No. 19-351 and No. 18-1447

In The Supreme Court of the United States

FEDERAL REPUBLIC OF GERMANY, et al.,

Petitioners,

v.

ALAN PHILIPP, et al.,

Respondents.

REPUBLIC OF HUNGARY, et al.,

Petitioners,

v.

ROSALIE SIMON, et al.,

Respondents.

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

BRIEF OF THE WORLD JEWISH CONGRESS, COMMISSION FOR ART RECOVERY, AND AMBASSADOR RONALD S. LAUDER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

THOMAS R. KLINE
Counsel of Record
L. EDEN BURGESS
CULTURAL HERITAGE PARTNERS, PLLC
2101 L Street NW, Suite 800
Washington, DC 20037
(202) 567-7594
tom@culturalheritagepartners.com

October 29, 2020

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTERESTS OF THE *AMICI CURIAE*

Amici curiae are two entities and one individual committed to the restitution of property stolen during the Nazi era to Holocaust victims and their heirs, particularly art, cultural objects, and other movable property.[1]

The World Jewish Congress ("WJC"), founded in 1936 in Geneva, Switzerland, represents Jewish communities and organizations in 100 countries. It advocates on their behalf before governments, parliaments, international organizations, and other faiths, and fights for the rights of Jews and minority Jewish communities around the world. Among other causes, the WJC advocates for justice for Holocaust victims and their heirs, including obtaining restitution of, or compensation for, stolen Jewish property, payment of reparations for hardship suffered under Nazi rule, and protecting the memory of the Holocaust.

The Commission for Art Recovery ("CAR") was established by Ambassador Ronald S. Lauder in 1997 to spur efforts to restitute art that was seized, confiscated, or wrongfully taken on a massive scale as a result of the policies and practices of the Third Reich. CAR works with governments, museums, and other institutions to help bring a small measure of justice to families whose art was lost, and to further the

---

[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.

universal application of international laws that recognize the theft of cultural objects during genocide as a crime against humanity. CAR advocates for a favorable claims environment through streamlined procedures and the removal of impediments to the return of art plundered during one of history's greatest tragedies.

Ambassador Lauder currently serves as president of the WJC, a position he has held since June 2007. His passion for art and his commitment to justice led him to create and head CAR, and to support international efforts to recover art stolen by the Nazis during World War II. From 1983 to 1986, Ambassador Lauder served as U.S. Deputy Assistant Secretary of Defense for European and NATO Affairs. In 1986, President Ronald Reagan appointed him U.S. Ambassador to Austria. In 2008, Ambassador Lauder was elected President of the World Jewish Restitution Organization.[2]

---

[2] For several decades, Ambassador Lauder has represented the interests of Jews and Jewish communities throughout the world. To reflect his personal commitment to the Respondents' efforts to pursue some measure of justice in these cases, he prepared a statement underscoring the scale and devastation of the theft and expropriation utilized as part of the Nazis' genocidal campaign in Europe and the connection between genocide and the takings, particularly with respect to art and cultural objects such as the artifacts at issue in *Philipp*. Ambassador Lauder's statement also provides information regarding the importance of the Holocaust Expropriated Art Recovery Act in developing U.S. policy regarding genocide-related takings – a statute which he strongly supported and led efforts to pass, including presenting testimony to Congress. Undersigned *amici* have submitted a proposal to lodge Ambassador Lauder's statement (Declaration of Ronald S. Lauder, Oct. 15, 2020 ("Lauder Decl.")) to the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

United States law and policy support affirmance of the D.C. Circuit decisions in *Germany v. Philipp*, No. 19-351, and *Hungary v. Simon*, No. 18-1447. Respondents are victims, and heirs of victims, of the crimes committed by Nazi Germany and its ally Hungary – regimes that committed crimes and atrocities so unprecedented that they necessitated the creation of a new legal term: genocide, viz. the total destruction of a people. Since the Nazi era (1933-1945), the United States and the international community have understood the crime of genocide to be in a class by itself, one that requires international opposition and concerted efforts to mete out justice whenever possible.

That the Third Reich committed genocide in Germany and Hungary cannot reasonably be gainsaid. Nor can the period during which genocide occurred. From the moment Adolf Hitler was appointed Chancellor on January 30, 1933, the Nazi government pursued a campaign to disempower, impoverish, isolate, and ultimately murder Jews in Germany (and later, in annexed and occupied nations). This campaign took many forms, not the least of which was seizing personal property from Jewish families. These seizures – referred to as economic *Entjudung* ("dejewification") – constituted a first step in the Nazis' crusade to exterminate the Jewish people and destroy their culture. *See Philipp*, Brief of Holocaust and Nuremberg Historians ("Historians' Brief") at 6-7. Respondents' allegations reflect this history, providing two examples of the

Third Reich's abuses of the civil and human rights of its victims: in *Philipp*, Respondents seek restitution or damages related to the below-market involuntary sale of the Guelph Treasure, a valuable collection of medieval relics; in *Simon*, Respondents seek compensation for the seizure and expropriation of personal property stripped from Nazi victims as Hungary forced them to board deportation trains to almost-certain death.

