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ABSTRACT

This article assesses the Foreign Sovereign Immunities Act (FSIA) after the Supreme Court's recent decision in *Germany v. Philipp*. *Philipp's* rejection of a genocide exception for a foreign state's act of property expropriation comports with the absence of such an exception in the FSIA's text. The article also suggests that the genocide exception as it had been developing was a detrimental development in FSIA interpretation, and was also harmful to international human rights law, inasmuch as it distorted the concept of genocide. The *Philipp* Court's renewed focus on the international law of property, rather than of human rights, should not harm victims of expropriation who have availed themselves of the genocide exception in past years, because discriminatory takings are a violation of international property law. Similarly, in *Philipp,* the Supreme Court framed the issue as one of domestic takings, concluding that such takings cannot come within an exception to foreign sovereign immunity, but at the same time the Court did not reject prior case law which holds that a taking is not domestic in nature if made by a sovereign against its own vulnerable minorities if it did not treat them as full citizens at the time of the property expropriation. Thus, the same sorts of victims who were recovering under the recent FSIA genocide exception (and had been recovering before the FSIA genocide exception was created) should be able to continue to have their cases heard under the FSIA. This article also considers recent international law developments which maintain that international law *is* concerned with how states treat their own citizens, suggesting that the FSIA's domestic versus alien expropriation test, not textually based in the statute, may be ripe for reconsideration, with a view to eliminating the distinction. While such an approach for FSIA's property expropriation section would not contradict the

statute's text, it would contravene precedential authority, and would not be endorsed under *Philipp's* reasoning.

Key words: *Germany v. Philipp,* Foreign Sovereign Immunities Act, property expropriation; genocide exception; domestic takings; international law.

I. Introduction

With its recent decision in *Federal Republic of Germany v. Philipp*,[1] the U.S. Supreme Court put an end to a case law evolution that had been developing over the past several years in some federal courts of appeal, including the D.C. Court of Appeals.[2] The federal appellate courts in question had adopted an exception to foreign sovereign immunity for property expropriations that occurred in the context of genocide.[3] A genocide exception is not enumerated in the text of Foreign Sovereign Immunities Act (FSIA)'s list of exceptions to immunity from jurisdiction, however.

The problems with this evolution in the law of the FSIA were both from the standpoint of the FSIA and from that of the law of genocide. The FSIA is a

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[1] 141 S. Ct. 703, 592 U.S. – (2020).

[2] Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661 (7th Cir. 2012); Fischer v. Magyar Allamvasutak Zrt., 777 F.3d 847 (7th Cir. 2016); Davoyan v. Republic of Turkey, 116 F. Supp. 3d 1084 (C.D. Cal. 2013; Mezerhane v. República Bolivariana Venezuela, 785 F.3d 545 (11th Cir. 2015) (distinguiushing its case on Seventh Circuit criteria); Camparelli v. República Bolivariana Venezuela, 891 F.3d 1311 (11th Cir. 2018) (citing *Abelesz* exhaustion requirements with approval).

[3] *See id*.

comprehensive statute, to be interpreted based on its text, as Congress stated when enacting it,[4] and as the Supreme Court has expressly held on more than one occasion: "The key word … is *comprehensive;*"[5] and "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."[6]

The courts that interpreted FSIA's property expropriation exception so as to include a genocide exception were not just creating a new meaning in the property expropriation text of the FSIA; they also were creating case law precedent that redefined and weakened the concept of genocide at a time when the politicization of the term has been signaled as becoming increasingly problematic.[7] Moreover, victims of genocide previously had been able to obtain satisfaction under a separate evolution of FSIA case law that involved an interpretation of the statute directly involving the expropriation of property by foreign sovereigns of non-nationals,[8] so plaintiffs did not need the genocide exception from a practical perspective. *Philipp* on the whole represents a salutary redirection of the law, although it fails to adopt the position international law

[4] "Claims of foreign states should henceforth be decided by courts … in conformity with the principles set forth [herein]." 28 U.S.C. § 1602.
[5] Republic of Argentina v. NML Capital, 573 U.S. 134, 1414 (2014) (emphasis in original); referring to Austria v. Altmann, 541 U.S. 677, 699 (2004) and Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 493 (1983).
[6] *Id*.
[7] *See infra*, Section III.
[8] *See id.*

increasingly has been espousing: namely, that international law today *is* concerned with how other states treat their own nationals.[9] The Supreme Court's rejection of that interpretation of the FSIA property expropriation exception is consistent with past case law and, as it explained, much international law and U.S. legal tradition.[10]

II. The FSIA's Property Expropriation Exception

A. *Jus Cogens* in an Early Case and Reprised in *Philipp*

The statute's property expropriation, Section 1605 (a) (3), reads in relevant part as follows: "(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…."[11] The challenge for genocide victims has been that the FSIA does not allow for non-commercial tort recovery for such torts if they are committed outside of the United States.[12] Plaintiffs therefore have sued under Section 1605 (a) (3) for the property that was stolen from them as part of the genocidal projects.

