The Foreign Sovereign Immunities Act's Evolving Genocide Exception

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THE FOREIGN SOVEREIGN IMMUNITIES ACT’S EVOLVING GENOCIDE EXCEPTION

Vivian Grosswald Curran*

ABSTRACT

The Foreign Sovereign Immunities Act (FSIA) was passed by Congress as a comprehensive statute to cover all instances when foreign states are to be immune from suit in the courts of the United States, as well as when foreign state immunity is to be limited. Judicial interpretation of one of the FSIA’s exceptions to immunity has undergone significant evolution over the years with respect to foreign state property expropriations committed in violation of international law. US courts initially construed this FSIA exception by denying immunity only if the defendant state had expropriated property of a citizen of a nation other than itself. Later, such suits were allowed even where the plaintiffs were deemed by courts to have been formal citizens so long as they had not been treated as such at the time of the expropriation. This tended to occur where states had dispossessed groups of citizens, often minority populations, of their property rights, and often coincided with grave human rights violations. The courts applied a test of substantive over formal citizenship that had been used in related areas of the law.

In the most recent appellate decisions that considered the issue, however, the Seventh Circuit and the DC Circuit discarded nationality entirely as a

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criterion to abrogate immunity if a court considers the defendant state’s expropriation to have been part of a policy of genocide. The DC Circuit has gone still further in its latest cases and equates the act of property expropriation with genocide. Both circuits initially also imposed a new exhaustion of local remedies requirement. As of 2018, a conflict exists between the two circuits on that issue.

The genocide interpretation with the imposition of exhaustion distorts both the FSIA and customary international law. It risks trivializing the concept of genocide, and in the Seventh Circuit it removes exhaustion from its international law roots in cases that occur exclusively in international tribunals by inserting the requirement into a domestic court framework. Neither development is consistent with the FSIA statute. Coupling the new genocide category with an exhaustion requirement also has a net effect of depriving plaintiffs of recovery inasmuch as lawsuits in the foreign defendant states are unlikely to succeed, and the obstacles are steep for persuading US federal courts subsequently to retry a case once an adverse foreign judgment has been issued.

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I. INTRODUCTION

The Foreign Sovereign Immunities Act (variously “FSIA” or the “Act”) was passed by Congress in 1976.\(^1\) Before then, international and US views on foreign sovereign immunity had undergone significant transitions, and US sovereign immunities law had become less coherent as courts deferred to executive branch decisions that were not known for mutual consistency, creating what the Supreme Court once described as "bedlam" in the law.\(^2\) Of signal note in the legal evolution of sovereign immunity law both internationally and in the United States was a trend towards granting foreign states immunity from suit for their public acts only. Under this restrictive view of immunity, foreign states were not immune to jurisdiction in US courts for their commercial activity.\(^3\)

As a result of the increasingly confused condition of US law, Congress enacted the FSIA to be a comprehensive statute that removed jurisdictional decisions from the executive branch to the judiciary. Subsequently, the US Supreme Court stated of the Act that “[t]he key word … is comprehensive.”\(^4\) In that case, *NML Capital v. Republic of Argentina*, the Court further made explicit that congressional enactment of a comprehensive statute on foreign sovereign immunity means that the statutory text must be the judiciary’s sole consideration in interpreting it: “[A]ny sort of immunity defense made by a foreign sovereign in an American court must stand on the Act’s text. Or it must fall.”\(^5\) Congress itself had gone somewhat less far than that in the FSIA’s text, requiring conformity only to its “principles,” not to its “text”: “Claims of foreign states to immunity should henceforth be decided by courts . . . in

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\(^3\) This growing trend was noted in a letter issued by the US Department of State, in which it also announced the Executive Branch’s adoption of the new approach, known as “restrictive” sovereign immunity, in contrast to the “absolute” version. See Alfred Dunhill of London v. Republic of Cuba, 425 U.S. 682, 707–11 (1976) (letter reprinted in its entirety). For an account of the restrictive theory of immunity in the United States and other nations, see *Restatement (Third)* of US Foreign Relations § 451, reporters’ note 1 (AM. LAW INST. 1987) [hereinafter *Restatement (Third)*]; Garb v. Republic of Poland, 440 F.3d 579, 585 (2d. Cir. 2006). For an overview of law outside the United States, see Ilaria Queirolo, *Immunity, in Encyclopedia of Private International Law* 896–99.


\(^5\) Republic of Argentina, 573 U.S. at 142.
conformity with the principles set forth [herein].”

Foreign sovereign immunity has been described by the US Supreme Court as never having been a matter of right, but always of “grace and comity.” Concurring in this assessment, Ian Brownlie, the author of one of the seminal English-language works on international law, cites in his Principles of Public International Law Justice Marshall’s premise that every state’s jurisdiction within its national territory is “necessarily exclusive and absolute.” According to Justice Marshall, a state’s jurisdiction “is susceptible of no limitation not imposed by itself.” The FSIA establishes such a limitation to US jurisdiction, creating a presumption that a foreign state will not be subject to civil suit in the United States.

This grant of immunity from civil liability to foreign sovereigns sued in the United States is subject to exceptions enumerated in Section 1605 of the Act. One of these, Section 1605(a)(3), deprives a foreign state of its immunity where the defendant state has expropriated property in violation of international law:

(a) A foreign state shall not be immune from the jurisdiction of 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 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.

It is this particular exception which has been the object of genocide-related suits. Over time, it has been subject to a series of judicial interpretations, the
latest of which have taken it a good distance from the FSIA’s text.

As its language makes clear, Section 1605(a)(3) deals exclusively with property expropriation. The FSIA’s exception for non-commercial torts was not of assistance to victims of foreign state abuse because it requires those torts to be committed on the territory of the United States:

[M]oney damages [may be] sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.  

Although Congress proposed bills to amend the FSIA to provide jurisdiction for tort suits where the gravest human rights violations had occurred, regardless of location, such bills were not enacted. In the absence of such a provision, plaintiffs who had been victims of the Holocaust or Armenian genocide tend to frame claims for property expropriation where the property at issue might be of trivial value, but coexisted with physical and moral atrocities the victim had undergone, but for which the FSIA provides no recourse.

Initially, where a foreign state had expropriated property from its own citizens, US courts found the Section 1605(a)(3) exception to immunity inapplicable under a domestic takings exception, and therefore found that they did not have jurisdiction to hear the case. This result created considerable unease, however, as it could leave victims of unspeakable horrors with no recourse against foreign states under

13 Id.  
14 See infra Part II.  
16 See Chuidian v. Philippine Nat’l Bank, 912 F.2d 1095, 1105 (9th Cir. 1990).
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the FSIA if they had been nationals of those states at the time of the acts at issue, even when those victims were US citizens or residents at the time of bringing legal action in the United States. Eventually, the courts created an exception to the domestic takings rule for situations in which the defendant state had expropriated property of people only nominally its citizens, such as those whom it had not considered or treated as full citizens at the time of the expropriations, often minority populations against whom it had been discriminating.

