# NOTE

## Genocidal Takings and the FSIA: Jurisdictional Limitations

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*Claims brought under 28 U.S.C. § 1605(a)(3)—the international takings exception of the Foreign Sovereign Immunities Act—allege some type of expropriation. Although expropriations are generally considered to be sovereign activity, this statutory exception provides that a foreign state shall not be immune from the jurisdiction of state and federal courts in the United States when the foreign state has taken property rights in violation of international law and the property at issue has a commercial-activity nexus with the United States. Until recent years, domestic and foreign courts have generally interpreted expropriation claims according to state responsibility and the international law of expropriation, which stipulates that a taking in violation of international law means an uncompensated taking (takings without prompt, adequate and effective payment) or a taking that is discriminatory or arbitrary in nature. However, some federal courts have rendered an unreasonable interpretation of § 1605(a)(3) to include some variation of genocidal takings: takings that effectuate genocide or are integral to genocide, or takings that constitute genocide.*

*Based on the legislative history, international law practice, and American constitutional law, Congress did not intend to use § 1605(a)(3) to cover international human rights abuses and, particularly, takings in the context of genocide. Had Congress intended § 1605(a)(3) to encompass allegations of genocide, it could have easily chosen language to achieve such a purpose. Similarly, rulings by the Supreme Court concerning § 1605(a)(3) have emphasized the significance of standards under customary international law and provide scant support for a lower court's reading of genocidal takings. More fundamentally, a reading of genocidal takings raises sensitive foreign policy issues that are principally entrusted to the political branches responsible for the conduct of international relations—not the judiciary. This Note argues that § 1605(a)(3) provides U.S. courts with jurisdiction only for a plaintiff's claim based on the traditional prohibition, under international law, against a foreign state's taking of property without compensation—not for human rights violations. Fairly*

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*read, the language of § 1605(a)(3) is clear, and an interpretation of genocidal takings exceeds the jurisdictional limits of the FSIA.*

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## INTRODUCTION

Oskar Moll commissioned his art teacher, Henri Matisse, to paint a portrait of his wife, Greta Moll, which he then purchased from Matisse in 1908.[1] Greta Moll sat for ten three-hour sessions during which Matisse created the renowned "Portrait of Greta Moll" which was inspired by a work from Italian Renaissance artist Paolo Veronese.[2] The Molls transferred the painting for safe deposit in Switzerland to protect the painting from looting during World War II; however, without authorization, an intermediary illegally sold the painting.[3] After the death of the couple and subsequent change of hands, the National Gallery of Art in London acquired the painting.[4]

In 2016, heirs of Greta Moll filed a lawsuit against both Great Britain and the National Gallery alleging that the painting was stolen and demanding its return.[5] Because Great Britain and the National Gallery (which is an instrumentality owned by Great Britain) fall within the FSIA's statutory definition of a foreign state, the Foreign Sovereign Immunities Act of 1976 (FSIA) applied to the plaintiffs' claims.[6] The FSIA[7] provides immunity from U.S. jurisdiction to foreign states unless an enumerated statutory exception is applicable.[8] One of the statutory exceptions alleged in the case was the FSIA's expropriation exception, which provides that a foreign state shall not be immune from jurisdiction in any case involving "property taken in violation of international law."[9] Unfortunately for Moll's heirs, however, the federal district court rejected their argument that the failure of a foreign sovereign to return property stolen by a private individual was a "taking" that fell within the scope of the FSIA.[10]

Unsurprisingly, the court's interpretation of the expropriation exception invoked customary international law and explained that Congress is responsible for setting the jurisdictional boundaries of the FSIA. "[A]dopting Plaintiffs'

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1. Williams v. Nat'l Gallery of Art, No. 16-CV-6978 (VEC), 2017 WL 4221084, at *1 (S.D.N.Y. Sept. 21, 2017).

2. Jonathan Stempel, *London's National Gallery Prevails in 'Stolen' Matisse Lawsuit: New York Judge*, REUTERS (Sept. 21, 2017, 5:30 PM), https://www.reuters.com/article/us-matisse-lawsuit/londons-national-gallery-prevails-in-stolen-matisse-lawsuit-new-york-judge-idUSKCN1BW2ZY [https://perma.cc/WPM9-2JZQ].

3. *See Williams*, 2017 WL 4221084, at *1.

4. *See id.*; *see also* Stempel, *supra* note 2.

5. *Williams*, 2017 WL 4221084, at *2. Three of Greta Moll's heirs alleged several causes of action, including "conversion, replevin, constructive trust, restitution based upon unjust enrichment, and declaratory relief." *Id.* Great Britain and the National Gallery both responded with "Rule 12(b)(1) challenge[s] to jurisdiction under [the] FSIA." *Id.* at *3.

6. *See id.* at *2.

7. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in 28 U.S.C. § 1602–1611 (2012)).

8. *See id.* at § 1602; *see also* § 1605 (listing the "exceptions to the jurisdictional immunity of a foreign state"). The FSIA defines the term "foreign state" to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." *Id.* at § 1603(a).

9. *Id.* at § 1605(a)(3).

10. *Williams*, 2017 WL 4221084, at *3–5. The court stated that the FSIA "does not cover a sovereign retaining property initially taken by a private individual." *Id.* at *4.

interpretation of the expropriation exception would not only defy Congress's intent to limit and specifically define the expropriation exception but it would also deviate from the exceptions to sovereign immunity generally recognized by international law . . . ."[11] Furthermore, such an interpretation "would significantly expand the expropriation exception" and "undermine Congress's goal to minimize irritations in foreign relations arising out of litigation."[12] As such, the court determined that it did not have jurisdiction pursuant to the expropriation exception.[13]

Some courts, however, have interpreted the expropriation exception to establish jurisdiction for a foreign state's taking that effectuates the international human rights violation of genocide.[14] In *Phillip v. Federal Republic of Germany*, Jewish art dealers sued Germany and Stiftung Preussischer Kulturbesitz, an instrumentality of Germany, for coercion in the sale of eighty-two medieval reliquary and devotional objects known as the "Welfenschatz."[15] The court concluded "that Plaintiffs sufficiently pled the taking of the Welfenschatz was part of the genocide of the Jewish people during the Holocaust and, accordingly, violated international law."[16] In other words, the court found that the taking of the Welfenschatz "bears a sufficient connection to genocide such that the alleged coerced sale may amount to a taking in violation of international law."[17]

A reading of "genocidal takings"[18] into the expropriation exception raises red flags because it signals that U.S. courts are, essentially, international human rights courts—an interpretation that overrides congressional and presidential prerogatives and jeopardizes the United States' diplomatic relations. The FSIA entitles foreign states to jurisdictional immunity in federal and state courts of the United States subject to specific exceptions.[19] Yet, this fact has not dissuaded some federal courts from holding that the FSIA's expropriation exception encompasses a foreign state's expropriation of property that constitutes genocide or is integral to genocide.[20] This conclusion, however, is not supported by the text of the FSIA

11. *Id*. at *5.

12. *Id*.

13. *Id*. The court then dismissed the plaintiffs' complaint with prejudice for lack of jurisdiction over the National Gallery and Great Britain. *Id*. at *5–6.

14. *See, e.g*., de Csepel v. Republic of Hungary, 859 F.3d 1094, 1101–02 (D.C. Cir. 2017); Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 674–75 (7th Cir. 2012); Davoyan v. Republic of Turkey, 116 F. Supp. 3d 1084, 1101–02 (C.D. Cal. 2013).

15. 248 F. Supp. 3d 59, 64–66, 70 (D.D.C. 2017) ("Here, Plaintiffs allege that the 1935 sale was made under duress as part of the Nazi's systematic organized plunder of Jewish property in furtherance of the genocide of the Jewish people during that time.").

16. *Id*. at 70.

17. *Id*. at 71. The Court found that it had subject-matter jurisdiction under the FSIA's expropriation exception for five specific claims alleged by the plaintiffs. *Id*. at 74.

18. Simon v. Republic of Hungary, 812 F.3d 127, 145 (D.C. Cir. 2016).

19. *See* 28 U.S.C. § 1605 (2012) (setting out "[g]eneral exceptions to the jurisdictional immunity of a foreign state").

20. *See* Davoyan v. Republic of Turkey, 116 F. Supp. 3d 1084, 1101 (C.D. Cal. 2013) (considering "whether a state's systematic expropriation of its nationals' property in conjunction with an overall alleged genocidal scheme can establish jurisdiction under the FSIA's international takings exception").

nor what Congress intended when enacting the FSIA. It is incumbent upon Congress to amend the FSIA's expropriation exception before a court obtains jurisdiction over a plaintiff's claim against a foreign state for genocidal takings.

This Note addresses the expropriation exception of the FSIA and argues that the legislative history is clear and, until now, was clearly understood by the judiciary: the exception includes only takings that are expropriations or nationalizations without prompt, adequate, and effective payment, which includes arbitrary and discriminatory takings. There is no special rule for takings in the context of genocide. Yet, nothing is preventing the United States from adopting such a rule. The decision to amend jurisdictional boundaries, however, must be made by the legislature, not the judiciary.

Part I of this Note reviews the historical background of the FSIA's expropriation exception. Part II then defines each component of the expropriation exception and explains its scope. Part III evaluates recent developments affecting the expropriation exception and other considerations based on customary international law. Part IV demonstrates why, given statutory interpretation, the customary international law norm of state responsibility, the international law of expropriation, and American constitutional law, the FSIA's expropriation exception does not confer jurisdiction for claims of genocidal takings. Finally, Part V examines federal cases and concludes that, because of the constitutional allocation of foreign affairs power to the political branches and the shifting approach to foreign sovereign immunity abroad, Congress must amend the FSIA's expropriation exception to reach human rights abuses before courts interpret "rights in property taken in violation of international law" to encompass allegations based upon genocide.

## I. THE EXPRESS PURPOSE OF THE FSIA'S EXPROPRIATION EXCEPTION

A long held and widely embraced principle of customary international law is that one foreign sovereign maintains immunity in the jurisdiction of another foreign sovereign.[21] Today, a majority of foreign states have made a transition to the restrictive theory of sovereign immunity, meaning that foreign states are not immune from jurisdiction for their commercial activities,[22] which the United

21. *See* United States v. Diekelman, 92 U.S. 520, 524 (1875).

> A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in performance of his obligations, by treaty or otherwise, voluntarily assumed. Hence, a citizen of one nation wronged by the conduct of another nation, must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered.

