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 DAVIS R. ROBINSON, ABRAHAM D. SOFAER, DAVID P. STEWART AND EDWIN WILLIAMSON AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*

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[1] No counsel for any party authored this brief in whole or part, and no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have filed a blanket consent with the Court.

January 20, 1993. He served on the Members Consultative Group for the Restatement (Fourth), Foreign Relations Law of the United States (2018).

SUMMARY OF ARGUMENT

The decision below[2] embraces a vast (and a-textual) expansion of the Foreign Sovereign Immunities Act's ("FSIA") "expropriation" exception, far beyond the original intent of Congress and inconsistent with its understanding of relevant international law. That re-interpretation potentially opens U.S. courts to a wide range of claims against foreign sovereigns arising from situations of mass human rights violations committed against their own people that have been, or could be, characterized as "genocide" in violation of international law. Whether to make such a consequential change to the statute, and if so, in what terms, is a matter for the legislature, especially in light of the significant foreign relations ramifications for the United States likely to result from the adjudication of such cases.

Neither the FSIA nor the principles of customary international law upon which the expropriation exception is based explicitly require U.S. courts to condition the exercise of the jurisdiction given by the statute on the prior exhaustion of available remedies in the courts of the expropriating country. However, adopting a rule permitting U.S. courts to abstain—as a matter of comity—from adjudicating claims by

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[2] *Philipp v. Fed. Republic of Germany*, 894 F.3d 406 (D.C. Cir. July 18, 2018), *cert. granted*, No. 19-351, 2020 WL 3578677 (July 2, 2020).

nationals of that country until they have first exhausted adequate and available domestic ("local") remedies in the relevant foreign jurisdiction would be consistent with (even if not required by) principles of customary international law governing the exhaustion of remedies in claims against governments.

ARGUMENT

I. Whether to Expand the FSIA's Expropriation Exception Is a Question for the Legislature.

As enacted, the FSIA's "takings" or "expropriation" exception, 28 U.S.C. § 1605(a)(3),[3] was intended to provide a U.S. forum for claims (primarily by U.S. individuals and entities) against foreign governments arising from those governments' nationalization or expropriation of foreign-owned property or property interests within their territory in violation of international law.[4] Under customary

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[3] Section 1605(a)(3) states: "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."

[4] H.R. Rep. 94-1487, at 19–20 (1976); H. Comm. on Foreign Affairs, 88th Cong., *Report on Expropriation of American-Owned Property by Foreign Governments in the Twentieth Century* vii,

international law, such "takings" violate international law if (1) they were not for a public purpose; (2) they were discriminatory; or (3) no just compensation was provided for the property taken.[5]

In other words, the takings exception—like the principles of international law it references—was (relatively narrowly) concerned with a foreign State's unlawful treatment of the property of the citizens and nationals of other countries (such as nationalizations and expropriations of U.S.-owned business and investments in that country). It was clearly not understood to encompass a foreign government's "domestic" takings of the property of its *own* citizens or nationals within its own territory.[6]

1–2 (Comm. Print 1963); *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Rels. of the H. Comm. on the Judiciary*, 94th Cong. 82 (1976).

[5] H.R. Rep. 94-1487, at 19–20; *see also de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113, 128 (D.D.C. 2011), *aff'd in part*, *rev'd in part*, 714 F.3d 591 (D.C. Cir. 2013); *Comparelli v. Republica Bolivariana De Venezuela*, 891 F.3d 1311, 1326 (11th Cir. 2018).

[6] *See* H.R. Rep. 94-1487, at 19–20; *see also Chettri v. Nepal Rastra Bank*, 834 F.3d 50, 58 (2d Cir. 2016); *Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 251 (2d Cir. 2000) ("[T]he legislative history makes clear that the phrase 'taken in violation of international law' refers to 'the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law,' including 'takings which are arbitrary or discriminatory in nature.'" (quoting H.R. Rep. No. 94-1487, at 19, *reprinted in* 1976 U.S.C.C.A.N. 6004, 6618)).