Likewise, that these alleged actions violated international law cannot reasonably be doubted. It is highly improper, even repugnant, for the U.S. to argue that the crime of genocide cannot occur when the carnage, theft, and cultural destruction take place within a state's own borders and involve a state's own nationals. That was certainly not the U.S. position at Nuremberg,[3] where this country prosecuted "crimes against humanity," the precursor to genocide, which emphasized the central role of Nazi expropriations. Since that time, the U.S. government has viewed genocide as a threat to national security regardless of geography, publicly denouncing as genocide domestic actions in Sudan, Cambodia, Rwanda, Iraq, Syria, and elsewhere, and supporting international efforts to hold the perpetrators responsible. Far from being a "foreign-cubed case," the takings at issue constituted and were part of a genocide that threatened American safety and

[3] This brief uses the term "Nuremberg" to refer collectively to the 1945-46 International Military Tribunal's single unified trial of twenty-one defendants and the twelve subsequent trials of Nazi war criminals conducted by the U.S. military occupation authority under Control Council Law No. 10.

security, and had to be addressed through force of arms; they also meet the requirements of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1441(d), 1602 *et seq*. ("FSIA"), for a sufficient link to the U.S. To retreat from U.S. policy to oppose genocide in any country, as the U.S. asks the Court to do here, would wind the clock backwards, undoing major policy advances that began in response to the world-shattering events of World War II.

Finally, with respect to Petitioners' argument that international-comity-based abstention mandates dismissal, comity is an improper basis for allowing Petitioners to avoid answering for past genocidal acts by refusing to litigate genocide-related expropriation claims in Respondents' chosen forum. Given the seriousness of genocide-related takings, it would not be appropriate for the vague and subjective doctrine of comity to give back immunity to foreign nations that Congress took away in the carefully constructed FSIA. The U.S. has long urged courts to decide Holocaust-related disputes on their merits, leading the international effort to adopt the Washington Conference Principles on Nazi-Confiscated Art ("Washington Principles") and enacting the Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524-1525 ("HEAR Act"), as well as other laws, to encourage claimants to come forward and discourage defendants' attempts to avoid liability on non-merit-based arguments.

ARGUMENT

I. Takings That Occurred As Part Of The Nazis' Campaign To Destroy European Jewry Constituted Genocide.

A. Origins and definition of the term "genocide."

The term "genocide" came into existence toward the end of World War II, as the world learned the full scope of Nazi Germany's atrocities and their intended purpose: not merely mass murder of innocents, but total elimination of the Jewish people, including taking their property and destroying their culture. Before the community of nations recognized genocide as a crime, atrocities committed solely inside a particular nation, and directed only against that nation's own nationals and their property, were not subject to the judgment of other countries. Henry Morgenthau, then-U.S. Ambassador to the Ottoman Empire, understood that the U.S. was helpless in the face of the Armenian genocide in Turkey between 1914 and 1923, stating in his memoirs, " . . . I had no right to interfere. According to the cold-blooded legalities of the situation, the treatment of Turkish subjects by the Turkish Government was purely a domestic affair." Menachem Z. Rosensaft, *The Long and Tortured History of Genocide*, Tablet Magazine, Apr. 29, 2019. Likewise, during an August 24, 1941 radio broadcast, Prime Minister Winston Churchill bemoaned the lack of adequate terminology to describe the horrors of the Holocaust, referring to the vast carnage perpetrated by Nazi Germany as "a crime without a name." *Id.*

All of this changed forever with the trials and judgments at Nuremberg and in its aftermath. In 1944, Raphaël Lemkin, a Jewish legal scholar who fled Poland at the outbreak of World War II and found refuge in the United States, conceptualized both the name and scope of such a crime:

> By "genocide" we mean the destruction of a nation or of an ethnic group. . . . [G]enocide . . . is intended [ ] to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.

Id. (citing Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for Int'l Peace, 1944)).[4] The term "genocide" spread rapidly thereafter, as the Allies grappled with meting out justice to those who sought to annihilate Jews and other groups.

Even without a specific treaty establishing genocide as a crime, the U.S. and its wartime allies punished officials of Nazi Germany for their commission of widespread atrocities, including torturing and murdering civilians, arbitrarily arresting and imprisoning individuals without trial, confining prisoners under

---

[4] Hitler's intention to destroy European Jewry in its entirety, and not merely to kill millions of people, is well documented. *See* n.12, *infra*.

unhealthy and inhumane conditions, and expropriating property. On October 1, 1946, the International Military Tribunal ("IMT") sentenced twelve high-level Nazi officials to death, three to life imprisonment, and four to prison terms ranging from ten to twenty years for committing, among others, the then-innovative "crimes against humanity." *See* Brigadier General Telford Taylor, *Final Report to the Secretary of the Army on Nuernberg War Crimes Trials Under Control Council Law No. 10*, at 64 (Aug. 15, 1949) ("Taylor Report").[5] Nuremberg thus solidified the concept that long-term persecution and theft and destruction of property, culminating in mass killings, constituted a crime against humanity.

This crime came to be known as genocide pursuant to a United Nations General Assembly declaration of 1946. United Nations General Assembly, The Crime of Genocide, A/RES/96 (Dec. 11, 1946). That declaration served as the basis for the unanimously adopted Convention on the Prevention and Punishment of the Crime of Genocide, which went into effect on January 12, 1951 ("Convention"). The Convention followed Lemkin's lead in defining genocide to include more

---

[5] The Taylor Report points out that "in the 'Justice Case,' where 'crimes against humanity' committed after 1939 were [] charged against the defendants," the IMT stated that "certain crimes against humanity committed by Nazi authority against German nationals constituted violations not alone of statute but also of common international law." *Taylor Report* at 225-26. The IMT thus accepted that other "states are allowed to interfere in the name of international law if 'human rights' are violated to the detriment of any single race." *Id.* at 226.

than killing and physical injury – specifically mentioning "conditions of life":

> [G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.

Convention, art. 2, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277, 280. The UN's definition has been widely adopted by national governments and international organizations, including the International Criminal Court. *See* Rome Statute of the International Criminal Court, Art. 6, July 17, 1998, 2187 U.N.T.S. 90, eff. July 1, 2002. Today, 150 nations are parties to the Convention and it has provided grounds for genocide trials before international tribunals, such as the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia.