*Id.*

22. This theory differentiates a foreign state's private acts from its public acts. *See* Mary Kay Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385, 385 (1982); *see also* LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 821 (5th ed. 2014). Although most states have adopted this view, a few global superpowers, including China, have not made a complete transition. Russia has indicated acceptance of the restrictive theory, while China's position indicates that it has not necessarily abandoned the former absolute theory of sovereign immunity. *Id.* at 824–25.

States codified through the passage of the FSIA. The FSIA is a jurisdictional statute that first presumes that a foreign state is immune from jurisdiction in the courts of the United States[23] and then limits that presumptive immunity through certain exceptions.[24] The expropriation exception is set forth in 28 U.S.C. § 1605(a)(3).[25] This Part surveys the historical background before enactment of the FSIA and details the legislative history of §1605(a)(3).

### A. CODIFYING THE RESTRICTIVE THEORY OF SOVEREIGN IMMUNITY

In the early 1800s, Chief Justice Marshall crystallized the absolute theory of immunity based on territory in *Schooner Exchange v. McFaddon*.[26] His opinion is commonly regarded as the source of American foreign sovereign immunity jurisprudence and served as the standard for more than a century.[27] It provided that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."[28] Chief Justice Marshall continued,

> The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.[29]

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23. 28 U.S.C. §§ 1602, 1604 (2012). Foreign states are immune unless an exception applies. Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993) (citing Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 488–89 (1983)). A foreign state is inclusive of political subdivisions, agencies and instrumentalities, such as a majority-owned corporation or subsidiary. It does not include any individual who was or is a current foreign government official. Samantar v. Yousuf, 560 U.S. 305, 315–16 (2010).

24. A claim of sovereign immunity raises a jurisdictional defense, not a substantive defense on the merits. *See* Republic of Austria v. Altmann, 541 U.S. 677, 700 (2004). It is also the sole basis for initiating a civil action against a foreign state in federal and state courts. *See, e.g.*, Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439 (1989); Garb v. Republic of Poland, 440 F.3d 579, 581 (2d Cir. 2006) (affirming lower court's dismissal of plaintiff's claims because the commercial transactions involving expropriated property did not meet the subject matter jurisdiction requirement).

25. The term "expropriation" is interchangeable with "takings." *See* Comparelli v. República Bolivariana de Venezuela, 891 F.3d 1311, 1315 (11th Cir. 2018).

26. 11 U.S. (7 Cranch) 116, 137 (1812). American owners claimed that French nationals forcibly seized a vessel originally belonging to them on the high seas in violation of the law of nations, and the Americans sought to gain ownership when the vessel was stationed in a Pennsylvanian port. The issue presented was "whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States." *Id.* at 135. The Court noted that a "principle of public law" was that "national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from jurisdiction." *Id.* at 145–46.

27. *See, e.g.*, *Altmann*, 541 U.S. at 688; *Verlinden B.V.*, 461 U.S. at 486.

28. *Schooner Exchange*, 11 U.S. (7 Cranch) at 136 (explaining that any restriction imposed on a nation's jurisdiction "deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction").

29. *Id.* at 136.

Historically, the norm was jurisdictional immunity regardless of the nature of the foreign sovereign's activity.[30] In 1952, however, the infamous Tate Letter[31] evaluated the source of foreign sovereign immunity doctrine in response to the spread of commercial activities among sovereigns.[32] This letter, issued by the State Department, formally announced the United States' adoption of the "restrictive" theory of sovereign immunity: the theory that foreign states will no longer be accorded immunity when conducting commercial activities.[33] Other foreign states gradually adopted the restrictive theory of sovereign immunity during the first half of the twentieth century by distinguishing public acts from private acts.[34] The Tate Letter documented how the impact of globalization on trans-border commercial transactions underscored deficiencies in the absolute theory of sovereign immunity.[35] As a result of the policy change, the State Department participated in court proceedings to provide (on a case-by-case basis) its assessment on whether a specific kind of transaction by a foreign state should or should not be afforded immunity.[36]

The immediate aftermath following the transition presented conflicts in both internal and external affairs because the Executive Branch, via the State Department, bore the burden of appearing in court to file its perspective.[37] The courts were reflexively deferential to the government's position, and "[a]s a consequence, foreign nations often placed diplomatic pressure on the State Department in seeking immunity. On occasion, political considerations led to suggestions of immunity in cases where immunity would not have been available

30. *See* Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 705 (9th Cir. 1992) ("Chief Justice Marshall announced that the common practice of nations forms the foundation for the doctrine of foreign sovereign immunity, while a given state's agreement to grant immunity in a particular case is a matter of grace, comity, and respect for the equality and independence of other sovereigns."); *see also* Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Philip B. Perlman, Att'y Gen. (May 19, 1952), *in* 26 DEPARTMENT OF STATE BULLETIN 984–85 (1952) [hereinafter Tate Letter] ("According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign.").

31. Tate Letter, *supra* note 30. "Until 1952 the Executive Branch followed a policy of requesting immunity in all actions against friendly sovereigns." *Altmann*, 541 U.S. at 689.

32. *See Siderman de Blake*, 965 F.2d at 705 (noting that "[w]ith the issuance of the Tate Letter, the United States joined the emerging international consensus that private acts of a sovereign—commercial activities being the primary example—were not entitled to immunity").

33. Tate Letter, *supra* note 30, at 985.

34. *Id*. at 984.

35. Tate wrote that "the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts." *Id*. at 985. Notions of fairness also influenced this rationale: "the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort." *Id*.

36. *See, e.g*., Chem. Nat. Res., Inc. v. Republic of Venezuela, 215 A.2d 864, 864–65 (Pa. 1966). Often, the State Department would render a "Suggestion of Immunity" to certify a sovereign immunity claim. *Id*.

37. *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983).

under the restrictive theory."[38] Eventually, the State Department persuaded Congress to respond to these difficulties and inconsistencies by codifying the new restrictive theory of sovereign immunity such that "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)."[39] Congress adopted the Foreign Sovereign Immunities Act (FSIA) of 1976[40] both to codify the restrictive theory of sovereign immunity as currently recognized in customary international law and to achieve a uniform standard for determining jurisdictional immunities.[41] To minimize adverse political consequences, the FSIA provides that the courts—not the Executive Branch—should answer and resolve foreign sovereign immunity questions.[42]

### B. LEGISLATIVE HISTORY AND STATUTORY TEXT

The expropriation exception is one of the FSIA's nine jurisdictional exceptions that limits the immunity of foreign states in state and federal courts.[43] Each exception should be interpreted in light of the general purpose of the FSIA. Most relevant here, the FSIA permits a claimant to invoke the jurisdiction of courts in the United States over foreign states for certain claims related to expropriations.[44] According to § 1602, designated as "Findings and Declaration of Purpose:"

> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not

38. *Id*. "Thus, sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied." *Id*. at 488.

39. Tate Letter, *supra* note 30, at 984; *see also* Crist v. Republic of Turkey, 995 F. Supp. 5, 9 (D.D.C. 1998) ("Under the restrictive theory of immunity, immunity is confined to the sovereign or public acts undertaken by the sovereign and does not extend to its commercial or private acts."). *See generally* William A. Dobrovir, *A Gloss on the Tate Letter's Restrictive Theory of Sovereign Immunity*, 54 VA. L. REV. 1 (1968) (defining, and suggesting a qualification to, the restrictive theory). Additionally, the global transition from the absolute theory to the restrictive theory is well-documented. *See, e.g.*, Oberster Gerichtshof [OGH] [Supreme Court] May 10, 1950, 1 Ob 167/49, ENTSCHEIDUNGEN DES ÖSTERREICHISCHEN OBERSTEN GERICHTSHOFES IN ZIVILSACHEN [SZ] No. 41 (Austria) (documenting the progressive trend of foreign sovereigns migrating away from the absolute theory of foreign sovereign immunity).

40. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1602–11 (2012)).

41. H.R. REP. NO. 94-1487, at 7 (1976).

42. *Id*. The new statutory scheme would also provide rules for proper procedure, such as service of process, and manage execution of judgments. *Id*. at 8. For a succinct background on the FSIA's purpose, see *Republic of Austria v. Altmann*, 541 U.S. 677, 688–91 (2004) and *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1125–28 (9th Cir. 2010).

43. 28 U.S.C. §§ 1605–1607 (2012). *See generally* DAVID P. STEWART, FED. JUD. CTR., THE FOREIGN SOVEREIGN IMMUNITIES ACT: A GUIDE FOR JUDGES (2013) (providing a practical overview of the FSIA as interpreted and applied in U.S. courts). Under the FSIA, personal jurisdiction is automatically established for every claim over which the district courts have subject-matter jurisdiction and in which service has been made. *Id*. at 14.

44. 28 U.S.C. § 1605(a)(3) (2012).

> immune from the jurisdiction of foreign courts insofar as their *commercial activities* are concerned, and their *commercial property* may be levied upon for the satisfaction of judgments rendered against them in connection with their *commercial activities*. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.[45]

Under the FSIA, commercial activity is "either a regular course of commercial conduct or a particular commercial transaction or act."[46] Although Congress anticipated the FSIA's extraterritorial application,[47] Congress also envisioned a genuine nexus requirement to satisfy the expropriation exception—a substantial connection between the property, commercial activity in the United States, and the foreign state.

First, the FSIA's legislative history addressing the scope of expropriation claims describes two circumstances based on commercial activity when "rights in property taken in violation of international law are in issue:"

> The first category involves cases where the property in question or any property exchanged for such property is present in the United States, and where such presence is in connection with a *commercial activity* carried on in the United States by the foreign state, or political subdivision, agency or instrumentality of the foreign state. The second category is where the property, or any property exchanged for such property, is (i) owned or operated by an agency or instrumentality of a foreign state and (ii) that agency or instrumentality is engaged in a commercial activity in the United States. Under the second category, the property need not be present in connection with a *commercial activity* of the agency or instrumentality.[48]

Additionally, the legislative history defines key terms and those key terms describe the international law of expropriation:

> The term "taken in violation of international law" would include the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law. It would also include takings which are arbitrary or discriminatory in nature. Since, however, this section deals solely with issues of immunity, it in no way affects

45. 28 U.S.C. § 1602 (2012) (emphasis added).

