

Nazi Stolen Art: Uses and Misuses of the Foreign Sovereign Immunities Act

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U.S. courts in Foreign Sovereign Immunities Act (“FSIA”) cases must interpret a comprehensive statute which has been said to stand or fall on its terms. At the same time, in Nazi-looted art cases, they do not ignore entirely the backdrop of the U.S.’ adoption of international principles and declarations promising to ensure the return of such art. To some extent, such an undertaking has been incorporated into a statutory amendment of the FSIA. The years 2021 and 2022 have seen major developments in the FSIA both at the U.S. Supreme Court and in the D.C. Circuit Court of Appeals in cases involving Nazi-looted art. The Supreme Court ended what had been a judicially created exception to foreign state immunity for genocide, refocused attention on whether the victim of property expropriation had been a de facto citizen, rather than a formal one for purposes of the statute’s domestic takings exception and decided that there is no federal common law applicable to FSIA conflict of laws cases. The D.C. Circuit reaffirmed prior caselaw that the FSIA does not require exhaustion of local remedies in a decision supported by both the statute and international customary law but leaving a potential inter-circuit conflict if the Seventh Circuit should reaffirm its contrary prior caselaw. In an opinion difficult to reconcile either with the FSIA’s express terms or with precedential authority, the D.C. Circuit also decided to increase the difficulties to obtaining jurisdiction against a state, as opposed to a state instrumentality.

198	<i>TRANSNATIONAL LAW & CONTEMPORARY PROBLEMS</i>	[Vol. 32:2
I. INTRODUCTION		198
II. THE FSIA, INTERNATIONAL LEGAL PRINCIPLES ON NAZI-LOOTED ART RESTITUTION, AND NATIONAL STATUTORY MEASURES		204
<i>A. The FSIA Is a Comprehensive Statute</i>		204
<i>B. The Washington Conference, the Terezin Declaration, the HEAR Act and Other Domestic Measures</i>		205
III. FSIA DEVELOPMENTS FROM 2021 TO 2022.....		208
<i>A. Ending the Genocide Exception</i>		208
<i>B. Refocusing Domestic Takings on a Substantive Citizenship Test</i>		210
IV. FSIA DEVELOPMENTS IN THE D.C. CIRCUIT IN 2022		213
<i>A. Exhaustion of Local Remedies</i>		213
<i>B. State Versus Federal Law Conflict Rules in FSIA Cases</i>		215
<i>C. The Enhanced Significance for the FSIA of Suing a State Versus a State Instrumentality</i>		217
V. CONCLUSION		219

I. INTRODUCTION

The Foreign Sovereign Immunities Act (“FSIA”)¹ is, as the Supreme Court noted in *Federal Republic of Germany v. Philipp*² in 2021, the only foreign sovereign immunities statute in the world that contains an exception to a foreign state’s immunity for the state’s violations of customary international law, otherwise known as *jus cogens* or fundamental human rights violations: “the [FSIA’s] expropriation exception, because it permits the exercise of jurisdiction over some public acts of expropriation . . . , is unique; no other country has adopted a comparable limitation on sovereign immunity.”³ This exception is located in Section 1605(a)(3) of the act, dealing with property expropriations: “A foreign state shall not be immune from the jurisdiction of

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¹ Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611 (1976).

² *Germany v. Philipp*, 141 S. Ct. 703, 707–08 (2021).

³ *Id.* at 713 (citing RESTATEMENT (FOURTH) U.S. FOREIGN REL. § 455 (AM. L. INST. 2018)); accord HAZEL FOX & PHILIPPA WEBB, *THE LAW OF STATE IMMUNITY* 430–31 (3d ed. 2015).

courts of the United States or of the States in any case . . . (3) in which rights in property taken in violation of international law are in issue”⁴

The FSIA is a law of jurisdiction, technical in its provisions, but, as the Alien Tort Statute⁵ has receded as a mechanism for international human rights recovery since the Supreme Court’s *Kiobel* decision,⁶ the FSIA at times has been stretched to and beyond its limits in an attempt to create a new jurisdictional avenue for some international human rights violations, with varying degrees of success. Thus, for example, until the Supreme Court disagreed in *Philipp*, several courts had judicially carved a genocide exception to foreign sovereign immunity into Section 1605 even though none existed textually.⁷ In addition, the immunity exception of Section 1605(a)(3), frequently invoked for Nazi-era crimes, is often cloaked in the language of property law to disguise the fact that underlying torts are the gravamen of the complaints, because the statute would preclude suing for torts committed by Nazis in Europe.⁸

The FSIA courts, which decide Nazi stolen art cases, struggle to accommodate potentially mutually incompatible FSIA statutory provisions with each other⁹ and to deal with defendant states and entities still persisting in legal battles close to eighty years after survivors initially sought the return of their property. One can get a sense of how distasteful defendants’ arguments can be from an ongoing Nazi-looted art case not involving the FSIA, where the original plaintiff, Dina Babbitt, was a prisoner of the Auschwitz death camp and was forced to make paintings for Dr. Mengele, the Nazi torturer.¹⁰ Throughout her life, she was unable to obtain the return of her paintings from the Auschwitz museum, where they now hang. Babbitt’s daughters have continued to seek their recovery since her death, and have faced the museum’s

⁴ *Philipp*, 141 S. Ct. at 713. The textual reference in the FSIA is to “international law” violations, referring to customary international law. Customary international law evolved from natural law to the customs accepted by “civilized nations.” See William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19 (2007). For the view that customary international law violations will not enable jurisdiction where one state sues another in an international tribunal for money damages related to fundamental human rights violations (i.e. Nazi military massacres in Italy during the Second World War), see *Jurisdictional Immunities of the State* (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. Rep. 99, ¶ 1, 15–17 (Feb. 3).

⁵ Alien Tort Claims Act, 28 U.S.C. §1350 (1948).

⁶ See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 111–25 (2013).

⁷ As I developed more fully elsewhere, in my view the genocide exception was both unnecessary for plaintiffs and harmful to genocide law. See Vivian Grosswald Curran, *The Foreign Sovereign Immunities Act’s Evolving Genocide Exception*, 23 UCLA J. INT’L. L. FOREIGN AFF. 46 (2019) [hereinafter *Genocide Exception*].

⁸ Here, I refer to cases that do not involve stolen art, such as *Philipp*’s companion case, *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016). Under FSIA § 1605(a)(5), a foreign state must commit the torts in the United States to come within the jurisdiction of U.S. courts. 28 U.S.C. § 1605(a)(5).

⁹ See 28 U.S.C. §§ 1605(a)(3) and 1605(h)(2); *infra* note 41 and surrounding text.

¹⁰ See Dina Babbitt, *Artist at Auschwitz, Is Dead at 86*, N. Y. TIMES (Aug. 1, 2009), <https://www.nytimes.com/2009/08/02/arts/02babbitt.html>.

apparently seriously maintained argument that it owns the paintings and, if not, that they belong to Dr. Mengele's heirs.¹¹ In the FSIA art cases, defendants also may argue that the plaintiffs or plaintiffs' ancestors willingly sold valuable art under the Nazi regime, when in fact such sales were coerced in one way or another.¹² For example, in *Von Saher v. Norton Simon*,¹³ the Netherlands described the collection plundered by Hermann Göring, Nazi creator of the Gestapo and one of the greatest art thieves throughout the war, as "voluntary sales undertaken without coercion."¹⁴ Similarly, it was argued that the sizable collection in *Philipp*, another case in which Göring coveted plaintiffs' ancestors' art, was obtained in a voluntary transaction.¹⁵ The Advisory Commission for the return of Nazi-confiscated cultural artifacts,¹⁶ a commission set up in Germany under the Washington Principles, initially adjudicated plaintiffs' claims, and issued an opinion agreeing that the transaction had been voluntary.¹⁷ This argument seems to have been made once again by the defendants in the latest (as of this writing) iteration of the *Philipp* case to have been adjudicated, and to have been accepted by the D.C. Federal District Court, which described the sale of the fantastically valuable *Welfenschatz* artwork as having been "negotiated" by Prussia with its Jewish art owners in June of 1935, as though such negotiations at such a time could be at arms' length.¹⁸ And finally, in a case decided in August of 2022, *Toren v.*

¹¹ See *id.*; see also Ofer Aderet, *The Nazis Made Her Paint Portraits. The Auschwitz Museum Claims They Belong to Mengele*, HAARETZ (July 16, 2022), <https://www.haaretz.com/world-news/2022-07-16/ty-article-magazine/.highlight/the-nazis-made-her-paint-portraits-the-auschwitz-museum-claims-they-belong-to-mengele/00000182-0346-dbce-a1e2-47eed60b0000>.