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[9] *See infra*, Conclusion.
[10] *See* Philipp, 141 S. Ct. at 709-711; Restatement (Fourth) § 441.
[11] 28 U.S.C. §1605 (2016).
[12] See 28 U.S.C. § 1605 (a) (5) ("money 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 …").

Early cases were dismissed, however. In *Princz v. Federal Republic of Germany*,[13] a man who had at all relevant times continuously been a U.S. citizen was unable to maintain an action against Germany for property expropriation connected with deporting him during the Second World War from Slovakia to Nazi concentration camps, where he underwent inhumane physical abuse and during which time all of his family perished under agonizing circumstances. The Second Circuit's majority, in a reversal of the lower court, noted in particular that the commission of a *jus cogens* violation "does not confer jurisdiction under the FSIA."[14] The court reasoned that the plaintiff had failed to establish any of Section 1605's exceptions to immunity, and rejected plaintiff's argument that fundamental human rights violations could be equated with an implicit waiver of immunity.[15]

The *Princz* case was controversial because the plaintiff had always been a U.S. citizen, even at the time of the alleged acts, and because the decision left him entirely without a remedy precisely because, as a U.S. citizen, he was not eligible for post-war German restitution which he otherwise would have been able to obtain as a European Nazi victim.[16] The waiver of immunity exception has been

[13] 26 F.3d 1166 (D.C. Cir. 1994).
[14] *Id*. at 1174.
[15] *Id*.
[16] *See id*. at 1176-85.

less frequently invoked ever since, and, as explained by the *Restatement (Fourth) of the Foreign Relations Law of the United States (« Restatement Fourth »),* in keeping with the rationale of *Princz*, it is problematic for plaintiffs because the legal concept of waiver requires a voluntary act on the part of the defendant.[17]

With *Philipp,* the Supreme Court echoed *Princz's* understanding of *jus cogens* as not being a basis for an independent Section 1605 basis for FSIA jurisdiction. The *Philipp* case involved valuable art that had belonged to German Jewish owners during the Nazi period until Hitler's Reich Marshal Goering decided he wanted to own it personally. The plaintiffs alleged in the case that the owners then were forced to sell at a coerced price after Goering's representatives threatened them. In *Philipp*, the Supreme Court reasoned that that the plaintiffs were misguided in arguing that section 1605's phrase "in violation of international law" includes genocide, the basis of plaintiffs' Section 1605 exception claim,[18] because, in the opinion of the Supreme Court, the international law referenced in the FSIA section at issue in cases of property expropriation is the international law of *property* (presumably the customary international law of property), not an

[17] Section 453, Reporters' note 1.
[18] For how the taking of property came to be a basis for claiming genocide, see *infra*, Section III.

expanded law of international customary law that encompasses all of international human rights.[19]

Section B below starts with a case in which the foreign sovereign *was* deemed to have waived its immunity in the context of *jus cogens* violations, unlike in *Princz*, yet it nevertheless resulted in a dismissal of most of the case when the court applied what is known as the domestic takings exception to bar most of plaintiffs' claims.[20]

B. Domestic Takings and the Relevant Nationality Test

In *Siderman de Blake v. Republic of Argentina*, the U.S. district court deemed Argentina to have waived its sovereign immunity where it had asked the U.S. courts to assist it in criminally prosecuting the Sidermans as part of Argentina's discriminatory persecution of the family based on their Jewish heritage.[21] That, however, was not the end of the story. Under international law in general, states traditionally do not interfere with what other sovereigns do to their own nationals, so the courts of the United States have adopted a domestic takings exception that reinstates immunity where a sovereign's property

[19] Philipp, 141 S. Ct. 703, at 715.
[20] Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992).
[21] *Id*.

expropriation is committed against its own national.[22] This principle of non-interference derives from international comity,[23] and has been noted with approval in The Restatement (Fourth).[24] In *Siderman*, the Ninth Circuit held that only the family's daughter's claims could survive because she was a U.S. citizen, such that Argentina in her case had dispossessed a non-Argentinian in violation of Section 1605. The court dismissed the parents' claims because, being Argentinian, they fell within the domestic takings exception.

