United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 2, 2018 Decided July 10, 2018

No. 17-7064

ALAN PHILIPP, ET AL.,
APPELLEES

v.

FEDERAL REPUBLIC OF GERMANY AND STIFTUNG
PREUSSISCHER KULTURBESITZ,
APPELLANTS

Consolidated with 17-7117

Appeals from the United States District Court
for the District of Columbia
(No. 1:15-cv-00266)

Jonathan M. Freiman argued the cause for appellants. With him on the briefs were *Benjamin M. Daniels*, *David R. Roth*, and *David L. Hall*.

Nicholas M. O'Donnell argued the cause and filed the brief for appellees.

Gary A. Orseck, *Ariel N. Lavinbuk*, *Daniel N. Lerman*, and *D. Hunter Smith* were on the brief for *amicus curiae* David Toren in support of appellees.

Before: TATEL, GRIFFITH, and WILKINS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* TATEL.

TATEL, *Circuit Judge*: In this case, the heirs of several Jewish art dealers doing business in Frankfurt, Germany in the 1930s seek to recover a valuable art collection allegedly taken by the Nazis. Defendants, the Federal Republic of Germany and the agency that administers the museum where the art is now exhibited, moved to dismiss, claiming immunity from suit under the Foreign Sovereign Immunities Act. They also argued that the heirs failed to exhaust their remedies in German courts and that their state-law causes of action are preempted by United States foreign policy. The district court rejected all three arguments and denied the motion to dismiss. For the reasons set forth below, we largely affirm.

I.

Because this appeal comes to us from the district court's ruling on a motion to dismiss, "we must accept as true all material allegations of the complaint, drawing all reasonable inferences from those allegations in plaintiffs' favor." *de Csepel v. Republic of Hungary*, 714 F.3d 591, 597 (D.C. Cir. 2013) (internal quotation marks omitted). Viewed through that lens, the complaint relates the following events:

In 1929, three Frankfurt-based firms owned by Jewish art dealers joined together into a "Consortium"

and purchased "a unique collection of medieval relics and devotional art" called the Welfenschatz. First Amended Compl. (FAC) ¶ 1, *Philipp v. Federal Republic of Germany*, 248 F. Supp. 3d 59 (D.D.C. 2017) (No. 1:15-cv-00266); *see id.* ¶¶ 34–35. The treasure—or "schatz"—acquired its name due to its association with the House of Welf, an ancient European dynasty. *See id.* ¶ 30. Dating primarily from the eleventh to fifteenth centuries, the several dozen pieces that make up the Welfenschatz were housed for generations in Germany's Brunswick Cathedral. *See id.* After displaying the Welfenschatz throughout Europe and the United States and selling a few dozen pieces, the Consortium placed the remainder of the collection, which at that time retained about eighty percent of the full collection's value, into storage in Amsterdam. *Id.* ¶¶ 41, 78.

The heirs allege that "[a]fter the [1933] Nazi-takeover of power in Germany, . . . the members of the Consortium faced catastrophic economic hardship," *id.* ¶ 10, and in 1935, following "two years of direct persecution" and "physical peril to themselves and their family members," *id.* ¶ 145, the Consortium sold the Welfenschatz to the Nazi-controlled State of Prussia for 4.25 million Reichsmarks (the German currency at the time), *id.* ¶¶ 145-160, "barely 35% of its actual value," *id.* ¶ 12. "Standing behind all of this was [Hermann] Goering," *id.* ¶ 73, "Prime Minister of Prussia at that time," *id.*, a "notorious racist and anti-Semite," *id.* ¶ 74, and "legendary" art plunderer, *id.* ¶ 75. Goering "seldom if ever" seized outright the art he desired,

preferring "the bizarre pretense of 'negotiations' with and 'purchase' from counterparties with little or no ability to push back without risking their property or their lives." *Id.* The Welfenschatz was then shipped from Amsterdam to Berlin, *see id.* ¶ 157, where Goering presented it to Adolf Hitler as a "surprise gift," *id.* ¶ 179 (quoting *Hitler Will Receive $2,500,000 Treasure*, Balt. Sun, Oct. 31, 1935, at 2). All but one of the Consortium members then fled the country. *See id.* ¶¶ 163, 170–171. The remaining member died shortly after, officially of "cardiac insufficiency," *id.* ¶ 163, but "rumors" circulated that he was "dragged to his death through the streets of Frankfurt by a Nazi mob," *id.* ¶ 166.

"After the war, [the Welfenschatz] was seized by U.S. troops," *id.* ¶ 181, and eventually turned over to appellant Stiftung Preussischer Kulturbesitz (SPK), a German agency formed "for the purpose . . . of succeeding to all of Prussia's rights in cultural property," *id.* ¶ 184; *see id.* ¶¶ 181–84. The Welfenschatz is now exhibited in an SPK-administered museum in Berlin. *Id.* ¶ 26(iv).

In 2014, appellees, Alan Philipp, Gerald Stiebel, and Jed Leiber, heirs of Consortium members, sought to recover the Welfenschatz, and they and the SPK agreed to submit the claim to a commission that had been created pursuant to the Washington Conference Principles on Nazi–Confiscated Art, *id.* ¶ 220, an international declaration that "encouraged" nations "to develop . . . alternative dispute resolution mechanisms" for Nazi-era art claims, *id.* ¶ 197 (quoting U.S. Dep't

of State, Washington Conference Principles on Nazi-Confiscated Art ¶ 11 (1998) [hereinafter Washington Principles]). Known as the German Advisory Commission for the Return of Cultural Property Seized as a Result of Nazi Persecution, Especially Jewish Property, *id.* ¶ 205, the Advisory Commission concluded "that the sale of the Welfenschatz was not a compulsory sale due to persecution" and it therefore could "not recommend the return of the Welfenschatz to the heirs," Advisory Commission, *Recommendation Concerning the Welfenschatz (Guelph Treasure)* (Mar. 20, 2014), Appellants' Supp. Sources 7; *see also* FAC ¶ 221.

Seeking no further relief in Germany, the heirs filed suit in the United States District Court for the District of Columbia against the Federal Republic of Germany and the SPK (collectively, "Germany"), asserting several common-law causes of action, including replevin, conversion, unjust enrichment, and bailment. *See* FAC ¶¶ 250–304. They sought the return of the Welfenschatz "and/or" 250 million dollars, *id.* Prayer for Relief, a "conservative estimate[]" of its value, *id.* ¶ 33. Germany moved to dismiss, arguing that it enjoyed immunity from suit under the Foreign Sovereign Immunities Act (FSIA), that international comity required the court to decline jurisdiction until the heirs exhaust their remedies in German courts, and that United States foreign policy preempted the heirs' state-law causes of action. The district court rejected all three arguments and, aside from a few uncontested issues, denied the motion to dismiss. *Philipp*, 248 F. Supp. 3d at 87.

Germany appealed the district court's FSIA determination as of right. *See Owens v. Republic of Sudan*, 531 F.3d 884, 887 (D.C. Cir. 2008) ("[W]hen . . . a denial [of a motion to dismiss] subjects a foreign sovereign to jurisdiction, the order is 'subject to interlocutory appeal.'" (quoting *El-Hadad v. United Arab Emirates*, 216 F.3d 29, 31 (D.C. Cir. 2000))). On Germany's motion, the district court certified the other two issues for interlocutory appeal, *Philipp v. Federal Republic of Germany*, 253 F. Supp. 3d 84 (D.D.C. 2017), and this court granted Germany's petition to present them now, Per Curiam Order, *In re Federal Republic of Germany*, No. 17-8002 (D.C. Cir. Aug. 1, 2017). Reviewing *de novo*, we address Germany's immunity, comity, and preemption arguments in turn.

II.

Under the FSIA, foreign sovereigns and their agencies enjoy immunity from suit in United States courts unless an expressly specified exception applies. 28 U.S.C. § 1604. The heirs assert jurisdiction under the statute's "expropriation exception," *see id.* § 1605(a)(3), which "has two requirements": that "'rights in property taken in violation of international law are in issue,'" and that "there is an adequate commercial nexus between the United States and the defendant[]," *de Csepel v. Republic of Hungary*, 859 F.3d 1094, 1101 (D.C. Cir. 2017) (quoting 28 U.S.C. § 1605(a)(3)). Germany "bears the burden of proving that [the heirs'] allegations do not bring [the] case

within" the exception. *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000).

A.

As to the expropriation exception's first requirement, we explained in *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016), that although an "intrastate taking"—a foreign sovereign's taking of its own citizens' property—does not violate the international law of takings, *id.* at 144, an intrastate taking can nonetheless subject a foreign sovereign and its instrumentalities to jurisdiction in the United States where the taking "amounted to the commission of genocide," *id.* at 142. This, we explained, is because "[g]enocide perpetrated by a state," even "against its own nationals[,] . . . is a violation of international law." *Id.* at 145. In so holding, we adopted the definition of genocide set forth in the Convention on the Prevention of the Crime of Genocide. *Id.* at 143. "[A]dopted by the United Nations in the immediate aftermath of World War II," *id.*, the Convention defines genocide, in relevant part, as "[d]eliberately inflicting" on "a national, ethnical, racial or religious group. . . . conditions of life calculated to bring about its physical destruction in whole or in part," Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), art. 2, Dec. 9, 1948, 78 U.N.T.S. 277.

In *Simon*, "survivors of the Hungarian Holocaust," 812 F.3d at 134, alleged that in 1944–45 Hungary "forced all Jews into ghettos, . . . confiscating Jewish

property" in the process, *id.* at 133, and then "transport[ed] Hungarian Jews to death camps, and, at the point of embarkation, confiscate[d] [their remaining] property," *id.* at 134. Assuming the truth of these allegations—like here, the case came to us from a ruling on a motion to dismiss—we held that because the allegations of "systematic, wholesale plunder of Jewish property . . . aimed to deprive Hungarian Jews of the resources needed to survive as a people . . . describe[d] takings of property that are *themselves* genocide within the legal definition of the term," *id.* at 143–44 (internal quotation marks omitted), they "fit[] squarely within the terms of the expropriation exception," *id.* at 146.

A year later, in *de Csepel v. Republic of Hungary*, 859 F.3d 1094 (D.C. Cir. 2017), we considered claims by the heirs of a Jewish collector whose art was seized by the "Hungarian government and its Nazi collaborators," *id.* at 1097. We held, among other things, that plaintiffs could pursue their "bailment" claim for return of the art. *Id.* at 1103. The case, we explained, was "just like *Simon*." *Id.* at 1102. "Here, as there, Hungary seized Jewish property during the Holocaust. Here, as there, plaintiffs bring 'garden-variety common-law' claims to recover for that taking." *Id.*

In today's case, the heirs argue that, after *Simon* and *de Csepel*, "[i]t is beyond serious debate that Nazi Germany took property in violation of international law by systematically targeting its Jewish citizens to make their property vulnerable for seizure." Appellees' Br. 27. The district court agreed, concluding that, "like

in *Simon*, the taking of the Welfenschatz as alleged in the complaint bears a sufficient connection to genocide such that the alleged coerced sale may amount to a taking in violation of international law." *Philipp*, 248 F. Supp. 3d at 71. Germany disagrees, insisting that "[t]he allegations here have little in common with the *Simon* allegations except that they happened under Nazi rule." Appellants' Br. 35. According to Germany, four differences between this case and *Simon* compel a different result.

First, Germany argues that unlike in *Simon*, where the Nazis confiscated "food, medicine, clothing, [or] housing," here they seized art. *Id.* at 40. Although *de Csepel* also involved a seizure of art, we had no need to decide then whether *Simon* applied because the Hungarian government had conceded that the seizure there was genocidal, see *de Csepel v. Republic of Hungary*, 169 F. Supp. 3d 143, 164 (D.D.C. 2016). Thus, we are asked for the first time whether seizures of art may constitute "takings of property that are themselves genocide." *Simon*, 812 F.3d at 144 (emphasis omitted). The answer is yes.

Congress has twice made clear that it considers Nazi art-looting part of the Holocaust. In enacting the Holocaust Victims Redress Act, which encouraged nations to return Nazi-seized assets, Congress "f[ound]" that "[t]he Nazis' policy of looting art was a critical element and incentive in their campaign of genocide against individuals of Jewish . . . heritage." Holocaust Victims Recovery Act, Pub. L. No. 105-158, § 201, 112 Stat. 15, 15 (1998). And in the Holocaust Expropriated

Art Recovery Act (HEAR Act), which extended statutes of limitation for Nazi art-looting claims, Congress again "f[ound]" that "the Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe *as part of their genocidal campaign* against the Jewish people and other persecuted groups." Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 2, 130 Stat. 1524, 1524 (emphasis added).

In this case, moreover, the Welfenschatz was more than just art. As Germany acknowledges, "the Consortium bought [the Welfenschatz] not for pleasure or display, but as business inventory, to re-sell for profit." Appellants' Br. 12. By seizing businesses' inventory—like the other economic pressures alleged in the complaint, such as the "boycott of Jewish-owned businesses," FAC ¶ 58, and "exclu[sion]" of Jews from certain professions, *id.* ¶ 120—the Nazis "dr[ove] Jews out of their ability to make a living," *id.* ¶ 61, and thereby, in the words of the Genocide Convention, "inflict[ed] . . . conditions of life calculated to bring about [a group's] physical destruction in whole or"—at the very least—"in part," Genocide Convention art. 2(c).

Second, Germany argues that whereas *Simon* involved a "forcible deprivation" of property, Appellants' Br. 40, this case involves only a "forced sale . . . for millions of Reichsmarks," *id.* at 42. For purposes of this appeal, however, Germany concedes that the forced sale qualifies as a "tak[ing]," *id.* at 28 n.12, and it offers no reason why a taking by forced sale cannot qualify as a genocidal taking. Indeed, the heirs'

allegations—allegations that, we repeat, we must accept as true at this stage of the litigation—support just that conclusion. According to the complaint, Goering "routinely went through the bizarre pretense of 'negotiations' with and 'purchase' from" powerless counterparties. FAC ¶ 75. In addition, the heirs allege, the Nazis made it impossible for Jewish dealers to sell their art on the open market. Jewish art dealers' "means of work" were "effectively end[ed]," and "[m]ajor dealers' collections were liquidated because they could not legally be sold." *Id.* ¶ 120. "Jewish art dealers . . . lost" even "their Jewish customers," because, as a result of the crippling economic policies, "there was no money left to buy art." *Id.* ¶ 124. "By spring of 1935," the heirs allege, "the exclusion of Jews from . . . German life . . . had become nearly total. The means by which German art could be sold by Jewish dealers had effectively been eliminated." *Id.* ¶ 138. It was within that context, the heirs allege, that the Nazis pressured the Consortium to sell the Welfenschatz for well below market value. *Id.* ¶ 139. "The Consortium had," the heirs allege, "only one option." *Id.* ¶ 145. Fearful of losing the entire value of their property, or worse, the Consortium acquiesced. *Id.* ¶ 139.

Third, Germany claims that "conditions for Hungarian Jews in 1944–45"—the period of time at issue in both *Simon* and *de Csepel*—"were far different from conditions for German Jews nearly a decade earlier, in the summer of 1935." Appellants' Br. 40 n.23. The sale of the Welfenschatz, Germany points out, predated "the Nuremberg Laws, . . . the Decree on the

Elimination of the Jews from Economic Life . . . , and . . . the mass murder of German Jews." *Id.*

In *Simon*, however, we explained that the "Holocaust proceeded in a series of steps." *Simon*, 812 F.3d at 143. " 'The Nazis . . . achieved [the Final Solution] by first isolating [the Jews], then expropriating the Jews' property, then ghettoizing them, then deporting them to the camps, and finally, murdering the Jews and in many instances cremating their bodies.' " *Id.* at 144 (alterations in original) (quoting Complaint ¶ 91, *Simon v. Republic of Hungary*, 37 F. Supp. 3d 381 (D.D.C. 2014) (No. 1:10-cv-1770)). Although the events at issue in *Simon* occurred at the later steps of the Holocaust, *i.e.*, ghettoization and deportation, and the events at issue here occurred at the earlier steps, *i.e.*, isolation and expropriation, both are "steps" of the Holocaust, *id.* at 143. And, as the heirs allege, those earlier steps began as early as 1933, more than two years before the Nazis seized the Welfenschatz. Specifically, the heirs allege that the Nazis rose to power in the early 1930s by "blam[ing] Jews for any and all economic setbacks," FAC ¶ 48, and once in power, "encourage[d]" the "boycotts of Jewish businesses [that] spread in March and April 1933, just weeks after Hitler's ascension," *id.* ¶ 58. Moreover, the 1933 "found[ing] [of] the Reich Chamber of Culture," which "assumed total control over cultural trade" and excluded Jews, "effectively end[ed] the means of work for any Jewish art dealer in one stroke." *Id.* ¶ 120. The heirs also allege that outright violence against German Jews began several years before the seizure, including that "[b]y the spring

1933, . . . the murder of Jews detained [in the Dachau concentration camp] went unprosecuted." *Id.* ¶ 59.

Moreover, in two statutes dealing with Nazi-era art-looting claims, Congress has expressly found that the Holocaust began in 1933. In the first statute—the very section of the FSIA at issue here—Congress provided jurisdictional immunity for certain art exhibition activities, 28 U.S.C. § 1605(h), but created an exception for art taken during the "Nazi[] era," defined as beginning in January 1933, *id.* § 1605(h)(2)(A). In the second, the HEAR Act, Congress again defined January 1933 as the beginning of the Nazi era. HEAR Act § 4 (defining "covered period" as "beginning on January 1, 1933").

The heirs' position finds further support in a timeline on the website of the United States Holocaust Memorial Museum, which Germany itself cites for its observation that the taking of the Welfenschatz predated the Nuremburg Laws. *See* Appellants' Br. 40 n.23. That same timeline demonstrates that, by the time of the taking in 1935, the Nazi government had already opened the Dachau concentration camp, excluded Jews from all civil-service positions, and organized a nationwide boycott of Jewish-owned businesses.

Fourth, emphasizing that the definition of genocide includes an "*intent* to destroy," Genocide Convention art. 2(c) (emphasis added), Germany argues that this case differs from *Simon* because unlike there, where the plaintiffs alleged that the takings were "*aimed* to deprive Hungarian Jews of the resources

needed to survive as a people," *Simon*, 812 F.3d at 143, here the heirs allege that the Nazis wanted the Welfenschatz because it was "historically, artistically and national-politically valuable," FAC ¶ 111. Elsewhere in the complaint, however, the heirs make clear that "[the Nazis] took the collection from [the Consortium] in order to 'Aryanize' [it]." *Id.* ¶ 25(iv). More specifically, the heirs allege that "the collection was wrongfully appropriated not least because [the Consortium members] were regarded as state's enemies for holding the iconic Welfenschatz," *id.* ¶ 25(ii), that "the Gestapo[ ] opened files on the members of the Consortium because of their ownership of the Welfenschatz and their prominence and success," *id.* ¶ 67, and that "Prussian interest in the Welfenschatz was . . . revived . . . [once] the Consortium was . . . vulnerable," *id.* ¶ 68. In short, the heirs have sufficiently alleged that in seizing the Welfenschatz the Nazis were motivated, at least in part, by a desire "to deprive [German] Jews of the resources needed to survive as a people." *Simon*, 812 F.3d at 143.

Finally, unable to demonstrate that this case falls outside *Simon*'s reach, Germany warns that allowing this suit to go forward will "dramatically enlarge U.S. courts' jurisdiction over foreign countries' domestic affairs" by stripping sovereigns of their immunity for any litigation involving a "transaction from 1933–45 between" a Nazi-allied government and "an individual from a group that suffered Nazi persecution." Appellants' Br. 42–43. But as we have just explained, our conclusion rests not on the simple proposition that this

case involves a 1935 transaction between the German government and Jewish art dealers, but instead on the heirs' specific—and unchallenged—allegations that the Nazis *took* the art in *this* case from *these* Jewish collectors as part of their effort to "drive[] [Jewish people] out of their ability to make a living." FAC ¶ 61. Because Germany has failed to carry its burden of demonstrating that these allegations do not bring the case within the expropriation exception as defined and applied in *Simon*, the district court properly denied Germany's motion to dismiss.

B.

In *Simon* we held that, with respect to foreign states (but not their instrumentalities), the expropriation exception's second requirement—"an adequate commercial nexus between the United States and the defendant[]," *de Csepel*, 859 F.3d at 1101—is satisfied only when the property is present in the United States. *Simon*, 812 F.3d at 146. Because the *Simon* plaintiffs had offered but a "bare, conclusory assertion" to that effect, we dismissed the Republic of Hungary from the action. *Id.* at 148. We faced the same issue in *de Csepel* because the art at issue there was not in the United States. *de Csepel*, 859 F.3d at 1107. Bound by *Simon*, we again dismissed the Republic of Hungary. *Id.*

Relying on *Simon* and *de Csepel*, Germany argues that because the Welfenschatz is in Berlin, not the United States, the Federal Republic of Germany must be dismissed. Although the heirs initially urged us to

"reverse course on th[is] question," Appellees' Br. 34, as they acknowledged at oral argument, this panel is bound by *Simon* and *de Csepel*, Oral Arg. 50:14–40. Accordingly, on remand, the district court must grant the motion to dismiss with respect to the Federal Republic of Germany—but not the SPK, an instrumentality for which the commercial-nexus requirement can be satisfied without the presence of the Welfenschatz in the United States. *See de Csepel*, 859 F.3d at 1007 (explaining that "an agency or instrumentality loses its immunity if" the agency or instrumentality owns or operates the property at issue and is engaged in commercial activity in the United States).

III.

In *Simon*, we left open the question whether a court, despite having jurisdiction over an expropriation claim, "nonetheless should decline to exercise [it] as a matter of international comity unless the plaintiffs first exhaust domestic remedies (or demonstrate that they need not do so)." *Simon*, 812 F.3d at 149. In arguing that the answer to that question is yes, Germany does not claim, as it did in the district court, that we should defer to the Advisory Commission's refusal to recommend the return of the Welfenschatz, *see Philipp*, 248 F. Supp. 3d at 81. Instead, Germany argues that the heirs must "exhaust [their] remedies against [Germany] in [its] courts before pressing a claim against it elsewhere." Appellants' Br. 65. "'[B]ypass[ing] [its] courts,'" Germany insists, would "undermine [its] 'dignity [as] a foreign state.'" *Id.* at 68

(quoting *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008)). The district court rejected this argument, as do we.

The key case is the Supreme Court's decision in *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014), where Argentina claimed immunity from post-judgment discovery as a matter of international comity. The Court rejected that claim because nothing in the FSIA's plain text provided for such immunity. *Id.* at 2255. As the Court explained, although courts once decided on a case-by-case basis whether to grant foreign states immunity as matter of international comity, "Congress abated the bedlam in 1976, replacing the old executive-driven, factor-intensive, loosely common-law-based immunity regime with the [FSIA]'s 'comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.'" *Id.* (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983)). "[A]fter the enactment of the FSIA," the Court continued, "the Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity." *Id.* at 2256 (quoting *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010)). Going forward, "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." *Id.*

Acknowledging that nothing in the text of the FSIA's expropriation exception requires exhaustion, Germany argues that applying *NML Capital* here "confuses immunity from jurisdiction with non-immunity

common-law doctrines." Appellants' Reply Br. 38. The FSIA, Germany points out, operates as a pass-through, "granting jurisdiction yet leaving the underlying substantive law unchanged." *Id.* at 39 (quoting *Owens v. Republic of Sudan*, 864 F.3d 751, 763 (D.C. Cir. 2017)). As Germany emphasizes, FSIA section 1606 provides that foreign states not entitled to immunity, "shall be liable in the same manner and to the same extent as a private individual under like circumstances." *Id.* at 38 (quoting 28 U.S.C. § 1606). According to Germany, "exhaustion is a non jurisdictional common-law doctrine," that, like forum non conveniens, "'remains fully applicable in FSIA cases.'" *Id.* at 39 (quoting *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 100 (D.C. Cir. 2002)).

Germany's effort to circumvent *NML Capital* fails for several reasons. To begin with, although a different provision of the FSIA, its terrorism exception, conditions jurisdiction on the claimant "afford[ing] the foreign state a reasonable opportunity to arbitrate the claim," 28 U.S.C. § 1605A(a)(2)(A)(iii), no such requirement appears in the expropriation exception, and we have long recognized "the standard notion that Congress's inclusion of a provision in one section strengthens the inference that its omission from a closely related section must have been intentional," *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 948 (D.C. Cir. 2008). Moreover, far from demonstrating that the FSIA leaves room for an exhaustion requirement, the very FSIA provision that Germany relies on, section 1606, forecloses that

possibility. By its terms, that provision permits only defenses, such as forum non conveniens, that are equally available to "private individual[s]," 28 U.S.C. § 1606. Obviously a "private individual" cannot invoke a "*sovereign's* right to resolve disputes against it." Appellants' Br. 68 (emphasis added).

To be sure, the Seventh Circuit, in a case similar to *Simon*, required the plaintiffs—survivors of the Hungarian Holocaust and the heirs of other victims—to "exhaust any available Hungarian remedies or [show] a legally compelling reason for their failure to do so," *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 852 (7th Cir. 2015). In doing so, the court distinguished *NML Capital*, holding that "defendants need not rely on . . . the FSIA," but may "invoke the well-established rule that exhaustion of domestic remedies is preferred in international law as a matter of comity." *Id.* at 859. The Seventh Circuit drew that "well-established rule" from a provision of the Third Restatement of Foreign Relations Law of the United States, but as this court has explained, that "provision addresses claims of one state against another," *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 949 (D.C. Cir. 2008). Confirming that interpretation, the tentative draft of the Fourth Restatement explains that "the rule cited by the [Seventh Circuit] applies by its terms to 'international . . . proceedings,'" Restatement (Fourth) of Foreign Relations Law of the United States § 455 Reporters' Note 9 (Am. Law Inst., Tentative Draft No. 2, 2016)—*i.e.*, "nation vs. nation litigation," *Chabad*, 528 F.3d at 949; *see also Agudas*

Chasidei Chabad of U.S. v. Russian Federation, 466 F. Supp. 2d 6, 21 (D.D.C. 2006) ("[T]his court is not willing to make new law by relying on a misapplied, non-binding international legal concept."). And as we explained above, the FSIA, Congress's "comprehensive" statement of foreign sovereign immunity, which "is, and always has been, a 'matter of grace and comity,'" *NML Capital*, 134 S.Ct. at 2255 (quoting *Verlinden*, 461 U.S. at 486), leaves no room for a common-law exhaustion doctrine based on the very same considerations of comity.

In so concluding, we have considered the contrary position advanced by the United States in an amicus brief recently filed before a different panel of this court, where it argued that "[t]he fact [that] the FSIA itself does not impose any exhaustion requirement for expropriation claims . . . does not foreclose dismissal on international comity grounds." Brief of United States as Amicus Curiae at 14–15, *Simon v. Republic of Hungary*, No. 17-7146 (D.C. Cir. June 1, 2017). This position, of course, is flatly inconsistent with *NML Capital*, a case the government fails to cite, relying instead on non-FSIA cases, *see id.* at 15. Accordingly, nothing in the government's brief alters our conclusion that the heirs have no obligation to exhaust their remedies in Germany.

Germany protests that, as a "staunch U.S. ally," it "deserves the chance to address [the heirs'] attacks" in its own courts. Appellants' Br. 77. As the Court made clear in *NML Capital*, however, such "apprehensions are better directed to that branch of government with

authority to amend the [FSIA]." *NML Capital*, 134 S. Ct. at 2258.

IV.

This brings us, finally, to Germany's argument that the heirs' state-law causes of action—replevin, conversion, unjust enrichment, and bailment—conflict with, and thus are preempted by, United States foreign policy. In support, Germany cites the Washington Principles, which "encouraged" nations "to develop . . . alternative dispute-resolution mechanisms for resolving ownership issues," Washington Principles ¶ 11, as well the Terezin Declaration, a follow-up agreement also urging alternative dispute resolution. According to Germany, "letting [the heirs] press [the] same claims" they already presented to the Advisory Commission "again in a U.S. court" may cause signatories to the Washington Principles to "question whether [they] should follow the [] Principles," thereby "undermin[ing] the considerable diplomatic effort that the U.S. devoted to them." Appellants' Br. 56–57.

Germany relies principally on two cases, *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), and *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). In *Garamendi*, the Supreme Court began by reiterating the basic rule that "at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the

Constitution's allocation of the foreign relations power to the National Government in the first place." *Garamendi*, 539 U.S. at 413 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964)). Applying that rule to the facts of the case before it, the Court found California's attempt to regulate Holocaustera insurance claims preempted by "the foreign policy of the Executive Branch, as expressed principally in . . . executive agreements with Germany, Austria, and France." *Id.* In those executive agreements, the United States had "promised to use its 'best efforts, in a manner it considers appropriate,' to get state and local governments to respect [an internal dispute resolution process] as the exclusive mechanism.'" *Id.* at 406 (quoting Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," Ger.-U.S., July 17, 2000, 39 I.L.M. 1298, 1300). In particular, the United States agreed that in any case involving Holocaust-era insurance claims, it would submit a statement "'that U.S. policy interests favor dismissal on any valid legal ground.'" *Id.* (quoting Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," 39 I.L.M. at 1304). Acknowledging that the executive agreements contained no preemption clause, the Court nonetheless concluded that the "express federal policy and the clear conflict raised by the [California] statute . . . require[d] state law to yield." *Id.* at 425.

Similarly, in *Crosby*, the Court found Massachusetts's regulation of commerce with Burma to be "an obstacle to the accomplishment of Congress's full

objectives under [a] federal Act" that imposed some economic sanctions on Burma and gave the President discretion to impose more. 530 U.S. at 373. The Massachusetts law, the Court explained, by "imposing a different, state system of economic pressure against the Burmese political regime," could "blunt the consequences of discretionary Presidential action," *id.* at 376.

This case is very different. Although the Washington Principles and Terezin Declaration both "encourage[ ]" nations "to develop . . . alternative dispute resolution mechanisms for resolving ownership issues," Washington Principles ¶ 11, neither requires that the alternative mechanisms be *exclusive* or otherwise "takes an explicit position in favor of or against the litigation of claims to Nazi-confiscated art." Brief of United States as Amicus Curiae at 18, *Saher v. Norton Simon Museum of Art at Pasadena*, 131 S. Ct. 3055 (2011) (No. 09-1254), 2011 WL 2134984, at *18. Unlike in *Garamendi*, where the President promised to seek "dismissal on any valid legal ground," 539 U.S. at 406 (internal quotation marks omitted), or in *Crosby*, where the state law at issue "blunt[ed]" the force of discretion Congress had explicitly granted the President, 530 U.S. at 376, here, as the district court explained, there is no "direct conflict between the property-based common law claims raised by Plaintiffs and [United States] foreign policy," *Philipp*, 248 F. Supp. 3d at 78.

Indeed, far from adopting, as in *Garamendi*, an "express federal policy," 539 U.S. at 425, of disfavoring

domestic litigation of Nazi-era art-looting claims, the United States has repeatedly made clear that it *favors* such litigation. Congress, as explained above, *see supra* at 8, recently extended statutes of limitation for Nazi-era art-looting claims, *see* HEAR Act § 4, and the FSIA exempts them from the jurisdictional immunity otherwise afforded certain art collections temporarily exhibited in the United States, *see* 28 U.S.C. § 1605(h)(1)–(3).

V.