B. Genocide in Nazi Germany.

Petitioners question whether the expropriations that form the basis of Respondents' claims constitute or were part of genocide. These *amici* urge the Court to conclude that they were.

Starting in 1933, immediately upon Hitler's appointment as Chancellor, Germany passed a deluge of laws making it impossible for Jews and other minorities in Germany to live normal lives. *See* Historians' Brief at 4; Lauder Decl. ¶¶5-8. The new government promptly urged "members of the national community" to boycott Jewish businesses, burn non-German books, and purge Jewish employees. *Timeline of Events, 1933-1938*, U.S. Holocaust Memorial Museum.[6] *See also* Historians' Brief at 4 ("Even before they were rendered officially stateless, Jews faced growing statelessness via a creeping curtailment of legal and property rights."). The Third Reich sought not only to marginalize and economically cripple European Jews; its intent was to end their very existence as a people and a culture.

Expropriations of property – businesses, homes, art and cultural objects, Judaica, furniture, jewelry, clothing – were critical incremental steps in the Nazis' effort to exterminate the Jewish people. By removing Jewish families' ability to support themselves, participate in public life in any way, or defend themselves in

---

[6] *See Timeline of Events, 1933-1938*, U.S. Holocaust Memorial Museum, at https://www.ushmm.org/learn/timeline-of-events/1933-1938.

the public arena, the Nazis furthered their goal of first isolating Jews, then ending Jewish lives and Jewish life in Europe. According to Ambassador Lauder, "The Nazis vigilantly tracked, identified, and seized Jewish movable and immovable property as an integral part of their campaign to rid Germany of – as Hitler stated – the 'Jewish race' as a 'race-tuberculosis of the peoples.'" Lauder Decl. ¶6.

As Ambassador Lauder testified during the Senate hearings regarding the HEAR Act, "[w]e know about the mass industrial murder of millions of human beings, but few people know about the mass theft of the victims' property. And even fewer know about the systematic confiscation of priceless works of art by Nazi leaders, including Hitler, Göring, and other top officials." *The Holocaust Expropriated Art Recovery Act – Reuniting Victims with Their Lost Heritage*: *Hearing on S. 2763 Before the Subcomm. on the Constitution and Subcomm. on Oversight, Agency Action, Federal Rights and Federal Courts of the S. Comm. on the Judiciary*, 114th Cong. 114-394 (2016) (statement of Ronald S. Lauder). *See also* Lauder Decl. ¶¶9-11 (same). "'The Nazis . . . achieved [the Final Solution] by first isolating [the Jews], then expropriating the Jews' property, then ghettoizing them, then deporting them to the camps, and finally, murdering the Jews and in many instances cremating their bodies.'" *Simon v. Rep. of Hungary*, 812 F.3d 127, 144 (D.C. Cir. 2016) (citations omitted); *Philipp v. Fed. Rep. of Germany*, 894 F.3d 406, 413 (D.C. Cir. 2018). That is, the "Holocaust proceeded in a series of steps" (*Simon*, 812 F.3d

at 143), each one building on those that came before and setting up the next ones.

This gradually building intensity makes it fundamentally illogical to label early acts, such as the takings in *Philipp*, as non-genocidal and later ones, such as the takings in *Simon*, as genocidal. All the steps undertaken by the Nazis "toward ever more complete and violent exclusion of the Jews. . . . were indispensable steps toward genocide and inseparable from it." Historians' Brief at 7. *See also Simon v. Rep. of Hungary*, 911 F.3d 1172, 1179 (D.C. Cir. 2018) ("Systematically stripping 'a protected group' of life's necessities in order to 'physical[ly] destr[oy]' them is 'genocide.' "). The Nuremberg prosecutors argued to the IMT that property thefts and seizures were part of the broader Nazi scheme of genocide, explaining that "[t]he confiscation of the property of Jews was part of the conspirators' larger program of extermination of the Jews." IMT Nuremberg Transcript, Vol. 3, p. 576 (Dec. 14, 1945), at https://avalon.law.yale.edu/imt/12-14-45.asp. "Property theft and appropriation were not tangential or opportunistic in the Nazi program. . . . [T]hey were central to the purpose of making it impossible for German Jews to continue living in Germany." Historians' Brief at 19. Expropriations of movable property such as those alleged in *Philipp* and *Simon* deprived Jews of valuable resources and fit this understanding of the

Third Reich's strategy to commit genocide with respect to the Jewish population, and were genocidal acts.[7]

C. The United States' strong condemnation of genocide.

U.S. policy has followed the lessons of Nuremberg and the mandate of the Genocide Convention to identify and oppose genocide wherever it arises. The Senate provided its advice and consent for ratification of the Convention in 1986; Congress then passed the Genocide Convention Implementation Act of 1987, 18 U.S.C. §§ 1091-1093. The statute largely adopts the Convention's definition of genocide. In 2011, President Obama's Presidential Study Directive on Mass Atrocities defined the U.S. government's interests: "[p]reventing mass atrocities and genocide is a core national security interest and a core moral responsibility of the United States." Presidential Study Directive/PSD-10 (Aug. 4, 2011), at https://www.hsdl.org/?view&did=690868.

---

[7] The U.S. questions "the extent to which the judiciary can properly be granted the discretion to make foreign policy determinations," such as "whether and to what extent a foreign sovereign has committed a genocide." *Philipp*, U.S. *Amicus* Brief at 27. But the pending cases present no such problem: no party or *amicus* in *Philipp* or *Simon* seriously questions whether genocide took place in Nazi Germany or in Hungary. Also, Congress passed the Genocide Convention Implementation Act in 1988 defining genocide (18 U.S.C. § 1091(a)), then passed the HEAR Act in 2016 defining the Holocaust as "the period beginning on January 1, 1933, and ending on December 31, 1945" (HEAR Act § 4(3)) – a period that encompasses both takings.