1. Germany

In the years since *Siderman*,[25]and perhaps particularly since *Princz*, however, the courts have developed a test for nationality under the FSIA property expropriation exception that *Philipp* endorsed and that had become established in FSIA case law well before plaintiffs argued, and in some circuits obtained, the now-overturned genocide exception. That test, which I have called the « substantive citizenship rights »[26] standard, to contrast with nominal or formal

[22] *See, e.g.,* Vivian Grosswald Curran, *The Foreign Sovereign Immunities Act's Evolving Genocide Exception*, 23 UCLA J. INT'L L. & FOR. AFF.46, 60-63 (2019).
[23] *See* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071 (2015) (offering a comprehensive analysis of the area).
[24]See RESTATEMENT (FOURTH) §405.
[25] It is not clear that the Spiderman case would have come out differently under the substantive citizenship test. It is true that Jews were a particular target of persecution at the time known as Argentina's « dirty war, » but given how viciously others were persecuted at the time for their political views, the Siderman case may not be in contrast to the substantive citizenship rights test. For an excellent portrayal of the dirty war by a Jewish leftist newspaper publisher, see JACOBO TIMERMAN, PRISONER WITHOUT A NAME, CELL WITHOUT A NUMBER (1981).
[26] *See* Curran, 23 UCLA J. INT'L L. & FOR. AFF. 46, at 60.

citizenship, began when the Ninth Circuit decided in *Cassirer v. Kingdom of Spain*[27] that German Jews living in Nazi Germany in 1939, although not having citizenship in any other country, were exempt from being deemed German for purpose of the FSIA's domestic takings exception. *Cassirer* concerned the plaintiff's grandmother, a German Jew who had had to undergo a forced sale of her property at a ludicrously low amount in order to be permitted to leave Nazi Germany. The Ninth Circuit rejected Germany's argument that this constituted a « domestic taking » and that, therefore, it was immune from jurisdiction under the FSIA. Rather, the court said that the plaintiff's grandmother, although nominally German, had been deprived by the defendant's predecessor state of the fundamental rights that characterize citizenship : « 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… ».[28]

2. Hungary

In *De Csepel v. Republic of Hungary,*[29] the lower court found, and the appellate court approved, that Jews in Hungary dispossessed of property during

[27] 616 F.3d 1019 (9th Cir. 2010).
[28] *Id*., at1023. (emphasis added). The Nazi government's Nuremberg laws of 1935 had relegated Jews to second-class citizenship, depriving them of such rights, and Nazi Germany made clear that it did not consider Jews to be part of the German nation in terms of *Volk*, an ethnic perspective of nationhood, based on what it called blood and race ("*Blut und Rasse*"). *See Nuremberg Laws, in* 12 ENCYCLOPAEDIA JUDAICA at 1282.
[29] 808 F.Supp.2d 113, 130 (D.D.C. 2011), *affid in part, rev'd in part*, 714 F.3d 591 (D.C. Cir. 2013).

the Second World War also did not fall within the domestic takings exception. The district court evoked the plaintiff's evidence that

as 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 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.[30]

Perhaps most notably, where Hungary objected that plaintiff herself had maintained that she was a Hungarian citizen, the court emphasized that whether or not *she* « 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. » [31]

Both Germany and Hungary had passed antisemitic statutes,[32] so the court's conclusion could have rested on a *de jure* basis, but it did not. It is to be

[30] *Id*. at 129 (internal references omitted).
[31] *Id*. at 130.
[32] Hungary had a concept of the Hungarian nation as being based on Magyar ethnic derivation, just as Nazi Germany did on its version of its *Volk,see supra* note [28]. For Hungary and the Magyar nationhood concept, see SUSAN FALUDI, IN THE DARKROOM 72 et seq. (2016). This understanding of the Hungarian people was enacted into law in the Hungarian Citizenship Law of 1879, Law L, 1879, which remained in effect throughout the Second World War. On Hungary's antisemitic legislation, see also *Anti-Jewish Legislation, in* MOSHE Y. HERCZL, CHRISTIANITY AND THE HOLOCAUST AGAINST HUNGARIAN JEWRY 81-169 (trans. Joel Lerner, NYU Press, 1993), available on J-STOR, at https://www.jstor.org/stable/pdf/j.ctt9qg6vj.5.pdf?refreqid=excelsior%3A4bc3263c5966ccf34de82218b847242d

