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Shifting Sands for the Stateless Under the Foreign Sovereign Immunities Act

Vivian Grosswald Curran
University of Pittsburgh School of Law, vcurran@pitt.edu

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by
Vivian Grosswald Curran*

Abstract

The Foreign Sovereign Immunities Act (FSIA) grants foreign sovereigns immunity from suit in U.S. courts, but also sets forth some exceptions. One exception to a foreign sovereign's immunity occurs if its expropriation of property violates international law. Where the sovereign has expropriated property from its own nationals, however, the sovereign still remains immune from suit. This "domestic takings" rule is consistent with general principles of international law, although international law increasingly has been challenging a State's right to mistreat its own nationals. In 2023, in *Simon v. Republic of Hungary*,[1] the D.C. Circuit considered the issue of stateless plaintiffs, and held that they have no standing to sue foreign sovereigns under the FSIA. The court relied heavily on the Restatement (Second) of Foreign Relations in its reasoning. The Supreme Court subsequently granted certiorari, but only agreed to review other issues in this case, thus leaving the D.C. appellate court's decision in place with respect to stateless individuals. *Simon* was decided after it arose on remand from the U.S. Supreme Court's decision two years earlier (2021), heard in conjunction with *Federal Republic of Germany v. Philipp*,[2] and remanded *per curiam* to be consistent with the *Philipp* opinion. The Supreme Court had directed the lower courts to consider plaintiffs' nationality at the time of the alleged property expropriations for purposes of determining FSIA jurisdiction. In *Philipp*, the context was Nazi German expropriation of Jewish-owned property, and in *Simon,* Hungary's expropriation of Jewish-owned property under antisemitic laws. This article considers the 2023 D.C. circuit court's holding in *Simon* in light of indications and implications concerning the standing of stateless FSIA plaintiffs to be garnered from the Supreme Court's *Philipp* decision; the evolution of FSIA case law on the issue of standing; the U.S. Restatements of Foreign Relations; and international law. It concludes that a better interpretation of the FSIA does allow standing for stateless individuals.

Key words: Foreign Sovereign Immunities Act; statelessness; standing; domestic takings rule; property expropriation; Section 1605 (a) (3); *Germany v. Philipp*; *Hungary v. Simon*.

Table of Contents

*Distinguished Professor of Law, University of Pittsburgh. Vice-President, International Academy of Comparative Law. I would like to thank Lance Huckabee for his research assistance.

[1] 77 F.4th 177 (D.C. Cir. 2023).

[2] 592 U.S. 169 (2021).

I. Introduction

The United States' law on foreign sovereign immunity comes under the purview of a statute enacted in 1976, the Foreign Sovereign Immunities Act (FSIA).[3] The FSIA was intended to be an all-encompassing statute and has been interpreted as such by the Supreme Court: "[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",[4] and the FSIA's "key word is *comprehensive*."[5] U.S. foreign sovereign immunity law has been called unique in the world in denying immunity to sovereigns which violate international customary law.[6]

FSIA § 1605 (a) (3) provides in pertinent part as follows:

[3] 28 U.S.C. §§1602-1611 (1976).

[4] Republic of Argentina v. NML Capital, Ltd, 573 U.S. 134, 141 (2014).

[5] *Id*. (Emphasis in original) (*referring to* Republic of 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] *See, e.g.,* Federal Republic of Germany v. Philipp, 592 U.S. 169, 183 (2021) ("the [FSIA's] expropriation exception, because it permits the exercise of jurisdiction over some public acts of expropriation ... is unique; no other country has adopted a comparable limitation on sovereign immunity.") (citing Restatement (Fourth) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 455, REPORTERS' NOTE 15 (2017)); HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 267 (Oxford, 3d ed., 2013). Under the influence of international public policy declarations to foster the return of Nazi stolen property, other countries today do refer to international law, but often nevertheless make recovery difficult or impossible due to statutes of limitation or other restrictions. *See* Mathew Franks, *American Handling of Holocaust Property Takings: What We Can Learn from International Policies*, 49 BROOKLYN J. INT'L. L. 556, 572-584 (2024). *But see* SEAN D. MURPHY & EDWARD T. SWAINE, THE LAW OF FOREIGN RELATIONS 273 (2023) ("the idea that state immunity from foreign national jurisdiction yields to claims of expropriations violating international law has not been broadly accepted by other states.")

> (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.[7]

At one time, judicial interpretation of Section 1605 (3) in some circuits had taken the position that property expropriations during a genocide defeated sovereign immunity, without the necessity of engaging in any further jurisdictional analysis under that Section.[8] FSIA §1605 (a) (3) provides no textual support for this short-circuit "genocide exception" jurisdiction.[9] Before the "genocide exception"[10] had been created, the judicial analysis had been to engage in a two-step inquiry. The first step was to determine if there had been a property expropriation "in violation of international law."[11] The second was to determine if the foreign sovereign nevertheless retained immunity because the victim fell under a special rule concerning takings, pursuant to which the FSIA grants immunity where a sovereign deprives its own nationals of their property, no matter how egregious the expropriation was.[12] This provision, known as the

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[7] 28 U.S.C. *§*1605 (2016).

[8] The D.C. Circuit in Simon v. Republic of Hungary, 812 F.3d 127 (D.C. Cir. 2016); Philipp v. Federal Republic of Germany, 894 F.3d 406 (D.C. Cir. 2018); the Seventh Circuit in Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661 (7th Cir. 2012), *rehearing sub nom* Fischer v. Magyar Allamvasutak Zrt., 777 F.3d 847 (7th Cir. 2015**).**

[9] *See supra* note 7 and surrounding text. [text of §1605]; Vivian Grosswald Curran, *The Foreign Sovereign Immunities Act's Evolving Genocide Exception,* 23 U.C.L.A. J. INT'L L. & FOR. AFF. 46 (2019).

[10] *See id*.

[11] FSIA §1605 (a) (3).

[12] This step, not expressly mandated in the text, was motivated by the principle of comity that States do not interfere with each other's internal affairs. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §405 (AM. LAW. INST. 2018**)** (as a matter of prescriptive

domestic takings rule, is in keeping with the principle of international law that a sovereign is free to do as it wishes within its own territory to its own people.[13]

In 2021, the United States Supreme Court considered and rejected the "genocide exception" in *Federal Republic of Germany v. Philipp*,[14] a case which was heard in conjunction with *Republic of Hungary v.* S*imon*[15] because of the two cases' factual and legal similarities. *Philipp* involved extremely valuable art work which Göring, one of the highest-ranked Nazis, coveted, and obtained from plaintiffs' Jewish antecedents in 1935 under conditions of duress.[16] *Simon* involved property expropriated from Jewish Holocaust victims in 1944 pursuant to Hungarian antisemitic laws.[17] In rejecting the "genocide exception," the Supreme Court said that FSIA § 1605 (a) (3)'s reference to international law meant the international law of property, not general international human rights law: "We need not decide whether the sale of the consortium's property was an act of genocide, because the expropriation exception is best read as referencing the international law of expropriation rather than of human rights. We do not look to the law of genocide to determine if we have jurisdiction …"[18]

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comity, "courts seek to avoid unreasonable interference with the legitimate sovereign authority of other states".)