¹² For a good account of, not just Nazi forced sales, but of the derisory amounts paid to Jewish art owners, see LYNN H. NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* 26–40 (2d ed. 1995).

¹³ 754 F.3d 712 (9th Cir. 2014).

¹⁴ Chloe Ricke, *The Time Is Now: Why the United States Should Follow the United Kingdom's Lead and Implement a Federal Nazi-Looted Art Spoliation Advisory Panel*, 44 GA. J. INT'L. & COMP. L. 665, 680 (2016). More recently, the Netherlands have renewed their commitment to returning Nazi-looted art. See Parliamentary Document, *More Looted Art to be Returned to Rightful Owners* (June 5, 2021), <https://www.government.nl/latest/news/2021/06/25/more-looted-art-to-be-returned-to-rightful-owners>.

¹⁵ Recommendation of the Advisory Commission for the return of Nazi-confiscated cultural artefacts – Position on the "Welfenschatz", BERATUNDE KOMMISSION [ADVISORY COMMISSION] (Mar. 20, 2014), <https://www.beratende-kommission.de/media/pages/empfehlungen/welfenschatz-konsortium-stiftung-preussischer-kulturbesitz/46e3484fa4-1638797256/14-03-20-recommendation-welfenschatz-spk.pdf>

¹⁶ BERATUNDE KOMMISSION IM ZUSAMMENHANG MIT DER RÜCKGABE NS-VERFOLGUNGSBEDINGT ENTZOGENEN KULTURGUTS, INSBESONDERE AUS JÜDISCHEM BESITZ [ADVISORY COMMISSION ON THE RETURN OF CULTURAL PROPERTY SEIZED AS A RESULT OF NAZI PERSECUTION, ESPECIALLY JEWISH PROPERTY], <https://www.beratende-kommission.de/de>. Most recently, the Netherlands have adopted a new position in conformity to the Washington Principles. See Alex Greenberger, *Dutch Government to Lead Major Investigation into Nazi-Looted Art, 'An Important Step Forward'*, ARTNEWS (June 28, 2021), at <https://www.artnews.com/art-news/news/dutch-restitution-nazi-looted-art-investigation-1234597080/>.

¹⁷ See *Philipp v. Fed. Republic of Ger.*, 894 F.3d 406, 410 (D.C. Cir. 2018).

¹⁸ *Philipp v. Stiftung Preussischer Kulturbesitz*, F. Supp. 3d, 2022 WL 3681348, Mem. Op. at *2 (D.D.C. Aug. 25, 2022).

Federal Republic of Germany,¹⁹ Germany argued successfully to the D.C. Federal District Court that it was protected under the domestic takings exception against a German Jewish art owner, whom the Gestapo imprisoned and murdered in 1942, because, according to Germany, he counted as a German national under German law in 1939, albeit four years after Germany enacted the Nuremberg Laws.²⁰ It may give one pause to reflect on the German state's arguing this in 2022.

U.S. courts are not oblivious to U.S. policies, embedded in another FSIA subsection and in U.S. foreign policy, which explicitly endorse the return of Nazi-looted art to survivors and their descendant claimants.²¹ The states and state instrumentalities which retain stolen art from the heirs of the dispossessed, depending on the case, nevertheless may be entitled to immunity from suit in the United States under a fair interpretation of the FSIA.²² The Court's struggle was clear in *Philipp* where the Supreme Court simultaneously ended an unwarranted genocide exception, but also *sua sponte* suggested another door under domestic takings.²³

It has been said of Nazi-looted art that the very topic “evokes a vanished world that once stood at the crossroads between the heights of civilization and the depths of barbarism”²⁴ The recent FSIA cases dealing with such art, including two decided by the U. S. Supreme Court since 2021, bring that world into the present inasmuch as they are not just cases involving art stolen during World War II and the families which have sought to reclaim it. They also are about foreign governments and entities which continue to this day to refuse to return the art and are willing to fight in court with every means at their disposal to retain it.

¹⁹ *Toren v. Fed. Republic of Ger.* 2022 WL 3646307, Mem. Op. at *1 (D.D.C. Aug. 24, 2022).

²⁰ The short *Toren* memorandum opinion does not explore or explain the fact that in 1939, the date of expropriation, and four years after the Nuremberg Laws were enacted, no Jew could be a German citizen or national pursuant to German law—the term used for the status of Jews was “subjects” (“*Staatsangehörige*”). See *infra*, note 96. The *Toren* court's references to the Supreme Court's *Philipp* decision as mandating dismissal of the case are cursory and conclusory, so its conclusion that the Supreme Court's decision in *Philipp* mandates dismissal in *Toren* is difficult to follow.

²¹ See, e.g., FSIA § 1605(h)(2); *supra* note 15, and surrounding text.

²² See, e.g., *Cassirer v. Thyssen Bornemisza Collection Foundation*, 153 F. Supp. 3d 1148, 1168 (C.D. Cal. 2015), *rev'd and remanded*, 862 F.3d 951 (9th Cir. 2017), *vacated and remanded*, 142 S. Ct. 1502 (2022).

²³ The *Philipp* court also conceded that policy favored returning Nazi looted art while maintaining that FSIA § 1605(a)(3) involved only international property expropriation law, not international human rights law, as claimants argued under the genocide exception. For my own elaboration on the domestic takings clause under the de facto test as a better solution to plaintiffs' claims, predating the Supreme Court *Philipp* decision, see *Genocide Exception*, *supra* note 7; and following the *Philipp* decision, Vivian Grosswald Curran, *Appraising the Supreme Court's Philipp Decision*, 83 U. PITT. L. REV. 303 (2021).

²⁴ James Gardner, *reviewing* PAULINE BAER DE PÉRIGNON, *THE VANISHED COLLECTION* (trans. Natasha Lehrer 2020) (unpaginated page).

Thus, in granting summary judgment to one defendant due to the court's interpretation of the lack of available relief under the FSIA, a California district court nevertheless ended its decision by urging the defendant to reach some other more plaintiff-friendly solution than the ownership of the painting the court had just granted it:

Although the [defendant] Foundation has now prevailed in this prolonged and bitterly contested litigation, the Court recommends that, before the next phase of litigation commences in the Ninth Circuit, the Foundation pause, reflect, and consider whether it would be appropriate to work towards a mutually-agreeable resolution of this action, in light of Spain's acceptance of the Washington Conference Principles²⁵ and the Terezin Declaration,²⁶ and, specifically, its commitment to achieve "just and fair solutions" for victims of Nazi persecution.²⁷

The defendant did not agree to return the painting, and the litigation then proceeded to the Ninth Circuit, eventually followed by a 2022 Supreme Court decision. Currently it is on remand for further proceedings as this article is being written. In referencing the Washington Conference Principles and the Terezin Declaration, the California district court was encouraging the defendant to adhere to nonbinding commitments undertaken by many governments, including the defendant's government of Spain, to ensure that their countries return Nazi-looted art.²⁸ The Washington Conference Principles and the Terezin Declaration also represent commitments made by the United States to ensure that it oversee the return of such art.²⁹ One such effort to implement this undertaking by the United States was the passage of the Holocaust Expropriated Art Recovery, or "HEAR," Act of 2016.³⁰

²⁵ See Office of the Special Envoy for Holocaust Issues, *Washington Conference Principles On Nazi-Confiscated Art*, U.S. DEPT. OF STATE (Dec. 3, 1998), <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/>.

²⁶ See Office of the Special Envoy for Holocaust Issues, 2009 Terezin Declaration on Holocaust Era Assets and Related Issues, U.S. DEPT OF STATE (June 30, 2009), <https://www.state.gov/prague-holocaust-era-assets-conference-terezin-declaration/>.

²⁷ *Cassirer*, 153 F. Supp.3d at 1168.