More recently, Congress passed the Elie Wiesel Genocide and Atrocities Prevention Act of 2018, Pub. L. No. 115-441, 132 Stat. 5586 (2019) ("Wiesel Act"), which defines "atrocities" as "war crimes, crimes against humanity, and genocide" (§ 6(2)) and requires the President to submit a report to Congress within 180 days of its passage, then annually thereafter for six years, regarding actions undertaken by federal agencies to prevent, mitigate, and respond to atrocities, and to provide a global assessment of ongoing atrocities and countries at risk of atrocities. The Wiesel Act also incorporates the definition of genocide from Section 1091(a) of the Genocide Convention Implementation Act (§ 6(1)). The Wiesel Act does not limit the President's report to Congress to international atrocities, or to mass murder committed outside a state's borders, but plainly states that U.S. policy is to "regard the prevention of atrocities as in its national interest" (§ 3(1)) and urges agencies to act broadly to, among other things, "identify, prevent, and respond to the risk of atrocities" (§ 3(3)).[8]

Likewise, U.S. policy and practice support the international community's efforts to prevent genocide without regard to whether it was within the borders of the perpetrating nation. One such instance to arise under the Genocide Convention Implementation Act

[8] The first Wiesel Act Report was submitted in September 2019. Elie Wiesel Genocide and Atrocities Prevention Report (Sept. 2019), at https://www.whitehouse.gov/wp-content/uploads/2019/09/ELIE-WIESEL-GENOCIDE-AND-ATROCITIES-PREVENTION-REPORT.pdf.

concerned violence in the Darfur region of Sudan, which Congress declared to be state-sponsored genocide. Darfur Peace and Accountability Act, Pub. L. No. 109-344, 120 Stat. 189 (2006). In September 2004, then-Secretary of State Colin Powell testified before the Senate Foreign Relations Committee that "We concluded – I concluded – that genocide has been committed in Darfur and that the Government of Sudan and the Janjaweed bear responsibility – and that genocide may still be occurring." Colin Powell, Testimony Before the Senate Foreign Relations Committee, Washington, DC (Sept. 9, 2004), at https://2001-2009.state.gov/secretary/former/powell/remarks/36042.htm.

The U.S. also opposed genocide in the mass murder perpetrated within the borders of Cambodia by the Khmer Rouge, the armed wing of Cambodia's Communist Party that ruled the country from 1975 to 1979. During that time, the Khmer Rouge killed up to two million Cambodian nationals who were forced out of the cities to labor and internment camps in the countryside. The regime targeted intellectuals and the educated middle-classes, as well as ethnic Vietnamese and Cham Muslims. In 1994, President Clinton signed the Cambodian Genocide Justice Act, Pub. L. No. 103-236, Tit. V, part D, 108 Stat. 486 (1994). Congress intended this law to ensure that the principal perpetrators of the Khmer Rouge's crimes would be brought to trial; the U.S. provided $500,000 for research and collection of information about the crimes. In November 2018, a tribunal formed and operated cooperatively by the new Cambodian government and the UN found three of

Khmer Rouge's former leaders guilty of genocide for the attempted extermination of the Vietnamese and Cham minorities.[9] The U.S. government voiced its support for these genocide convictions, which concerned genocide committed by the Khmer Rouge regime against Cambodian nationals. Press Statement, Office of the Spokesperson, Conviction of Khmer Rouge Leaders Noun Chea and Kieu Samphan (Nov. 16, 2018), at https://www.state.gov/conviction-of-khmer-rouge-leaders-noun-chea-and-khieu-samphan/.

The U.S. also supported findings that Hutu extremists committed genocide against Rwandan nationals within Rwanda where, in just 100 days in 1994, Hutus slaughtered about 800,000 people – mostly members of the minority Tutsi community – in an effort to "weed out the cockroaches." *Rwanda genocide: 100 days of slaughter, BBC* (Apr. 4, 2019), at https://www.bbc.com/news/world-africa-26875506. The UN Security Council established an International Criminal Tribunal for Rwanda, which convicted dozens of former senior officials of committing genocide. *Id.* At a commemoration event in April 2019, a high-level U.S. diplomat stated this country's view that "the genocide in Rwanda" "is one of the darkest moments in our common history as humankind." Dr. J. Peter Pham, Special Envoy for the Great Lakes Region of

[9] *See generally Khmer Rouge: Cambodia's years of brutality*, BBC (Nov. 16, 2018), at https://www.bbc.com/news/world-asia-pacific-10684399; *A Tribunal for Cambodia*, U.S. Holocaust Memorial Museum, at https://www.ushmm.org/genocide-prevention/countries/cambodia/case-study/justice/tribunal (last visited Oct. 19, 2020).