emphasized that the substantive citizenship test is a *de facto* test, as the court explicitly stated in *de Csepel.*[33] The *de jure* aspect of antisemitic legislation is potent and no doubt conclusive ; thus, *sufficient* evidence for establishing the stripping of the essential rights of full citizenship, but the courts' analysis in both *Cassirer* and De *Csepel* make clear that *de jure* deprivation of rights is not *necessary* to disqualify a taking from being deemed domestic where evidence exists that the defendant state stripped plaintiff of the full rights of citizenship *de facto*.

3. *Philipp's* Endorsement of the Substantive Citizenship Test

The Supreme Court held as follows in *Philipp*: «[T]he phrase 'rights in property taken in violation of international law,' as used in the FSIA's expropriation exception, refers to violations of the international law of expropriation and thereby incorporates the domestic takings rule."[34] In the last sentence of the decision, it also acknowledged that plaintiffs do not fall within the domestic takings ban if they can meet the substantive citizenship requirement: "Nor do we consider an alternative argument noted by the heirs: that the sale of

(last visited May 3, 2021). It is argued that this conception is being perpetuated by the contemporary government. *See* Peter S. Verovsek, *Caught between 1945 and 1989: collective memory and the rise of illiberal democracy in postcommunist Europe*, 28 J. EUR. PUB. POLICY 840, 848 (2020).

[33] De Csepel, 808 F.Supp. 2d at 130.

[34] 141 S. Ct., at 715.

the Welfenschatz is not subject to the domestic takings rule because the consortium members were not German nationals at the time of the transaction. The Court of Appeals should direct the District Court to consider this argument, including whether it was adequately preserved below."[35]

The problem for the *Philipp* plaintiffs was that, in the words of the Supreme Court, they had not based their argument on Germany's failure to come within the domestic takings exception, but, rather, that "[t]he heirs [had] responded that the exception did apply because Germany's purchase of the Welfenschatz was an act of genocide and the taking therefore violated the international law of genocide;"[36] and "[t]he heirs contend that their claims fall within the exception for "property taken in violation of international law," § 1605(a)(3), because the coerced sale of the Welfenschatz, their property, constituted an act of genocide, and genocide is a violation of international human rights law."[37] Plaintiffs' argument to the Supreme Court summarized the D.C. Circuit's holding, along with the Seventh Circuit's, that the very taking of property, no matter how minimal, could be equated with genocide, and that, in direct contradiction to the holding in

[35] *Id*. at 715-716 (internal citations omitted). At oral argument, justices repeatedly asked the plaintiffs' attorneys who argued the genocide exception if their clients really should be considered to have been nationals of the defendant states at the time of the takings.
[36] Id. at 709.
[37] *Id*.

Princz, the FSIA denies sovereign immunity for genocide. The next section explains how such an unlikely development emerged.

III. Genocide and the FSIA

A. The FSIA Genocide Cases

The genocide exception to the FSIA, entirely court created, displaced the domestic takings test where plaintiffs argued that property expropriation occurred in the context of genocide. In *Abelesz v. Magyar Nemzeti Bank*, [38] later reheard as *Fischer v. Magyar Allamvasutak Zrt*.,[39] the Seventh Circuit held that the domestic takings standard was inapplicable where property expropriation was "an integral part[] of [an] overall genocidal plan...."[40] In *Abelesz - Fischer*, the plaintiffs were Hungarian Jews whose last belongings were stolen at the train station prior to deportation to concentration camps; thus, the smallest last remaining possession of an already impoverished person would qualify as genocide. In that case, the court did make clear that the taking needed to be an integral part of the overall genocide, such that the property expropriation that displaced the domestic takings exception test was not to be isolated from the plan of genocide.[41]

[38] 692 F.3d 661 (7th Cir. 2012).
[39] 777 F.3d 847 (7th Cir. 2016)
[40] Abelesz, 692 F.3d at 676.
[41] *See id.*