As reflected in the Restatement (Fourth), Foreign Relations Law of the United States (2018) ("Restatement Fourth"), it is generally agreed that under the so-called "domestic takings" exclusion, "a foreign government's taking of the property of its own nationals within its own country does not violate international law on expropriation and thus does not fall within the statute's expropriation exception."[7]

However, the statute itself does not explicitly preclude such claims, nor does it provide a definition of "rights in property" or "violations of international law" other than by reference in the legislative history to principles of customary international law. In addition, the expropriation exception does not by its terms require claimants to be U.S. nationals or their claims to have any other "jurisdictional connection" with the United States other than the presence of the property in question (or property derived from it).[8]

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[7] Restatement (Fourth), Foreign Relations Law of the United States (2018) § 455, Rep.'s n. 5.

[8] To satisfy the expropriation exception against a foreign state, the property at issue must be (1) present in the United States and (2) used in connection with a commercial activity carried on in the United States. For claims against agencies or instrumentalities of the foreign state, the property need not be in the United States and the commercial activity in the United States need not have a nexus to the specific property. *Cf. Schubarth v. Fed. Republic of Germany*, 891 F.3d 392 (D.C. Cir. 2018); *de Csepel v. Republic of Hungary*, 859 F.3d 1094 (D.C. Cir. 2017).

Like most of the FSIA's statutory exceptions,[9] the expropriation exception was initially interpreted narrowly. Over time, however, the courts have given an increasingly broad reach both to the term "property" (for example, to include interference with contractual rights[10]) as well as to the meaning of "property exchanged for taken property."[11] More recently, a number of courts (up to and including the decisions in *Simon* and *Philipp*) have disregarded the "domestic takings" exclusion and permitted claims by a foreign government's own nationals to proceed when committed as part of particularly egregious violations of international law (such as genocide and other

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[9] *Cf. Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312 (2017); *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015); *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 827 (2018). Given that it envisions application of U.S. law to actions of foreign governments within their own territory, restrictive interpretation is appropriate. *Cf.* the Court's cautious approach to extraterritorial application of U.S. remedies, *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016).

[10] *See Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 673 (7th Cir. 2012), *aff'd sub nom. Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847 (7th Cir. 2015); *Nemariam v. Fed. Democratic Republic of Ethiopia*, 491 F.3d 470, 480 (D.C. Cir. 2007).

[11] When taken property is sold, and the proceeds from the sale go into the state's treasury, courts presume that any commercial activity undertaken by the foreign state in the United States is done with "proceeds" from the taking. (*Simon v. Republic of Hungary*, 812 F.3d 127, 147 (D.C. Cir. 2016), *Abelsz*, 692 F.3d 661, and the *Rukoro* district court decision, *Rukoro v. Fed. Republic of Germany*, 363 F. Supp. 3d 436, 447-49 (S.D.N.Y. 2019), have all embraced this idea.) This makes it very easy to satisfy the commercial nexus for suing foreign states directly.

situations of massive violations of internationally recognized human rights).

These decisions portend a significant expansion in the scope of the exception, opening U.S. courts to claims against foreign governments by foreign nationals (including their own citizens) in a potentially wide array of situations involving massive human rights violations far beyond the contemplation of Congress in enacting the statute.

One need only consider a few of the more notorious situations of massive human rights violations to which the label "genocide" has been applied, such as those in Armenia or Cambodia, the conflicts within the eastern regions of the Democratic Republic of the Congo or in southern Sudan (Darfur), Myanmar (the Rohingya), Rwanda (the Hutus and Tutsis) or in Bosnia/Herzegovina. More current situations might include the mistreatment of the Yazidis in Iraq, the Uighurs in the People's Republic of China, and the Waimiri-Atroari in Brazil's Amazon, to say nothing of the Middle East (Israel/Palestine).

That the expanded exception would focus only on "property claims" does not promise significantly to limit the potential scope of such claims, given the increasingly broad interpretation given by the courts to "property" and because most situations of massive human rights violations do, in fact, involve at least some element of property confiscation or deprivation, almost always without any compensation (or indeed any opportunity to seek compensation).

It may be that, as in the case of claims arising from the Holocaust, few if any claims arising from situations of mass human rights violations committed by foreign governments will be able to satisfy the exception's "commercial nexus" requirement. The so-called "fourth prong" conditions jurisdiction on the existence of a connection between the taking and specific commercial activity in the United States. If the suit is against the foreign state itself, the seized property in question (or property exchanged for such property) must be present in the United States in connection with a commercial activity carried on by that foreign state in the United States. If the property in question (or property exchanged for it) is owned or operated by an agency or instrumentality of the foreign state, then all that is required is for that agency or instrumentality to be engaged in commercial activity in the United States.[12] Since in the latter situation the required commercial activity in the United States need not be related to the disputed property, virtually *any* commercial activity by the foreign agency or instrumentality may suffice to subject that entity to suit.