For the foregoing reasons, we affirm the district court's denial of the motion to dismiss, except that on remand, the district court must, as required by *Simon* and *de Csepel*, grant the motion to dismiss with respect to the Federal Republic of Germany.

So ordered.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-7064 **September Term, 2017**
FILED ON: JULY 10, 2018

ALAN PHILIPP, ET AL.,
APPELLEES

v.

FEDERAL REPUBLIC OF GERMANY,
A FOREIGN STATE AND STIFTUNG
PREUSSISCHER KULTURBESITZ,
APPELLANTS

Consolidated with 17-7117

Appeals from the United States District Court
for the District of Columbia
(No. 1:15-cv-00266)

Before: TATEL, GRIFFITH, and WILKINS, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in these causes be

affirmed as to the denial of the motion to dismiss, except that on remand, the district court must grant the motion to dismiss with respect to the Federal Republic of Germany, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

Date: July 10, 2018

Opinion for the court filed by Circuit Judge Tatel.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALAN PHILLIP, *et al.*, Plaintiffs, v. FEDERAL REPUBLIC OF GERMANY, *et al.*, Defendants.	Civil Action No. 15-266 (CKK)

MEMORANDUM OPINION
(May 18, 2017)

Plaintiffs, who are the legal successors of the estates of three art dealer firms in Frankfurt, Germany, filed suit against Defendants the Federal Republic of Germany ("Germany") and Stiftung Preussischer Kulturbesitz ("SPK"), an instrumentality of Germany, alleging that the SPK is in wrongful possession of a collection of medieval relics, known as the "Welfenschatz," because the 1935 sale of same was coerced as part of the Nazi persecution of the Jewish sellers.[1] Defendants moved to dismiss each of Plaintiffs' ten claims.

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[1] The Court reviewed the background of this case more extensively in its Memorandum Opinion regarding the resolution of Defendants' motion to dismiss. *Philipp v. Fed. Republic of Germany*, No. CV 15-266 (CKK), 2017 WL 1207408, at *2-*3 (D.D.C. Mar. 31, 2017).

On March 31, 2017, the Court entered an [25] Order granting in part and denying in part Defendants' Motion to Dismiss the First Amended Complaint. Specifically, the Court dismissed five of Plaintiffs' ten claims, but denied Defendants' request to dismiss the following five claims: declaratory relief (Count I); replevin (Count II); conversion (Count III); unjust enrichment (Count IV); and bailment (Count IX). In reaching this holding, the Court found that: (1) Plaintiffs sufficiently pled these five claims under the expropriation exception to the Foreign Sovereign Immunities Act ("FSIA"), codified at 28 U.S.C. § 1605(a)(3) ("FSIA claims"); (2) Plaintiffs' claims are not preempted or non-justiciable, nor should they be dismissed under the doctrine of forum non conveniens ("non-FSIA claims"). Defendants filed an interlocutory appeal as of right before the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") with respect to the FSIA issue. *See*, *e.g.*, *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1126 (D.C. Cir. 2004) ("The denial of a motion to dismiss on the ground of sovereign immunity . . . is . . . subject to interlocutory review.").

Presently before the Court are Defendants' [28] Motion for Certification of the Court's March 31, 2017 Opinion, and Defendants' [29] Motion to Stay Further Proceedings. Defendants request that the Court certify the Order in its entirety, which includes the remaining non-FSIA issues, for interlocutory appeal and stay the case while the interlocutory appeal is pending before the D.C. Circuit. Plaintiffs oppose both requests. Upon

consideration of the pleadings,[2] the relevant legal authorities, and the record as a whole, the Court GRANTS Defendants' [28] Motion for Certification of the Court's March 31, 2017 Opinion, and GRANTS Defendants' [29] Motion to Stay Further Proceedings.

A. Interlocutory Appeal of Court's Order of March 31, 2017

As previously mentioned, Defendants is proceeding with an interlocutory appeal of the Court's determination that Plaintiffs' claims fall within the expropriation exception to the FSIA. As such, Defendants now request that the Court certify the Order granting in part and denying in part its motion to dismiss so that the three remaining non-FSIA issues are considered as part of the already pending interlocutory appeal. These issues are: (1) whether Plaintiffs' claims are preempted under U.S. foreign policy; (2) whether Plaintiffs' claims are non-justiciable due to international comity; and (3) whether Plaintiffs' claim should be dismissed under the doctrine of forum non conveniens.

A district judge may certify a non-final order for appeal if it "involves a controlling question of law as to

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[2] While the Court bases its decision on the record as a whole, its consideration has focused on the following documents: Defs.' Mot. for Cert. of Ct.'s Mar. 31, 2017 Opinion ("Defs.' Mot. for Cert."), ECF No. [28]; Defs.' Mot. to Stay Further Proceedings ("Defs.' Mot. to Stay"), ECF No. [29]; Pls.' Opp'n to Defs.' Mots. ("Pls.' Opp'n"), ECF No. [31]; Defs.' Reply in Supp. of Their Mots. ("Defs.' Reply"), ECF No. [32].

which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see also Z St. v. Koskinen*, 791 F.3d 24, 28 (D.C. Cir. 2015). The decision whether to certify a case for interlocutory appeal is within the discretion of the district court. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) *cert. denied sub nom. U.S. ex rel. Barko v. Kellogg Brown & Root, Inc.*, 135 S. Ct. 1163 (2015). "Because certification runs counter to the general policy against piecemeal appeals, this process is to be used sparingly." *Sai v. Dep't of Homeland Sec.*, 99 F.Supp.3d 50, 59 (D.D.C. 2015).[3]

The Court must first determine whether the issues raise a controlling question of law. "Under § 1292(b), a 'controlling question of law is one that would require reversal if decided incorrectly or that could materially affect the course of litigation with

[3] Plaintiffs also urge the Court to consider factors relevant to the collateral order doctrine in reaching its decision. Indeed, as Plaintiffs note, some courts have relied on these factors in determining whether it is appropriate to grant certification of a non-final order. *See*, *e.g.*, *United States v. Rostenkowski*, 59 F.3d 1291, 1296 (D.C. Cir. 1995) (considering whether the decision: "(1) conclusively determine[s] the disputed question; (2) resolve[s] an important issue completely separate from the merits of the action; and (3) would be effectively unreviewable on appeal from a final judgment." (internal quotations omitted)). However, Plaintiffs do not discuss the import of these factors to the instant action. As such, the Court shall treat this argument as abandoned. However, the Court notes that it would reach the same conclusion even in light of these factors.

resulting savings of the court's or the parties' resources.'" *APCC Servs. v. Sprint Communs. Co.*, 297 F. Supp. 2d 90, 95-96 (D.D.C. 2003) (quoting *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 233 F. Supp. 2d 16, 19 (D.D.C. 2002)). "Controlling questions of law include issues that would terminate an action if the district court's order were reversed." *Id.* Here, Defendants seek appellate review of three issues, each of which would result in dismissal of the complaint and termination of the action if the order from this Court is reversed. As such, the issues raised by Defendants involve controlling issues of law.

The Court must next determine whether there are substantial grounds for difference of opinion with respect to these issues. "A substantial ground for difference of opinion is often established by a dearth of precedent within the controlling jurisdiction and conflicting decisions in other circuits." *Id.* at 97. In some instances, this may be satisfied if a court's decision conflicts with the decisions of several other courts. *Id.* at 97-98. The Court need not to rehash its earlier ruling on each of these three claims, but simply notes, as demonstrated in the Memorandum Opinion, that it appears this requirement is satisfied with respect to each of the three issues. *See* Mem. Op. (Mar. 31, 2017), at 20-41, ECF No. [26].

Finally, the Court must determine whether certifying these issues for an interlocutory appeal would materially advance the litigation. Other courts recognized that this factor encompasses the "salutary objective of 'avoid[ing] piecemeal review' on appeal. *Vila v.*

Inter-American Inv., Corp., 596 F. Supp. 2d 28, 30 (D.D.C. 2009) (quoting *Judicial Watch, Inc.*, 233 F. Supp. 2d at 20); *see Howard v. Office of Chief Admin. Officer of U.S. House of Representatives*, 840 F. Supp. 2d 52, 55 (D.D.C. 2012) (quoting *Tolson v. United States*, 732 F.2d 998 at 1002 (D.C. Cir. 1984)) ("It 'is meant to be applied in relatively few situations and should not be read as a significant incursion on the traditional federal policy against piecemeal appeals.' "). Here, Defendants have appealed the Court's decision that they are not entitled to sovereign immunity pursuant to the FSIA's expropriation exception. As such, certifying the remaining issues raised by Defendants in their motion to dismiss will avoid the piecemeal review of Defendants' claims that this Court lacks jurisdiction over Plaintiffs' claims, that Plaintiffs' claims already have been adjudicated, and/or that this Court is not the appropriate forum to hear their claims.

The Court has considered Plaintiffs' arguments with respect to each of the factors considered in determining whether to grant the request for appellate review, and is not persuaded that such arguments warrant denial of Defendants' request in this particular situation. *See* Pls.' Opp'n at 5-10. Instead, the Court has determined that Defendants have demonstrated that appellate review is appropriate. While it is the Court's view that its prior decision is correct, the Court finds that all three requirements to certify a case for interlocutory appeal are satisfied. As such, in an exercise of its discretion, the Court shall certify its Order on the motion to dismiss, including the three non-FSIA

issues, for interlocutory appeal in order to have the entirety of the issues raised in the motion addressed by the D.C. Circuit.

B. Stay Pending Interlocutory Appeal

Defendants also request that the Court issue a formal stay of these proceedings while the interlocutory appeal is pending before the D.C. Circuit. "'[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.'" *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 n.6, 880 (1998) (quoting *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936)); *see also Clinton v. Jones*, 520 U.S. 681, 706 (1997). Moreover, a party requesting a stay of proceedings "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else." *Landis*, 299 U.S. at 255.

Here, the parties dispute whether the Court is divested of jurisdiction over these proceedings regardless of its decision on the request to stay in light of the pending interlocutory appeal related to the FSIA issues filed by Defendants as a matter of right. The Court finds that it need to not make a decision on this issue because the Court concludes that it is

appropriate to stay the proceedings while Defendants' interlocutory appeal is pending. Indeed, as previously mentioned, Defendants raised several dispositive issues, including arguing that this Court does not have jurisdiction to hear Plaintiffs' claims. As such, the Court shall not require Defendants to respond to the complaint and the parties to proceed with discovery at this time. In an exercise of its discretion, the Court shall stay the proceedings pending the resolution of the interlocutory appeal by the D.C. Circuit.

For the foregoing reasons, the Court shall GRANT Defendants' [28] Motion for Certification of the Court's March 31, 2017 Opinion, and GRANT Defendants' [29] Motion to Stay Further Proceedings. The Court shall certify its [25] Order for immediate appellate review pursuant to 28 U.S.C. § 1292(b), and shall stay the case pending the resolution of Defendants' interlocutory appeal.

An appropriate Order accompanies this Memorandum Opinion.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALAN PHILLIP, *et al*., Plaintiffs, v. FEDERAL REPUBLIC OF GERMANY, *et al*.., Defendants.	Civil Action No. 15-266 (CKK)

ORDER
(May 18, 2017)

For the reasons stated in the accompanying Memorandum Opinion, it is, this 18th day of May, 2017, hereby

ORDERED that Defendants' [28] Motion for Certification of the Court's March 31, 2017 Opinion is GRANTED; and it is further

ORDERED that Defendants' [29] Motion to Stay Further Proceedings is GRANTED; and it is further

ORDERED that all proceedings in this matter shall be STAYED until the D.C. Circuit issues its mandate in Defendants' interlocutory appeal in *Philipp, et al. v. Fed. Republic of Germany, et al.*, Case No. 17-7064 (D.C. Cir.); and it is further

ORDERED that this Court's [25] Order of March 31, 2017, is AMENDED to add the following statement:

It is further ORDERED that this [25] Order is certified for immediate appellate review because it involves "a controlling question of law as to which there is substantial ground for difference of opinion" and because "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

IT IS SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALAN PHILIPP, *et al*., Plaintiffs, v. FEDERAL REPUBLIC OF GERMANY, *et al*.., Defendants.	Civil Action No. 15-266 (CKK)

MEMORANDUM OPINION
(March 31, 2017)

This case centers around the June 14, 1935, sale of a collection of medieval relics known as the "Welfenschatz" by a consortium of three art dealer firms in Frankfurt ("Consortium") to the State of Prussia through the Dresdner Bank. Plaintiffs Alan Philipp, Gerald G. Stiebel, and Jed R. Leiber, legal successors of the estates of members of the Consortium, filed suit against Defendants the Federal Republic of Germany ("Germany") and Stiftung Preussischer Kulturbesitz ("SPK"), an instrumentality of Germany, alleging that the SPK is in wrongful possession of the Welfenschatz because the 1935 sale was coerced as part of the Nazi persecution of the Jewish sellers. Presently before the Court is Defendants' [18] Motion to Dismiss the First Amended Complaint and Incorporated Memorandum of Law, requesting that the Court dismiss all of Plaintiffs' claims on the grounds that:

(1) Defendants are entitled to sovereign immunity; (2) the claims are preempted and non-justiciable because they conflict with U.S. foreign policy; and/or (3) the doctrine of forum non conveniens favors dismissal.[1]

Upon consideration of the pleadings,[2] the relevant legal authorities, and the record as a whole, the Court GRANTS IN PART and DENIES IN PART Defendants' [18] Motion to Dismiss the First Amended Complaint for the reasons described herein. Specifically, the Court GRANTS as conceded Defendants' request that

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[1] Defendants also advanced an argument that Plaintiffs' claims are barred by the statute of limitations in their motion. However, Defendants formally withdrew their statute of limitations argument without prejudice with the possibility of it being raised later in light of the enactment of the Holocaust Expropriated Art Recovery Act of 2016, H.R. 6130, Pub L. No. 114-308, which was signed into law after briefing was complete on the pending motion to dismiss. Defs.' Notice at 3. As such, the Court shall not consider this argument at this time. However, Defendants are not barred from raising this issue at a later time.

[2] While the Court bases its decision on the record as a whole, its consideration has focused on the following documents: 1st Am. Compl. ("Compl."), ECF No. [14]; Defs.' Mot. to Dismiss 1st Am. Compl. & Incorp. Mem. of Law ("Defs.' Mot."), ECF No. [18]; Pls.' Opp'n to Defs.' Mot. to Dismiss ("Pls.' Opp'n"), ECF No. [19]; Defs.' Reply in Further Supp. of Mot. to Dismiss 1st Am. Compl. ("Defs.' Reply"), ECF No. [20]; Pls.' Notice, ECF No. [21]; Defs.' Notice, ECF No. [22]; Pls.' Stmt. on HEAR Act as it Relates to U.S. Policy ("Pls.' Stmt."), ECF No. [23]; Jt. Status Report on Need for Further Briefing on Effect of HEAR Act ("Jt. Status Report"), ECF No. [24]. These motions are fully briefed and ripe for adjudication. In an exercise of its discretion, the Court finds that holding oral argument would not be of assistance in rendering its decision. *See* LCvR 7(f).

the Court dismiss the following five non-property based claims because Defendants are entitled to sovereign immunity on each claim: fraud in the inducement (Count V); breach of fiduciary duty (Count VI); breach of the covenant of good faith and fair dealing (Count VII); civil conspiracy (Count VIII); and tortious interference (Count X). The Court DENIES Defendants' request for dismissal on the remaining five claims: declaratory relief (Count I); replevin (Count II); conversion (Count III); unjust enrichment (Count IV); and bailment (Count IX).

I. BACKGROUND

In or around 1929, the Consortium was formed by three art dealer firms owned by German Jews in Frankfurt. The three firms, J. & S. Goldschmidt, I. Rosenbaum, and Z.M. Hackenbroch, were owned by Plaintiffs' ancestors and/or predecessors-in-interest.[3] Compl. ¶ 34. The Consortium acquired the Welfenschatz on

[3] Specifically, Plaintiff Philipp, a citizen of the United Kingdom and a resident of London, is the grandson and sole legal successor to the estate of the late Zacharias Max Hackenbroch, the sole owner of the former Hackenbroch art dealers. Compl. ¶ 17. Plaintiff Stiebel, a U.S. citizen and a resident of Santa Fe, New Mexico, is the great nephew and legal successor of the estate of the late Isaak Rosenbaum, co-owner of I. Rosenbaum art dealers. *Id.* ¶ 18. Plaintiff Leiber, a U.S. citizen and resident of West Hollywood, California, is the grandson and sole heir of Saemy Rosenberg, the other co-owner of Rosenbaum art dealers, and the great nephew of Isaak Rosenbaum and partly a successor to his estate. *Id.* ¶ 19. Plaintiffs are the assignees of the claims of Julius Falk Goldschmidt by written instrument from the sole owners of the J. & S. Goldschmidt firm. *Id.* ¶ 20.

October 5, 1929, pursuant to a written agreement with the Duke of Brunswick-Lüneberg. *Id.* ¶ 35. The Welfenschatz is comprised of 82 medieval reliquary and devotional objects, dating primarily from the 11th to 15th century, that were originally housed in the Braunschweiger Dom (Brunswick Cathedral) in Germany. *Id.* ¶¶ 30, 41. The Consortium eventually brought the Welfenschatz to the United States to offer it for sale to museums and, by 1931, sold 40 of the 82 pieces to museums and individuals in Europe and the United States, including the Cleveland Museum of Art. *Id.* ¶ 41. Plaintiffs' claims center around the remaining 42 objects that were acquired by the State of Prussia pursuant to a contract with the Consortium on June 14, 1935, which was facilitated through the Dresdner Bank.[4] *Id.* ¶ 151. Defendant SPK, an instrumentality of Germany, was created for the purpose of succeeding all of Prussia's rights in cultural property and currently is in possession of the Welfenschatz. *Id.* ¶ 184. The Welfenschatz currently is located at the SPK-administered Museum of Decorative Arts ("Kunstgewerbemuseum") in Berlin.[5] *Id.* ¶ 26(iv).

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[4] For ease of reference, the Court shall refer to these 42 objects at issue as "the Welfenschatz," even though Plaintiffs' claims do not involve the 40 of the 82 objects in the collection that were sold in the United States and Europe prior to the 1935 transaction. *See* Compl. ¶ 31 (listing the objects at issue).

[5] During World War II, the Welfenschatz was shipped out of Berlin to be saved from destruction and robbery. It was seized by U.S. troops and handed over in trust to the State of Hesse. Compl. ¶ 181.

Plaintiffs' position is that the 1935 sale between the Consortium and the State of Prussia, a political subdivision of the German Weimar Republic and later the Third Reich, was coerced as part of the Nazi persecution of the Jewish sellers of the Welfenschatz and, as such, the Court shall briefly summarize the allegations in the complaint that Plaintiffs rely on in support of this position. *Id.* ¶ 22. Specifically, Plaintiffs allege the 1935 transaction was spearheaded by Nazi-leaders Hermann Goering and Adolf Hitler, who were involved in explicit correspondence to "save the Welfenschatz" for the German Reich. *Id.* ¶¶ 2, 9. Further, the 1935 sale resulted in a payment of 4.25 million RM, which Plaintiffs assert demonstrates the lack of an arms'-length transaction because it was barely 35% of the market value of the Welfenschatz. *Id.* ¶¶ 4, 12. Further, the money exchanged was never fully accessible to the Consortium because it was split and partly paid into a blocked account, and was subject to "flight taxes" that Jews had to pay in order to escape. *Id.* ¶¶ 4, 12. Moreover, in November of 1935, Goering presented the Welfenschatz as a personal "surprise gift" to Hitler during a ceremony. *Id.* ¶¶ 13, 179.

Plaintiffs contend that during the time that the Consortium possessed the Welfenschatz, there were concerted efforts by Germany's Reichsregierung (Reich Government), the Prussian State Government and several other entities and museum officials to regain possession of the Welfenschatz starting in 1930. *See generally id.* ¶¶ 37-40. After the Nazi rise to power in Germany, *see generally id.* ¶¶ 44-65, Plaintiffs point to

more statements regarding an interest in Germany regaining possession of the Welfenschatz. Specifically, Plaintiffs point to a letter written by the new Mayor of Frankfurt Friedrich Krebs to Hitler requesting that Hitler "create the legal and financial preconditions for the return of the [Welfenschatz]." *Id.* ¶ 69 (quoting Compl., Ex. 2). Plaintiffs also reference a letter from 1933 written by a Frankfurt museum director to the President of the German Association for the Preservation and Promotion of Research indicating that one member of the Consortium indicated the owners were "very willing . . . to enter into negotiations with the Reich," *id.* ¶ 77, and minutes from a 1934 meeting among several museum directors and a board member of the Dresdner Bank when the purchase of the Welfenschatz was again discussed, *id.* ¶ 79.

Dresdner Bank, which was majority-owned by the German state at the time of the Nazi rise to power, served as the intermediary facilitating the 1935 transaction between the Consortium and Prussia. *Id.* ¶¶ 88-89. Plaintiffs cite to an investigative report from a German weekly news magazine noting that it "shows the [Dresdner] bank took part early on in Third Reich's policy of confiscating Jewish property and wealth." *Id.* ¶ 90; *see also id.* ¶ 132. Plaintiffs detail the history of the discussions between the Dresdner Bank and the Consortium regarding the sale price of the Welfenschatz, noting that in January 1934, the Consortium was unwilling to sell the objects for below 6.5 million RM or 6 million RM in "extreme circumstances," *id.* ¶ 92, while the Dresdner Bank indicated the sale price

could not exceed 3.5 million RM, *id.* ¶ 93. Plaintiffs also point to a record from May 1934 indicating that the Consortium advised the Dresdner Bank that it had an offer of 7 million RM, probably from a Berlin private banker. *Id.* ¶ 94. Further, Plaintiffs point to a draft letter written to Hitler by the Secretary of the Prussian State Ministry and provided to the Deputy Minister of the Ministry of Science in July 1934 regarding acquisition of the Welfenschatz through Prussian treasury bonds in order to "bring the historically, artistically and national-politically valuable [Welfenschatz] to the Reich in addition to many other valuable cultural treasures," and specifically referencing the role of Prussian Prime Minister Goering. *Id.* ¶¶ 103, 111 (quoting Compl., Ex. 3). In February 1935, the Dresdner Bank Director noted that the Prussian Finance Minister asked him to handle the Welfenschatz matter. *Id.* ¶ 133.

In April 1935, an owner of a Berlin art dealership who served as the messenger between the Bank and the Consortium, notified the Bank's Director that he had been "intensely preoccupied with the matter" for a year and a half and reported that the problem with acquiring the Welfenschatz was that the members of the Consortium were confident in the asking price. *Id.* ¶¶ 83, 137. Later that month, the Dresdner Bank Director authorized a bid of 3.7 million on behalf of its client. *Id.* ¶ 140. At some point, the Consortium sent word that it was willing to sell the Welfenschatz for 5 million RM. *Id.* ¶ 139. Plaintiffs also point to a new museum that intended to acquire the Welfenschatz and allege that "[t]he 'authoritative entities' were . . .

invited to review the plans at [the prospective buyer museum] to ensure that there was no 'conflict," which resulted in the elimination of an independent interested purchaser. *Id.* ¶ 143.

On May 4, 1935, the Consortium offered the Welfenschatz for a sale price of 4.35 million RM to the Dresdner Bank, *id.* ¶ 146, and, after receiving a response from the Dresdner Bank, submitted its final offer on May 17, 1935, *id.* ¶ 148. The contract was executed on June 14, 1935, selling the Welfenschatz for the price of 4.25 million RM. *Id.* ¶ 151. On July 18, 1935, the Welfenschatz was packed for shipping from Amsterdam, where it was housed, for delivery to Berlin, and the Dresdner Bank made the requisite payment on the following day. *Id.* ¶¶ 157-58. The payments were split, with 778,125 RM paid into a blocked account with Dresdner Bank, and 3,371,875 RM, paid to three different bank accounts in Germany. *Id.* ¶¶ 159-60. Plaintiffs agreed to accept art objects in Berlin museums to satisfy some of the purchase price. *Id.* ¶ 159. However, the objects were not selected by art dealers, as the parties had agreed to, but rather by museum officials. *Id.* The Consortium also was required to pay a 100,000 RM commission to the Berlin art dealer who served as the messenger between the Bank and the Consortium. *Id.* The Consortium used the proceeds from the sale to pay back investors who financed the 1929 purchase of the Welfenschatz. *Id.* ¶ 161.

Plaintiffs raised their claims related to the Welfenschatz before the German Advisory Commission for the Return of Cultural Property Seized as a Result of

Nazi Persecution, Especially Jewish Property ("Advisory Commission") which was established by Germany in 2003 to address Nazi-looted art claims in accordance with the Washington Conference on Holocaust Era-Assets' Principles on Nazi-Confiscated Art. *Id.* ¶¶ 15, 196-98, 205. After hearing testimony from five experts presented by Plaintiffs, the Advisory Commission issued a non-binding recommendation that the 1935 sale at issue was not a coerced transaction and, as such, the Advisory Commission did not recommend the return of the Welfenschatz to Plaintiffs. *Id.* ¶¶ 224, 227-28.

Plaintiffs now bring the following ten claims related to the 1935 sale of Welfenschatz, which Plaintiffs' assert was made under duress, against Germany and the SPK: declaratory relief (Count I); replevin (Count II); conversion (Count III); unjust enrichment (Count IV); fraud in the inducement (Count V); breach of fiduciary duty (Count VI); breach of the covenant of good faith and fair dealing (Count VII); civil conspiracy (Count VIII); bailment (Count IX); and tortious interference (Count X). Defendants seek dismissal of each of the claims on the grounds that: (1) Defendants are entitled to sovereign immunity on each Plaintiffs' claims; (2) Plaintiffs' claims are preempted and non-justiciable because they conflict with U.S. foreign policy; and (3) the doctrine of forum non conveniens requires that Plaintiffs' claims be resolved in Germany, rather than in this Court.

II. LEGAL STANDARD

A court must dismiss a case when it lacks subject matter jurisdiction pursuant to Rule 12(b)(1). In so doing, the Court may "consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003) (citations omitted). "At the motion to dismiss stage, counseled complaints, as well as *pro se* complaints, are to be construed with sufficient liberality to afford all possible inferences favorable to the pleader on allegations of fact." *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1106 (D.C. Cir. 2005). In spite of the favorable inferences that a plaintiff receives on a motion to dismiss, it remains the plaintiff's burden to prove subject matter jurisdiction by a preponderance of the evidence. *Am. Farm Bureau v. Envtl. Prot. Agency*, 121 F. Supp. 2d 84, 90 (D.D.C. 2000). Furthermore, a court need not accept inferences drawn by the plaintiff if those inferences are not supported by the facts alleged in the complaint. *Odhiambo v. Republic of Kenya*, 930 F. Supp. 2d 17, 22-23 (D.D.C. 2013), *aff'd* 764 F.3d 31 (D.C. Cir. 2014) (citing *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002)).

III. DISCUSSION

A. Sovereign Immunity

Under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611, "a foreign state is

presumptively immune from the jurisdiction of United States courts," and "unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993); *see also* 28 U.S.C. §§ 1604-1605. The FSIA defines the term "foreign state" to include a state's political subdivisions, agencies, and instrumentalities. 28 U.S.C. § 1603(a). The FSIA provides "the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Nelson*, 507 U.S. at 355 (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989) (internal quotation marks omitted)). Because "subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions . . . [a]t the threshold of every action in a district court against a foreign state . . . the court must satisfy itself that one of the exceptions applies." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493-94 (1983). "In other words, U.S. courts have no power to hear a case brought against a foreign sovereign *unless* one of the exceptions applies." *Diag Human S.E. v. Czech Republic-Ministry of Health*, 64 F. Supp. 3d 22, 30 (D.D.C. 2014), *rev'd on other grounds* 824 F.3d 131 (D.C. Cir. 2016). Plaintiffs assert that this Court has subject matter jurisdiction over each of their claims against Germany and its instrumentality, the SPK, under FSIA's expropriation exception, 28 U.S.C. § 1605(a)(3).

The FSIA's expropriation exception to foreign sovereign immunity allows a party to proceed with a claim:

> 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.

28 U.S.C. § 1605(a)(3). As such, in order to satisfy the expropriation exception, a claim must satisfy three requirements: "(i) the claim must be one in which 'rights in property' are 'in issue'; (ii) the property in question must have been 'taken in violation of international law'; and (iii) one of two commercial-activity nexuses with the United States must be satisfied." *Simon v. Republic of Hung.*, 812 F.3d 127, 140 (D.C. Cir. 2016).

The U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") has clarified that for the purposes of the analysis under this exception, the district court must examine the relationship between the jurisdictional question and the merits determination. *See id.* at 140-41. Specifically, the D.C. Circuit recognized situations in which a plaintiff raises a basic expropriation claim, arguing that his or her property has been taken without just compensation in violation of international law. *Id.* In such instances, the merits of the claim directly mirror the jurisdictional standard, i.e., a determination as to whether the property was taken in violation of international law. *Id.* When there

is a complete overlap between the inquiries, "the plaintiff need only show that its claim is 'non-frivolous' at the jurisdictional stage, and then must definitively prove its claim in order to prevail at the merits stage." *Id.* at 141. However, in other situations, a plaintiff may seek recovery based on "garden-variety common-law causes of action such as conversion, unjust enrichment, and restitution," and plead a violation of international laws to give rise to jurisdiction but not to establish liability on the merits. *Id.* In those situations, the court requires more than a mere non-frivolous argument to satisfy the jurisdictional standard. *Id.*

The parties dispute which standard the Court should apply in this case. Plaintiffs assert that they need only advance a non-frivolous argument because the alleged coerced sale of the Welfenschatz is a taking in violation of international law. Defendants argue that Plaintiffs raise common-law causes of action in which there is not a complete overlap between the jurisdictional issue and the merits of the claims. The Court agrees with Defendants that the merits of Plaintiffs' common law claims do not mirror the jurisdictional standard because in order for this Court to have jurisdiction, Plaintiffs must demonstrate that the takings were in violation of *international law*, a showing that is not required in order to succeed on the merits of their claims. *See de Csepel v. Republic of Hung.* (*de Csepel III*), 169 F. Supp. 3d 143, 157 (D.D.C. 2016) (finding that the plaintiffs' claims did not directly mirror the expropriation jurisdictional standard because plaintiffs relied on a violation of international law

exclusively for jurisdictional purposes and not to establish liability on the merits). As such, the Court shall require that Plaintiffs advance more than a mere non-frivolous argument with respect to Plaintiffs' assertion that a taking in violation of international law is at issue.

Bearing this in mind, the Court now turns to the issue of whether the FSIA's expropriation exception gives rise to subject matter jurisdiction in this Court over Plaintiffs' ten claims.[6] The Court shall address each of the requirements of the expropriation exception in turn.

1. Rights in Property

Defendants argue that the Court should dismiss the following five claims because they do not directly implicate property interests or rights to possession of property: fraud in the inducement (Count V); breach of fiduciary duty (Count VI); breach of the covenant of good faith and fair dealing (Count VII); civil conspiracy (Count VIII); and tortious interference (Count X).