Subsequently, relying on *Abelesz*, a California district court specified that even where a plaintiff was a full citizen of the defendant state, a taking in the context of genocide would be deemed to warrant FSIA jurisdiction because of the inapplicability of the domestic takings exception.[42] That case involved property expropriation of ethnic Armenians by Turkey during the Armenian genocide, when, the court held, the Armenians were full citizens of Turkey, however implausible it may be that the *de facto Cassirer* and *De Csepel* substantive citizenship test can support the conclusion that people targeted for expropriation and death because of belonging to a minority population could have been full-fledged citizens of the expropriating defendant sovereign state.[43]

The D.C. Circuit in *Philipp* echoed *Abelesz-Fischer* in dispensing with the domestic takings exception where "the takings of property … bear a sufficient connection to genocide that they amount to takings 'in violation of international law.'"[44] But the court then proceeded to exceed even the holding of the Seventh Circuit by stating that, "[i]n such situations, the expropriations themselves constitute genocide."[45]

[42] Davoyan v. Republic of Turkey, 116 F. supp. 3d 1084, 1099 (C.D. Cal. 2013).
[43] *See supra* Section II, B
[44] Philipp, 248 F.Supp. 3d at 70 (*quoting* Simon, 812 F.3d at 142).
[45] *Id*.

The idea that expropriations in and of themselves are genocide was expressed very clearly by the appellate court in *Simon v. Republic of Hungary*,[46] the companion case to *Philipp* in the Supreme Court.[47] The facts of *Simon* were virtually identical to those of *Abelesz*, also involving the expropriation of the last possessions of Hungarian Jews as they were being deported on trains to concentration camps. The court stated that the act of property dispossession, without regard to value, or anything else, was itself genocide: "we see the expropriations *as themselves genocide.*"[48]

B. The Law of Genocide

Raphael Lemkin, the author of *Axis Rule in Occupied Europe*,[49] is the man who coined the term "genocide" after having lost almost all of his family to the Nazi genocide of Jews. He had been an occasional law professor at Duke and Columbia Law Schools after his emigration to the United States, but spent almost all of his time and energy trying to persuade the United Nations to pass a genocide convention. Michael Ignatieff, whose father was a Canadian diplomat at

[46] Simon, 812 F.3d 127 (D.C. Cir. 2016).
[47] Republic of Hungary v. Simon, 592 U.S. – (2021) (per curiam).
[48] Simon, 812 F.3d. at 142.
[49] RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE. LAWS OF OCCUPATION. ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS (Lawbook Exchange, Ltd., 2d ed., 2008).

the U.N. at the time, told his son that Lemkin relentlessly pestered anyone he came across at the U.N. until finally he succeeded.[50] In Philippe Sands' book, *East Street West Street*: *On the Origins of "Genocide" and "Crimes against Humanity*,"[51] about Lemkin and Lauterpacht, the two giants of twentieth century international human rights law who influenced the Nuremberg trials, Lemkin comes across in much the same way. In 1948, Lemkin's work paid off. The U.N. passed *The Convention on the Prevention and Punishment of the Crime of Genocide*. It defines genocide as follows: As part of "an intent to destroy … a national, ethnical, racial or religious group…. (a) killing members of the group; … (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction…" and similar acts calculated to annihilate the group.

The history of genocide has been a long and sordid one. Its latest twist has been its politicization and the inevitable trivialization of the concept that politicization entails. According to Ignatieff, the term " '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

[50] *See* Michael Ignatieff, *The Unsung Hero Who Coined the Term "Genocide", New Republic*, Sept. 21, 2013, *available at* https://newrepublic.com/article/114424/raphael-lemkin-unsung-hero-who-coined-genocide (last visited April 30, 2021); PHILIPPE SANDS, EAST STREET, WEST STREET: ON THE ORIGINS OF "GENOCIDE" AND CRIMES AGAINST HUMANITY" (2016).

[51] (2016).

achievement,"[52] and "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 the word lest it entrain an obligation to act."[53] In *East Street West Street*, Philippe Sands, writing of his own reflections as an international human rights lawyer, echoes this sobering perspective.[54] They are not alone in decrying international human rights' politicization.[55]

When a court says that the taking of any property, however minimal, is itself genocide, the court, however well-intentioned the judge might be, and I do not doubt for a moment that all of the FSIA judges in the district and appellate courts of the Seventh and D.C. circuits and the California and other relevant district courts were well-meaning, such a judge is not performing a service to the victims of the Nazi genocide represented by the plaintiffs before them, or, in one California case, of the Armenian genocide. Rather, it is a disservice to the memory of those terrible genocides. And it was unnecessary under pre-existing domestic takings law. Moreover, as things now stand, plaintiffs in *Philipp* may lose the