²⁸ See *Philipp v. Stiftung Preussischer Kulturbesitz*, F. Supp. 3d, 2022 WL 3681348, Mem. Op. at *2 (D.D.C. Aug. 25, 2022); see also *Toren v. Fed. Republic of Ger.* 2022 WL 3646307, Mem. Op. at *1 (D.D.C. Aug. 24, 2022).

²⁹ See *infra* Part II. The United States was a signatory. See *Philipp v. Stiftung Preussischer Kulturbesitz*, F. Supp. 3d, 2022 WL 3681348, Mem. Op. at *2 (D.D.C. Aug. 25, 2022); see also *Toren v. Fed. Republic of Ger.* 2022 WL 3646307, Mem. Op. at *1 (D.D.C. Aug. 24, 2022).

³⁰ Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub. L. No. 114-308, § 5, 130 Stat. 1524, 1526–28 (2016); see *infra* Part II. The *Cassirer* court found that the statute of limitations had not expired due to the HEAR Act, as did the court in *De Csepel v. Republic of Hungary*, 859 F.3d 1094, 1097 (D.C. Cir. 2017). For a longer discussion of the HEAR Act, including a critique of its shortcomings, see Simon J. Frankel & Sari Sharoni, *Navigating the Ambiguities and*

Even if otherwise courts in the U.S. would adjudicate cases relating to Nazi-looted art through the lens of such political commitments, FSIA courts, including the Supreme Court, have placed limits on the FSIA's interpretive elasticity due to the challenges imposed by the FSIA's comprehensive nature.³¹ Moreover, the public policy of returning looted art has confronted the judicial policy, in FSIA and non-FSIA cases, of limiting U.S. jurisdiction to cases deemed to have a sufficiently strong connection to the United States, better known as the presumption against extraterritoriality.³² The Supreme Court has asserted its endorsement of a strong presumption against extraterritoriality in a growing line of cases.³³ In its focus on rejecting extraterritorial jurisdiction, the Court analogized the Alien Tort Statute in *Kiobel* to statutes and cases arising in commercial law, thus shifting the Alien Tort Statute from the terrain of human rights to logic developed for commercial law.³⁴ The Court continued that reasoning with respect to the FSIA in *Philipp* inasmuch as it cited to *Kiobel* and *Microsoft* for their (and its own) presumption against extraterritoriality: "United States law governs domestically but does not rule the world."³⁵ In *Philipp*, however, the Court also suggested a viable legal theory under the FSIA for plaintiffs *sua sponte*, thus attempting to accommodate the presumption against extraterritoriality with the policy supporting the return of Nazi-looted art to its victims.³⁶

Uncertainties of the Holocaust Expropriated Art Recovery Act of 2016, 42 COLUM. J. L. & ARTS 157 (2019).

³¹ On the FSIA's comprehensive nature, see *Republic of Argentina v. NML Capital*, 573 U.S. 134, 141–42 (2014) (referring to *Austria v. Altmann*, 541 U.S. 677, 699 (2004) ("the key word is . . . comprehensive") and to *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983) ("any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall.").

³² For the trend away from extraterritorial jurisdiction, see, e.g., William S. Dodge, *The New Presumption against Extraterritoriality*, 133 HARV. L. REV. 1582 (2020).

³³ See *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007); *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010); *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021).

³⁴ See *Kiobel*, 569 U.S. at 1664.

³⁵ *Philipp*, 141 S. Ct. at 714 (citing *Kiobel*, 569 U.S. at 1664).

³⁶ See *id.* at 715–16.

II. THE FSIA, INTERNATIONAL LEGAL PRINCIPLES ON NAZI-LOOTED ART RESTITUTION, AND NATIONAL STATUTORY MEASURES

A. *The FSIA Is a Comprehensive Statute*

The FSIA is a comprehensive, self-contained statute according to both its legislative history and to the Supreme Court's interpretation.³⁷ Although the opinion of the Executive branch concerning foreign policy has been taken into consideration in FSIA cases, the purpose of the statute was to wrest the area of sovereign immunity from the hands of the Executive branch and place it in that of the judiciary.³⁸ The relevance of the Executive branch was and is considered controversial for this reason.³⁹

Amendments to the FSIA reference, among others, loss of immunity for states on a U.S. Department of State list of terrorist states;⁴⁰ they also reference Nazi-looted art in the overall context of freeing foreign states from amenability to jurisdiction where they lend art exhibits to U.S. museums, provided, however, that the art at issue is not subject to claims of being Nazi stolen art.⁴¹ The U.S. public policy of ensuring the return of such art has therefore entered into considerations of the FSIA, albeit not explicitly within Section 1605(a)(3). Judges entertaining FSIA §1605 cases both apply the canons of statutory construction for this self-contained statute,⁴² which can lead to two contrary interpretations,⁴³ and keep in mind underlying policy. As we have seen,⁴⁴ one FSIA court has made explicit reference to the Washington

³⁷ See 28 U.S.C. § 1602 ("Claims of foreign states to immunity . . . should henceforth be decided by courts . . . in conformity with the principles set forth [herein].").

³⁸ See *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004); H.R. Rep. No. 94-1487, at 97 (1976); U.S. Code Cong. & Admin. News 1976, at 6605-06 ("[S]overeign immunity decisions are [to be] made exclusively by the courts and not by a foreign affairs agency."); see also *Altmann*, 541 U.S. at 717 (Kennedy, J., dissenting) ("[T]he Act sought to implement its objectives by removing the Executive influence from the standard determination of sovereign immunity questions.").

³⁹ See *Altmann*, 541 U.S. at 734 (Kennedy, J. dissenting) (objecting to the majority's view that the Executive has a role in giving its opinion in FSIA cases).

⁴⁰ See FSIA § 1605(a).

⁴¹ FSIA § 1605(h)(2). More specifically, the amendment provides that lending the art is in general not "commercial activity" within the meaning of FSIA § 1605(a)(3) unless it is subject to claims of having been looted by the Nazis. FSIA § 1605(h)(2). Section 1605(a)(3) abrogates immunity where "rights in property [are] taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States"

⁴² See *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134 (2014).

⁴³ See *infra* note 51 and surrounding text.

⁴⁴ After the recent D.C. Circuit decision in *De Csepel v. Republic of Hungary*, 859 F.3d 1094 (D.C. Cir. 2017), suits against foreign states, as opposed to public foreign museums considered state instrumentalities, may well be curtailed in the D.C. Circuit. See *infra*, Section IV, B. *Accord*,

Conference Principles, the Terezin Declaration, and the HEAR Act.⁴⁵ It should also be kept in mind that courts generally look to customary international law in interpreting the meaning of international law violations under the FSIA.⁴⁶

*B. The Washington Conference, the Terezin Declaration, the HEAR Act
and Other Domestic Measures*

In recent years, international law has not governed Nazi-looted art other than in a non-binding form. Initially, in 1952, after the end of the Second World War, the Western Allies signed a treaty with the Federal Republic of Germany to regulate the restitution of property, which was incorporated into West German statutory law.⁴⁷ In more recent years, the U.S. entered into bilateral agreements with individual European countries for property compensation, but these did not relate to looted art.⁴⁸ Rather, they addressed issues of compensation for stolen property more generally. International law governing Nazi-looted art is a matter of wide agreement on paper, but only as soft law.⁴⁹ The current law emerged in an era marked by a resurgence of interest in Nazi-looted art, as (1) the opening of archives after the fall of the USSR permitted expanded research⁵⁰; (2) the internet enhanced art research and communication capabilities through digital databases;⁵¹ and (3) the U.S. Supreme Court held that foreign states could be sued in U.S. courts under the FSIA for acts which preceded the 1976 enactment of the FSIA.⁵²

Jonathan Freiman & David Roth, *U.S. Changes the Rules for Claims of Nazi-looted Art Against Foreign Sovereigns and Foreign Public Museums*, INT'L BAR ASS'N: ART, CULTURAL INST. & HERITAGE L. (Nov. 17, 2017), <https://www.wiggin.com/publication/us-changes-the-rules-for-claims-of-nazi-looted-art-against-foreign-sovereigns-and-foreign-public-museums/> (last visited August 23, 2022).