Africa, *Remarks for Kwibuka 25* (Apr. 7, 2019), at https://www.state.gov/remarks-for-kwibuka-25/.[10]

In 2018, Congress offered protection to members of religious and ethnic minority groups within Iraq and Syria (primarily Christians, Yezidis, and Shia) from genocide. Iraq and Syria Genocide Relief and Accountability Act of 2018, Pub. L. No. 115-300, 132 Stat. 4390 (2018). The law authorizes the Secretary of State and the U.S. Agency for International Development ("USAID") to provide assistance "to address genocide, crimes against humanity, or war crimes, and their constituent crimes by ISIS [the Islamic State of Iraq and Syria] in Iraq by," among other things, conducting criminal investigations and collecting evidence for criminal prosecutions. *Id.* § 5. *See also* H.R. Con. Res. 75, 114th Cong. (2016) & H.R. Res. 259, 116th Cong. (2019) (concluding that ISIS committed genocide against Yezidis, Christians, and Shia Muslims). In July 2018, the Trump Administration announced the formation of the Genocide Recovery and Persecution Response Program within USAID to help ethnic and religious minorities in Iraq restore their communities. *See* Vice President Michael Pence, Ministerial to Advance Religious Freedom, Washington, DC (July

[10] At the same time, the United States has been criticized for departing from traditional U.S. policy by failing to intervene at the time, despite apparently knowing that the Hutus were exterminating the Tutsis, a lapse for which President Clinton later expressed regret. *See* Samantha Power, *Bystanders to Genocide*, The Atlantic (Sept. 2001), at https://www.theatlantic.com/magazine/archive/2001/09/bystanders-to-genocide/304571/.

26, 2018), at https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-ministerial-advance-religious-freedom/ ("[T]he United States of America, I promise you, will always call ISIS brutality what it truly is: It is genocide, plain and simple.").

Finally, the U.S. House of Representatives has adopted resolutions condemning certain crimes as genocide, such as the Srebrenica massacre (H.R. Res. 310, 116th Cong. (2015)), and actions by Myanmar's security forces against Rohingya Muslims (H. Res. 1091, 115th Cong. (2018)), without regard to whether the genocide was purely domestic.[11]

In sum, the Executive and Legislative branches have directly and actively opposed genocide, whether it took place domestically or outside the perpetrator nation's borders, or was carried out by a fictive state such as ISIS. The U.S. has taken the strong and consistent position that genocidal acts harm not only the victims, but also the world community, and threaten the national security of the U.S. *See* Lauder Decl. ¶¶4, 12-13.

---

[11] The Myanmar government's actions paralleled Nazi Germany's in many respects, such as forcing members of the Rohingya Muslim minority to accept identity cards that categorized them as foreigners, thus stripping them of the chance to become citizens. The Third Reich likewise deprived Jews of German citizenship, a step which gave nominal legal cover to the widespread seizures of Jewish businesses and property – one of the earliest steps taken toward the Nazis' plan to isolate Jews and put them on a path to extermination.

II. A Foreign State's Domestic Takings That Occur As Part Of, Or Effectuate, Genocide Constitute A Violation Of International Law.

A. On its face, the FSIA supports the lower court's ruling that it may assert jurisdiction over Petitioners in both cases.

The plain language of the FSIA provides that when a civil action is premised upon a taking that violates international law, a U.S. court may assert jurisdiction over the foreign sovereign accused of effectuating that taking, assuming a sufficient connection between this country and the claim.

Although the language of the FSIA could not be clearer, Petitioners in *Philipp* add words and concepts not found in the text of the statute to argue that a state's taking of property from its own nationals does not violate international law under the FSIA's expropriation exception, 28 U.S.C. § 1605(a)(3). Petitioners reach this remarkable conclusion by claiming that only takings that violate the *international law* ***of takings*** may be addressed by a U.S. court. Pet. Brief at 22. Congress, however, did not so limit the "violation of international law"; on FSIA's face and by its plain language, the words are not limited to the international law of takings but rather encompass *any* violation of international law committed in connection with the taking. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 436 (1989) ("Congress had violations of international law by foreign states in mind when it enacted the FSIA. For example, the FSIA

specifically denies foreign states immunity in suits 'in which rights in property taken in violation of international law are in issue.' 28 U.S.C. 1605(a)(3)."). *See also Bostock v. Clayton Cty.*, 590 U.S. ___, 140 S. Ct. 1731, 1749 (2020) (a statute's application may reach " 'beyond the principal evil' legislators may have intended or expected to address. . . . But 'the fact that [a statute] has been applied in situations not expressly anticipated by Congress' does not demonstrate ambiguity; instead, it simply 'demonstrates [the] breadth' of a legislative command.") (internal citations omitted).

To support its flawed interpretation of the FSIA, *Philipp* Petitioners misdescribe the Respondents' claims: claimants are *not* suing to address violations of human rights, nor are they seeking to remedy personal injury or death caused by genocide. Following the classic parameters of the FSIA, Respondents sue to remedy takings of property that constituted or advanced genocide, thus violating international law. The FSIA provides in plain language that a foreign sovereign is not immune for any case "in which rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3).

Taking an alternative tack, the U.S. claims that the FSIA cannot possibly mean what it says – that immunity is waived for takings of property in violation of international law – because Congress did not *also* waive jurisdiction for human rights claims. *Phillip*, U.S. *Amicus* Brief at 7-8. For this reason, the U.S. finds the plain language of the FSIA illogical (*id.*); however,

Congress chose to address improper takings in the statute and its decision not to write a broader law does not change the plain meaning of the words it used. The U.S. further argues that the meaning of "taking" at the time of the FSIA's passage in 1976 – according to the Restatement (Second) of Foreign Relations Law of the United States § 192, at 572 (1965) – was "[c]onduct attributable to a state that is intended to, and does, effectively deprive *an alien* of substantially all the benefit of his interest in property." *Phillip*, U.S. *Amicus* Brief at 15 (emphasis original). The statutory language does not indicate that Congress applied this constrained definition of "taking" or that this limited meaning should be inferred. Congress used the word in its usual, ordinary sense. The FSIA's expropriation exception plainly removes foreign sovereign immunity in cases where takings violate international law – not just the international law of takings or takings affecting aliens.