[52] Michael Ignatieff, *Lemkin's Word*, NEW REPUBLIC, Feb. 26, 2001, available at https://newrepublic.com/article/62613/lemkins-word (last visited May 1, 2021).
[53] Ignatieff, *supra* note [49].
[54] SANDS, *supra* note [50], at 36.
[55] *See, e.g.,* Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 EJIL 113 (2005); GÜNTER FRANKENBERG, COMPARATIVE LAW AS CRITIQUE 172-175 (2016).

compensation they merit if the lower court on remand finds that they failed to avail themselves of that argument.[56]

The recent U.S. Supreme Court *Philipp* decision was unanimous. It has corrected the law of the Foreign Sovereign Immunities Act by eliminating a genocide exception that the FSIA does not have and does not warrant under the text and interpretive caselaw of the statute, and that demeans the meaning of genocide.

When the Court emphasized that it was shutting the door on general international human rights claims and restricting Section 1605 to violations of international law in the context of property law, it was not precluding the sort of property expropriation that typifies the claims of genocide victims. The FSIA's legislative history characterizes Section 1605 property expropriation "in violation of international law" as follows:

> The term 'taken in violation of international law' would include the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law. It would also include takings which are arbitrary or discriminatory in nature. [57]

[56] *See* Philipp,

[57] H.R. Rep. 94-1487, at 6616 (Sept. 9, 1976). The House Report contemplates the possible application of the Act of State doctrine: "Since, however, this section deals solely with issues of immunity, it in no way affects existing law on the extent to which, if at all, the 'act of state' doctrine may be applicable."

The Restatement (Fourth) § 455 similarly highlights the following characteristics which reflect customary international law on property expropriations: "the taking was not for a public purpose, was discriminatory, or not accompanied by prompt, adequate, and effective compensation."[58]

After *Philipp*, the international law of illegal property takings does not include genocide. It does, however, include property expropriation which targets minority populations in a discriminatory manner and which does not involve prompt and adequate financial compensation.

A lingering critique of the Supreme Court decision concerns the domestic takings exception, and whether it would be warranted to move beyond that well-established doctrine to embrace current trends in international law. That is the subject of the following Section.

IV. Modern International Law's Evolution Beyond Citizenship Inquiries for Discriminatory Takings

A. The *Philipp* Court's Affirmation of the Domestic Takings Rule

The domestic takings exception is a well-settled doctrine, as the Supreme Court took pains to note in *Philipp*,[59] but like the genocide exception, it does not

[58] RESTATEMENT (FOURTH) §455, comment c. *See also* Reporters' Note 4 (analyzing caselaw); and RESTATEMENT (THIRD) OF UNITED STATES LAW OF FOREIGN RELATIONS § 712, both more detailed and specifying that it is a summary of customary international law.
[59] Philipp, 141 S. Ct. at 710; 714.

appear in the text of the FSIA. The Court in recent years has shown a tendency towards unanimous decisions where some justices' concerns about maintaining harmonious relations with other countries meet other concerns of different justices, such as stemming the tide of litigation.[60] *Philipp* explains the Court's objective of furthering U.S. policy to refrain from "producing friction in our relations with [other] nations and leading some [of them] to reciprocate by granting their courts permission to embroil the United States in expensive and difficult litigation."[61]

The Court then cited the pre-FSIA letter of Secretary of State Hull to the effect that Mexico was free to mistreat its own citizens as far as the United States was concerned, but not U.S. citizens. The Court presented it as part of the origins of the domestic takings position in the U.S.:

> The domestic takings rule has deep roots not only in international law but also in United States foreign policy. Secretary of State Cordell Hull most famously expressed the principle in a 1938 letter to the Mexican Ambassador following that country's nationalization of American oil fields. The Secretary conceded "the right of a foreign government to treat its own nationals in this fashion if it so desires. This is a matter of domestic concern." …The United States, however, could not "accept the idea" that "these plans can be carried forward at the expense of our citizens."[62]

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[60] *See, e.g.,* Kiobel v. Royal Dutch Petroleum Company, 569 U.S. 108, 133 S. Ct. 1659 (2013).

[61] Philipp, 141 S. Ct. at 714 (*citing* " Helmerich, 581 U.S., at ——, 137 S.Ct., at 1322 (internal quotation marks omitted); RJR Nabisco, Inc. v. European Community, 579 U.S. ——, ——, 136 S.Ct. 2090, 2100 (2016).