⁴⁵ While U.S. courts may adjudicate cases dealing with claims of Nazi looted art through the lens of all three where the FSIA does not govern, one commentator concludes the contrary. See Bert Demarsin, *Let's Not Talk About Terezin: Restitution of Nazi Era Looted Art and the Tenuousness of Public International Law*, 37 BROOK. J. INT'L L. 117 (2011) (U.S. courts do not take Terezin Declaration or Washington Conference Principles into account and tend to dismiss claims for the recovery of Nazi looted art).

⁴⁶ See RESTATEMENT (FOURTH) U.S. FOREIGN REL. § 455, cmt. c (looking either to customary international law or the text of an applicable treaty).

⁴⁷ Convention on Relations Between the Three Powers and the Federal Republic of Germany, signed 26 May 1952 (Bundesgesetzblatt 1955 II 29.03. 1954, No. 3.). For a detailed description of the Allies' measures both before and after the end of the war with respect to property restitution, see KATJA LUBINA, *CONTESTED CULTURAL PROPERTY: THE RETURN OF NAZI SPOLIATED ART AND HUMAN REMAINS FROM PUBLIC COLLECTIONS*, Chapter 1 § VII (2009), <https://core.ac.uk/download/pdf/231329125.pdf> (last viewed Aug. 3, 2022).

⁴⁸ See generally, MICHAEL J. BAZYLER, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS* (2005).

⁴⁹ All of the international Declarations and Principles discussed in this section are non-binding. Only national laws, such as the HEAR Act, have binding effect.

⁵⁰ LUBINA, *supra* note 47, at 160–161.

⁵¹ E.g., THE ART LOSS REGISTER, <https://www.artloss.com/>; *Catalogues Raisonnés*, THE INT'L FOUND. FOR ART RSCH., https://www.ifar.org/cat_rais.php.

⁵² See *Altmann v. Republic of Austria*, 541 U.S. 677 (2004) (stating that since the FSIA is a law of jurisdiction, it does not violate the principle of non-retroactivity of substantive law).

The Washington Conference was organized by the U.S. Department of State in December of 1998, producing eleven short principles, among others urging nations to “achieve a just and fair solution” (Principle 8).⁵³ When, a decade later, another international meeting was convened, this time in Terezin, or Theresienstadt (as Nazi Germany called the ghetto which was a waystation to Auschwitz once located there) forty-seven states attended,⁵⁴ three more than at the Washington Conference.⁵⁵ The Terezin Declaration explicitly reaffirmed the Washington Principles, but also added others.⁵⁶ Notable in its much longer text is the commitment on the part of the signatories “to make certain that claims to recover such art are resolved expeditiously and *based on the facts and merits of the claims . . .*”⁵⁷ Like the Washington Principles, it too is soft law.

⁵³ The Washington Principles are as follows:

1. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.
2. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.
3. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.
4. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.
5. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.
6. Efforts should be made to establish a central registry of such information.
7. Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.
8. If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.
9. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, cannot be identified, steps should be taken expeditiously to achieve a just and fair solution.
10. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.
11. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.

Washington Conference Principles on Nazi-Confiscated Art, U.S. DEPT’ OF STATE, <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/> (last visited Aug. 3, 2022).

⁵⁴ The Holy See attended as an observer; the remaining forty-six signed the Declaration. *See Terezín Declaration*, MINISTRY OF FOREIGN AFFS. OF THE CZECH REPUBLIC, https://www.mzv.cz/jnp/en/foreign_relations/terezin_declaration/index.html.

⁵⁵ *See* Stuart Eizenstat, Under Secretary of State for Economic, Business, and Agricultural Affairs, Briefing on the Washington Conference on Holocaust-Era Assets Conference and release of proceedings of the conference, Washington, DC, May 20, 1999, <https://fcit.usf.edu/holocaust/resource/assets/heac.htm>.

⁵⁶ *See* Terezin Declaration, June 30, 2009, https://www.mzv.cz/public/b9/af/cb/4297655_2634845_Terezin_Declaration_FullText.pdf.

⁵⁷ *Id.* at ¶ 3 (emphasis added).

The countries involved in defending against returning the relevant art to plaintiffs in the recent FSIA cases discussed in these pages were signatories to the Terezin Declaration and were among those present at the Washington Conference who produced its Principles and adopted them by consensus.

In addition to signing the Terezin Declaration, the United States has passed the HEAR Act to implement Paragraph 3's commitment of ensuring that cases be heard on their merits rather than be dismissed for procedural reasons, such as, in the case of the HEAR Act, statutes of limitations.⁵⁸ Moreover, in 2018 the United States also enacted the Justice for Uncompensated Survivors Today ("JUST") Act, requiring the U.S. Secretary of State to report to Congress on the ongoing implementation efforts of the Terezin Declaration's forty-seven signatories, and room for improvement.⁵⁹ A European Union soft law regulation dating a year after the Washington Principles also urges the return of Nazi-looted art, and also is soft law.⁶⁰

A final international meeting was held in Vilnius, Lithuania. Holding such a European-wide conference was one of the suggestions contained in the European Parliament Resolution 1205.⁶¹ It was carried out in 2000, the year after the Resolution. One assessment of the Vilnius Forum, also producing no more than recommendations, is of a fairly weak result inasmuch as its recommendations are peppered with qualifiers, such as "reasonable" before "measures" to be taken,⁶² and that it was understood by the Vilnius Forum that "solutions to restitution may vary 'according to the differing legal systems among countries.'"⁶³

In summary, current international law is soft law of precatory force only, but it becomes hard law when national legislatures enact statutes to implement it. In common law countries like the United States, it also becomes hard law to the extent that courts implement it, since *stare decisis* subsequently transforms it into a binding, precedential source of law. In the FSIA cases which follow, it should be remembered that the FSIA is comprehensive. The references within the statute to property subject to claims relating to the Holocaust can, however, lead to two opposite, legitimate conclusions under the rules of U.S. statutory interpretation: (1) that FSIA §

⁵⁸ Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub. L. No. 114-308, § 5, 130 Stat. 1524, 1526–28 (2016).

⁵⁹ Justice for Uncompensated Survivors Today (JUST) Act of 2017, Pub. L. 115–171, 132 Stat. 1288 (2018).

⁶⁰ See EUR. PARL. ASS. RES. 1205 (Nov. 4, 1999). The Resolution is a strong statement, recommending a number of actions to be taken, but they have for the most part not come to fruition. See also Lubina's thorough account of international measures, *supra* note 47, noting, *inter alia*, U.N. Conventions which also are non-binding soft law regarding looted cultural property.

⁶¹ See EUR. PARL. ASS. RES. 1205 (Nov. 4, 1999) at ¶ 19, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16726&lang=en>.

⁶² Patrick J. O'Keefe, *Vilnius International Forum on Holocaust-Era Looted Cultural Assets*, 10 INT'L J. CULTURAL PROP. 127, 128 (2001).

⁶³ *Id.*

1605(a)(3) should be interpreted in contradistinction to the references to claims that art was stolen by the Nazis (Section 1605(h)(2)) because Section 1605(a)(3) does *not* contain any explicit reference to Nazi-looted property or art itself; or (2) that FSIA § 1605(a)(3) should be interpreted in light of the public policy contained in other parts of Section 1605 to illuminate the public policy underlying the entire statute and the entire section. As the cases also make clear, the latter interpretation must not be deemed incompatible with the presumption against extraterritoriality which the Supreme Court has been endorsing ever more strongly, including in FSIA caselaw, but the Supreme Court has also cited the FSIA's origins in foreign policy in supporting its conclusions.⁶⁴

III. FSIA DEVELOPMENTS FROM 2021 TO 2022

A. *Ending the Genocide Exception*

The Supreme Court's 2021 *Philipp* decision made clear that the D.C. and Seventh Circuits' creation within FSIA § 1605(a)(3) of a special exception to immunity where a property taking was deemed to have been a genocide was not warranted by the statute.⁶⁵ The Seventh Circuit had created the exception, describing it as a taking in connection to a genocidal project, "an integral part[] of [an] overall genocidal plan."⁶⁶

This exception had been further extended by the D.C. Circuit, which insisted that the property taking was *itself* the genocide, no matter how minimal in nature: "th[e]se expropriations themselves amount to genocide," as in the case before it where deportees en route to Auschwitz from Hungary had been robbed of their last possessions by their guards.⁶⁷ The courts in these cases did not consider how they might be altering the meaning of the law of genocide with their rulings, contributing to the growing problem of its dilution and politicization.⁶⁸ The Supreme Court in *Philipp* held that FSIA § 1605(a)(3) requires plaintiffs to prove their case under the international law of property, not of international human rights: "the expropriation exception is best read as

⁶⁴ See, e.g., *Federal Republic of Germany v. Philipp*, 141 S. Ct. 703, 709–10 (2021); see also *Cassirer v. Thyssen Bornemisza Collection Foundation*, 153 F. Supp.3d 1148 (C.D. Cal. 2015) (urging foreign policy considerations on the defendant).

