No. 19-351

IN THE

Supreme Court of the United States

FEDERAL REPUBLIC OF GERMANY, a foreign state, and STIFTUNG PREUSSICHER KULTURBESITZ,

Petitioners,

v.

ALAN PHILIPP, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

BRIEF OF *AMICI CURIAE* FOREIGN INTERNATIONAL LAW SCHOLARS AND JURISTS IN SUPPORT OF PETITIONERS AND REVERSAL

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae are foreign scholars of public international law who have published numerous works on the issues that are central to this case. They have also participated as counsel and experts in proceedings involving matters of State immunity and the notion of genocide before international courts and tribunals such as the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), the International Criminal Court ("ICC"), the European Court of Human Rights ("ECHR") and the International Court of Justice ("ICJ").

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[1] No counsel for a party authored this brief in whole or in part. No one other than *amici curiae* and *amici*'s counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief, and copies of the letters of consent are on file with the Clerk's Office.

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As experts on the law of immunity, *amici* respectfully submit this brief to provide a full statement of the principles of customary international law regarding State immunity, which may be helpful to the Court in resolving this case. As explained below, *amici* believe the D.C. Circuit's opinion is at odds with customary international law concepts regarding State immunity and genocide. The decision below also creates a conflict between the interpretation of the Foreign Sovereign Immunities Act of 1976, 28 USC 1602 *et seq*. ("FSIA") and settled principles of international law, as clarified in the jurisprudence of international courts before which *amici* have appeared.

INTRODUCTION AND SUMMARY OF ARGUMENT

While this case will be assessed on the basis of the rules of State immunity set out in the FSIA, this brief centers on the international law framework governing State immunity. That international law framework is the product of centuries of State practice of forum States giving effect to the immunity of foreign States, their representatives, and their agencies and instrumentalities. Central features of this framework have been affirmed in the recent case-law of the ICJ—the principal judicial organ of the United Nations. Many aspects have also been clarified in long-standing inter-state negotiations resulting in the adoption, in 2004, of the United Nations Convention on Jurisdictional Immunities of States and Their Property ("State Immunity Convention" or "Convention"), Dec. 16, 2004, G.A. Res. 59/38, annex.[2] Although the State Immunity Convention is not binding upon the United States as a matter of treaty law, it reflects

[2] Statements made in the process of elaborating on the State Immunity Convention reflect widespread agreement on core aspects of the customary international rules governing State immunity. As the ICJ has emphasized, "State practice of particular significance is to be found in . . . the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention." *Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening)* ("*Jurisdictional Immunities*"), Judgment, 2012 I.C.J. at 122 (Feb. 3).

accepted rules of customary international law and is considered "the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases." *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, [2006] UKHL 26, ¶26 (appeal taken from Eng.).

This brief proceeds from three undisputed starting points about the customary international law of State immunity:

First, States are bound, under international law, to respect the sovereign immunity of foreign States. Immunity is not a matter of comity, but of binding international obligation. The ICJ authoritatively affirmed this position in the *Jurisdictional Immunities* case. It noted both parties' agreement "that immunity is governed by international law and is not a mere matter of comity":

> States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity. ... [T]he rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is

> one of the fundamental principles of the international legal order.

Jurisdictional Immunities, 2012 I.C.J. at 122-24. A passage from Lord Hoffmann's opinion in the House of Lords' judgment in *Jones* gives eloquent expression to this understanding:

> [S]tate immunity is not a "self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt" and which it can, as a matter of discretion, relax or abandon. It is imposed by international law without any discrimination between one state and another.

Jones, [2006] UKHL 26, ¶ 101 (quoting *Holland v. Lampen-Wolff*, 1 WLR 1573, 1588 (HL 2000)). In requiring States to respect the immunity of other States, international law formulates *minimum* standards to be observed. States remain free, subject to other international legal obligations, to accord immunity in a wider set of circumstances, *see Jurisdictional Immunities*, 2012 I.C.J. at 122-23, and they often do.