In a more recent development, the Seventh Circuit created an exception to immunity that did not consider victim nationality, but found FSIA jurisdiction where the claimed expropriation related to a policy of genocide, without further inquiry. This reasoning was extended in later decisions by the DC Circuit that equated the act of property expropriation with genocide, such that the very dispossession of the property is deemed to constitute genocide under the FSIA, in one case in explicit contradistinction to its being part of a policy of genocide.

It will be argued here that the FSIA’s initial human rights gap had been resolved before the latest judicial development of a genocide category in the context of property expropriation, and that the analytical framework of FSIA interpretation had evolved adequately for genocide-related cases by the courts’ inquiry into nationality as a substantive rather than a formalistic concept. Existing criteria to offset official citizenship where the plaintiff had not been treated as a full citizen by the offending state allowed for victim compensation in the genocide-related cases without the need for a judicially-created genocide exception.

However well-intentioned the courts may have been in developing the new FSIA subcategory, which was nowhere to be found within the statute itself, it would be particularly regrettable for US courts to set a precedent that trivializes the concept of genocide, a concept and claim already fraught with politicization on the world stage. The new subcategory has also been coupled with a requirement to exhaust local remedies, a combination that effectively means plaintiffs are being sent to foreign courts where their

18 E.g., Cassirer v. Kingdom of Spain, 616 F.3d 1019 (9th Cir. 2010) (Jews in Nazi Germany). See infra Part V.
19 See infra Part VI.
20 See id.
21 Id.
chances of succeeding are exceedingly slim,\textsuperscript{23} and their sole hope of being reheard in the United States is meeting the extremely high bar of persuading a US court to proceed with a new trial in the face of a foreign judgment. This may produce inconsistent judgments and the possible unpleasantness of a US court’s offending the contemporaneous foreign state whose judiciary has dismissed the case or ruled in favor of its state. Under this regimen of coupling a new apparent FSIA exception to immunity when genocide is at issue with a requirement of exhausting local remedies, plaintiffs have a much smaller chance of prevailing on a FSIA jurisdiction argument than under the situation that had developed before the genocide subcategory.

The exhaustion requirement has arisen from Section 1605’s reference to “international law.” Confusion as to international law requirements may have stemmed from silence on the part of the Restatement (Third) of United States Foreign Relations (“Restatement Third”) § 713 with respect to exhaustion of local remedies in domestic courts. Customary international law does not have such a requirement unless a proceeding is preliminary to one before an international tribunal. Fortunately, the Restatement (Fourth) has expressly remedied this ambiguity,\textsuperscript{24} and it is to be hoped that future judicial decisions will take heed of this clarification as the courts seek to balance the FSIA’s text and purpose with international law in their interpretations.

II. FOREIGN STATES’ EXPROPRIATIONS OF THEIR OWN CITIZENS’ PROPERTY: AN EXCEPTION TO AN EXCEPTION

The House Report on the legislative history of the FSIA discusses takings in violation of international law as including “takings which are arbitrary or discriminatory in nature,”\textsuperscript{25} and for which the victim has not received “prompt, adequate and effective compensation.”\textsuperscript{26} It does not discuss the issue of the victim’s citizenship. In Verlinden, where a Dutch corporation sued the state of Nigeria in the United States for breach of a letter of credit, the Second Circuit concluded that (1) Congress probably had not considered the

\textsuperscript{23} Since the development of the new criteria is recent, only one case has been tried to date in a foreign state under the new exhaustion requirement. In that case, a Hungarian court made short shrift of the plaintiff’s Holocaust-related claims, dismissing it, among others for the plaintiffs’ paucity of precise documentary evidence of having been dispossessed of her last valuables on the train stations towards her deportation to a concentration camp. See infra n.141 and surrounding text.

\textsuperscript{24} See Restatement (Fourth), supra note 15, § 455.


\textsuperscript{26} Id.
citizenship issue, and (2) the broad language of the FSIA can accommodate even foreign plaintiffs, although jurisdiction under the FSIA is circumscribed by the Constitution’s Article III limitations on all federal jurisdiction. In *Verlinden*, the citizenship of the victim was an issue only with respect to the court’s jurisdiction, not the expropriation by the defendant of its own citizen’s property.

The issue of citizenship in terms of what became known as “domestic takings” did not arise until a few years later. In *Jafari v. Islamic Republic of Iran*, where three current and one former Iranian citizens sued the state of Iran for property expropriations concerning real property, rental moneys, and pensions, the District Court for the Northern District of Illinois centered its discussion around the definition of customary international law, or in its older name, the law of nations, with respect to the victim’s citizenship: “[T]he ‘law of nations’ does not prohibit a government’s expropriation of the property of its own nationals.” According to the court, this was because, unlike physical torture, “governmental expropriation is not so universally abhorred that its prohibition commands the general assent of civilized nations – a prerequisite to incorporation in the ‘law of nations.’” The *Jafari* court explained its rationale in terms of non-interference in the internal affairs of foreign states: “We cannot elevate our American-centered view of governmental taking of property without compensation into a rule that binds all civilized nations.”

*Dreyfus v. Von Finck* presented both sets of issues: a foreign plaintiff suing a foreign state in the United States and a plaintiff whose nationality at the time of the expropriation was that of the defendant state. It concerned, moreover, a Nazi-era expropriation of a Jewish victim, the sort of property deprivation over which today the FSIA would be considered to abrogate immunity either (1) by virtue of such a plaintiff’s not having been considered

27 Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320, 324 (2d Cir. 1981), rev’d, 461 U.S. 480 (1983). In the cases that developed the genocide exceptions, the plaintiffs typically had been foreign-born but became US citizens or residents by the time of the lawsuit.

28 *Id.* at 324–28.


30 *Id.* at 215 (quoting a case decided under the Alien Tort Statute, 28 U.S.C. § 1350, an eighteenth-century statute which uses the term “law of nations”).

31 *Id.* (inner quotation marks omitted). “Civilized nations” is a term found in literature about customary international law to explain the nature of a practice’s acceptance for it to be deemed one of customary international law. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 694, 732, 734 (2004).

a German citizen at the time of the expropriation in Nazi Germany, or (2) pursuant to a genocide exception that ignores citizenship.

In Dreyfus, however, the Second Circuit held the law of nations not to have been violated on the reasoning that international law is a law of states, not of individuals. The court cited for this proposition a 1937 treatise on the law of nations and another dating to 1826. This conception of international law had been accurate up to the Second World War but had been changed by that war and its aftermath, in particular by the legal principles laid down in the Nuremberg trials, or, more precisely, the London Charter that preceded those trials. Hersch Lauterpacht, one of the great internationalists of the first half of the twentieth century whose work was used extensively by the British prosecution team at Nuremberg to initiate this change, wrote in 1950 that “there is no rule of international law which definitely precludes individuals and bodies other than States from acquiring directly rights under or being bound by duties imposed by customary or conventional international law...”