⁶⁵ See *Philipp*, 141 S.Ct. 703 (rejecting the genocide basis for jurisdiction adopted in *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012), *reheard and aff'd sub nom.* See also, *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847 (7th Cir. 2015); *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016); and *Philipp v. Federal Republic of Germany*, 248 F. Supp. 3d 59, 70 (D.D.C. 2017).

⁶⁶ *Abelesz*, 692 F.3d at 676.

⁶⁷ *Simon*, 812 F.3d at 132.

⁶⁸ This issue was the topic of my analysis of those cases in Vivian Grosswald Curran, *The Foreign Sovereign Immunities Act's Evolving Genocide Exception*, 23 UCLA J. INT'L L. & FOREIGN AFF. 46 (2019).

referencing the international law of expropriation rather than of human rights.”⁶⁹

The international law of expropriation, however, overlaps with fundamental human rights in that it is violated where a state expropriates property without compensation and in a discriminatory way.⁷⁰ That the FSIA enactors aimed to address discriminatory takings is clear from the House Report on the statute’s legislative history. The Report specifies that takings in violation of international law within the meaning of the FSIA are “takings which are arbitrary or discriminatory in nature,”⁷¹ and for which the victim has not received “prompt, adequate and effective compensation,”⁷² namely, also the standard definition of property expropriation in international law and in the *Restatement (Fourth) on U.S. Foreign Relations*.⁷³

The Supreme Court implicitly accepted as much in *Philipp* by specifying that it was leaving undecided the issue of whether plaintiffs really had been German citizens at the time of the alleged taking, and by instructing the lower court to examine that on remand, along with the question of whether the plaintiffs had preserved the issue by raising it below.⁷⁴ Indeed, it was in response to the justices’ questions at oral argument about whether the plaintiffs truly had been German citizens at the relevant time that plaintiffs’ counsel argued they had not.⁷⁵ The pleadings on remand accordingly focused on this issue, with defendant claiming that the citizenship question has been foreclosed because plaintiffs did not raise it until they reached the Supreme Court,⁷⁶ and plaintiffs maintaining that they raised the issue from the beginning because the facts they alleged from their earliest pleadings gave rise to such an inference.⁷⁷ The plaintiffs had recounted facts about Germany

⁶⁹ *Philipp*, 141 U.S. at 712. On the thorny issue of treating cases of Nazi looted art entirely as property cases, see Robert Schwartz, *The Limits of the Law: A Call for a New Attitude Toward Artwork Stolen During World War II*, 32 COLUM. J. L. & SOC. PROBS. 1, 11–14. (discussing Price v. United States 707 F.Supp. 1465 (S.D. Tex. 1989).

⁷⁰ See RESTATEMENT (FOURTH) OF U.S. FOREIGN REL. § 455 cmt. c (AM. L. INST. 2018); see also JAMES CRAWFORD, BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 605 (Oxford, 9th ed. 2019) (“The rule long supported by Western governments and jurists is that the expropriation of alien property is only lawful if prompt, adequate and effective compensation is provided for. The full compensation rule has received considerable support from state practice and international tribunals”) (internal quotation marks and citations omitted).

⁷¹ H.R. REP. NO. 94-1487, at 20 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6618.

⁷² *Id.*

⁷³ See *supra*, note 70.

⁷⁴ See *Philipp*, 141 S. Ct. at 715–16.

⁷⁵ Transcript of Oral Argument at 12–13, *Federal Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021) (No. 19-351), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-351_d0fi.pdf.

⁷⁶ Defendant’s Motion to Dismiss the Second Amended Complaint (D.D.C. Feb. 23, 2015).

⁷⁷ Plaintiffs’ Response to Defendants’ Notice of Supplemental Authority, July 27, 2022 document 69, case 1:15-cv-00266-CKK (arguing in a footnote that it had maintained the argument from the beginning, but without citing to any document).

during the Nazi time which were sufficient for a court to have concluded that Germany did not consider them to be citizens, but plaintiffs had relied on the genocide theory of recovery in their pleadings.⁷⁸

The Supreme Court's instruction suggests two conclusions: (1) the well-established common law principle that plaintiffs bore the burden of stating the theory in their pleadings and briefs; and (2), perhaps most significantly, that the Court is receptive to the view that minorities and vulnerable populations not treated as full citizens by their *de jure* state still are not nationals of that state within the meaning of the FSIA and do not come within the domestic takings exception, such that the foreign state is amenable to jurisdiction under FSIA §1605(a)(3).

B. Refocusing Domestic Takings on a Substantive Citizenship Test

Numerous courts in the past have imposed a substantive, rather than formal, citizenship test, notably lower and appellate courts in FSIA cases.⁷⁹ In *Cassirer*, the Ninth Circuit had applied the following substantive test to the domestic takings exception of FSIA §1605(a)(3), taken from the lower court, and not challenged on appeal: whether the plaintiff “was no longer regarded by Germany as a German citizen” when the property expropriation occurred.⁸⁰ In *De Csepel v Republic of Hungary*,⁸¹ the lower court applied the same test, citing *Nagano v. McGrath*⁸² for the proposition that “a citizen is one who has the right to exercise all the political and civil privileges extended by his government . . . citizenship conveys the idea of membership in a nation.”⁸³ In *De Csepel* both the D.C. district court and the D.C. Circuit Court of Appeals held that the expropriation of plaintiffs' art was not a domestic taking because,

[a]s of 1944, Hungarian Jews could not acquire citizenship by means of naturalization, marriage, or legalization; vote or be elected to public office; be employed as civil servants, state employees, or schoolteachers; enter into enforceable contracts; participate in various industries and professions; participate in paramilitary youth training or serve in the armed forces; own

⁷⁸ See Complaint at ¶¶ 162, 166, *Philipp v. Federal Republic of Germany*, 248 F. Supp. 3d 59 (D.D.C. 2017) (No. 15-266), 2015 WL 757806; First Amended Complaint at ¶¶ 1–16, 44–185, *Philipp v. Federal Republic of Germany*, 248 F. Supp. 3d 59 (D.D.C. 2017) (No. 15-266), 2016 WL 510536 (describing facts from which Plaintiffs' lack of German nationality could be inferred). The lower court on remand decided that plaintiffs had not preserved the issue, see *Philipp v. Stiftung Preussischer Kulturbesitz*, F. Supp. 3d, 2022 WL 3681348, Mem. Op. at *2 (D.D.C. Aug. 25, 2022). The decision can be criticized principally for its analysis of the domestic takings exception, for the reasons set forth in the following section (III, B).

⁷⁹ *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010); *De Csepel v Republic of Hungary*, 808 F. Supp. 2d 113, 130 (D.D.C. 2011), *aff'd in part, rev'd in part*, 714 F.3d 591 (D.C. Cir. 2013).

⁸⁰ *Cassirer*, 616 F.3d at 1023, *and esp.* n. 2.

⁸¹ *De Csepel*, 808 F. Supp. 2d at 130.

⁸² *Nagano v. McGrath*, 187 F.2d 759, 768 (7th Cir. 1951) (quoting the Trading with the Enemy Act, 50 U.S.C.A. Appendix § 1 et seq., applicable to that case).