46. 28 U.S.C. § 1603(d) (2012). "The most common FSIA cases involve claims against foreign governmental entities for breach of commercial contracts . . . ." STEWART, *supra* note 43, at 3. Commercial activity is arguably the exception prompting the most lawsuits. *See* Beg v. Islamic Republic of Pakistan, 353 F.3d 1323, 1325 (11th Cir. 2003); *see, e.g.*, Saudi Arabia v. Nelson, 507 U.S. 349 (1993); Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992); Rong v. Liaoning Province Gov't, 452 F.3d 883 (D.C. Cir. 2006).

47. *See* Comparelli v. República Bolivariana de Venezuela, 891 F.3d 1311, 1325 (11th Cir. 2018) ("So long as the nexus requirement is met, § 1605(a)(3) may apply to an extraterritorial taking in violation of international law of property belonging to individuals who are not United States nationals.") *Id.*

48. H.R. REP. NO. 94-1487, at 19 (1976) (emphasis added).

> existing law on the extent to which, if at all, the "act of state" doctrine may be applicable.[49]

Congress's explicit reference to one area of international law strongly implies that other bodies of law are excluded.[50] A string of Cuban expropriation cases[51] that were decided by the Supreme Court—and preceded the enactment of the FSIA—provided the "impetus" for the codification of the restrictive theory of sovereign immunity[52] and specifically § 1605(a)(3). These disputes showcase the primary motivating force for Congress and the Executive Branch: a foreign state's expropriation of property that belonged to a United States corporation or individuals, without just compensation.[53] In one instance, prior to the enactment of the FSIA, the Supreme Court addressed conceptions of the international law of expropriation in a case concerning the act of state doctrine, which "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory."[54] In *Banco Nacional de Cuba v. Sabbatino*, the Court held that the act of state doctrine barred American citizens from claiming damages against Cuba after the Cuban government expropriated assets from a company in which they held ownership interests.[55] The Court recognized that international opinion was divided as to the

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49. *Id.* at 19–20.

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> The expropriation exception represented an effort to bring U.S. claims for compensation from foreign sovereigns, which had previously been at the mercy of diplomatic and political machinations, into a formal adjudicatory process. The enactment of the expropriation exception followed an epidemic of foreign expropriation of U.S. assets, especially in communist countries.

Brief of Former State Department Attorneys John Norton Moore and Edwin D. Williamson as Amici Curiae in Support of Respondent at 16, Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312 (2017) (No. 15-423), 2016 WL 5800342. "In the years immediately preceding the FSIA's enactment, both Congress and the Executive Branch adopted measures to penalize foreign sovereigns who expropriated U.S.-owned property without just compensation." *Id.* at 17.

51. First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

52. Ronald Mok, *Expropriation Claims in United States Courts: The Act of State Doctrine, the Sovereign Immunity Doctrine, and the Foreign Sovereign Immunities Act. A Road Map for the Expropriated Victim*, 8 PACE INT'L L. REV. 199, 200 (1996).

53. *See id.* at 211.

54. *Sabbatino*, 376 U.S. at 401; *see also Banco Para El Comercio Exterior de Cuba*, 462 U.S. at 759 ("The act of state doctrine represents an exception to the general rule that a court of the United States, where appropriate jurisdictional standards are met, will decide cases before it by choosing the rules appropriate for decision from among various sources of law including international law."); Underhill v. Hernandez, 168 U.S. 250, 252 (1897) ("Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.").

55. *Id.* at 413–15. Cuba's Foreign Ministry conducted expropriations, pursuant to Cuban law, which the United States government found unacceptable: "Our State Department has described the Cuban law as 'manifestly in violation of those principles of international law which have long been accepted by the free countries of the West. It is in its essence discriminatory, arbitrary and confiscatory.'" *Id.* at 402–03.

extent of "a state's power to expropriate the property of aliens."[56] However, the Court acknowledged the emerging view among the international community of what constitutes an illegal taking: "a taking is improper under international law if it is not for a public purpose, is discriminatory, or is without provision for prompt, adequate, and effective compensation."[57]

As presently constituted, the expropriation exception differs little from its drafting stages, with the exception of a definition of terms. Under § 1605(a)(3), courts obtain subject-matter jurisdiction under circumstances:

> 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.[58]

## II. THE MEANING OF § 1605(A)(3)

Since the enactment of the FSIA more than forty years ago,[59] the international law of expropriation has been the touchstone for takings in violation of international law.[60] A claim of foreign sovereign immunity in the United States is more than a defense of liability: it acts as a shield providing a foreign state complete protection from suit.[61] To establish subject-matter jurisdiction pursuant to § 1605(a)(3), courts generally analyze four main elements: a plaintiff bears the burden of proving (1) rights in property are at issue, (2) the property was taken, (3) the taking violates international law, (4) and a commercial-activity nexus with the United States.[62]

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56. *Id*. at 428.

57. *Id*. at 429.

58. 28 U.S.C. § 1605(a)(3) (2012).

59. *See* Frederic Alan Weber, *The Foreign Sovereign Immunities Act of 1976: It's Origin, Meaning and Effect*, 3 YALE STUD. IN WORLD PUB. ORD. 1, 2 (1976).

60. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712 (AM. LAW INST. 1987).

61. *See* Crist v. Republic of Turkey, 995 F. Supp. 5, 8 (D.D.C. 1998). "A plaintiff must make more than a nonfrivolous showing that FSIA's expropriation exception applies." Schubarth v. Federal Republic of Germany, 891 F.3d 392, 399 (D.C. Cir. 2018).

62. *See, e.g*., Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 671 (7th Cir. 2012); Garb v. Republic of Poland, 440 F.3d 579, 588 (2d Cir. 2006); Freund v. Republic of France, 592 F. Supp. 2d 540, 553 (S.D.N.Y. 2008). Some courts break down the last element:

> 1) the plaintiff's rights in property are at issue; 2) the property was taken; 3) the taking violated international law; and 4) *either* (a) the taken "property, or any property exchanged for the taken property, is present in the United States in connection with a commercial activity carried on in the United States by the foreign state," *or* (b) the taken "property, or any property exchanged for the taken 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[.]"

Best Med. Belg., Inc. v. Kingdom of Belgium, 913 F. Supp. 2d 230, 239 (E.D. Va. 2012) (quoting 28 U.S.C. § 1605(a)(3) (2006)).

A. RIGHTS IN PROPERTY ARE IN ISSUE

As a threshold matter, a court adjudicating a claim under the expropriation exception must determine whether the FSIA provides subject-matter jurisdiction.[63] If the requirements under § 1605(a)(3) are not met, a court lacks both personal and subject-matter jurisdiction, which means that the foreign state is shielded from litigation and the court must dismiss the suit.[64] The FSIA prompts a burden-shifting scheme during the initial stages of litigation—specifically the jurisdictional stage—once a plaintiff seeks a court to confer jurisdiction over an expropriation claim.[65] Sovereign immunity is an affirmative defense to jurisdiction:[66] a foreign state has the ultimate burden to produce evidence that establishes that it or one of its subdivisions (or agencies or instrumentalities) is immune from jurisdiction in United States courts because the plaintiff's claim relates to a public act of the foreign state.[67] After the foreign state produces prima facie evidence of immunity, the burden shifts to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity.[68]

To satisfy the first element, rights in property must be at issue. The meaning of property under this statutory exception is "physical property" such as real property or personal property.[69] However, there appears to be a growing conflict about whether intangible property also qualifies as property rights for purposes of the FSIA.[70] All claims brought under § 1605(a)(3) must implicate rights in property: this element excludes non-property based claims such as personal injury or death.[71]

63. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 493–94 (1983). Unless an exception under the FSIA applies, a court does not possess subject-matter jurisdiction. *See Garb*, 440 F.3d at 584 (finding on remand that the district court correctly found both the "commercial activity" and "takings" exceptions to the FSIA inapplicable and thus properly dismissed for lack of subject-matter jurisdiction). *See* Mok, *supra note* 52, at 225 (explaining that an "expropriation claim can proceed on the merits" upon a court's finding that it has jurisdiction).

64. *See* 28 U.S.C. § 1330(b) (2012). Personal jurisdiction exists when there is subject-matter jurisdiction and proper service of process. *Id.*

65. *Crist*, 995 F. Supp. at 10; *see* Chettri v. Nepal Rastra Bank, 834 F.3d 50, 55 (2d Cir. 2016).

66. H.R. REP. NO. 94-1487, at 17 (1976).

67. *See id.*

68. "The ultimate burden of proving immunity . . . rest[s] with the foreign state." *Id.*

69. *See* Lord Day & Lord v. Socialist Republic of Vietnam, 134 F. Supp. 2d 549, 560 (S.D.N.Y. 2001) (stating that property rights do not include the right to receive payment).

70. *See, e.g.*, Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 673 (7th Cir. 2012) (agreeing with the D.C. Circuit that "the rights in property" element applies to both tangible and intangible property); Nemariam v. Federal Democratic Republic of Ethiopia, 491 F.3d 470 (D.C. Cir. 2007) (disagreeing with the district court's holding that intangible property, such as a bank account, is inconsistent with the FSIA's expropriation exception); *see also* George C. Christie, *What Constitutes a Taking of Property Under International Law?*, 38 BRIT. Y.B. INT'L L. 307, 318–19 (1964) ("[C]ontract and many other so-called intangible rights can, under certain circumstances, be expropriated . . . .").

71. Simon v. Republic of Hungary, 812 F.3d 127, 141 (D.C. Cir. 2016); *Abelesz*, 692 F.3d at 697.

### B. THE PROPERTY WAS "TAKEN"

Expropriation is inherently a sovereign activity—it is a unique sovereign power—for purposes of the FSIA.[72] Based on this general understanding, the FSIA limits sovereign immunity for illegal takings. Accordingly, the word "taken' . . . clearly refers to acts of a sovereign, not a private enterprise, that deprive a plaintiff of property without adequate compensation."[73] In essence, this element is not satisfied unless the foreign state itself performs a taking that violates international law.[74] This element focuses solely on the actions by the foreign state,[75] and courts often confront challenging analyses to determine whether a foreign state legitimately exercises its sovereign police powers to expropriate property.[76]

### C. FINDING PROPERTY TAKEN IN VIOLATION OF INTERNATIONAL LAW

Until recently, courts have looked to customary international law to determine the relevant standard for takings in violation of international law. The standard interpretation for an expropriation that violates international law requires a foreign state to expropriate property that is unaccompanied by prompt, adequate, and effective compensation, which includes takings that serve no public purpose or are discriminatory in nature.[77] Federal courts have repeatedly asserted the meaning of "property taken in violation of international law" to track the

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72. *See* Devengoechea v. Bolivarian Republic of Venezuela, 889 F.3d 1213, 1228–29 (11th Cir. 2018); de Csepel v. Republic of Hungary, 714 F.3d 591, 598 (D.C. Cir. 2013); Garb v. Republic of Poland, 440 F.3d 579, 584–86 (2d Cir. 2006).

73. Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi, 215 F.3d 247, 251 (2d Cir. 2000). For example, an "[e]xpropriation to satisfy a debt declared valid by a foreign court is not a taking for the purposes of the FSIA." Best Med. Belg., Inc. v. Kingdom of Belgium, 913 F. Supp. 2d 230, 239 (E.D. Va. 2012) (citing Amorrortu v. Republic of Peru, 570 F. Supp. 2d 916, 924 (S.D. Tex. 2008)).

74. "Any deprivation of property interest is a taking, regardless of whether the taking served a public purpose or not." Mok, *supra* note 52, at 223.

75. *Abelesz*, 692 F.3d at 673 (supporting the view that "[a]ny property expropriated by [a] national bank would qualify as 'taken' and could be subject to the expropriation exception").

76. West v. Multibanco Comermex, S.A., 807 F.2d 820, 831–32 (9th Cir. 1987). During the same year of the FSIA's enactment, the Supreme Court noted that an expropriation implicates sovereign power: "There may be little codification or consensus as to the rules of international law concerning exercises of *governmental* powers, including military powers and expropriations, within a sovereign state's borders affecting the property or persons of aliens." Alfred Dunhill v. Republic of Cuba, 425 U.S. 682, 704–06 (1976).

77. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712 (AM. LAW INST. 1987). "[A] state is responsible under international law for injury resulting from: (1) a taking by the state of the property of a national of another state that (a) is not for a public purpose, or (b) is discriminatory, or (c) is not accompanied by provision for just compensation . . . ." *Id*. For compensation to be just, it must "be in an amount equivalent to the value of the property taken and be paid at the time of the taking or within a reasonable time thereafter with interest from the date of takings, and in a form economically usable by the foreign national." *Id*. Compensation has long been accepted as required under international law. Press Release, U.S. Dep't of State, Mexico: Expropriation of American Properties 135–36 (Aug. 25, 1938). For a thorough examination of the responsibility of states for injuries to foreign nationals, see generally JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART (2013); EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS (1915).

legislative history which mirrors international law. For example, in *Zappia Middle East Construction Co*. the Court states the following:

> The FSIA does not define the term "taken." However, the 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."[78]

This understanding of takings as a violation of international law, or the standard conception of international expropriation law,[79] is enshrined in countless multinational treaties ratified both before and after the enactment of the FSIA.[80] Such widespread and consistent use evidences the conventional and narrow meaning of property "taken in violation of international law." Claims of expropriation routinely arise from disputes centered in international investment law: in *Fireman's Fund Insurance Co. v. United Mexican States*,[81] an American insurance company brought an expropriation claim against the Mexican government under the North American Free Trade Agreement (NAFTA).[82] The tribunal found that Mexico's actions, individually and collectively, did not amount to an unlawful

78. Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi, 215 F.3d 247, 251–52 (2d Cir. 2000). For another case with a similar discussion, see Greenpeace, Inc. v. France, 946 F. Supp. 773, 783 (C.D. Cal. 1996) (holding France's seizure and impoundment of ship did not satisfy §1605(a)(3) because France's conduct was for a public purpose and was neither arbitrary or discriminatory). Most courts employ this formulation and have interpreted the elements in the context of genocide and other human rights abuses. *See Abelesz*, 692 F.3d at 675–76 (highlighting that the relationship between genocide and expropriation in the Hungarian Holocaust takes the expropriation claims into the realm of international law); *see also* Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 711–12 (9th Cir. 1992) (explaining that the three requisites for a valid expropriation under international law are that the taking serves a public purpose, the taking does not discriminate, and the taking is with just compensation).

79. *See also* Peter Charles Choharis, *U.S. Courts and the International Law of Expropriation: Toward a New Model for Breach of Contract*, 80 S. CAL. L. REV. 1, 5 (2006) (explaining that "traditional seizures of property without compensation are near universally considered unlawful").

80. *E.g*., Organization of American States, American Convention on Human Rights, art. 21, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. In *Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*, 729 F.2d 422 (6th Cir. 1984), an American company sued the Ethiopian government. The court held that a Friendship, Commerce, and Navigation Treaty (FCN) between the United States and Ethiopia contained a property protection clause sufficient to confer jurisdiction over the Ethiopian government:

> [P]roperty of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. *Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation.*

*Id*. at 426. The court included comparable excerpts in other modern FCN treaties from countries such as Belgium, France, Iran, Israel, Japan, Pakistan, Togo, and Vietnam. *Id*. at 428–30.

81. ICSID Case No. ARB(AF)/02/1, Award (2006).

82. *Id*. at ¶ 5. ICSID's stated purpose is to provide facilities for conciliation and arbitration of investment disputes. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 1, Aug. 27, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090.

expropriation[83] based on NAFTA's provisions: "No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment . . . ."[84]

The classic scenario for an expropriation claim, of the sort contemplated by Congress, features an investor who invests assets abroad, or controls property in a foreign state, and is wronged by that foreign state and the resulting injury has a sufficient nexus with the United States for such a claim to be presented in a U.S. court.[85] Owing to the doctrine of state responsibility and its primary concern with the protection of and standard for treatment of foreigners, the general rule is that a taking in violation of international law does not arise when a foreign state commits an intrastate taking.[86] "What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration . . . [s]uch nationals must look to their own government

83. *Fireman's Fund*, No. ARB(AF)/02/1 at ¶ 217. According to the tribunal: "[e]xpropriation requires a taking (which may include destruction) by a government-type authority of an investment by an investor" and "usually involves a transfer of ownership to another person (frequently the government authority concerned)." *Id*. at ¶ 176. The tribunal listed several other elements of an expropriation, including that the "covered investment may include intangible as well as tangible property" and "the effects of the host State's measures are dispositive, not the underlying intent, for determining whether there is expropriation." *Id*. at ¶ 176. Types of expropriations include indirect, *de facto*, and "creeping." *Id*. *See also Expropriation*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining expropriation as "[a] governmental taking or modification of an individual's property rights, esp. by eminent domain"). Another case related to an international dispute over an investment in land considers other forms of an expropriation and applies a function-based analysis. *See* Tecnicas Medioambientales Tecmed S.A. v. Mexico, ICSID Case No. ARB (AF)/00/2, Award (2004).

> Generally, it is understood that the term 'equivalent to expropriation . . .' or 'tantamount to expropriation' included . . . in other international treaties related to the protection of foreign investors refers to the so-called 'indirect expropriation' or 'creeping expropriation'. . . do not have a clear or unequivocal definition . . . [T]hey materialize through actions or conduct, which do not explicitly express the purpose of depriving one of rights or assets, but actually have that effect. . .

*Id*. at ¶ 114.

84. *Fireman's Fund*, No. ARB(AF)/02/1 at ¶ 170.

85. "The expropriation exception was the product of a concerted effort by both the Executive Branch and Congress to respond to the widespread expropriation of U.S.-owned assets by foreign sovereigns, particularly in communist countries like Cuba following Fidel Castro's rise to power." Brief of Former State Department Attorneys John Norton Moore And Edwin D. Williamson as Amici Curiae in Support of Respondent at 3, Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312 (2017) (No. 15-423), 2016 WL 5800342.

86. The law of state responsibility provides principal rules on injury to aliens. *See generally* ALWYN V. FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIALS OF JUSTICE (1938). Historically, in the expropriation context, state responsibility meant that if a foreign national was subjected to an expropriation by a foreign government, the foreign national's government may take up the claim on behalf of its citizen. In *Banco Nacional de Cuba v. Sabbatino*, the Court explained that for an American citizen, "[f]ollowing an expropriation of any significance, the Executive engages in diplomacy aimed to assure that United States citizens who are harmed are compensated fairly." 376 U.S. 398, 401, 431 (1964). "The law of responsibility to aliens posited and invoked an international standard of justice for individuals . . . ." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW pt. VII, intro. note (AM. LAW INST. 1987).

for any redress to which they may be entitled."[87] Domestic takings do not violate international law.[88] In sum, a taking in violation of international law forecloses claims of a foreign state's domestic takings[89] and materializes when the foreign state expropriates property without provision of prompt, adequate and effective payment, and includes takings that do not serve a public purpose—such as an "arbitrary taking," or discriminates or singles out aliens for regulation by the state.[90] State responsibility doctrine generally remains independent and resists attempts to graft human rights violations into the international law of expropriation.[91]

### D. FINDING AN APPLICABLE STATUTORY NEXUS

The nexus standard is a substantive element through which Congress imposed "some form of substantial contact with the United States."[92] There are two ways for an expropriation victim to satisfy the statutory nexus requirement—depending on whether the claim is against a foreign state or agencies and instrumentalities.[93] For suits against a foreign state, the seized property in dispute or property exchanged for the seized property must be present in the United States in connection with a commercial activity conducted by the foreign state.[94] "[A] foreign state is immune to claims for the expropriation of property not present in the United States . . . ."[95] For suits against an agency or instrumentality of the foreign state, the agency or instrumentality must own the expropriated property and conduct commercial activity in the United States.[96] Under the FSIA, "[t]he commercial

87. United States v. Belmont, 301 U.S. 324, 332 (1937).

88. When a state takes the property of its own citizen, it does not constitute a violation of international law. *See* Beg v. Islamic Republic of Pakistan, 353 F.3d 1323, 1328 n.3 (11th Cir. 2003) (explaining that international law "does not prohibit governments from expropriating property from their own nationals without compensation"); Chuidian v. Phil. Nat'l Bank, 912 F.2d 1095, 1105 (9th Cir. 1990) ("Expropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law."); de Sanchez v. Banco Cent. de Nicar., 770 F.2d 1385, 1396 (5th Cir. 1985) ("As long as a nation injures only its own nationals . . . then no other state's interest is involved; the injury is a purely domestic affair, to be resolved within the confines of the nation itself.").

89. Davoyan v. Republic of Turkey, 116 F. Supp. 3d 1084, 1098 (C.D. Cal. 2013). Where a plaintiff is a citizen of the defendant country at the time of expropriation, the FSIA does not apply. *Id.*

90. "The burden of adducing evidence to establish a taking in violation of international law is on Plaintiffs, not on Defendants, once [Defendants] . . . have established the presumption of immunity." Greenpeace, Inc. v. France, 946 F. Supp. 773, 783 (C.D. Cal. 1996).