B. U.S. courts consistently take the view that genocide must be treated differently.

Nazi Germany's systematic persecution of Jews and other groups within its own borders and elsewhere, including Hungary's high-speed destruction of more than half of its Jewish population, constituted genocide and violated international law. To argue that the FSIA does not provide jurisdiction over such claims is inimical to long-standing U.S. policy and practice regarding genocide dating back to the Nuremberg indictments and judgments that relied on the predecessor

language "crimes against humanity," and is belied by U.S. courts' near unanimous condemnation of genocide – regardless of where that genocide takes place. *See de Csepel v. Republic of Hungary*, 859 F.3d 1094 (D.C. Cir. 2017), *reh'g denied*, No. 16-7042 (D.C. Cir. Oct. 4, 2017) (interpreting the expropriation exception to allow U.S. courts to hear claims by victims against their own governments for property losses arising from genocide, since genocide is a violation of international law); *Fischer v. Magyar Allamvasutakt Zrt.*, 777 F.3d 847, 858 (7th Cir. 2015) ("genocide is so different and so universally condemned by international law that plaintiffs' allegations of takings as an integral part of and a means of funding the genocidal campaign against Hungary's Jews should not be subject to the domestic takings rule. . . . [T]he strong links to genocide . . . led us to find that plaintiffs had alleged takings in violation of international law."); *Mezerhane v. Republica Bolivariana de Venezuela*, 785 F.3d 545, 551 (11th Cir. 2015) (distinguishing cases that did not apply domestic takings rule because they involved genocidal takings); *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 675 (7th Cir. 2012) ("All U.S. courts to consider the issue recognize genocide as a violation of customary international law."); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) ("The universal and fundamental rights of human beings identified by Nuremberg – rights against genocide, enslavement, and other inhumane acts – are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*. . . . [*J*]*us cogens* norms . . . enjoy the highest status within international law." (citations and

internal quotations omitted)); *Davoyan v. Republic of Turkey*, 116 F. Supp. 3d 1084, 1101, 1103 (C.D. Cal. 2013) ("It is settled in the Ninth Circuit that genocide violates international law. . . . [T]o establish subject matter jurisdiction under the FSIA, Plaintiffs must prove that the actions of the [defendant] amounted to 'genocide,' because only that type of egregious conduct would violate international law."). *Cf. Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 759 (9th Cir. 2011) (en banc) ("Claims of genocide, therefore, fall within the limited category of claims constituting a violation of internationally accepted norms for [Alien Tort Statute] jurisdiction."); *In re Estate of Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory.").

Consistent with these decisions, the D.C. Circuit held that Nazi expropriations "did more than effectuate genocide or serve as a means of carrying out genocide. Rather, we see the expropriations *as themselves genocide*." *Simon*, 812 F.3d at 142. Indeed, stripping Jews and other victimized groups of their property including personal effects was part and parcel of the Nazis' genocidal campaign. Holocaust survivor and Nobel Laureate Elie Wiesel observed that the Nazis effectuated genocide not only through war and physical violence, but also by ensuring that victims were financially crippled, remarking, "Only later did I realize that what we so poorly call the Holocaust deals not only with political dictatorship, racist ideology and military conquest, but also with financial gain, state-organized

robbery, or just money." Holocaust Era Assets: Conference Proceedings, June 26-30, 2009, at 63 (2000), at http://www.commartrecovery.org/docs/PragueConference Proceedings.pdf. *See also* Justice for Uncompensated Survivors Today Act of 2017, Pub. L. No. 115-171, 132 Stat. 1288 (2018) ("JUST Act"), JUST Act Report, Bureau of European and Eurasian Affairs (March 2020), at https://www.state.gov/wp-content/uploads/2020/02/JUST-Act5.pdf, at Foreword ("The Holocaust was also one of the largest organized thefts in human history. The Nazi regime's confiscation, seizure, and wrongful transfer of the Jewish people's property were designed . . . to permanently eliminate all aspects of Jewish cultural life."). The District Court for the Central District of California similarly explained:

> *Expropriating property from the targets of genocide has the ghoulishly efficient result of both paying for the costs associated with a systematic attempt to murder an entire people and leaving destitute any who manage to survive.* The expropriations alleged by plaintiffs in these cases – the freezing of bank accounts, the straw-man control of corporations, the looting of safe deposit boxes and suitcases brought by Jews to the train stations, and even charging third-class train fares to victims being sent to death camps – should be viewed, at least on the pleadings, as an integral part of the genocidal plan to depopulate Hungary of its Jews. The expropriations thus effectuated genocide in two ways. They funded the transport and murder of Hungarian Jews, and they impoverished those who survived,

> depriving them of the financial means to reconstitute their lives and former communities.

Davoyan, 116 F. Supp. 3d at 1101-02 (emphasis added). *See also Simon*, 812 F.3d at 143 ("The Holocaust's pattern of expropriation and ghettoization" was a "wholesale plunder of Jewish property . . . aimed to deprive Hungarian Jews of the resources needed to survive as a people") (internal quotations omitted).

This point is particularly significant in *Philipp*, in which Petitioner argues (Pet. Brief at 19) that because the claim concerns only cultural objects, and the sale of the Guelph Treasure occurred in 1935 – before Nazi Germany formally deprived Jews of their citizenship via the Nuremberg laws, before the fate of Europe's Jews was sealed at the Wannsee Conference,[12] and before the Third Reich, although already murderous, had begun systematically killing Jews on an industrial scale – that sale should not be considered part of the Nazis' genocidal campaign. The D.C. Circuit rejected that argument out-of-hand, recognizing that the Nazis' actions to effectuate the Holocaust cannot be divided into genocidal and pre-genocidal depredations, but are best understood as always proceeding toward the same