⁸³ *De Csepel*, 808 F. Supp. 2d at 130 (quoting *Nagano*, 187 F.2d at 768).

property; or acquire title to land or other immovable property. Moreover, all Hungarian Jews over the age of six were required to wear distinctive signs identifying themselves as Jewish, and were ultimately subject to complete forfeiture of all assets, forced labor inside and outside Hungary, and ultimately genocide.⁸⁴

The Court further stated that the test was *de facto*, not *de jure*: regardless of whether the plaintiff “still considered herself to be a Hungarian citizen in 1944, it is clear that . . . the government of Hungary thought otherwise and had *de facto* stripped her . . . and all Hungarian Jews of their citizenship rights.”⁸⁵

A D.C. district court, post-*Philipp* analysis of this issue also entered into considerable and thoughtful detail, agreeing with the earlier substantive citizenship test cases discussed above, and, based on the Supreme Court’s 2021 reasoning in *Philipp*, decided that the test is whether the foreign state’s law at the time of the plaintiff’s dispossession considered plaintiff to be a national.⁸⁶ The district court in that FSIA case, *Ambar v. Federal Republic of Germany*,⁸⁷ also cited *international* citizenship law, not just the U.S. perspective on what constitutes a citizen as the courts in *Cassirer* and *De Csepel* had, in concluding that the relevant foreign state’s own laws are determinative.⁸⁸ Taking its lead from the Supreme Court in *Philipp* that the exceptions to immunity under FSIA § 1605 are construed narrowly, the court nevertheless denied defendant’s motion to dismiss where the plaintiff had been a German Jew after the passage of the anti-Jewish Nazi Nuremberg laws.⁸⁹ In fact, Germany was not contesting that plaintiff’s property had been expropriated because he was Jewish, but defendant argued in that case that the applicable German law of citizenship was *post-war* German law.⁹⁰ The D.C. district court rejected this argument, in keeping with the earlier courts which had focused on the time of expropriation as the relevant moment for identifying plaintiff’s nationality.⁹¹

⁸⁴ *Id.* (*aff’d on this ground*, 714 F.3d 591 (D.C. Cir. 2013)).

⁸⁵ *Id.*

⁸⁶ *Ambar v. Federal Republic of Germany*, 596 F. Supp. 3d 76, 84–88 (D.D.C. 2022) (Memorandum Opinion) (distinguishing the D.C. district court in *Simon* which is now on remand at 579 F. Supp. 3d 91) (Memorandum Opinion). That district court opinion is being appealed as of this writing: Jan 25, 2022 (No. 22-7010).

⁸⁷ *Id.*

⁸⁸ *Id.* at 83 (quoting Convention on Certain Questions Relating to the Conflict of Nationality Laws, art. 1, 2, Apr. 12, 1930, 179 U.N.T.S. 89 and European Convention on Nationality, art. 3, Nov. 6, 1997, E.T.S. No. 116).

⁸⁹ *See Ambar*, 596 F. Supp. 3d 76 (D.D.C. 2022).

⁹⁰ *See id.*

⁹¹ *See Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010); *De Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113 (D.D.C. 2011), *aff’d in part, rev’d in part*, 714 F.3d 591 (D.C. Cir. 2013); *Philipp v. Fed. Republic of Ger.*, 894 F.3d 406, 410 (D.C. Cir. 2018).

As seen above, the *Cassirer* case, involving the coerced transfer of plaintiff's grandmother's Pissarro painting for a derisory amount as the price for the owner to obtain an exit visa from Germany, also used the *de facto* citizenship test,⁹² as did *De Csepel*, which concerned an enormously valuable painting collection in Hungary.⁹³ The U.S. Supreme Court denied certiorari in *Cassirer* after the Ninth Circuit adopted the *de facto* substantive citizenship test of looking to whether the foreign state had regarded the plaintiff as a full citizen at the time of the expropriation. Although the denial of certiorari is never a sign from the Supreme Court, in and of itself, of substantive approval of an appellate court's decision, the Supreme Court did subsequently grant certiorari in the same case in 2022, but still left untouched the Ninth Circuit's substantive citizenship test, and decided only whether state or federal conflicts of law rules applied to this FSIA case.⁹⁴

On remand from the Supreme Court, the D.C. district court's decision to dismiss *Philipp* made no reference to the *de facto* substantive citizen test which U.S. FSIA courts have established. Rather, it adopted the simplistic dichotomy defendant had suggested of analyzing the plaintiffs as either being German "nationals" or as being "stateless,"⁹⁵ even though Germany under Hitler had other categories, and the court tried to equate a *de facto* substantive citizenship test with the genocide exception that the Supreme Court had rejected.⁹⁶ The earlier courts which established the *de facto* citizenship test had never espoused a genocide exception, however. The D.C. district court's uncritical acceptance of defendant's argument is not the test under the FSIA domestic takings exception. The Nuremberg laws of 1935 stripped all Jews, *de jure*, of their German citizenship, making them merely German "*subjects*," not German "*nationals*," as claimed by defendants, and repeated by the district court in a translation from the German which benefits the defendant by making even the Nazi Nuremberg Laws sound benignly not to have deprived Jews of German nationality. At the time of the expropriation of the *Philipp* plaintiffs' art in June of 1935, just three months before the official enactment of the Nuremberg Laws, *de facto* subjugation was fully in place: already at that time Jews were not entitled to practice professions, their books were burned, and they were excluded from the *Volk*, meeting the requirements set forth by the D.C. and Ninth Circuits for disqualifying a foreign sovereign from invoking the domestic takings exception.⁹⁷ Finally, the Supreme Court's *Philipp*

⁹² See discussion *supra* Section III.A.

⁹³ See *De Csepel*, 808 F. Supp. 2d at 129–30.

⁹⁴ *Cassier*, 142 S. Ct. at 1507 (stating that the determination of whether the plaintiffs fit within the expropriation exception of FSIA § 1605 "is no longer at issue").

⁹⁵ *Philipp v. Stiftung Preussischer Kulturbesitz*, F. Supp. 3d, 2022 WL 3681348, Mem. Op. at *7, *9, *11 (D.D.C. 2022).

⁹⁶ *Id.* at *10.

⁹⁷ The German word used in the Nuremberg Laws for Jews was "*Staatsangehörige*," a term translated into English as "subjects," not "nationals" as the defendants argued and the court accepted uncritically. It should also be noted that the district court purported to discuss the issues

decision, containing the Court's inquiry about the plaintiffs' citizenship role in Germany and its direction that this be explored on remand, suggest Supreme Court agreement with the *de facto* substantive citizenship test.

IV. FSIA DEVELOPMENTS IN THE D.C. CIRCUIT IN 2022

A. Exhaustion of Local Remedies

An issue unresolved by the Supreme Court's recent decisions is if the FSIA, mandates or allows for the exhaustion of local remedies. Defendants argued in *Philipp's* companion case, *Simon*,⁹⁸ as did defendants in § 1605(a)(3) looted art cases such as *Altmann*,⁹⁹ that the U.S. courts lack jurisdiction where plaintiffs have not first brought their suit in the defendant state under principles of exhaustion of local remedies. The issue of whether FSIA § 1605(a)(3) requires exhaustion of local remedies resulted in an inter-circuit split, which the Supreme Court did not resolve in *Philipp*, but which has been addressed post-*Philipp* by the D.C. Circuit Court of Appeals in *De Csepel*.¹⁰⁰

In the reprised 2022 *De Csepel* opinion, the D.C. Circuit held that, although the Supreme Court's *vacatur* in *Philipp* allowed for the subsequent reopening of the issue, it nevertheless reaffirmed its prior holdings in *Simon* and *Philipp* that FSIA § 1605(a)(3) does not require the exhaustion of local remedies:

We reaffirm our holdings and rationales in *Simon* and *Philipp* that the FSIA does not require prudential exhaustion in suits against foreign states. The FSIA “replac[ed] the old executive-driven, factor-intensive, loosely common-law-based immunity regime” with a “comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state. Thus, any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall.” In particular, “[w]hen Congress wanted to require the pursuit of foreign remedies as a predicate to FSIA jurisdiction, it said so explicitly.” The terrorism exception, for example, requires a claimant to first “afford[] the foreign state a reasonable opportunity to arbitrate the claim.”¹⁰¹

of plaintiffs' preservation of their claims about domestic takings and the substantive issue of nationality as two separate matters, but in fact conflated the two: “While Plaintiffs rely on language from the Nazi party platform that ‘no Jew may be a member of the [German] nation, that language was not included in their Complaint.” *Id.* at *12 (internal citation omitted).

⁹⁸ See *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016).