91. *Cf.* DAMROSCH ET AL., *supra* note 22, at 1012–13 ("Notwithstanding differences in the development and origins of the customary law of responsibility for injury to aliens and the law of human rights, there is a substantial overlap and a growing interrelationship between them.").

92. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 490–91 (1983).

93. 28 U.S.C. § 1603(b) (2012). "The expropriation exception focuses on the connection of the property in question to the United States." Comparelli v. República Bolivariana de Venezuela, 891 F.3d 1311, 1324 (11th Cir. 2018).

94. 28 U.S.C. § 1605(a)(3) (2012). "Considered at a more general level, both kinds of claims require: (i) that the defendants possess the expropriated property or proceeds thereof; and (ii) that the defendants participate in some kind of commercial activity in the United States." Simon v. Republic of Hungary, 812 F.3d 127, 146 (D.C. Cir. 2016).

95. Schubarth v. Federal Republic of Germany, 891 F.3d 392, 394–95 (D.C. Cir. 2018).

96. *Id.*; *see* Agudas Chasidei Chabad v. Russian Federation, 528 F.3d 934, 947 (D.C. Cir. 2008). Section 1605(a)(3) "constrains its own reach by restricting jurisdiction to rights in property, taken in violation of international law, that is now in the hands of a foreign state or its instrumentality, when that

character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.'"[97]

Congress evidently did not seek to create worldwide subject matter jurisdiction for genocide claims or other human rights violations under § 1605(a)(3). The substantive standards, which are fixated on commercial activity, lack any indication that federal and state courts are "uniquely hospitable forum[s]"[98] for claims of human rights violations. Indeed, finding the existence of any nexus between a foreign state's commission of genocide and the United States, where the wrongs are sustained by foreign plaintiffs located entirely outside of the United States, is questionable.[99]

## III. THE DEVELOPMENT OF THE EXPROPRIATION EXCEPTION

Both Congress and the Supreme Court are active in amending and interpreting § 1605(a)(3). Recent judicial rulings and enacted laws demonstrate that the Court and Congress embrace judicial caution. Their actions exhibit sober regard for "the danger of unwarranted judicial interference in the conduct of foreign policy."[100]

### A. JUDICIAL RULINGS

In Supreme Court opinions resolving disputes that concern the FSIA's expropriation exception, the Court reaffirms existing principles of customary international law. Most recently, the Court ruled on the pleading standard required for § 1605(a)(3) claims.[101] In *Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co*., the Court focused on the meaning of "rights in property taken in violation of international law"[102] and held that both "state and federal courts can maintain jurisdiction to hear the merits of a case only if they find that the property in which the party claims to hold rights was indeed 'property taken in violation of international law.'"[103] In other words, a plaintiff must meet a heightened pleading standard because "the relevant factual allegations must make out a legally valid claim that a certain kind of right is at issue

instrumentality is engaged in a commercial activity in the United States." Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1031 (2d Cir. 2010).

97. 28 U.S.C. § 1603(d) (2012).

98. *Kiobel*, 569 U.S. at 116.

99. *See* Mezerhane v. República Bolivariana de Venezuela, 785 F.3d 545, 549 (11th Cir. 2015) (holding that the FSIA's expropriation exception did not apply to claims brought by a Venezuelan national against Venezuela and its agencies alleging treaty-based human rights violations).

100. *Kiobel*, 569 U.S. at 116.

101. Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312 (2017).

102. Here, the facts involved a dispute between an American company and its wholly-owned Venezuelan subsidiary against the Venezuelan government. *Id*. at 1316.

> According to stipulated facts, by early 2010 the Venezuelan Government had failed to pay more than $10 million that it owed the Subsidiary. At that point the government sent troops to the equipment yard where the rigs were stored, prevented the Subsidiary from removing the rigs, and issued a 'Decree of Expropriation' nationalizing the rigs.

*Id*. at 1317.

103. *Id*. at 1316.

(*property* rights) and that the relevant property was taken in a certain way (in violation of international law). A good argument to that effect is not sufficient."[104] The Court provided a hypothetical example:

> [A] party might assert a claim to a house in a foreign country. If the foreign country nationalized the house and, when sued, asserted sovereign immunity, then the claiming party would as a jurisdictional matter prove that he claimed "property" (which a house obviously is) and also that the property was "taken in violation of international law." He need not show as a *jurisdictional* matter that he, rather than someone else, owned the house. That question is part of the merits of the case and remains "at issue."[105]

Drawing on statutory text, legislative history, and customary international law, the Court acknowledged important considerations. First, the Court explained that "the expropriation exception on its face emphasizes conformity with international law by requiring not only a commercial connection with the United States but also a taking of property '*in violation of international law*.'[106] Second, the Court reiterated that "[a] sovereign's taking or regulating of its own nationals' property within its own territory is often just the kind of foreign sovereign's public act (a '*jure imperii*') that the restrictive theory of sovereign immunity ordinarily leaves immune from suit."[107] Third, the Court identified that no provision comparable to the expropriation exception has been adopted by domestic immunity statutes in foreign governments.[108] The Court's analysis of basic statutory objectives and international standards shows that § 1605(a)(3) is designed "to reflect basic principles of international law" and that "Congress intended [no] radical departure from these basic principles."[109]

A fundamental rationale for the heightened standard behind § 1605(a)(3) claims is preventing adverse consequences in foreign relations. In rejecting the legal sufficiency of non-frivolous arguments to support finding jurisdiction, the Court warned about several risks, including: "embroil[ing] the foreign sovereign in an American lawsuit for an increased period of time," creating "friction in our

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104. *Id*. at 1317. A party's argument that the property was taken in violation of international law—no matter how strong—is not alone sufficient to confer jurisdiction because whether the rights in property constitute takings in violations of international law is a jurisdictional issue that "the court must typically decide at the outset of the case, or as close to the outset as is reasonably possible." *Id*. at 1319.

105. *Id*. at 1319.

106. *Id*. at 1320–21.

107. *Id*. at 1321.

108. *Id*.

109. *Id*. at 1320. In *Republic of Austria v. Altmann*, the plaintiff alleged that Austria and its art gallery, an Austrian instrumentality, expropriated six Gustav Klimt masterpiece paintings originally stolen from the plaintiff's uncle by the Nazis during World War II. Although the Court did not reach the substantive components of § 1605(a)(3), it recognized customary international law principles relating to the international law of expropriation, noting there is a "consensus view that Section 1605(a)(3)'s reference to 'violation of international law' does not cover expropriations of property belonging to a country's own national." 541 U.S. 677, 713 (2004) (Breyer, J., concurring). The Court held that the FSIA applies to alleged pre-enactment conduct. *Id*. at 697–98.

relations," and causing negative reciprocal treatment where the courts of foreign states subject the United States to protracted and expensive litigation.[110] In the few opinions where the Court has clarified the scope of § 1605(a)(3), the Court reaffirmed adherence to prevailing norms of customary international law.

### B. CONGRESSIONAL AMENDMENTS TO § 1605(A)(3)

Congress has enacted "narrow legislation"[111] amending § 1605(a)(3), but the impact of the law bears no support for genocidal takings. The purpose of the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act (FCEJICA) is to shield a foreign state from suits for damages concerning the ownership of culturally significant property—typically artwork—if certain conditions are met.[112] The new law restricts the scope of § 1605(a)(3) because it bars the applicability of the "commercial activity" nexus requirement to loans of artwork with the exception of "Nazi-Era Claims" and "Other Culturally Significant Works."[113] It seeks to minimize the legal risk to foreign states (by expanding their immunity) when lending cultural works of art to the United States and its institutions.

According to the legislative history, the FCEJICA makes a "modest but important amendment" to § 1605(a)(3) in response to federal court decisions that "held that the Immunity from Seizure Act does not preempt the Foreign Sovereign Immunities Act."[114] Such decisions "significantly impeded the ability of U.S. institutions to borrow foreign-government-owned items" and "resulted in cultural exchanges being curtailed."[115] Consequently, the FCEJICA empowers courts to exercise jurisdiction over claims alleging that (1) Germany or an affiliated foreign sovereign during World War II expropriated the loaned artwork in violation of international law, or (2) the artwork was "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."[116] Absent these two narrow exceptions, artwork on loan from a foreign state to a

110. *Helmerich & Payne Int'l Drilling Co*., 137 S. Ct. at 1321–22. The Court stated that the basic objective of the FSIA is to free a foreign state from suit. *Id*. at 1317.

111. 161 CONG. REC. H3957 (daily ed. June 9, 2015) (statement of Rep. Goodlatte) ("For 40 years, the Immunity from Seizure Act provided foreign government lenders with this confidence.").

112. Pub. L. No. 114-319, 130 Stat. 1618 (2016).

> [O]ne, that the property is in the United States pursuant to an agreement between the foreign state and the U.S. or a U.S.-based cultural or educational institution; two, the President has granted the work at issue immunity from seizure pursuant to the Immunity from Seizure Act; and three, that the President's grant of immunity from seizure is published in the Federal Register. All three of those conditions must be met.

161 CONG. REC. H3957 (daily ed. June 9, 2015) (statement of Rep. Goodlatte).

113. Pub. L. No. 114-319, 130 Stat. 1618–19 (2016). The first exception is time-bound from the period between 1933 and 1945.

114. 161 CONG. REC. H3957 (daily ed. June 9, 2015) (statement of Rep. Goodlatte).

115. *Id*.

116. *Id*.; *see also* Ingrid Wuerth, *An Art Museum Amendment to the Foreign Sovereign Immunities Act*, LAWFARE (Jan. 2, 2017, 12:48 PM), https://www.lawfareblog.com/art-museum-amendment-foreign-sovereign-immunities-act [https://perma.cc/7VP2-ZDP8].

United States institution does not constitute "commercial activity" for purposes of § 1605(a)(3).

As a recent amendment to § 1605(a)(3), the FCEJICA's exceptions do not suggest approval for a court's conclusion that the systematic taking of property constitutes genocide and therefore violates international law. Its purpose is to enhance jurisdictional immunity for certain art exhibitions subject to two exceptions. Congress could have included a direct and blanket exception for genocide—yet the FCEJICA makes no explicit reference to any human rights violations. The FCEJICA is an amendment limited in scope because it clarifies the commercial activity nexus standard of § 1605(a)(3) in the context of art exhibition activities.