[13] *See id; see also* Jafari v. Islamic Republic of Iran, 539 F. Supp. 209 (N.D. Ill. 1982). ("[T]he 'law of nations' does not prohibit a government's expropriation of the property of its own nationals" [because] "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'.").

[14] 592 U.S. 169 (2021).
[15] 592 U.S. 207 (2021).
[16] *See id*., at 173-174.
[17] *See* Simon v. Republic of Hungary, 77 F.4th 1077, 1087-1088 (D.C. Cir. 2023).
[18] 592. U.S. at 180. It has been suggested that Congress should amend the FSIA to legislate the genocide exception into it. *See* Joshua Newman, *Amending the Foreign Sovereign Immunity Act to Promote Accountability for Violations of Peremptory Norms of International Law*, 49 BROOKLYN J. INT'L. L.585, 587 (2024).

While the Supreme Court reversed the lower courts' holding that a context of genocide sufficed in and of itself for FSIA jurisdiction, it did not dismiss the cases. Rather, it remanded both of them for further inquiry as to whether, among others, the victims had been nationals of the defendant sovereigns at the time of the property expropriations.[19] In both *Simon* and *Phillip*, many of the plaintiffs would have become stateless or, in the Supreme Court's word, "denationalized."[20] The Supreme Court was thus embracing the view that the domestic takings interpretation would not immunize a defendant foreign State if it were determined that it had expropriated from plaintiffs whom the State had not deemed to be nationals at the time of the property takings by rendering them stateless.[21]

The two remanded cases wended their ways through the lower courts and back upwards to appellate courts, and the Supreme Court granted certiorari in *Simon* as to three issues which are not the focus of this article.[22] In so doing, the Supreme Court leaves in place for the moment a lower court holding concerning international law that seems inconsistent with its remand in

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[19]Philipp, 592 U.S. at 187; Simon, 592 U.S. at 208. The tenet that a State can expropriate property at will from its own nationals and otherwise not be held accountable to them has come under increasing criticism in recent years but it is embodied in FSIA's domestic takings exception and was endorsed by the Supreme Court in *Philipp.* In the context of grave human rights violations, the controversial area of humanitarian intervention goes so far as to recommend military intervention to protect besieged minority populations. For a summary, see Vivian Grosswald Curran, "Humanitarian Intervention", *in The International Legal Order and the Rule of Law*, 33 S. CAL. REV. L. & SOC. JUSTICE 227 (2024).

[20] *See infra* note [47], *and surrounding text*.

[21] The D.C. District court's interpretation of *Philipp* on remand seems inconsistent with *Philipp* in this regard. *See infra* notes – to-, and surrounding text.

[22] The three issues for which the Supreme Court granted certiorari on June 24, 2024 were: ''(1) Whether historical commingling of assets suffices to establish that proceeds of seized property have a commercial nexus with the United States under the expropriation exception to the Foreign Sovereign Immunities Act. (2) Whether a plaintiff must make out a valid claim that an exception to the Foreign Sovereign Immunities Act applies at the pleading stage, rather than merely raising a plausible inference. (3) Whether a sovereign defendant bears the burden of producing evidence to affirmatively disprove that the proceeds of property taken in violation of international law have a commercial nexus with the United States under the expropriation exception to the Foreign Sovereign Immunities Act."

Philipp.[23] The Supreme Court also leaves in place the D.C. Circuit's construction of the Restatement (Second) of United States Foreign Relations (Restatement) § 175 in which the appellate court arguably conflated an explanation of the standing of stateless individuals in *international* law tribunals to mean that they have no standing in *domestic* tribunals such as the FSIA.[24] This article suggests that the reasons stateless people lack standing in international tribunals are not applicable to FSIA courts, which are domestic courts.[25]

The next Part considers the status of the stateless under the domestic takings rule as the Supreme Court suggested it should be considered in *Philipp*; as it had evolved before *Philipp*; how the Supreme Court implied a resumption of that analysis; and, finally, how some, but not all, courts on remand have interpreted *Philipp* to narrow the domestic takings exception so as to exclude stateless individuals from suing under the FSIA.

II. Statelessness Under the Domestic Takings Rule

A. The Supreme Court's 2021 Indications as to the Stateless

In *Philipp*, the Supreme Court rejected the D.C. Circuit's holdings that genocide provided an independent basis of jurisdiction under FSIA § 1605 (a) (3), insisting that the domestic takings rule must continue to be analyzed, regardless of the genocidal context of the taking: "[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."[26] The Court then proceeded to the issue of domestic takings, explaining that the lower courts should address whether the plaintiffs were

[23] *See infra,* notes – to -, *and surrounding text*.
[24] *See infra* notes – to-, *and surrounding text.*
[25] *See infra*, Part III.
[26] Philipp, 592 U.S. 169, at 187. In so doing, the Court was also rejecting the Seventh Circuit's similar interpretation of the FSIA.

nationals of Germany in *Phillip* (and, in *Simon*, of Hungary), and if the plaintiffs had preserved the issue on appeal by raising it below.[27] At oral argument, when plaintiffs' attorneys initially argued that there was FSIA jurisdiction because the defendants had engaged in the Nazi genocide, the Supreme Court justices, dubious about the "genocide exception," asked if, in the alternative, plaintiffs had been considered nationals of the defendant States by defendants at the time of the expropriations.[28]

This last query reprised the domestic takings test that had developed prior to the "genocide exception" and had denied immunity to sovereigns which expropriated property from minorities in their own territories which they *de facto* or *de jure* no longer considered to be citizens of their State.[29] On remand, however, the lower courts sometimes narrowed this domestic takings analysis by conflating the Supreme Court's rejection of genocide (international human rights) as a *sole* basis for jurisdiction with the idea that the Supreme Court now requires immunity whenever the foreign sovereign's expropriation had its basis in genocide.[30] These two propositions are not remotely the same. The very fact that the Supreme Court remanded for an inquiry into whether the plaintiffs were deemed nationals of the defendant States which expropriated property from them during the Holocaust is evidence that the Nazi and genocidal[31] expropriations would be subject to suit under the FSIA, and plaintiffs would have standing, so

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[27] *Id*. The Court refers to Germany, but the decision was equally applicable to Simon, involving Hungary. See Republic of Hungary v Simon, 592 U.S. 207, 208 (2021) ("The judgment of the United States Court of Appeals for the D. C. Circuit is vacated, and the case is remanded for further proceedings consistent with the decision in *Federal Republic of Germany v. Phillip*…")

[28] *See, e.g*., Transcript of Oral Argument at 12, Philipp, 141 S. Ct. 703 (No. 19-351), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-351_d0fi.pdf [https://perma.cc/7UEZ-GZUT].

