



Two Supreme Court Cases to Test Limits on Foreign Sovereign Immunity for Holocaust Harms

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UPDATE: On February 3, 2021, the Supreme Court issued unanimous opinions in [Germany](#) and [Hungary](#), holding that the Foreign Sovereign Immunities Act (FSIA) does not permit claims against foreign governments for “taking” property from their own citizens, even if the taking occurred as part of a genocide or other human rights violation. The Court agreed with Germany that the FSIA’s expropriation exception incorporated the international law of property—which excludes purely domestic takings. The Court reasoned that the domestic takings rule does not implicate the law of genocide or human rights, and, as such, the expropriation exception does not apply. The Court did not address the comity question, nor did it address the factual dispute over whether an act of genocide took place. Instead, the Court remanded this case, as well as the Hungary case, for further proceedings consistent with its FSIA holding.

The original post from December 16, 2020, is below.

In two cases this term, [Republic of Hungary v. Simon](#) (Hungary) and [Federal Republic of Germany v. Philipp](#) (Germany), the Supreme Court is set to address intersecting issues about foreign sovereign immunity and the Holocaust. The plaintiffs in both cases seek to make foreign governments liable for Nazi-era injuries. But the defendants, which include Hungary and Germany, argue the suits should be dismissed based on international comity—a [legal doctrine](#) that allows courts to abstain from jurisdiction out of respect for foreign sovereignty. Germany also argues that it is immune from suit because it believes the U.S. [Foreign Sovereign Immunities Act](#) (FSIA) does not permit claims in U.S. courts against foreign governments for “taking” property from their own citizens within its own territory.

The legal questions in both cases may have longstanding implications for when foreign countries can be sued in U.S. courts. The cases also have attracted attention because of the way in which the legal defenses intersect with the tragic events of the Holocaust. Some observers, including some [Members of Congress](#), contend that the defendants’ legal arguments contradict the historical timeline of the Holocaust. The United States, on the other hand, supports the defendants’ legal theories in its [role](#) as [amicus curiae](#).

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Factual Background

The atrocities of the Holocaust form the factual backdrop for *Hungary* and *Germany*. In *Hungary*, a group of 14 Holocaust survivors filed a putative class action against Hungary and a state-owned railway company, [Magyar Államvasutak Zrt \(MÁV\)](#). From 1941 to 1945, Hungary deported [more than 440,000](#) Hungarian Jews to Nazi-run concentration camps, chiefly Auschwitz. According to the survivors, Hungarian officials facilitated the mass deportation using MÁV's rail system, and MÁV employees robbed Jewish citizens of their last remaining possessions as they were loaded onto trains. The survivors seek compensation from Hungary and MÁV for taking their property during the genocidal campaign.

In *Germany*, the heirs of a group of Jewish art dealers working during the rise of the Nazi regime sued to recover a collection of [medieval relics and art](#) known as the Welfenschatz (Guelph Treasure in English). The art dealers purchased the collection in 1929 before the stock market crash that year, but soon faced persecution when the Nazi party came to power in 1933. In 1935, the dealers sold most of the Welfenschatz to government officials in Prussia (then part of Nazi Germany) for what the plaintiffs allege to be 35% of its actual value. The Prime Minister of Prussia at the time, Hermann Goering, later presented the collection as a gift to Adolph Hitler. Goering was one of the era's most [notorious collectors](#) of Jewish-owned art and was eventually convicted as a [Nazi war criminal](#). After World War II, American troops turned over the Welfenschatz to Stiftung Preussischer Kulturbesitz (SPK), a German state agency formed to preserve Prussian cultural heritage and property. SPK continues to hold the collection, which is on [display](#) in Berlin's Bode Museum.

The heirs of the art dealers contend that the Nazi government forced their predecessors to sell the Welfenschatz below fair market value by making it effectively impossible for Jewish owners to sell artwork on the open market. In 2014, the heirs and SPK submitted the dispute to a non-binding German [claims commission](#), which makes recommendations on how to resolve claims concerning Nazi-confiscated art. The commission did not recommend that the SPK return the collection, [concluding](#) instead “that the sale of the Welfenschatz was not a compulsory sale due to persecution.” The next year, the heirs [sued](#) in U.S. federal court seeking return of the collection and monetary damages.

Legal Background

Because the plaintiffs in *Hungary* and *Germany* sued foreign states, both cases raise issues arising from the [FSIA](#)—a federal statute governing when foreign sovereign immunity bars suits in U.S. courts against foreign government entities. The FSIA [provides](#) a presumptive rule that foreign countries and their agencies and instrumentalities are immune from suit in both state and federal courts. The “[sole basis](#)” by which U.S. courts can obtain jurisdiction over those defendants is through one of the FSIA's [exceptions](#) to that general rule.

