announced additional sanctions on two Houthi military leaders involved in the offensive against Marib.[56]

State Jurisdiction and Immunity

U.S. Supreme Court Rules that the Foreign Sovereign Immunity Act's Expropriation Exception Does Not Extend to Domestic Takings

doi:10.1017/ajil.2021.30

In *Federal Republic of Germany v. Philipp*, the U.S. Supreme Court unanimously held that a country's taking of property from its own nationals does not fall within the Foreign Sovereign Immunities Act (FSIA) exception for "rights in property taken in violation of international law."[1] The case involved a claim that Nazi officials coerced a consortium of three art firms owned by Jewish residents of Germany to sell a collection of "medieval relics and devotional objects known as the Welfenschatz" to Prussia for "approximately one-third of their value."[2] The plaintiffs—descendants of the members of the consortium—argued that the coerced sale constituted genocide, thus bringing their claim within the FSIA exception. The Supreme Court disagreed, holding that "the expropriation exception is best read as referencing the international law of expropriation rather than of human rights" and that international law does not bar a state's taking of the property of its own nationals.[3] The Court declined to reach Germany's alternative argument that international comity required dismissal of the case, and it vacated and remanded a companion case, *Republic of Hungary v. Simon*, that also posed the comity question.[4]

The Welfenschatz includes pieces dating back to the Holy Roman Empire.[5] The consortium of art firms purchased the collection during the Weimar Republic and sold some pieces to European and U.S. museums before, the complaint alleges, Nazi official Hermann Goering used "a combination of political persecution and physical threats to coerce the consortium into selling the remaining pieces to Prussia in 1935" for well below market value.[6] During the occupation of Germany after World War II, the United States came into possession of the collection and then returned it to the Federal Republic of Germany.[7] The Stiftung

[56] U.S. Dep't of State Press Release, Special Briefing via Telephone with Timothy Lenderking, U.S. Special Envoy for Yemen (May 20, 2021), *at* https://www.state.gov/special-briefing-via-telephone-with-timothy-lenderking-u-s-special-envoy-for-yemen [https://perma.cc/2YEG-L4W8]; U.S. Dep't of State Press Release, The United States Designates Houthi Militants (May 20, 2021), *at* https://www.state.gov/the-united-states-designates-houthi-militants [https://perma.cc/X3YD-YGYP].

[1] Fed. Republic of Germany v. Philipp, 141 S. Ct. 703, 715 (2021).

[2] *Id.* at 708.

[3] *Id.* at 712.

[4] Republic of Hungary v. Simon, 141 S. Ct. 691 (2021).

[5] *Fed. Republic of Germany v. Philipp*, 141 S. Ct. at 708.

[6] *Id.*

[7] *Id.*

https://doi.org/10.1017/ajil.2021.30 Published online by Cambridge University Press

Preussischer Kulturbesitz (SPK), a government instrumentality, now holds the collection.[8] The consortium members' heirs attempted to reclaim the pieces from the SPK, but the organization determined that the 1935 transaction "occurred at a fair market price without coercion."[9] In 2014, the heirs and the SPK agreed to submit the dispute to a German commission tasked with the return of cultural property seized during the Nazi era, and the commission similarly determined "that the sale had occurred at a fair price without duress."[10] The heirs subsequently brought their common law property claims in federal court in the District of Columbia, seeking $250 million in compensation.[11]

The FSIA provides the sole basis for a federal court's jurisdiction over a foreign state, and foreign states retain sovereign immunity unless their conduct falls within a specified exception.[12] Cases where "rights in property taken in violation of international law are in issue" represent one of these exceptions.[13] The district court accepted the heirs' argument that the expropriation exception applied because the alleged coerced transfer of the Welfenschatz was connected to an act of genocide and therefore a taking in violation of international law.[14] The D.C. Circuit affirmed and then denied en banc review over a dissent from Judge Katsas.[15] The Supreme Court granted certiorari.

Before the Supreme Court, the heirs argued that their claim fell within the expropriation exception "because the coerced sale of the Welfenschatz . . . constituted an act of genocide, and genocide is a violation of international human rights law."[16] The plain text of the FSIA, they argued, therefore deprived the SPK of sovereign immunity because this was a taking of property in violation of international law.[17] The heirs also asserted that when the FSIA was enacted, it was executive and congressional policy that Nazi art takings violated international law, and legislative history shows that Congress anticipated domestic takings claims under the expropriation exception.[18]

Germany argued that the expropriation "exception is inapplicable because the relevant international law is the international law of property," under which "a foreign sovereign's taking of its own nationals' property remains a domestic affair."[19] Germany also contended that the exception codified the "customary international law of expropriation as it existed when Congress enacted the FSIA," and "[t]his body of international law only addresses a state's taking of *foreign nationals'* property."[20] As a result, Germany argued that the heirs "alleged a

[8] *Id.* In English, the SPK is known as the Prussian Cultural Heritage Foundation.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434–35 (1989).