[6] In their initial motion, Defendants appear to contend that Plaintiffs only advanced their unjust enrichment claim (Count IV) under the FSIA's commercial activity exception and not under the expropriation exception. Defs.' Mot. at 9. However, the Complaint indicates that Plaintiffs rely on the expropriation exception as a basis for proceeding with their claims, but also rely on the commercial activity exception only for their unjust enrichment claim. *See* Compl. ¶¶ 25, 28. Plaintiffs clarified this point in their opposition, noting "the expropriation exception provides jurisdiction over *all* of the Plaintiffs' claims," which necessarily includes their unjust enrichment claim. Pls.' Opp'n at 39 (emphasis added).

Instead, Defendants assert these five claims to "seek damages for allegedly wrongful conduct and are not property claims concerning the rightful ownership or possession of the Welfenschatz." Defs.' Mot. at 12. Indeed, this Court is required to "make FSIA immunity determinations on a claim-by-claim basis." *Simon*, 812 F.3d at 141. In order to meet the requirements of the expropriation exception, each claim must "'directly implicat[e] property interests or rights to possession,' . . . , thus satisfying the 'rights in property . . . in issue' requirement of § 1605(a)(3)." *Id.* at 142.

Despite Defendants setting forth this argument in a separate subsection of their motion, *see* Defs.' Mot. at 11-12, Plaintiffs did not directly respond to this argument in their opposition, *see generally* Pls.' Opp'n at 22-39. Defendants in a separate section of their reply brief request that the Court find Plaintiffs conceded this argument by failing to respond in their opposition. Defs.' Reply at 4-5. Plaintiffs have not sought leave to file a surreply or otherwise respond to this argument. Here, Plaintiffs have only alleged that this Court has jurisdiction over the five claims at issue based on the FSIA's expropriation exception. As such, the Court shall treat Defendants' argument as conceded and dismiss these five claims on the basis that this Court lacks subject matter jurisdiction over these claims. *See Hopkins v. Women's Div., Gen. Bd. of Glob. Ministries*, 238 F. Supp. 2d 174, 178 (D.D.C. 2002) (citing *FDIC v. Bender*, 127 F.3d 58, 67-68 (D.C. Cir. 1997) ("It is well understood in this Circuit that when a plaintiff files an opposition to a motion to dismiss addressing only

certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded."); *Achagzai v. Broad. Bd. of Governors*, 109 F. Supp. 3d 67, 70 n.2 (D.D.C. 2015) (points not disputed in opposition to motion to dismiss conceded) (citing *Hopkins*, 238 F. Supp. 2d at 178); *Youming Jin v. Ministry of State Sec.*, 335 F. Supp. 2d 72, 82 n.7 (D.D.C. 2004) (applying this principle to arguments regarding the grounds for jurisdiction).

2. Taking in Violation of International Law

Defendants next contend that Plaintiffs failed to sufficiently plead that the Welfenschatz was taken in violation of international law. 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. For the reasons described herein, the Court finds 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.

The D.C. Circuit has recognized that takings may fall within the expropriation exception when "the takings of property described in the complaint bear a sufficient connection to genocide that they amount to takings 'in violation of international law.'" *Simon*, 812 F.3d at 142. In such situations, the expropriations themselves constitute genocide and genocide itself is a clear violation of international law. *Id.* As the D.C.

Circuit recognized, the generally accepted definition of genocide for the purposes of customary international law is as follows:

> [A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group; [or]
>
> (c) *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part . . .*

Id. at 143 (quoting Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), art. 2, Dec. 9, 1948, 78 U.N.T.S. 277 (emphasis added)).

In *Simon v. Republic of Hungary*, the D.C. Circuit considered claims arising out of actions carried out against Hungary's Jewish population starting in 1941 with a systematic campaign of discrimination culminating in the implementation of policies calling for the total destruction of that population by Hungary's fanatically anti-Semitic Prime Minister Döme Sztójay between 1944 and 1945. *Id.* at 133. As the D.C. Circuit noted, the complaint in that case detailed the persecution, property confiscation and ghettoization, and transport and murder in death camps of the Hungarian Jewish population during this time period. *Id.* at 133-34. The claims brought by Jewish survivors of the

Hungarian Holocaust against the Republic of Hungary, a state-owned Hungarian railway, and an Austrian rail-freight company alleged that Hungary collaborated with the Nazis to exterminate Hungarian Jews and expropriate their property and that the railway defendants played an integral role in these efforts by transporting Hungarian Jews to death camps and confiscating their property. *Id.*

The D.C. Circuit applied the allegations in that case to the definition of genocide set forth above and found that the complaint sufficiently alleged takings of property intended to "[d]eliberately inflict[ ] on the group conditions of life calculated to bring about its physical destruction in whole or in part to bring about its physical destruction." *Id.* at 143 (quoting Genocide Convention, art. 2(c)). Specifically, the D.C. Circuit explained:

> The Holocaust's pattern of expropriation and ghettoization entailed more than just moving Hungarian Jews to inferior, concentrated living quarters, or seizing their property to finance Hungary's war effort. Those sorts of actions would not alone amount to genocide because of the absence of an intent to destroy a people. The systematic, "wholesale plunder of Jewish property" at issue here, however, aimed to deprive Hungarian Jews of the resources needed to survive as a people. Expropriations undertaken for the purpose of bringing about a protected group's physical destruction qualify as genocide.

Id. (internal citation omitted). The D.C. Circuit found the allegations in the complaint to be sufficient under the FSIA's expropriation exception because "the complaint describe[d] takings of property that are *themselves* genocide within the legal definition of the term" and, as such, takings in violation of international law. *Id.* at 144.

The Court finds that, like in *Simon*, the taking of the Welfenschatz as alleged in the complaint bears a sufficient connection to genocide such that the alleged coerced sale may amount to a taking in violation of international law. Plaintiffs sufficiently pled that they were targeted because they were Jewish sellers in possession of property that was of particular interest to the Nazi regime. The complaint further includes sufficient allegations that the taking of this property was in furtherance of the genocide of the Jewish people during the Holocaust. Indeed, in addition to the allegations highlighted in the background section of this opinion surrounding the 1935 transaction, Plaintiffs describe the hostile environment for Jews in Germany following Adolf Hitler's ascension to power in 1933. Compl. ¶¶ 44-65. Plaintiffs allege that members of the Consortium were particularly vulnerable to persecution because of their ownership of the Welfenschatz and because of their prominence and success. *Id.* ¶ 67. Specifically, Plaintiffs assert that the Geheime Staatspolizei ("the Gestapo") opened files on members of the Consortium, *id.*, and that the members of the Consortium were subject to direct threats of violence for being Jewish and for trying to sell the

Welfenschatz, *id.* ¶ 10. With this context in mind, the Court finds that Plaintiffs have sufficiently alleged a taking in violation of international law to satisfy the FSIA's expropriation exception.

In the interest of completeness, the Court shall address Defendants' arguments that the facts at issue in this case are distinguishable from those in *Simon*. First, Defendants point to the subject of the alleged taking. Here, Defendants assert that the Consortium's 1929 purchase of the Welfenschatz was a business investment because the Consortium planned to flip it for a profit and, as such, the Welfenschatz was not "property indispensable for individual survival." Defs.' Mot. at 22. Second, Defendants point to the nature of the transaction. Defendants assert that Plaintiffs merely allege a forced sale for less than market value and not the outright plunder of the Welfenschatz. *Id.* The Court is not persuaded by these arguments.

First, the Court finds that expropriating property that Plaintiffs planned to sell for a profit falls within the definition of genocide that includes deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. Plaintiffs alleged that the coerced sale of the Welfenschatz was accomplished to deprive the Consortium of their ability to earn a living and the motivation for the taking was to deprive the Consortium of resources needed to survive as a people in furtherance of the genocide of the German Jews during the Holocaust. *C.f. de Csepel III*, 169 F. Supp. 3d at 163-64 (noting that the confiscation of artwork during the Holocaust in

furtherance of the Nazis' campaign of genocide satisfies the elements of the expropriation exception as recognized by the D.C. Circuit in *Simon*). Indeed, Plaintiffs allege that they were specifically targeted because they were Jewish. Further, the fact that there was money exchanged for the Welfenschatz does not undermine Plaintiffs' assertion that this was a sham transaction meant to deprive them of their property as part of the genocide that occurred during the Holocaust. As another judge in this district noted, "the legislative history of the FSIA 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.*" *Id.* at 166 (quoting H.R. Rep. No. 91-1487, at 19 (emphasis added)). As such, Plaintiffs' allegations that the 1935 sale was coerced without adequate and effective compensation meets the requirements of the expropriation exception of the FSIA.

Finally, Defendants advance an argument that the takings at issue in this case cannot be one made in violation of *international* law because Plaintiffs merely argue that Germany expropriated property of its own nationals. Defs.' Mot. at 13. In such instances, Defendants contend that purely domestic taking cannot fall within the expropriation exception and the "domestic takings" rule as set forth in the Restatement (Third) of Foreign Relations § 712(1) bars such actions from proceeding in this Court. *Id.* at 13-14. As the D.C. Circuit explained, "[t]he domestic takings rule means that, as

a general matter, a plaintiff bringing an expropriation claim involving an intrastate taking cannot establish jurisdiction under the FSIA's expropriation exception because the taking does not violate international law." *Simon*, 812 F.3d at 144-45. However, in *Simon*, the D.C. Circuit expressly rejected the application of the domestic takings rule in the context of intrastate genocidal takings. *Id.* at 145. Rather, the D.C. Circuit, tracing the development of international human rights law, noted that in those circumstances the relevant international law violation for jurisdictional purposes under the expropriation exception is genocide, including genocide perpetuated by a foreign state against its own nationals. *Id.* at 145-46. In light of the D.C. Circuit's holding in *Simon*, the Court rejects Defendants' argument that the domestic takings rule precludes the application of the FSIA's expropriation exception in these circumstances. In sum, the Court finds Plaintiffs have set forth allegations sufficient to establish a takings in violation of international law at the motion to dismiss stage based on this record.

3. Commercial Activity Nexus

Defendants next allege that Plaintiffs have failed to adequately plead a commercial activity nexus with respect to Germany. Defendants concede that Plaintiffs have adequately pled a commercial-activity nexus as to the SPK, an instrumentality of Germany.[7] Defs.'

[7] With respect to the SPK, Plaintiffs must show "that [the Welfenschatz] or any property exchanged for [the Welfenschatz] is owned or operated by [the SPK] and that [the SPK] is engaged

Mot. at 23. The FSIA provides two avenues for establishing jurisdiction under the expropriation exception, one that addresses the commercial activity requirements for a foreign state, like Germany, and one that addresses the requirements for an instrumentality of a foreign state, like the SPK. As discussed above, the Court finds that the parties sufficiently pled that the rights in property taken in violation of international law are at issue. The statute provides that a foreign state, like Germany, is not immune from a suit when: "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. . . ." 28 U.S.C. § 1605(a)(3) (emphasis added).

The crux of the issue before the Court is whether Plaintiffs must satisfy both clauses, the first to proceed against Germany and the second to proceed against its instrumentality SPK, or whether the two clauses present alternative requirements and, as such, Plaintiffs need to only satisfy one requirement to proceed. If

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in a commercial activity in the United States." *See* 28 U.S.C. § 1605(a)(3). As the FSIA explains: "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial 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." *Id.* § 1603(d).

Plaintiffs are only required to satisfy one clause, they would not need to make any additional showing since Defendants concede that Plaintiffs have satisfied the commercial-activity nexus requirement with respect to the SPK.[8]

The parties point to two D.C. Circuit opinions that seem to suggest different requirements. In *Agudas Chasidei Chabad v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008), the D.C. Circuit noted that the two clauses "specify[ ] alternative commercial activity requirements."[9] *Id.* at 946; *see also id.* at 948 (finding the "second alternative commercial activity requirement" was clearly satisfied). The use of the word "or" to separate the two clauses in the statute would seem to support this reading. However, in *Simon*, the D.C. Circuit recognized that "the nexus requirement differs

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[8] Plaintiffs' briefing seems to conflate the analysis under the two separate clauses and does not separately analyze the requirements for a foreign state and an instrumentality. *See* Pls.' Opp'n at 35-39.

[9] In *Chabad*, the D.C. Circuit parsed the language of the expropriation exception as follows:

> [A] rights in property taken in violation of international law are in issue and [B] [1] 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 [2] 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. . . .

Chabad, 528 F.3d at 946-47.

somewhat for claims against the foreign state itself [like Germany] . . . as compared with claims against an agency or instrumentality of a foreign state [like the SPK]. . . ." *Simon*, 812 F.3d at 146. As the *Simon* court explained:

> As to the claims against [a foreign state], the question is whether the 'property [in issue] 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.' As to the claims against [an instrumentality], the question is whether the 'property [in issue] 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.'

Id. (internal citations omitted). As such, *Simon* suggests that to proceed on claims against a foreign state like Germany, Plaintiffs must meet the requirements of the first clause and to proceed on claims against an instrumentality such as the SPK, Plaintiffs must meet the requirements of the second clause.

The Court is persuaded by the analysis of District Judge Christopher R. Cooper with respect to this issue in *Helmerich & Payne International Drilling Co. v. Bolivarian Republic of Venezuela*, 185 F. Supp. 3d 233, 239-42 (D.D.C. 2016). In *Helmerich*, Judge Cooper raised several important points: (1) *Simon* did not ignore or distinguish *Chabad*, but instead appeared to

apply it; (2) the D.C. Circuit denied the request for a rehearing on this issue in *Simon;* (3) to follow *Chabad* would require deviating from *Simon*'s directive that to proceed against a foreign state, the first commercial-nexus requirement must be met (as is the case here); and (4) this issue was not argued or briefed in *Chabad* or *Simon*. *Id.* at 241-42. However, as Judge Cooper noted, while the Court seems bound by the precedent in *Chabad*, "the D.C. Circuit's clear articulation of a contrary rule in *Simon* and its implicit view that the new rule is consistent with—and perhaps even based on—*Chabad* places the Court in somewhat of a quandary." *Id.* at 242. Ultimately, Judge Cooper deferred ruling on the issue without further briefing. At this juncture, the Court deems it appropriate to follow the D.C. Circuit's ruling in *Chabad* and allow the claims against Germany to proceed because it is uncontested that Plaintiffs have sufficiently pled the second requirement of the commercial-activity nexus.[10] However, the parties are not precluded from raising this issue at a later juncture with more fulsome briefing.

In sum, the Court finds that it has subject matter jurisdiction over five of Plaintiffs' ten claims pursuant to the expropriation exception of the FSIA. As such, the Court shall deny Defendants' request to dismiss the following claims on that basis: declaratory relief

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[10] Plaintiffs pled that the Welfenschatz is featured in books and guidebooks produced by the SPK that are for sale in the United States, and that Germany engages in painting and exhibition loans with museums in the United States. *See generally* Compl. ¶ 26.

(Count I); replevin (Count II); conversion (Count III); unjust enrichment (Count IV); and bailment (Count IX). Further, the Court finds that it does not have subject matter jurisdiction over the following five claims because these claims do not directly implicate property interests or rights to possession: fraud in the inducement (Count V); breach of fiduciary duty (Count VI); breach of the covenant of good faith and fair dealing (Count VII); civil conspiracy (Count VIII); and tortious interference (Count X). Accordingly, the Court shall dismiss only those five claims as Plaintiffs have not demonstrated that those claims fall within one of the FSIA's exceptions that would give rise to this Court's jurisdiction over a foreign state and its instrumentality.

B. Preemption and Non-Justiciability

Defendants next argue that the Court should dismiss Plaintiffs' claims because they are preempted and because they run afoul of international comity. Specifically, Defendants assert that U.S. foreign policy encourages parties to pursue their claims related to Nazi-looted art through dispute resolution mechanisms established under the multinational Washington Conference Principles on Nazi-Confiscated Art. In this instance, Defendants argue that Plaintiffs' claims in this Court are preempted because they already have been adjudicated through Germany's Advisory Commission, which was created to hear such claims under the Washington Principles, and the Commission determined that there was not a compulsory sale of the

Welfenschatz due to persecution. Defendants also allege that international comity requires the Court to defer to the decision of the Advisory Commission or, in the alternative, require Plaintiffs to first litigate their claims in Germany. The Court shall first address Defendants' preemption arguments and then shall turn to Defendants' arguments concerning international comity.

1. Preemption

Defendants assert that modern U.S. policy towards recovered art reflects the preference that claims be decided through alternative dispute resolution mechanisms like Germany's Advisory Commission. The Court shall first provide a brief history of the developments in U.S. foreign policy that Defendants argue support their position that Plaintiffs' claims are preempted by the decision of Germany's Advisory Commission. The Court shall then address the substance of Defendants' preemption argument.

The United States convened the Washington Conference on Holocaust Era Assets in 1998 to develop an equitable approach to Nazi-looted art given some of the inadequacies that previously existed in the processes for dealing with such claims. *See* Defs.' Mot. at 32; Compl. ¶ 196. To that end, the Washington Conference agreed upon a set of non-binding principles to "expeditiously . . . achieve a just and fair solution" to claims of Nazi-confiscated art. Defs.' Mot. at 32 (quoting *Von Saher v. Norton Simon Museum of Art*, 754 F.3d 712,

721 (9th Cir. 2014)). "[T]he Principles [also] encouraged nations 'to develop national processes to implement these principles,' including alternative dispute resolution." *Von Saher*, 754 F.3d at 721. Defendants also point to the Terezin Declaration issued after the Prague Holocaust Era Assets Conference, in 2009, which was a follow-up to the Washington Conference. Compl. ¶¶ 201-02. The Terezin Declaration reaffirmed the Washington Principles and noted "Governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property, in order to achieve just and fair solutions, as well as alternative dispute resolution, where appropriate under law." *Id.* ¶ 202. Defendants' position is that the Washington Principles and the Terezin Declaration clearly demonstrate a preference for the resolution of claims related to Nazi-looted art through mediation rather than litigation, and encourage use of alternative dispute resolution mechanisms. Defs.' Mot. at 33, 40. The Court notes that although the proceedings before the Advisory Commission are a form of alternative dispute resolution, they do not constitute a mediation as it is known. Moreover, Defendants argue that the State Department's position is to defer to other nations' alternative dispute resolution proceedings under the Washington Principles. *Id.* at 33-35 (citing an amicus brief filed before the Supreme Court of the United States and a press statement issued by then-Secretary of State Hillary Rodham Clinton).

The parties point to the following summary of U.S. policy on restitution of Nazi-looted art as described by the United States Court of Appeals for the Ninth Circuit:

> (1) a commitment to respect the finality of "appropriate actions" taken by foreign nations to facilitate the internal restitution of plundered art; (2) a pledge to identify Nazi-looted art that has not been restituted and to publicize those artworks in order to facilitate the identification of prewar owners and their heirs; (3) the encouragement of prewar owners and their heirs to come forward and claim art that has not been restituted; (4) concerted efforts to achieve expeditious, just and fair outcomes when heirs claim ownership to looted art; (5) the encouragement of everyone, including public and private institutions, to follow the Washington Principles; and (6) a recommendation that every effort be made to remedy the consequences of forced sales.

Von Saher, 754 F.3d at 721. As Plaintiffs correctly point out, this language does not preclude seeking resolution of their claims through litigation, especially where, as here, Plaintiffs sought a remedy through the procedures put in place in Germany in accordance with the Washington Principles.[11]

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[11] Defendants' preemption challenge centers around U.S. foreign policy as expressed by the Executive Branch to date and, as such, that is the focus the Court's discussion. However, the position of Congress appears consistent with the position of the Executive Branch as to the resolution of claims related to Nazi-looted

In 2003, Germany created the Advisory Commission in light of the Washington Principles and after the German Federal Government, the German Länder, and the German National Associations of Local Authorities issued a Joint Declaration related to tracing and returning Nazi-looted art. Defs.' Mot. at 35-36. In 2012, Plaintiffs submitted their claim regarding the Welfenschatz to the Commission. *Id.* at 36; Compl. ¶ 220. After hearing the evidence including testimony from five experts presented by Plaintiffs, the Commission did not recommend the restitution of the Welfenschatz. Compl. ¶¶ 221, 224. Defendant chose not to present evidence to the contrary. *Id.* ¶ 223. It is

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art. Indeed, the Holocaust Expropriated Art Recovery Act of 2016, H.R. 6130, Pub. L. No. 114-308 ("HEAR Act"), which was signed into law on December 16, 2016, reflected Congress' preference that disputes such as the one at issue here be resolved by alternative dispute resolution processes but did not preclude the possibility of litigating such claims. In relevant part, the HEAR Act includes the following Congressional finding:

> *While litigation may be used to resolve claims to recover Nazi-confiscated art*, it is the sense of Congress that the private resolution of claims by parties involved, on the merits and through the use of alternative dispute resolution such as mediation panels established for this purpose with the aid of experts in provenance research and history, will yield just and fair resolutions in a more efficient and predictable manner.

HEAR Act § 2(8) (emphasis added). It is clear from the text of the HEAR Act that Congress specifically recognized and did not foreclose the use of litigation as a means to resolve claims to recover Nazi-confiscated art. As such, the Court agrees with Plaintiffs that the HEAR Act supports their argument that U.S. policy does not conflict with Plaintiffs' ability to pursue their claims in this Court.

undisputed by the parties that the Commission's recommendation is non-binding and Defendants would not have been required to return the Welfenschatz even if that had been the Commission's recommendation. Compl. ¶ 235; Defs.' Mot. at 39 n.16; Defs.' Reply at 15 n.7. Defendants now argue that Plaintiffs' state law claims are preempted because allowing these claims to proceed in this Court would undercut U.S. foreign policy on Nazi-looted art.

Defendants primarily rely on the Supreme Court of the United States' opinion in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), and the United States District Court for the Southern District of New York's application of that opinion in *In re Assicurazioni Generali S.P.A. Holocaust Ins. Litig.*, 340 F. Supp. 2d 494 (S.D.N.Y. 2004), *aff'd*, 592 F.3d 113 (2d Cir. 2010), *cert. denied*, 562 U.S. 952 (2010), in support of their argument. For the reasons described herein, this Court is not persuaded that these cases support Defendants' preemption argument.

In *Garamendi*, the Supreme Court addressed the issue of claims-based on insurance policies issued to Jews before and during World War II, the proceeds of which were either paid to the Third Reich or never paid at all. *Garamendi*, 539 U.S. at 402-03. At issue were two procedures put in place to address such claims, one based on an agreement between the President of the United States and the German Chancellor and one enacted by the state of California. The Court shall briefly address each in turn as such background is relevant in

distinguishing the issue in that case from the one in the instant action.

After multiple class-action lawsuits seeking restitution for such insurance claims poured into the United States, negotiations between the German Chancellor and the President of the United States produced an executive agreement through which Germany agreed to enact legislation to create a foundation funded by a voluntary compensation fund contributed to equally by the German Government and German companies. *Id.* at 405. In exchange, the United States agreed to file a notice in all related cases brought in U.S. courts indicating that it was the U.S. Government's position that foreign policy interests support the foundation as the exclusive forum and remedy for resolution of all such claims. *Id.* at 406. Further, the United States agreed to use its "best efforts" to get state and local governments to respect the foundation as the exclusive mechanism for resolving these claims. *Id.* With respect to insurance claims, the countries agreed that the foundation would work with the International Commission on Holocaust Era Insurance Claims (ICHEIC), which negotiated with European insurers to get information on unpaid policies issued to Holocaust victims and worked to settle claims under those identified policies. *Id.* at 406-07. Germany stipulated that insurance claims within the scope of the handling procedures adopted by the ICHEIC against German companies *shall* be processed based on procedures of the ICHEIC and any additional procedures

agreed to by the foundation, the ICHEIC, and the German Insurances Association. *Id.* at 407.

Meanwhile, California enacted a state statute making it an unfair business practice for insurers operating in California to fail to pay any valid claim from a Holocaust survivor and enacted a subsequent statute that allowed California residents to sue in state court on insurance claims based on acts perpetrated during the Holocaust. *Id.* at 409. At issue in *Garamendi* was a portion of the state statute that required all insurers currently doing business in California to disclose the details of insurance policies issued to persons in Europe which were in effect between 1920 and 1945. *Id.* The California legislation specifically acknowledged that while the international Jewish community was in active negotiations to resolve all outstanding claims through the ICHEIC, it still deemed the state legislation necessary to protect the claims of California residents. *Id.* at 410-11. In response to the enactment of the California legislation, Deputy Secretary of the Treasury Stuart Eizenstat wrote both to the insurance commissioner and the governor of California to express concern regarding the California statute, and noting that such actions by the state government threatened to damage the ICHEIC and related diplomatic relations with Germany. *Id.* at 411.

Several American and European insurance companies and a national trade association filed suit against the insurance commissioner of California to challenge the constitutionality of the state statute. *Id.* at 412. The Supreme Court recognized that "at some

point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place." *Id.* at 413. The Court also noted that generally there is executive authority to determine the policy of the United States government in foreign affairs. *Id.* at 414. The Supreme Court acknowledged, "At a more specific level, our cases have recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic." *Id.* at 415. While the Supreme Court noted that the text of the executive agreement at issue did not have a preemption clause, the Court nevertheless found that the state statute was in clear conflict with the federal policy and, as such, was preempted. *Id.* at 420-25. The Supreme Court specifically found that with respect to insurance claims, the national opinion as expressed in the executive agreements signed by the President has been to encourage European insurers to work with the ICHEIC to develop claim procedures, a position that was repeatedly supported by high levels of the Executive Branch. *Id.* at 421-22.

In *Assicurazioni Generali*, the U.S. District Court for the Southern District of New York applied *Garamendi* to claims brought against an Italian insurer based on policies in Europe before and during World

War II under several state statutes and common law, as well as customary international law. There, the district court dismissed the plaintiffs' claims finding that pursuant to the Supreme Court's holding in *Garamendi*, "[l]itigation of Holocaust-era insurance claims, no matter the particular source of law under which the claims arise, necessarily conflicts with the executive policy favoring voluntary resolution of such claims through ICHEIC." *Assicurazioni Generali*, 340 F. Supp. 2d at 501.

The Court finds the reasoning in *Garamendi* to be inapplicable to the facts of the instant action for a number of reasons. First, *Garamendi* dealt with the applicability of a state statute setting forth a process for addressing claims that already were covered by a process set forth in an executive agreement signed by the President of the United States. Defendants appear to assert that this action brings claims akin to actions brought under a state statute because Plaintiffs advance claims rooted in common law even though those claims are brought in federal court under an exception to the FSIA. While the issue of preemption was not directly addressed, the Court notes that in *Simon*, the D.C. Circuit permitted common law property-based claims, like the ones here, to proceed against a foreign state pursuant to the FSIA's expropriation exception.

Second, there does not appear to be a direct conflict between the property-based common law claims raised by Plaintiffs and foreign policy as expressed by the President. Indeed, in *Garamendi*, the executive agreement at issue clearly contemplated the U.S. Government

taking active steps to declare its view that U.S. foreign policy interests supported the notion that the ICHEIC should be the exclusive mechanism for resolution of these types of insurance-related claims. Specifically, the U.S. Government agreed to submit a statement in cases in which a German company was sued on a Holocaust-era claim in an American court. Second, recognizing that the filing of such statements may not provide an American court with an independent basis for dismissal, the U.S. Government agreed to tell courts that U.S. policy grounds favor dismissal on any valid legal ground. Further, the U.S. Government "promised to use its 'best efforts, in a manner it considers appropriate,' to get state and local governments to respect the foundation as the exclusive mechanism." *Garamendi*, 539 U.S. at 406.

The U.S. Government made no such assurances that it would submit statements expressing its view that U.S. foreign policy supports all claims related to Nazi-looted art being resolved through alternative dispute mechanisms when such claims are pursued in American courts. Further, Defendants do not point to any statements made by the Executive Branch that such alternative dispute mechanisms set up in accordance with the Washington Principles should be the *exclusive* mechanism for resolving such claims. Rather, the statements of U.S. foreign policy related to such claims demonstrate only that this is the *preferred* mechanism for addressing such claims. The United States acknowledged this point in an amicus brief filed in the Supreme Court and cited by the Defendants in

their briefing. Brief for the United States as Amicus Curiae, *Von Saher v. Norton Simon Museum of Art*, No. 09-1254 (U.S. May 27, 2011), 2011 WL 2134984, at *15, *cert. denied*, 564 U.S. 1037 ("Unlike in *Garamendi*, the United States has not entered into Executive Agreements with foreign governments to resolve contemporary claims for Holocaust art, and it has supported the just and equitable resolution of claims from that era.").

This is a logical distinction. The *Garamendi* Court tackled an executive agreement that established the formation of the ICHEIC, procedures for identifying and processing claims through same, and a system for funding the recovery of such claims. This is not the type of comprehensive scheme contemplated by the Washington Principles and the Terezin Declaration. Rather, the Washington Principles were agreed-upon, non-binding principles entered into by 13 nongovernmental organizations and 44 governments that encouraged nations to develop national processes, including alternative dispute resolution processes, to implement these principles. As such, the executive agreement itself did not establish such processes but only provided guidance for doing so to the stakeholders.[12]

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[12] The Court notes that while Defendants in the instant action have not pointed to a direct statement made by the President, it may be sufficient that such statements were made by high-level executive officials. Indeed, the majority in *Garamendi* noted:

> The dissent would also dismiss the other Executive Branch expressions of the Government's policy, insisting on nothing short of a formal statement by the

Third, Plaintiffs rely on an amicus brief filed by the United States in a case before the Supreme Court in which the Supreme Court ultimately denied certiorari. *See generally* Brief for the United States as Amicus Curiae, *Von Saher*, No. 09-1254 (U.S. May 27, 2011), 2011 WL 2134984. In that case, the United States advanced its view that:

> [I]t is United States policy to support both the just and fair resolution of claims to Nazi-confiscated art on the merits and the return of such art to its rightful owner. But that policy does not support relitigation of all art claims in U.S. courts. Neither the Washington Principles nor the Terezin Declaration takes an explicit position in favor of or against the litigation of claims to Nazi-confiscated art. Rather, they encourage resort to alternative dispute resolution, so that such claims may be resolved as justly, fairly, and expeditiously as possible.

Id. at *18. The United States went on to explain: "When a foreign nation . . . has conducted bona fide post-war internal restitution proceedings following the return of Nazi-confiscated art to that nation under the external restitution policy, the United States has a substantial interest in respecting the outcome of that

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> President himself. But there is no suggestion that these high-level executive officials were not faithfully representing the President's chosen policy, and there is no apparent reason for adopting the dissent's "nondelegation" rule to apply within the Executive Branch.

Garamendi, 539 U.S. at 424 n.13 (internal citations omitted).

nation's proceedings." *Id.* at *19. As such, the United States' own statement of its foreign policy undercuts Defendants' request for dismissal. Indeed, the United States notes that neither the Washington Principles nor the Terezin Declaration explicitly take a position regarding the litigation of Nazi-confiscated art claims. Further, the United States does acknowledge a "substantial interest" in respecting the outcome of a nation's "bona fide post-war internal restitution proceedings." However, here, Plaintiffs have sufficiently pled that the Advisory Commission proceedings were not bona fide proceedings but rather specifically allege that it was a "sham process" that was conducted inconsistently with "internationally accepted principles and precedents (among others)," Compl. ¶ 221, and resulting in a "politically-motivated decision," *id.* ¶ 222, that failed to address Plaintiffs' uncontested expert testimony, *id.* ¶ 227-28. At the motion to dismiss stage, the Court finds such allegations sufficient to allow the claims to proceed as U.S. foreign policy supports the just and fair resolution of claims to Nazi-confiscated art.