Second, under international law, States are *presumed* to enjoy immunity in proceedings before foreign State courts. This presumption is subject to exceptions, but it marks the starting point of any inquiry regarding State immunity from suit. Drawing inspiration from domestic immunity statutes (such as the FSIA), Article 5 of the State

Immunity Convention stipulates that "[a] State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention." G.A. Res. 59/38, annex, at 4 (art. 5). This means that, to the extent a State or its instrumentalities qualify as *prima facie* immune, international law places "the burden of proof ... on the claimant to prove that the State is *not* immune." To discharge that burden, the claimant will have to establish that an immunity exception recognized in international law applies. *See* Thomas D. Grant, *Article 5*, *in* THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY: A COMMENTARY 103 (Roger O'Keefe & Christian J. Tams, eds. 2013) (hereinafter "IMMUNITIES CONVENTION COMMENTARY"). "Exceptions to the immunity of the State represent a departure from the principle of sovereign equality." *Jurisdictional Immunities*, 2012 I.C.J. at 123-24.

Third, domestic courts play an important role in ensuring respect for State immunity. As the State Immunity Convention puts it, States must "ensure that its courts determine on their own initiative that the immunity of that other State … is respected." G.A. Res. 59/38, annex, at 4 (art. 6(1)). This determination must be made at the outset of a proceeding, as "immunity from jurisdiction … is an immunity not merely from being subjected to an adverse judgment but *from being subjected to the trial process*." *Jurisdictional Immunities*, 2012 I.C.J.

at 136 (emphasis added). Conversely, by upholding a plea of immunity, a domestic court does not take a view on the merits of the underlying claim. Even less does it endorse the foreign State's conduct that has been challenged. "[R]egulat[ing] the exercise of jurisdiction in respect of particular conduct, [immunity] ... is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful." *Id.* at 140.

With these principles in mind, this brief will make the following two points: First, there is no applicable exception to sovereign immunity in this case under customary international law. International law does not recognize a freestanding exception to immunity for international crimes like genocide or other grave breaches of international law. Nor does international law recognize a "takings" exception to immunity for loss of tangible property abroad.

Second, even if there were a recognized immunity exception for genocidal acts, the 1935 acquisition of the Welfenschatz could not have constituted genocide under the accepted international law definition of that term. In reaching a contrary conclusion, the D.C. Circuit rendered a decision that is squarely at odds with customary international law.

ARGUMENT

I. THERE IS NO APPLICABLE EXCEPTION TO SOVEREIGN IMMUNITY UNDER INTERNATIONAL LAW

The primary question in this case is whether the (then) State of Prussia's acquisition, in 1935, of parts of the Guelph Treasure is covered by one of the FSIA's limited exceptions to sovereign immunity. Section 1605(a)(3)—the so-called "expropriation exception"—is the sole FSIA exception that has been invoked in this case. That section requires a "taking" that occurs "in violation of international law." 28 USC 1605(a)(3). It targets sovereign, governmental conduct affecting property interests to permit judicial redress for infractions of binding rules of international law.

The parties disagree on whether the "expropriation exception" covers conduct that took place outside the United States (in Germany) and between nationals of a foreign State (Germany), as was the case here, but in line with its focus on the international legal framework, this brief outlines how customary international law treats such an alleged taking occurring outside the forum State, between foreign nationals. As explained below, under international law such conduct would not be covered by any accepted immunity exception.

At the outset, the "expropriation exception" is a unique feature of the FSIA. It has no direct

equivalent in customary international law or in the domestic laws of other States. *See* HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 270 (3d ed. 2015); RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 455 n. 15 (2018). At no point during the preparation of the State Immunity Convention was the inclusion of an equivalent provision proposed with any chance of success. That said, there have been long-standing debates in international law on the questions underlying the expropriation exception, including (A) whether proceedings concerning particular breaches of international law should be covered by an immunity exception, and (B) how the international law of immunity should address instances in which a State interferes with property interests on its own soil. Customary international law has answered both questions in favor of immunity.

A. International Law Does Not Recognize A Self-Standing Immunity Exception For International Crimes Or Other Grave Breaches Of International Law

While the FSIA's expropriation exception concerns "takings" in violation of international law, customary international law does not focus on the issue of a "taking"; instead, it looks at the broader question of whether immunity should yield where a State is accused of grave breaches of international law. The debate on that question has centered on

breaches of international law that qualify as an "international crime" or as a violation of a peremptory norm of international law (*jus cogens*).[3] Even for this narrow circle of alleged breaches, however, customary international law does not recognize an immunity exception. In fact, States, as well as international and domestic courts, have firmly rejected claims that State immunity should yield where States are accused of egregious conduct.