By 1976, the time of the Dreyfus decision, the Second Circuit’s statement cannot be said to have been an accurate representation of international law for three decades. Almost ten years later, however, the Fifth Circuit cited Dreyfus in De Sanchez v. Banco Cent. De Nicaragua as persuasive authority for the same principle when it reasoned that a Nicaraguan national could not sue Nicaragua under the FSIA: “International law, as its name suggests, deals with

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34 See infra Part V.
35 See infra Part VI.
36 See Dreyfus, 534 F.2d at 24, 31 (quoting Redlich and Kent).
37 See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 512–515, 553–602 (4th ed. 1990); THOMAS BUERGENTHAL, et al., INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 2 (5th ed. 2017) (“International law was defined traditionally as the law governing relations between nation-states exclusively. This meant that only states were subjects of and had legal rights and duties under international law’’); id. at 31 (explaining how the individual came to be a subject of international law in the aftermath of the Second World War: “Modern international human rights law is largely a post-World War II phenomenon. Its development can be attributed to the monstrous violations of human rights committed during the Nazi era and to the belief that these violations and possibly the war might have been prevented had an effective international system’’ been in place); Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 279 (hereinafter London Charter).
38 For the significance of Lauterpacht’s influence, not only on the British but also on the United States’ prosecutorial team, see, e.g., PHILIPPE SANDS, EAST WEST STREET: ON THE ORIGINS OF “GENOCIDE AND “CRIMES AGAINST HUMANITY” 65, 273 (2016).
relations between sovereign states, not between states and individuals."\(^\text{40}\)

That suit concerned a stop-payment order by the new Nicaraguan Sandinista’s government bank on a certificate of deposit the plaintiff had purchased under the pre-revolutionary government. The court also reiterated Dreyfus’ reasoning that where a state expropriates the property of its own nationals, international law is not at issue and, therefore, FSIA § 1605(a)(3) is inapplicable. Yet at the same time, the Fifth Circuit did recognize that international legal principles had evolved in this area:

Recently, this traditional dichotomy between injuries to states and to individuals—and between injuries to home-grown and to alien individuals—has begun to erode. The international human rights movement is premised on the belief that international law sets a minimum standard not only for the treatment of aliens but also for the treatment of human beings generally.\(^\text{41}\)

However, according to the court, that standard did not encompass property expropriation: “[T]he standards of human rights that have been generally accepted—and hence incorporated into the law of nations—are still limited. They encompass only such basic rights as the right not to be murdered, tortured, or otherwise subjected to cruel, inhuman or degrading punishment; the right not to be a slave; and the right not to be arbitrarily detained. At present, the taking by a state of its national's property does not contravene the international law of minimum human rights.”\(^\text{42}\)

Problematically, the De Sanchez court cited F. Palicio y Compania, S.A., v. Brush,\(^\text{43}\) to support its reasoning. While De Sanchez, like Dreyfus, was a FSIA case, Brush had not been analyzed under the FSIA, but under the Act of State doctrine. As others have noted, the two standards are sometimes confused but are distinct.\(^\text{45}\) The Supreme Court has described the common

\(^{40}\) De Sanchez v. Banco Cent. de Nicaragua, 770 F.2d 1385, 1396 (5th Cir. 1985).

\(^{41}\) Id. at 1396–97.

\(^{42}\) Id. at 1397. But see concurring opinion of Judge Rubin (“I cannot agree that ‘as long as a nation injures only its own nationals . . . ’ [as the majority states], then no other state's interest is involved. The interests of the United States are involved if a nation takes property legally situated within its borders from a person resident in the United States, whether the property is tangible (as the majority agrees) or intangible. International law forbids, and certainly does not condone, a nation's taking of private property situated in another nation simply because the owner of the property is a citizen of the rapacious nation.” Id. at 1400.


\(^{44}\) De Sanchez, 770 F.2d at 1397 n.16.

\(^{45}\) DAVID P. STEWART, FED. JUDICIAL CTR., THE FOREIGN SOVEREIGN IMMUNITIES ACT: A GUIDE FOR JUDGES 10 (2013). On the inapplicability of the Act of State doctrine to FSIA cases, see
law, court-created Act of State doctrine as follows: “The courts of one independent government will not sit in judgment upon the validity of the acts of another done within its own territory, even when such government seizes and sells the property of an American citizen within its boundaries.” It may be noted that internationalists were expressing another perspective:

[A] state does not violate any rule of international law if in assessing the legality of the act of another state it bases its assessment on international law, provided it correctly applies international law. In an alternative formulation, a state does not violate any rule of international law if it adopts the position that that public international law requires it to apply substantive international law in assessing the validity of foreign states...  

Moreover, the Act of State doctrine as a common law doctrine is to be distinguished from US foreign sovereign immunity law that since 1976 depends on a comprehensive governing statute. It is a defense that becomes viable only after jurisdiction has been established, and does not apply to issues of whether the US court may try the case under § 1605(a)(3). Thus, in Siderman, the Ninth Circuit decided that the applicability of the Act of State doctrine as a defense would depend on the court’s first reaching the decision to apply the expropriation exception to immunity and to hear the case against Argentina. Others have noted that most “courts have failed to come to grips


Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 424–425 (1964) (quoting Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 224 (1933)). This definition originated with Underhill v. Hernandez, 168 U.S. 250, 252 (1897) (“Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.”).


Restatement (Fourth), supra note 15, § 455.

Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 713 (9th Cir. 1992); Ved P. Nanda et al., The Expropriation Exception, in Litigation of International Disputes in U.S. Courts §3.37, at 6 (2d ed. 2008). The Restatement (Fourth) also points out that the “Second Hickenlooper Amendment” overruled Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (which had associated the act of state doctrine with the judiciary’s view that the United States should refrain from judging the acts of other nations) so that the act of state doctrine
with the relationship of the act of state doctrine to the expropriation exception contained in the FSIA," although the Restatement (Fourth) clarifies the distinction.\(^{52}\)

Human rights issues continued to arise under the FSIA, however, and plaintiffs sought new theories to persuade FSIA courts to try their cases. The next part analyzes the argument that a defendant state implicitly waives its immunity from jurisdiction where it has committed grave human rights violations.

### III. **JUS COGENS VIOLATIONS AND WAIVER OF IMMUNITY**

Plaintiffs have argued that *jus cogens* violations, those regarding the most fundamental human rights, constitute an implied waiver of jurisdiction within the meaning of Section 1605(a)(1). This part of the statute provides that a foreign state will not be immune from US court jurisdiction where “the foreign state waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.” As will be seen from this par, this argument has failed.

In *Princz v. Federal Republic of Germany*, the plaintiff was a man who had continuously been a US citizen. Princz had been living with his parents and siblings in present-day Slovakia at the time of the Nazi invasion. Because the family was Jewish, they were sent to concentration camps where his parents and sisters were murdered, his brothers starved to death, and the plaintiff subjected to all of the horrors associated with the Holocaust. Plaintiff had been ineligible to receive reparations from Germany under its post-war laws by reason of his US nationality at the time of the crimes, and by reason of his not qualifying as a refugee under international law.\(^{56}\)

The district court had held that there was an implied waiver of immunity

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\(^{51}\) NANDA et al., *supra* note 50, at 5.