[29] *See infra*, sub-Part B; for a more detailed discussion; Vivian Grosswald Curran, *The Foreign Sovereign Immunities Act's Evolving Genocide Exception,* 23 U.C.L.A. J. INT'L L. & FOR. AFF. 46, 60-63 (2019).

[30] *See infra*, notes – to --, and surrounding text.

[31] In Simon, the expropriations were attributed to the Hungarian government.

long as plaintiffs established that they had not been subject solely to property expropriation but also to denationalization (statelessness). Thus, in both *Philipp* and *Simon*, many of the plaintiffs would have been stateless for all intents and purposes, a status understood by previous lower courts which had endorsed FSIA jurisdiction in similar cases, as discussed below in Part II, B.

B. Pre-"Genocide Exception" Domestic Takings Law and the Stateless

Domestic takings law developed over time.[32] It had come to full fruition by 2010 in *Cassirer v Kingdom of Spain*.[33] The case involved the forced sale in 1939 of a German Jewish woman's painting as the price of her exit from Nazi Germany. The Ninth Circuit rejected Germany's argument of immunity under the domestic takings rule, holding instead that by the time of the expropriation "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]."[34] In *Cassirer*, the Ninth Circuit had defined the reference to a takings in violation of international law as one which "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."[35] This definition is consistent with the Restatement (Fourth) of U.S. Foreign

[32] *See* Curran, *The Evolving Genocide Exception*, *supra* note --, at 53-63.

[33] 616 F.3d 1019, 1023 (9th Cir. 2010).

[34] *Id*., at 123.

[35] 616 F.3d, at 1027.

Relations § 712.[36] The international law of property requires the prompt payment of just compensation for expropriations.[37]

In a case dealing with art expropriation under Hungarian antisemitic laws during the Second World War, *de Csepel v. Republic of Hungary*,[38] the D.C. Circuit court used the same domestic takings standard as the Ninth Circuit had in *Cassirer*. The appellate court affirmed the district court's analysis that, at the time of the property expropriation, and relevant to the domestic takings inquiry, the foreign sovereign did not consider plaintiffs to be Hungarian citizens:

> 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 Jews over the age of six were required to wear signs identifying themselves as Jewish, and were ultimately subject to complete forfeiture of all assets, forced labor inside and outside Hungary….[39]

The court also made clear that, under the above conditions, even a plaintiff who still considered herself to be Hungarian would not be deemed such for purposes of FSIA domestic takings law because Hungary had not considered her to be part of the Hungarian nation: "[even] if plaintiff still considered herself to be a Hungarian citizen in 1944, it is clear that … the government of

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[36] *See infra*, Part III for a more detailed analysis.

[37] Restatement (Fourth) § 712; BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 605 (Oxford, 9th ed., 2019). *See also infra*, Part III.

[38] 714 F.3d 591, 598 (D.C. Cir. 2013) (*reh. en banc denied* June 4, 2013**).**

[39] 808 F. Supp. 2d 113, at 129, *aff'd in part* (and on this ground), *rev'd in part*, 714 F.3d 591 (D.C. Cir. 2013).

Hungary thought otherwise and had *de facto* stripped her and all Hungarian Jews of their citizenship rights.[40]

Thus, by 2013, the domestic takings test developed in *Cassirer* and *de Csepel* under the FSIA had three characteristics: (1) it was an objective measure of the civil, political, contractual and property rights the victim had within the body politic of the foreign sovereign; (2) it was a *de facto* and therefore not necessarily a *de jure* stripping of citizenship*;* and (3) since those stripped of citizenship without acquiring a new one are by definition stateless, it recognized the standing of stateless individuals under the FSIA to sue foreign sovereigns for property expropriations taken in violation of international law under Section 1605 (a) (3).

The D.C. Circuit "genocide exception" FSIA cases that the Supreme Court heard nine years later in *Philipp* and *Simon* had extended *Cassirer* and *de Csepel* beyond recognition by eliminating the essential FSIA jurisdictional inquiry into defendant States' recognition of plaintiffs as members of the nation-state at the time of the expropriations. The D.C. Circuit, like the Seventh Circuit in *Abelesz* and *Fischer*, instead skirted the whole process in a no doubt well-meaning but flawed inquiry that made genocide a sole criterion for jurisdiction.[41] In reversing this judicially created "genocide exception" misstep in 2021, the *Philipp* Supreme Court did not in any way suggest disagreement with the pre-genocide exception analysis of *Cassirer* and *de Csepel*.

The next Part discusses how, on the contrary, *Philipp* suggests the Supreme Court's endorsement of the evolution of FSIA domestic takings analysis which *Cassirer* and *de Csepel*

[40] *See id.*
[41] *See* Philipp v Federal Republic of Germany, 894 F.3d 406,410-414 (D.C. Cir. 2018).

had applied, as evidenced both by the Supreme Court at oral argument,[42] and by its decision to remand for an inquiry into the nationality status of plaintiffs, many of whom had been born German (*Philipp*) and Hungarian (*Simon*) in pre-Nazi days but would have been made stateless if deprived of those nationalities by Nazi and antisemitic regimes at the time of the alleged property expropriations.

C. The Supreme Court's Implicit Endorsement of Standing for the Stateless

Oral argument need not be an indication of the way Supreme Court justices believe an issue should be resolved. In this case, however, when the following questions and comments are coupled with the Court's remand, the context of remand on the nationality issue suggests that the Court at oral argument was expressing genuine views on the criteria for FSIA domestic takings.

Several Supreme Court justices indicated their agreement with the way that the FISA domestic takings exception had developed into a substantive, not nominal, nationality inquiry in accordance with the *Cassirer* and *de Csepel* cases discussed in the last Part. Justice Gorsuch, for one, indicated the *de facto* rather than *de jure* nature of the test by asking defendant's lawyer why defendant Germany argued it was crucial that Germany's Nuremberg laws of 1935 which stripped Jews of citizenship rights were still a few months in the future at the time plaintiffs alleged that their Jewish forbears could not be considered German.[43]

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[42] *See infra*, Part II, C.

[43] June of 1935, the time of the property expropriation, was nevertheless over two years after Hitler had acceded to power and at a time when progressively antisemitic measures in Germany had effectively already ousted Jews from the body politic.