[13] 28 U.S.C. § 1605(a)(3).

[14] Philipp v. Fed. Republic of Germany, 248 F. Supp. 3d 59, 71 (D.D.C. 2017).

[15] Philipp v. Fed. Republic of Germany, 894 F.3d 406, 418 (D.C. Cir. 2018); Philipp v. Fed. Republic of Germany, 925 F.3d 1349 (D.C. Cir. 2019).

[16] *Fed. Republic of Germany v. Philipp*, 141 S. Ct. at 709.

[17] Brief for Respondents at 11–13, Fed. Republic of Germany v. Philipp, 141 S. Ct. 703 (2021) (No. 19-351).

[18] *Id.* at 19–26.

[19] *Fed. Republic of Germany v. Philipp*, 141 S. Ct. at 709.

[20] Brief for Petitioners at 17, Fed. Republic of Germany v. Philipp, 141 S. Ct. 703 (2021) (No. 19-351) [hereinafter Philipp Petitioners' Brief].

https://doi.org/10.1017/ajil.2021.30 Published online by Cambridge University Press

domestic taking, not a taking 'in violation of international law,'"[21] and therefore Germany should retain sovereign immunity.

The United States filed an amicus brief in support of Germany. The United States argued that "the expropriation exception does not apply to cases in which a sovereign has taken the property of its own nationals,"[22] and no different rule applies for domestic takings that occur as part of a human rights violation.[23] The United States argued that the D.C. Circuit erred in holding that the expropriation exception "encompass[es] claims involving property seized as part of a genocide" because the FSIA's "text, context, and history all demonstrate that the expropriation exception deprives a sovereign of immunity only in cases where the sovereign is alleged to have violated the international law governing expropriations."[24]

In a unanimous opinion by Chief Justice Roberts, the Supreme Court ruled in favor of Germany, reversing the decision below. The Court began by examining background principles of international law and noting that "international law customarily concerns relations among sovereign states, not relations between states and individuals."[25] Thus, according to the Court, international law governs a state's taking of the property of foreigners, but the "'domestic takings rule' assumes that what a country does to property belonging to its own citizens within its own borders is not the subject of international law."[26] The Court noted that the domestic takings rule "has deep roots not only in international law but also in United States foreign policy," citing a 1938 letter from U.S. Secretary of State Cordell Hull to Mexico's ambassador, protesting Mexico's nationalization of American oil fields but also recognizing Mexico's right to take the property of its own nationals.[27]

The Court explained that the domestic takings rule has survived the growth of international human rights law, which regulates states' actions with respect to their own nationals.[28] Major human rights documents, including the Universal Declaration of Human Rights and the Genocide Convention, are "silent . . . on the subject of property rights," and international tribunals have held that a state's takings of its own nationals' property did not violate customary international law.[29]

The Court noted that, to the extent that the international law of property has provoked criticism, such critiques have come from those arguing that "*all* sovereign takings [a]re outside the scope of international law," not that international law should prohibit domestic takings.[30] The Court considered such arguments in *Banco Nacional de Cuba v. Sabbatino*, which involved claims related to Cuba's nationalization of U.S. interests in a sugar factory, and avoided the issue by invoking the act of state doctrine.[31] In response to *Sabbatino*,

[21] *Id.* at 19.

[22] Brief for the United States as Amicus Curiae Supporting Petitioners at 10, Fed. Republic of Germany v. Philipp, 141 S. Ct. 703 (2021) (No. 19-351) [hereinafter Philipp U.S. Amicus Brief].

[23] *Id.* at 13–14.

[24] *Id.* at 14.

[25] *Fed. Republic of Germany v. Philipp*, 141 S. Ct. at 709–10.

[26] *Id.* at 709.