[62] Philipp, 141 S. Ct. at 710 (*internal citations omitted*; *citing* Letter from C. Hull to C. Nájera (July 21, 1938), *reprinted in* 5 Foreign Relations of the United States Diplomatic Papers 677 (1956)).

It also cited to *Banco Nacional de Cuba v. Sabbatino*[63] as an indication of U.S. Congressional intent to distinguish between a foreign sovereign's taking of its own citizens' property and others', inasmuch as the reaction to the case's holding that the Court would not interfere with Cuba's nationalization of U.S. citizens' property in Cuba was met by subsequent legislation to require courts to grant such compensation for U.S. citizens. Moreover, in the context of foreign states' confiscation of their own citizens' property, the *Philipp* Court said that the principle that domestic takings were not a matter of international law concern was "beyond debate," noting that numerous states which nationalized formerly private property as they adopted socialism vociferously argued for their sovereign right, not just to do so, but also to nationalize foreigners' property.[64] The Court did not note, however, that this stance largely has disappeared as developing states started to want to attract foreign investment to increase their prosperity.[65]

The takings distinction between a foreign sovereign's expropriation of its own nationals' property and its expropriation of the property of aliens also derives from an international law tenet that is becoming increasingly obsolete: that international law does not concern itself with how a state treats its own

[63] 376 U.S. 398 (1964).
[64] Philipp, 141 S. Ct. at 711.
[65] *See* Elihu Lauterpacht, *International Law and Private Foreign Investment*, 4 IND. J. GLOBAL LEG. STUD. 259 (1997).

citizens. The *Philipp* Court anticipated this argument by stating that the "domestic takings rule endured even as a growing body of human rights law made states' treatment of individual human beings a matter of international concern."[66] As international law norms continue to evolve, the issue is if the rule also should evolve and the FSIA's §1605 (a) (3)'s property expropriation exception should deny immunity to a sovereign for any taking in violation of the customary international law of property, whether its own nationals' property or the property of aliens.

B. Current International Law Norms

As the Court acknowledged in *Philipp*, modern international law came to recognize the individual as a subject where previously international law had been a law of states without individuals having a direct role.[67] This development, although with pre-World War II antecedents, predominantly was the consequence the Second World War's atrocities.[68] The recognition that international law could and should no longer count on states to protect their own vulnerable minority populations, much less espouse their legal claims in

[66] Philipp, 141 S. Ct. at 710.
[67] *See id*.
[68] *See generally*, HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS, 27 -29 (1973); Thomas Buergenthal, The Evolving International Human Rights System, 100 A.J.I.L. 783 (2006); M.W. Janis, Individuals as Subjects of International Law, 17 CORNELL INT'L. L. J.61 (1984); OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 267-270 (1991); *but* see JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW (9th ed., Oxford University Press, 2019) ("to classify the individual as a 'subject' of [international] law is unhelpful …").

international tribunals, has led to a reassessment of entrenched distinctions between nationals and aliens in numerous international law contexts.

One context is universal jurisdiction, "the authority of the State to punish certain crimes wherever and by whom committed,"[69] regardless of nationality. While such universally recognized crimes tend to be the subject of jurisdiction-conferring treaties, they need not be, since by virtue of being universally recognized as violations of fundamental human rights, they are *erga omnes.*[70] The *Philipp* Court has distanced Section 1605 (a) (3) from this discussion by restricting it to property law. One need not depend on the law of crimes against humanity, however, to conclude that the FSIA's property expropriation section should apply without regard to citizenship distinctions.

Modern international law has followed the path begun in international human rights since the Second World War by progressively erasing citizenship distinctions in international law. In international corporate law, it had long been held that a state could not espouse the claims of its citizens who held shares in a company that allegedly was harmed by another state where the company had a

[69] SCHACHTER, *supra* last note, at 267.
[70] *Id*, at 269, referring to Restatement (Third) §§702, 704 and comments; and §404, comment (a).

citizenship other than that of the shareholders.[71] In commenting on *Diallo*,[72] a more recent case in which the International Court of Justice (ICJ) evoked the above *Barcelona Traction* principle, Brownlie commented as follows: *"[T]he law has moved on. It is no longer the case that states do not bear international responsibility for injuries caused to their own nationals."*[73] The injury at issue was precisely the sort of property expropriation that arises in FSIA Section 1605 (a) (3) cases: it was an allegedly discriminatory taking of the individual's property involving harm to his corporation that had been incorporated under the laws of the defendant state, the Democratic Republic of Congo.[74]

