# WOULD HITLER DEFINE JEWS LIVING IN *HIS* GERMANY AS CITIZENS?

## AN AMENDMENT TO THE FOREIGN SOVEREIGN IMMUNITIES ACT COULD SOLVE THIS LEGAL PUZZLE FOR UNITED STATES COURTS

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*"We should never forget that everything Adolph Hitler did in Germany was 'legal'. . . . It was 'illegal' to aid and comfort a Jew in Hitler's Germany."– Martin Luther King Jr.*

## INTRODUCTION

Jews living in Nazi Germany were a people without a country. In 1933, the Nazi regime began the process of stripping Jews of all rights and privileges associated with German citizenship.[1] This tragic history has become pivotal in cases where American heirs have filed suit against the German government, seeking the return of Jewish owned art or cultural property taken by the Nazis during World War II. Attorneys defending Germany have attempted to block the litigation of such claims in U.S. district courts by relying on the Foreign Sovereign Immunities Act ("FSIA") of 1976; foreign nations are typically immune from jurisdiction in United States courts unless one of several exceptions apply.[2] The heirs of Jewish Holocaust survivors contend that the expropriation exception of the FSIA provides jurisdiction in cases "where property has been taken in violation of international law."[3]

1. *See generally* United States Holocaust Memorial Museum, *Nuremberg Race Laws*, HOLOCAUST ENCYCLOPEDIA (Sept. 11, 2019), https://encyclopedia.ushmm.org/content/en/article/nuremberg-laws.

2. *See* Federal Republic of Germany v. Philipp, 141 S. Ct. 703, 709 (2021).

3. Foreign Sovereign Immunities Act of 1976 (FSIA), Pub. L. No. 94-583, 90 Stat. 2891. ("The FSIA grants foreign sovereign immunity from civil liability when foreign nations are sued in United States courts.") 28 U.S.C. § 1604 (2018). FSIA is subject to several exceptions, including the expropriation exception. 28 U.S.C. § 1605(a)(3) (2018).

However, the expropriation exception is limited by the domestic takings rule of international law, which decrees that the United States does not have jurisdiction over claims involving property taken by a nation from its own citizens.[4]

Herein lies the controversy. If Jews living in Germany during World War II are designated as German citizens, Nazi looted art claims will be barred from adjudication in a U.S. courtroom.[5] The heirs of Holocaust survivors argue that Jewish individuals geographically residing in Nazi Germany between 1933 and 1945 were not legally German citizens.[6] During that time, Jewish people living under Hitler's rule did not have equal rights or protection according to German law,[7] and should not be considered citizens based solely on their inability to claim another state as their own.

The recent Supreme Court holding in *Federal Republic of Germany v. Philipp* put a spotlight on this controversy.[8] In a unanimous decision, the Court in *Philipp* held that based on the domestic takings rule of international law, the FSIA expropriation exception would not establish jurisdiction for plaintiffs in cases of Nazi looted art where property was taken by Germany from German Jews.[9] The *Philipp* holding indicated that American courts had reached the limits of their jurisdictional pull to decide cases involving Nazi-looted art. This lack of jurisdiction

4. Philipp, 141 S. Ct. at 709.

5. Brief of the National Jewish Commission on Law and Public Affairs ("COLPA") and Seven National Orthodox Jewish Organizations Amici Curiae in Support of Respondents at 8, F.R.G. v. Philipp, 141 U.S. 703 (2021) (No. 19-1351), 2020 WL 6275392, at *8 [hereinafter COLPA Brief] ("Germany asserts at page 19 of its brief that the issue it has brought to this Court - whether property Germany took 'from its own national' is a violation of international law—is dispositive of this case because, it says, the 'individuals who owned these art dealerships were German nationals.' In footnote 7 the brief claims that the plaintiff-respondents have 'forfeited' the 'novel argument' that the owners of the *Welfenschatz* in June 1935 were no longer 'German nationals.'"). *See also* Cassirer v. Kingdom of Spain, 461 F. Supp. 2d 1157 (C.D. Cal. 2006).

6. Brief for Respondents Federal Republic of Germany v. Philipp, 141 U.S. 703 (2021) (No. 19-351), 2020 WL 6323715, at *37.

7. *See generally* United States Holocaust Memorial Museum, *Anti-Jewish Legislation in Prewar Germany*, HOLOCAUST ENCYCLOPEDIA, https://encyclopedia.ushmm.org/content/en/article/anti-jewish-legislation-in-prewar-germany?parent=en%2F11475 (last visited Jan. 9, 2022).

8. *See generally* Federal Republic of Germany v. Philipp, 141 S. Ct. 703 (2021).

9. *Id.* at 715.

emerged from a semantic technicality,[10] namely the fiction that Jews located in Germany between 1933 and 1945 were citizens in-fact of Germany.[11]

This argument fails when confronted with the historical facts that Jewish "Germans" were completely stripped of the rights and privileges of German citizenship as of 1935.[12] In cases involving Nazi looted art, designating Jewish Holocaust victims as citizens in-fact of Germany allows for the continued pillaging of Jewish heritage and culture.