---

[12] At the Wannsee Conference on January 20, 1942, Reinhard Heydrich, chief of the Reich Security Main Office, presented plans for the "Final Solution of the Jewish Question." "The 'Final Solution' was the code name for the systematic, deliberate, physical annihilation of the European Jews." Hitler authorized this scheme for mass murder sometime in 1941. *Timeline of Events, 1942-1945*, U.S. Holocaust Memorial Museum, at https://www.ushmm.org/learn/timeline-of-events/1942-1945/wannsee-conference.

goal: the mass extermination of the Jewish people and their culture. *Philipp*, 894 F.3d at 413.[13]

C. Genocide violates international law regardless of geography.

The view espoused by Petitioner Germany – and disturbingly, by the U.S. – that Nazi Germany did not violate international law when it committed genocide within its own borders (*Philipp*, Pet. Brief at 12-13; *Philipp*, U.S. *Amicus* Brief at 15-16) is also inconsistent with historic U.S. policy. The idea that domestic takings do not violate international law, even when they are conducted in furtherance of genocide, contradicts the positions the U.S. has taken for decades against genocide, beginning with the Nuremberg trials. *See* Lauder Decl. ¶¶12-13. As well-stated in the Taylor Report, "the concept of 'crimes against humanity' comprises atrocities which are part of a campaign of discrimination or persecution, and which are crimes against international law even when committed by nationals of one country against their fellow nationals or against those of other nations irrespective of belligerent status." *Taylor Report* at 66. *See also U.S. v. Altstoetter, et al.* (Justice Case), 3 Trials of War Criminals Before the Nurenberg Military Tribunals Under Control Counsel Law No. 10 p. 973 (1951) ("acts by Germans against German nationals may constitute crimes

---

[13] Likewise, whether a taking was a forced deprivation (*Simon*) or a forced sale (*Philipp*) is immaterial to the question of genocidal takings; both qualify. *Philipp*, 894 F.3d at 412.

against humanity within the jurisdiction of this Tribunal to punish.").

Numerous legislative and executive branch actions since Nuremberg demonstrate the United States' commitment to restitution of Holocaust art thefts. In 2016, Congress passed the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, Pub. L. No. 114-319, 130 Stat. 1618 (2016), which amended the FSIA to provide immunity to foreign sovereigns for certain art exhibition activities (28 U.S.C. § 1605(h)(1)), while carving out Nazi-era claims from that immunity (28 U.S.C. § 1605(h)(2)). Notably, the Act also excludes "other culturally significant works" from immunity when a claimant alleges that such works were "taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group." 28 U.S.C. § 1605(h)(2)(B)(ii). Such language indicates that Congress was aware that takings of art and other objects of cultural significance (28 U.S.C. § 1605(h)(3)) have historically been part of genocide, and also that Congress allows courts to address those takings in the context of loans to U.S. institutions from foreign museums.

Immediately thereafter, in 2018, Congress passed the JUST Act, which requires the State Department to submit a report to Congress on countries' progress in implementing the goals of the Terezin Declaration (issued by forty-six countries in 2009 to renew their commitment to the Washington Principles; *see infra*), and to identify implementation gaps and serve as a model

of best practices to fulfill commitments that countries, including the United States, took upon themselves by endorsing the Terezin Declaration. Pub. L. No. 115-171, § 2(b). The JUST Act also encourages the Secretary of State to continue to report to Congress on Holocaust-era assets and related issues. *Id.* § 2(c).

Perhaps most notably, Congress passed the HEAR Act in 2016, which gives claimants six years after actual discovery of the whereabouts of stolen art to file a claim. HEAR Act § 5(a). Prior to the HEAR Act, "governments, museums, auction houses and unscrupulous collectors allowed [an] egregious theft of culture and heritage to continue, imposing legal barriers like arbitrary statutes of limitations to deny families prized possessions stolen from them by the Nazis." Press Release, Ronald S. Lauder, World Jewish Congress (Dec. 19, 2016), at http://art.claimscon.org/home-new/looted-art-cultural-property-initiative/advocacy/holocaust-expropriated-art-recovery-hear-act-signed-u-s-law/. By establishing a generous national statute of limitations for claims to Nazi-looted art and cultural objects, Congress has ensured that, where possible, defendants cannot rely merely on the passage of time to avoid responsibility for such claims. Congress also made clear its intent that claims of takings of art associated with the Nazis' genocide be addressed on their merits in U.S. courts. *See id.* ("This important law will help victims of Nazi looting find justice and peace. No longer will legal technicalities bar families from having their claims heard on their merits.").

D. The international community treats genocide as a distinct and particularly heinous crime.

Interpreting the FSIA to include genocide as a "violation of international law" is entirely consistent with U.S. law and policy, and does not put the U.S. in a category by itself among the world's nations, as Petitioner Germany would have this Court believe. Since World War II, beginning with the UN Genocide Declaration and Convention, the world has accepted the view that genocide is different from other crimes and should be treated accordingly.

This Court itself has acknowledged that: "To be sure, there are fair arguments to be made [under the FSIA] that a sovereign's taking of its own nationals' property sometimes amounts to an expropriation that violates international law, and the expropriation exception provides that the general principle of immunity for these otherwise public acts should give way." *Bolivarian Republic of Venezuela v. Helmerich & Payne*, 581 U.S. ___, 137 S. Ct. 1312, 1321 (2017). Respondents in both *Philipp* and *Simon* present "fair arguments" (*id.*) that Petitioners' takings of their own nationals' property during the Holocaust amounted to an expropriation that violates international law.

