

U.S. Supreme Court Defines Contours of FSIA’s Expropriation Exception

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On February 3, 2021 the U.S. Supreme Court issued an important ruling in *Federal Republic of Germany v. Philipp*, a case involving takings by Germany during the Holocaust. The Supreme Court held that the Foreign Sovereign Immunities Act (“FSIA”)’s “expropriation exception,” which confers U.S. courts with jurisdiction over some expropriations in violation of international law, does not reach “domestic” expropriations—*i.e.*, a taking by a state from its own citizens.¹

The unanimous decision limits the claims that can be brought against foreign sovereigns in U.S. court, and may indicate how the Supreme Court will rule in other cases involving international human rights law violations. In vacating the D.C. Circuit’s prior decisions in the *Philipp* case and in a parallel case against Hungary, the Supreme Court declined to rule on the lower court’s separate holding that the FSIA prevents foreign sovereigns from raising international comity-based defenses in U.S. courts—a ruling that had potentially wide-reaching implications for foreign sovereign defendants in commercial and other cases. The issue now may arise again in further proceedings in *Philipp* or other cases.

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¹ *Fed. Republic of Germany v. Philipp*, No. 19-351, slip op. (U.S. Feb. 3, 2021) (Roberts, C.J.) (“*Philipp*”).



Background

Under the FSIA, foreign sovereigns are presumptively immune from suit in U.S. courts unless one of the exceptions to immunity enumerated in the FSIA applies. The FSIA's expropriation exception provides for jurisdiction where a foreign sovereign takes property "in violation of international law," and there is an adequate commercial nexus between the United States and the defendant.²

In *Philipp*, heirs of Jewish art dealers, who in the 1930s sold to Prussia a collection of medieval relics and artifacts known as the Guelph Treasure, brought suit against the Federal Republic of Germany and its state museum-administering agency in the U.S. District Court for the District of Columbia. Plaintiffs asserted that the sale took place under duress, and therefore that their claims fell within the FSIA's expropriation exception since Germany's taking of property from Jewish people during the Holocaust "was an act of genocide and the taking therefore violated the international law of genocide."³

Germany moved to dismiss the case, arguing that the sale, even if coerced, would not fall within the expropriation exception because "a sovereign's taking of its own nationals' property is not unlawful under the international law of expropriation."⁴ Germany also argued that "international comity required the court to decline jurisdiction until the heirs exhaust their remedies in German courts."⁵ The district court denied Germany's motion to dismiss, accepting plaintiffs' broader reading of the expropriation

exception and finding that the taking had "a sufficient connection to genocide such that the alleged coerced sale may amount to a taking in violation of international law."⁶ The district court also rejected Germany's arguments that the case should be dismissed as a matter of international comity (i) in deference to a previous finding by a German Advisory Commission established to address Nazi-confiscated art claims that the sale at issue was not a coerced transaction, or (ii) because plaintiffs must first exhaust their remedies in German courts.

The D.C. Circuit Court of Appeals affirmed the district court's ruling. Regarding the expropriation exception, the D.C. Circuit held that although a foreign sovereign's taking of its own citizens' property does not violate the international law of expropriation, such an "intrastate taking" can nonetheless fall within the expropriation exception where the taking "amounted to the commission of genocide," since genocide perpetrated by a state—even "against its own nationals"—violates international law.⁷

As to international comity, the D.C. Circuit ruled a foreign sovereign could not raise comity-based defenses that would create immunity but were not contemplated in the FSIA's text, since the FSIA is a "comprehensive statement of foreign sovereign immunity" that "leaves no room" for such defenses.⁸ Five months later, the D.C. Circuit reached the same comity ruling in a case by heirs of Holocaust survivors against Hungary ("*Simon*").⁹

² See 28 U.S.C. § 1605(a)(3) (providing for jurisdiction 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; 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").

³ *Philipp*, slip op. at 3.

