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# *GERMANY V. PHILIPP*: CLOSING THE DOOR ON VICTIMS OF THEIR OWN COUNTRIES

Todd Grabarsky*

In its recent ruling in *Federal Republic of Germany v. Philipp*,[1] the Supreme Court abrogated a major tool that held foreign governments accountable for gross violations of international law.[2] This tool was the Foreign Sovereign Immunities Act's ("FSIA") "takings exception."[3] The FSIA provides foreign nations a presumption of immunity from the jurisdiction of United States courts; the "takings exception" provides an exception to this immunity and permits claims against foreign states to be heard in relation to property taken in "violation of international law."[4] Essentially, the Court held that, even where property expropriation was part of a larger program of international law violations, such as genocide, the victims could not recover their property if they were citizens of the sovereign at the time of the genocidal expropriation.[5] In other words, the FSIA's takings exception no longer "cover[s] expropriations of property belonging to a country's own nationals."[6]

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[1] Fed. Republic of Ger. v. Philipp, 141 S. Ct. 703 (2021).

[2] *Id.*

[3] *Id.*

[4] 28 U.S.C. § 1605(a)(3). The Foreign Sovereign Immunities Act ("FSIA") dictates whether and to what extent a federal district court has jurisdiction over a foreign sovereign state. *See* 28 U.S.C. § 1602. The FSIA establishes a general rule of immunity for a foreign government, 28 U.S.C. § 1604, while also providing vehicles through which individuals can litigate claims against foreign sovereigns via the stated "exceptions" to immunity. 28 U.S.C. §§ 1605, 1607. A federal court has jurisdiction over a foreign sovereign state *only* in those cases in which the statutory exceptions to immunity are met. *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439 (1989).

[5] *See Philipp*, 141 S. Ct. at 715.

[6] *Id.* at 711 (quoting Republic of Austria v. Altmann, 541 U.S. 677, 713 (2004) (Breyer, J., concurring)).

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This ruling troublingly fails to consider the realities of domestic genocides, which invariably involve treating certain groups of citizens or nationals as second class or stripping them of the rights and privileges true citizenship would otherwise guarantee. *Philipp* also ignores substantial precedent whereby genocide victims were able to avail themselves of the FSIA's takings exception despite unquestionably being citizens of the foreign sovereign defendant.[7] And, it opens the door to defenses against FSIA suits whereby sovereigns attempt to shoehorn genocide victims into a category of "nationals" to shield themselves from being subject to the takings exception.[8]

The *Philipp* decision also glaringly misses that the shift from "absolute" sovereign immunity to "restrictive" sovereign immunity—which would eventually be codified in the FSIA along with its many exceptions—arose from a historical event where a nation expropriated property from one of its own citizens. The purpose of this Article is to shed light on that historical event.

In 1937, Arnold Bernstein, a Jewish German business owner and veteran of the German armed forces during World War I, was imprisoned in Hamburg by Nazi authorities, where he was tortured and forced to sign over his valuable shipping line to a Nazi trustee.[9] The trustee subsequently transferred the company's assets to a Belgian corporation[10] and a Dutch shipping company.[11] In 1939, after his friends paid a ransom, Bernstein was released and made his way to the United States,

[7] *See, e.g.*, Cassirer v. Kingdom of Spain, 616 F.3d 1019 (9th Cir. 2010) (en banc); Agudas Chasidei Chabad of U.S. v. Russian Fed'n, 528 F.3d 934 (D.C. Cir. 2008); Garb v. Republic of Pol., 440 F.3d 579 (2d Cir. 2006); Altmann v. Republic of Austria, 317 F.3d 954 (9th Cir. 2002), *aff'd on other grounds*, 541 U.S. 677 (2004).

[8] For example, in recent class litigation against the German government for expropriations in South West Africa (modern day Nambia) during the Ovaherero and Nama Genocides (1904–1908), the German government went so far as to argue that the Herero and Nama tribespeople were its own "nationals" and that its crimes constituted mere "inner dealings," thereby negating the takings exception. *See* Defendant's Memorandum of Law in Support of Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, for Lack of Personal Jurisdiction, for Failure to Exhaust Remedies in Germany and Under the Doctrines of Political Question and *Forum Non Conveniens* at 7–9, Rukoro v. Fed. Republic of Ger., 363 F. Supp. 3d 436 (S.D.N.Y. 2018) (No. 17 CV 62-LTS).

[9] Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246, 247 (2d Cir. 1947).

[10] *Id.*

[11] Bernstein v. N.V. Nederlandsche-Amerikaansche, 173 F.2d 71, 73 (2d Cir. 1949).