The drafters of the State Immunity Convention specifically considered the introduction of a limited immunity exception for grave breaches of international law, notably violations of peremptory norms of international law. In 1999, they concluded the matter was not "ripe" for inclusion in the Convention. *See* Working Group on Jurisdictional Immunities, Statement by the Chairman of the Working Group, UN Doc. A/C.6/54/L.12, ¶ 47 (Nov. 12, 1999). That decision was confirmed in 2003, during the final stages of the drafting process. The Chairman of the Ad Hoc Committee in which the deliberations took place later explained that "[t]he general view ... was that the denial of immunity in such situations [of alleged *jus cogens* violations] had

[3] The Vienna Convention on the Law of Treaties defines a *jus cogens* norm as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted." 1155 U.N.T.S. 331, art. 53 (May 23, 1969). For the avoidance of doubt, we note that, for the purposes of these proceedings, it would further need to be shown that the concept of *jus cogens* could retroactively apply to conduct that took place in 1935.

not attained, and was unlikely to attain, the status of a rule of customary international law." Gerhard Hafner, *Historical Background to the Convention*, *in* IMMUNITIES CONVENTION COMMENTARY, *supra,* at 9.

Both domestic and international courts have confirmed this approach. For example, the ECHR has regularly rejected claims that immunity should yield where a State is accused of grave breaches of international law, such as acts of torture or crimes against humanity. *See, e.g.*, *Al-Adsani v. United Kingdom*, 123 I.L.R. 64, ¶¶ 53-67 (Eur. Ct. H.R. 2001); *Jones v. United Kingdom*, App. Nos. 34356/06, 40528/06, ¶ 198 (Eur. Ct. H.R. 2014); *Kalogeropoulou v. Greece & Germany*, 129 I.L.R. 537 (Eur. Ct. H.R. 2002). In the case of *Al Adsani,* the ECHR recognized that the customary international law rule of immunity limited the due process rights of applicants, even where they brought damages claims for alleged torture, which, like genocide, constitutes a violation of *jus cogens*. *Al-Adsani*, 123 I.L.R. 64, ¶¶ 53-67. The clear majority of domestic courts have reached the same result.[4]

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[4] *See, e.g.*, *Kazemi Estate v. Islamic Republic of Iran*, 3 S.C.R. 176 (Can. 2014); *Réunion Aérienne v. Socialist People's Libyan Arab Jamahiriya*, 150 I.L.R. 630 (Fr. Ct. of Cass. 1e civ. 2011); *Zhang v. Zemin*, [2010] NSWLR 255; *Jones,* [2006] UKHL 26; *Fang v. Jiang Zemin*, 141 I.L.R. 702 (N.Z. High Ct. 2006); *Bouzari v. Islamic Republic of Iran*, 71 O.R. 3d 675 (Can. Ont. C.A. 2004); *Al-Adsani v. Gov't of Kuwait* (No 2), 107 I.L.R. 536 (U.K. Ct. App. 1996).

The *Jurisdictional Immunities* case before the ICJ is particularly relevant here. It turned on whether Italian courts were required to respect Germany's claim to immunity in proceedings for war crimes committed by German troops during World War II. The ICJ noted that Germany's conduct undoubtedly violated fundamental rules of international law, but it nevertheless upheld Germany's claim to immunity based on a detailed analysis of international practice and jurisprudence. *See Jurisdictional Immunities,* 2012 I.C.J. at 135-42. It concluded that "under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict." *Id.* at 131. Even if it could be established that "proceedings in the Italian courts involved violations of *jus cogens* rules" this would not affect "the applicability of the customary international law on State immunity." *Id.* at 142.