Justice Gorsuch:

You indicated that Jewish victims of the Holocaust were stripped of their citizenship. But not nationality and are, therefore, still barred by the domestic takings rule. But, if they can't access the domestic takings rule because they are no longer citizens, in – in what respect could that – could that rule bar them? … Your third answer to Justice Alito supposed that they [plaintiffs] were, in fact, stripped of their citizenship before the taking, but that – you said that doesn't matter because they're still nationals … And *I'm asking you, well in what relevant sense does that make a difference*?[44]

Justice Thomas insisted on the issue of statelessness,[45] which some minutes later was brought up by Justice Alito in the *Simon* oral argument which followed *Philipp*: "If we were to rule … in favor of Germany on the jurisdictional issue [in *Philipp*], wouldn't the plaintiffs in this case [*Simon*] still have an argument based on their claim of denaturalization?"[46] Or, in other words, of statelessness, since denaturalization signifies statelessness.

The one other issue which would prove to be thorny for the plaintiffs in both of these related Supreme Court cases, heard together but with separate oral arguments in immediate succession of each other, was whether the issue of statelessness had been preserved for appeal. The preservation issue arose because both parties had relied heavily on the post- *Cassirer* and *de Csepel* "genocide exception," arguing that the sole fact that the expropriations had taken place as part of the Holocaust sufficed for FSIA jurisdiction, implicitly without further inquiry into the domestic takings rule.[47] Justice Coney Barrett's query to the plaintiffs' attorney in *Simon*, for

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[44] Justice Gorsuch to Defendant Germany's attorney, *Philipp,* Oral Tr, pp. 13 -14, *available at* https:///www.supremecourt.gov/oral_oral_argument_transcripts/2020/19-351_d0fi.pdf, at 19-20. (Emphasis added).

[45] *Id*., at 30.

[46] Oral Tr, at 13,*available at* https:///www.supremecourt.gov/oral_oral_argument_transcripts/2020/18-1447_ap11.pdf.

[47] They were relying on their circuit courts' adoption of this position.

instance, as to whether plaintiffs had preserved the domestic takings issue, would have made no sense in the context of the Court's subsequent unanimous decision to remand as to whether they had preserved it, and what plaintiffs' nationality was,[48] unless she and her brethren believed that the stateless ("denaturalized" as the justices put it) have standing under the FSIA.[49]

The next Part discusses how some, but not all, lower courts after remand from the Supreme Court in both *Philipp* and *Simon* interpreted its reasoning. Those lower courts have concluded that the Supreme Court's rejection of genocide as a sole basis for FSIA jurisdiction was, instead, a bar to jurisdiction whenever and indeed solely *because* a case arose in the context of a foreign sovereign's genocide or complicity with genocide. It is suggested below that this is not a justified interpretation either of the FSIA or of the Supreme Court's reasoning in *Philipp*.

D. Remand Applications of *Phillip*

On remand, the district court in *Philipp* held that plaintiffs had not preserved the argument that their forbears were stateless at the time of the takings, but that, for argument's sake, the court still would examine the issue of their nationality under the FSIA's domestic takings rule.[50] It opined that the issue of statelessness under the domestic takings rule was one of first impression for the D.C. Circuit.[51] This ignored *de Csepel* in which the D.C. Circuit had considered the issue and accepted that the FSIA provides standing for the stateless.[52]

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[48] Philipp, 596 U.S. at 187.
[49] *See supra* note [46], at 81 ("And let me ask you a question about the citizenship point. You know, you point out that some plaintiffs in the suit below were not Hungarian nationals and others have a claim to their citizenship having been severed … Is that a claim you raised below? As Justice Gorsuch pointed out, it's not one that's developed here …"). For a perspective on the *Philipp* Supreme Court's view of statelessness and the domestic takings rule which agrees with mine, see Leila A. Amineddoleh, *Kings, Treasure and Looting: The Evolution of Sovereign Immunity and the Foreign Soveriegn Immunities Act*, 46 COLUM. J. L. & ARTS 419,437 (2023).
[50] 628 F. Supp.3d 10, at 22 (D.D.C. 2022), *aff'd* 77 F.4th 707 (2023).
[51] *Id*., at 25.
[52] *See supra* notes – to --, *and surrounding text*.

The district court then proceeded to interpret the Supreme Court's rejection of genocide as a *sole* basis for FSIA jurisdiction as constituting, rather, a *complete bar* to FSIA jurisdiction even where the plaintiff was not a national of the foreign State:

> Put another way, if a loss of nationality is part and parcel of a set of genocidal acts that happen to include expropriation, then the expropriation exception becomes the very type of "all-purpose jurisdictional hook for adjudicating human rights violations" rejected in *Philipp*, 141 S. Ct. at 713 ... The logical result of plaintiffs' argument, then, is that any program of genocidal conduct of which expropriations are a part – because it inherently entails a loss of nationality – falls outside the domestic takings rule and can be prosecuted using the expropriation exception. That is precisely what *Philipp* forecloses, only without articulating the intermediate "loss of nationality" step."[53]

In summary, the district court's reasoning was that genocidal States denaturalize their victims, but such denaturalizations should not be considered when applying the domestic takings rule in the context of genocide because the Supreme Court had said that genocide does not justify FSIA jurisdiction. The Supreme Court in *Philipp* actually had said virtually the opposite: namely, that genocidal undertakings do not suffice *without also analyzing the domestic takings rule* for FSIA jurisdiction; namely, where there was *only* a genocidal undertaking, but the foreign State was expropriating from its own nationals, the FSIA grants immunity under the domestic takings rule, but where the net effect of the foreign State's genocidal actions had been not *just* to expropriate property but *also* to strip the victim of nationality, then the domestic takings rule does not apply, the defendant lacks immunity and plaintiffs have jurisdiction under FSIA §1605 (a) (3).[54]

In analyzing plaintiffs' nationality on remand, the *Philipp* district court accepted that until the September 1935 enactment of Hitler's Nuremberg laws, German statutory law did not distinguish between "citizens" and "nationals."[55] It also concluded that, because the relevant

[53] 628 F. Supp.3d 10, at 25.
[54] *See Philipp*.
[55] 628 F. Supp.3d, at 28.

expropriation had taken place in June of 1935, three months prior to the enactment of the Nuremberg Laws, defendant Germany was immune under the domestic takings rule because plaintiffs were full-fledged Germans at that time.[56]

The D.C. Circuit had applied a very different domestic takings analysis in *de Csepel*, however, looking to the plaintiff's substantive, *de facto*, situation as a member of the defendant nation rather than her *de jure* citizenship,[57] as had the Ninth Circuit in *Cassirer*.[58] Such an inquiry might have yielded the conclusion that by the time of the *Philipp* expropriation, just three months before the formal enactment of the 1935 Nuremberg laws, Germany already had stripped its Jewish population of its membership in the German nation:

> The first wave of [Nazi German] legislation, from 1933 to 1934, focused largely on limiting the participation of Jews in German public life. The first major law to curtail the rights of Jewish citizens was the "Law for the Restoration of the Professional Civil Service" of April 7, 1933, according to which Jewish … civil servants and employees were to be excluded from state service. The new Civil Service Law was the German authorities' first formulation of the so-called Aryan Paragraph, a kind of regulation used to exclude Jews … from organizations, professions, and other aspects of public life.
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> In April 1933, German law restricted the number of Jewish students at German schools and universities. In the same month, further legislation sharply curtailed "Jewish activity" [i.e., presence] in the medical and legal professions. Subsequent laws and decrees restricted reimbursement of Jewish doctors from public (state) health insurance funds. The city of Berlin forbade Jewish lawyers and notaries to work on legal matters, the mayor of Munich disallowed Jewish doctors from treating non-Jewish patients, and the Bavarian Interior Ministry denied admission of Jewish students to medical school.
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> At the national level, the Nazi government revoked the licenses of Jewish tax consultants; imposed a 1.5 percent quota on admission of "non-Aryans" to public schools and universities; fired Jewish civilian workers from the army; and, in early 1934, forbade Jewish actors to perform on the stage or screen.