Germany's taking in *Philipp*, as alleged, violates multiple principles of illegal expropriation under international law: it refused to pay just compensation for the Guelph Treasure, and the taking was a discriminatory act against the primarily Jewish consortium of art

dealers that owned the collection. *See* Restatement (Second) § 185 & cmt. a. That the transaction occurred in 1935 does not alter this analysis; as the U.S. recognizes, the Holocaust started as soon as Hitler came to power in January 1933, when Germany began to marginalize Jews and deprive them of the ability to participate in commercial and cultural life of the country and sustain themselves. HEAR Act § 4(3) ("The term 'covered period' means the period beginning on January 1, 1933, and ending on December 31, 1945."). As other *amici* have noted, by 1935 Jewish individuals in Germany lacked full legal rights and remedies, and the consortium members were not in a position to negotiate just compensation for the Treasure. *See* Historians' Brief at 3, 5 ("[T]he Holocaust . . . unfolded between 1933-1935, especially with respect to Jews in business, and particularly in the art market in Germany. . . . '[N]o sale of Jewish property under the Nazi regime was voluntary in the sense of a freely negotiated contract in a free society.' ") (internal citation omitted).

Respondents in *Simon* present equally "fair arguments" (*Helmerich*, 137 S. Ct. at 1321) that Petitioner Hungary's takings of its own nationals' property, literally on their way to their deaths, amounted to an expropriation that violates international law. "In 1944 alone, a concentrated campaign by the Hungarian government marched nearly half a million Jews into Hungarian railroad stations, divested them of all their personal property and possessions, forced them onto trains, and transported them to death camps like Auschwitz, where 90% of them were murdered upon

arrival" (*Simon*, 812 F.3d at 133-34 (internal quotation marks and citation omitted)) – one of the most heinous episodes of the Holocaust. A genocide-related expropriation that more starkly violates international law can hardly be imagined.

The United States has long recognized genocide as a separate category of wrong and a particularly appalling crime deserving universal condemnation and international response. Congress adopted the FSIA to address, among other things, property crimes committed against this kind of background, and should not now be used as a tool with which to immunize thefts associated with indefensible violence, mass murder, and the attempted destruction of a people and their culture.

III. U.S. Law And Policy Favor Resolving Holocaust-Related Claims On Their Merits, Therefore Comity Is An Improper Basis For Dismissing Respondents' Claims In Both Cases.

A. For genocide-related cases, the FSIA displaced comity as a defense to jurisdiction for foreign sovereigns.

The D.C. Circuit ruled that the FSIA leaves "no room" for a court to abstain from exercising jurisdiction as a matter of international comity. *Philipp*, 894 F.3d at 416. Indeed, as other *amici* argue, Congress intended the FSIA "to free the Government from case-by-case diplomatic pressures, to clarify the governing

standards, and to 'assure litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.'" Estreicher & Lee *Amicus* Brief at 10, *citing Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 488 (1983) (internal citations omitted). In a case growing out of genocide, allowing international-comity-based abstention would disregard Congress' intent.

In genocide-related cases, if jurisdiction exists under the FSIA, America's interest in a thorough adjudication is so great that comity provides an insufficient basis for a U.S. court to refuse to exercise jurisdiction over claims lodged against a foreign sovereign. As described above, Congress has determined that genocide anywhere is against the national interests of the United States. Genocide threatens national security, infringes on the human rights of wide swaths of people, and counters American interests in spreading peace and supporting democracy. A court's determination that a case grows out of genocide establishes that the interests of the U.S. predominate and comity-based abstention would not be justified.

B. Holocaust cases should be decided on their merits whenever practicable.

It is particularly inappropriate to apply comity in *Philipp* and *Simon*, both of which, as alleged, arise from Holocaust takings. The U.S. has long urged courts to decide Holocaust-related cases based on their merits. In 1998, then-Under Secretary of State for Economic,

Business and Agricultural Affairs Stuart Eizenstat hosted the Washington Conference on Holocaust-Era Assets, intended to support efforts by proper owners to recover art stolen during the Holocaust or to obtain equitable settlements. The forty-four governments participating in the Conference endorsed the eleven Washington Principles for dealing with Nazi-confiscated art, calling for claims to be resolved on their merits. *See* Principles on Nazi-Confiscated Art, The Washington Conference on Holocaust Era Assets (Dec. 3, 1998), at https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/. ("If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution. . . ."). That same year, the U.S. enacted the Holocaust Victims Redress Act, Pub. L. No. 105-158, Tit. II, § 202, 112 Stat. 17 (1998), which affirmed the Washington Principles and pressed "all governments [to] undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner."

The 10th anniversary of the Washington Conference was commemorated by a June 2009 conference in Prague that closed with approval of the Terezin Declaration on Holocaust Era Assets and Related Issues by forty-six countries, again including the United States. The signatories affirmed their commitment to assist

Holocaust survivors and Jewish communities to identify and reclaim their properties. Terezin Declaration, Prague Holocaust Era Assets Conference (June 30, 2009), at https://2009-2017.state.gov/p/eur/rls/or/126162.htm (reaffirming the countries' commitment to the Washington Principles' goal to "facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties.").

Both the Washington Principles and the Terezin Declaration incorporate U.S. policy that Holocaust restitution claims should be decided on their merits whenever possible. These *amici* respectfully urge the Court to follow this well-established U.S. policy and reject the application of comity here. Affirming the D.C. Circuit's decisions in both *Philipp* and *Simon* is appropriate under the FSIA to enable Holocaust victims and their families to pursue meaningful justice, and principles of comity should not dictate a contrary result.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgments of the Court of Appeals in *Philipp* and *Simon*.

Respectfully submitted,

THOMAS R. KLINE
Counsel of Record
L. EDEN BURGESS
CULTURAL HERITAGE PARTNERS, PLLC
2101 L Street NW, Suite 800
Washington, DC 20037
(202) 567-7594
tom@culturalheritagepartners.com

Counsel for Amici Curiae

October 29, 2020