## IV. FSIA'S EXPROPRIATION EXCEPTION DOES NOT ENCOMPASS GENOCIDE

Several federal courts have interpreted § 1605(a)(3) to incorporate international human rights law, but the text of the FSIA, its legislative history, constitutional doctrines, and customary international law, weighs against U.S. courts obtaining jurisdiction for genocide-based claims.[117] Instead, if Congress decides to designate U.S. courts as a forum for claims of genocidal takings, a statutory amendment is most constitutionally sound. A fair reading of the statutory exception in light of past and present conditions sufficiently demonstrates that § 1605 (a)(3) does not confer jurisdiction over a foreign state in a U.S. court to hear actions alleging genocidal takings. The issue is not about the merits of genocide as a claim—the exception addresses a foreign state's immunity from the jurisdiction of federal and state courts.[118]

Significant foreign policy interests are almost always at stake for § 1605(a)(3) litigation.[119] Neither the emerging international consensus concerning jurisdictional immunities nor international expropriation law support the conclusion of some federal courts that plaintiffs alleging genocidal takings may sue a foreign state in a U.S. court, even if at the time of the genocide the plaintiffs were citizens of the foreign state. This extraordinary interpretation of § 1605(a)(3) exceeds its scope. To construe the expropriation exception to reach beyond international expropriation law overlooks statutory interpretation, ignores customary international law, and distorts the constitutional allocation of powers.

### A. STATUTORY INTERPRETATION

A claim of genocidal takings is at odds with the requirements under § 1605(a)(3) considering the text, purpose, and legislative history of the FSIA. First, the

117. *See infra* notes 118–79 and accompanying text.

118. "The FSIA is purely jurisdictional; it doesn't speak to the merits or to possible defenses that may be raised to cut off stale claims or curtail liability." Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1031 (2d Cir. 2010). "And decisional law further limits the universe of potential claimants, for instance, by excluding nationals of the expropriating country from the scope of § 1605(a)(3)." *Id.*

119. *See e.g.*, Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1321–22 (2017).

statutory language makes no express reference to the word "genocide" or any international human rights crime.[120] If Congress had intended for genocide to trigger § 1605(a)(3) jurisdiction, then Congress would have legislated the offense into the FSIA. Nor does the recent amendment[121] to § 1605(a)(3) enhance the text because the amendment strictly applies to the commercial nexus standard for confiscations of artwork.

The primary purpose of § 1605(a)(3) is not to enlarge the exposure of foreign states to U.S. jurisdiction based on the changing field of international human rights law. Rather, the FSIA attempts to provide "foreign states and their instrumentalities some *present* 'protection from the inconvenience of suit'"[122] by "clarifying the rules that judges should apply in resolving sovereign immunity claims and eliminating political participation in the resolution of such claims."[123] Accordingly, the purpose of § 1605(a)(3) is to limit foreign sovereign immunity for takings in violation of, as Professor David P. Stewart interprets, "the international law of expropriation and state responsibility, not to other bodies of international law, such as human rights law."[124]

Most importantly, the legislative history buttresses the conclusion that § 1605 (a)(3) exclusively embraces state responsibility and international expropriation law, absent Congressional amendment. A foreign state's act of genocide was simply not contemplated by Congress in 1976. "[T]here is no indication in the legislative history that Congress affirmatively considered § 1605(a)(3)'s applicability in the distinctive context of genocidal takings. Rather, the general international-law prohibition against expropriations without just compensation would have been foremost in Congress's mind."[125]What constitutes takings in violation of international law is set forth in unambiguous terms in the legislative history.[126] Furthermore, the domestic takings exception—fundamental to the international law of expropriation—prevents court from hearing a claim asserted by a foreign national against its own government.[127] When courts shoehorn genocide into a discrete statutory provision, they frustrate the FSIA's purpose to protect the rights of foreign states under international law.[128] Given that "[t]he restrictive theory rests, at bottom, upon the consideration that the widespread practice on the part of governments engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights

120. 28 U.S.C. § 1605(a)(3) (2012).

121. *See supra* notes 111–16 and accompanying text.

122. Republic of Austria v. Altmann, 541 U.S. 677, 696 (2004) (quoting Dole Food Co. v. Patrickson, 538 U.S. 468, 479 (2003)).

123. *Id*. at 699.

124. STEWART, *supra* note 43, at 56.

125. Simon v. Republic of Hungary, 812 F.3d 127, 146 (D.C. Cir. 2016).

126. H.R. REP. NO. 94-1487, at 19–20 (1976). *See supra* notes 44–57.

127. *See* United States v. Belmont, 301 U.S. 324, 332 (1937).

128. *See* 28 U.S.C. § 1602 (2012); H.R. REP. NO. 94-1487, at 7 (1976).

determined in the courts,"[129] notions of fairness and international comity necessitate an adequate notice requirement for foreign states.

Accordingly, the substantive requirements built into § 1605(a)(3) serve to counteract any temptation for U.S. courts to replace international fora for the adjudication of human right claims. "Congress was aware of concern that 'our courts [might be] turned into small 'international courts of claims[,]' . . . open . . . to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world,'"[130] which is why the jurisdictional nexus standard requires substantial contacts.[131] Efforts to use the FSIA's jurisdictional exceptions as pretexts to reach human rights violations have not been successful.[132] Thus, the legislative history demonstrates that Congress did not intend § 1605(a)(3) to provide jurisdiction for genocidal takings.

### B. STATE RESPONSIBILITY AND THE INTERNATIONAL LAW OF EXPROPRIATION

Over time, a global approach to resolving sovereign immunity[133] questions has manifested without achieving consensus. What is not repeatedly found around the world—except in the law of the United States—is a comparable expropriation exception incorporated into the jurisdictional immunities statutes of other foreign states.[134] This contrast is substantial because expropriation is understood to be a sovereign activity: "whether an action by a government is a legitimate exercise of the police power in the regulation of its internal affairs as opposed to a taking of property can pose particularly difficult problems."[135] State sovereignty serves as the fountainhead of international law.[136] "Our courts have understood, as international law itself understands, foreign nation states to be 'independent sovereign' entities."[137] This understanding informs how a court should exercise judicial caution:

> It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for

129. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the Subcomm. On Admin. Law & Gov't Relations of the H. Comm. on the Judiciary*, 94th Cong. 30 (1976) (testimony of Bruno A. Ristau, Chief of the Foreign Litigation Section, Civil Division, Dep't of Justice).

130. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 490 (1983) (citing testimony of Bruno A. Ristau, *Hearing on H.R. 11315*, at 31).

131. *See supra* notes 92–99 and accompanying text.

132. *See, e.g.*, STEWART, *supra* note 43, at 49 (noting "efforts to use the commercial activity exception in § 1605(a)(2) . . . have not been successful").

133. Sovereign immunity is derived from customary international law. *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729, 825 (2012). For a more careful treatment of customary international law, see generally M. H. Mendelson, 272 *Recueil des cours* 245 (1998) (discussing the objective and subjective elements of customary international law).

134. *See, e.g.*, *Foreign States Immunity Act 1985* (Cth) (Austl.).

135. West v. Multibanco Comermex, S.A., 807 F.2d 820, 831 (9th Cir. 1987).

136. "The issues of respecting the dignity and independence of the sovereigns, and the avoidance of inter-branch conflict in foreign relations" is at the heart of foreign sovereign immunity doctrine. Mok, *supra* note 52, at 206.

137. Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1319 (2017).

> the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.[138]

If Congress were to extend the scope of § 1605(a)(3) to reach genocidal takings, there would be scant, if any, support in international law and the practice of international law. In 2004, the United Nations adopted the Convention on Jurisdictional Immunities of States and Their Property[139] to be "the first modern multilateral instrument to articulate a comprehensive approach to issues of state or sovereign immunity from suits in foreign courts."[140] However, the Convention is, unlike the FSIA, remarkably silent on expropriations because it sets forth no substantive rules or provision concerning takings of any kind.[141] There is no parallel to the expropriation exception in the practice of other foreign states, "perhaps not surprisingly in view of the controversial nature of what constitutes a 'taking' of property contrary to international law."[142]

A groundbreaking international dispute showcased the hazards of removing foreign sovereign immunity based on alleged violations of customary international law.[143] In *Jurisdictional Immunities of the State*, Germany defended a right to foreign sovereign immunity after Italian courts adjudicated claims stemming

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138. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

139. G.A. Res. 59/38, Convention on Jurisdictional Immunities of States and Their Property (Dec. 2, 2004).

140. David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 AM. J. INT'L L. 194, 194 (2005).

141. G.A. Res. 59/38, Convention on Jurisdictional Immunities of States and Their Property (Dec. 2, 2004). A tentative draft of the Restatement of Foreign Relations notes:

> Standing alone, the Convention may not represent a codification of actual state practice in every area it addresses. Nevertheless, its text was concluded after lengthy negotiations by states with differing economic and political systems, and it was adopted by consensus, so that its language can be understood as broadly representative and at least suggestive as to the content and/or future direction of international law.

RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: SOVEREIGN IMMUNITY ch. 5, intro. note (AM. LAW INST., Tentative Draft No. 3, 2017).

142. HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 267 (3d ed. 2013). Terms about the nature of the expropriation (creeping, de facto, indirect) and the standard for compensation remain disputed issues. *See generally* M.H. Mendelson, *Compensation for Expropriation: The Case Law*, 79 AM. J. INT'L L. 414 (1985); Burns H. Weston, *"Constructive Takings" Under International Law: A Modest Foray into the Problem of "Creeping Expropriation,"* 16 VA. J. INT'L L. 103 (1975). *See Sabbatino*, 376 U.S. at 430. It is not appropriate for the judiciary to render decisions that would require judges to attempt the sensitive task of international justice without clear and established international law rules. The international community engenders a "basic divergence between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and those that adhere to a free enterprise system." *Id.*

143. "[A] a few states have denied immunity to foreign states in cases alleging fundamental human-rights violations." RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: SOVEREIGN IMMUNITY ch. 5, intro. note (AM. LAW INST., Tentative Draft No. 3, 2017).

from their wartime conduct.[144] The court confirmed the general proposition that customary international law accords states jurisdictional immunities[145] and concluded that the restrictive theory extends to civil proceedings for "acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum State."[146] In essence, the International Court of Justice held that customary international law shields foreign states from jurisdiction for egregious human rights law violations. Unlike the judiciary, the political branches can best respond to the vagaries of international law and practice: "[i]f U.S. courts are ready to exercise jurisdiction to right wrongs all over the world, including those of past generations, we should not complain if other countries' courts decide to do the same."[147]

Since 1976, other areas of international law have emerged to adjudicate takings in violation of international law. A historical practice developed where a foreign state would espouse its nationals' claims against another foreign state for commercial-based injuries.[148] This practice still continues, but is also accompanied by the founding of international institutions created from bilateral and multilateral treaties to address a myriad of claims: investor-state relations, arbitral awards, and other commercial transactions.[149] More often international economic law and similar bodies of law govern the resolution of disputes between

144. Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J Rep. 99, at ¶ 1, 15–17 (Feb. 3). The suit was based on non-commercial torts committed by Germany during World War II. *See, e.g.*, *id.* at ¶ 21, 27–36.