⁴ *Id.*

⁵ *Philipp v. Fed. Republic of Germany*, 894 F.3d 406, 410 (D.C. Cir. 2018). Germany additionally claimed that U.S.

foreign policy preempted plaintiffs' state-law claims, an issue that was not presented to the Supreme Court.

⁶ *Id.* at 411.

⁷ *Id.* at 410-11. The D.C. Circuit accepted Germany's claim that the expropriation exception's heightened commercial nexus standard for foreign states required dismissal of the Federal Republic of Germany from the case, although the claims could proceed against the state museum agency.

⁸ *Id.* at 415-16 (citing *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141-42 (2014)) (quotation omitted).

⁹ *Simon v. Republic of Hungary*, 911 F.3d 1172, 1180-81 (D.C. Cir. 2018).

After the D.C. Circuit denied rehearing *en banc* in *Philipp* and *Simon*,¹⁰ Germany and Hungary petitioned the Supreme Court for *certiorari*. In *Philipp*, the Supreme Court granted review on two questions: *first*, whether the expropriation exception applies to domestic takings, and *second*, whether a foreign sovereign could assert an international comity abstention defense. The Supreme Court also granted review on the international comity question in *Simon*.

The Supreme Court's Decision

In a unanimous opinion by Chief Justice Roberts, the Supreme Court accepted Germany's narrower reading of the expropriation exception, holding that the FSIA does not provide for jurisdiction over a state's taking of its own citizens' property. The Supreme Court did not reach the international comity question or plaintiffs' alternative argument that their claim was not a domestic taking since their ancestors were stripped of their citizenship through acts of the Nazi government before the taking occurred. Instead, the Supreme Court remanded these issues to be considered by the lower courts.

In interpreting the expropriation exception's "in violation of international law" requirement, the Supreme Court relied on international law, the FSIA's history and overall statutory scheme, and reciprocity principles. The Court first observed that international law concerned relations between states—not relations between a state and an individual. Accordingly, the Court noted, a state's taking of property belonging to a *foreign* national was a "violation of international law," because it was an affront to the other sovereign state, whereas a state's taking from its own citizens was a purely domestic affair.¹¹

The Court recounted that when the FSIA was enacted in 1976, the expropriation exception referred to the international law of property, under which a "taking of property" was "wrongful" only if a state deprived an "alien" of property.¹² The Court therefore rejected plaintiffs' argument that the FSIA incorporated "international law" broadly, noting that the statutory text referred to property and property-related rights—not genocide or human rights abuses.

From a practical perspective, the Court expressed concern that plaintiffs' construction of the expropriation exception would open the doors to litigating any human rights abuse in U.S. courts under the FSIA, running afoul of "international law's preservation of sovereign immunity" and the FSIA's overall statutory scheme.¹³ The Court cautioned that a contrary reading would render Congress's FSIA limitations "of little consequence," as "human rights abuses could be packaged as violations of property rights."¹⁴

Finally, the Court grounded its holding on the principle that "United States law governs domestically but does not rule the world."¹⁵ The Court noted 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."¹⁶

Accordingly, the Supreme Court vacated the D.C. Circuit's rulings in the cases against Germany and Hungary, and directed the lower courts to consider the other remaining issues in further proceedings consistent with the Supreme Court's opinion.¹⁷

¹⁰ Judge Katsas dissented from the D.C. Circuit's denial of rehearing *en banc* in *Philipp* and on the merits in *Simon*.

¹¹ See also *United States v. Belmont*, 301 U.S. 324, 332 (1937) ("What another country has done in the way of taking over property of its nationals . . . is not a matter for judicial consideration here.").

¹² *Philipp*, slip op. at 9.

¹³ *Id.* at 10-12; see also *Jurisdictional Immunities of the State (Germany v. Italy)*, Judgment, 2012 I.C.J. 99, 139

(Feb. 3) ("[A] State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law.").