The first [question presented](#) in *Hungary* and *Germany* concerns how FSIA interacts with the international comity doctrine. As discussed below, international comity permits courts to abstain jurisdiction based on deference to foreign nations' sovereignty. The defendants in *Hungary* and *Germany* asked lower courts to dismiss the suits on comity grounds, but the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) [concluded that](#) the comity doctrine is not available in cases against foreign sovereigns that fall under the FSIA's framework. The Supreme Court is set to address whether the D.C. Circuit was correct in concluding that the FSIA displaces international comity.

In *Germany*, the Supreme Court [granted certiorari](#) on the [separate question](#) of whether the FSIA's expropriation (i.e., government seizure) exception to foreign sovereign immunity applies to claims that a country took the property of its own citizens as part of an act of genocide. The *Germany* defendants contend that the expropriation exception does not apply when a government takes property from its own citizens within its own territory because such “[domestic takings](#)” do not violate international law. The heirs to the art dealers assert—and the D.C. Circuit agreed—that, while the FSIA's [expropriation](#)

[exception](#) typically does not apply to domestic takings, because the takings in question was part of a genocide, it violated international law and, consequently, falls within the exception.

The Comity Question

The first [question presented](#) in *Hungary* and *Germany* is whether courts can conduct a comity analysis in cases falling under the FSIA's rubric. [Courts and commentators describe](#) international comity as a loosely defined doctrine that permits courts to abstain from exercising jurisdiction based on deference to foreign nations' sovereignty. The doctrine's classic description comes from *Hilton v. Guyot*, an 1895 decision in which the Supreme Court stated:

“Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having 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.

The defendants in *Hungary* and *Germany* argue that, under principles of comity, U.S. courts should decline jurisdiction until the plaintiffs attempt to obtain relief through the judicial system in Europe. However, the D.C. Circuit disagreed, instead [concluding](#) that the FSIA prohibits U.S. courts from conducting a comity analysis in the first place.

The Supreme Court has described the FSIA as providing a “[comprehensive](#)” set of standards governing when “[foreign nations should be amenable to suit in the United States.](#)” Because the FSIA is comprehensive, the D.C. Circuit reasoned, it displaced the court's authority to conduct a case-by-case comity analysis. The defendants in *Hungary* and *Germany* agree that FSIA governs when U.S. courts *cannot* exercise jurisdiction because of foreign sovereign immunity. But they argue that FSIA does not eliminate courts' discretionary authority to use [prudential abstention doctrines](#), such as comity, to examine whether courts *should not* assume jurisdiction. The defendants contend that U.S. courts should decline jurisdiction on comity grounds because these Nazi persecution cases have “[little connection to the United States](#)” and invade the German and Hungarian governments' ability to make sensitive decisions about how to remedy historical injustices. By way of analogy, the *Hungary* defendants [argue](#) that it is no more appropriate for U.S. courts to resolve disputes about Holocaust atrocities than it would be for Hungarian courts to hear Americans' claims for reparations for slavery or racial discrimination.

Foreign Sovereign Immunity and “Domestic Takings”

In the second question presented, the *Germany* defendants argue that the case should be dismissed regardless of comity because the FSIA bestows them with foreign sovereign immunity. Under the FSIA's [expropriation exception](#), foreign sovereign immunity is unavailable in cases “in which rights in property taken in violation of international law are in issue” and the property meets statutory requirements for a commercial nexus to the United States. The heirs to art dealers in *Germany* contend that the Welfenschatz sale was involuntary and amounted to a “tak[ing] in violation of international law” that falls within the exception. A government that takes property of an alien may violate international law if the taking “is not for a public purpose, is discriminatory, or is [done] without provision for [prompt, adequate, and effective compensation.](#)” But the expropriation exception is limited by what has become known as the “[domestic takings](#)” rule. Under this rule, it is U.S. courts' “[consensus view](#)” that foreign governments that take the property of their own nationals within their own territory typically do not breach international law and are outside the scope of the expropriation exception. Because the art dealers were German citizens and companies, and Germany allegedly forced the sale within its own borders, the defendants argue that this is a “domestic takings” case to which sovereign immunity still applies.

While the D.C. Circuit agrees that domestic takings [ordinarily](#) do not violate international law, it [held](#) that the standard rule does not apply when the taking constitutes an act of genocide. Unlike typical domestic expropriations, perpetrating genocide against a country's own nationals may still violate international law. Citing the [Convention on the Prevention of the Crime of Genocide](#) and [federal statutes](#) that [recognize](#) Nazi art confiscations were part of a genocidal strategy, the D.C. Circuit [concluded](#) that the plaintiffs made sufficient allegations that the sale of the Welfenschatz was a genocidal taking to which foreign sovereign immunity does not apply.