As the statute's history and the cases under consideration demonstrate, it is not at all unlikely

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[12] In *de Csepel*, 859 F.3d at 1106–07, the D.C. Circuit held that the two standards operate independently of each other, so that under § 1605(a)(3), a foreign state loses its immunity only if its own activities satisfy the requirements of the first clause of the "commercial activity" requirement, and not the commercial activities of its agencies or instrumentalities.

that such jurisdictional connections may arise (or be alleged) years after the events in question.

None of these considerations argues that the perpetrators of genocide and other gross violations of internationally recognized human rights and fundamental freedoms should not be held to account, or that the victims of such tragic situations should not be provided remedies. To the contrary, the international community as a whole bears a heavy responsibility for ensuring that justice is done and that the governments in question (or their successors) provide appropriate remedial measures including compensation to the victims of such atrocities. If satisfaction cannot be obtained within the legal systems of the countries concerned, then appropriate international measures (such as tribunals, commissions, etc.) should be created. Indeed, the international community has in recent decades created a number of new mechanisms for addressing violations of human rights (although many would question their ability to offer effective redress to the victims).

The result of the decision below may well be to open U.S. courts to a wide range of such claims by foreign nationals against their own governments and having little or nothing to do with the United States—apart from a relatively incidental property connection and a genuine (even laudable) desire to see justice done in the context of the gravest historical wrongs. Whether the U.S. judicial system should be open to such claims, and under what conditions, is a question for the legislature, in light of the potentially massive numbers of such claims and the potentially

significant foreign relations implications they may have for the U.S. government.

Nothing in the statute or its legislative history indicates that Congress had in mind making U.S. courts a global "claims resolution" forum. Whether to do so now, in light of an appreciation of the relevant principles of international law and the possible foreign relations consequences, is properly a matter for consideration by the legislature. Congress has certainly not been averse to amending the FSIA to provide jurisdiction over claims it deems worthy,[13] and indeed it has in recent years adopted several measures directly related to Holocaust-related claims.[14]

II. The Foreign Sovereign Immunities Act Does Not Preclude Comity-Based Abstention.

With respect to the question of judicial abstention on the basis of comity, the statute itself is silent. However, U.S. courts have on occasion adopted rules of prudential abstention in various situations arising under the statute.[15]

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[13] *Cf.* the FSIA's "state sponsors of terrorism" exception, now codified at 28 U.S.C. § 1605A, and Justice Against State Sponsors of Terrorism Act (JASTA), codified at 28 U.S.C. § 1605B.

[14] *Cf.* Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (Dec. 16, 2016), and Holocaust Victims Redress Act, Pub. L. No. 105-158, Tit. II § 201, 112 Stat. 15 (Feb. 13, 1998).

[15] *See Fischer*, 777 F.3d at 852; *Freund v. Republic of France*, 592 F. Supp. 2d 540, 579–80 (S.D.N.Y. 2008), *aff'd sub nom. Freund*

The doctrine of prudential abstention based on principles of "international comity" as understood and applied in U.S. courts provides a basis for declining to exercise jurisdiction in suits against foreign states even where customary international law would not require that result.[16] The doctrine of comity is well developed in federal court jurisprudence.[17] Indeed, this Court has on occasion endorsed the application of the doctrine to address the legitimate concerns of foreign sovereigns in cases where the Foreign Sovereign Immunities Act does not accord immunity.[18]

Several U.S. courts have suggested that respect for the customary international law requirement of exhaustion of domestic remedies in foreign courts or related procedures might be appropriate under §

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v. Societe Nationale des Chemins de fer Francais, 391 F. App'x 939 (2d Cir. 2010); *Animal Sci. Prods., Inc. v. China Nat'l Metals & Mins. Imp. & Exp. Corp.*, 702 F. Supp. 2d 320, 388 (D.N.J. 2010), *vacated and remanded sub nom. Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011), *as amended* (Oct. 7, 2011); *cf.* Restatement (Fourth), Foreign Relations Law of the United States (2018) § 461 Rep.'s n. 6 (*forum non conveniens*); *see also* § 424 Rep.'s n. 10 (prudential exhaustion).