⁹⁹ See, e.g., Appellant's Reply Brief at *11, *Altmann v. Republic of Austria*, 377 F.3d 1105 (9th Cir. 2001).

¹⁰⁰ *De Csepel v. Republic of Hungary*, 27 F.4th 736, 753 (D.C. Cir. 2022).

¹⁰¹ *Id.* at 753 (internal citations omitted).

The circuit split before the Supreme Court's decision in *Philipp* had been between the D.C. and Seventh Circuits; it is not yet known if the Seventh Circuit will continue to require exhaustion.¹⁰²

The D.C. Circuit seems to have the more persuasive position on this matter for the reasons it stated in *De Csepel*: that FSIA § 1605(a)(3)'s text does not call for the exhaustion of local remedies and that the text is comprehensive.¹⁰³ In addition to those reasons, exhaustion militates against the very international comity its proponents argue it supports. In Nazi-era stolen property cases, the defendants do not argue that they support the Nazi regime. State defendants such as Germany (*Philipp*; *Cassirer*; *Ambar*) and Hungary (*Simon*; *Abelesz*; *Fischer*) repudiate the predecessor states that embraced Nazism. To rule in favor of plaintiffs today in cases which involve expropriations from the 1933-1945 era thus is not an offense against these current defendant states. To require exhaustion of local remedies in those countries which are actively denying liability to the plaintiffs generally means that the plaintiffs will lose. This is what happened in *Fischer*¹⁰⁴ when, after the Seventh Circuit required plaintiffs to exhaust their remedies in Hungary, plaintiffs brought suit in Hungary.¹⁰⁵ Among the Hungarian court's reasons for dismissing was lack of documentary evidence of plaintiff's having been stripped of possessions at the train tracks where she had stood waiting to be sent to Auschwitz.¹⁰⁶

Finally, the exhaustion requirement under customary international law is not intended for domestic courts such as those applying the FSIA, but for international tribunals adjudicating the claims of two state parties. As the Restatement (Fourth) of U.S. Foreign Relations puts it, "[T]he rule [of exhaustion of local remedies] cited by the *Abelesz*¹⁰⁷ court applies by its terms to "international," not domestic, proceedings. Accordingly, the interpretation of the statute that it *does not require* exhaustion appears to be the proper one."¹⁰⁸

After losing in the foreign state, plaintiffs' options are few and far between. To obtain a hearing in a U.S. court, the court must conclude that the foreign proceeding was fundamentally inadequate.¹⁰⁹ U.S. judges are highly reluctant

¹⁰² See *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 681 (7th Cir. 2012); *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 855 (7th Cir. 2015).

¹⁰³ *De Csepel*, 27 F.4th at 753.

¹⁰⁴ *Fischer*, 777 F.3d at 855.

¹⁰⁵ See *Genocide Exception*, *supra* note 7.

¹⁰⁶ See *id.*

¹⁰⁷ *Abelesz* was the precursor to *Fischer*. See *Abelesz*, 692 F.3d at 681.

¹⁰⁸ RESTATEMENT (FOURTH) OF U.S. FOREIGN REL. § 455, cmt. 11 (emphasis added).

¹⁰⁹ U.S. courts, unlike those in some other countries, work under a presumption against reviewing foreign judgments on the merits; thus, their review will be for procedural flaws such as lack of due process which tend to implicate the foreign state's judicial system. See Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?*, 31 BERKELEY J. INT'L L. 150, 167-68 (2013).

to do this for reasons of international comity, viewing such rulings as an offensive condemnation of the foreign state's judiciary. The basic guidelines for such a refusal to recognize and enforce a foreign proceeding were articulated by the Supreme Court in the late nineteenth century case of *Hilton v. Guyot*,¹¹⁰ and relate to fundamental, procedural flaws as those capable of invalidating foreign judgments:

When an action is brought in a court of this country by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is prima facie evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that, by the principles of international law, and by the comity of our own country, it should not be given full force and effect.¹¹¹

Thus, in FSIA Nazi-looted art cases, not only is there no reference to exhaustion in the text, and not only is exhaustion intended for international, not domestic (such as FSIA) tribunals, but it is the exhaustion of local remedies requirement that endangers standards of international comity rather than granting jurisdiction under the FSIA.

B. State Versus Federal Law Conflict Rules in FSIA Cases

The *Cassirer* issue for which the Supreme Court did grant certiorari, and decided in 2022, was whether federal or state conflict of laws rules apply to FSIA cases. The art in that case was the Pissarro painting once owned by Lilly Cassirer, relative of Paul Cassirer, the well-known German Jewish art dealer and publisher.¹¹² Forced to turn over the painting to the Nazis to be able to leave Germany, she was unable to locate it after the war.¹¹³ She eventually emigrated to the United States. After changing hands a number of times, the painting was sold to an instrumentality of the Spanish government, the

¹¹⁰ *Hilton v. Guyot*, 159 U.S. 113 (1895).

¹¹¹ *Id.* at 123.

¹¹² Lilly had inherited the painting, originally bought by her great-grandfather the year after it had been painted. See *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1023 (2010).

¹¹³ See *id.*

Thyssen-Bornemisza Foundation.¹¹⁴ After Lilly died, her son Claude succeeded to her interests.¹¹⁵ It was he who discovered the whereabouts of the painting from a friend who had seen the Spanish museum's catalogue.¹¹⁶ Claude resided in California and brought suit there.

The defendant does not dispute that the painting was stolen. It maintains, however, that Spanish law applies to the case.¹¹⁷ Under Spanish law, a purchaser in good faith can obtain good title after sufficient time.¹¹⁸ The plaintiff, on the other hand, argues that California law applies. Under California law, a purchaser in good faith does not obtain good title.¹¹⁹ The defendant argued that a federal common law choice-of-law rule applied, and that *Erie*¹²⁰ was inapplicable to the FSIA, while plaintiff argued that California's choice-of-law rule applied.¹²¹

The Supreme Court resolved an ongoing circuit split in which the Ninth Circuit had been the only circuit to apply a federal conflict-of-law rule to FSIA cases.¹²² The Court rejected the applicability of federal common law, citing FSIA § 1606¹²³ in support of the proposition that, "a foreign state, if found ineligible for immunity, must answer for its conduct just as any other [private] actor would."¹²⁴ More precisely, this means that the choice-of-law rule for foreign states and instrumentalities under the FSIA, once they have been found amenable to jurisdiction under a Section 1605 exception, is the same as for any private party.¹²⁵ Although Section 1606 is clear in directing private party treatment for states lacking immunity under the FSIA, the justification

¹¹⁴ *See id.*

¹¹⁵ Claude having now died, it is his son who has become the successor in interest and current plaintiff. *Cassirer v. Thiessen-Bornemisza Collection Foundation*, 142 S. Ct. 1502, 1507 (2022).

¹¹⁶ *Id.* at 1506.

¹¹⁷ *Id.* at 1507.

¹¹⁸ *Cassirer v. Thiessen-Bornemisza Collection Foundation*, 862 F.3d 951, 960–61 (9th Cir. 2017), and sources cited therein. The lower court had found that defendant's possession had been sufficient, *Cassirer v. Thyssen Bornemisza Collection*, 153 F. Supp. 3d 1148 (C.D. Cal. 2015), as had the Ninth Circuit. 862 F.3d at 964–65. But, the Ninth Circuit reversed and remanded on the issue of whether defendant was complicit through knowledge of the art's stolen provenance, which under Spanish law would invalidate defendant's title. 862 F.3d at 981. On remand, the lower court held that defendant lacked knowledge, and the Ninth Circuit affirmed for the defendant. *Cassirer v. Thyssen Bornemisza Collection*, 824 Fed. App'x 452 (9th Cir. 2020), *rev'd and remanded*, 142 S. Ct. 1502 (2022).

¹¹⁹ *See Cassirer*, 862 F.3d at 960–61, and sources cited therein.

¹²⁰ *Erie R. Co. v. Tomkins*, 304 U.S. 64 (1938).

¹²¹ *See Cassirer*, 142 S. Ct. at 1507, 1509.

¹²² *See id.* at 1507.

¹²³ Under FSIA § 1606, where a state is not immune from jurisdiction, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances"

¹²⁴ *Cassirer*, 142 S. Ct. at 1508.