[56] *Id*., at 29-30.
[57] *See supra*, notes – to—and surrounding text.
[58] *See supra*, notes – to—and surrounding text.

> Local governments also issued regulations that affected other spheres of Jewish life: in Saxony, Jews could no longer slaughter animals according to ritual purity requirements, effectively preventing them from obeying Jewish dietary laws.[59]

In *Lehman v. Israelitische Kultusgemeinde*, a non-FSIA case decided as this article was being written, a N.Y. state court judge wrote an 87-page decision analyzing the claims concerning Nazi-stolen art work, a Schiele painting, holding that even a transfer on its face voluntarily made to an acquaintance of the art owner had to be considered coerced if made after the Nazi discrimination of Jews was underway:

> Karl's transfer of his art collection to his non-Jewish acquaintance, Etelka, at a time when he was completely dehumanized and devalued by Nazi ideology in practice and in reality is not a realistic setting for a voluntary transfer of a sentimentally valuable art collection. The atmosphere of fear and brutality mounted by the Third Reich is undeniably not a fertile ground for valid donative intent. Whatever transfer occurred between Karl and Etelka was not voluntary due to the conditions of extreme duress and antisemitism suffered by Karl that existed at the moment in time when the transfer occurred. The evidence adduced at trial established that Karl Mayländer was under duress during the time period that his art collection came into the possession of Etelka Hoffman.[60]

In *Lehman*, the painting's owner was well acquainted with the transferee whereas in *Philipp*, the transfer was to Nazi authorities.[61]

Equally importantly, Jews in Germany effectively had lost the ability to enforce contracts by the time of the *Philipp* expropriation.[62] The *de facto* "aryanization" of property had begun

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[59] THE HOLOCAUST ENCYCLOPEDIA, *available at* https://encyclopedia.ushmm.org/content/en/article/anti-jewish-legislation-in-prewar-germany .

[60] Robert Owen Lehman Foundation, Inc. v. Israelitische Kutusgemeinde Wien et al, NYSCEF DOC. NO. 1313 (Aug. 1, 2024).

[61] *See* Philipp, 592 U.S., at 173-174

[62] Viktor Klemperer's diary recounts the helplessness of Jews as their contracts became unenforceable against "Aryans" when courts were called upon to adjudicate contract disputes where one party was Jewish, and his fears of losing his house in such a process. On this subject, *see also* INGO MÜLLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH (trans. Deborah Lucas Schneider, 1992) (an excellent account of the judicial system under Hitler, including a description of the German judiciary's enthusiastic

from the time that Jews became unable to resist Nazi demands, well before the passage of the 1935 Nuremberg Laws, when the courts had stopped protecting Jewish parties.[63] By that time, German Jews effectively already had become *Staatsangehörige*, as the Nuremberg laws were to put it, or those who "belonged" to Germany as possessions to be made of as the State decided. They were not "nationals" as defendant Germany argued and the *Phillip* district court uncritically accepted on remand since, as plaintiffs argued, the Nazi party platform was from before 1935 that "no Jew may be a member of the [German] nation."[64] The German word for "German nationality", "*deutsche Nationalität*,"[65] was not used in connection to Jews by the Nazis, either in the Nuremberg laws or elsewhere, and is a distinct word from "*Staatsangehörigkeit*," casting further doubt on the propriety of using "nationals" as a translation. The district court, however, did adopt defendant Germany's English translation of *Staatsangehörige* as "nationals" for the Nazi legal term used for Jews to distinguish them from citizens. Since "national" in English implies being a full part of the nation-state, and was the very word used by the Supreme Court in *Philipp* to denote the characteristic that would make the plaintiffs come within the purview of the domestic takings rule and lose standing, this translation served to exclude plaintiffs from the FSIA's jurisdiction in the eyes of the district court.

Germany today continues to argue solemnly in courts of law that the *Philipp* transfer was at arm's length, a position one might consider remarkable for its refusal to acknowledge the status of Jews in 1935 and specifically their inability to refuse Nazi demands, let alone transact

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reception of Hitler's accession to the Chancellorship in 1933, ultimately changing Hitler's original ideas about suppressing Germany's regular judiciary); MICHAEL STOLLEIS, THE LAW UNDER THE SWASTIKA: STUDIES ON LEGAL HISTORY IN NAZI GERMANY (trans. Thomas Dunlap, 1998).

[63] *See id.*

[64] 628 F. Supp.3d 10, 28 (D.D.C. 2022); *see* Vivian Grosswald Curran, *Nazi Stolen Art*, *supra*, at 18–19 (footnotes omitted).

[65] *See* Ralf Michaels, Director of Max Planck Institute for Private International Law, Hamburg (explanation of German legal terms, email on file with author, August 15, 2024).

with Nazis at arm's length. In *The Rape of Europa*, Lynn Nicholas has described the issues claimants faced after the war when they tried to recover their property, only to be told that they had sold it to the Nazis, regardless of the coercion to which they had been subjected or the derisory prices they had received.[66] For its part, in *Simon*, Hungary has continued to argue that Jews were citizens even in 1944, despite the antisemitic laws and practices which led the court in *de Csepel* to rule otherwise.[67]

On remand in *Simon*, the D.C. District Court acknowledged that the Supreme Court had left the door open to arguing that the defendant State's denaturalizing its own minority population took such plaintiffs out of the domestic takings rule,[68] yet at the same time nevertheless concluded that the domestic takings rule applied:

> Indeed, it is difficult to conceive of a hypothetical program of genocide that does *not* deprive "member[s] of a minority group" of "full civic and political rights," or treat its victims as something less than "full citizen[s]," The logical result of plaintiffs' argument, then, is that any program of genocidal conduct of which expropriations are a part—because it inherently entails a loss of nationality—falls outside the domestic takings rule and can be prosecuted using the expropriation exception. That is precisely what *Philipp* forecloses, only without articulating the intermediate "loss of nationality" step. As the defendant in *Philipp* articulates in a renewed motion to dismiss on remand, "claim[ing] some de facto statelessness exception to the domestic-takings rule ... do[es] little more than ask[ ] this Court to reinstate the unanimously overruled *Simon [I]* decision in new words."[69]

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[66] LYNN NICHOLAS, THE RAPE OF EUROPA : THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND SECOND WORLD WAR 407-444 (2009).