\(^{52}\) RESTATEMENT (FOURTH), *supra* note 15, § 455 n.12; *see also* Ilaria Queirolo, *Immunity, in 1 ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW* 896, 901 (Basedow et al. eds., 2017) (explaining Act of State doctrine and the FSIA).


\(^{54}\) Id. at 1168.

\(^{55}\) *See id.*

\(^{56}\) *Id.*
under the FSIA, *a fortiori* because the aggrieved plaintiff was an American citizen, but principally because

>[t]he Foreign Sovereign Immunities Act has no role to play where the claims alleged involve undisputed acts of barbarism committed by a one-time outlaw nation which demonstrated callous disrespect for the humanity of an American citizen, simply because he was Jewish. The Court cannot permit such a nation, which at the time these barbaric acts were committed neither recognized nor respected US or international law, to now block the legitimate claims of a US citizen by asserting US law to evade its responsibilities.

A government which stands in the shoes of a rogue nation the likes of Nazi Germany is estopped from asserting US law in this fashion. To allow otherwise would create a severe imbalance in the reciprocity and mutual respect which must exist between nations, and would work an intolerable injustice against the plaintiff and the principles for which this country stands.  

The appellate court reversed, finding that the plaintiff had not satisfied any of the exceptions to immunity enumerated in FSIA § 1605, the sole bases for obtaining such an exception according to the US Supreme Court in *Argentine Republic v. Amerada Hess Shipping Corp.* The *Princz* appellate court held that even an implied waiver had to include the defendant’s intention to waive immunity, and that to consider *jus cogens* crimes as implied waivers of immunity to jurisdiction would violate that standard. Moreover, it cited to the case of *Siderman de Blake* for the proposition that,

>although no reported decision considers the . . . specific argument that a violation of *jus cogens* norms forfeits immunity under the implied waiver provision of the FSIA, the Ninth Circuit has stated broadly that “[t]he fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA.”

The *Siderman* case had involved a case of torture and property expropriation of a Jewish family in Argentina during the time of the anti-Semitic Argentine junta. The Ninth Circuit held that the district court did

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58 *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (holding that FSIA is a comprehensive statute and exceptions to immunity must be established by plaintiffs as specified thereunder).
59 *Princz*, 26 F.3d at 1174.
60 *Id.* (quoting *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 719 (9thCir. 1992).
61 *Siderman*, 965 F.2d at 703.
have jurisdiction due to waiver, but the waiver was not triggered by the discrimination. Rather, it concluded that Argentina had waived its immunity only because that state had pursued the plaintiffs criminally first, and had asked for US legal assistance in that undertaking. Although characterizing the taking as one that violated international law on the basis of ethnic discrimination, the court ruled that of all the plaintiff family members, only the daughter had a cause of action because she was a US citizen, and thus, the expropriation would not be considered a domestic taking in her case.\(^{62}\)

As the D.C. Circuit made clear in *Princz*, US courts reject the idea that *jus cogens* violations can be a basis for FSIA jurisdiction:

In *Amerada Hess*, the Court had no occasion to consider acts of torture or other violations of the peremptory norms of international law, and such violations admittedly differ in kind from transgressions of *jus dispositivum*, the norms derived from international agreements or customary international law with which the *Amerada Hess* Court dealt. However, the Court was so emphatic in its pronouncement “that immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA’s exceptions,” and so specific in its formulation and method of approach, (‘Having determined that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court, we turn to whether any of the exceptions enumerated in the Act apply here’), that we conclude that if violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so. The fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA.\(^{63}\)

In the words of the Restatement (Fourth), “courts in the United States construe this [implicit waiver of jurisdiction] exception narrowly.”\(^{64}\) These cases are in a long line of decisions which hold that grave violations of international customary law do not constitute an implicit waiver of jurisdictional immunity within the meaning of the FSIA.\(^{65}\) The judiciary’s refusal to allow a waiver for *jus cogens* acts may be understood as arising from concern that waivers, even implicit waivers, need to have an element of intention, and thus, that the plaintiffs’ theory of implicit waiver for *jus cogens*

\(^{62}\) Id. at 711.

\(^{63}\) Id., at 718–19 (citations omitted).

\(^{64}\) See *Restatement (Fourth)*, supra note 15, § 453 reporters’ note 1.

acts contradicted the accepted legal concept of waivers as voluntary acts. As the next part discusses, the courts developed another means to interpret the domestic takings exception without disturbing these precedents.

IV. THE DOCTRINE OF SUBSTANTIVE CITIZENSHIP RIGHTS: A WAY TO DO JUSTICE WITHIN THE LANGUAGE AND INTENT OF THE FSIA

The Princz decision was controversial, especially in light of an impassioned dissent by Judge Wald, which was in line with the lower court’s view quoted above that jus cogens violations must constitute waivers of immunities where dismissing a case for lack of jurisdiction would render a United States victim with no legal recourse in the face of unspeakable inhumanity.

Soon after Princz was decided, one scholar presciently predicted that its holding was not the end of the story. In keeping with the majority views in Siderman and Princz, subsequent courts did not disturb the finding that a foreign state’s jus cogens violations in and of themselves did not abrogate its immunity under the FSIA. Nevertheless, consistent with the stated legislative goal of Congress in enacting Section 1605 to prevent discriminatory takings, they began to apply already-operative concepts of citizenship from other areas of the law to their FSIA citizenship analysis. Thus, they rejected the claim that a foreign state had committed a domestic expropriation from its own citizens if the victims had been deprived of civil and political rights at the time of the expropriation, especially where the victims were part of a minority population that the state was persecuting.

In Cassirer v. Kingdom of Spain, the Ninth Circuit adjudicated a

67 Princz, 26 F.3d at 1176–85.
68 See Reimann, supra note 45.
69 See supra notes 26–28, and surrounding text.
70 The Supreme Court established in 2004 that the FSIA could be applied retroactively because it is a jurisdictional rather than a substantive statute. Republic of Austria v. Altmann, 541 U.S. 677 (2004).
71 Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1023 (9th Cir. 2010).
§1605(a)(3) FSIA case concerning the forced sale of property by plaintiff’s German-Jewish grandmother on her departure from Nazi Germany in 1939. The court decided that this did not qualify as a case of a foreign state that had committed a domestic expropriation because, by 1939, “German Jews had been deprived of their civil rights, including their German citizenship; their property was being ’Aryanized’ and ... [p]ermission was required both to leave and to take belongings [out of the country].”72 The Cassirer court, like the de Csepel court the following year, was adopting the Seventh Circuit’s definition of the essential attributes of citizenship: “[O]ur concept of 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...”73

After explaining that a victim would not be considered by the US court to have been a national of the defendant state if that state had not treated it as one, the Ninth Circuit in Cassirer, sitting en banc, also defined a taking in violation of international law. It said an expropriation “offends international law when it does not serve a public purpose, when it discriminates against those who are not nationals of the country, or when it is not accomplished with a payment of just compensation.”74 The Second Circuit had previously issued a similar definition in 2000, using many of the same terms, based on the FSIA’s legislative history.75 The FSIA itself does not define takings in violation of international law. The Restatement (Fourth) notes that, in the absence of such a statutory definition, US courts look to customary international law to supply the meaning.76

Similarly, in De Csepel v. Republic of Hungary,77 the D.C. district court cited with approval the lower court’s finding that Hungarian Jews who had been dispossessed of property during the Second World War were no longer considered citizens by the Hungarian government.78 The relevant measures to

72 Id.
74 616 F.3d, at 1027.
76 See RESTATEMENT (FOURTH), supra note 15, § 455 cmt. c (noting that, where applicable, courts look to treaties between the U.S. and the defendant state).
78 This would have sufficed for a claim by the plaintiff under the FSIA’s expropriation exception, but not under plaintiff’s claim of bailment, the central claim in De Csepel. See id.
which Hungarian Jews had been subjected included being deprived of the right to vote, to hold public office, to practice most professions, to serve in the military, to own property, and being forced to wear a yellow star to mark them as different, all of which “ultimately [made them] subject to ... genocide.”