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becoming a U.S. citizen in 1945, after World War II.[12] There is no doubt that Bernstein, like so many other Jewish Germans, was a German citizen at the time of the forced sale of his shipping line.[13]

After becoming a U.S. citizen, Bernstein quickly availed himself of one of the rights and privileges conferred upon him by his new homeland: the ability to bring suit to recover what was taken from him by the Nazi government.[14] His lawsuit, brought in federal court, was initially dismissed for lack of subject matter jurisdiction.[15] The Second Circuit Court of Appeals then affirmed the decision under the principle of absolute sovereign immunity, under which *all* claims against foreign sovereigns were beyond the jurisdiction of federal courts.[16] The Second Circuit found that, under the principle of absolute sovereign immunity, federal courts had no jurisdiction to hear claims that involved the action of a foreign sovereign government.[17] Additionally, the court emphasized Bernstein's German citizenship and nationality at the time of the alleged domestic expropriation.[18] In essence, the court refused to render judgment on a foreign sovereign's actions over one of its nationals[19]—even on a claim that involved wrongful expropriation of property as part of the governmental program of "eliminating so-called non-Aryans from German life."[20] Bernstein brought suit again, which was also dismissed.[21]

Bernstein, however, would not quit, and he turned to the Federal Executive, imploring the State Department for authorization for a federal court to review his

[12] Michael J. Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 20 (2000).

[13] *Van Heyghen*, 163 F.2d at 247.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Van Heyghen*, 163 F.2d 246.

[18] *Id.* at 249–50.

[19] *Id.*

[20] *Id.* at 247, 251.

[21] Bernstein v. N.V. Nederlandsche-Amerikaansche, 173 F.2d 71 (2d Cir. 1949); Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 76 F. Supp. 335 (S.D.N.Y. 1948).

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case.[22] On April 13, 1949, Jack B. Tate, Acting Legal Advisor of the U.S. Department of State, granted his request by letter, stating in part:

> This government has consistently opposed the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls.[23]

The Letter also made clear that the United States government had a "policy of undoing forced transfers and restituting identifiable property to persons wrongfully deprived of such property within the period from January 30, 1933, to May 8, 1945, for reasons of race, religion, nationality, ideology or political opposition to National Socialism."[24]

Furthermore, the Letter asserted that in restitution claims arising from expropriation and forced property transfers, Executive Policy would be to "relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."[25] The Executive Branch was allowing, perhaps even commanding, federal courts to adjudicate claims involving actions by foreign governments. In the context of the recent *Philipp* decision, the established Executive Policy is notable since that case is similar to Bernstein's as it came at the request of someone whose property was wrongly taken from him by his former sovereign while he was a citizen of that foreign sovereign.[26]

In 1952, the State Department issued another letter that affirmed the Executive's position on restrictive sovereign immunity in favor of absolute immunity.[27] This new letter, known as the "Tate Letter," made clear that for certain

[22] Robert Delson, *The Act of State Doctrine—Judicial Deference or Abstention?*, 66 AM. J. INT'L L. 82, 89 (1972).

[23] Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Bennett, House, & Couts, Couns. at Law (Apr. 13, 1949), *in* 20 DEP'T ST. BULL. 573, 592 (1949).

[24] *Id.*

[25] *Id.*

[26] *See id.*; Fed. Republic of Ger. v. Philipp, 141 S. Ct. 703 (2021).

[27] Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Philip B. Perlman, U.S. Att'y Gen. (May 19, 1952), *in* 26 DEP'T ST. BULL. 969, 984 (1952).

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claims, foreign governments could not always claim sovereign immunity where unlawful property expropriation occurred even against its own citizens.[28]

With both letters from the State Department in hand, Bernstein returned to the courts, and asked the Second Circuit to reevaluate its decision in *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij* in 1954.[29] The amended decision reprinted significant portions of Jack Tate's letter to Bernstein in 1949, and ordered that the case be tried on the merits:

> In view of this supervening expression of Executive Policy, we amend our mandate in this case by striking out all restraints based on the inability of the court to pass on acts of officials in Germany during the period in question . . . . This will permit the district court to accept the Release in evidence and conduct the trial of this case without regard to the restraint we previously placed upon it.[30]

The reconsidered decision found that a foreign sovereign could not claim immunity for wrongful acts committed against its own citizens, where those acts were part of a larger program of genocide and other international law violations.[31]

Eventually, in the 1970s, the FSIA codified the restrictive theory of sovereign immunity. While the statute has its own story with other directly preceding events, Bernstein's story represents the first crack in the wall of absolute sovereign immunity and the shift toward the restrictive approach. Bernstein's suit to recover property unlawfully taken from him while he was a German citizen resonates significantly in the wake of the *Philipp* decision. The *Bernstein* case established a redress against crimes of a sovereign, even when the crimes were against the sovereign's citizens and part of a larger program of human rights violations and genocide.

The *Philipp* Court did not consider—or, at least, was not convinced of—this historical context. While a court may certainly revisit this issue in FSIA litigation in the future, the *Philipp* rule creates troubling and perverse incentives today. It provides an escape hatch from the jurisdiction of federal courts to nefarious regimes worldwide that expropriate property in violation of international law from persons who technically might qualify as their nationals. In the case of genocidal expropriations by a government against a subset of its own citizens, the persecuted

[28] *Id.*

[29] Bernstein v. N.V. Nederlandsche-Amerikaansche, Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954).

[30] *Id.*

[31] *Id.*

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group's citizenship becomes a mere fiction when its own government tramples on its rights. It is a dismal justice to allow a government to use "citizenship" as a shield against liability for its wrongful actions.

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