[67] *See supra* note -, *and surrounding text*.

[68] *See* Simon v Republic of Hungary, 579 F.Supp. 3d 91,118 ("To be sure, the Supreme Court in *Philipp* did not categorically close the door on the argument: "Nor do we consider an alternative argument noted by the heirs: that the sale of the Welfenschatz is not subject to the domestic takings rule because the consortium members were not German nationals at the time of the transaction.""") (quoting Philipp, 141 S.Ct. at 715).

[69] *Id*., at 119 (quoting in part Defendant's Supp. Mot. Dismiss Second Am. Compl. at 41, *Philipp v. Stiftung Preussischer Kulturbesitz).* (Internal citations omitted).

The district court was not disagreeing that Hungary may have rendered the plaintiffs *de facto* stateless:

> To be clear, none of this discussion is meant to suggest that Hungary granted plaintiffs the rights and dignity afforded to persons Hungary unambiguously considered to be that country's nationals. It plainly did not. *Nor does the Court necessarily reject the proposition that plaintiffs were rendered* de facto *stateless*. Nor is there any real question whether Hungary committed "serious violations of international human rights law." *Philipp*, 141 S. Ct. at 713. The holding here is more technical in nature: genocidal expropriations, including those directly associated with the result of denaturalization, cannot under *Philipp* trigger the expropriation exception with respect to plaintiffs that would have been nationals of the offending state but for the genocidal conduct.[70]

Rather, the court was holding that the very fact that the expropriation occurred during a genocide precluded the domestic takings analysis. The Supreme Court had quite clearly indicated otherwise, as even the district acknowledged.[71] In the words of the Supreme Court, the expropriation of "property belonging to a country's *own nationals"*[72] does not violate the international law of expropriation. The stateless are not nationals: they are nationless.

On appeal from the district court in *Simon*, the D.C. Circuit Court of Appeals,[73] "assumed without deciding" that Hungarian-Jewish plaintiffs in Hungary by the time of the expropriations had become *de facto* stateless.[74] The court rejected the defendant (and lower court's) reading of *Philipp* as finding that non-nationals who had been denationalized by the defendant State could not have jurisdiction under the FSIA: " *Phillip* did not opine on, let alone foreclose, the possibility that conduct that could give rise to a claim of genocide might also bear on the nationality inquiry for purposes of the expropriation exception or the domestic takings rule.

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[70] *Id*. (Emphasis added).
[71] *See* [dist ct above]; and see supra notes – and surrounding text.
[72] Philipp, 592 U.S. 169, at 170 (emphasis added) (*quoting* Republic of Austria v. Altmann, 541 U.S. 677, 713 (2004) (Breyer, J., concurring).
[73] Simon v Republic of Hungary, 77 F.4th 1077 (2023).
[74] *Id*., at 1088.

Rather, *Phillip* left open for lower courts to resolve what conduct is relevant to the nationality inquiry. We thus reject the view that *Phillip* preempts the Trianon [i.e., stateless] Survivors' takings theory."[75]

The court nevertheless dismissed the case against the presumptively stateless plaintiffs based on finding that they had not persuaded the court that the international law of property expropriation supported their claim.[76] In particular, the court relied heavily on the Restatement (Second) of U.S. Foreign Relations § 175 which says that stateless individuals have no standing to make property expropriation claims against the expropriating State because they lack a State to espouse their claims.[77]

The Restatement puts it as follows:

> The responsibility of [a] state under international law for an injury to an alien cannot be invoked directly by the alien against the state except as provided by
> (a) the law of the state,
> (b) international agreement, or
> (c) agreement between the state and the alien.[78]

The court also quoted Section 175, comment d:

> Under traditional principles of international law, a state, being responsible only to other states, could not be responsible to anyone for an injury to a stateless alien. Under the rule stated in this Section, a stateless alien may himself assert the responsibility of a state in those situations where an alien who is a national of another state may do so. However, in those situations not covered by the rule stated in this Section or by an international agreement providing some other remedy, a stateless alien is without remedy, since there is no state with standing to espouse his claim.[79]

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[75] *Id*. at 1096.
[76] *Id*. at 1097.
[77] *Id*., at 1097-1098.
[78] Restatement §175.
[79] 77 F.4th 1077, at 1097-1098.

Both of these principles are correct statements of international law but they do not apply to FSIA cases; rather, they are accurate because they refer to international tribunals in which only States have standing to argue.[80] Such a court would include, for instance, the International Court of Justice. FSIA courts, by contrast, are domestic courts in which individuals do have standing to assert claims against States. The issue of courts' reliance on Restatements "without any recourse to its drafting history and intellectual lineage"[81] has been noted critically and was a problem in this case. The Restatement drafters had not been referring to domestic, national courts, although the Restatement language did not make that clear.[82]

The Supreme Court's remand on the issue of plaintiffs' nationality would have made no sense had statelessness barred plaintiffs from standing under principles of international law. Perhaps sensing it was on uncertain ground, the D.C. Circuit left the door open: "The Survivors have thus failed to persuade us that a state's taking of a *de facto* stateless person's property violates the customary international law of expropriation. To be clear, we do not foreclose the possibility that such support exists in sources of international law not before us in this case or based on arguments not advanced here."[83]

As seen in *Simon,* U.S. Restatements of Law play an important role in influencing U.S. judges.[84] The next Part considers the Restatements of Foreign Relations at greater length and analyzes applicable international law.

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[80] A similar confusion relating to the Restatement drafters' intention was made concerning the exhaustion of local remedies. The drafters of the Restatement (Fourth) explained the confusion, indicating that FSIA and other domestic courts were not included. *See* Restatement (Fourth) § 455 cmt. 9.
[81] *See* Shyamkrishna Balganesh, *Relying on Restatements*, 122 COLUM. L. REV. 2119, 2126 (2022).
[82] See id. The author blames some of the problem on the ALI's procedural opacity. Id. at 2146-2147.
[83] 77 F.4th 1077, at 1098.
[84] Shyamkrishna Balganesh, *Relying on Restatements*, 122 COLUM. L. REV. 2119,2123 (2022) ("innumerable courts … treat Restatements as statutory directives, that is, as primary sources of law.")

III. The Restatement and International Law

Although the FSIA is a self-contained, comprehensive statute, Section1605 (a) (3) requires inquiry outside of the text by referencing exceptions to foreign sovereign immunity for acts "in violation of international law." In *Philipp*, the Supreme Court said that international law refers to the international law of property, not of international human rights.[85] The international law of property is not neatly divorced from basic human rights principles, however. The Restatement (Third) of U.S. Foreign Relations §712, discussing property expropriations of "nationals of other states," specifies that

> A state is responsible under international law for injury resulting from:
>
> (1) a taking by the state of the property of a national of another state that
>
> (a) is not for public purpose, or
> (b) is discriminatory, or
> (c) is not accompanied by provision for just compensation;
>
> For compensation to be just under this Subsection, it must, in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken and be paid at the time of taking, or within a reasonable time thereafter….