[27] *Id.* at 710.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 711 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)).

https://doi.org/10.1017/ajil.2021.30 Published online by Cambridge University Press

Congress adopted the Second Hickenlooper Amendment to the Foreign Assistance Act of 1964, which prohibited U.S. courts from applying the act of state doctrine "where a 'right[] to property is asserted' based upon a 'taking . . . by an act of that state in violation of the principles of international law.'"[32] The Amendment, the Court explained, "permit[s] adjudication of claims the *Sabbatino* decision had avoided—claims against foreign nations for expropriation of American-owned property," but did not "purport[] to alter any rule of international law, including the domestic takings rule."[33] When Congress adopted the FSIA in 1976, it used nearly the same language in the expropriation exception that it had previously used in the Second Hickenlooper Amendment.[34]

Turning to the language of the FSIA, the Court explained that the expropriation exception's text "as a whole supports Germany's reading":

> The exception places repeated emphasis on property and property-related rights, while injuries and acts we might associate with genocide are notably lacking. That would be remarkable if the provision were intended to provide relief for atrocities such as the Holocaust. A statutory phrase concerning property rights most sensibly references the international law governing property rights, rather than the law of genocide.[35]

The heirs' contrary interpretation, the Court explained, "is not limited to violations of the law of genocide but extends to any human rights abuse," and therefore "would arguably force courts themselves to violate international law, not only ignoring the domestic takings rule but also derogating international law's preservation of sovereign immunity for violations of human rights law."[36]

The Court added that the property-based interpretation aligns more closely with "the FSIA's express goal of codifying the restrictive theory of sovereign immunity."[37] Although recognizing that the expropriation exception narrows foreign sovereign immunity even more than the restrictive view by "permit[ting] the exercise of jurisdiction over some public acts of expropriation," the Court nonetheless declined to "subject all manner of sovereign public acts to judicial scrutiny under the FSIA by transforming the expropriation exception into an all-purpose jurisdictional hook for adjudicating human rights violations."[38]

Other FSIA provisions bolstered the Court's conclusion. The Court noted that when Congress did target human rights violations in the FSIA, "it did so explicitly and with precision" in the exceptions for noncommercial torts and state sponsors of terrorism.[39] These carefully calibrated provisions, the Court concluded, "would be of little consequence if human rights abuses could be packaged as violations of property rights and thereby brought within the expropriation exception to sovereign immunity."[40]

[32] *Id.* (citing 22 U.S.C. § 2370(e)(2)).
[33] *Id.*
[34] *Id.*
[35] *Id.* at 712–13.
[36] *Id.* at 713.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 713–14.
[40] *Id.* at 714.

https://doi.org/10.1017/ajil.2021.30 Published online by Cambridge University Press

In addition, the Court noted that it generally interprets statutes to avoid friction with other nations. The Court explained that given that the United States "would be surprised—and might even initiate reciprocal action—if a court in Germany adjudicated claims by Americans that they were entitled to hundreds of millions of dollars because of human rights violations committed by the United States government years ago," Germany could well react similarly.[41]

The Court concluded that "the phrase 'rights in property taken in violation of international law,' as used in the FSIA's expropriation exception, refers to violations of the international law of expropriation and thereby incorporates the domestic takings rule."[42]

In ruling for Germany based on the expropriation exception, the Court declined to reach the other question presented in the case, namely Germany's argument that the district court "was obligated to abstain from deciding the case on international comity grounds."[43] The D.C. Circuit had rejected Germany's argument that the court should decline to exercise jurisdiction as a matter of international comity unless the heirs first exhausted their remedies in German courts.[44] The Supreme Court had also granted review of the domestic exhaustion and international comity question in another case, *Republic of Hungary v. Simon*,[45] in which Jewish Hungarian nationals sued Hungary and its state-owned railway for expropriation of property during the Holocaust.[46] In both cases, the parties disagreed about whether the FSIA displaced common-law considerations of comity, or whether international comity survived the statute's enactment. In *Simon*, Hungary argued that comity-based abstention survived the passage of the FSIA.[47] In *Philipp*, Germany also contended that the lower court erred by conflating sovereign immunity—which the FSIA addresses—and comity-based abstention—which it does not.[48] In both cases, the United States agreed that the FSIA does not prevent courts from applying comity in cases that fall under the FSIA's exceptions.[49]

The parties also disputed whether the FSIA provision specifying the extent of a foreign sovereign's liability under the statute allowed for application of comity. The foreign states and the United States contended that because a private individual may assert a comity defense, and the FSIA provides that a foreign state "shall be liable in the same manner and to the same extent as a private individual," the FSIA allows sovereigns to assert a comity defense as well.[50] The survivors responded that the provision only limits a foreign sovereign's "substantive liability" and does not govern the extent of U.S. courts' "*jurisdiction* over a foreign sovereign defendant."[51]

[41] *Id.*.