2. Non-justiciability

Defendants also contend that Plaintiffs' claims are non-justiciable due to international comity and, as such, should be dismissed. Here, Defendants argue that international comity requires that the Court defer to the Advisory Commission or, in the alternative, requires that Plaintiffs exhaust their remedies in Germany. The Court shall first address Defendants' argument that international comity requires this Court to

defer to the decision of the Advisory Commission. The Court shall then address Defendants' argument that international comity requires Plaintiffs to exhaust their remedies in Germany before proceeding in this Court.

The term "'[c]omity' summarizes in a brief word a complex and elusive concept—the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum." *de Csepel v. Republic of Hung.* (*de Csepel II*), 714 F.3d 591, 606 (D.C. Cir. 2013) (quoting *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984)). The D.C. Circuit explained that "'the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh' based 'upon the mere assertion of the party that the judgment was erroneous in law or in fact," *id.* provided:

> there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect. . . .

Id. (quoting *Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895)).

Defendants first assert that international comity requires the Court to defer to the decision of the Advisory Commission. In essence, Defendants' argument appears to be either that the Advisory Commission's decision is unreviewable or that Plaintiffs have failed to sufficiently plead a basis for reviewing the Commission's decision. Defendants have pointed to no authority that would preclude judicial review of a decision made by a commission set up in accordance with the non-binding, agreed upon Washington Principles, particularly in light of Plaintiffs' uncontested assertion that the parties are not bound by the Commission's decision even if it recommends the return of the property at issue. Here, Plaintiffs allege that the Commission's decision was not supported by the uncontested evidence presented by Plaintiffs and that the proceeding itself was a "sham." Compl. ¶¶ 3, 224-25. Indeed, Plaintiffs claim that:

> [T]he Advisory Commission heard from five experts who established the context surrounding the sale at issue by showing (i) the actual market value of the collection in 1935; 11.6 Million RM; (ii) the law applicable to the sale; (iii) the historical background which supports the claim that the sale in issue was coercive and made under duress—and certainly cannot be characterized as one governed by free will and free choice in an open market; and (iv) the art dealers were the sole owners of the collection.

Id. ¶ 224. Further, Plaintiffs contend that the Commission did not incorporate these uncontested findings

into their recommendation and argue that "[i]gnoring the experts entirely in an otherwise detailed opinion undermines the credibility of the report by the Advisory Commission." *Id.* ¶¶ 227-28. The Court finds that these allegations along with the other allegations in the complaint are sufficient to provide a plausible basis for review. In reaching this holding, the Court simply finds that Plaintiffs' allegations as set forth in the complaint are sufficient to survive a motion to dismiss on this issue. However, the Court expresses no other opinion regarding the validity or prudence of the Commission's decision related the Welfenschatz.

Defendants next assert that Plaintiffs are required to exhaust their remedies in Germany before bringing an action in this Court. The issue of whether international comity requires a plaintiff to exhaust remedies in a foreign state prior to bringing an action under an exception to the FSIA has not been squarely addressed by the D.C. Circuit. However, the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") expressly tackled the issue in *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847 (7th Cir. 2015), *cert. denied*, ___ U.S. ___, 135 S. Ct. 2817 (2015). In *Fischer*, the Seventh Circuit recognized that the text of the FSIA's expropriation exception does not include an exhaustion requirement. *Id.* at 859. However, the Seventh Circuit held that the defendants could invoke "the well-established rule that exhaustion of domestic remedies is preferred in international law as a matter of comity." *Id.* As such, the *Fischer* court required plaintiffs "to show either that they exhausted any available

. . . remedies [in the foreign state] or that there was a legally compelling reason to excuse such an effort." *Id.* In reaching this holding, the *Fischer* court relied primarily on an earlier Seventh Circuit opinion in *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012), and §§ 712 and 713 of the Restatement (Third) of the Foreign Relations Law of the United States.

Given that the Seventh Circuit did not rely on any binding precedent in this jurisdiction, the Court next turns to precedent from the D.C. Circuit. In *Chabad*, the D.C. Circuit addressed a district court's holding that a plaintiff was not required to exhaust remedies in Russia before litigating the case in the United States. *Chabad*, 528 F.3d at 948. The D.C. Circuit opined this result was "likely correct," but found that the issue need not be reached on appeal because Russia identified plainly inadequate remedies. *Id.* Specifically, the D.C. Circuit noted that a different section of the FSIA previously contained a local exhaustion requirement that required foreign states to be provided the opportunity to arbitrate certain claims, but that provision was repealed by Congress in 2008. *Id.* The D.C. Circuit noted that although the exhaustion requirement was repealed, its original inclusion supported the inference that "Congress's inclusion of a provision in one section strengthens the inference that its omission from a closely related section [here, the expropriation exception] must have been intentional." *Id.* at 948. The D.C. Circuit in *Chabad*, like the Seventh Circuit in *Fischer*, also addressed the language of the

Restatement (Third) of the Foreign Relations Law of the United States, which provides:

> *Exhaustion of remedies.* Under international law, ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged.

Restatement § 713, cmt. f. The D.C. Circuit distinguished this provision from the facts of that case, noting that the Restatement addressed claims of one state against another, or nation v. nation litigation. *Chabad*, 528 F.3d at 949. However, the FSIA's expropriation exception involves the claims of an individual of one state against another state and, as such, "there is no apparent reason for systematically preferring the courts of the defendant state."[13] *Id.*

In *Simon*, the D.C. Circuit again touched on the issue. Specifically, the D.C. Circuit noted that the Seventh Circuit in *Fischer* found persuasive the prudential exhaustion argument that "the court . . . should decline to exercise jurisdiction as a matter of international

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[13] The D.C. Circuit also addressed Justice Stephen G. Breyer's concurrence in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004). The D.C. Circuit characterized Justice Breyer's argument regarding exhaustion as follows, "there simply is no unlawful taking if a state's courts provide adequate postdeprivation remedies." *Chabad*, 528 F.3d at 949. However, the D.C. Circuit suggested that this substantive theory advanced by Justice Breyer would appear "to moot the argument from the language of the FSIA and is independent of Restatement § 713." *Id.*

comity unless the plaintiffs first exhaust domestic remedies (or demonstrate that they need not do so)." *Simon*, 812 F.3d at 149. However, the D.C. Circuit declined to address the issue because it was not before that Court on appeal. *Id.* Rather, the D.C. Circuit noted that the district court on remand should consider the issue if it is raised by the defendants. *Id.*

In *de Csepel*, another district judge in this jurisdiction, Judge Ellen Segal Huvelle, addressed the issue of whether the court should decline to exercise jurisdiction as a matter of international comity unless plaintiffs first exhausted their remedies in Hungary or demonstrated that such efforts would be futile. *de Csepel III*, 169 F. Supp. 3d at 169. After tracing the language of the Restatement and the D.C. Circuit's discussion in *Chabad*, the *de Csepel* court noted that "both international and domestic courts (including the D.C. Circuit) have reasonably construed the prudential theory of exhaustion to be inapplicable to causes of action brought by *individuals* and not states." *Id.* at 169 (emphasis added). In light of that finding, the court respectfully declined to apply the Seventh Circuit's holding in *Fischer* and rejected the defendants' exhaustion argument based on international comity. *Id.* However, the *de Csepel* court stated in a footnote that even if the court agreed with the Seventh Circuit's application of the exhaustion requirement based on international comity, the court still found that the plaintiffs had adequately shown that efforts to seek a remedy in Hungary would have been futile. *Id.* at 169 n.15.

Here, absent binding precedent from the D.C. Circuit, the Court is persuaded by Judge Huvelle's analysis in *de Csepel* and is inclined to agree that the prudential exhaustion requirement based on international comity is not applicable to cases, such as this one, which are brought by individuals against the a foreign state. The Court further notes that even if it were inclined to apply the prudential exhaustion requirement, it would decline to do so based on this record without first affording the parties an opportunity to provide further, targeted briefing on the adequacy of available remedies in Germany.

C. Doctrine of Forum Non Conveniens

Finally, Defendants argue that the Court should dismiss Plaintiffs' claims based on the doctrine of forum non conveniens. Forum non conveniens is a discretionary doctrine that permits a federal court to dismiss an action in favor of its resolution in a court of foreign state. *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 429 (2007). "The forum non conveniens analysis calls for the court to consider '(1) whether an adequate alternative forum for the dispute is available and, if so, (2) whether a balancing of private and public interest factors strongly favors dismissal.'" *de Csepel II*, 714 F.3d at 605 (quoting *Chabad*, 528 F.3d at 950). Specifically, an action may be dismissed when there is an alternative forum available and "'trial in the chosen forum would establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience, or . . . the chosen

forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems.'" *Sinochem*, 549 U.S. at 429 (quoting *American Dredging Co. v. Miller*, 510 U.S. 443, 447-48 (1994)). "Dismissal for *forum non conveniens* reflects a court's assessment of a 'range of considerations, most notably the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality.'" *Id.* (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 723 (1996)). Moreover, a defendant invoking the doctrine bears a heavy burden in challenging a plaintiff's chosen forum. *Id.* at 430. However, "[w]hen the plaintiff's choice is not its home forum, . . . the presumption in the plaintiff's favor 'applies with less force,' for the assumption that the chosen forum is appropriate is in such cases 'less reasonable.'" *Id.* (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981)). For the reasons described herein, the Court shall not exercise its discretion to dismiss Plaintiffs' claims based on the doctrine of forum non conveniens.

1. Alternative Forum

Defendants contend that Germany is an available and adequate forum for Plaintiffs to pursue their claims. *See generally* Defs.' Mot. at 53-55. Plaintiffs argue that Germany is not an adequate forum "because of the inability of [P]laintiffs even to bring the claims, Germany's lack of coherent policy generally toward victims of Nazi-looted art, and the unfair treatment that Plaintiffs specifically have already suffered as a

result of the Advisory Commission's recommendation." Pls.' Opp'n at 57.

The parties submitted competing opinions from experts on the German legal system regarding the sufficiency of German courts as a forum to adjudicate Plaintiffs' claims in support of their respective positions. *See generally* Defs.' Mot., Ex. A (Declaration of Prof. Dr. Christian Armbrüster); *Id.* Ex. B (Declaration of Prof. Dr. Jan Thiessen); Pls.' Opp'n, Ex. 1 (Declaration of Prof. Dr. Stephan Meder); Defs.' Reply, Ex. A (Supp. Declaration of Prof. Dr. Jan Thiessen); *Id.* Ex. B (Supp. Declaration of Prof. Dr. Christian Armbrüster). Specifically, these expert opinions differ as to whether Plaintiffs would be able to pursue their claims in German courts. *See, e.g.*, Theissen Decl. at 15 ("German courts would have jurisdiction over this lawsuit. There are various legal provisions on which a plaintiff could base a claim. Thus, the plaintiffs would not be excluded from the outset with their claims as alleged in the First Amended Complaint."); Meder Decl. at 33 ("From my point of view, and in consideration of the legal framework, the literature and the legal precendent [sic], the matter of asserting and enforcing these claims in Germany before German courts must be at best affirmed theoretically (in contrast to the assertion by Thiessen), but is de facto excluded from a practical point of view."); *Id.* at 38 ("The plaintiffs Alan Philipp, Gerald Stiebel, and Jed Leiber cannot pursue the claims asserted before the District of Columbia in Washington D.C. before German courts.").

In the Court's analysis under the forum non conveniens doctrine, the first step is to consider whether there is an available forum before moving to the next steps of the analysis. The Court has considered the competing information regarding the availability of causes of action for Plaintiffs if their claims were pursued in Germany. However, regardless of the adequacy of Germany as a forum to adjudicate the claims at issue, which is disputed by the parties, the Court finds that it would not exercise its discretion to dismiss the claims under the forum non conveniens doctrine based on the balance of the private and public interests at play. As such, the Court shall not reach a decision on this issue. The Court deems this course to be appropriate particularly because Defendants carry the burden of demonstrating this requirement in support of dismissal. *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 677 (D.C. Cir. 1996). In light of this decision, the Court shall not address the parties' arguments regarding the application of the statute of limitations to Plaintiffs' claims should they be raised in a German court and, relatedly, Defendants' concession that it would not raise a statute of limitations defense if this Court required Plaintiffs to first pursue their claims in a German court.

2. Private Interests

The Supreme Court provided the following guidance when considering private interests in the forum non conveniens analysis:

> Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial.

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947), *superseded on other grounds as recognized in Quackenbush*, 517 U.S. at 722.

Defendants set forth three main arguments to support their contention that private interest factors strongly favor dismissal: (1) Plaintiffs' claims center on German-language documents located in German historical archives, many of which have not been digitized and would require translation; (2) German law is likely applicable because the relevant events occurred in Germany and involved the German Government, German nationals, and German legal entities; and (3) this Court's judgement is potentially unenforceable in Germany without a separate action from a German court. *See generally* Defs.' Mot. at 55-61. In response, Plaintiffs contend that the factors identified by Defendants do not balance strongly in favor of dismissal. Plaintiffs also point to the fact that the District of Columbia is a convenient forum for their witness Plaintiff Leiber's mother, who Plaintiffs assert has personal knowledge

of the allegations in their Complaint, is of advanced age, and lives in the United States.[14] Pls.' Opp'n at 65-66. Moreover, Plaintiffs point out that two of the three Plaintiffs in this case reside in the United States. Plaintiffs also argue that the District of Columbia is convenient for Defendant Germany because of the presence of German diplomatic representatives in the city and the proximity of the Embassy of the Federal Republic of Germany. *Id.* at 66.

Here, the Court agrees that proceeding in this Court rather than in Germany will place some additional burdens on the parties, namely requiring the translation of certain German language documents. However, as Plaintiffs point out, these documents would likely need to be digitized regardless of the forum. Further, while this matter may require the Court to consider issues of foreign law, this Court is capable of considering such issues even though this factor weighs in favor of having the case heard in Germany. Finally, to the extent that Defendants who are the German Government and its instrumentality that currently has possession of the objects at issue raises the issue of the enforceability of this Court's judgment, the Court shall not consider this as a factor that weighing

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[14] In their reply, Defendants argue that Plaintiff Leiber's mother would only have been seven or eight years old at the time that the Consortium sold the Welfenschatz. Defs.' Reply at 29. Plaintiffs have not been specific as to the nature of this witness' potential testimony. However, the witness may be available to offer testimony not specifically regarding the discussions leading to the transaction but rather about the effects of the transaction on their lives including the access to funds.

in favor of dismissal. *TMR Energy Ltd. v. State Prop. Fund of Ukr.*, 411 F.3d 296, 303 (D.C. Cir. 2005). To do so would allow a defendant to overcome a plaintiff's choice of forum based on a defendant's own assertion that it may not adhere to a judgment entered in that forum even if that forum otherwise has jurisdiction (as here, under the FSIA). Further, to the extent that further steps are required to enforce a judgment of this Court, Plaintiffs, who chose to file suit in this Court, are the party that would be required to take those additional steps. As such, the Court finds the balance of these private interest factors weigh slightly, but not heavily, in favor of Defendants' request.

3. Public Interests

The D.C. Circuit has identified three factors for a court to weigh when conducting a public interests analysis:

> first, that courts may validly protect their dockets from cases which arise within their jurisdiction, but which lack significant connection to it; second, that courts may legitimately encourage trial of controversies in the localities in which they arise; and third, that a court may validly consider its familiarity with governing law when deciding whether or not to retain jurisdiction over a case.

Pain v. United Technologies Corp., 637 F.2d 775, 791-792 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

Defendants assert this suit lacks significant connections to the District of Columbia and Germany has an interest in litigating this case in its courts because the claims arose there. Defs.' Mot. at 62-63. Further, Defendants argue that Germany has a particular interest in this case because it has "powerful interest[s] in remedying the crimes of the Nazi government[,] . . . in providing compensation and restitution of Nazi-looted art to victims of Nazi persecution," *id.* at 63, and in having a German court resolve the issue of the ownership of the Welfenschatz which currently is displayed in a German museum and any damages related thereto, *id.* at 65. Finally, Defendants assert that choice-of-law issues favor litigation in Germany because this action may require the Court to apply areas of German law which are open and/or unfamiliar to the Court and which present a language barrier to this Court.

Plaintiffs counter these arguments by asserting that "federal courts in the United States have expressed a strong interest in providing a forum for the resolution of Holocaust-era claims." Pls.' Opp'n at 67. Moreover, Plaintiffs note that the District of Columbia has been designated by Congress as the proper venue for claims brought against foreign states under the FSIA. *See* 28 U.S.C. § 1391(f)(4). Further, Plaintiffs point out that this Court is regularly called upon to address issues of foreign legal concepts in cases. Plaintiffs also note that the majority of German law at issue in this case is historical law which would require the

use of historical legal experts regardless of the forum. Pls.' Opp'n at 67-68.

Here, the Court finds the balance of the public interests are in equipoise. The Court recognizes Germany's interest in adjudicating claims like the ones in the instant action. However, " 'there is a public interest in resolving issues of significant impact in a more central forum, such as this one.' " *de Csepel v. Republic of Hung.* (*de Csepel I*), 808 F. Supp. 2d 113, 139 (D.D.C. 2011) (quoting *Agudas Chasidei Chabad v. Russian Fed'n*, 466 F. Supp. 2d 6, 29-30 (D.D.C. 2006)).

4. Balance of Interests

The parties dispute the degree of deference that the Court should afford Plaintiffs' choice of forum. While Defendants acknowledge that Plaintiffs' choice to proceed in this Court enjoys some deference, Defendants argue that the Court should grant Plaintiffs little deference because the lack of significant contacts between the events and this forum "suggests that [P]laintiffs' choice of forum was motivated by tactical considerations, such as a desire to avoid Germany's fee-shifting rules or to force the defendants to litigate the case in a much more costly forum." Defs.' Mot. at 67. Plaintiffs argue that their choice of forum is entitled to strong deference because two of the three Plaintiffs are U.S. citizens who currently reside in the United States, and note that the analysis should be unaffected by the fact that Plaintiffs do not live in the District of Columbia because any federal court in this

country may be considered their "home forum." Pls.' Opp'n at 60-61. Plaintiffs further assert that they are not engaged in forum shopping and instead selected this Court because Defendant SPK is engaged in commercial activity in the District pursuant to 28 U.S.C. § 1391(f)(3) and because this District is the proper forum to bring claims against Defendant Germany pursuant to § 1391(f)(4). The Court agrees with Plaintiffs that their selection of this forum to adjudicate their claims is entitled to deference. Indeed, the Court finds no support for Defendants' claim that Plaintiffs engaged in forum shopping when they brought their claims in the home forum of two of the three Plaintiffs and, as such, the Court shall not diminish the degree of deference that it applies to Plaintiffs' choice of forum based on this argument. Here, the Court finds that the balance of public and private interests does not overcome that presumption in favor of Plaintiffs' choice of forum. As such, the Court shall decline to exercise its discretion to dismiss Plaintiffs' claims under the doctrine of forum non conveniens.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' request that the Court dismiss five non-property based claims because Defendants are entitled to sovereign immunity on the following claims: fraud in the inducement (Count V); breach of fiduciary duty (Count VI); breach of the covenant of good faith and fair dealing (Count VII); civil conspiracy (Count VIII); and tortious interference (Count X). The Court DENIES

Defendants' request for dismissal on the remaining five claims: declaratory relief (Count I); replevin (Count II); conversion (Count III); unjust enrichment (Count IV); and bailment (Count IX). Specifically, the Court finds that Plaintiffs have sufficiently pled these five claims under the expropriation exception to the FSIA pursuant to 28 U.S.C. § 1605(a)(3). The Court further finds that these five claims are not preempted or non-justiciable, nor should they be dismissed under the doctrine of forum non conveniens.

An appropriate Order accompanies this Memorandum Opinion.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALAN PHILIPP, *et al.*, Plaintiffs, v. FEDERAL REPUBLIC OF GERMANY, *et al.*, Defendants.	Civil Action No. 15-266 (CKK)

ORDER
(March 31, 2017)

For the reasons stated in the accompanying Memorandum Opinion, it is, this 31st day of March, 2017, hereby

ORDERED that Defendants' [18] Motion to Dismiss the First Amended Complaint is GRANTED IN PART and DENIED IN PART; and it is further

ORDERED that the Defendants' Motion is GRANTED in that Plaintiffs' fraud in the inducement (Count V), breach of fiduciary duty (Count VI), breach of the covenant of good faith and fair dealing (Count VII), civil conspiracy (Count VIII), and tortious interference (Count X) claims are DISMISSED as conceded based on Plaintiffs' failure to respond to the argument that these claims do not involve rights in property; and it is further

ORDERED that the Defendants' motion is DENIED in all other respects; and it is further

ORDERED that Defendants shall file their Answer to the remaining claims in Plaintiffs' First Amended Complaint by no later than **April 21, 2017**.

IT IS SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed On: June 18, 2019

No. 17-7064

ALAN PHILIPP, ET AL.,
APPELLEES

v.

FEDERAL REPUBLIC OF GERMANY, A FOREIGN STATE
AND STIFTUNG PREUSSISCHER KULTURBESITZ,
APPELLANTS

Consolidated with 17-7117

Appeals from the United States District Court
for the District of Columbia
(No. 1:15-cv-00266)

On Petition for Rehearing En Banc

Before: GARLAND, *Chief Judge*; HENDERSON, ROGERS, TATEL, GRIFFITH, SRINIVASAN, MILLETT, PILLARD, WILKINS, KATSAS**, and RAO*, *Circuit Judges*.

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* Circuit Judge Rao did not participate in this matter

** A statement by Circuit Judge Katsas, dissenting from the denial of rehearing en banc, is attached.

ORDER

Appellants' petition for rehearing en banc, the response thereto, and the amicus curiae brief in support of rehearing en banc were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Ken R. Meadows
Deputy Clerk

KATSAS, *Circuit Judge*, dissenting from the denial of rehearing en banc:

The panel decision in this case, together with *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016) (*Simon I*), and *Simon v. Republic of Hungary*, 911 F.3d 1172 (D.C. Cir. 2018) (*Simon II*), makes the district court sit as a war crimes tribunal to adjudicate claims of genocide arising in Europe during World War II. The basis for these decisions is not any federal statute authorizing a private right of action for victims of foreign genocide, nor even any statute punishing foreign genocide under United States law. Rather, these decisions rest on a statute abrogating the jurisdictional immunity of foreign sovereigns from claims for

unlawful takings of property. As a result, the district court must hear genocide claims against foreign sovereigns, but only to determine whether it has subject-matter jurisdiction over common-law tort claims for conversion and the like. Moreover, the plaintiffs bringing these genocide-based takings claims may recover neither for killings nor even for personal injuries, but only for the loss of their property. And the district court must adjudicate these claims—and thus effectively determine the scope of a genocide—without first affording the foreign sovereign an opportunity to provide redress, whether for genocide or conversion.

Before allowing this remarkable scheme to proceed further, we should reconsider it en banc. In this case, *Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018), and in *Simon II*, we rejected any defense of exhaustion or comity-based abstention for claims under the Foreign Sovereign Immunities Act (FSIA). These decisions create a clear split with the Seventh Circuit, are in tension with decisions from the Ninth and Eleventh Circuits, disregard the views of the Executive Branch on a matter of obvious foreign-policy sensitivity, and make the FSIA more amenable to human-rights litigation against foreign sovereigns than the Alien Tort Statute (ATS) is to human-rights litigation against private defendants abetting the sovereigns. Moreover, they clear the way for a wide range of litigation against foreign sovereigns for public acts committed within their own territories. This includes claims not only for genocide, but also for the violation of most other norms of international human-rights law.

The consequences of *Simon I* and its progeny are thus dramatic, while their foundations are shaky.

I

The FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided" in the FSIA itself. 28 U.S.C. § 1604. It then provides that a "foreign state shall not be immune from the jurisdiction of courts of the United States or of the States" when certain exceptions apply. *Id.* § 1605. The exception at issue here, commonly called the "expropriation exception," applies to any case

> 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.

Id. § 1605(a)(3).

In *Simon I*, this Court held that the expropriation exception covers property taken as part of a genocide. We reasoned that genocide includes deliberately inflicting on a protected group "conditions of life

calculated to bring about its physical destruction." 812 F.3d at 143 (quotation marks omitted). We held that the complaint at issue, which described the experience of Jews in Hungary between 1941 and 1944, adequately alleged "the requisite genocidal acts and intent," including a "systematic, 'wholesale plunder of Jewish property'" that "aimed to deprive Hungarian Jews of the resources needed to survive as a people." *Id.* at 143–44 (citation omitted). We recognized that the international law of expropriation applies only to takings by one sovereign of property owned by nationals of another. *Id.* at 144. But we distinguished the prohibition against genocide, which encompasses acts committed by a sovereign "against its own nationals." *Id.* at 145. We also acknowledged that, for genocide-based expropriation claims, the jurisdictional and merits inquiries diverge: Genocide must be established to create subject-matter jurisdiction, but the merits involve "garden-variety common-law causes of action such as conversion, unjust enrichment, and restitution." *Id.* at 141. As to damages, we noted that another FSIA exception covers claims "for personal injury or death," but only for losses "occurring in the United States." 28 U.S.C. § 1605(a)(5). So, we construed the expropriation exception to permit plaintiffs claiming genocide to "seek compensation for taken property but not for taken lives." 812 F.3d at 146 (quotation marks omitted).

In *Philipp* and *Simon II*, this Court rejected exhaustion, abstention, and *forum non conveniens* defenses to the genocide-based expropriation claims

recognized in *Simon I.* In *Philipp*, the panel held that the FSIA, by comprehensively codifying rules for foreign sovereign immunity, foreclosed any requirement that plaintiffs exhaust remedies available in the courts of the defendant sovereign. 894 F.3d at 414–16. *Simon II* reaffirmed that holding. There, we stated that, unlike other common-law defenses preserved by the FSIA, exhaustion "lacks any pedigree in domestic or international common law." 911 F.3d at 1181. We further reasoned that, if an exhaustion requirement would preclude the plaintiffs from returning to federal court (as would a comity-based abstention requirement), that would only make exhaustion more like immunity. *Id.* at 1180. Then, we held that the district court abused its discretion in dismissing the claims on *forum non conveniens* grounds, even though they involved acts perpetrated by the Hungarian government against Hungarian nationals in Hungary. *Id.* at 1181–90.

II

A

The expropriation exception applies to claims for "property taken in violation of international law." 28 U.S.C. § 1605(a)(3). *Simon I* held that this provision encompasses property taken in violation of the international-law prohibition against genocide. In my judgment, it encompasses only property taken in violation of international takings law. The literal language could bear either meaning, but statutes must be

construed in context. *See*, *e.g.*, *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007). Here, several contextual considerations support the narrower reading.

To begin, genocide is not about the taking of property. Rather, it involves the attempted extermination of a national, ethnic, racial, or religious group. A United Nations convention defines genocide 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) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277. *Simon I* reasoned that takings may have a genocidal intent, and thus meet the last prong of this definition. 812 F.3d at 143–44. But they still must be intended to cause the "physical destruction" of a group—what matters is the attempted mass murder. And if genocide involves attempted mass murder, a provision keyed to "property taken" would be a remarkably elliptical way of addressing it. *See*, *e.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

It would be even stranger for Congress to address genocide as exclusively a property offense. The FSIA's expropriation exception encompasses only claims for

"property," 28 U.S.C. § 1605(a)(3), whereas its separate tort exception, which encompasses claims "for personal injury or death," covers only harms "occurring in the United States," *id.* § 1605(a)(5). So, *Simon I* approved an exceedingly odd type of genocide claim—one for property harms but *not* for personal injury or death. Moreover, the expropriation exception requires a connection between the property taken and commercial activity in the United States: the property or its proceeds must either be "present in the United States in connection with a commercial activity carried on in the United States by the foreign state," or "owned or operated by an agency or instrumentality of the foreign state" that is itself "engaged in a commercial activity in the United States." *Id.* § 1605(a)(3). These requirements would make little sense in a provision addressed to human-rights abuses such as genocide, rather than to purely economic wrongdoing.

As strange is the mismatch between jurisdiction and merits. *Simon I* requires proof of genocide to abrogate sovereign immunity—which must be determined at the outset. *See Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1318–24 (2017). But abrogating immunity does not create a private right of action, *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1033 (D.C. Cir. 2004), and there is no common-law right of action for genocide. Instead, the merits here involve "'garden-variety common-law' claims," such as "replevin, conversion, unjust enrichment, and bailment." *Philipp*, 894 F.3d at 410–11 (citation omitted); *see also Simon*

I, 812 F.3d at 141. This scheme oddly matches the jurisdictional equivalent of a thermonuclear weapon (determining the scope of a genocide) to the merits equivalent of swatting a fly (determining whether there was a common-law conversion). And it is in marked contrast to the FSIA's terrorism exception, which applies to claims for various specified acts, 28 U.S.C. § 1605A(a)(1), and which creates a cause of action for those acts, *id.* § 1605A(c).

Broader statutory context creates further difficulties. The FSIA's other primary exceptions are narrow ones covering waiver, commercial activity in the United States, rights to property in the United States, torts causing injury in the United States, and arbitration. 28 U.S.C. § 1605(a)(1)–(6). The Supreme Court has described these exceptions as collectively codifying the pre-FSIA "restrictive" theory of foreign sovereign immunity, which covers a sovereign's "public acts" but not its commercial ones. *See Helmerich & Payne*, 137 S. Ct. at 1320–21; *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486–89 (1983). In a case specifically involving the expropriation exception, the Court "found nothing in the history of the statute that suggests Congress intended a radical departure from these basic principles." *Helmerich & Payne*, 137 S. Ct. at 1320. Abrogating immunity for public acts committed by a foreign sovereign against its own nationals within its own territory would be just such a radical departure.

The international law of foreign sovereign immunity cuts in the same direction. Here is its "Basic Rule":

"Under international law, a state or state instrumentality is immune from the jurisdiction of the courts of another state, except with respect to claims arising out of activities of the kind that may be carried on by private persons." Restatement (Third) of the Foreign Relations Law of the United States § 451 (1987) (Third Restatement). Like the FSIA, international law provides narrow exceptions to immunity for claims arising out of commercial activity, *id.* § 453(1); torts causing injuries within the forum state, *id.* § 454(1); property claims involving commercial activities, gifts, or immovable property in the forum state, *id.* § 455(1); and waiver, *id.* § 456(1). None of these exceptions covers the genocide-based takings claims recognized in *Simon I*. So, *Simon I* construes the FSIA to conflict with international law—which is to be avoided if possible. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Of course, none of this suggests that genocide or other violations of international human-rights law should go unremedied; but such violations typically are addressed either through diplomacy or in international tribunals, rather than in the domestic tribunals of another sovereign. *See* Third Restatement § 906 & cmt. *b*.

Consistent with these principles, the courts have rejected attempts to shoehorn modern human-rights law into the FSIA exceptions. For example, in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), the Supreme Court held that the commercial-activity exception did not cover claims that Saudi Arabia illegally detained and tortured a United States citizen employed by a

Saudi government hospital. The Court construed the exception to track the restrictive theory of sovereign immunity:

> [T]he intentional conduct alleged here (the Saudi Government's wrongful arrest, imprisonment, and torture of Nelson) could not qualify as commercial under the restrictive theory. The conduct boils down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature.