Thus, the court concluded that even if 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. “80 This conclusion echoed that of an earlier case concerning the persecution of Hungarian Jews decided under another statute.81

A case decided before De Csepel involved a religious organization whose property had been expropriated by the Soviet government in Russia.82 A motion to dismiss under the domestic takings exception failed on the grounds that plaintiffs had made a non-frivolous argument to the effect that they constituted a world-wide organization rather than Soviet citizens.83 Thus, there was no analysis of who should be considered to have been a full-fledged Soviet citizen at the time of the expropriation, nor any indication of the substantive citizenship requirement that later courts developed. The inquiry into the reality, rather than the nomenclature, of nationality had taken the FSIA to a new point. Courts now were interpreting the statute according to its goal of allowing jurisdiction for “discriminatory” takings (the term corresponding to the Act’s legal history)84 while still immunizing foreign states for acts towards those who had been their citizens in substance, not just in form, at the time of the acts at issue. However much the human rights problems raised in Princz and other cases seemed to have been solved satisfactorily, judicial interpretation did not stop there.

The recent development of a genocide exception by two circuits and a California district court is hard to reconcile with Siderman and Princz’s finding that “[t]he fact that there has been a violation of jus cogens does not

80 Id. at 130.
81 The earlier case was Roboz v. Kennedy, 219 F.Supp. 892, 894 (D.D.C. 1963), in which the D.C. district court had held that Nazi persecutions occurring in Hungary signified that Hungarian Jews were not Hungarian citizens within the meaning of the International Claims Settlement Act, 22 U.S.C. § 1631.
82 Agudas Chasidei Chabad of U.S. v. Russian Federation, 528 F.3d 934 (D.C. Cir. 2008).
83 Id. It should be noted that the non-frivolous standard was abandoned for a higher burden of proof in Bolivarian Republic of Venezuela v. Helmerich & Payne Int’l Drilling Co., 137 S. Ct. 1312, 1318–19 (2017).
84 See RESTATEMENT (FOURTH), supra note 15, § 455, reporters’ note 4.
confer jurisdiction under the FSIA.”  

It is also hard to reconcile with the Supreme Court’s finding that arguments based on the FSIA must stand or fall on its text. Recent cases, which are the subject of the next part, have not attempted to explain how they can be harmonized with the above or with the established line of cases rejecting implied waiver of jurisdiction under Section 1605(a)(1).

V. THE NEW GENOCIDE EXCEPTION TO IMMUNITY

The new turn of affairs started in the Seventh Circuit. In Abelesz v. Magyar Nemzeti Bank, reheard sub nom Fischer v. Magyar Allamvasutak Zrt., the court ruled that a context of genocide obviated the need for judicial inquiry into whether a taking was domestic. The plaintiffs were Hungarian Jews who had been dispossessed of the last property they owned at railroad stations in 1944 as they were about to be deported from Hungary to Nazi concentration camps. In Abelesz and Fischer, nationality ceased to be a criterion to the extent that the court found a defendant state to have been participating in a genocidal policy towards the plaintiffs:

The international norm against genocide is specific, universal, and obligatory. Where international law universally condemns the ends, we do not believe the domestic takings rule can be used to require courts to turn a blind eye to the means used to carry out those ends—in this case, widespread expropriation of victims' property to fund and accomplish the genocide itself. Plaintiffs' allegations of these expropriations as an integral part of the overall genocidal plan allege violations of international law notwithstanding the domestic takings rule that would apply in most other circumstances.

87 Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661 (7th Cir. 2012).
88 Fischer v. Magyar Allamvasutak Zrt., 777 F.3d 847, 854 (7th Cir. 2016).
89 Abelesz, 692 F.3d at 676. See also Restatement (Fourth), supra note 15, § 455 reporters’ note 4 (referring to these cases as “eliminating the ‘domestic takings’ rule and permitting claims to proceed on the basis of allegations that the takings occurred in the context egregious violations of international law”). The domestic takings exception, distinguishing between expropriations in violation of international law of a state’s own citizens and of foreign citizens, continues unabated outside of the context of genocide. See Mezerhane v. República Bolivariana de Venezuela, 785 F.3d 545, 549 (11th Cir. 2015) (“When a foreign nation confiscates the property of its own nationals, it does not implicate principles of international law.”) (citation omitted); Arch Trading Corp. v. Republic of Ecuador, No. 13-CV-4445, 2015 WL 3443906 at
Cases involving the precise issue of FSIA Section 1605(a)(3) claims are sufficiently few in number that both district and circuit courts have tended to look to authority from beyond their jurisdictional borders when dealing with the issues the subpart raises. Thus, the year after Abelesz was decided by an Illinois district court, a California district court, citing to Abelesz, dispensed with the nationality inquiry in a §1605(a)(3) case against the Republic of Turkey and two Turkish banks involving property confiscated from Armenians during the Armenian genocide of 1915. The case followed Abelesz in forswearing the domestic takings principle in the context of genocide, explicitly citing Abelesz, and went one step farther by specifically holding that the Armenian plaintiffs, unlike the Hungarian Jews in Abelesz, had been deemed full citizens of the Ottoman Empire at the time of the genocide. Rejecting the plaintiffs’ argument that the victims had not been full-fledged citizens at the time of the takings, the court completely discarded the domestic takings rule while holding simultaneously that the victims had been full-fledged citizens of the defendant state yet could recover for property expropriation under its application of Abelesz:

[It] is clear that ethnic Armenians living in the Ottoman Empire during the events giving rise to this lawsuit were Ottoman citizens. At the hearing, Plaintiffs asserted that the ethnic Armenians living in the Ottoman Empire were treated as de facto non-citizens in the same way as Jews living in Nazi-era Germany. The German Jews, however, had been stripped of their citizenship as a result of the Reichsbürgergesetz [Reich Citizenship Law], Sept. 15, 1935, RGB1. 1, at 1146. See generally Richard J. Evans, The Third Reich in Power 544 (2005) (“The Reich Citizenship Law defined citizens of the Reich exclusively as people of ‘German or kindred blood.’ ... [T]he Jews ... were merely ‘subjects of the state.’ They had ‘obligations towards the Reich’ but were given no political rights in return.”). Legally, Armenians whose property was taken and who were deported from the Ottoman Empire were citizens at the time.