[42] *Id.* at 715.

[43] *Id.*

[44] Philipp v. Fed. Republic of Germany, 894 F.3d 406, 415–16 (D.C. Cir. 2018).

[45] Republic of Hungary v. Simon, 141 S. Ct. 187 (2020).

[46] Jean Galbraith, Contemporary Practice of the United States, 113 AJIL 376, 404–05 (2019).

[47] Brief for Petitioners at 25–26, Republic of Hungary v. Simon, 141 S. Ct. 691 (2021) (No. 18-1447) [hereinafter Simon Petitioners' Brief].

[48] Philipp Petitioners' Brief, *supra* note, 20, at 45–47.

[49] Philipp U.S. Amicus Brief, *supra* note 22, at 30; Brief for the United States as Amicus Curiae Supporting Petitioners at 17, Republic of Hungary v. Simon, 141 S. Ct. 691 (2021) (No. 18-1447).

[50] *E.g.*, Simon Petitioners' Brief, *supra* note 47, at 16–17, 29–31 (citing 28 U.S.C. § 1606).

[51] Brief for Respondents at 24, Republic of Hungary v. Simon, 141 S. Ct. 691 (2021) (No. 18-1447).

https://doi.org/10.1017/ajil.2021.30 Published online by Cambridge University Press

By declining to reach the comity question in *Philipp* and remanding *Simon* for further proceedings based on *Philipp*,[52] the Court left in place a circuit split between the D.C. and Seventh Circuits regarding whether comity applies to claims brought under the FSIA when plaintiffs fail to exhaust local remedies.[53] As a result, the Court will likely need to grant certiorari in the future to settle the question.

International Human Rights and Humanitarian Law

Military Coup in Burma Draws International Condemnation and Pressure

doi:10.1017/ajil.2021.31

On February 1, 2021, the military in Burma[1] overthrew the democratically elected government, declared a one-year state of emergency, and installed Senior General Min Aung Hlaing as the head of government. Since the coup, the military has cracked down on protestors, killing over 800 people and detaining many more. Numerous countries and international organizations, including the United States and the United Nations, have condemned the coup and ensuing violence and called for the restoration of a democratic government. The United States and other countries have also imposed rigorous sanctions on the Burmese military, its officials and affiliated corporations, and social media companies have imposed content restrictions to prevent the spread of pro-military propaganda.

This is not the first military coup in Burma. The Burmese military seized power in 1962 and maintained control over the country for forty-nine years.[2] After elections in 2010, Burma began a peaceful transition from authoritarian rule to a quasi-civilian government,[3] and in 2015, the military accepted election results that brought the National League for Democracy (NLD), led by Aung San Suu Kyi, to power.[4] Even after this transition, however, the military retained significant control over key cabinet positions and national corporations.[5] Burma and its military in particular have drawn international condemnation since the 2017 launch of a violent campaign against the Rohingya, a Muslim ethnic minority, that forced over 750,000 refugees to flee the country.[6] Even in the face of allegations that the campaign

[52] *Republic of Hungary v. Simon*, 141 S. Ct. at 691.

[53] Fischer v. Magyar Államvasutak Zrt., 777 F.3d 847, 858–59 (7th Cir. 2015); Brief for the United States as Amicus Curiae Supporting Petitioners on Petition for a Writ of Certiorari at 10, Republic of Hungary v. Simon, 141 S. Ct. 691 (2021) (No. 18-1447).

[1] In 1989, the Burmese military government renamed the country "Myanmar," but the U.S. government continues to call the country "Burma." U.S. Dep't of State Press Release, Bilateral Relations Fact Sheet: U.S. Relations with Burma (Jan. 21, 2020), *at* https://www.state.gov/u-s-relations-with-burma [https://perma.cc/2ZSK-5RBV]. This Article uses "Burma" for consistency with the U.S. government naming convention.

[2] Hannah Beech, *Myanmar's Leader, Daw Aung San Suu Kyi, Is Detained Amid Coup*, N.Y. Times (Jan. 31, 2021), *at* https://www.nytimes.com/2021/01/31/world/asia/myanmar-coup-aung-san-suu-kyi.html.

[3] U.S. Dep't of State, Bilateral Relations Fact Sheet, *supra* note 1.

[4] Beech, *supra* note 2.

[5] *Id.*

[6] U.S. Dep't of State, Bilateral Relations Fact Sheet, *supra* note 1; *see also* Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 112 AJIL 322 (2018).

https://doi.org/10.1017/ajil.2021.30 Published online by Cambridge University Press