In reaching this result, the ICJ relied on the drafters' decision *not* to include a *jus cogens*

In exceptional circumstances, courts in Greece and Italy have asserted the existence of an immunity exception for international crimes. *See, e.g.*, *Areios Pagos, Prefecture of Voiotia v. Germany*, 129 I.L.R. 513 (Greece 2000); *Ferrini v. Germany*, 128 I.L.R. 658 (It. Ct. of Cass. 2004). However, the decisions of these courts have been widely criticized and remain outliers. They are also in direct conflict with the ICJ's judgment in the *Jurisdictional Immunities* case, which is binding on those courts under Article 94 of the U.N. charter.

exception in the State Immunity Convention. The court added that, when the Sixth (Legal) Committee of the U.N. General Assembly discussed the matter, "no State suggested that a *jus cogens* limitation to immunity should be included in the Convention." *Id.* at 138-39. The ICJ also emphasized the fact that the domestic courts of a significant number of States had recognized Germany's right to immunity in proceedings concerning war crimes or other grave breaches of international law committed on their territory during World War II. *See id.* at 132-33, 137 (citing decisions from the Supreme Court of Poland, the Constitutional Court of Slovenia, the French *Cour de Cassation,* and courts in Brazil and Belgium, among others).

Finally, the ICJ held that it was required to uphold Germany's claim to immunity because, as noted above, immunity acts as a procedural bar to protect foreign States from being subjected to the trial process. In this respect, the ICJ clearly noted the risks of admitting an immunity exception for grave breaches of international law:

> If immunity were to be dependent upon the State actually having committed a serious violation of international human rights law or the law of armed conflict, then it would become necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction. If, on the other hand, the mere allegation that the

> State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skilful construction of the claim.

Id. at 136.

The proceedings before the D.C. Circuit Court bear out precisely these risks. Under the approach adopted by the Circuit Court, Germany and the Stiftung Preußischer Kulturbesitz are denied State immunity unless they argue, and successfully demonstrate, that the 1935 purchase of the Welfenschatz did not constitute an act of genocide. This subverts the presumption of immunity and runs counter to the understanding of immunity as a procedural bar protecting States from being subjected to the trial process.

The ICJ's judgment in *Jurisdictional Immunities* is widely considered to have settled the debate as to whether there is an immunity exception for alleged international crimes. According to one commentator, the decision was the "final nail in the coffin of attempts to circumvent state immunity in domestic civil proceedings." Roger O'Keefe, *State Immunity and Human Rights: Heads and Walls, Hearts and Minds*, 44 VAND. J. OF TRANS'L L. 999, 1032 (2011). The ECHR has similarly described the effect of the ICJ's decision:

> [I]t is not necessary for the [ECHR] to

> examine all of these developments [in domestic case-law] in detail since the recent judgment of the ICJ in *Germany v. Italy* [the *Jurisdictional Immunities* case] ... —which must be considered by this Court as authoritative as regards the content of customary international law—clearly establishes that, by February 2012, no *jus cogens* exception to State immunity had yet crystallized.

Jones, 2014 Eur. Ct. H.R. at 52.

By firmly rejecting claims that immunity should yield where States are accused of having committed grave breaches of international law, States as well as domestic and international courts have underscored the crucial importance of respecting State immunity.[5] The Circuit Court's decision in this case undermines that principle and is therefore in conflict with customary international law.

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[5] Indeed, a number of States including Switzerland, France, Spain, Austria, and Belgium, have submitted notes verbale to the State Department in this case, expressing their view that Germany is entitled to immunity under customary international law and the law of their domestic States. *See* Br. for Pet'rs at 9 n.3; Pet'r's Request to Lodge Materials Pursuant to Rule 32.3 (Sept. 4, 2020). As explained in this brief, rejecting that claim of immunity under a purported "takings" exception deviates from settled principles of international law and creates an unnecessary conflict between those principles and the FSIA.

B. International Law Does Not Recognize A "Takings" Exception To Immunity For Loss Of Tangible Property Abroad

The importance of State immunity is also reflected in debates over governmental interferences with property interests. As noted above, customary international law does not recognize an equivalent to the FSIA's expropriation exception. However, customary international law does address the tension between State immunity and the protection of property interests against governmental interference, which underlies section 1605(a)(3). The customary international law approach reflects a firm, widely shared agreement on the importance of a territorial nexus. As noted by one leading scholar, "[t]he principle of territoriality lies at the root of the issue of State immunity" and is "the most important rationale for denying immunity." XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 73 (2013).