Had the court applied the doctrine of substantive citizenship explained

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*2 (S.D.N.Y. May 28, 2015) (holding that where plaintiffs were companies owned by Ecuadorian citizens and located in that country, their expropriation “does not concern United States courts.”), aff’d 839 F.3d 193 (2d Cir. 2016); Smith Rocke Ltd. v. República Bolivariana de Venezuela, No. 12-CV-7316, 2014 WL 288705, at *7-9 (S.D.N.Y. Jan. 27, 2014).


91 Id. at 1099.
above in Part IV, it might have reached the conclusion that, however ostensibly classified under Turkish law, where a nominal citizen was subject to the stripping of all rights and subject to being murdered by virtue solely of ethnic origin in a policy of genocide, a US court does not categorize such a person as having been a citizen of the foreign state for purposes of FSIA analysis. Thus, in the absence of the new genocide exception, the substantive citizenship doctrine would have been sufficient to protect the Davoyan plaintiffs.

Abelesz, Fischer, and Davoyan all stand for the proposition that the domestic takings exception is unnecessary and inapplicable where the expropriation is part of a defendant state’s policy of genocide. In 2016, Simon v. Republic of Hungary,92 went yet a step further. The facts of Simon were similar to those in Abelesz and Fischer, where Hungarian Jews were stripped of their last possessions before being deported from Hungary to Nazi concentration camps. In this case, however, both the D.C. district and circuit courts held that acts of property dispossesison, no matter how small, were themselves genocide, emphasizing this difference in the opinion: “[W]e see the expropriations as themselves genocide.”93 In 2017, in Philipp v. Federal Republic of Germany,94 a case involving a Jewish-owned art treasure known as the Welfenschatz, sold during the Nazi era under coerced circumstances, the court echoed the D.C. Circuit in Simon.95 The Philipp lower court quoted the D.C. Circuit’s Simon opinion as follows: “The D.C. Circuit has recognized that takings may fall within the expropriation exception when ‘the takings of property described in the complaint bear a sufficient connection to genocide that they amount to takings ‘in violation of international law.’”96

A close reading of both cases suggests a difference between the two cases inasmuch as the D.C. district court in Philipp implies the importance of the expropriation as an integral part of a policy of genocide, as did Abelesz and Fischer. In contrast, taken as a whole, the Simon court focuses more on equating expropriation with genocide, seemingly to the point of separating the expropriation act from the overall policy.

93 Id. at 142 (emphasis in original).
95 According to Plaintiffs, the Welfenschatz art collection sale was coerced by Goering who later presented it as a gift to Hitler. See Philipp, 894 F. 3d at 409.
96 Philipp, 248 F. Supp. 3d at 70 (quoting Simon, 812 F.3d at 142).
Meanwhile, the Eleventh Circuit has indicated its inclination to apply the genocide exception and impose the exhaustion rule. In Mezerhane, the Eleventh Circuit granted Venezuela immunity where the court distinguished the facts at bar from those in Abelesz because no genocide was involved in plaintiffs’ allegations. In the 2018 Camparelli case, the Eleventh Circuit cited Abelesz’s exhaustion of local remedies rule with approval, as did the Eastern District of Virginia in a case against Belgium. So far, federal district courts in New York are withholding decisions until the Second Circuit has a case on exhaustion.

One may wonder why it would be problematic or so noteworthy that courts sought to create an exception to Section 1605 (a) (3) FSIA immunity for acts associated with genocide, since the development of the substantive citizen doctrine had a similar aim and effect of protecting victims of grave international human rights violations. The problem is principally two-fold and is the subject of the next part.

VI. WHY THE GENOCIDE EXCEPTION IS PROBLEMATIC: TRIVIALIZING GENOCIDE AND AN EXHAUSTION REQUIREMENT NOT DERIVED FROM CUSTOMARY INTERNATIONAL LAW

A. Trivializing Genocide

Genocide is a term that was coined by the international legal scholar Raphael Lemkin. In Axis Rule in Occupied Europe, Lemkin’s subtitle for his chapter on “Genocide” is “A New Term and New Conception for Destruction of Nations.” He defines genocide as having “the aim of annihilating the

97 See Mezerhane v. República Bolivariana Venezuela, 785 F.3d 545 (11th Cir. 2015), cert. denied, 136 S. Ct. 800 (2016); Comparelli v. República Bolivariana Venezuela, 891 F.3d 1311 (11th Cir. 2018).

98 Mezerhane, 785 F.3d at 551.

99 Comparelli, 891 F.3d at 1327.


102 Raphael Lemkin, Axis Rule in Occupied Europe: Laws of Occupation. Analysis of
groups themselves . . . [and as being] directed against the national group as an entity, and the actions involved are against individuals, not in their individual capacity, but as members of the national group.”

Lemkin lost almost all of his family to the Nazi genocide of Jews and devoted the rest of his life to advocating for the U.N. adoption of a convention against genocide. The Convention on the Prevention and Punishment of the Crime of Genocide was adopted in 1948, with Article 2 providing that genocide is

any of the following acts committed with intent to destroy, in whole or in part,

a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Of the legacy of the term “genocide,” it has been written by Michael Ignatieff that “Lemkin would have been astonished and indignant at the afterlife of his word—how victim groups of all kinds have pressed it into service to validate their victimization, and how powerful states have eschewed

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103 Id.
104 Raphael Lemkin, Genocide, 15 AM. SCHOLAR 227, 229 (1946).
107 Id. art. 2.
the word lest it entrain an obligation to act."\textsuperscript{108} A few years earlier Ignatieff wrote that "[t]he word that [Lemkin] coined--"genocide"--is now so banalized and misused that there is a serious risk that commemoration of his work will become an act of forgetting, obliterating what was so singular about his achievement."\textsuperscript{109} Philippe Sands expresses similar and even stronger concerns.\textsuperscript{110}

The crime of genocide, as Lemkin and the U.N. Convention define it, has not been eradicated in the sixty years which have followed its legal enactment in 1948. It is for this reason that the term’s definition continues to be crucial. To dilute it through case law holdings and dicta can only heighten the risk that the victims of genocides will become even more powerless because those who have suffered from lesser offenses will be able to avail themselves of the term, and genocide will lose its meaning and force. However pure the intent of the FSIA judges who created the new genocide exception may have been, the unintended consequence of the precedential authority their cases represent for distorted definitions of genocide will resonate in future cases unless these cases are rectified.

International law is already fraught with politicization, as Martti Koskenniemi has argued.\textsuperscript{111} The new genocide exception to the FSIA is a judicial interpretation lacking a basis in statutory terms in what purportedly is a comprehensive statute,\textsuperscript{112} and has led to dubious interpretations of international law. According to Philippe Sands, over time, since the era of Lauterpacht and Lemkin, “the crime of genocide has distorted the prosecution of war crimes and crimes against humanity, because the desire to be labeled a victim of genocide brings pressures on prosecutors to to indict for that crime.”\textsuperscript{113} He further notes that none of this has had any effect in lessening the incidences of mass killings.\textsuperscript{114}

The next problematic aspect of the genocide exception is the exhaustion of local remedies requirement with which it has been coupled in confusion about the FSIA and international law. This is the topic of Subpart B.