Id. at 361. In *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), we likewise construed the FSIA's waiver exception, which includes waivers "by implication," 28 U.S.C. § 1605(a)(1), to track the restrictive theory. We held that Germany did not impliedly waive its foreign sovereign immunity by using slave labor during the Nazi era. 26 F.3d at 1173. And we did so despite recognizing that slavery—like genocide—violates a *jus cogens* norm of international human-rights law, *i.e.*, "a norm from which no derogation is permitted." *Id.* (quotation marks omitted).

The only deviation from this pattern is the FSIA's terrorism exception, which covers a significant class of cases involving the public acts of a foreign sovereign. But the differences between the terrorism and expropriation exceptions are striking: The terrorism exception meticulously describes and limits the possible

plaintiffs (United States nationals, members of the United States armed forces, and United States employees or contractors), 28 U.S.C. § 1605A(a)(2)(A)(ii); the possible defendants (generally, foreign states formally designated as sponsors of terrorism), *id.* § 1605A(a)(2)(A)(i); the acts triggering the exception ("torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act"), *id.* § 1605A(a)(1); the associated private cause of action (covering the same parties and acts), *id.* § 1605A(c); and the damages available (for personal injury, death, or foreseeable property loss), *id.* § 1605A(a)(1), (d). This carefully reticulated framework is far different from a provision keyed only to "property taken in violation of international law." *Id.* § 1605(a)(3).

B

The grave consequences of *Simon I* bear not only on its correctness, but also on the appropriateness of en banc review.

Most obviously, *Simon I* requires federal courts to determine the scope of genocide committed by various foreign countries during World War II. We suggested that this determination may sometimes be straightforward—as in the case of Hungarian Jews in the early 1940s. *See* 812 F.3d at 142–44. Even so, each individual plaintiff must prove not only that there was a genocide, but also that he or she (or a decedent) was subjected to a genocidal taking. Sometimes, this will be far from

clear. For example, the *Philipp* panel concluded that a coerced sale of art in 1935, for "barely 35% of its actual value," could be an act of genocide. 894 F.3d at 409, 413–14 (quotation marks omitted). Germany objected that the plaintiffs' theory would transform into genocide any "'transaction from 1933–45 between' a Nazi-allied government and 'an individual from a group that suffered Nazi persecution.'" *Id.* at 414. The panel envisioned something only slightly less concerning—case-by-case adjudications of which commercial transactions were sufficiently coercive, unfair, and improperly motivated to be genocide. *Id.* Such claims could be made against a number of European nations. *See*, *e.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677 (2004); *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010) (en banc); *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005); *Freund v. Republic of France*, 592 F. Supp. 2d 540 (S.D.N.Y. 2008). And they would create massive exposure. For example, in a case that, like *Simon*, involved Jews who lost property in the Hungarian Holocaust, the damages sought were some $75 billion—"nearly 40 percent of Hungary's annual gross domestic product in 2011." *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 682 (7th Cir. 2012).

Moreover, the reasoning of *Simon I* cannot be limited to genocide. International law sharply distinguishes between the law of expropriation, which restricts only the takings by one sovereign of property belonging to the nationals of another, *see* Third Restatement § 712, and human-rights law, which now

governs one sovereign's treatment of its own nationals within its own borders, *id.* § 701. Under the latter,

> A 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 (g) a consistent pattern of gross violations of internationally recognized human rights.

Id. § 702. The first six of these seven categories are *jus cogens* norms—the most serious ones, which are binding even in the face of an international agreement to the contrary. *Id.* cmt. *n.* Most of them—including not only genocide, but also slavery, murder, degrading treatment, and systemic racial discrimination—can involve harms to property. Under the reasoning of *Simon I*, all of these could be the subject of litigation through the expropriation exception.

To appreciate the gravity of this, consider if the shoe were on the other foot. Imagine the United States' reaction if a European trial court undertook to adjudicate a claim for tens of billions of dollars for property losses suffered by a class of American victims of slavery or systemic racial discrimination. Yet that is a precise mirror image of *Simon.* Given the stakes, what we once said about the waiver exception rings true here:

> We think that something more nearly express is wanted before we impute to the Congress

> an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading of § 1605(a)(1) would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations. In many if not most cases the outlaw regime would no longer even be in power and our Government could have normal relations with the government of the day—unless disrupted by our courts, that is.

Princz, 26 F.3d at 1175 n.1.

III

Philipp and *Simon II* magnify the concerns about *Simon I* and come with their own analytical difficulties.

A

On the merits, *Philipp* and *Simon II* held that the FSIA forecloses any exhaustion or comity-based abstention defense. 894 F.3d at 414–16; 911 F.3d at 1180–81. But far from foreclosing these defenses, the FSIA affirmatively accommodates them. It provides that, for any claim falling within an immunity exception, "the foreign state shall be liable in the same manner and to

the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. A "private individual" under "like circumstances" would be one facing claims for aiding and abetting violations of international human-rights law. Such claims would be brought under the ATS, which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Another like circumstance might involve private individuals sued for wrongful death, battery, or conversion. In either instance, exhaustion and abstention defenses would likely be available.

The Supreme Court has at least hinted that an ATS plaintiff must exhaust local remedies before litigating an international-law tort claim in federal district court. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Court explained:

> the European Commission argues . . . that basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other forums such as international claims tribunals. We would certainly consider this requirement in an appropriate case.

Id. at 733 n.21 (citations omitted). Four justices have embraced exhaustion more definitively—without provoking any disagreement. *See Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1430–31 (2018) (Sotomayor, J.,

dissenting); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 133 (2013) (Breyer, J., concurring in the judgment). The Ninth Circuit has held that exhaustion is required in ATS cases if local remedies are adequate. *See Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 828–32 (9th Cir. 2008) (en banc) (plurality opinion); *id.* at 833–37 (Bea, J., concurring); *id.* at 840–41 (Kleinfeld, J., concurring).

Private defendants also may seek comity-based abstention. For example, *Mujica v. AirScan, Inc.*, 771 F.3d 580 (9th Cir. 2014), involved ATS and state-law claims against defendants alleged to have abetted the bombing of a Colombian village by the Colombian government. *See id.* at 584. After dismissing the ATS claims as impermissibly extraterritorial, the Ninth Circuit dismissed the state-law claims "based on the doctrine of international comity." *Id.* at 596–97. As the court explained, "[i]nternational comity is a doctrine of prudential abstention, one that 'counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law.'" *Id.* at 598 (citation omitted). Likewise, in *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004), the Eleventh Circuit dismissed on comity-based abstention grounds a claim by an American citizen that two German banks, during the 1930s and early 1940s, had stolen her family property "through the Nazi Regime's program of 'Aryanization.'" *Id.* at 1229, 1237–40. Comity interests are heightened where, as here, the claims "arise from

events of historical and political significance" to the foreign sovereign. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008). Like exhaustion, comity-based abstention presupposes an adequate forum in the offending country. *See*, *e.g.*, *Mujica*, 771 F.3d at 603–04. But *Philipp* and *Simon II* rejected exhaustion and abstention defenses as categorically unavailable in FSIA cases, not on the narrower ground that fora in Germany and Hungary were inadequate.

The *Philipp* panel reasoned that because the FSIA comprehensively sets forth immunity defenses, *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141–42 (2014), but does not expressly provide for exhaustion or abstention defenses, it must implicitly have foreclosed those defenses. 894 F.3d at 415–16. But foreign sovereign *immunity*—which eliminates subject-matter *jurisdiction*—is distinct from non-jurisdictional defenses such as exhaustion and abstention. As shown above, these defenses are available to private defendants no less than to foreign sovereigns. In that critical respect, the defenses are less akin to immunity than to generally applicable, judge-made defenses such as *forum non conveniens*, the act-of-state doctrine, and the political-question doctrine—none of which is mentioned in the text of the FSIA, but all of which survived its enactment. *See*, *e.g.*, *Agudas Chasidei Chabad v. Russian Federation*, 528 F.3d 934, 951 (D.C. Cir. 2008); *Hwang Geum Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005). Exhaustion and abstention are also different from arbitration. So, the inclusion of an arbitration requirement in the terrorism exception, 28 U.S.C.

§ 1605A(a)(2)(A)(iii); *see Philipp*, 894 F.3d at 415, says nothing about exhaustion or abstention.

Simon II further reasoned that exhaustion "lacks any pedigree in domestic or international common law." 911 F.3d at 1181. But international law requires an individual "claiming to be a victim of a human rights violation" to "exhaust[] available remedies under the domestic law of the accused state" before another state may espouse his claim. *See* Third Restatement § 703 cmt. *d.* Likewise, individual victims generally have international remedies only as provided by agreement, *see id.* cmt. *c*, and international agreements "also generally require that the individual first exhaust domestic remedies," *id.* cmt. *d.* To be sure, the Third Restatement does not expressly apply the same rule to instances where the victim seeks redress in the courts of a foreign sovereign. *See Philipp*, 894 F.3d at 416. But the drafters would have had no occasion to address exhaustion in that specific circumstance, given the overwhelming likelihood that, under international standards, sovereign immunity would have barred the claims. *See* Third Restatement §§ 451–56. Moreover, the logic for requiring exhaustion is even stronger in the context of actions filed in domestic courts; "if exhaustion is considered essential to the smooth operation of international tribunals whose jurisdiction is established only through explicit consent from other sovereigns, then it is all the more significant in the absence of such explicit consent to jurisdiction." *Sarei*, 550 F.3d at 830 (plurality opinion). As for domestic exhaustion rules, federal courts have crafted

them for over a century, out of respect for other sovereigns such as states or Indian tribes. *See*, *e.g.*, *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14–15 (1987); *Ex parte Royall*, 117 U.S. 241, 251 (1886).

Finally, *Simon II* reasoned that exhaustion might, by operation of *res judicata*, bar plaintiffs from ever bringing claims in the United States. 911 F.3d at 1180. That is not necessarily true, at least if the plaintiff reserves the right to litigate international claims in the United States after pursuing domestic tort claims elsewhere. *Cf. England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 413–19 (1964). In any event, there is nothing anomalous with exhaustion triggering preclusion. *See*, *e.g.*, *Iowa Mut.*, 480 U.S. at 19. Moreover, the same objection would apply to exhaustion under the ATS, yet the Ninth Circuit still adopted it. Comity-based abstention does prevent a plaintiff from litigating in a United States forum, yet the courts have applied it to cases involving private defendants facing foreign-centered human-rights claims. The FSIA makes the same defenses also available to foreign sovereigns.

B

Philipp and *Simon II* warrant rehearing en banc for several reasons. *First*, they create a circuit split on a sensitive foreign-policy question. The Seventh Circuit has required Hungarian Holocaust survivors to exhaust remedies in Hungary before seeking to litigate under the FSIA's expropriation exception. *Fischer v.*

Magyar Államvasutak Zrt., 777 F.3d 847, 856–66 (7th Cir. 2015); *Abelesz*, 692 F.3d at 678–85. After describing the nearly existential threat of a $75 billion lawsuit, the Seventh Circuit held that "Hungary, a modern republic and member of the European Union, deserves a chance to address these claims." *Abelesz*, 692 F.3d at 682. The *Philipp* panel acknowledged creating a circuit split. 894 F.3d at 416.

Second, Philipp rejected the position advanced by the United States. *See* 894 F.3d at 416. In *Simon II*, the United States argued at length that "[d]ismissal on international comity grounds" was consistent with the FSIA and "can play a critical role in ensuring that litigation in U.S. courts does not conflict with or cause harm to the foreign policy of the United States." Br. for Amicus Curiae United States at 14–15, *Simon v. Republic of Hungary* (No. 17-7146); *see also id.* at 14–24. The United States again took the same position in supporting rehearing en banc in *Philipp.* Br. for United States as Amicus Curiae in Support of Rehearing En Banc at 3–14. Given the Executive Branch's "vast share of responsibility for the conduct of our foreign relations," *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (quotation marks omitted), we should consider its views on this issue with special care.

Third, by eliminating various defenses, these decisions heighten concern about *Simon I.* Two important defenses—exhaustion and abstention—are now foreclosed. And if it was an abuse of discretion to dismiss on *forum non conveniens* grounds the foreign-cubed claims in *Simon II, see* 911 F.3d at 1182, then

few of these human-rights cases will qualify for that defense. Other possible doctrines for limiting the expropriation exception, *see Altmann*, 541 U.S. at 713 (Breyer, J., concurring), are also unlikely to have much effect: Personal jurisdiction requirements do not apply to foreign sovereigns. *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002). Venue is always proper in the District of Columbia for actions "brought against a foreign state or political subdivision thereof." 28 U.S.C. § 1391(f)(4). The act-of-state doctrine may not apply to Nazi-era claims, *see First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 764 (1972) (plurality opinion); *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954) (per curiam), and generally does not apply to expropriation claims arising after January 1, 1959, *see* 22 U.S.C. § 2370(e)(2). Statutes of limitation may bar some claims arising from World War II, despite inevitable tolling or concealment arguments, but they will have no effect on claims arising from recent alleged human-rights abuses. Finally, *Simon I* itself held that the political-question doctrine does not bar the claims that it approved. *See* 812 F.3d at 149–51.

Fourth, these decisions make the FSIA more receptive to human-rights litigation than is the ATS. Under *Simon I*'s broad interpretation of the expropriation exception, most modern ATS claims could be recast as FSIA ones. And after *Philipp*, recasting has significant advantages. For example, ATS claims that a defendant had abetted crimes against humanity by Papua New

Guinea must be exhausted. *See Sarei*, 550 F.3d at 824 (plurality opinion). Yet under *Philipp*, the same lawsuit would face no exhaustion requirement if filed directly against Papua New Guinea. ATS claims of abetting atrocities committed by a foreign sovereign within its own territory are impermissibly extraterritorial. *See Kiobel*, 569 U.S. at 111–12, 124–25. Yet under *Philipp*, the same lawsuits, if filed directly against the foreign sovereigns, might survive on the theory that common-law tort claims have no territorial limit. *Compare Mujica*, 771 F.3d at 591–96 (dismissing ATS claims as extraterritorial), *with id.* at 596–615 (dismissing state-law claims only on comity grounds). Such results are perverse, for FSIA actions against foreign sovereigns raise even greater foreign-policy concerns than do ATS actions against private parties who may abet them.

Finally, the mismatch noted above between jurisdictional and merits issues under *Simon I* makes exhaustion even more important. If the federal courts must resolve the scope of a genocide in order to decide garden-variety conversion claims, then so much the better if the foreign sovereign can perhaps resolve the claims by addressing only the merits.

* * * *

For these reasons, I would grant rehearing en banc to reconsider the approach to the FSIA's expropriation exception set forth in *Simon I, Philipp*, and *Simon II*.

[ARGUED MAY 2, 2018; DECIDED JULY 10, 2018]

No. 17-7064, consolidated with No. 17-7117

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALAN PHILIPP, ET AL.,

Plaintiffs-Appellees,

v.

FEDERAL REPUBLIC OF GERMANY, a foreign state; and STIFTUNG PREUSSISCHER KULTURBESITZ,

Defendants-Appellants.

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF REHEARING EN BANC

(Filed Sep. 14, 2018)

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

The plaintiffs-appellees are Alan Philipp, Gerald G. Stiebel, Jed R. Leiber. The defendants-appellants are the Federal Republic of Germany and Stiftung Preutßischer Kulturbesitz. Amicus curiae are David Toren and the United States of America.

B. Rulings Under Review

The ruling under review is the district court's March 31, 2017 order denying a motion to dismiss the action, for the reasons set forth in the accompanying memorandum opinion. The decision is published at 248 F. Supp. 3d 59 (D.D.C. 2017), and is reprinted at Joint Appendix 310-51.

C. Related Cases

On April 21, 2017, defendants filed a notice of appeal regarding the district court's decision, which was

assigned case number 17-7064. At the same time, defendants moved the district court to certify the entirety of its decision for interlocutory appeal under 28 U.S.C. § 1292(b). The district court granted defendants' motion on May 18, 2017, and so certified its opinion. *See Philipp v. Federal Republic of Germany*, 253 F. Supp. 3d 84 (D.D.C. 2017). On May 30, defendants filed a petition with this Court asking the Court to accept an interlocutory appeal of the entirety of the district court's decision. That petition was assigned case number 17-8002. On August 1, this Court granted Defendants' petition. The district court then filed this Court's order as a separate notice of appeal, which was assigned case number 17-7117. On August 4, this Court consolidated cases 17-7064 and 17-7117.

There appear to be no other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C). However, there have been a number of other cases that raised similar legal issues, including *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847 (7th Cir. 2015), *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012), and *Simon v. Republic of Hungary*, 277 F. Supp. 3d 42 (D.D.C. 2017), *appeal docketed*, No. 17-7146 (D.C. Cir. Oct. 23, 2017).

/s/ Casen B. Ross
CASEN B. ROSS

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* Authorities upon which we chiefly rely are marked with asterisks.

Statutes:

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INTRODUCTION AND STATEMENT OF INTEREST

Pursuant to 28 U.S.C. § 517 and Federal Rule of Appellate Procedure 29(b)(2), the United States submits this brief as amicus curiae in support of rehearing en banc.

The United States deplores the wrongdoings committed against victims of the Nazi regime, and supports efforts to provide them with remedies for the wrongs they suffered. Since the end of World War II, the United States has worked in numerous ways to achieve some measure of justice. With the United States' encouragement, the German government has provided roughly $100 billion (in today's dollars) to compensate Holocaust survivors and other victims of the Nazi era.

The United States has not been involved in efforts to resolve plaintiffs' specific property claims, but it hosted the conference that produced the Washington Conference Principles on Nazi-Confiscated Art, *see* U.S. Dep't of State, https://go.usa.gov/xPYUU (last visited Sept. 15, 2018), in accordance with which Germany established an Advisory Commission to resolve disputes regarding cultural assets seized by the Nazi regime.

[2] The United States takes no position on whether the Advisory Commission correctly decided not to recommend the return of the property at issue here, or whether the district court correctly denied the defendants' motion to dismiss. The United States files this brief as amicus curiae, however, to express its view

that a district court may, in an appropriate case, abstain on international comity grounds from exercising jurisdiction over claims brought under the expropriation exception to the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1605(a)(3). Comity-based abstention may be appropriate where litigation would be at odds with the foreign policy interests of the United States and the sovereign interests of a foreign government.[1]

The panel erred in holding that the FSIA "leaves no room" for a court to abstain from exercising jurisdiction as a matter of international comity. Slip Op. 17. The FSIA comprehensively addresses foreign sovereign immunity, but does not displace other areas of law, including comity-based abstention. The panel relied on *Republic of Argentina v.* [3] *NML Capital, Ltd.*, 134 S. Ct. 2250 (2014), but there, the foreign state claimed immunity under the FSIA, and the Court expressly noted that a court "may appropriately consider comity interests" in resolving non-immunity issues relating to post-judgment discovery. *Id.* at 2258 n.6. These interests may similarly be considered by a court when it is asked to abstain on comity grounds. The provisions of the FSIA that the panel relied on do not suggest Congress intended to bar considerations of comity, a common-law doctrine that courts have applied for centuries.

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[1] The defendants' rehearing petition (at 11-19) also asks the Court to review its decision in *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016). The United States takes no position on whether the court should grant rehearing on this issue.

ARGUMENT

THE FSIA DOES NOT PROHIBIT A DISTRICT COURT FROM ABSTAINING AS A MATTER OF INTERNATIONAL COMITY FROM EXERCISING JURISDICTION OVER A CLAIM BROUGHT UNDER THE FSIA'S EXPROPRIATION EXCEPTION.

A. United States courts have long recognized the doctrine of international comity, which permits courts to recognize the "legislative, executive or judicial acts of another nation" giving "due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895); *see also id.* at 164-65 (citing Joseph Story, *Commentaries on the Conflict of Laws* §§ 33-38 (1834) (describing international comity as a doctrine of "beneficence, [4] humanity, and charity," which "arise[s] from mutual interest and utility")); *Emory v. Grenough*, 3 U.S. (3 Dall.) 369, 370, n.* (1798) (referring to the doctrine of comity of nations).

International comity discourages a U.S. court from second-guessing a foreign government's judicial or administrative resolution of a dispute (or provision for its resolution), or otherwise sitting in judgment of a foreign government's official acts. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918) ("To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations."). One strand of comity is "adjudicatory comity," pursuant to

which a U.S. court may abstain from exercising jurisdiction in deference to adjudication in a foreign forum. *Mujica v. AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014). This doctrine is one of "prudential abstention," applied "when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law." *Id.* at 598 (quotations omitted).

[5] In enacting the FSIA, Congress established a comprehensive legal framework governing the immunity of foreign states from the jurisdiction of U.S. courts. *See Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014). But the Act was not meant to affect substantive liability or other areas of law. *See Owens v. Republic of Sudan*, 864 F.3d 751, 763 (D.C. Cir. 2017) ("[T]he FSIA * * * grant[ed] jurisdiction yet le[ft] the underlying substantive law unchanged." (citing *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620 (1983)).

Along these lines, "the doctrine of *forum non conveniens* remains fully applicable in FSIA cases." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 100 (D.C. Cir. 2002). And this Court has recognized that other common-law principles continue to apply in cases against foreign states following the FSIA's enactment. *See, e.g.*, *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 951 (D.C. Cir. 2008) (*forum non conveniens* and act-of-state doctrine); *Hwang Geum Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005) (political question doctrine).

[6] This Court has also observed that litigation under the FSIA may involve sensitive questions of foreign affairs that "obviously occasion a continuing involvement by the Executive * * * in matters relating to the application of the act of state doctrine and giving appropriate weight to those views." *Millen Indus., Inc. v. Coordination Council for N. Am. Affairs*, 855 F.2d 879, 881 (D.C. Cir. 1988) (citations omitted).

Abstention on the basis of international comity, like *forum non conveniens*, is not a jurisdictional doctrine but instead a federal common-law doctrine of abstention in deference to an alternative forum. *See In re Papandreou*, 139 F.3d 247, 255-56 (D.C. Cir. 1998) ("Forum non conveniens does not raise a jurisdictional bar but instead involves a deliberate abstention from the exercise of jurisdiction."). And like the act-of-state doctrine, adjudicatory comity is grounded in concerns that a court's adjudication of a claim may improperly impinge on the sovereignty of a foreign nation. *See, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-39 (1964) (distinguishing between court's jurisdiction over claim against foreign state for expropriation, and the court's application of the act-of-state doctrine to decline to examine the merits). Nothing in the text or history of the FSIA suggests that it was [7] intended to foreclose application of those longstanding common-law doctrines.

Significantly, abstention on adjudicatory comity grounds is akin to other common-law abstention principles applied by federal courts. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (recognizing

that a federal court may decline to exercise jurisdiction in deference to predominant State interests under various abstention doctrines, including *Pullman* and *Younger* abstention); *see also id.* at 723 (noting that comity-based abstention stems from a similar premise as *forum non conveniens*). Just as the "longstanding application of [federalism-based abstention] doctrines reflects the common-law background against which the statutes conferring jurisdiction were enacted," *Id.* at 717—that Congress should not be presumed to have intended to override absent clear evidence to the contrary, *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)—a court should not presume from statutory silence that the FSIA's immunity provisions were intended to abrogate comity-based abstention. The panel offered no explanation why federal courts should be able to abstain from [8] exercising jurisdiction in deference to a State's interests, but not in deference to the interests of a foreign sovereign.

Notably, the Supreme Court has explicitly left open the possibility that the United States could suggest that "courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity," *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004) —abstention based on international comity could be such a basis. *See id.* at 702 (explaining that the Court would give deference to the Executive Branch's foreign policy views in deciding whether to exercise jurisdiction under the FSIA).

Jurisdiction under the FSIA's expropriation exception, 28 U.S.C. § 1605(a)(3), is unusual in that it

typically involves claims alleging international-law violations committed in a foreign state, rather than purely private-law disputes ordinarily brought under the FSIA's other exceptions to sovereign immunity, in which the relevant action (or at least the gravamen of the claim) took place in the United States. This exception thus contemplates particular solicitude for international comity and consideration for whether a plaintiff had exhausted remedies in the country where the alleged expropriation took place. At [9] the very least, the text and history of the FSIA afford no reason to foreclose a court from abstaining as a matter of comity.

B. The Supreme Court's decision in *NML Capital*, 134 S. Ct. 2250, does not preclude a court from abstaining based on adjudicatory comity in a case in which the court has jurisdiction under the FSIA. In *NML Capital*, the Court addressed "[t]he single, narrow question * * * whether the [FSIA] specifies a different rule [for post-judgment execution discovery] when the judgment debtor is a foreign state." 134 S. Ct. at 2255. The Court held that "any sort of immunity defense made by a foreign sovereign in an American court must stand or fall on the Act's text," and that the FSIA does not "forbid[] or limit[] discovery in aid of execution of a foreign-sovereign judgment debtor's assets." *Id.* at 2256. The Court noted the concerns raised by Argentina and the United States in arguing for a contrary statutory interpretation regarding the potential affront to foreign states' sovereignty and to international comity resulting from sweeping discovery

orders, but held that only Congress could amend the statute to address those concerns. *Id.* at 2258.

[10] The panel relied on *NML Capital* to conclude that, if a court has jurisdiction under the FSIA, it may not abstain from exercising that jurisdiction on comity grounds. Slip Op. 16-17. To be sure, *NML Capital* held that a foreign state's immunity is governed by the FSIA. But the Supreme Court also expressly recognized that, even where a court has jurisdiction under the FSIA, comity might be relevant to other non-immunity determinations in the litigation. *NML Capital*, 134 S. Ct. at 2258 n.6 ("[W]e have no reason to doubt that [a court] may appropriately consider comity interests" in determining the appropriate scope of discovery.).

A court that declines to exercise jurisdiction on international comity grounds is not treating a foreign state as immune. *See, e.g.*, *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847, 859 (7th Cir. 2015) (explaining that comity is not "a special immunity defense found in the FSIA"); *cf. Republic of Philippines v. Pimentel*, 553 U.S. 851, 865-66 (2008) (distinguishing between foreign state's claim to sovereign immunity under the FSIA and its "unique interest in resolving the ownership of or claims to" assets wrongfully taken). The panel thus [11] erred by reading *NML Capital* to resolve an issue not addressed in that case to foreclose application of a long-recognized abstention doctrine.

C. The panel also relied on two provisions of the FSIA in holding that the statute precludes abstention on comity grounds. Neither supports the panel's conclusion.

First, the panel pointed to the FSIA's terrorism exception, which requires a plaintiff in some circumstances to "afford[ ] [a] foreign state a reasonable opportunity to arbitrate" before bringing suit. 28 U.S.C. § 1605A(a)(2)(A)(iii). The panel reasoned by negative implication that, because a district court *must* dismiss such a claim brought under the FSIA's terrorism exception if the claim is not appropriately exhausted, a district court *cannot* dismiss a claim for failure to exhaust in a foreign forum. Slip Op. 15.

There is no evidence, however, that in enacting the terrorism exception some twenty years after the FSIA was originally enacted, Congress intended to foreclose the possibility that a court might abstain from exercising jurisdiction under other exceptions based on common-law abstention. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1241. The Act's [12] expropriation exception does not require exhaustion, but neither does it forbid a court from abstaining in deference to an alternative forum. The panel's reasoning would also appear to foreclose dismissal on *forum non conveniens* grounds, despite binding circuit precedent to the contrary. *Price*, 294 F.3d at 100.

Furthermore, abstention on comity grounds is not, as the panel seemed to understand it, an exhaustion requirement. Rather, it reflects the principle that, in an appropriate case, a foreign sovereign may have a greater interest in resolving a particular dispute than does the United States, and U.S. interests are better served by deferring to that sovereign's interests. That

may mean deferring to an alternative forum, *e.g.*, *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237-38 (11th Cir. 2004); deferring to a foreign law that strips plaintiffs of standing to bring suit, *e.g.*, *Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582, 586 (2d Cir. 1993); or giving conclusive weight to the foreign state's resolution of a dispute, *e.g.*, *Mujica*, 771 F.3d at 614-15. The FSIA requirement to arbitrate terrorism claims before bringing suit does not suggest that Congress intended to prohibit a court from [13] deferring to the foreign state's interests in a claim brought under a different provision of the Act.

The panel also erred in claiming support for its position from 28 U.S.C. § 1606, which provides that, "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity under [28 U.S.C. §§ 1605, 1607], the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances," with the exception of punitive damages. Slip Op. 15-16. The panel appeared to believe that provision requires a court to treat foreign states the same as private defendants. Slip Op. 16 ("[Section 1606] permits only defenses * * * that are equally available to private individuals").

Even under the panel's reasoning, its conclusion was erroneous. Just as private individuals may invoke *forum non conveniens* as a basis for a court to abstain from exercising jurisdiction, *see* Slip Op. 16, private parties may similarly seek abstention on the basis of adjudicatory comity. *See, e.g.*, *Mujica*, 771 F.3d at 615; *Ungaro-Benages*, 379 F.3d at 1238. In asserting that a

private individual cannot invoke a [14] sovereign's right to resolve disputes against it, the panel construed comity far more narrowly than the doctrine has been applied.

The panel erred in ruling that a court may not abstain, on international comity grounds, from adjudicating a claim over which the court has jurisdiction under the FSIA.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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September 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(4) and 29(b)(4) because it contains 2,537 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Century Schoolbook 14-point font, a proportionally spaced typeface.

/s/ Casen B. Ross
CASEN B. ROSS

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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September 9, 2004

Via Federal Express
Roseann B. MacKechnie, Clerk of Court
U.S. Court of Appeals for the Second Circuit
United States Courthouse
40 Foley Square
New York, New York 10007

Re: *Garb v. Republic of Poland*, No. 02-7844 (2d Cir.)

Dear Ms. MacKechnie:

Amicus curiae the United States of America respectfully submits this letter brief in response to the Court's July 27, 2004, Order directing the submission of briefs on the question "[w]hether, and if so how, the United States Supreme Court's decision in *Republic of Austria v. Altmann*, 541 U.S. ___ (June 7, 2004) is relevant to the issue of subject matter jurisdiction in this case." *Altmann* makes clear that the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* (FSIA), should be applied to determine a court's jurisdiction in all post-enactment suits against a foreign sovereign. As we demonstrate, under the FSIA's takings exception, § 1605(a)(3), jurisdiction is limited to expropriations of aliens' property, such as those claims that were the subject of the 1960 Agreement between the United

States and Poland, and does not encompass the broader range of property deprivations in violation of international human rights law. That exception also permits jurisdiction over a foreign state only where its own contacts with the United States satisfy the first prong of the exception, *i.e.*, the state holds seized property in the United States in connection with its own commercial activity here. A court may not base jurisdiction over the state itself on the less extensive contacts of a juridically distinct instrumentality, on the basis that those contacts would allow jurisdiction over the instrumentality under the terms of the exception's second prong.

I. Background

The plaintiffs are former Polish citizens or their heirs, who allege that Poland engaged in a pogrom against surviving Jewish citizens following World War II, confiscating Jewish citizens' property, encouraging violence against Jewish citizens, and otherwise discriminating against Poland's remaining Jews in an effort to drive them into exile. Although the FSIA imposes a general rule of immunity for claims against foreign sovereigns and their instrumentalities, 28 U.S.C. § 1604, it creates exceptions to immunity where, *inter alia*, the action is based on a foreign state's commercial activity in or directly affecting the United States; or the action involves property rights "taken in violation of international law" and the property is in the United States in connection with a foreign state's commercial activity or is owned or operated by a

foreign instrumentality engaged in commercial activity in the United States. *Id.* § 1605(a)(1)-(3).