In line with this territorial focus, customary international law recognizes a number of exceptions to immunity for conduct taking place on the territory of the forum State. One such exception, a "tort exception" to immunity, covers proceedings relating to compensation for personal injury or damage to, or loss of, tangible property, caused by the State. Included in Article 12 of the State Immunity Convention, the "tort exception" to immunity has been described as "open[ing] the way ... to calling States to account under national law for damage

resulting from governmental acts performed in the exercise of sovereign authority." FOX, *supra,* at 468. In that sense, the so-called "tort exception" could be said to bear some similarity to the expropriation exception, but there is still a question as to whether such an exception is accepted in customary international law.[6] Even if it were, it is beyond doubt that this alleged immunity exception is strictly limited to "territorial torts." According to the text of Article 12, it requires a *dual territorial nexus*:

> Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission *occurred in whole or in part in the territory of that other* State and if the author of the act or omission *was present in*

[6] In its 2001 judgment in *McElhinney v. Ireland*, the ECHR observed that agreement on this point was "by no means universal." *McElhinney*, 123 I.L.R. 73, 85 (Eur. Ct. H.R. 2001). The ICJ did not answer that question in 2012, noting that it was "not called upon ... to resolve the question whether there is in customary international law a 'tort exception' to State immunity applicable to *acta jure imperii* in general." *Jurisdictional Immunities,* 2012 I.C.J. at 127-35.

> *that territory* at the time of the act or omission.

G.A. Res. 59/38, annex, at 7 (art. 12) (emphases added).

The International Law Commission's Special Rapporteur, responsible for preparing a draft provision that served as a model for Article 12, explained the basis for the rule:

> The exercise of jurisdiction by the court of the place where the damage has occurred is probably the best guarantee of sound and swift justice. Adequate relief can be expected as the court is in reality a *forum conveniens* or, indeed, a most practical and convenient judicial authority with an unchallenged claim to exercise jurisdiction and facilities to establish or disprove evidence of liability and to assess compensation.

Sompong Sucharitkul (Special Rapporteur), *Fifth Rep. on the Jurisdictional Immunities of States and Their Property*, U.N. Doc. A/CN.4/363, ¶ 69 (Mar. 22, 1983).

Thus, even under a "tort exception" to immunity, where a State, acting as a sovereign, interferes with property interests on its own soil, it continues to benefit from immunity under international law. In the present instance, it is undisputed that the alleged "taking" of the Welfenschatz took place in

Germany, between German nationals. Thus, if assessed against the standards of customary international law, it would not be covered by any exception to immunity concerning sovereign interference with property rights.

II. EVEN IF A "TAKINGS" EXCEPTION APPLIED, THE ACT AT ISSUE WAS NOT A "TAKING IN VIOLATION OF INTERNATIONAL LAW"

Although customary international law recognizes no exception to immunity for sovereign interference with property rights on its own soil, *see supra* Part I.B, the D.C. Circuit held that the FSIA's expropriation exception nevertheless applied in this case by finding that the alleged expropriation constituted an act of genocide. As explained above, that construction of the FSIA departs from the accepted concept of what constitutes a "taking" under international law, and it is erroneously based on an immunity exception for international crimes like genocide that simply does not exist. *See supra* Part I. In any event, even if there *were* a recognized immunity exception for genocidal acts under customary international law, the alleged act in question still would not have come within its scope.

A. As Understood Under International Law, The Concept of Genocide Does Not Apply

The D.C. Circuit determined that the acts at issue constituted genocide based on its

interpretation of the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 ("Genocide Convention"). But two accepted features of international law illustrate why the Genocide Convention and the concept of genocide do not apply.

First, the Genocide Convention does not have retroactive effect. *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serb.)* ("*Croatia Genocide Case*"), 2015 I.C.J. 3, 51 (Feb. 3). Thus, while the D.C. Circuit looked to the 1948 Genocide Convention in determining whether the alleged act, in 1935, constituted genocide, the convention does not apply to an act that occurred 13 years prior to its enactment. Nor did the Nuremberg Statute or Control Council Law No. 10—both adopted to deal with the crimes of the Nazi perpetrators—embrace the notion of genocide. It is therefore questionable whether the concept of genocide even existed in 1935 as a matter of customary international law.