These principles of international law, expressed in terms of States and nationals of other countries, are, like those in Restatement (Second) §175, situated in the context of international tribunals in which only States have standing. In FSIA courts, Restatement (Third) §712 is equally applicable to the property of stateless individuals.[86]

As *Brownlie's Principles of Public International Law* sets forth, "[t]he rule long supported by Western governments and jurists is that expropriation of alien property is only

[85] 592. U.S. at 180.
[86] *See supra* notes – to – , *and surrounding text.*

lawful if prompt, adequate and effective compensation is provided for. The full compensation rule has received considerable support from state practice and international tribunals."[87]

In *Fireman's Fund Insurance Co. v. Mexico,*[88] the tribunal set forth similar criteria in a case decided under the North American Free Trade Agreement (NAFTA):

> 1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
>
> (a) for a public purpose;
>
> (b) on a non-discriminatory basis....
>
> 3. Compensation shall be paid without delay and be fully realizable. [89]

It further elaborated the following criteria:

> (a) Expropriation requires a taking (which may include destruction) by a government-type authority ....
>
> (b) The covered investment may include intangible as well as tangible property.
>
> (c) The taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof (i.e., it approaches total impairment).
>
> (d) The taking must be permanent, and not ephemeral or temporary.
>
> (e) The taking usually involves a transfer of ownership to another person (frequently the government authority concerned), but that need not necessarily be so in certain cases (e.g., total destruction of an investment due to measures by a government authority without transfer of rights).
>
> (f) The effects of the host State's measures are dispositive, not the underlying intent, for determining whether there is expropriation.
>
> (g) The taking may be *de jure* or *de facto*....
>
> (i) The taking may have the form of a single measure or a series of related or unrelated measures over a period of time ....

[87] BROWNLIE, *supra* note --, at 605 (internal quotation marks and citations omitted).
[88] ICSID Case No. ARB (AF)/02/1, Award July 17, 2006.
[89] *Id*., Para. 170, *quoting* NAFTA Art. 1110.

> (j) To distinguish between a compensable expropriation and a noncompensable regulation by a host State, the following factors (usually in combination) may be taken into account: whether the measure is within the recognized police powers of the host State; the (public) purpose and effect of the measure; whether the measure is discriminatory; the proportionality between the means employed and the aim sought to be realized; and the bona fide nature of the measure.....[90]

These sources are also consistent with the International Law Commission's position that "[a] State responsible for an internationally wrongful act is under an obligation to make restitution ... [or] compensation."[91]

The international law of property has dealt with State nationalizations of private property, a topic outside the scope of this Article. The basic principles of private property expropriation are, however, fairly consistent with each other, as exemplified by the NAFTA and Restatement principles. One recent FSIA case also considered additional international instruments when deciding a case of Nazi expropriation.[92] In *Ambar,* the D.C. District Court dealt with conflicting arguments about the nationality of plaintiff's ancestor at the time of a 1941 expropriation.[93] The court in this case adopted a substantive test consistent with the analysis of the 2010 and 2013 *Cassirer* and *de Csepel* courts and the 2023 D.C. Circuit Court in *Simon* by determining nationality based on how the defendant State considered the plaintiff at the time of the taking,[94] but in doing so,

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[90] Id., para 176.
[91] Int'l L. Comm'n Rep. on the Work of Its Fifty-Third Session, *State Responsibility*, Y.B. Int'l L. Comm'n, art. 34, U.N. Doc. A/CN.4SER.A/2001/Add.1 (Part 2) (2001).
[92] Ambar v. Federal Republic of Germany, 596 F. Supp.3d 76 (2022)
[93] *See id.*
[94] *Id*., at 83 ("It is for each State to determine under its own law who are its nationals[,]" and "[a]ny question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.") (*quoting* Convention on Certain Questions Relating to the Conflict of Nationality Laws, art. 1, 2, Apr. 12, 1930, 179 U.N.T.S. 89).

it relied on the *Convention on Certain Questions Relating to the Conflict of Nationality Laws,*[95] and the *European Convention on Nationality*.[96]

The plaintiff in *Ambar* fell under a November 1941 amendment to the 1935 Nuremberg Laws. The 1941 amendment explicitly severed any and all legal ties between Germany and "non-Aryans" located outside of Germany who in 1935 were mere *Staatsangehörige,* the already downgraded status of Jews.[97] Thus, in Ambar's case, the plaintiff was *de jure* stateless.[98] Germany nevertheless still argued immunity in this case under the FSIA's domestic takings rule because, it said, current German law should be applied, and today German law would have recognized plaintiff as a full-fledged citizen despite being Jewish.[99] The court rejected this argument, applying Germany's law at the time of expropriation and denying defendant's motion to dismiss. The standard of looking to the sovereign's own perception of the plaintiff at the time of the taking is in keeping with the substantive citizenship test that the D.C. Circuit had developed earlier in *de Csepel* and the Ninth Circuit in *Cassirer*. It also subsequently has been applied on remand by the D.C. Circuit in *Simon,* consistently with the Supreme Court's instructions in *Philipp*.

One of the most famous international law cases to deal with nationality is *Nottebohm,*[100] in which the International Court of Justice emphasized the importance of substance over form in

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[95] *Id*. ` .

[96] *Id*. ("Each State shall determine under its own laws who are its nationals.")(quoting European Convention on Nationality, art. 3, Nov. 6, 1997, E.T.S. No. 166).
art. 3, Nov. 6, 1997, E.T.S. No. 166.

[97] *See id*., at 80.

[98] For a similar case of *de jure* statelessness, in this case Iraqi Jews stripped of their citizenship under the Denaturalization Act of 1950 and property once owned by the Jewish community but now claimed by the Iraqi government, see Leila Selchaif, *The Iraqi Jewish Archive in Exile: A Legal Argument for Equitable Return Practice*, 14 NORTHEASTERN U. L. REV. 275 (2022).

[99] Ambar, 596 F. Supp.3d 76, at 84 ("Plaintiffs argue that if German law is to be considered, then German law at the time of the taking of the Building should be the relevant analysis, whereas Defendant contends that only German law retroactively should apply.").