The district court held that the FSIA's takings exception could not be applied to pre-FSIA conduct. *Garb v. Republic of Poland*, 207 F. Supp.2d 16, 28-30 (E.D. N.Y. 2004). The court also held that the commercial activity exception, although potentially available, was not satisfied because plaintiffs' claims were based on the "quintessentially sovereign act" of Poland's expropriation of its citizens' property, which also lacked any direct effect on the United States. *Id.* at 31-33. Finally, the court suggested that the takings exception would not be satisfied even if it were available, reasoning that numerous courts have held that international law is not violated by a sovereign's expropriation of its own nationals' property, and further that the Ministry of Treasury appears to be part of the Polish state rather than an agency or instrumentality. *Id.* at 34-38.

This Court vacated and remanded for further proceedings. *Garb v. Republic of Poland*, No. 02-7844, 2003 WL 21890843, at *2 (Aug. 6, 2003). The Court held that jurisdiction turned on "whether the plaintiffs * * * could have legitimately expected to have their claims adjudicated in the United States" prior to enactment of the FSIA, and ordered the district court to determine the State Department's pre-FSIA policy with respect to sovereign immunity for claims against Poland arising out of post-War conduct. *Id.* at 2-*3 & n.1.

The Supreme Court granted defendants' petition for certiorari, and vacated and remanded for further

consideration in light of *Altmann*. 124 S. Ct. 2835 (2004). *Altmann*, which was decided after this Court's decision, involved claims against Austria arising out of World War II-era conduct. *See id.* at 2243-2246. The claimed basis for jurisdiction was the FSIA's takings exception, although no such exception to the rule of foreign state immunity had existed at the time of the alleged wrongdoing. *See id.* at 2245-2247. The Supreme Court held that courts should apply the FSIA's principles of foreign state immunity to conduct pre-dating the statute's enactment. *Id.* at 2252-2255.

II. Discussion

Altmann holds that the FSIA should be applied to determine a court's jurisdiction in all post-enactment suits against a foreign sovereign. The FSIA grants sovereign immunity to a foreign state sued in a United States court unless the claim against it falls within the exceptions defined by statute. *See* 28 U.S.C. § 1604-1605. In our prior brief to this Court, the United States explained that the commercial activity exception to the FSIA does not provide a basis for subject matter jurisdiction over plaintiffs' claims against Poland because the "expropriation of property by a foreign government by sovereign act is not the type of 'commercial activity' that Congress intended to fall within that exception to the FSIA." U.S. Am. Br. 13-14. *Altmann* did not alter that analysis.

However, we have not previously addressed the scope of the takings exception, which *Altmann* holds

applies to all claims brought after the FSIA's enactment. That exception denies sovereign immunity in cases "in which rights in property taken in violation of international law are at issue and [i] 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 [ii] 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." 28 U.S.C. § 1605(a)(3). As we explain below, plaintiffs' claims do not involve "rights in property taken in violation of international law" within the meaning of the statute. Nor, where the stringent nexus requirements of the exception's first prong are not satisfied, does the provision strip a state of its immunity based solely on the lesser class of contacts of an instrumentality that would confer jurisdiction over that instrumentality under the second prong of the exception.

1. *Section 1605(a)(3) applies only to takings in violation of the international law of state responsibility and expropriation.* The FSIA's takings exception was intended to deny immunity for violations of the international law of state responsibility and expropriation, which governs a state's seizure of property belonging to nationals of another state. Absent a clear directive from Congress, the exception should not be interpreted to substantially expand the universe of legal principles relating to property rights that can serve as a basis for

U.S. courts' jurisdiction, to include the full range of international human rights law affecting nationals as well as aliens.

The legislative history of the FSIA explains that the takings exception was intended to govern "Expropriation claims," encompassing "the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law," as well as "takings which are arbitrary or discriminatory in nature." *Foreign Sovereign Immunities Act of 1976*, H.R. Rep. No. 94-1487, at 19, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6618. This characterization of the exception's scope parallels the Restatement's description of the international law principles of state responsibility, which bar a state's discriminatory expropriation of the property of aliens and its expropriation of foreign nationals' property without the payment of adequate, reasonably prompt, and effective compensation. *See* Restatement (2d) of Foreign Relations Law §§ 165-166, 185-187 (1965); *see also* Restatement (3d) of Foreign Relations Law § 712 (1986) ("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 * * * (b) is discriminatory, or (c) is not accompanied by provision for just compensation."). As the Restatement makes clear, international law of state responsibility does not regulate a state's treatment of its own nationals, but rather is limited to certain "taking[s] by the state of the property of a *national of another state*." Restatement (3d) § 712(1) (emphasis added). There is no evidence that

Congress intended to confer jurisdiction over the entire range of potential deprivations of property in violation of international human rights principles.

Consistent with this, the takings exception has been interpreted by every court to have considered the question not to apply to the expropriation by a country of the property of its own nationals. *E.g.*, *Beg v. Islamic Republic of Pakistan*, 353 F.3d 1323, 1328 n.3 (11th Cir. 2003); *Altmann v. Republic of Austria*, 317 F.3d 954, 968 (9th Cir. 2002); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711-712 (9th Cir. 1992); *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1395-1398 (5th Cir. 1985); *see also Altmann*, 124 S. Ct. at 2262 (Breyer, J., concurring) (noting lower courts' "consensus view * * * that § 1605(a)(3)'s reference to 'violation of international law' does not cover expropriations of property belonging to a country's own nationals").[1] Notably, Congress has never overridden that uniform interpretation.

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[1] A number of courts have based their holdings on a conclusion that a foreign state's seizure of the property of its own national does not, even if motivated by religious or racial discrimination, violate international law. *Cf. Dreyfus v. Von Finck*, 534 F.2d 24, 30-31 (2d Cir. 1976) (holding, under Alien Tort Statute, that Nazi Germany's discriminatory seizure of Jewish citizen's property did not violate international law). As we explain in the text, the proper question before the court is *not* whether the discriminatory taking of Jewish property violated international human rights norms, but whether that conduct is within the class of cases against foreign states that Congress intended U.S. courts to hear under the takings exception. It is not.

In their prior briefs, plaintiffs relied on the legislative history reference to "discriminatory" takings as evidence that the takings exception was intended to encompass a sovereign's racial or religious discrimination against its own nationals. *E.g.*, Appellants' Br. at 54. When viewed in context, however, the reference in the legislative history is to discrimination against aliens—*i.e.*, the very subject on which the law of state responsibility and expropriation is focused. See Restatement (2d) § 166. Indeed, many of the sources cited by plaintiffs as evidence of the customary international law norm against "discriminatory" expropriations address the taking of non-nationals' property, and thus lend support to a more limited interpretation of the takings exception. *See, e.g.*, Appellants' Reply at 14 ("to comply with international law, nationalization 'must not discriminate against *aliens* or any particular kind of *alien*' " (emphasis added)); *ibid.* ("the minimum standard of justice * * * means the right of *foreign nationals* to receive full compensation" (emphasis added)).

The interpretation of § 1605(a)(3) as limited to the international law of expropriation is further confirmed by the statutory backdrop against which it was enacted—in particular, the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2). That statute, originally enacted in 1964, bars a federal court from invoking the "act of state" doctrine to dismiss a suit challenging a state "taking * * * in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection." The statute has consistently been interpreted to apply only

in cases involving the taking of alien property, not that of a state's own national. *E.g.*, *Fogade v. ENB Revocable Trust*, 263 F.3d 1274, 1294 (11th Cir. 2001) (collecting cases). The FSIA takings exception was intended to harmonize the scope of foreign sovereign immunity with the act of state doctrine under U.S. law. *See Canadian Overseas Ores Ltd. v. Campania de Acero del Pacifico, S.A.*, 528 F. Supp. 1337, 1346 (S.D.N.Y. 1982), *aff'd*, 727 F.2d 274 (2d Cir. 1984).

Limiting the takings exception to a foreign government's seizure of aliens' property is also consistent with courts' general reluctance to construe the FSIA exceptions to confer jurisdiction over claims that a foreign state violated human rights, particularly where the conduct took place within the state's own borders. *See, e.g.*, *Saudi Arabia v. Nelson*, 507 U.S. 349, 361-363 (1993) (commercial activity exception does not confer jurisdiction over claims involving torture by foreign government's police and penal officers); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173-1176 (D.C. Cir. 1994) (waiver exception does not confer jurisdiction over Nazi-era slave labor case); *cf. Smith v. Socialist People's Libyan Arab Hamahiriya*, 101 F.3d 239, 244-245 (2d Cir. 1996) (waiver exception does not confer jurisdiction over terrorism bombing alleged to violate *jus cogens* norms). Congress has also set careful limits on federal jurisdiction over tort claims against foreign sovereigns arising out of conduct occurring outside of the United States, providing that, as a general matter, noncommercial tort claims can be brought against foreign states only if the damage or injury

occurred in this country. *See* 28 U.S.C. § 1605(a)(5); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439-441 (1989). Although Congress amended the FSIA in 1996 to allow for certain extraterritorial tort claims relating to terrorism, it strictly limited and defined the permissible claims and the class of potential defendants. *See id.* § 1605(a)(7). Construing § 1605(a)(3) to allow for international human rights claims would undermine these careful limitations.

Finally, courts' consensus interpretation of the takings exception as not encompassing claims against a state by its nationals is consistent with international expropriation law, which was the premise of numerous claims settlement agreements entered into by the United States over the last century, including a 1960 agreement between the United States and Poland. As we described in our supplemental amicus filing on May 2, 2003, the United States and Poland entered into that agreement to settle claims arising out of the Polish government's nationalization of property. *See* Agreement Between the Government of the United States of America and the Government of the Polish People's Republic Regarding Claims of Nationals of the United States (July 16, 1960), U.S.T. 1953. Although the United States undertook in that agreement to settle the claims of U.S. nationals, it did not purport to settle or address claims relating to property that was not owned at the time of the taking by a U.S. national. The limited scope of the U.S.-Poland settlement agreement reflects the circumscribed nature of international law and practice concerning state responsibility for the expropriation

of aliens' property. At that time, the sole recourse for expropriation claims was espousal. It was a well-established principle of international law that states could espouse only claims relating to wrongs done to their own citizens, absent the consent of the state both of the third-party national and also the respondent state. Congress removed immunity in certain cases, but there is no indication—much less a clear one—that it intended to include nationals of the expropriating state among those whose claims could be asserted in U.S. courts.

To the extent that there is any remaining ambiguity about the scope of the takings exception, the foreign policy interests of the United States weigh against inferring the dramatic expansion of federal court jurisdiction that plaintiffs seek. As the Supreme Court recognized in its post-*Altmann* decision in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), serious "risks of adverse foreign policy consequences" are created when U.S. courts attempt to set "limit[s] on the power of foreign governments over their own citizens." *Id.* at 2763. As the Court held, "the potential implications for the foreign relations of the United States of recognizing" causes of action for violations of customary international law should make courts reluctant to exercise jurisdiction over such claims absent a "clear mandate" from Congress to do so. *Id.* at 2763. The FSIA contains no such "clear mandate"; to the contrary, Congress enacted the FSIA with the statement that it was intended to "codify" sovereign immunity principles "presently recognized in international law." H.R. Rep.

No. 94-1487, at 7, *reprinted in* 1976 U.S.C.C.A.N. at 6605. This Court should reject the suggestion that Congress nonetheless intended to significantly expand U.S. courts' jurisdiction over previously-barred claims brought by foreign citizens against their own governments.

2. *Section 1605(a)(3) provides jurisdiction over a foreign state only where its own connections with the United States satisfy the statutory criteria under the first prong of the statutory exception.* In addition to requiring a taking "in violation of international law" for jurisdiction to exist, § 1605(a)(3) requires certain minimum connections to the United States: (i) the seized property or property exchanged for it "is present in the United States in connection with a commercial activity carried on in the United States by the foreign state"; or (ii) the seized property or property exchanged for it "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."

The district court correctly found that there was no basis for jurisdiction under the exception. Plaintiffs do not assert that the limited circumstances for jurisdiction under the first prong are satisfied, because they have not alleged that Poland or its Ministry of the Treasury have brought expropriated property into the United States. Nor, as the court suggested, is the second prong of the statute met, because that prong grants jurisdiction only over the agency or instrumentality that has the requisite jurisdictional contacts.

We continue to adhere to the view articulated in the United States's amicus brief in *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151 (D.C. Cir. 1994), and accepted by the district court in this case, that the test for determining the status of a foreign governmental entity as an agency or instead as the state itself should "look to the 'core function' " of the entity, and whether it "is the type of entity that is an integral part of a foreign state's political structure, or rather an entity whose structure and function is predominantly commercial." *Transaero*, 30 F.3d at 151. Under that standard, the Ministry of the Treasury was part of the Polish state itself, not an agency or instrumentality.

Even if the Ministry *were* an agency or instrumentality, however, the takings exception still would not confer jurisdiction over the Republic of Poland because the seized property is not present in this country and the contacts of its agency or instrumentality under the second prong of the takings exception are not a proper basis for stripping the state itself of sovereign immunity. Section 1605(a)(3) is properly interpreted to strip immunity from a foreign state only if its own contacts satisfy the requirements for jurisdiction under the provision's first prong. That prong, which specifically addresses jurisdiction based on the contacts of the "foreign state," requires a much closer nexus with the United States than does the second prong, which provides for jurisdiction based on the contacts of "an agency or instrumentality of the foreign state." It would turn the provision on its head to permit these lesser contacts of

the agency or instrumentality to support jurisdiction over the foreign sovereign itself. Instead, the second prong should be understood as overriding the immunity only of the agency or instrumentality with the contacts at issue.

Interpreting § 1605(a)(3) to require that the foreign state's own contacts, and not those of its agency or instrumentality, meet the requirements of the first prong of the provision is buttressed by the differential treatment accorded foreign states and their agencies and instrumentalities in the FSIA's attachment provision, 28 U.S.C. § 1610. That provision modifies only partially the "traditional view" that "the property of foreign states is absolutely immune from execution," while providing for more expansive rights of execution against the property of a foreign agency or instrumentality. *See* H.R. Rep. No. 94-1487, at 27, *reprinted in* 1976 U.S.C.C.A.N. 6626. A litigant who receives a judgment of unlawful taking by a foreign state may execute the judgment against property owned by the state only if the property relates to the taking; in contrast, a similar judgment against a foreign agency or instrumentality may be executed against *any* property owned by that agency or instrumentality. *See* 28 U.S.C. § 1610(a)(3), (b). Congress clearly envisioned that the attachment provisions would parallel the immunity provisions of § 1605(a)(3). *See* H.R. Rep. No. 94-1487, at 27, *reprinted in* 1976 U.S.C.C.A.N. at 6626.

Further, the historic treatment of expropriation claims prior to enactment of the FSIA supports its interpretation as providing jurisdiction over foreign

states only where the seized property is present in this country in connection with the foreign state's commercial activity, while providing for jurisdiction over foreign state agencies or instrumentalities in a broader set of circumstances. Prior to enactment of the FSIA, foreign states enjoyed immunity from suit arising out of the expropriation of property within their own territory, *see, e.g.*, *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1200 (2d Cir. 1971), with the possible exception of *in rem* cases in which U.S. courts took jurisdiction to determine rights to property in the United States. *E.g.*, *Stephen v. Zivnostenska Banka*, 15 A.D.2d 111, 119 (N.Y. App. Div. 1961), *aff'd*, 186 N.E. 2d 676 (1952). In contrast, separately incorporated state-owned companies engaged in commercial activities of a private nature were generally not accorded foreign sovereign immunity. *See, e.g.*, *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 201-203 (S.D.N.Y. 1929). In creating for the first time an exception to the *in personam* immunity of a foreign state, Congress adopted an incremental approach granting jurisdiction over foreign states that paralleled those few cases in which title to property in the United States had been in issue, while permitting, as had historically been the case, a broader class of cases against agencies and instrumentalities.

Plaintiffs contend that their interpretation of the takings exception is compelled by the text of the takings provision, asserting that, under § 1605(a), "a foreign state shall not be immune" in the specified circumstances, including the second prong of (a)(3), which

confers jurisdiction based upon the commercial contacts of "an agency or instrumentality of a foreign state." Notably, under a literalistic reading of that text, together with the definition of "foreign state" in § 1603(a), the second prong of the takings exception would strip immunity to *all* of a foreign state's agencies and instrumentalities whenever *any one* of them owns seized property and engages in commercial activity in the United States. This result is plainly absurd, and is flatly at odds with the FSIA's legislative history, which makes clear that Congress did not intend to permit the sort of corporate veil-piercing advocated by plaintiffs. *See* H.R. Rep. No. 94-1487, at 29 (statute intended to "respect the separate juridical identities of different [foreign state] agencies or instrumentalities"), *reprinted at* 1976 U.S.C.C.A.N. at 6628; *see also*, *e.g.*, *First National Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 620-621 (1983). It would have made little sense for Congress to require that the instrumentality that owns or operates the seized property be the same instrumentality engaged in commercial activity in the United States in order for jurisdiction to exist under the second prong, if, once the test were satisfied, the state itself and all its instrumentalities would have been subject to suit.

In sum, the text, structure, and history of the FSIA's takings exception show that it is most reasonably interpreted to require that, before a foreign state will be denied immunity, the seized property must be

present in the United States in connection with a foreign state's own commercial activities.

Respectfully submitted,

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Expert Report

On the Possibility of Bringing a Claim in a German Court

Introduction

My name is Prof. Dr. Jan Thiessen. I was born in 1969 in Berlin, Germany. After studying law at the Humboldt University of Berlin, I received my doctorate there in 2004 and my habilitation (an academic distinction beyond the doctorate) in 2009. Having held positions as interim professor at the Free University of Berlin, in Bielefeld and Mannheim, I was appointed in 2010 as a full professor at University of Tuebingen. At the Faculty of Law I hold a chair of Civil Law, German and Contemporary Legal History, Commercial and Corporate Law.

My core fields of research are mergers and acquisitions, the law of partnerships and corporations, contemporary legal history and business law

Vorstellung

Mein Name ist Prof. Dr. Jan Thiessen. Ich wurde 1969 in Berlin, Deutschland geboren. Nach dem Jurastudium an der Humboldt-Universität zu Berlin wurde ich dort 2004 promoviert und 2009 habilitiert. Nach Lehrstuhlvertretungen an der Freien Universität Berlin, in Bielefeld und Mannheim wurde ich 2010 an die Universität Tubingen berufen. An der Juristischen Fakultät bin ich Inhaber eines Lehrstuhls für Bürgerliches Recht, Deutsche Rechtsgeschichte und Juristische Rechtsgeschichte, Handels- und Gesellschaftsrecht.

Meine Hauptforschungsgebiete betreffen den Unternehmenskauf, das Recht der Personen- und Kapitalgesellschaften, die

history. For more than fifteen years I have done research on legal history of the Nazi (National Socialist, or NS) period, and I also taught on that subject for more than five years.

In my research, I focus mainly on the influence of the Nazi ideology in German law and the responsibility of German lawyers for the Nazi past. Since 2013, I have been a member of a task force on the Critical Study of The National Socialist Past, appointed by the Independent Academic Commission at the Federal Ministry of Justice. My task is to examine the Nazi past of the civil servants of the ministry's business law section. I presented lectures on that research at several German universities. I will soon publish a study on the expulsion of Jewish partner from limited liability companies during the Nazi period. In May 2016, by invitation of

Juristische Zeitgeschichte und die Wirtschaftsrechtsgeschichte. Seit mehr als fünfzehn Jahren forsche ich zur Rechtsgeschichte der Zeit des Nationalsozialismus und unterrichte seit mehr als fünf Jahren such zu diesern Thema. Mein weseritliches Interesse gilt dem Einfluss der nationalsozialistischen Ideologie auf das deutsche Recht und der Verantwortung deutscher Juristen für die nationalsozialistische Vergangenheit. Seit 2013 bin ich Beauftragter der Unabhängigen Wissenschaftlichen Kommission beim Bundesministerium der Justiz zur Aufarbeitung der NS-Vergangenheit. Meine Aufgabe besteht darin, die NS-Vergangenheit der Beamten der wirtschaftsrechtlichen Abteilung zu untersuchen. Hierzu habe ich mehrere Vorträge an deutschen Universitäten gehalten. In Kürze werde ich eine Studie über den

Professor Hanoch Dagen and Professor Roy Kreitner, I will present a study at Tel Aviv University on the history of the German Stock Corporations Act of 1937.

On January 17th, 2016, Prof. Dr. Rainer Schröder passed away unexpectedly. He had provided an expert opinion in connection with the lawsuit at hand, at the defendants' request, and it was submitted to the court in connection with a motion to dismiss the original complaint, which was superseded by a First Amended Complaint. I studied and worked with Professor Schröder for fifteen years. He supervised my doctoral thesis and my habilitation. After his death, the defendants asked me to review Professor Schröder's opinion and revise it as appropriate to reflect my own opinion, in connection with a motion to dismiss the First Amended Complaint. Having reviewed

Ausschluss jüdischer Gesellschafter aus Gesellschaften mit beschränkter Haftung während der NS-Zeit publizieren. Im Mai 2016 werde ich auf Einladung von Professor Hanoch Dagan und Professor Roy Kreitner an der Universität Tel Aviv eine Studie zur Geschichte des deutschen Aktiengesetzes von 1937 präsentieren.

Am 17. Januar 2016 ist Prof. Dr. Rainer Schröder unerwartet verstorben. Ursprünglich hatte er im vorliegenden Rechtsstreit im Auftrag der Beklagten ein Rechtsgutachten erstattet, das dem Gericht im Zusamrnenhang mit einem Antrag auf Abweisung der ursprünglich eingereichten Klage vorgelegt wurde, die nunmehr durch eine erweiterte Klage (First Amended Complaint) ersetzt wurde. Ich habe bei Professor Schröder fünfzehn Jahre lang studiert und gearbeitet. Er hat meine Dissertation und meine Habilitation

Professor Schröder's expert opinion, I endorse it without any reservation, with further commentary below.

Possibility of Bringing a Claim in German Court

In this case I have been asked to assess the following question: Could the plaintiffs bring a claim in a German court against the Prussian Cultural Heritage Foundation (*Stiftung Preußischer Kulturbesitz* – SPK) and the Federal Republic of Germany based on the allegations in the First Amended Complaint?

1. German courts would have jurisdiction over the Defendants and this lawsuit

According to constant case law by the German Federal Court of Justice (*Bundesgerichtshof* – BGH, Germany's highest court in matters of civil and criminal law), the

betreut. Nach seinem Tod haben mich die Beklagten gebeten, Professor Schröders Gutachten zu prüfen und es insoweit zu überarbeiten, als es für die Wiedergabe meiner eigenen Auffassung erforderlich sein sollte, im Zusammenhang mit einem Antrag auf Abweisung der erweiterten Klage. Nach Prüfung des Rechtsgutachtens von Professor Schröder kann ich dieses ohne jeglichen Vorbehalt befürworten und schreibe es nachfolgend für den vorliegenden Rechtsstreit fort.

Klagemöglichkeit in Deutschland

Ich bin beauftragt worden, in dem vorliegenden Fall folgende Frage zu beantworten: Könnten die Kläger auf Grundlage der in der erweiterten Klageschrift behaupteten Tatsachen Ansprüche gegen die Stiftung Preußischer Kulturbesitz und die

applicable rules regarding civil procedure are those of the law of the forum (*lex fori*).[i] Thus, the local (and international[ii]) jurisdiction is determined according to the rules of the German Code of Civil Procedure (*Zivilprozessordnung* – "ZPO"), Sec. 12 et seq. ZPO.[iii]

German law applies the principle that a defendant has to be sued at his or her place of residence – at its statutory seat in the case of a legal entity.[iv] In this case, the defendants are the Federal Republic of Germany and the SPK, which have their seats in Berlin.

Hence, the place of general jurisdiction (and thus where the court would have international jurisdiction) is Berlin, Germany, under Sec. 12, 17 ZPO. Under German law, the Federal Republic of Germany itself can be sued just like any other legal or natural person.[v]

Bundesrepublik Deutschland vor einem deutsehen Gericht geltend machen?

1. Deutsche Gerichte wären für Klagen gegen die Beklagten und sachlich für diesen Rechtsstreit zuständig

Nach ständiger Rechtsprechung des Bundesgerichtshofs (BGH, Deutschlands höchstes Gericht in Zivil- und Strafsachen) ist das anwendbare Verfahrensrecht das Recht am Gerichtsort (*lex fori*): Dementsprechend richtet sich die örtliche (und internationale) Zuständigkeit nach den Vorschriften der Zivilprozessordnung (ZPO), §§ 12 ff. ZPO.

Das deutsche Recht folgt dem Grundsatz, dass der Beklagte an seinem Wohnsitz – bzw. bei juristischen Personen an ihrem satzungsmäßigen Sitz – verklagt werden muss. Beklagte sind hier

Germany has no equivalent to the American doctrine of sovereign immunity. The 1794 Prussian Land Law (*Preußisches Landrecht*) established the possibility of a citizen suing the state.[vi] This is also true with respect to the law which is applicable today.

For example, Article 34 of the German constitution. (*Grundgesetz* – "GG"), in connection with § 839 German Civil Code (*Bürgerliches Gesetzbuch* – "BGB"), sanctions in principle each (culpably committed) state injustice that has led to a damage of the citizen.

2. German law provides statutory bases for Plaintiffs' claims

a. General claims for restitution, in particular Sec. 985 BGB

German law recognizes causes of action for restitution. A claim by a property owner against an

die Bundesrepublik Deutschland sowie die Stiftung Preußischer Kulturbesitz (SPK) mit Sitz in Berlin.

Der allgerneine Gerichtsstand (und damit das international zuständige Gericht) ist hier folglich nach §§ 12, 17 ZPO in Berlin, Deutschland.

Nach deutschem Recht kann die Bundesrepublik Deutschland wie jede andere juristische oder natürliche Person verklagt werden. Deutschland hat keine der amerikanischen Rechtsfigur der ,,sovereign immunity" (Staatenimmunität) vergleichbare Rechtsfigur. Seit 1794 ist nach preußischem Recht die Möglichkeit der Klage eines Bürgers gegen den Staat eröffnet. Dies gilt gleiehermaßen für das heute geltende Recht. Beispielsweise sanktionieren Art. 34 Grundgesetz (GG, die deutsche Verfassung) in Verbindung mit § 839 BGB grundsätzlich jede (schuldhaft

entity that wrongfully possesses his property would generally be based on Section 985 of the BGB.

Elements of a Sec. 985 BGB Claim

Pursuant to Sec. 985 BGB, German courts allow plaintiffs to seek restitution of property that another entity wrongfully possesses. More precisely, the following conditions: must be satisfied:

1. The claimant is the owner of a certain object.
2. The defendant is the possessor of the object (Sec. 854 et seq. BGB).
3. The defendant is not entitled to possession according to Sec. 986 BGB (e.g., the right to possession may arise from a contract with the owner).

If the conditions are satisfied, the claimant may demand the return of the Object (*Sache*).

begangene) Amtspflichtverletzung, die einen Dritten schädigt.

2. Deutsches Recht sieht gesetzliche Anspruchsgrundlagen für die klägerischen Ansprüche vor

a. Allgemeine Anspruchsgrundlagen, insbesondere § 985 BGB

Das deutsche Recht sieht Anspruchsgrundlagen vor, die auf Herausgabe gerichtet sind. Ein Eigentümer kann Herausgabe seines Eigentums von einem unberechtigten Besitzer auf Grundlage von § 985 BGB verlangen.

Voraussetzungen des § 985 BGB

Gemäß § 985 BGB kann ein Kläger vor deutseben Gerichten geltend machen, dass er Anspruch auf die Herausgabe seines Eigentums hat, das ein Dritter unberechtigt

Ownership of plaintiff. Ownership usually requires that the plaintiff did not transfer title to the property in question. However, in certain circumstances, German courts recognize a cause of action for restitution even where the owner has transferred ownership as a result of a sale, if the sale and the transfer of property are void. If a plaintiff can show and prove that a transfer of title was nonconsensual or the transaction violated a statute, a court will declare it null and void.

- German courts would declare the obligation and the transfer null and void if "good morals" (*gute Sitten*), Sec. 138 para. 1 BGB, were violated. "Violation of good morals" means a serious breach of the moral order that is against the sense of decency of all fair and just thinking people:

besitzt. Dafür müssen die folgenden Voraussetzungen erfüllt sein:

1. Der Anspruchsteller ist Eigentümer einer bestimmten Sache.
2. Der Anspruchsgegner ist Besitzer dieser Sache (§ 854 ff. BGB).
3. Der Anspruchsgegner hat kein Recht zum Besitz im Sinne des § 986 BGB (beispielsweise aus einem Vertrag mit dem Eigentümer).

Sind diese Voraussetzungen erfüllt, kann der Anspruchsteller die Herausgabe der Sache verlangen.

Eigentum des Klägers. Eigentum erfordert üblicherweise, dass der Kläger das Eigentum an der streitgegenständlichen Sache nicht übertragen hat. Allerdings gehen deutsche Gerichte unter bestimmten Voraussetzungen von

> "*A mutual contract is [. . .] considered in violation of good morals according to Sec. 138 para. 1 BGB if there is a striking disproportion between performance and consideration and at least one other circumstance is present that will show that the contract in its entirety [. . .] violates good morals. This is specifically the case if an objectionable intention of the beneficiary was observed. Such an objectionable intention is to be assumed in cases of an especially striking disproportion between performance and consideration.*"[vii]

"*An especially striking disproportion between performance and consideration regarding real estate transactions can be assumed when the value of the performance is almost twice as high as the value of the consideration (senate; judgment of January*

einem Herausgabeanspruch aus, obwohl zwischen den Parteien das Eigentum infolge eines Verkaufs übertragen wurde, nämlich in solchen Fällen, in denen der Verkauf und die Eigentumsübertragung unwirksam sind. Wenn ein Kläger darlegen und beweisen kann, dass er nicht freiwillig über das Eigentum verfügt hat oder das Rechtsgeschäft gegen ein gesetzliches Verbot verstößt, stellt ein Gericht die Nichtigkeit fest.

- Deutsche Gerichte würden die Verpflichtung und die Verfügung für nichtig erklären, wenn die ,,guten Sitten" im Sinne des § 138 Abs. 1 BGB verletzt worden wären. Eine Verletzung der guten Sitten liegt vor, wenn das Anstandsgefühl aller billig und gerecht Denkenden verletzt ist:

19, 2001 – V ZR 437/99 – BGHZ 146, 298, 302)."[viii]

"*This requirement is in principle (only) fulfilled above a disproportion, in value of plus or minus 90 % (German Federal Court of Justice, judgment of January 1, 2014 – V ZR 249/12 – NJW 2014, 1652, No. 8)*"[ix]

This yardstick effectively applies to all kinds of transactions, not just real estate transactions.

In both cases cited above[x], the German Federal Court of Justice and the Court of Appeals of Oldenburg, respectively, found such an especially striking disproportion between performance and consideration to be present. In the first case, the buyer paid 118,000 Euros for a condominium which the seller himself had bought for only 53,000 Euros two months before. In the second case, the buyer paid 90,000 Euros for a number of

„*Ein gegenseitiger Vertrag ist . . . nach § 138 Abs, 1 BGB sittenwidrig, wenn zwischen Leistung und Gegenleistung ein auffalliges Missverhältnis besteht und außerdem mindestens ein weiterer Umstand hinzukommt, der den Vertrag bei Zusammenfassung der subjektiven und der objektiven Merkmale als sittenwidrig erscheinen lässt. Dies ist insbesondere der Fall, wenn eine verwerfliche Gesinnung des Begünstigten hervorgetreten ist. 1st das Missverhältnis zwischen Leistung und Gegenleistung besonders grob, lässt dies den Schluss auf eine verwerfliche Gesinnung des Begünstigten zu*".