¹⁴ *Philipp*, slip op. at 10-12.

¹⁵ *Id.* at 13 (citation omitted).

¹⁶ *Id.*

¹⁷ See *Republic of Hungary v. Simon*, No. 18-1447, slip op. at 1 (U.S. Feb. 3, 2021).

Implications of the Case

The Supreme Court's decision in *Philipp* narrows the scope of the FSIA's expropriation exception and therefore limits the claims that can be brought against foreign sovereigns in U.S. court. It is consistent with past rulings by U.S. courts that a sovereign cannot violate international law by taking the property of its own citizens,¹⁸ and may forecast the approach that the Supreme Court will take in other cases involving human rights claims premised on violations of international law, even against private defendants.¹⁹ Had the Supreme Court adopted the *Philipp* plaintiffs' broader reading of the expropriation exception to immunity, that could have provided a basis for other plaintiffs to try to bring suit not only in connection with purported human rights violations but also for other purported violations of international law involving property rights of some kind.

The Supreme Court's parallel decisions in both *Philipp* and *Simon* are also notable for vacating the D.C. Circuit's rulings that a foreign sovereign cannot raise international comity-based defenses that in the court's view would create immunity if those defenses are not explicitly contemplated in the text of the FSIA. Those rulings potentially foreclosed a wide array of comity-based defenses for sovereign defendants even outside of the expropriation context. For example, foreign sovereigns have asserted comity-based defenses in commercial cases in connection with sovereign debt restructurings, or sought deference from a U.S. court to foreign court proceedings. In holding that foreign sovereigns are categorically barred from asserting such comity-based defenses, the D.C. Circuit departed from a decision by the Seventh Circuit,²⁰ and potentially placed foreign sovereigns at a disadvantage compared to private parties who remain

free to assert defenses of various kinds based on international comity.

In light of the Supreme Court's decision, the D.C. Circuit's rulings foreclosing certain comity-based defenses are no longer in effect. The Supreme Court's ruling in *Philipp* would seem to preclude further proceedings in *Simon*, where plaintiffs' claims against Hungary were premised on a domestic expropriation and the asserted basis for jurisdiction was the expropriation exception. However, it is possible that the comity issue could arise again in further proceedings in *Philipp*, since the *Philipp* plaintiffs raised an alternative argument that their claim should not be viewed as a domestic taking because their ancestors had become stateless people by the time of the 1935 sale as a result of Nazi regime regulations.²¹ If the lower courts accept this argument, the *Philipp* case could proceed and the lower courts likely would have another opportunity to address the comity issue. In any event, the D.C. Circuit's reasoning in *Philipp* and *Simon* regarding the unavailability of comity-based defenses under the FSIA may be tested in other cases in the D.C. Circuit or other courts. Insofar as the Supreme Court construed the structure of the FSIA differently than the D.C. Circuit as concerns the expropriation exception, and in so doing articulated a different and arguably narrower role for U.S. courts in adjudicating international disputes, it will be interesting to see whether in the future the D.C. Circuit or others will take a more hospitable view of comity arguments raised by sovereign defendants.

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¹⁸ See, e.g., *United States v. Belmont*, 301 U.S. 324, 332 (1937); cf. *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1321 (2017).

¹⁹ See *Doe v. Nestle, S.A.*, 906 F.3d 1120 (9th Cir. 2018), (Alien Tort Statute suit against Nestle for allegedly aiding and abetting human rights abuses in Africa), cert. granted, No. 19-416, 2020 WL 3578678 (U.S. July 2, 2020) (argued Dec. 1, 2020).

²⁰ Cf. *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 860 (7th Cir. 2015) (principles of comity required plaintiffs to exhaust Hungarian remedies before suing Hungary for expropriation in U.S. court).

²¹ See Brief for Pet'rs at 19 n.7, *Philipp* (claiming that the heirs forfeited this argument by failing to raise it earlier).