\textsuperscript{108} Ignatieff, supra note 106.
\textsuperscript{110} Sands, supra note 38, at 364.
\textsuperscript{113} Sands, supra note 38, at 364.
\textsuperscript{114} Id.
B. The Exhaustion Requirement

1. Why Customary International Law Applies to Parties Before International Tribunals

The exhaustion requirement originates from the system of diplomatic protection based on the idea that when an individual was harmed, his state was offended and would take action on his behalf.115 According to Theodor Meron,

there is a well-known proposition, according to which the rule of local remedies is applicable only to cases which are genuine cases of diplomatic protection, and is not [even] applicable to cases primarily based on a direct breach of international law, causing immediate injury by one State to another (hereinafter referred to as cases of 'direct injury'). The distinction between cases of diplomatic protection and cases of direct injury is generally recognized. Professor Jessup observes that various situations in the history of international claims reveal that in addition to the rights of its nationals a state has, in its relations with other states, certain rights which appertain to it in its collective or corporate capacity. The typical cases are those in which injury is done to an official of the state, particularly a consular or diplomatic official. Treatises on international law contain many examples of categories of acts of one State considered to involve a direct injury to another State, and as such not subject to the [exhaustion of] local remedies rule.116

The exhaustion requirement aimed to defuse tensions between the two nations, one of which was protecting its citizen hurt abroad. In the era of international courts, in cases such as Interhandel,117 cited by Abelesz,118 the rule continued to serve that purpose. The Restatement (Third) of United States Foreign Relations §713, Reporters’ Note 5, citing the famous Interhandel court, explains the exhaustion rule as follows: it “has generally been observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law.”119 The Restatement also accurately summarizes Interhandel as

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115 See EMMERICH DE VATTEL, LE DROIT DES GENS, ¶71 (1758).
118 See Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661 (7th Cir. 2012).
119 I.C.J. Rep. 6, 26–27 (emphasis supplied).
characterized by the *lis pendens* situation involving an ongoing suit in the United States, which weighed substantially in the International Court of Justice’s (ICJ) decision. As the ICJ explained in *Interhandel*, the case involved the diplomatic protection by Switzerland of its citizen. Therefore, it fit squarely within the traditional customary international law exhaustion of local remedies standard.\(^{120}\)

The exhaustion requirement also serves an important additional goal in international tribunal cases. It secures the adherence of member states to the international court system by ensuring the ongoing subsidiarity of the international court to the national courts.\(^{21}\) However, under customary international law, it does not apply outside of international tribunals: “Without exception, customary international law limits the local remedies rule to two situations: (1) States exercising diplomatic protection and (2) plaintiffs, whether public or private, bringing claims before international tribunals.”\(^{122}\)

2. Confusing the International Customary Law Exhaustion Rule for International Tribunals with Domestic Courts

The exhaustion requirement runs counter to the international law referenced in the FSIA. It may have had its origin in the lack of more precise instruction in the *Restatement (Third)*, now remedied.\(^{123}\) Under international customary law, as correctly explained in the *Restatement (Third)*, an exhaustion of local remedies is appropriate where two states are before an international tribunal.\(^{124}\) The earlier Restatement did not explicitly state that there is no similar requirement, for the reasons explained below, in domestic courts where both parties are not states, as in FSIA cases, in which parties are before a domestic tribunal and one of the parties is an individual.\(^{125}\)

\(^{120}\) See *id.* at 45.


\(^{123}\) As the Restatement (Fourth) was being drafted, the *Abelesz* decision was brought to the attention of the new Restatement’s drafters, prompting explicit criticism of a FSIA local exhaustion rule. (The author was part of the Members Consultative Committee of the Restatement). See *Restatement (Fourth)*, supra note 15, § 455, reporter’s note 9.

\(^{124}\) See *Restatement (Third)*, supra note 3, § 713 cmt. f.

\(^{125}\) See *id.*
Thus, in *Abelesz* the court cited to the *Restatement (Third)* but made no distinctions between *Abelesz*’ own domestic court jurisdictional inquiry and the international tribunal issue that the *Restatement (Third)* was discussing. It quoted the *Restatement (Third)* § 713 Comment (f) and sources cited therein, including Ian Brownlie and *Interhandel*, for the proposition that “[u]nder international law, ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies…”.

The court did not comment on the fact that it was a domestic court and that the proposition it was citing explicitly referenced international tribunals. In *Fischer*, the court acknowledged that the FSIA text does not require exhaustion. Affirming *Abelesz*, however, it held that, “[e]ven though § 1605 (a)(3) itself does not require exhaustion, we went on to conclude [in *Abelesz*] that the provision's reliance on international law norms made clear that plaintiffs would need to exhaust domestic remedies before they could assert a violation of customary international law in a United States court. This exhaustion principle, based on comity, is a well-established rule of customary international law.”

That comity does not require imposing an exhaustion rule has now been supported by several sources, including the D.C. Circuit. From a purely comity perspective, in the genocide-related cases that have arisen, the defendant states generally have repudiated the acts and regimes of their own former governments at issue. Comity thus is less of a concern when the state whose acts are the object of the suit is a predecessor of half a century that had a completely different political orientation, such as a fascist or Nazi regime. On the other hand, comity would be a far greater concern for a US court asked to repudiate a contemporaneous adverse foreign court judgment when plaintiffs request a rehearing by the FSIA court after unsuccessfully exhausting their remedies in the state that originally expropriated their property.

126 692 F.3d 661, 680 (7th Cir. 2012).
127 See *id.*
128 *Id.* (citing *BrowNLie*, *supra* note 8, at 492–501 (7th ed. 2008); *Interhandel* (Switz. v. U.S.), Judgment, 1959 I.C.J. 6, at 26–27 (Mar. 21)).
129 *Fischer* v. Magyar Allamvasutak Zrt., 777 F.3d 847, 854 (7th Cir. 2016).
In addition, the exhaustion requirement sets an extraordinarily high bar for plaintiffs. The Abelesz court held, and was affirmed three years later after the case had wended its way on remand back to the Seventh Circuit *sub nom Fischer*, that only where a foreign court’s dismissal of the plaintiff’s claims were “sham or inadequate” would the US court be willing to rehear the case.\(^{131}\)

Moreover, Congress was clear about its intention to make the FSIA a comprehensive statute, as the Supreme Court held in 2014, the year before *Fischer* was decided.\(^{132}\) The Court emphatically declared that FSIA arguments and decisions must be based exclusively on the FSIA’s text.\(^{133}\)