„*Von einem besonders groben Missverhältnis zwischen Leistung und Gegenleistung kann bei Grundstücksgeschäften ausgegangen werden,*

condominiums although each single Condominium was worth at least 100,000 Euros.

- German courts also have the power to declare an obligation or a transaction null due to usury (*Wucher*), Sec. 138 para 2 BGB:

  "*Usury according to Sec. 138 para. 2 BGB requires – in addition to a striking disproportion between performance and consideration (objective element) – that a special situation of weakness of the victim, based on a predicament, inexperience, lack of judgment or due to a weak will, is exploited (subjective element: see German Federal Court of Justice, judgment of May 24, 1985 – V ZR 47/84 – NJW 1985, 3006, 3007). It is not necessary that the perpetrator intends to exploit, but he has to be aware wenn der Wert der Leistung knapp doppelt so hoch ist wie der Wert der Gegenleistung (Senat, Urteil vom 19.01.2001 – V ZR 437/99 – BGHZ 146, 298, 302).*"

  „*Diese Voraussetzung ist grundsätzlich (erst) ab einer Verkehrswertüber- oder -unterschreitung von 90% gegeben (BGH, Urteil vom 24.01.2014 – V ZR 249/12 – NJW 2014, 1652 Tz. 8).*"

Dieser Maßstab gilt letztlich für sämtliche Arten von Geschäften, nicht nur Grundstücksgeschäfte.

In den beiden zitierten Entscheidungen sahen der deutsche Bundesgerichtshof bzw. das Oberlandesgericht Oldenburg solch ein besonders grobes Missverhältnis zwischen Leistung und Gegenleistung als gegeben an. Im ersten Fall bezahlte der Käufer 118.000 Euro für eine Eigentumswohnung, welche der Verkäufer selbst zwei

of both the striking disproportion and the weakness and intentionally avails himself of the resulting advantages (German Federal Court of Justice, judgment of February 25, 2011 – V ZR 208/09 – NJW-RR 2011, 298, No. 10; judgment of June 16, 1990 – XI ZR 280/89 – NJW-RR 1990, 1199).”[xi]

In the case cited above, the Court of Appeals of Oldenburg held that a predicament required by Sec. 138 para. 2 BGB was present. The seller who sold his property below its market value faced a foreclosure proceeding which was initiated by a third party. Thus, the seller was in urgent need of the purchase price to be paid by the buyer who exploited the predicament of the seller.

- Thus, if there is a striking disproportion between performance and consideration, a

Monate zuvor für nur 53.000 Euro gekauft hatte. Im zweiten Fall bezahlte der Käufer 90.000 Euro für mehrere Eigentumswohnungen, obwohl jede einzelne Eigentumswohnung mindestens 100.000 Euro wert war.

- Deutsche Gerichte können eine Verpflichtung oder Verfügung auch wegen Wuchers für nichtig erklären, § 138 Abs. 2 BGB:

„Der Tatbestand des Wuchers gemäß § 138 Abs. 2 BGB setzt neben einem auffälligen Missverhältnis, zwischen Leistung und Gegenleistung (objektives Tatbestandsmerkmal) die Ausnutzung einer – auf einer Zwangslage, der Unerfahrenheit, dem Mangel im Urteilsvermögen oder einer erheblichen Willensschwäche beruhenden – besonderen Schwächesituation beim Bewucherten durch den Wucherer voraus (subjektives

transaction can be declared null and void in two additional situations: Either the beneficiary has exploited the situation of the victim (Sec. 138 para. 2 BGB), or other circumstances show that the contract violates good morals – especially an objectionable intention of the beneficiary, which is assumed in cases of an especially striking disproportion between performance and consideration (Sec. 138 para. 1 BGB). Under the judgment cited above, German courts tend to ease the burden of proof in favor of the victim by assuming an objectionable intention of the beneficiary.

- In addition, any transaction that violates statutory law, especially statutes of criminal law, German Criminal Code ("StGB"), is considered null and void under Sec. 134 BGB.[xii] In

Tatbestandsmerkmal: vgl. BGH, Urteil vom 24. Mai 1985 – V ZR 47/84 – NJW 1985, 3006, 3007). Zwar ist dafür keine Ausbeutungsabsicht des Wucherers erforderlich, wohl aber ist es notwendig, dass dieser Kenntnis von dem auffalligen Missverhältnis und der Ausbeutungssituation hat und sich diese Situation vorsätzlich zunutze macht (BGH, Urteil vom 25.02.2011 – V ZR 208/09 – NJW-RR 2011, 298 Tz. 10; Urteil vom 16.06.1990 – XI ZR 280/89 – NJW-RR 1990, 1199)."

In dem zitierten Fall entschied das Oberlandesgericht Oldenburg, dass eine Zwangslage, wie sie § 138 Abs. 2 BGB voraussetzt, gegeben war. Der Verkäufer, der sein Eigentum unter Marktwert verkaufte, sah sich einem Zwangsversteigerungsverfahren gegenüber, das eine dritte Partei gegen ihn angestrengt hatte.

case of claims of restitution of property, the following statutes could be violated:

- Usury (Sec. 291 StGB – *Wucher*): The requirements are identical to the ones described above for Sec. 138 Para. 2 BGB.
- Duress (Sec. 240, StGB – *Nötigung*): Sec. 240 StGB protects the freedom of choice and action. Duress therefore requires that the perpetrator causes, by means of force or threat with a considerable evil, the victim to act against its own will as desired by the perpetrator.
- Blackmail (Sec. 253 StGB – *Erpressung*): Blackmail requires monetary disadvantage as a result of duress or a threat, which could lie in a coerced sale below market price (this also fulfills the

Deshalb war der Verkäufer dringend auf die Kaufpreiszahlung des Käufers angewiesen, der die Zwangslage des Verkäufers ausnutzte.

- Stehen Leistung und Gegenleistung in einem auffälligen Missverhältnis, kann demnach ein Geschäft unter zwei zusätzlichen Voraussetzungen sittenwidrig sein: Entweder die begünstigte Partei hat die Situation, des Opfers ausgenutzt (§ 138 Abs. 2 BGB). Oder weitere Umstände lassen das Geschäft als sittenwidrig erscheinen, insbesondere eine verwerfliche Gesinnung des Begünstigten, die vermutet wird, wenn Leistung und Gegenleistung in einem besonders groben Missverhältnis stehen (§ 138 Abs. 1 BGB). Ausweislich der zitierten Urteile neigen die deutschen Gerichte dazu, die

requirements for Duress). Blackmail according to Sec. 253 StGB requires pecuniary damages by means of duress with the intention to enrich oneself or a third party.

If one of the above listed statutes is violated, both the purchase agreement as well as the *in rem* transfer of title would be null and void.

No Right to Possession. The defendant must have the objects in his *possession* at the time the claim is asserted but lack a right to possess. Such a right to possess may result from ownership as a result of a contract (*Vertrag*), e.g., a sales contract. If the contract and its fulfilment were null and void as described above, the defendant would not have a "right to possess" within the meaning of Sec. 986 para. 1 sentence 1 BGB – either from the purchase agreement or the *in rem*

Beweislast zugunsten des Opfers durch die Vermutung der besonderen Verwerflichkeit zu erleichtern.

- Darüber hinaus ist nach § 134 BGB jedes Rechtsgeschäft nichtig, das gegen ein gesetzliches Verbot, insbesondere Normen des StGB, verstößt. Im Kontext von Ansprüchen, die auf die Herausgabe von Besitz bzw. Eigentum gerichtet sind, kommen die folgenden Verbotsnormen in Betracht:
  - Wucher, § 291 StGB: Die Tatbestandsvoraussetzungen entsprechen den oben zu § 138 Abs. 2 BGB beschriebenen.
  - Nötigung, § 240 StGB: § 240 StGB schützt die Freiheit der Willensentschließung und Willensbetätigung. Die Nötigung setzt voraus, dass durch Gewalt

transaction (*dingliches Geschäft*). As a consequence, the defendant would not be entitled to refuse the restitution of the object. Thus, a claim for restitution would exist under Sec. 985 BGB.

b. Further claims under German law

Plaintiffs have the ability to bring various other statutory claims for the alleged wrongful dispossession of property.

i. Tort claims

Plaintiffs who have suffered wrongful dispossession of their property can assert claims under the following three tort provisions of German Law:

- Injury to property and interference with an established and functioning business (Sec. 823 para. 1 BGB).

oder Drohung mit einem empfindlichen Übel das vom Täter erwünschte Verhalten des Opfers veranlasst wird und dass diese gegen den Willen des Opfers geschieht.

- Erpressung, § 253 StGB: Erpressung erfordert einen Vermögensnachteil als Ergebnis einer Drohung mit Gewalt oder einem anderen Übel, was bei einem Zwangsverkauf zu einem Preis weit unter dem marktüblichen Preis der Fall sein könnte (damit wären auch die Voraussetzungen der Nötigung erfüllt). Erpressung nach § 253 StGB erfordert eine Vermögensbeschädigung durch Nötigung in der Absicht, sich oder einen Dritten zu bereichern.

Wurde gegen eines der aufgeführten Verbote verstoßen, sind sowohl

- Violation of a statute that is intended to protect another person and his or her property (e.g. Sec. 823 para, 2 BGB in connection with Sec. 240, 253, 263 and 291 StGB: as explained above, Sec. 240 protects individuals from unlawful and culpable coercion; Sec. 253 protects from blackmail; and Sec. 263 protects from fraud).
- Intentional damage contrary to "good morals," (Sec. 826 BGB: The provision requires intentional actions that "violate good morals" (*sittenwidrig*), as explained above, and are intended to cause damage to another person).[xiii]

In each case, compensation would be owed in the form of restitution in kind according to Sec. 249 BGB.

der Verkauf als auch die Eigentumsübertragung nichtig.

Kein Recht zum Besitz. Der Beklagte muss die Sache zum Zeitpunkt der Geltendmachung des Anspruchs besitzen, aber kein Recht zum Besitz haben. Ein solches Recht zum Besitz kann sich aus Eigentum als Folge eines Vertrags, beispielsweise eines Kaufvertrags, ergeben. Wären der Vertrag und seine Erfüllung aber wie oben beschrieben unwirksam, hätte der Beklagten eben kein Recht zum Besitz im Sinne des § 986 Abs. 1 Satz 1 BGB – weder aus dem Verpflichtungsgeschäft noch aus dem dinglichen Geschäft. Infolgedessen könnte der Beklagte die Herausgabe der Sache nicht verweigern. Ein Herausgabeanspruch aus § 985 BGB wäre damit gegeben.

ii. Claims due to Unjust Enrichment

Claimants might also be entitled to a claim for restitution, under Sec. 812 para. 1 sentence 1, 1st variant BGB. Assets have to be returned to the former owner unless, the new "possessor" is entitled to the assets. If a purchase contract as a potential legal ground for the transfer of assets (*Vermögensverschiebung*) would be null and void (see above), the legal reason for the transfer of assets (*Vermögensverschiebung*) would be removed. As a consequence, the defendant would have to restitute, according to Sec. 818 para. 1 BGB, both the obtained object as well as the benefits gained.

> *„In case a sales contract has been fulfilled by both parties and is discovered to be null and void, each party is primarily entitled to a return of his or her*

b. Weitere Ansprüche nach deutschem Recht

Kläger könnten weitere Anspruchsgrundlagen auf Wiedergutmachung für den behaupteten unberechtigten Eigentumsentzug geltend machen.

i. Deliktische Ansprüche

Kläger, denen Eigentum unberechtigt entzogen wurde, können Ansprüche im Sinne der folgenden drei deliktischen Anspruchsgrundlagen geltend machen:

- Verletzung von Eigentum und Eingriff in den eingerichteten und ausgeübten Gewerbebetrieb (§ 823 Abs. 1 BGB).
- Verletzung eines Gesetzes, das auf den Schutz anderer Personen und deren Eigentums gerichtet ist, z.B. § 823 Abs. 2 BGB i.V.m. §§ 240, 253, 263 und 291 StGB: wie

respective performance in exactly the manner it was given, Sec. 812, 818 para. 1 BGB."[xiv]

c. Special Laws concerning reparations expired due to time

In addition to the general provisions of the BGB described above, various more specific German laws dealt with reparations for the National Socialist period[xv], but all of them have expired due to the passage of time. The last of them expired on April 1, 1959.

The German Federal Court of Justice is so far of the view that claims which result from the unlawfulness of National Socialist measures of expropriation could only be asserted in accordance with the specific restitution and compensation laws which had been intended to provide for reparation of wrongs in the National Socialist period.[xvi] Because the

voranstehend beschrieben schützt § 240 StGB Personen vor schuldhaftem rechtswidrigen Zwang, § 253 StGB schützt vor Erpressung und § 263 StGB schützt vor Betrug.

- Sittenwidrige vorsätzliche Schädigung, § 826 BGB: Voraussetzung für einen Anspruch ist eine vorsätzliche Handlung, die sittenwidrig ist, wie voranstehend beschrieben, und die einem anderen einen Schaden zufügen soll.

In jedem der genannten Fälle würde Schadensersatz *in natura* nach § 249 BGB geschuldet werden.

ii. Ansprüche aus ungerechtfertiger Bereicherung.

Kläger könnten auch einen Herausgabeanspruch aus § 812 Abs. 1 S. 1, 1. Alt.

limitations periods of those specific laws had expired, the corresponding claims could, in principle, no longer be asserted.

However, in its decision of March 16, 2012 (V ZR 279/10, "Sachs")[xvii], the German Federal Court of Justice addressed the question again. The German Federal Court of Justice decided on a case in which the objects in question had been deemed lost at the time the specific laws expired, thus making it impossible to seek restitution according to those laws. In the Sachs case, the German Federal Court of Justice permitted a plaintiff to go forward under the general laws of the BGB with a claim to restitution of National Socialist-expropriated property. The Court declined to rule broadly on whether plaintiffs in all cases involving National Socialist-expropriated property could invoke the general restitution

BGB haben. Vermögensgegenstände müssen dem früheren Eigentümer zurückgegeben werden, wenn der neue Besitzer nicht berechtigter Eigentümer ist. Wenn ein Verkaufsvertrag als möglicher Rechtsgrund für die Vermögensverschiebung unwirksam wäre (siehe oben), wäre damit der Rechtsgrund für die Vermögensverschiebung entfallen.. Infolgedessen müsste der Beklagte nach § 818 Abs. 1 BGB sowohl die erlangte Sache als auch gezogene Nutzungen herausgeben.

> *„Im Falle der Nichtigkeit eines beiderseits erfüllten Kaufvertrags hat gemäß §§ 812, 818 Abs. 1 BGB jeder Teil in erster Linie einen Anspruch auf Rückgabe der von ihm gemachten Leistung in Natur.*"

provisions of the BGB, expressly noting that:

"*bb) in contrast [to previous cases], current academic literature – in part following a decision by the Great Senate for Civil Matters (order of February 28, 1955 – GSZ 4/54, BGHZ 16, 350) – is of the opinion that the restitution laws served primarily the interests of the injured parties. That would prohibit denying the injured party claims that he was already entitled to under general civil statutes due to the injustice.*

cc) Whether the opinion just mentioned calls into question the previous precedents is a question that can be left open."

d. Statute of Limitation with respect to the Claims

As the cause for the claim essentially dates from 1935, statutes of limitation should also be considered. The title to property

c. Spezialgesetzliche Entschädigungsansprüche verfristet

Neben den oben beschriebenen allgemeinen Anspruchsgrundlagen des BGB gibt es mehrere Spezialgesetze zur Wiedergutmachung nationalsozialistischen Unrechts, deren Ausschlussfristen aber abgelaufen sind. Die letzte Ausschlussfrist endete am 1. April 1959.

Der Bundesgerichtshof vertritt bisher in ständiger Rechtsprechung die Ansicht, dass Ansprüche, die sich aus der Unrechtmäßigkeit einer nationalsozialistischen Enteignungsmaßnahme ergeben, grundsätzlich nur nach Maßgabe der zur Wiedergutmachung erlassenen Rückerstattungs- und Entschädigungsgesetze und in dem dort vorgesehenen Verfahren verfolgt werden können. Da diese

(*Eigentum*) in itself is not statute-barred, but only the claims that arise from such a title[xviii] such as the claim for restitution under Sec. 985 BGB in question in the present case. A claim under § 985 BGB is statute-barred after 30 years according to Sec. 197 para. 1 no. 2 BGB.

However, no observations are necessary in this regard, as under German law, the statute limitation is an affirmative defense that must be explicitly raised by the defendant during the proceedings.[xix] Thus, the claim is not legally lost; rather, it can no longer be enforced (*Hemmung der Durchsetzung*) if the affirmative defense is raised.[xx] The statute of limitations affirmative defense is not examined by the court sua sponte (*von Amts wegen*). The court could only examine whether a claim had become time-barred if, in the specific proceeding and matter in dispute,

Ausschlussfristen der Spezialgesetze verstrichen sind, könnten im Grunde genommen keine entsprechenden Ansprüche mehr geltend gemacht werden.

Nichtsdestotrotz hat der BGH in seiner Entscheidung vom 16. März 2012 (V ZR 279/10, Fall „Sachs") diese Frage noch einmal angesprochen. Dabei entschied der BGH über einen Fall, in dem die streitgegenständlichen Kunstwerke bis zum Ablauf der Ausschlussfristen verschollen waren, so dass keine Herausgabeansprüche nach den Spezialgesetzen geltend gemacht werden konnten. Im Fall „Sachs" sah der BGH die Möglichkeit eröffnet, auf Grundlage der allgemeinen Normen des BGB einen Anspruch auf Wiedergutmachung von NS-Unrecht zu verfolgen. Der BGH lehnte es ab, allgemein darüber zu entscheiden, ob in

the defendant had raised the affirmative defense.

Summary and Conclusion

German courts would have jurisdiction over this lawsuit.

There are various legal provisions on which a plaintiff could base a claim. Thus, the plaintiffs would not be excluded from the outset with their claims as alleged in the First Amended Complaint.

sämtlichen Fällen nationalsozialistischer Enteignung auf die allgemeinen Anspruchsgrundlagen des BGB zurückgegriffen werden könnte und erklärte ausdrücklich:

> *"bb) Demgegenüber [Anm: Gegenüber der bisherigen Rechtsprechung] herrscht im neueren Schrifttum – zum Teil im Anschluss an eine Entscheidung des Großen Senats für Zivilsachen (Beschluss vom 28. Februar 1955 – GSZ 4/54, BGHZ 16, 350) – die Auffassung vor, dass das Rückerstattungsrecht in erster Linie den Interessen des Geschädigten gedient habe. Das schließe es aus, dem Geschädigten Ansprüche zu versagen, die bereits nach den allgemeinen zivilrechtlichen Bestimmungen durch die Unrechtsmaßnahme begründet worden seien.*

cc) Ob die zuletzt genannte Ansicht Veranlassung bietet, die bisherige Rechtsprechung in Frage zu stellen, kann dahin stehen."

d. Verjährung etwaiger Ansprüche

Da die den geltend gemachten Ansprüchen zugrundeliegenden Vorgänge im Jahr 1935 abgeschlossen waren, könnten etwaige Ansprüche verjährt sein. Eigentum selbst unterliegt nicht der Verjährung, anders als die mit dem Eigentum einhergehenden Rechte wie der vorliegend relevante Herausgabeanspruch nach § 985 BGB. Dieser Herausgabeanspruch verjährt gem. § 197 Abs. 1 Nr. 2 BGB nach dreißig Jahren.

Diesbezüglich ist aber keine weitere Erörterung erforderlich, da, nach deutschem Recht, Verjährung eine Einrede ist,

die vom Beklagten in dem jeweiligen Verfahren ausdrücklich erhoben werden muss. Verjährung führt dementsprechend nicht dazu, dass der Anspruch erloschen wäre, sondern er ist lediglich nicht mehr durchsetzbar, wenn die Einrede erhoben wird. Die mögliche Verjährung eines Anspruchs wird vom Gericht nicht von Amts wegen geprüft. Das Gericht könnte nur prüfen, ob ein Anspruch verjährt ist, wenn der Beklagte in dem anhängigen Verfahren die Einrede erhoben hat.

Zusammenfassung und Ergebnis

Deutsche Gerichte wären für den Rechtsstreit zuständig.

Es gibt eine Vielzahl von Anspruchsgrundlagen, auf die ein Kläger Ansprüche stützen könnte. Die Kläger wären also mit ihren Ansprüchen nach den vorgetragenen Behauptungen in der

erweiterten Klageschrift
nicht von vornherein
ausgeschlossen.

/s/ Jan Thiessen

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[i] See fundamentally German Federal Court of Justice, Judgments of April 27, 1977, WM 1977, p. 793 et seq. as well as of June 27, 1984, NJW 1985, p. 552 et seq. This view is, however, not entirely undisputed, see Hans-Henning Kunze Papers on the Protection of Cultural Property, Restitution of "degenerate" Art, Property Law and International Private Law (Scluiften zum Kulturguterschutz, Restitution "entarteter" Kunst, Sachenrecht und Inteinationales Privatrecht), Tilbingen 2012, p. 109, fn. 2 with reference to e.g. Haimo Schack, Law of international Civil Procedure (Internationales Zivilverfahrensrecht), Munich 2010, Sec. 2 III with further references; Otto Palandt/Karsten Thorn, Palandt Civil Law Code with supplementary statutes, 74th ed. Munich 2015, Intro. To EGBGB Art. 3. recital 27.

[ii] See in this regard the leading German statements: Reinhold Geirner, Law of International Civil Procedure (Internationales Zivilprozessrecht), 7th ed. (2015); Hartmut Linke / Wolfgang Hau, Law of International Civil Procedure (Internationales Zivilverfahrensrecht), 6th ed. (2015); Heinrich Nagel / Peter Gottwald, Law of International Civil Procedure (Internationales Zivilprozessrecht), 7th edition (2013); Haimo Schack, Law of International Civil Procedure (Internationales Zivilverfahrensrecht), 5th ed. (2010).

[iii] German Federal Court of Justice, judgment of April 18, 1985 – VII ZR 359/83, BGHZ 94, 156, 158; judgment of June 14, 1965 – GSZ 1/65, BGHZ 44, 46; judgment of October 30, 1974 – IV ZR 18/73, BGHZ 63, 219, 220.

[iv] See Sec. 12, 13, 17 ZPO.

[v] German laws and regulations take this for granted. See, e.g., the Directive on the representation of the Federal Republic of Germany in the division of the Federal Ministry of the Interior and on the procedure of representation, thereunder Part B Procedure, 1.2.1.1: If the Federal Republic of Germany

is the defendant, the report is to be submitted immediately upon notification of the complaint. In the past, there have also been numerous judgments against the Federal Republic of Germany, see, e.g., German Federal Court of Justice, Judgment of February 15, 2001 – III ZR 120/00; German Federal Court of Justice, Judgment of June 4, 2009 – III ZR 144/05.

[vi] "Allgemeines Landrecht für die Preußischen Staaten vom 1. Juni 1794" (General Land Law for the Prussian States of June 1, 1794), Einleitung § 74f., zitiert nach www.opinioiuris.de/quelle/1621.

[vii] German Federal Court of Justice, judgment of January 1, 2014 – V ZR 249/12, NJW 2014, 1652.

[viii] German Federal Court of Justice, judgment of January 1, 2014 – V ZR 249/12 NJ W 2014, 1652, No. 8.

[ix] Court of Appeals of Oldenburg, judgment of October 2, 2014 – 1 U 61/14, No. 16 (juris).

[x] German Federal Court of Justice, judgment of January 1, 2014 – V ZR 249/12 – NJW 2014, 1652; Court of Appeals of Oldenburg, judgment of October 2, 2014 – 1 U 61/14 (juris).

[xi] Court of Appeals of Oldenburg, judgment of October 2, 2014 – 1 U 61/14, No. 16 (juris)

[xii] See regarding the reciprocal relation of the provisions and especially between Sec. 134 BGB in connection with Sec. 291 StGB and Sec. 138 Subsec. II, Ellenberger in Palandt, Commentary on the BGB, 68th ed, Sec. 138 recital 13 et seq.

[xiii] With regard to the violation of good morals see above, Sec. 138 BGB.

[xiv] Supreme Court of the German Reich (Reichsgericht, "RG"), judgment of December 20, 1918 – II 204/18.

[xv] In particular the Restitution Laws of the Allied Forces (the USREG for the American occupation zone, the FrREV for the French occupation zone, BrREG of the British Government and the REAO for Berlin), respectively the Federal Restitution Law as well as the Property Law.

However, even if the prerequisites for the restitution according to the Restitution Laws of the Allied were fulfilled, such a claim could not be asserted by claimants any more as they would be blocked by the terms of exclusion of the respective laws, which ran up until 1959. Those terms have expired since late 1948 or mid-1950. They were, however,

subsequently extended by the German Federal Restitution Law (Bundesrückerstattungsgesetz – BRüG).

Law No. 59 by the American military government of November 10, 1947, in Official Gazette of the Military Government in Germany, American Controlled Territory, Issue G, p.1 = Law and Ordinance Gazette Hesse 1947, Supplement 9, 113 = Law and Ordinance Gazette Bavaria 1947, 221 = Law Gazette Bremen 1947, 303) last amended by Law No. 42 of the High Commissioner of the United States for Germany of August 23, 1954 (Official Gazette of the Allied High Commission in Germany, 3079), quoted from Graf, p. 24, fn. 73 (text of law available via German National Library website, at http://deposit.ddb.de/online/vdr/rechtsq.htm); Military Government Germany, British Controlled Territory, Law No. 59, Restitution of identifiable property assets to the victims of National Socialist measures of oppression (Rückerstattung feststellbarer Vermögensgegenstände an Opfer der nationalsozialistischen Unterdrückungsmaßnahmen), in Official Gazette of the Military Government in Germany, British Controlled Territory, No. 28, p.1169; Regulation No. 120 of the French High Commander in Germany of November 10, 1947 on the restitution of looted property assets (Verordnung über die Rückerstattung geraubter Vermögensobjekte), Official Gazette of the French High Command in Germany (Journal Officiel) No. 119, p. 1219.

[xvi] See German Federal Court of Justice, judgments of February 11, 1953 – II ZR 51/52, BGHZ 9, 34, 45; of October 8, 1953 – IV ZR 30/53, BGHZ 10/340, 343; of May 5, 1956 – VI ZR 138/54, RzW 1956, 237 as well as Resolution of May 27, 1954 – IVZB 15/54, NJW 1954, 1368.

[xvii] German Federal Court of Justice, March 16, 2012 – V ZR 279/10, NJW 2012, 1796.

[xviii] See e.g. Helmut Grothe in Munich Commentary on the Civil Code (Münchener Kommentar zum Bürgerlichen Gesetzbuch), 7th edition Munich 2015, Sec. 194 recital 2 with reference inter alia to German Federal Court of Justice, NJW 2011, 1133 recital 12.

[xix] See German Federal Court of Justice, judgment of January 27, 2010 – VIII ZR 58/09, No. 27 and 28.

[xx] See German Federal Court of Justice, judgment of January 27, 2010 – VIII ZR 58/09, No. 27 and 28.

Translation of selected excerpts of the German Civil Code (BGB), source: http://www.gesetze-im-internet.de/englisch_bgb/german_civil_code.pdf

Title 2 – Declaration of intent

Section 134 Statutory prohibition

A legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion.

Section 138 Legal transaction contrary to public policy; usury

(1) A legal transaction which is contrary to public policy is void.

(2) It particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance.

Title 26 – Unjust enrichment

Section 812 Claim for restitution

(1) A person who obtains something as a result of the performance of another person or otherwise at his expense without legal grounds for doing so is under a duty to make restitution to him. This duty also exists if the legal grounds later lapse or if the result intended

to be achieved by those efforts in accordance with the contents of the legal transaction does not occur.

(2) Performance also includes the acknowledgement of the existence or non-existence of an obligation.

Section 818 Scope of the claim to enrichment

(1) The duty to make restitution extends to emoluments taken as well as to whatever the recipient acquires by reason of a right acquired or in compensation for destruction damage or deprivation of the object obtained.

(2) If restitution is not possible due to the quality of the benefit obtained, or if the recipient is for another reason unable to make restitution, then he must compensate for its value.

(3) The liability to undertake restitution or to reimburse the value is excluded to the extent at the recipient is no longer enriched.

(4) From the time when the action is pending onwards, the recipient is liable under the general provisions of law.

Title 27 – Torts

Section 823 Liability in damages

(1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make

compensation to the other party for the damage arising from this.

(2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.

Section 826 Intentional damage contrary to public policy

A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage.

Title 4 – Claims arising from ownership

Section 985 Claim for restitution

The owner may require the possessor to return the thing.

Section 986 Objections of the possessor

(1) The possessor may refuse to return the thing if he or the indirect possessor from whom he derives his right of possession is entitled to possession as against the owner. If the indirect possessor is not authorised in relation to the owner to permit the possessor to have possession, the owner may require the possessor to deliver the thing to the indirect possessor or, if the

indirect possessor cannot or does not wish to take possession again, to the owner himself.

(2) The possessor of a thing that has been alienated under section 931 by assignment of the claim for return may raise against the new owner the objections that he is entitled to use against the claim assigned.

Translations of selected excerpts of the German Criminal Code (StGB), source: http://www.gesetze-im-internet.de/englisch_stgb/german.criminal_code.pdf

Section 240 Using threats or force to cause a person to do, suffer or omit an act

(1) Whosoever unlawfully with force or threat of serious harm causes a person to commit, suffer or omit an act shall be liable to imprisonment not exceeding three years or a fine.

(2) The act shall be unlawful if the use of force or the threat of harm is deemed inappropriate for the purpose of achieving the desired outcome.

(3) The attempt shall be punishable.

(4) In especially serious cases the penalty shall be imprisonment from six months to five years. An especially serious case typically occurs if the offender

1. causes another person to engage in sexual activity;

2. causes a pregnant woman to terminate the pregnancy; or

3. abuses his powers or position as a public official.

Section 253 Blackmail

(1) Whosoever unlawfully with force or threat of serious harm causes a person to commit, suffer or omit an act and thereby causes damage to the assets of that person or of another in order to enrich himself or a third person unlawfully shall be liable to imprisonment not exceeding five years or a fine.

(2) The act shall be unlawful if the use of force or the threat of harm is deemed inappropriate to the purpose of achieving the desired outcome.

(3) The attempt shall be punishable.

(4) In especially serious cases the penalty shall be imprisonment of not less than one year. An especially serious case typically occurs if the offender acts on a commercial basis or as a member of a gang whose purpose is the continued commission of blackmail.

Section 263 Fraud

(1) Whosoever with the intent of obtaining for himself or a third person an unlawful material benefit damages the property of another by causing or maintaining an error by pretending false facts or by

distorting or suppressing true facts shall be liable to imprisonment not exceeding five years or a fine.

(2) The attempt shall be punishable.