145. *See generally* Joan E. Donoghue, *The Role of the World Court Today*, 47 GA. L. REV. 181 (2012).

146. Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J Rep. 99, at ¶ 77; *see also* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: SOVEREIGN IMMUNITY § 452 (AM. LAW INST., Tentative Draft No. 3, 2017).

147. Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 682 (7th Cir. 2012). It is highly unlikely for Congress to amend § 1605(a)(3) to include jurisdiction for human rights violations like genocide considering there is no political advantage to gain by fooling with jurisdictional immunities.

148. For example, in the United States, the decision to espouse a claim is a discretionary function of the executive branch and is not subject to judicial review. MARIAN NASH, 2 CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2308–09 (1994). Under this procedure, damages are first paid to the foreign government, who then releases the funds to the injured citizen. *Id.* "Once espoused, the U.S. investor's claim is considered, under both U.S. law and international law, to become the U.S. Government's own claim. . . . [T]he Executive branch may settle the claim without the consent of the injured investor or may waive it altogether." *Id.* at 2309; *see also* Dames & Moore v. Regan, 453 U.S. 654, 679 (1981) (explaining how "nations have often entered into agreements settling the claims of their respective nationals" through treaty settlements and executive agreements).

149. Some examples include the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), June 7, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, Pub. L. No. 91-368, 84 Stat. 692 (1970) (codified at 9 U.S.C. §§ 201–08), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"), March 18, 1965, 17 U.S.T. 1270. *See* Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela, 863 F.3d 96, 101 (2d Cir. 2017) (the ICSID Convention "reflects an expectation that the courts of a member nation will treat the award as final. . . . Member states' courts are thus not permitted to examine an ICSID award's merits, its compliance with international law, or the ICSID tribunal's jurisdiction to render the award; under the Convention's terms, they may do no more than examine the judgment's authenticity and enforce the obligations imposed by the award.").

individuals and states and thereby replicate the practice of governments to espouse claims under the state responsibility doctrine.[150] However, one enduring principle in international practice is the "domestic takings rule," which means a court does not exercise jurisdiction against a foreign state's expropriation of property owned by its citizens.[151] Federal courts have generally recognized limitations to the scope of human rights violations:

> The international human rights movement is premised on the belief that international law sets a minimum standard not only for the treatment of aliens but also for the treatment of human beings generally. Nevertheless, the standards of human rights that have been generally accepted—and hence incorporated into the law of nations—are still limited. They encompass only such basic rights as the right not to be murdered, tortured, or otherwise subjected to cruel, inhuman or degrading punishment; the right not to be a slave; and the right not to be arbitrarily detained. At present, the taking by a state of its national's property does not contravene the international law of minimum human rights.[152]

In other words, the domestic takings rule—which stipulates that a sovereign's expropriation of the property of its own nationals is not prohibited under international law—applies in U.S. courts.[153]

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150. This area of law has been characterized as a combination of transactional law, enterprise law and constitutional law. Curtis R. Reitz, *International Economic Law*, 17 U. PA. J. INT'L ECON. L. 29, 29 (1996). International economic law is complex:

> The broad field can be divided usefully into three major segments. The first segment, of course, is laws that relate to cross-border exchange transactions and international trade in goods and services. A second segment is laws that relate to foreign direct investment, hence to multinational enterprises ("MNE" s). . . . A third segment focuses on 'small-C' or 'large-C' constitutional concerns. International economic law requires international legal institutions to create and to enforce the law and the legislative, administrative, and judicial functions that exist in domestic legal systems.

*Id*.; *see also* Stephen Zamora, *International Economic Law*, 17 U. PA. J. INT'L ECON. L. 63, 63 (1996) (defining it as the "legal aspects of international trade, international business, international banking, and other subjects that involve economic relations between nations, as well as between private parties").

151. de Sanchez v. Banco Cent. de Nicar., 770 F.2d 1385, 1396 (5th Cir. 1985).

152. Mezerhane v. República Bolivariana de Venezuela, 785 F.3d 545, 549 (11th Cir. 2015) (quoting *De Sanchez*, 770 F.2d at 1397). *See* DAMROSCH ET AL., *supra* note 22, at 1013.

> [I]t should be kept in mind that the law on injury to aliens retains independent vitality in providing protection against injuries to individual aliens that do not rise to the level of violations of human rights and against injuries to juridical entities (such as privately owned corporations) that have no human rights.

*Id*. For further exploration, see generally HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (PM Dupuy et al. eds., 2009).

153. *See, e.g*., Wahba v. Nat'l Bank of Egypt, 457 F. Supp. 2d 721, 731 (E.D. Tex. 2006); Jafari v. Islamic Republic of Iran, 539 F. Supp. 209, 215 (N.D. Ill. 1982). *But see* Simon v. Republic of Hungary, 812 F.3d 127, 144 (D.C. Cir. 2016) ("The domestic takings rule has no application in the unique circumstances of this case, in which, unlike in most cases involving expropriations in violation of international law, *genocide* constitutes the pertinent international-law violation.").

### C. VIOLATION OF SEPARATION OF POWERS

Some federal courts have done the functional equivalent of creating jurisdiction based on human rights violations by interpreting § 1605(a)(3) to provide jurisdiction to hear claims alleging genocidal takings.[154] Yet, Congress did not implement § 1605(a)(3) to create jurisdiction based on human rights law, and Congress alone has the power to do so. As the Supreme Court noted:

> By reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States. Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident.[155]

"The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative"[156] branches of government. Both Articles I and II of the Constitution delegate responsibilities for the conduct foreign relations.[157] The powers in pursuance of customary international law that were assigned to Congress "included the powers to send and receive ambassadors, make treaties, declare and wage war, issue reprisals, authorize captures, and define and punish offenses against the law of nations."[158] As for the executive branch, the Court declared the president to be "the sole organ of the federal government in the field of international relations."[159] With respect to the judiciary, Professors Anthony J. Bellia Jr. and Bradford R. Clark assert that the Constitution authorizes federal courts to participate in customary international law (or state-to-state relations) via limited jurisdictional grants.[160] A necessary implication of

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154. *See supra* Part I.

155. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 493 (1983). *See also* The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.")

156. Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918).

157. Bellia & Clark, *supra* note 133, at 732. As mentioned earlier, the Supreme Court in *Schooner Exchange* "made clear that its decision to uphold the immunity of foreign warships was a consequence of the Constitution's allocation of powers." *Id.* at 795. The authors further note that, "[a] judicial decision upholding seizure of a French warship almost certainly would have triggered hostilities with France." *Id.*

158. ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION 42 (2017).

159. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

160. BELLIA & CLARK, *supra* note 158, at 43. According to Bellia and Clark:

> From the time of the founding to the present, the Supreme Court has both upheld the traditional rights of recognized foreign sovereigns under the law of state-state relations, and avoided pursuing redress against foreign nations for their own violations of the law of nations—all in ways that have served to uphold the Constitution's allocation of specific foreign relations powers to the federal political branches.

*Id.* at 44.

the constitutional allocation of powers is that states and courts lack the power to "decide [on their own] whether, when, and how the United States [will] hold another nation accountable for a violation of its rights under the law of state-state relations."[161]

### D. HUMANITARIAN CONCERNS DO NOT OUTWEIGH THE NEED FOR CONGRESSIONAL ACTION

Some courts have relied on an interpretation that, because takings are the means and genocide[162] is the ends, § 1605(a)(3) provides enough clout to invoke jurisdiction against a foreign state.[163] But there is a limit embedded within the expropriation exception, and genocidal takings test those limits.[164] That § 1605 (a)(3) does not expressly prohibit granting jurisdiction in the case of genocidal takings is no justification for the interpretation that it does provide jurisdiction. U.S. law has criminalized genocide after accession to the Genocide Convention in 1948:[165] genocide is an offense under United States law that is punishable by imprisonment and up to a $1 million fine.[166] Under international law, a foreign state violates international law, if, as a matter of state policy, it practices, encourages, or condones:

(a) genocide,

(b) slavery or slave trade,

(c) the murder or causing the disappearance of individuals,

(d) torture or other cruel, inhuman, or degrading treatment or punishment,

(e) prolonged arbitrary detention,

(f) systematic racial discrimination, or

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161. *Id*. at 53 ("A unilateral decision by courts or states to pursue such redress without political branch authorization would contradict this allocation of powers."); *see also Curtiss-Wright*, 299 U.S. at 320.

162. According to the Genocide Convention, the crime of genocide is defined as:

> 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) [k]illing members of the group; (b) [c]ausing serious bodily or mental harm to members of the group; (c) [d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) [i]mposing measures intended to prevent births within the group; (e) [f]orcibly transferring children of the group to another group.

Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 280 [hereinafter Genocide Convention]. *See generally* Payam Akhavan, *Enforcement of the Genocide Convention: A Challenge to Civilization*, 8 HARV. HUM. RTS. J. 229 (1995).

163. Compelling moral claims do not necessarily convert into promising legal claims. *See Garb*, 440 F.3d at 581 (explaining that the capacity of the U.S. courts under the FSIA is a "legal inquiry narrowly circumscribed by statute").

164. *See supra* notes 122–48 and accompanying text.