The creation of an exception based on the human rights violation of genocide, which seemed to emanate from a desire to provide FSIA jurisdiction to victims of genocide for practical purposes, is negated in practice by coupling it with a local exhaustion of remedies requirement. In such cases, plaintiffs will be asking the FSIA court to rehear a case in which the current foreign state’s courts have dismissed the action. In terms of comity, under US rules of enforcing foreign judgments, foreign judgments generally are entitled to the same recognition as those of US States, and reasons for non-recognition reflect the US court’s view that the foreign judiciary “does not provide impartial tribunals”\(^{134}\) or lacks “procedures compatible with fundamental principles of fairness,”\(^{135}\) or that a judgment was issued by an “inadequate legal system.”\(^{136}\) In his article on international comity, William Dodge has noted that in the Alien Tort Statute situation, “an exhaustion requirement might be justified as an exercise of the federal courts’ authority to shape the federal common law cause of action,”\(^{137}\) but in a footnote on *Fischer*, he concludes that “there is no similar basis of authority for imposing an exhaustion requirement on international law claims more generally.”\(^{138}\)

The *Abelesz-Fischer* case is the only one to date in which plaintiffs did attempt to exhaust their remedies locally, in Hungary. The plaintiff’s claim was dismissed there for, among other reasons, failing to produce documentary

\(^{131}\) 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). The term “sham or inadequate” is from the *Restatement (Third)*, *supra* note 3, § 713 cmt. f.


\(^{133}\) See *id.* at 140–41.

\(^{134}\) *Restatement Fourth*, *supra* note 15, § 483, cmt. b.

\(^{135}\) *Restatement (Fourth)*, *supra* note 15, § 483 cmt. c.

\(^{136}\) *Id.* at reporters’ note 4.


\(^{138}\) *Id.*
evidence of the property for which she was seeking compensation, which had been taken from her on the Hungarian railway station on her way to Auschwitz. An idea of the mammoth difficulties of accessing documentary evidence and archives pertaining to Holocaust-related property ownership in Hungary can be gleaned from Susan Faludi’s 2016 account of her own futile searches over the years.

The Restatement (Fourth) has been explicit in criticizing the Seventh Circuit’s application of the exhaustion rule:

These decisions add a substantive requirement for jurisdiction that is not supported by the statute or its legislative history. By comparison, consider the “opportunity to arbitrate” precondition that was explicitly included in the text of the state-sponsored terrorism exception at § 1605A(a)(2)(A)(iii). . . [T]he rule cited by the Abelescz court applies by its terms to “international,” not domestic, proceedings. Accordingly, the interpretation of the statute that does not require exhaustion appears to be the proper one.

3. The D.C. Circuit: Simon and Philipp

In 2016, one year after the Seventh Circuit had decided Fischer, the D.C. Circuit echoed Fischer’s views on exhaustion in Simon: “The defendants could contend that, even if the claims at issue fit within § 1605 (a)(3) so as to enable the exercise of jurisdiction, the court nonetheless should decline to exercise jurisdiction as a matter of international comity unless the plaintiffs first exhaust domestic remedies (or demonstrate that they need not do so).” On remand, the district court required exhaustion of remedies in Hungary.

In 2018, however, a year after this last decision, the D.C. Circuit changed path with respect to the exhaustion of local remedies in the appeal of Philipp. It did continue to apply the genocide exception, however. The

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139 A copy of the English translation of the Hungarian decision is on file with the author. The US suit was a class action, but since Hungary does not have class-action lawsuits, only one of the plaintiffs from the US suit made the claims in Hungary. The author was an amica in that case.

140 SUSAN FALUDI, IN THE DARKROOM (2016).

141 RESTATEMENT (Fourth), supra note 15, § 455 cmt. 9 (emphasis added).


145 Id. at 411. In the court’s analysis of the taking as part of genocide, there is some incongruity between the convincing demonstration of property expropriation as having been an integral part
Philipp appellate court characterized the appellate decision in Simon as having left the issue of exhaustion open, but the court reasoned that the US Supreme Court’s assessment of the FSIA in NML Capital v. Republic of Argentina as self-containing and text-based precluded the exhaustion of local remedies. The court further explicitly rejected the Seventh Circuit’s analysis, disagreeing that NML Capital allowed for the application of an international comity-based prudential exhaustion requirement in determining FSIA jurisdiction. It further noted the new Restatement (Fourth)’s explanation that international customary law has an exhaustion requirement only for international tribunal cases, not domestic courts such as US FSIA courts.

Moreover, before Abelesz, Fischer and Simon were decided, the D.C. Circuit had precedential authority squarely against applying an exhaustion rule to FSIA cases, and the D.C. Circuit returned to this line of analysis in Philipp. Although Philipp did not cite to the particular case of De Csepel in that line, the D.C. district court in De Csepel had explicitly rejected Fischer in 2016 for having misunderstood the customary international law rule of Interhandel and the Restatement (Third).

In 2018, the D.C. Circuit reversed the lower court’s decision in Simon, reaffirming its holding in Philipp. This appellate court was the first to recognize that the exhaustion requirement effectively negates a plaintiff’s ability to avail itself of a US court’s jurisdiction because of what will essentially be the res judicata effect of a likely dismissal in the country that allegedly perpetrated the human rights violation against the plaintiff. Like the Simon lower court and Philipp, however, the D.C. Circuit court continued to equate the property expropriation plaintiffs underwent with genocide.

of Nazi genocide with how this fits the takings provision of the FSIA. See id. at 412–414. The substantive citizenship doctrine would have covered the Philipp plaintiffs without the genocide exception.

146 Id. at 414–15.
147 Id. at 416.
148 Id.
149 See id. (citing Agudas Chasidei Chabad of U.S. v. Russian Federation, 528 F.3d 934, 949 (D.C. Cir. 2008)).
150 Given that Fischer was decided in a different circuit, it did not have binding precedential authority.
153 Id. It noted additionally that the United States had filed a statement of interest in favor of assisting Holocaust victims.
CONCLUSION

Congress expressed an intent to protect discriminatory takings in Section 1605(a)(3) at the same time that it set out to create a comprehensive statute. The provisions of the text referring to violations of international law have been interpreted since inception to refer to customary international law. Over time, the courts developed a test that used a substantive citizen standard, such that the domestic takings rule that provides immunity to states for expropriations perpetrated against their own citizens would not apply to victims of the gravest international human rights violations. This development solved the human rights issue that had arisen in Princz and similar cases.

The recent evolution in the Seventh and Second Circuits and a California district court to carve out an explicit exception to FSIA immunity for genocide-related cases seems ill-advised. It risks trivializing genocide and has in one circuit to date led to the imposition of a rule of local exhaustion, the latter now rejected by the D.C. Circuit. That rule makes a rehearing in the United States extremely unlikely where the defendant state’s courts hear plaintiffs’ claims locally and deny recovery.

Some of the confusion in courts’ FSIA holdings may have stemmed from lack of clarity in the Restatement (Third), now remedied in the new Restatement (Fourth). As US courts continue to develop FSIA jurisdictional standards while remaining true to the statute, they will need to be ever better instructed in international law and its ongoing evolution in our transnationalizing world when they apply the capacious term of “violations of international law” to Section 1605(a)(3) claims.