(3) In especially serious eases the penalty shall be, imprisonment from six months to ten years. An especially serious case typically occurs if the offender

1. acts on a commercial basis or as a member of a gang whose purpose is the continued commission of forgery or fraud;

2. causes a major financial loss of or acts with the intent of placing a large number of persons in danger of financial loss by the continued commission of offences of fraud;

3. places another person in financial hardship;

4. abuses his powers or his position as a public official; or

5. pretends that an insured event has happened after he or another have for this purpose set fire to an object of significant value or destroyed it, in whole or in part, through setting, fire to it or caused the sinking or beaching of a ship.

(4) Section 243(2), section 247 and section 248a shall apply mutatis mutandis.

(5) Whosoever on a commercial basis commits fraud as a member of a gang, whose purpose the continued commission of offences under sections 263 to 264 or sections 267 to 269 shall be liable to imprisonment from

one to ten years, in less serious cases to imprisonment from six months to five years.

(6) The court may make a supervision order (section 68(1)).

(7) Section 43a and 73d shall apply if the offender acts as a member of a gang whose purpose is the continued commission of offences under sections 263 to 264 or sections 267 to 269. Section 73d shall also apply if the offender acts on a commercial basis.

Section 291 Usury

(1) Whosoever exploits the predicament, lack of experience, lack of judgment or substantial weakness of will of another by allowing material benefits to be promised or granted to himself or a third person

1. for the rent of living space or additional services connected therewith;
2. for the granting of credit;
3. for any other service; or
4. for the procurement of one of the previously indicated services,

which are in striking disproportion to the value of the service or its procurement, shall be liable to imprisonment not exceeding three years or a fine. If more than one person contribute as providers of benefits, procurers or in other ways, and if the result is thereby a striking disproportion between the sum of the material benefits and the value of the services the 1st sentence

above shall apply to each of the persons who exploits the predicament or other weakness of the other for himself or a third person in order to obtain excessive material benefits.

(2) In especially serious cases the penalty shall be imprisonment from six months to ten years. An especially serious case typically occurs if the offender

1. by the offence places the other in financial hardship;
2. commits the offence on a commercial basis;
3. accepts promissory notes representing usurious material benefits.

[LOGO] Urkundenrolle B1 UR 79 / 2016 B1 UZ 127 / 2016

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Authentication of Signature

I hereby certify, that the overleaf is the true signature, subscribed in my presence, of

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born on [redacted],
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identified by his German identity card

Tübingen, 07.03.2016

Notary [SEAL]

/s/ [Illegible]
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June 7, 2016

Supplemental Expert Opinion

On Possibility of Bringing a Claim in a German Court

I. Einleitung

Die anwaltlichen Vertreter der Beklagten im vorliegenden Fall haben mir das Gutachten von Herrn Prof. Dr. Stephan Meder zur Kenntnis gegeben. Herr Meder entgegnet darin meinem eigenen Gutachten vom 7. März 2016 und trägt vor, nach deutschem Recht bestehe für die Kläger praktisch keine Möglichkeit, ihre Forderungen mit Rechtsbehelfen vor deutschen Gerichten zu erheben. Ich nehme die Ausführungen von Herrn Meder zum Anlass, Herrn Meder entschieden zu widersprechen und meine Ausführungen in meinem Gutachten vom 7. März 2016 näher zu erläutern. Insbesondere ist zu betonen, dass die deutschen Gerichte, einschließlich des

I. Introduction

Counsel for the defendants have shared with me the expert opinion by Professor Dr. Stephan Meder. In his opinion, Professor Meder responds to my expert opinion dated 7 March 2016 and argues that under German law, plaintiffs would be practically precluded from addressing their claims before a German court. I take Professor Meder's arguments as an opportunity to contradict Professor Meder in the strongest terms and to further explain my previous statements made in my expert opinion of 7 March 2016. In particular, it must be emphasized that German courts, including the German Federal Constitutional Court, take into account Germany's

Bundesverfassungsgerichts, bei ihren richterlichen Entscheidungen die besondere Verantwortung Deutschlands für die Opfer der Nazi-Herrschaft als bedeutendes Kriterium der Rechtsauslegung berücksichtigen.

special responsibility towards the victims of the Nazi regime as an important criterion for legal interpretation in their decision-making.

II Spezielle und allgeineine Anspriiche

Das deutsche Recht enthält spezielle Rückerstattungs- und Entsehädigungsansprüche sowie allgemeine zivilrechtliche Herausgabeansprüche. Die speziellen Ansprüche wurden zum Teil unmittelbar nach der Kapitulation Deutschlands von den Alliierten eingeführt, zum Teil von der Bundesrepublik Deutschland nach deren Gründung, zum Teil nach der Wiedervereinigung. Diese speziellen Ansprüche wurden vom jeweiligen Gesetzgeber mit Ausschlussfristen versehen. Die Ausschlussfristen

II. Special and General Claims

German law provides for specific restitution and compensation claims as well as restitution claims deriving from general civil law.[1] The specific claims were introduced partly by the Allies immediately after Germany's surrender, partly by the Federal Republic of Germany after its foundation, and partly after the German reunification.[2] In each case, the respective legislature made the specific claims subject to limitation periods. These limitation periods were designed to cover the period of time within which victims

orientierten sich an dem Zeitraum, innerhalb dessen die Opfer ihre Ansprüche mutmaßlich geltend machen könnten.

Diese Fristen hatten das Ziel, für alle Beteiligten nach gewisser Zeit Rechtssicherhei über die bestehenden oder nicht bestehenden Ansprüche zu schaffen. Nach ständiger Rechtsprechung gehen deshalb diese speziellen Ansprüehe grundsätzlich den allgemeinen zivilrechtlichen Ansprüchen vor. Allgemeine zivilrechtliche Ansprüeh kommen also im vorliegenden Fall in Betracht, soweit sie nicht von den erwähnter speziellen Rechtsbehelfen verdrängt werden. Gerade dies ist hier prinzipiell aber der Fall, weil alle Fristen der spezialgesetzlichen Ansprüche bereits abgelaufen sind.

were presumed able to assert their claims.

The limitation periods were aimed at providing legal certainty, for all parties involved, with regard to the existing or non-existing claims. For this reason, according to established German case law, the specific restitution and compensation claims generally supersede claims deriving from general civil law.[3] In the present case, claims deriving from general civil law may be applicable insofar as they are not precluded by the specific claims mentioned above. In principle, however, this is precisely the case here because all time limits set by specific restitution and compensation claims have already expired.

III. Das Urteil Sachs

Im Urteil Sachs (Urteil vom 16. März 2012, Aktenzeichen V ZR 279/10) hat der Bundesgerichtshof sich freilich vorbehalten zu prufen, ob ein Ausschluss der spezialgesetzlichen und der allgemeinen zivilrechtlichen Ansprüche dazu führen könnte, in besonderen Einzelfällen das NS-Unrecht entgegen dem Sinn und Zweck der Rückerstattungsbestimmungen zu perpetuieren. Der BGH nennt hier den Fall, dass „*der verfolgungsbedingt entzogene Vermögensgegenstand nach dem Krieg verschollen war und der Eigentümer erst nach Ablauf der Frist für die Anmeldung eines Rückerstattungsanspruchs von seinem Verbleib Kenntnis erlangt hat*“.

III. The *Sachs* Case

In the *Sachs* case (judgment dated 16 March 2012, file no. V ZR 279/10), however, the German Federal Court of Justice reserved the right to assess, on a case-by-case basis, whether precluding restitution claims based on both specific restitution law and general civil law could lead to a perpetuation of Nazi injustice in the particular case, contrary to restitution law's nature and purpose. The German Federal Court of Justice described the case before it as one in which "*an asset seized as a result of persecution was untraceable after the war and its owner only learned of its whereabouts after the time limit for filing a restitution claim had already expired*."[4]

In einem soichen Fall seien die allgemeinen zivilrechtlichen Ansprüche im Zivilrechtsweg zu eröffnen. Mit Hinweis auf einen älteren Fall aus dem Jahr 1955 hat der Bundesgerichtshof zugleich bekräftigt, dass die Eroffnung des Zivilrechtswegs bei Konkurrenz zu spezialgesetzlichen, einem anderen Geriehtszweig zugewiesenen Rechtsbehelfen von den Zivilgerichten voll überprütt werden kann.

The Court held that in such a case, claims could be asserted based on general civil law through the civil courts. Referring to a prior case from 1955[5], the German Federal Court of Justice at the same time reaffirmed that where general civil law claims compete with applicable special restitution law remedies that fall within the jurisdiction of courts other than civil courts, the right to bring the case before the civil courts is subject to full review by the civil courts.

In jenem älteren Fall aus dem Jahr 1955 wie auch in einem weiteren Fall aus dem Jahr 2012 hat der Bundesgerichtshof sehr sorgfältig geprüft, oh der Zivilrechtsweg trotz der grundsätzlich vorrangigen Spezialgesetzgebung zu eröffnen ist. Diese beiden Fälle waren zwar mit dem Fall Sachs nicht identisch. Doch ist den beiden Fällen gemeinsam, dass der Bundesgerichtshof die

Both in this particular case from 1955 and in another case from 2012[6], the German Federal Court of Justice has meticulously examined whether general civil law proceedings are available despite the general primacy of specific legal remedies. Indeed, both cases were not identical with the *Sachs* case. However, both cases have in common that the

jeweiligen Entziehungen durch das Nazi-Regime bzw. das ostdeutsche kommunistische Regime schon nach den rechtlichen Maßstäben zur Zeit der Entziehung nicht als gültige Eigentumsübergänge anerkannt hat. Mit dem Fall Sachs haben diese beiden Entscheidungen gemeinsam, dass ungeachtet des grundsätzlichen Vorrangs der Spezialgesetzgebung der Zivilrechtsweg in besonderen Fällen eroffnet wurde. Damit solte sichergestellt werden, dass nicht entgegen der Absicht der Rückerstattungsbestimmungen, die Interessen des Geschädigten zu schützen, in diesen Fällen den Maßnahmen eines totalitären Regimes im Nachhinein zum Erfolg verholfen würde.

German Federal Court of Justice refused to recognize seizures by the Nazi regime and the east German communist regime, respectively, as valid ownership transactions, even on the basis of legal standards effective at the time of the expropriation. Just like with the *Sachs* case, in both cases access to civil courts has been granted for particular cases despite the general primacy of specific restitution laws. With that, it has been ensured that the specific restitution law's purposes of protecting the aggrieved party's interests were not undermined by retrospectively leveraging the methods of a totalitarian regime.

In diesem Kontext steht das Urteil Sachs. Die betreffende Passage aus dem Urteil Sachs lautet:

The *Sachs* case has to be read in this context. The relevant section of the *Sachs* case reads as follows:

„Das vorrangige Ziel der Naturalrestitution steht ferner der Annahme

"The primary objective of restitution in rem is

entgegen, ein zivilrechtlicher Herausgabeanspruch werde durch die alliierte Rückerstattungsanordnung auch dann verdrängt, wenn es dem Berechtigten unmöglich war, die Rückgabe des Vermögensgegenstands in deren Rahmen zu erreichen, weil dieser – wie hier – bis zum Ablauf der Anmeldefrist des § 50 Abs. 2 REAO verschollen und damit nicht ‚feststellbar' war. Bliebe es in einem solchen Fall auch nach dem Wiederauffinden des Gegenstands bei der von dem Bundesgerichtshof bislang angenommenen Sperrwirkung des Art. 51 Satz 1 REAO, wären der Berechtigte und seine Rechtsnachfolger von der vorrangig angestrebten Wiedergutrnachung durch Rückgabe dauerhaft ausgeschlassen, obwohl diese, wenn auch zu einem späteren Zeitpunkt, tatsächlich und – auf der Grundlage der allgemeinen Gesetze – auch

contrary to the assumption that a civil law claim for restitution would be precluded by the Restitution Decree [REAO] of the Allies, where the beneficiary was unable to achieve the restitution of the confiscated asset under the procedure [provided for under the Decree] because the asset – as in the present case – was missing until expiration of the filing deadline of article 50 para 2 REAO and was therefore not 'identifiable'. If, even after the re-emergence of the asset, the barrier effect of article 51 sentence 1 REAO as adopted thus far by the Federal Court of Justice were still to be applied in such a case, the beneficiary and his legal successors would be permanently excluded from compensation by way of restitution being primarily sought, despite the fact that such restitution would also be factually and – on the basis of the general laws – legally

rechtlich möglich ist. Die alliierten Rückerstattungsbestimmungen hätten dem Berechtigten damit jede Möglichkeit genommen, die Wiederherstellung des rechtmäßigen Zustands zu verlangen und auf diese Weise das nationalsozialistische Unrecht perpetuiert. Ein solches Ergebnis ist mit dem Sinn und Zweck dieser Bestimmungen, die Interessen des Geschädigten zu schützen (vgl. BGH Beschluss vom 28. Februar 1955 – GSZ 4/54, BGHZ 16, 350, 357), nicht zu vereinbaren."

possible at a later timer As a result, the restitution rules of the Allies would deny the beneficiary any possibility of claiming restoration of the lawful status and, by doing so, would perpetuate National-Socialist [Nazi] injustice. Such a result is incompatible with the nature and purpose of these provisions to protect the interests of the victim (cf. BGH, decision of 28 February 1955 – GSZ 4/54, BGH 16,350, 357)."[7]

Hiemach müsste sich ein deutsches Gericht im Lichte der Sachs-Entscheidung die Frage stellen, ob ein ähalich besonderer Einzelfall vorliegt, der es erforderlich macht, die allgemein zivilrechtlichen Ansprüehe trotz Ablaufs der Fristen der spezialgesetzlichen Ansprüche im Zivilrechtsweg zu eröffnen.

According to this reasoning, a German court hearing a claim for restitution under the general civil laws would have to consider, in the light of the *Sachs* case, whether the case before it is a similar special case that permits a claim under general civil law despite the expiration of time limits for claims under specific restitution laws.

Die Erwägungen des Bundesgerichtshofs im Sachs-Fall sind ersichtlich von der besonderen Verantwortung Deutsehiands gegenüber den Opfern des Nazi-Regimes getragen. Dies fügt sich ein in die ständige Rechtsprechung des Bundesverfassungsgerichts. So hat das Bundesverfassungsgericht wegen der Singularität der Nazi-Verbrechen eine Norm für verfassungsgemäß exklärt, die es verbietet, die Nazi-Herrschaft öffentlich zu billigen, zu verherrlichen oder zu reehtfertigen, um die Opfer der Nazi-Herrschaft vor einer Verhöhnung zu schützen. Das Bundesverfassungsgericht hat so entschieden *„[a]ngesichts des sich allgemeinen Kategorien entziehenden Unrechts und des Schrekkens, die die nationalsozialistische Herrschaft über Europa and weite Teile der Welt gebracht hat, und der als Gegenentwurf hierzu verstandenen Entstehung*

The line of reasoning of the German Federal Court of Justice in the *Sachs* case is obviously driven by Germany's special responsibility towards victims of the Nazi regime. This is consistent with established case law of the German Federal Constitutional Court. The German Federal Constitutional Court has generally considered a law to be constitutional that prohibited any attempts to approve, glorify or justify the Nazi regime in public, both because of the enormity of the crimes committed during the Nazi era and to effectively protect the victims of the Nazi regime from any insult. The German Federal Constitutional Court has explained this particular reasoning as based on "*the unmeasurable degree of injustice and terror imposed by the Nazi regime on Europe and many parts of the world, and the foundation of the*

der Bundesrepublik Deutschland“. Hier wie in anderen Fällen hat das Bundesverfassungsgericht die besondere Verantwortung Deutschlands als bedeutendes Kriterium der Rechtsauslegung berücksichtigt. Anders forumliert, ist die hohe moralische Verantwortung Deutschlands für die Nazi-Verbrechen auch für die rechtsprechende Gewalt in Deutschland so essentiell, dass sie in rechtlichen Auseinandersetzungen von grundsätzlicher Bedeutung ist und für die Entscheidung den Ausschlag geben kann.

Federal Republic of Germany as an explicit alternative to that”.[8] Indeed, in other cases the German Federal Constitutional Court has similarly accepted and used the German Nazi past as a significant criterion in its reasoning.[9] In other words, the enormous moral responsibility of Germany in light of the crimes committed during the Nazi-era is essential also to the German judicial power and may shape legal disputes and influence their outcome.

Der Fall Sachs selbst gab keinen unmittelbaren Anlass, einen weitreichenden Grundsatz aufzustellen, nach welchem die allgemeinen zivilrechtlichen Ansprüche im Zivilrechtsweg zu eröffnen seien, obwohl die Ausschlussfristen der spezialgesetzlichen Rechtsbehelfe bereits abgelaufen seien. Der Bundesgerichtshof hat es

The *Sachs* case itself did not provide an opportunity to establish a general principle for allowing claims based on general civil law notwithstanding the expiry of the time limits for remedies under specific restitution laws. Nevertheless, the German Federal Court of Justice considered it necessary to make reference to any

jedoch für erforderlich gehalten, auf mögliche Fälle hinzuweisen, in welchen eine Verdrängung der allgemeinen zivilrechtlichen Ansprüche durch bereits verfristete spezialrechtliche Ansprüche zu einem Ergebnis führen würde, das mit der Gerechtigkeit, den Grundrechten der Opfer und dem Rechtsstaatsprinzip unvereinbar wäre.

potential cases in which the preclusion of claims based on general civil law due to expired claims arising under specific restitution laws would lead to a situation that is unjust and incompatible with constitutional rights of the victims and with rule of law standards.

Der Bundesgerichtshof spricht hies von Fällen, in welehen die Opfer der NS-Herrschaft oder deren Nachfahren aufgrund besonderer Umstände daran gehindert waren, den Verbleib der entzogenen Gegenstände zu rekonstruieren. Wollte man in solchen Fällen den Opfern vorhalten, sie hätten ihre Ansprüche nicht rechtzeitig geltend gemacht, würde man sie gewissermaBen ein zweites Mal entrechten, oder wie der Bundesgerichtshof formuliert:

The German Federal Court of Justice made reference to cases in which the Nazi regime's victims or their descendants were, due to special circumstances, prevented from tracing back seized assets. If victims in those cases were confronted with the argument that they did not bring their claims in a timely manner, they would, to some extent, be deprived of their rights once again, or as the German Federal Court of Justice puts

man würde das NS-Unrecht perpetuieren.

Diese Aussagen des Bundesgeriehtshofs im Urteil Sachs sind in der deutschen Rechtsliteratur teilweise kritisch aufgenommen worden. Kritisiert wird insbesondere, dass der Bundesgerichtshof es in einem *obiter dictuin* für möglich erklärt hat, die allgemeinen zivilrechtlichen Ansprüche ungeachtet abgelaufener Fristen der Spezialrechtsbehelfe zu eröffnen, obwohl im Fall Sachs kein Anlass dafür bestand, den Vorrang der Spezialrechtsbehelfe prinzipiell in Frage zu stellen. Zudem ist der vom Bundesgerichtshof formulierte PrüfungsmaBstab, ob ein Ausschluss auch der allgemeinen zivilrechtlichen Ansprüche daze führen würde, das NS-Unrecht zu perpetuieren, so weitreichend formuliert, dass er auch die generelle Anwendbarkeit der Zivilrechtsansprüche tragen würde. In der deutschen

it: Nazi injustice would be perpetuated.

These statements by the German Federal Court of Justice in the *Sachs* case had some critical reception in German legal literature.[10] In particular, it has been criticized that the German Federal Court of Justice, as part of an *obiter dictum*, discussed a rule allowing claims based on general civil law despite the expiration of time limits for claims under specific restitution laws, even though the *Sachs* case gave no grounds for questioning the primacy of the specific restitution law in principle. Furthermore, the test established by the German Federal Court of Justice to determine whether the exclusion of claims based on general civil law would lead to a perpetuation of Nazi injustice, is, due to its extensive scope, likely to lay the groundwork for generally allowing restitution

Rechtsliteratur ist man sich dennoch weitgehend einig, dass der Bundesgerichtshof im Urteil Sachs nicht den grundsätzlichen Vorrang der spezialgesetzlichen Rechtsbehelfe aufheben wollte. Das Urteil Sachs wird deshalb weitgehend auch nicht als Ankündigung einer grundsätzlichen Rechtsprechungsänderung interpretiert.

claims based on general civil law. However, German legal scholars are in agreement that the German Federal Court of Justice in the *Sachs* decision did not intend to abandon the general rule of the specific restitution law's primacy. According to broad opinion, therefore, the *Sachs* decision is not seen as announcing a fundamental change in case law.[11]

Zweifelsfrei jedoch hat der Bundesgerichtshof sich vorbehalten, im Einzelfall zu prüfen, ob ein Ausschluss sowohl der spezialgesetzlichen als auch der allgemeinen zivilrechtlichen Ansprüche entgegen dem Sinn und Zweck der Rückerstattungsbestimmungen dazu führen würde, dass das NS-Utrecht fortgeschrieben wird. Hatten die Opfer oder ihre Rechtsnachfolger keine reale Chance, ihre spezialgesetzlichen Rechtsbehelfe innerhalb der dafür vorgesehene Fristen zu

It is, however, beyond doubt that the German Federal Court of Justice has reserved the right to assess on a case-by-case basis whether the exclusion of claims based on both specific laws and general civil law is contrary to the nature and purpose of specific restitution laws and would lead to a continuation of Nazi injustice. If the victims and their legal successors did not have a real chance to assert their claims based on special restitution laws within the stipulated

erheben, würde ein Ausschluss jeglicher Rechtsbehelfe dem Sinn und Zweck der Rückerstattungsgesetzgebung zuwiderlaufen.

time limits, a preclusion of any legal remedies would contradict the restitution law's nature and purpose.[12]

Meines Erachtens ist daher die zitierte Passage im Urteil Sachs wenigstens dahingehend zu verstehen, dass der Bundesgerichtshof für ausdrücklich angesprochene besondere Eitizelfälle eine begrenzte Rechtsprechungsänderung ankündigt, um mit seiner ÄuBerung im Urteil Sachs aus reehtsstaatlichen Gründen das Vertrauen etwaiger Beklagter in die Ausschlusswirkung der spezialgesetzlichen Fristen zu erschüttern. Grundsätzlich wird das Vertrauen von Prozessparteien auf die Gültigkeit der ständigen Rechtsprechung als schützenswert angesehen. Eine Rechtsprechungsänderung wirkt deshalb vor allem für zukünftige Rechtsstreitigkeiten. Es ist jedoch in der

In my view, therefore, the passage of the *Sachs* decision quoted above is to be interpreted at least to the effect that the German Federal Court of Justice, with regard to expressly mentioned specific individual cases, is announcing a limited change in case law with the aim of undermining, through its remarks in the *Sachs* ruling and in keeping with rule-of-law principles, the reliance of any defendants on the preclusive effect of the time periods under specific restitution laws. In principle, the reliance of litigants on the validity of established case law is considered to be legitimate.[13] Therefore, a change in case law becomes effective foremost to future litigation. However, it is widely accepted

deutschsprachigen Methodenlehre anerkannt, dass das Vertrauen in eine ständige Rechtsprechung insbesondere durch obiter dicta erschüttert werden kann, mit denen eine Rechtsprechungsänderung ‚angekündigt' wird. Kommit ein entsprechender Folgefall vor ein Gericht, kann die bisherige Rechtsprechung ganz oder teilweise aufgegeben werden. In der rechtsvergleichenden Literatur wird ein solches Vorgehen der angloamerikanisehen Rechtsfigur des ‚prospective overruling' an die Seite gestellt. Hierbei geht es darum, dass ein Gericht, ohne das der vorliegende Fall es notwendig mach vorab die Grundsätze einer bisherigen ständigen Rechtsprechung in Frage stellt, urn sie in einem kommenden einschlägigen Fall dann aufzugeben.

in German legal methodology that reliance on established case law can be undermined by 'announcing' a change in case law, mostly *in* the form of *obiter dicta.*[14] As soon as a similar case is brought before the courts, all or parts of prior decisions can be overruled. In comparative law commentary, this approach is compared to the Anglo-American concept of 'prospective overruling'.[15] This concept allows a court to question principles of prior case law in order to overrule them in a future similar case, even though the case at hand does not require it to do so.

Unabhängig davon, ob man das Urteil Sach als eine Art ‚prospective overruling' interpretieren

Regardless of whether the *Sachs* decision is interpreted as some kind of 'prospective overruling,'

kann, ist die zitierte Passage de Sachs-Urteils jedoch auch für sich genom men ganz unmissverständlich. Der Bundesgerichtshof hat in seltener Deutlichkeit aus gesprochen, dass er nicht die Hand dam reichen wird, in den genannten besonderer Einzelfällen das NS-Unrecht zu perpetuieren, da dies Sinn und Zweck der Rückerstattungsbestimmungen widerspräche. Vor diesem Hintergrund bietet der vorliegende Fall für ein etwa angerufenes deutsches Gerich notwendig Anlass, um eingehend zu prüfen, ob hier ein besonderer Einzelfall each der. Kriterien vorliegt, welche der Bundesgerichtshof in] Urteil Sachs aufgestellt hat.

the passage of the ruling quoted above is by itself completely unambiguous. The German Federal Court of Justice articulated with rare clarity that, with regard to the mentioned specific individual cases, it will not support any perpetuation of Nazi injustice, because this would run contrary to the nature and purpose of specific restitution laws. In this context, the present case would prompt a German court to thoroughly assess whether this is one of the specific cases that meet the test established by the Gentian Federal Court of Justice in its *Sachs* decision.

Die Kläger könnten sich auf das Urteil Sachs auch vor jedem deutschen Gericht berufen. Dieser Rechtsschutz vor jedeni deutschen Gericht wird lurch die alle Gerichte und Behörden bindende

Plaintiffs could base their claim on the *Sachs* case before any German court. This legal protection before any German court is safeguarded by the German Federal Constitutional Court's

Rechtsprechung des Bundesverfassungsgerichts gewahrleistet (§ 31 Abs. 1 BVerfGG).

jurisdiction, which is binding for all German courts and authorities (Sec. 31 para 1 of the Act on the German Federal Constitutional Court [*Bundesverfassungsgerichtsgesetz – BVerfGG*]).

IV. Keine Prüfung der Einrede der Verjährung durch die Geriebte von Amts wegen

Auch die allgemeinen zivilrechtlichen Ansprüche unterliegen freilich der Einrede der Verjährung. Es ist hier zu wiederholen and zu betonen, dass die Einrede der Verjährung von deutschen Gerichten nicht von Amts wegen geprüft wird, sondem nur geprüft werden darf, wenn die von der Verjährung begünstigte Prozesspartei sich ausdrücklich darauf beruft. Die von der Verjährung begünstigte Prozesspartei kann auch ausdrücklich auf die Einrede der Verjährung verzichten. Wird die

IV. No Assessment of the Defense of the Statute of Limitations by German Courts *sua sponte*

Of course, claims based on general civil law are subject to the defense of the statute of limitations. It should be reiterated and emphasized that the defense of the statute of limitations will not be assessed by the German courts *sua sponte*, but rather may only be assessed if the party seeking to benefit from the statute of limitations explicitly invokes the defense. The party benefitting from the statute of limitations may also expressly waive the defense of the statute of

Einrede der Verjährung nicht erhoben bzw. auf deren Erhebung verzichtet, prüft das Gericht zwingend die Voraussetzungen des materiell-rechtlichen Anspruchs ohne Rücksicht auf die seit der Vermögensentziehung bzw. seit deren Bekanntwerden verflossene Zeit.

limitations. In the event that the defense of the statute of limitations is not raised or is waived, it is mandatory for the court to examine whether the requirements of the substantive claim have been met, regardless of the time that has passed since the date of the assets being seized or, if applicable, the date the plaintiff became aware thereof.

VI. Schuss

Nadi alledem halte ich an meiner Auffassung fest, dass die Kläger, legt man ihren Vortrag zugrunde, Rechtsschutz vor deutschen Gerichten finden können.

VI. Conclusion

In light of the foregoing and based on plaintiffs' statements, I maintain my opinion that plaintiffs are entitled to legal protection before German courts.

/s/ Jan Thiessen
Prof. Dr. Jan Thiessen

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[1] As mentioned in my expert opinion dated 7 March 2016, pp. 5 et sqq., 12-3. 16 n. xv.

[2] On the following comprehensively Wolfgang Ernst, in: Harry Dondorp et al. (eds.), Ius Romanum – Ius Commune – Ius Hodiernum, Studies in honour of Eltjo J.H. Schrage on the ocassion of his 65th birthday (2010), pp. 116 et sqq.

[3] As mentioned in my expert opinion dated 7 March 2016, pp. 12-3, 16 n. xvi.

[4] German Federal Court of Justice, judgment of 16 March 2012, file no. V ZR 279/10, published in: Neue Juristische Wochenschrift 2012, p. 1796.

[5] German Federal Court of Justice, judgment of 16 March 2012, file no, V ZR 279/10, published in: Neue Juristische Wochenschrift 2012, p. 1796, at 1798, referring to German Federal Court of Justice, decision of 28 February 1955, file no. GSZ 4/54, published in: Entscheidungen des Bundesgerichtshofs in Zivilsachen 16 (1955), p. 350, at 357.

[6] German Federal Court of Justice, judgement of 7 December 2012, file no. V ZR 180/11, published m: Neue Juristische Wochenschrift 2013, p. 1236.

[7] German Federal Court of Justice, judgment of 16 March 2012, flue no. V ZR 279110, published in: Neue juristische Wochenschrift 2012, p. 1796, at 1798.

[8] German Federal Constitutional Court, decision of 4 November.2009, file no. 1 BvR 2150/08, published in Neue Juristische Wochenschrift 2010, p.47.

[9] Ulrich Ldiffler, Instru.mentalisierte Vergangenheit? Die nationalsozialistische Vergangenheit als Argumentationsfigur m der Rechtsprechung des l3undesverfassungsgerichts (2004), pp. 132 et sqq.

[10] In particular Wolfgang Ernst, in: Juristenzeitung 2013, p. 359, at 361; Thomas Finkenauer,Juristenzeitung 2014, p. p. 479, at 480; Johannes Wasmuth, Zeitschrift für offene Vermögensfragen, Rehabllitierungs- and sonstiges Wiedergutmachungsrecht 2014, p. 139, at 140 at sqq.

[11] For example Johannes Wasmuth, in: Neue Juristische Wochenschrift 2014, p. 747, at 750.

[12] German Federal Court of Justice, judgment of 16 March 2012, file no. V ZR 279/10, published in: Neue Juristische Wochenschrift 2012, p. 1796, at 1798.

[13] Most recently Getman Federal Court of Justice, judgment of 17 April 2012, file no. II ZR 95/10, published in Neue Zeitschrift fur Gesellschaftsrecht 2012, p. 701, at 703, with further references to previous case law.

[14] Comprehensively on that Ulrich Keil, Die Systematik privatrechtlicher Reehtsprechungsänderungen (2007), pp. 80 at sqq. with further reference.

[15] *Cf.* Keil (supra n. 14), pp. 83-4.

[LOGO]

Urkundenrolle UR IV 157 / 2016 UZ IV 171 / 2916

Notarielle Beglaubigung

Vorstehende, vor mir vollzogene Unterschrift von

Herrn Prof. Dr. Jan Peter Thiessen,
geboren am 25.04.1969,
wohnhaft in 72070 Tübingen, Pfalzhaldenweg 22,

- ausgewiesen durch Personalausweis -

beglaubige ich hiermit öffentlich.

Tübingen, den 07.06.2016

Notarin

/s/ [Illegible]

(Junk)

[SEAL]