[100] Nottebohm (Liechtenstein v. Guatemala), 1955 I.C.J. 4 (Apr. 6).

evaluating nationality. There, Liechtenstein had naturalized a formerly German citizen, whom it sought to represent at the ICJ in his claim against Guatemala, but the ICJ determined that the naturalization was not valid for purposes of allowing Liechtenstein to represent him as its citizen, because it concluded that the ICJ's substantive citizenship standards had not been met.[101] It has been suggested that *Nottebohm* should be interpreted as the ICJ's rejection of bad faith decisions in nationality, and that the ICJ rejected Liechtenstein's ability to represent an individual it had naturalized and recognized as its citizen because Nottebohm was a former German Nazi attempting to evade alien enemy status in Guatemala, his real country of residence.[102] That substance should prevail over form in the international law of property expropriation has also been confirmed by a major international law treatise, *Brownlie's Principles of International Law* in its discussion of property expropriation and sovereign immunity.[103]

Thus, the D.C. Circuit correctly concluded that the stateless can have standing under the domestic takings criteria the Supreme Court set forth in *Philipp*, but it misconstrued the *Restatement (Second)* to conclude that they cannot have standing after all. Had international law prevented the stateless from having standing under the FSIA, however, the Supreme Court's instructions to remand for a domestic takings inquiry would have been pointless, and the Court would have reversed without remand. The next Part, the Conclusion, considers FSIA statelessness jurisdiction today in a larger context.

IV. Conclusion

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[101] *See id.*

[102] *See* Robert D. Sloane, *Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality,* 50 HARV. INT'L. L. J. 2,4, 11-24 (2009).

[103] James Crawford, *Expropriation of Foreign Property*, *in Brownlie's Principles of International Law* 603 (Oxford University Press, 9th ed., 2019) ("The terminology of the subject is by no means settled and, in any event, *form should not prevail over substance*.")(emphasis added).

Inasmuch as modern international law has been moving towards holding States responsible for how they treat their own nationals on their own territory, it has been suggested that the *Phillip* Court's "focus on the citizenship of the property owner … represents a lost opportunity."[104] The Supreme Court distinguished this international law trend towards holding States accountable for their own nationals from FSIA § 1605 (a) (3) cases when it held that the section does not concern international human rights, but only international property expropriations:

> The domestic takings rule endured even as international law increasingly came to be seen as constraining how states interacted not just with other states but also with individuals, including their own citizens. The United Nations Universal Declaration of Human Rights and Convention on the Prevention of Genocide became part of a growing body of human rights law that made how a state treats individual human beings ... a matter of international concern. These human rights documents were silent, however, on the subject of property rights. International tribunals therefore continued to maintain that international law governed confiscation of the property of foreigners, but measures taken by a State with respect to the property of its own nationals are not subject to these principles.[105]

Within the domestic arena, the *Philipp* Supreme Court decision has brought the FSIA within the Court's increasing reluctance to recognize the extraterritoriality of U.S. laws, while simultaneously balancing it with U.S. public policy favoring the return of expropriated Holocaust property and the FSIA's own similar policy indications concerning Nazi-looted property.[106] A series of public declarations, one of which the United States spearheaded and

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[104] Gregory H. Fox & Noah B. Novogrodsky, *Of Looting, Land, and Loss: The New International Law of Takings*, 65 HARV. INT'L. L. J. 186, 190 (2023).
[105] *Philipp*, 592 U.S. at 710 (internal quotation marks and citations omitted)(citing to both the Restatement (Third) and a European Commission on Human Rights decision)..
[106] *See infra*, note 106.

all of which it signed, aim to ensure that U.S. courts and courts around the world will oversee the return of Nazi-looted property.[107]

A prior statute, the Alien Tort Statute (ATS), was excluded from having extraterritorial effect in *Kiobel v. Royal Dutch Petroleum Co*.[108] The Court limited extraterritoriality in *Kiobel* by displacing the Alien Tort Statute (ATS) from the context of international human rights law which it had occupied for decades[109] to commercial law, analyzing an international human rights claim as part of a line of cases in which the Court already had rejected extraterritoriality in commerce.[110] When the ATS stopped being a fruitful avenue for international human rights recovery, the FSIA remained a viable option, albeit limited to where the defendant was a foreign sovereign or its agency or instrumentality, and to where the plaintiff was able to meet the statute's other stringent requirements. One notable limitation is that the ATS is a torts statute, while the FSIA forecloses tort claims unless they are committed in the United States.[111] In some FSIA cases where the wrongdoing occurred outside of the United States, such as *de Csepel*, *Cassirer* and *Philipp*, extremely valuable property is at issue in bona fide property

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[107] U.S. public policy is reflected in the Washington Principles and The Terezin Declaration, see https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/; and Ministry of Foreign Affairs of the Czech Republic, *Terezin Declaration*, https://www.mzv.cz/jnp/en/foreign_relations/terezin_declaration/index.html.In addition, Congress passed the HEAR Act, Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 5, 130 Stat. 1524, 1526–28 (2016), to facilitate legal actions by relaxing statutes of limitation. The FSIA devotes a special section to Nazi-looted art, albeit not §1605 (a)(3), allowing for the conclusion either that the FSIA reflects the policy of returning Nazi looted property or, on the contrary, that §1605 (a) (3)'s silence on such property should be taken as distinguishing it from § 1605 (h) (2) under the interpretive canon of *expressio unius esalterius*. See generally Vivian Grosswald Curran, *Nazi Stolen Art: Uses and Misuses of the Foreign Sovereign Immunities Act*, 32 TRANS'L L. & CONTEMP. PROBLEMS 197 (2023).

[108] 569 U.S. 108 (2013).
[109] It had been an avenue for international human rights claims since 1980. *See* Filartiga v. Pena- Irala, 630 F.2d 876 (1980).
[110] *See Kiobel*, 569 U.S., at 664.
[111] FSIA § 1605 (2016).

expropriation claims.[112] In other claims, one can have the sense that an underlying tort claim has been transfigured into a property claim in order to state a cause of action within the purview of Section 1605 (a) (3).[113]

Just as in *Kiobel* the Supreme Court said it did not want the United States to become the only forum for the whole world's human rights claims,[114] we have seen that in *Phillip* it said that FSIA §1605 (a) (3)'s reference to international law is to the international law of property, not of human rights. That limitation was within the framework of an appeal from the D.C. Circuit's holding that a genocidal context to a taking suffices without further analysis for FSIA jurisdiction. Interestingly, it was the Court rather than the plaintiffs which raised the issue of potential Section 1605 (a) (3) jurisdiction if plaintiffs were found not to have been nationals of defendants at the times of expropriation. It was thus the Court that held the door ajar for their FSIA claims. In so doing, the Court was furthering declared U.S. foreign policy of seeking to assist restitution and compensation for Holocaust-era property expropriation and theft.[115]

[112] *See supra*, notes – and -, and surrounding text.
[113] In *Simon* and *Abelesz/Fischer*, for example, claims included the last vestiges of property remaining in the backpacks of possibly destitute victims as they were put on trains to concentration camps.
[114] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 123 (2013) ("there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms.")
[115] *See supra* notes – to --, *and surrounding text*.