As Brownlie tells us, international law has moved on, and that specifically includes the law of property expropriation.[75] Had *Siderman* been decided under Brownlie's criteria, the case would have proceeded on all claims despite the Siderman parents' having been Argentinian. Similarly, the plaintiffs in *Philipp* would be able to have their case heard under these criteria. Restricting the FSIA Section 1605 property expropriation exception to takings in violation solely of the

[71] Barcelona Traction (Belgium v. Spain), 1970 I.C.J. 3 (Belgium sued Spain on behalf of its shareholders but the International Court of Justice held that Belgium had no standing because the company harmed was Canadian).
[72] Diallo (Guinea v. Democratic Republic of the Congo), Preliminary Objections, ICJ Reports 2007, 582, 614.
[73] Brownlie, *supra* note [68], at 682 (emphasis added).
[74] *See* Diallo.
[75] Brownlie *supra*, note [68].

international law of property does not mean that Section 1605 need be restricted to takings of alien property under current international law.

In *Philipp,* the Court referred to a "consistent practice of interpreting the FSIA 'in keeping with international law at the time of the FSIA's enactment'"[76] in the context of the FSIA's requirement that sovereign immunity could be lost only for the expropriation of the property of aliens, or those deemed aliens under the appropriate application of the domestic takings exception. It cited to only one case for this appraisal, *Permanent Mission of India to United Nations*,[77] but that case involved diplomatic protection issues under the FSIA, and concerned the ability of New York City to tax certain properties rented by lower level employees of India's Mission. The Court ruled against sovereign immunity in that case. These issues are far removed from the takings exception of Section 1605 (a) (3) involved in *Philipp* and *Simon*. Moreover, in *Permanent Mission*, the Court looked to the relevant international law at the time of the FSIA's enactment without stating that it needed to do so. FSIA case law does not appear to provide a consistent practice in this regard. Some courts have, on the contrary, explained what they thought to be international law at the time they were deciding Section 1605 FSIA

[76] 141 S.Ct. 703, 712, *quoting* Permanent Mission of India to United Nations v. City of New York, 551 U.S. 193, 199–200, 127 S.Ct. 2352, 168 L.Ed.2d 85 (2007).
[77] *See id.*

cases, not at the time of the FSIA's enactment. An example is *De Sanchez v. Banco Cent. de Nicaragua*[78] in which the court explored recent international law developments in deciding its FSIA case. The *Philipp* Court's declaration of a consistent practice to the contrary is likely to weigh heavily on the future of this issue, however.

V. Conclusion

With *Philipp,* the Supreme Court has rectified the recent interpretive mishap of courts which imputed a genocide exception to the FSIA where none existed, and where its inclusion endangered the meaning of the concept of genocide. At the same time, the Court maintained the ability of minority victims of genocidal undertakings to recover for property expropriations where they were not accorded the rights of citizenship by the expropriating state.

The Court also rejected the possibility of interpreting the international law provision of the FSIA in terms of contemporary international law standards. Several factors militate against the probability that U.S. courts will adopt Brownlie's approach of making states responsible for how they treat their own citizens. The first is *Philipp's* having asserted that there is a practice of

[78] 770 F.2d 1385, 1396 (5th Cir. 1985). For some criticism of the court's substantive reasoning on international law in that case, see Curran, 23 UCLA J. INT'L L. & FOR. AFF. 46, at 55-56.

interpreting international law as of the time of the FSIA's enactment. The second is the Court's general reluctance in recent years to violate the presumption against extraterritoriality.[79] A third factor, related to the second, is the Court's general deference to the Act of State doctrine. The Court also correctly noted that, as it is, the United States stands as the only country in the world to have a provision like Section 1605 allowing for the abrogation of foreign sovereign immunity due to a foreign sovereign's public acts of property expropriations.[80]

None of these factors is part of the text of the FSIA, however. Unlikely as it may seem in *Philipp's* aftermath, their sway may ebb if, as time goes by, modern international law norms become more persuasive.

[79] *See* Morrison v. National Bank of Australia, Ltd., 561 U.S. 247, 130 S. Ct. 2869 (2010); Kiobel; Philipp.
[80] 141 S. Ct. at 713, *citing* Restatement (Fourth) §455, Reporters' Note 15. *Accord*, HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 430-431 (3d ed. 2015).