Second, even if the concept of genocide existed in 1935, it could not have been broader in scope than the carefully-crafted definition that the Genocide Convention adopted in 1948. International courts and tribunals that have applied that definition, such as the ICTY, the International Criminal Tribunal for Rwanda ("ICTR"), and the ICJ, look only at the particular act(s) in question—not other acts that occurred before or after the alleged action—to

determine if a genocidal act has occurred. Put differently, the focus of their inquiry is whether a given act qualifies as an act of genocide, not whether *other* acts of genocide were or may have been committed against the same group either before or after the particular act in question.

For example, in its judgment dealing with the conflict in Bosnia and Herzegovina, the ICJ, although finding that the mass killing of Muslims at Srebrenica constituted genocide, squarely rejected the argument that previous measures directed against the same ethnic group had also constituted acts of genocide because they had also involved the killing of members of that ethnic group. *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)* (*"Bosnia Genocide Case"),* Judgment, 2007 I.C.J. 43, 198 (Feb. 26). Instead, the ICJ limited its analysis to the particular acts at issue without looking at other actions that had been taken against the same protected group. *See id.* Thus, even acts of "ethnic cleansing" aimed at the displacement of members of a protected group, the ICJ found, would not amount to genocide unless such displacement took place in circumstances that themselves amount to genocide. *See id.* at 122-23.

Here, the D.C. Circuit looked at acts that occurred before and after the act in question in determining whether it was one of genocide. In doing so, the court applied a broader understanding of

genocide than the one that exists under customary international law.

B. Even If The Genocide Convention Applies, The Alleged Acts Did Not Constitute Genocide

These accepted principles of the concept of genocide make clear that the Genocide Convention does not apply. But even if the Convention applies, and even if the Court were to assume that all the facts are exactly as the Plaintiffs allege in their complaint, those facts still would not amount to genocide under international law.

1. There Is No Evidence The 1935 Transaction Was An Act Of Genocide

The category of genocide that the D.C. Circuit considered in this case requires a finding that the responsible individuals "[d]eliberately inflict[ed] on the group conditions of life calculated to bring about its physical destruction …." *See* Genocide Convention, 78 U.N.T.S. at 280 (art. II(c)).[7] That category of genocide prohibits specific acts when committed with the intention to destroy physically a

[7] The other categories of genocide include killing members of the group (Article II(a)), causing serious bodily or mental harm to members of the group (Article II(b)), imposing measures intended to prevent births within the group (Article II(d)), and forcibly transferring children to another group (Article II(e)). *See* 78 U.N.T.S. at 280.

protected group in whole or in part. As seen in its very wording, this category applies only to acts of "*physical destruction*"; the perpetrator must seek the death of the members of the protected group on whom the acts are inflicted, or deprive them of their essential means of livelihood. *See id.* (emphasis added); *Croatia Genocide Case*, 2015 I.C.J. at 70 (quoting *Prosecutor v. Stakić,* Case No. IT-97-24-T, Judgment, ¶¶ 517, 518 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003)).

At most, such acts may include the deprivation of food, medical care, shelter or clothing; lack of hygiene; the systematic expulsion from homes; or exhaustion as a result of excessive work or physical exertion. *Croatia Genocide Case*, 2015 I.C.J. at 70 (quoting *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgment, ¶ 691 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004)). The paradigmatic example the drafters had in mind were the physically destructive living conditions in the Jewish ghettos in German-occupied territories during World War II. *See* Lars Berster, *Article II, in* CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE: A COMMENTARY 122 n. 333 (Christian J. Tams, Lars Berster, & Bjorn Schiffbauer, eds. 2014).

Because the D.C. Circuit determined Article II(c) was the only relevant category of genocide in this case, it was required to make a finding that, by means of the purchase in question, the responsible

individuals inflicted on the sellers conditions of life calculated to bring about the physical destruction of the Jewish population in whole or in part. Nothing about the act in question, however, suggests that the 1935 purchase of the Welfenschatz could plausibly fit this standard. Even accepting as true all of the allegations in the Plaintiffs' Complaint, there is no allegation that, through the 1935 sale of the Welfenschatz, the sellers were subjected to conditions of life calculated to bring about the physical destruction of the Jewish population in whole or in part.