On appeal to the Supreme Court, the *Germany* defendants [contend](#) that the D.C. Circuit's decision expands the expropriation exception beyond Congress's original intent. They argue the decision violates the United States' [international legal obligations](#) to give foreign states immunity for sovereign acts and that it opens up U.S. courts to cases that have a limited connection to the United States.

The United States Position as Amicus Curiae

In its role as [amicus curiae](#), United States [supports](#) the defendants on both questions presented. The United States [emphasizes](#) that it “deplores the atrocities committed by the Nazi regime and its allies, and supports efforts to provide” remedies to Holocaust victims. But it [argues](#) that comity-based abstention serves the United States' interests by allowing courts to consider potential foreign policy problems when foreign sovereigns are sued in U.S. courts. In *Germany*, the United States [agrees](#) with the defendants that the FSIA's expropriation exception does not apply to domestic takings, even when the taking is part of a genocide or other human rights violation. Allowing an exception for genocidal takings, the United States contends, would compel courts to make sensitive foreign-policy judgments about whether a genocide has taken place. Those judgments, the United States [argues](#), would “give courts a role in foreign affairs far beyond what Congress (or the Constitution) intended” and “place the United States at odds with consistent intentional practice” on when to grant foreign sovereign immunity.

Treatment of the Holocaust

The relationship between the legal arguments in *Hungary* and *Germany* and the history of the Holocaust has garnered interest from [members](#) of the [Jewish community](#), as well as [Holocaust survivors](#), [historians](#), and [preservation organizations](#). Some groups have filed amicus curie briefs contesting, among things, the *Germany* defendants' [position](#) that the Welfenschatz sale does not rise to the level of an act of genocide. The *Germany* defendants [argue](#)—and the nonbinding German claims commission [agreed](#)—that the reduced sale of the Welfenschatz in 1935 did not result from Nazi persecution, but occurred because of poor economic conditions after the 1929 stock market crash and the Great Depression. Amici groups [respond](#) that economic discrimination against the Jewish population made a fair market value transaction impossible at the time, and that this discrimination was an “[integral aspect](#)” of the Nazi's early genocidal efforts. Other amici contend that the defendants' arguments in both cases amount to “[Holocaust revisionism](#)” that undermines the historical record by suggesting property loss was not part of the Nazi's genocidal aims.

While *Hungary* and *Germany* implicate sensitive factual questions about the Holocaust, the Supreme Court only [granted certiorari](#) on the [two threshold legal questions](#) concerning comity and domestic takings. Given the discrete questions presented, the Court may be able to decide the case without delving into factual issues about the timeline of the Holocaust or proof of the defendants' genocidal intent.

Congressional Interest

Hungary and *Germany* have also attracted attention from some Members of Congress. A bipartisan group of 18 Members of the House of Representatives [wrote](#) to the German Ambassador to the United States expressing concern about Germany's characterization of the Holocaust in the litigation. The Members

state that, by denying that the Welfenshatz sale violated international law, Germany “seems to be arguing that . . . the definition of genocide does not include what happened with respect to the full elimination of Jews from German economic life starting in 1933 when Adolph Hitler and the Nazi regime took complete control.”

Five signatories to the letter to the German Ambassador also jointly filed amicus curiae briefs in *Hungary* and *Germany*. The five Members *argue*, among other things, that Congress enacted legislation that shows congressional intent to allow victims of Nazi art theft to sue in U.S. courts. In the *Holocaust Victims Redress Act of 1998*, for example, Congress describes Nazi art looting as a “critical element” of the Holocaust. The *2016 Holocaust Expropriated Art Recovery Act* (HEAR Act) includes a Congressional finding that “the Nazis confiscated . . . hundreds of thousands of works of art and other property throughout Europe as part of their genocidal campaign” The HEAR Act extended the statute of limitations for claims for cultural property “lost” between 1933 and 1945 because of Nazi persecution. And in the *Foreign Cultural Exchange Jurisdictional Immunity Clarification Act*, which clarifies limits on when foreign sovereigns lose immunity for suits over art on exhibition in the United States, Congress created a carve-out for property that is the subject of “Nazi-era” expropriation claims.

In addition, three Democratic Members of the House sent a *letter* to the U.S. Acting Solicitor General raising issues with the United States amicus curiae brief in *Germany*. Citing the statutes noted above, the Members assert that, by supporting the *Germany* defendants, the U.S. brief promotes arguments that are “at odds with facts and decades of Congressional action” related to the Holocaust and are “antithetical to American policy and values.”

Ultimately, foreign governments’ immunity from suit in U.S. courts has been a product of statute since Congress enacted the FSIA in 1976. Congress maintains authority to amend the statute or enact new legislation that dictates whether the FSIA displaces comity and whether sovereign immunity is available for genocidal takings.

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