165. Genocide Convention, *supra* note 162, at 310.

166. Genocide Convention Implementation Act of 1987 ("Proxmire Act"), Pub. L. No. 100–606, 102 Stat. 3045 (1988).

(g) a consistent pattern of gross violations of internationally recognized human rights."[167]

But following the logic of some courts, any of the above violations may be incorporated into § 1605(a)(3). Some courts could interpret the FSIA to create jurisdiction for a "torturous taking" or a "taking done to further the enslavement of a people"—because conceivably tangible property would be confiscated—and thus ignore the limitations of the exception. This practice of reading human rights violations into § 1605(a)(3) has largely been resisted by federal courts. For example, in *Siderman de Blake v. Republic of Argentina*, a federal court decided whether Argentina's seizure of a family business satisfied the expropriation exception.[168] Plaintiffs alleged that Argentina conducted official torture which the court recognized as prohibited under international law.[169] The prohibition against torture is a *jus cogens* norm,[170] which means a non-derogable norm of a particular character that displaces customary international law and treaties.[171] However, the court recognized that neither "the text [nor] legislative history of the FSIA explicitly addresses the effect violations of *jus cogens* might have on the FSIA's cloak of immunity."[172] Unsurprisingly, the court acknowledged the significance of customary international law and the separation of powers: "if violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so."[173] Again, this rationale applies equally to genocidal takings because genocide is considered *jus cogens*.[174] If genocide committed outside the United States is to be an exception to immunity, Congress needs to first legislate a rule for genocidal takings.[175]

## V. CONGRESSIONAL PREROGATIVE TO AMEND § 1605(A)(3)

Some federal courts have wrongfully interpreted § 1605(a)(3) to allow "genocidal takings."[176] A court's decision to assert genocidal expropriations as fitting

167. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (AM. LAW INST. 1987).

168. 965 F.2d 699, 712–13 (9th Cir. 1992) (finding the family alleged sufficient facts to raise their claim under the takings exception).

169. *Id.* at 715–19.

170. *Id.* at 717.

171. *See* Anthony D'Amato, *It's a Bird, It's a Plane, It's Jus Cogens!*, 6 CONN. J. INT'L L. 1, 3 (1990). *See generally* Erika de Wet, Jus Cogens *and Obligations* Erga Omnes*, in* OXFORD HANDBOOK ON HUMAN RIGHTS 541 (Dinah Shelton ed., 2013).

172. *Siderman de Blake*, 965 F.2d at 718.

173. *Id.* at 719 ("The fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA.").

174. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 cmt. n (AM. LAW INST. 1987); *see also* Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 676 (7th Cir. 2012).

175. *See Abelesz*, 692 F.3d at 677.

176. *See, e.g.*, de Csepel v. Republic of Hungary, 859 F.3d 1094, 1102 (D.C. Cir. 2017); Simon v. Republic of Hungary, 812 F.3d 127, 145 (D.C. Cir. 2016); *Abelesz*, 692 F.3d at 675; de Csepel v. Republic of Hungary, 169 F. Supp. 3d 143, 163 (D.D.C. 2016); Davoyan v. Republic of Turkey, 116 F. Supp. 3d 1084, 1102 (C.D. Cal. 2013).

squarely within this statutory exception[177] signals interference into the domestic relations of a foreign state and, accordingly, undermines the role of the political branches to navigate sensitive issues of foreign policy. The international law does not necessarily confer jurisdiction under the FSIA's expropriation exception because the boundaries of this exception are defined by Congress and implemented by the judiciary. Congress has restricted the scope of § 1605(a)(3) in accordance with the international law of expropriation.[178]

A. COURT OF APPEALS DECISIONS THAT ARE INCONSISTENT WITH § 1605(A)(3)

Reading genocidal takings into the FSIA is inconsistent with the plain language of § 1605(a)(3). Nevertheless, some courts have stretched § 1605(a)(3) beyond a reasonable interpretation to incorporate international human rights law. In *Abelesz v. Magyar Nemzeti Bank*,[179] for example, the court determined that "the relationship between genocide and expropriation in the Hungarian Holocaust" allowed the court to hear genocide-based claims: "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."[180] Further, having read genocidal takings into § 1605(a)(3), the court determined that the domestic takings rule is inapplicable because the expropriated property was "an integral part of a widespread campaign to deprive Hungarian Jews of their wealth and to fund genocide, a long-recognized violation of international law." The court's decision is inconsistent with the plain terms of § 1605(a)(3) which does not confer jurisdiction when takings are conducted as part of a genocide.[181]

Similarly, another federal court incorporates international human rights law to stretch the substantive terms of § 1605(a)(3). In *Simon v. Republic of Hungary*, a federal court improperly held "that the FSIA's expropriation exception affords plaintiffs a pathway to pursue certain of their claims: those involving the taking of the plaintiffs' property in the commission of genocide against Hungarian

177. *See* Simon v. Republic of Hungary, 812 F.3d 127, 143 (D.C. Cir. 2016)

178. *See* Freund v. Republic of France, 592 F. Supp. 2d 540, 579 (S.D.N.Y. 2008).

179. 692 F.3d 661(7th Cir. 2012). Plaintiffs were Holocaust survivors and heirs of other Holocaust victims seeking damages in excess of $75 billion against Hungary and its national bank and railway for expropriating property from Hungarian Jews. *Id*. at 665–66.

180. *Id*. at 676.

> 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.

*Id*.

181. *Id*. at 677. Ultimately, the court remanded the case because it required plaintiffs to prove "local exhaustion of remedies." *Id*.

Jews."[182] According to the court, "the alleged takings did more than effectuate genocide or serve as a means of carrying out genocide" because "the expropriations . . . [are] *themselves genocide*."[183] Both courts appear to cherry pick doctrines of international law. Specifically, both courts improperly used the international human rights violation of genocide as a basis for jurisdiction, yet ignored the domestic takings rule. In the case of *Simon*, for example, the court was required to apply the domestic takings rule and dismiss the suit because the Hungarian plaintiffs were nationals of Hungary at the time of the expropriation. Congress is presumed to legislate against the backdrop of established doctrines of international law, such as the domestic takings rule. If Congress wanted to bypass the domestic takings rule, it would have done so expressly. But Congress has not done so with respect to § 1605(a)(3).[184]

### B. JUDICIAL DEFERENCE TO CONGRESS

For sensitive areas of international law—human rights abuses and sovereign immunity—the trend of domestic courts is to exercise judicial caution.[185] This means, for example, that federal and state courts should implement the *Charming Betsy* canon of construction to construe statutes to avoid unreasonable interference with the authority of another foreign state.[186] *Charming Betsy* states that a legislative act "ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country."[187] Judicial deference to Congress is especially important given that Congress has

182. 812 F.3d 127, 133 (D.C. Cir. 2016). The plaintiffs were fourteen Jewish survivors of the Holocaust who were Hungarian nationals during World War II. They alleged that Hungary "collaborated with the Nazis to exterminate Hungarian Jews and to expropriate their property" and that Hungarian railways "voluntarily played an integral role in that effort—specifically by transporting Hungarian Jews to death camps, and, at the point of embarkation, confiscating the property of those about to be deported." *Id.* at 134.

183. *Id.* The court detailed the Holocaust pattern of ghettoization and expropriation that was "deliberately inflict[ed]" to systematically bring about destruction of a group. *Id.* at 143–44. "Expropriations undertaken for the purpose of bringing about a protected group's physical destruction qualify as genocide." *Id.* at 144.

184. *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 521 (1989) ("A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change.").

185. *See* Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1322 (2017). The Supreme Court has stipulated that consistency with international law is of particular importance to § 1605(a)(3). For example, the court noted that "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law." Sosa v. Alvarez-Machain, 542 U.S. 692, 712, 726 (2004) (holding that a Mexican national abducted by U.S. Drug Enforcement Agency agents could not recover damages under the Alien Tort Statute because "at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law").

186. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).

187. *Id.* at 118. The *Charming Betsy* construction "reflects principles of customary international law" and "cautions courts to assume that legislators take account of the legitimate sovereign interests of other when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony." F. Hoffman-La Roche Ltd. v Empagran S.A., 542 U.S. 155, 164 (2004).

a clear history of amending the FSIA to suit its purposes. During the past 40 years, Congress has pursued multiple amendments. For example, twenty years after its initial codification, Congress enacted a new jurisdictional basis: the "state-sponsored terrorism" exception.[188] Here, Congress made an explicit amendment to the FSIA,[189] and it was recently amended in 2008 to make the list of actionable acts even broader.[190] In the context of § 1605(a)(3), the FCEJICA[191] is a testament that Congress alone should decide the question of whether or not § 1605(a)(3) allows for claims of genocidal takings. The political branches possess the prerogative to determine whether, when, and how the United States holds another foreign state accountable for violations of international human rights law.

## CONCLUSION

The FSIA matters substantially to foreign relations because it serves as the gatekeeper for courts to obtain jurisdiction over actions against foreign states. Following the enactment of § 1605(a)(3), courts have generally understood illegal takings to be takings without prompt, adequate and effective payment, and this includes takings that are discriminatory or arbitrary in nature.

Some federal courts have improperly interpreted the FSIA's expropriation exception to create jurisdiction for genocidal takings—and jettisoned the fundamental domestic takings rule. These federal courts have referenced other areas of international law, particularly international human rights law, to determine that "takings in violation of international law" encompass allegations of genocide. It is for Congress, and not the federal or state courts, to enact a "human rights exception" to § 1605(a)(3) or otherwise create jurisdiction for *jus cogens*. Opening U.S. courts to claims of genocidal takings and similar violations, with the locus being a foreign state's territory and the plaintiff being a national of that foreign state, is incompatible with state sovereignty in general.

Federal and state courts are not designed to secure international justice for human rights violations unless Congress provides them with the necessary tools. Congress's objective in setting out § 1605(a)(3) was to comply with the international law of expropriation and state responsibility. Section 1605(a)(3) captures a taking of property that is *itself* a violation of international law, not expropriations that constitute genocide or property taken as part of a genocide which, *in turn*, violates international law. The FSIA does not provide U.S. courts with jurisdiction over claims of genocidal takings under § 1605(a)(3) until Congress enacts such a rule through an amendment.

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188. 28 U.S.C. § 1605A (2012).

189. See Joseph W. Glannon & Jeffery Atik, *Politics and Personal Jurisdiction: Suing State Sponsors of Terrorism Under the 1996 Amendments to the Foreign Sovereign Immunities Act*, 87 GEO. L.J. 675 (1999).

190. STEWART, *supra* note 43, at 63. Under this exception, U.S. nationals and their family members may bring suit against a foreign sovereign responsible if an official employee or agent of the foreign nation 1) commits torture, extrajudicial killing, aircraft sabotage, hostage taking, aids or supplies provisions for such acts and 2) acts in an official capacity on the foreign state's behalf. 28 U.S.C. § 1605A.

191. *See supra* notes 111–16 and accompanying text.