Nor did the D.C. Circuit make any findings to that effect. The act in question was a legal transaction, and this transaction did not inflict on the sellers conditions of life calculated to physically destroy them as members of a protected group. In the absence of any such findings or allegations, there was no basis for the court to have concluded that the transaction in question was an act of genocide. An allegedly forcible purchase of part of the Welfenschatz for 4.25 million Reichsmark, even assuming it took place at a price below market value, is simply not what the drafters of the Genocide Convention had in mind when defining the acts that constitute genocide.

2. There Is No Evidence Of The Required Mens Rea

In addition to the absence of an *actus reus* of genocide, the evidence in this case also failed to show

the necessary proof of the required *mens rea* to constitute genocide. The Genocide Convention requires that any act of genocide, in order to qualify as such, must be committed with the specific intent (*dolus specialis)* to destroy a protected group as such, in whole or in part. *See* Genocide Convention, 78 U.N.T.S. at 280. That genocidal intent must be the only inference that can reasonably be drawn from the act in question. *See Croatia Genocide Case*, 2015 I.C.J. at 66, 74; *Bosnia Genocide Case*, 2007 I.C.J. at 129, 196-97.

Moreover, the aim must be to destroy the protected group "as such." This requirement constitutes an additional necessary element of genocide. *See Niyitegeka v. Prosecutor,* Case No. ICTR-96-14-A, Judgment, ¶ 49 (Int'l Criminal Tribunal for Rwanda July 9, 2004); *Prosecutor v. Ntakirutimana,* Case No. ICTR-96-10-A and ICTR-96-17-A, Judgment, ¶¶ 304, 363 (Int'l Criminal Tribunal for Rwanda Dec. 13, 2004). It was deliberately added during the drafting process and is distinct from the *dolus specialis* to destroy the protected group. *See* WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW 298-301 (2d ed. 2009).

Requiring an intent to destroy the group "*as such*" means that the proscribed acts, in order to constitute genocide, must have been committed against the victims *because of* their membership in the protected group. *See id*. This interpretation of the "as such" formula in the *chapeau* of Article II is

confirmed by the United States' proposal for an "Annex on Definitional Elements," which was part of its proposed definition of genocide for purposes of the Rome Statute. *See* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Proposal Submitted by the United States of America, "Annex on Definitional Elements for Part Two Crimes," U.N. Doc. A/CONF.183/C.1/L.10 (July 9, 1998). Accordingly, the goal to destroy the group, in whole or in part, must have been a driving motive for the acts committed against individual group members. *See* Matthew Lippman, *The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide*, 3 B.U. INT'L L. J. 1, 41 (1985).

The intent required by Article II(c) is separate from the general intent required for all forms of genocide; it is an additional form of specific intent requiring the intentional infliction of condictions of life with the purpose of physically destroying the protected group as such. *See* SCHABAS, *supra*, at 177. Hence, measures meant to force members of a protected group to leave their home by taking discriminatory measures, even if they amount to "ethnic cleansing," do not constitute acts of genocide.

The jurisprudence of the ICTY confirms this approach. The ICTY has frequently dealt with instances of "ethnic cleansing" in cases in which no genocide charges were brought, or ended up being

rejected. *See id.* at 292-93. In *Stakić*, for example, the ICTY emphasized that Article II(c) of the Genocide Convention may be violated only if the acts in question are accompanied by methods specifically seeking the physical destruction of the group. *Stakić*, Case No. IT-97-24-T, ¶ 557 (affirmed by Appeals Chamber in *Prosecutor v. Stakić,* Case No. IT-97-24-A, Judgment, ¶¶ 46-48 (Int'l. Criminal Tribunal for the Former Yugoslavia Mar. 22, 2006)).