¹²⁵ *See id.*

for this in conflict of laws cases has been challenged.¹²⁶ The original rationale for applying *Erie* to conflict of law cases was to eliminate disparate treatment within one state where defendants were able to remove their cases to federal court on state law issues, potentially leading to different outcomes within a state.¹²⁷ Since FSIA cases all can be removed to federal court, and are very rarely heard in state courts, this concern is *de minimis*.¹²⁸

In vacating and remanding for further proceedings, the Court left the painting's ownership undecided.¹²⁹ The district court had concluded, albeit cursorily, that plaintiff would lose under both Spanish and California law.¹³⁰ It has been suggested that the wisest course on remand would be to certify to the California Supreme Court the issue of whose substantive law applies to the case, since the federal courts are sitting in diversity as they apply state law in the way they believe the state supreme court would.¹³¹

C. The Enhanced Significance for the FSIA of Suing a State Versus a State Instrumentality

In another 2022 D.C. Circuit opinion dealing with Nazi-looted art and the FSIA, *De Csepel v. Republic of Hungary*, the court heard a case which had repeatedly been in the courts, as had all of those discussed in these pages.¹³² *De Csepel* is the most recent circuit court opinion to analyze at length the distinction between foreign state and foreign state instrumentality, ruling that plaintiffs' suit was viable under the FSIA against Hungarian National Asset Management Inc. ("MNV")¹³³ which exercises Hungary's ownership rights with respect to the art that was the subject of the proceeding.¹³⁴ The De Csepel family had lost an immensely valuable art collection when it had to escape Jewish persecution in Hungary.¹³⁵ Their paintings first had been inventoried under antisemitic laws of Hungary and, finally, were stolen by Adolf Eichmann.¹³⁶ After the war, the family was unable to retrieve its paintings,

¹²⁶ See Ted Folkman, *Case of the Day: Cassirer v. Thyssen-Bornemisza Collection Foundation*, LETTERS BLOGATORY (Apr. 25, 2022), <https://folkman.law/2022/04/25/case-of-the-day-cassirer-v-thyssen-bornemisza-collection-foundation/>.

¹²⁷ See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

¹²⁸ See Folkman, *supra* note 126; see also Symeon Symeonides, *Foreign Sovereign Immunity and Choice of Law—State, Not Federal*, TRANSL LITIG. BLOG (Apr. 28, 2022), <https://tlblog.org/foreign-sovereign-immunity-and-choice-of-law-state-not-federal/> (critiquing *Klaxon*).

¹²⁹ See generally *Cassirer*, 142 S. Ct. 1502 (2022).

¹³⁰ 153 F. Supp. 3d 1148, at 1167–68.

¹³¹ See Symeonides, *supra* note 128; Suzanna Sherry, *What Should Happen Next in Cassirer?* TRANSL LITIG. BLOG (Apr. 22, 2022), <https://tlblog.org/what-should-happen-next-in-cassirer/>.

¹³² *De Csepel v Republic of Hungary*, 27 F.4th 736 (2022).

¹³³ MNV had been added as a defendant under an amended complaint under the HEAR Act. *Id.* at 741.

¹³⁴ See *id.* at 742.

¹³⁵ See *id.* at 739–40 (describing it as one of the most valuable in Europe).

¹³⁶ *Id.*, at 740.

although it tried to do so through the courts of Hungary.¹³⁷ With respect to the paintings over which MNV exercised control, the lower court had dismissed Hungary for lack of jurisdiction under the FSIA, such that the issue before the court was whether it could exert FSIA jurisdiction over MNV but not Hungary. This, in turn, involved whether MNV was an instrumentality of Hungary. The appellate court granted plaintiff's interlocutory appeal under 28 U.S.C. §1292(b) as "involv[ing] a controlling question of law as to which there is substantial ground for difference of opinion"¹³⁸

The court reasoned that a foreign state does not lose its immunity under FSIA §1605(a)(3) where the property at issue is not in the United States.¹³⁹ This is a stricter application of the foreign state expropriation exception than has previously been the case, and one that is stricter than the statutory language requires or indicates. Section 1605(a)(3)'s language with respect to foreign states is that the exception applies to the foreign state where "rights in property taken in violation of international law are in issue and that property *or any property exchanged for such property* is present in the United States in connection with a commercial activity carried on in the United States by the foreign state."¹⁴⁰ The *De Csepel* court analyzed this in a truncated manner, as requiring for state immunity to be abrogated only where "*the property in issue is present in the United States* in connection with a commercial activity carried on in the United States by the foreign state."¹⁴¹ Previous case law had accepted a much looser connection between the property location and the foreign state's amenability to jurisdiction under the FSIA. Thus, for example, in *Altmann*, plaintiff's paintings were in Austrian museums, yet the U.S. Supreme Court denied Austria's motion to dismiss under Section 1605(a)(3). The *De Csepel* court created a starker distinction than previously had existed between states and state instrumentalities by holding that the looted property did not need to be located in the United States for the immunity exception to apply to state instrumentalities.¹⁴² This distinction would bring a major and textually unwarranted change to FSIA § 1605(a)(3) if it is followed by other circuits and not overturned by the Supreme Court.

The remaining portion of the analysis focused on two aspects of MNL's argument: (1) it was not an instrumentality of the government, but, rather, part of the government;¹⁴³ and (2) Hungary was an indispensable party, such that its dismissal required MNL's. The court applied the well-established core

¹³⁷ *De Csepel*, 27 F.4th at 741.

¹³⁸ *Id.* at 742.

¹³⁹ *Id.* at 743.

¹⁴⁰ *Id.* (emphasis added).

¹⁴¹ *Id.* (emphasis added).

¹⁴² *De Csepel*, 27 F.4th at 743 (quoting the entire clause of Section 1605(a)(3) applicable to state instrumentalities: "or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.").

¹⁴³ *Id.*

functions test as to whether the entity's functions are sovereign or commercial, to conclude that MNL was an instrumentality of the government rather than the government itself because its function was commercial in nature, as opposed to having core governmental duties such as declaring war.¹⁴⁴ The court seemed to weigh as particularly important that MNL engaged in managing property, "functions that private entities also perform."¹⁴⁵ The court also examined the type of property MNL managed, including "energy, gambling [and] waste,"¹⁴⁶ finding none of them "inherently sovereign" activities.¹⁴⁷ The court also rejected defendant's argument that it should be dismissed because Hungary was a required party to the suit, finding that Hungary was "required" but not "indispensable" because Hungary's interests coincided with MNL's such that MNL's defense would in all ways represent Hungary's interest vis-à-vis plaintiffs, reasoning that is standard fare in sovereign activities analysis.¹⁴⁸

V. CONCLUSION

Just in the few months from 2021 to 2022, interpretation of the FSIA's property expropriation exception for Nazi-looted art has evolved considerably. Because the FSIA is, by its own terms, by its legislative history, and by court interpretation, a comprehensive statute, the FSIA's evolution has not been in tandem with U.S. public policy to implement the Washington Principles and Terezin Declaration, but it also has not been entirely independent of that background, and some of its amended terms reflect those developments for looted art located in the United States.

Among the notable developments at the Supreme Court have been the end of the genocide exception as an independent source of claims under FSIA § 1605(a)(3); a renewed focus on issues of substantive, as opposed to formal, citizenship for domestic takings analysis; and state, not federal, conflict-of-laws rules for FSIA cases. At the circuit court level, there has been a reaffirmation by the D.C. Circuit of its pre-*Philipp* case law that the FSIA does not require the exhaustion of local remedies, leaving an inter-circuit conflict in a decision that seems well supported both by the statute and international customary law. Finally, in a decision that seems difficult to support either in precedent or by the FSIA's terms, the D.C. Circuit set a much higher bar for suits against states than state instrumentalities when it read into the first clause of § 1605(a)(3) the requirement that states remain immune from jurisdiction unless the looted art or other property at issue is located in the United States.

¹⁴⁴ See *id.* at 743–44.

¹⁴⁵ *Id.* at 744.

¹⁴⁶ *Id.* at 745.

¹⁴⁷ *De Csepel*, 27 F.4th at 745.

¹⁴⁸ *Id.* at 746–52 (citing FED. R. CIV. P. 19 (a) and (b)).