[16] *Cf.* Restatement (Fourth), Foreign Relations Law of the United States (2018) § 401 cmt. a ("As a matter of international comity, states often limit the exercise of jurisdiction to a greater extent than international law requires.").

[17] *See Mujica v. AirScan Inc.*, 771 F.3d 580 (9th Cir. 2014); *In re Vitro S.A.B. de CV*, 701 F.3d 1031 (5th Cir. 2012); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004).

[18] *E.g.*, *Republic of Argentina v. NML Cap., Ltd.*, 573 U.S. 134, 140 (2014).

1605(a)(3) as a prudential matter, notwithstanding that, as the Restatement Fourth notes, the principles of customary international law governing exhaustion of domestic remedies apply in respect of the "espousal" of claims by other governments as well as their presentation before international tribunals. Those principles neither impose nor preclude prudential application of an exhaustion requirement in appropriate cases brought in domestic courts.[19] The doctrine of international comity as applied in U.S. courts neither requires states to defer to another state's domestic proceedings nor discourages such deference. A court relying on principles of international comity thus has discretion to take prudential considerations into account.

As generally understood in customary international law (and as accepted by the United States), the "exhaustion of domestic remedies" requirement is a pre-requisite to the assertion of a claim by one state (on behalf of its own citizens or nationals) against another state directly or before an international tribunal with appropriate jurisdiction.[20] As the Restatement Fourth clarifies, this "exhaustion" requirement does not apply, as a matter of customary international law, to claims by a government's own citizens brought against it before

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[19] *Cf.* Restatement (Fourth), Foreign Relations Law of the United States (2018) § 424 Rep.'s n. 10.

[20] Restatement (Third), Foreign Relations Law of the United States (1987) § 713 and cmt. f; *cf.* Chittharanjan Felix Amerasinghe, Local Remedies in International Law 3–5 (Cambridge University Press, 2d ed. 2004).

its own domestic courts.[21] Moreover, the preclusive effect of the rule operates only where the domestic remedies in question are "adequate and available."

Section 1605(a)(3) contains no requirement that a claimant first attempt to exhaust available local remedies before bringing an action against the foreign state under the "expropriation" exception.[22] Accordingly, the interpretation of the statute that does not require prior exhaustion of adequate and available domestic remedies appears to be correct.[23] At the same time, it does not prohibit application of the concept under the doctrine of prudential comity in appropriate situations (i.e., where the alternative forum can provide adequate and effective remedies) if it serves to accommodate the interests of the courts as well as the United States as a whole, especially with

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[21] Restatement (Fourth), Foreign Relations Law of the United States (2018) § 424 Rep.'s n. 10 states: "But under customary international law, and subject to modification by treaty, the exhaustion of local remedies is a precondition only to espousal of a claim by the injured party's government or the filing of a claim in an international tribunal." *See also id.* § 455, Rep.'s n. 11 ("Section 1605(a)(3) makes no reference to a requirement that a claimant first attempt to exhaust available local remedies before bringing an action against the foreign state under the 'expropriation' exception.").

[22] *See* Restatement (Fourth), Foreign Relations Law of the United States (2018) § 455, Rep.'s n. 11 ("By comparison, the 'opportunity to arbitrate' precondition was explicitly included in the text of the state-sponsored terrorism exception at § 1605A(a)(2)(A)(iii).").

[23] *Cf. Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010) (en banc); *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934 (D.C. Cir. 2008).

regard to situations in which adjudication may affect the foreign relations or other interests of the United States as a whole.

CONCLUSION

It is for Congress, not the courts, to decide whether to extend the jurisdiction of U.S. courts to encompass claims by foreign nationals against their own government for takings that occur during conditions of mass human rights violations that may justifiably be characterized as constituting genocide as that term is understood in international law.

Neither the Foreign Sovereign Immunities Act as currently formulated, nor principles of customary international law upon which that statute's "expropriation exception" is based, require U.S. courts to condition their exercise of jurisdiction given by the statute on the prior exhaustion of available remedies in the courts of the expropriating country. However, application of the doctrine of prudential comity in appropriate situations can serve to accommodate the interests of the courts as well as the United States as a whole.

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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