It is only if all of these *mens rea* elements of genocide were met—*i.e.*, if the persons responsible for the purchase acted with the intention to destroy the German Jewish population as such in whole or in part and that they were also deliberately inflicting inhuman living conditions upon them calculated to physically destroy the group—that the purchase could be found to violate Article II(c) of the Genocide Convention. Accordingly, even if the sellers of the Welfenschatz had been treated in a discriminatory manner owing to their Jewish ethnicity or religion, this alone did not suffice to make a finding of genocidal intent under international law. Rather, it must be shown that the purchase was conducted with the specific intent of destroying the Jewish population of Germany as such, in whole or in part, and that specific intent must constitute the only reasonable conclusion to be drawn from the facts of the transaction. *See Croatia Genocide Case*, 2015 I.C.J. at 66; *Bosnia Genocide Case*, 2007 I.C.J. at 196-97.

Once again, there is no evidence to support such a finding. The record in this case reveals that Germany attempted to purchase the Welfenschatz as early as 1930, *see* Pet. App. 41, immediately after the Consortium had bought the collection in 1929 and several years before the rise to power by the Nazi party in 1933, Pet. App. 3. The purchase was considered to be of major cultural importance regardless of the political leanings of the actors involved, because the collection occupied a unique position in German history and culture. *See* Jt. App. 62-63. Indeed, despite his clear opposition to the Nazi regime, as late as 1933, Jewish writer and politician *Erich Mühsam* deplored the sale of the Welfenschatz to the Consortium because, in his view, it constituted a spoliation of the German nation. *See* Patrick M. de Winter, *The Sacral Treasure of the Guelphs*, 72 THE BULLETIN OF THE CLEVELAND MUSEUM OF ART 2, 137 (March 1985).

Given the prevailing economic situation at the time, the continuous efforts by Germany since 1931 to purchase the Welfenschatz with a view to protecting its cultural heritage, and the increases in price offered by Germany to the sellers—from less than 3.5 million Reichsmark to 3.7 million Reichsmark to eventually 4.25 million Reichsmark (which was only 100,000 Reichsmark lower than the sellers' last counter-offer), Pet. App. 43-44—there is simply no basis from which the court could have found that the purchase was made with the specific intent of physically destroying the German Jews as

such, in whole or in part, as required to make a finding of genocide.

On this point, it is worth noting that the District Court of Jerusalem in the *Eichmann* case had doubts whether the required strict standard could even be met for the period *prior to 1941*—that is whether the required specific intention to exterminate the German Jews had existed in Germany prior to 1941. *A-G Israel v. Eichmann,* 36 I.L.R. 5, ¶ 80 (Dist. Ct. Jerusalem 1961; reported in English 1968). Based on that approach, Eichmann was acquitted of charges of genocide with respect to acts that had taken place prior to August 1941. *Id.* at ¶ 244. In this case, the strict standard would need to be met for conduct taking place in or before 1935, that is a period during which Germany—while taking discriminatory action against members of its Jewish population—had not yet put in place a campaign aiming at physically destroying the German Jews as a group as such in whole or in part.

More specifically, in the present case, where German authorities had entered into negotiations with the sellers on the purchase of the Welfenschatz, significantly increased the offer more than once, and finally paid a very significant amount for the items, it cannot reasonably be assumed the purchase was made for the purpose of physically destroying the German Jews. This remains true even if one accepts *arguendo* that the price was below market value. In fact, if Germany had intended to exterminate its

Jewish population by bringing about conditions of life calculated to physically destroy the group as such as early as 1935, German authorities could have simply seized the Welfenschatz without any consideration at all.

The facts of the present case are therefore fundamentally different from other situations where, for example, members of a protected group were forcefully stripped of their personal property, money or food while or after having been deported into ghettos or concentration camps. The D.C. Circuit failed to note these differences when it erroneously concluded, without the required analysis, that the act in question amounted to genocide.

CONCLUSION

The D.C. Circuit's decision in this case is in conflict with rules of customary international law regarding State immunity that are legally binding on all States, including the United States. If left to stand, it will undermine the decisions of the ICJ and other domestic and international courts that have consistently rejected the arguments underlying the decision of the D.C. circuit and will place the United States in violation of international law. This Court should uphold the State immunity of Germany and its instrumentality, the Stiftung Preußischer Kulturbesitz, by interpreting the FSIA in conformity with customary rules of international law.

Respectfully Submitted,

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