A simple and expeditious solution to clarify this legal ambiguity would be an amendment to the FSIA, closing any loopholes that would allow Germany to avoid facing Nazi looted art claims brought by U.S.-citizens who are Jewish German heirs. An amendment to the FSIA expropriation exception for the taking of property that violates international law could define Jews living in Nazi controlled territories from 1933 through 1945 as "aliens" not "citizens" of their respective states.[13] This designation would eliminate Germany's argument that it was immune from such suits because of the domestic takings rule. Notably, Congress has made numerous efforts to support reparations to Jewish heirs, and legislation involving this issue has unified both sides of the aisle in support of justice.[14] Reparation and restitution of property taken from Holocaust-era Jews and their heirs is one of the few issues generating congressional bi-partisan agreement and support. [15]

The purpose of this Note is to present a plausible solution to the current controversy of whether Jews living in Nazi Germany were actual citizens of Germany during the reign of the Third Reich. If U.S. courts recognize Jews living in Nazi Germany as citizens, Germany will

10. *See generally id*. at 709.

11. COLPA Brief, *supra* note 5, at 8.

12. *See generally Nuremberg Race Laws, supra* note 1.

13. Brief for Respondents, *supra* note 6, at n.5 ("Jews may be deemed aliens of their respective countries during the Holocaust because they were not treated as citizens.").

14. *See generally* Conference on Jewish Material Claims Against Germany [Claims Conference] & World Jewish Restitution Org. [WJRO], *The Role of the United States in Pursuing Compensation for Holocaust Victims and Heirs, and the Historical Bases for U.S. Leadership*, (Sept. 23, 2020) [hereinafter Claims Conference & WJRO Memorandum].

15. JTA, *US Senate Passes Bill to Help Recover Nazi-Looted Art*, JERUSALEM POST (Dec. 11, 2016, 15:29), https://www.jpost.com/Diaspora/US-Senate-passes-bill-to-help-recover-Nazi-looted-art-475047 [hereinafter JTA].

have successfully blocked the heirs in *Philipp* from having their case heard in a U.S. court. Such a decision would be inconsistent with the United States' legislative approach to Holocaust reparations and property restitution.

Part I of this Note provides a succinct background on *Federal Republic of Germany v. Philipp.* Part II discusses the U.S. Supreme Court's decision in *Philipp* as well as the historical and procedural background of the *Welfenschatz* collection controversy. Part III explains the FSIA and the expropriation exception. Part IV considers the history of the U.S. legislative approach to reparations for Nazi looted art. Part V discusses the international consensus for the need to return looted art and cultural property to Jewish Holocaust survivors and their heirs. Finally, Part VI proposes a solution to this issue by amending the FSIA to include an exception to the expropriation exception. As a result, the international domestic takings rule would no longer provide Germany protection from Holocaust survivors' heirs takings claims brought in U.S. courts.

## I. BACKGROUND ON *FEDERAL REPUBLIC OF GERMANY V. PHILIPP*

In *Philipp*, the heirs of a Jewish art consortium sued Germany in D.C. District Court over a collection known as the *Welfenschatz*.[16] The collection consisted of an assortment of ecclesiastical medieval relics.[17] The heirs claim that their ancestors were persecuted Jews, coerced into selling the collection at one-third of its value; however, Germany claims the collection was sold for a reasonable amount based on the economy at the time.[18] The details surrounding the sale of the *Welfenschatz* are complex and date back to the 1920's.[19] If the *Philipp*

16. Philipp v. Federal Republic of Germany, 894 F.3d 406, 410-14 (D.C. Cir. 2018), *vacated and remanded*, 141 S. Ct. 703 (2021).

17. Henry Rome, *Were Jews Forced to Sell Medieval Treasure to Hermann Goering*?, JERUSALEM POST (Jan. 12, 2014, 9:52 PM), https://www.jpost.com/Jewish-World/Jewish-Features/Were-Jews-forced-to-sell-medieval-treasure-to-Hermann-Goering-337941.

18. Philipp, 894 F.3d at 409 ("[T]he Consortium sold the Welfenschatz to the Nazi-controlled State of Prussia for 4.25 million Reichsmarks (the German currency at the time) . . . barely 35% of its actual value.").

19. Recommendation of the Advisory Commission for the Return of Nazi-Confiscated Cultural Artefacts, at 1 (Feb. 20, 2014) https://www.beratende-kommission.de/Content/06_Kommission/EN/Empfehlungen/14-03-20-

case ever makes it to trial in a U.S. court, the facts may reveal that the sale of the *Welfenschatz* was transacted fairly. Nevertheless, a significant number of historical documents contradict Germany's position.[20] Germany should not be permitted to evade fair and unbiased adjudication of legitimate takings claims by using creative legal gymnastics.

The Supreme Court has addressed complicated issues involving citizenship as far back as 1831, when it chose to designate Native American tribes as "domestic dependent nations."[21] At that time, the Cherokee Nation sought to enjoin and restrain the state of Georgia from executing state laws the Cherokee Nation alleged "annihilate[d] the Cherokees as a political society . . . ."[22] As such, the Cherokee Nation declared itself a foreign state that did not owe allegiance to the U.S. or any of its states.[23] Although the Court denied the motion for an injunction against Georgia,[24] Chief Justice Marshall explained the relationship between Native American people and the United States as most similar to a "ward [and] his guardian."[25] Ultimately, the Court created a unique citizenship status for Native Americans by defining them as members of a "domestic dependent nation."[26] Essentially, Native Americans were considered "non-citizen Indians" until the Citizenship Act of 1924, in which all Native Americans were granted U.S. citizenship.[27]

Although the struggles of Native Americans and Jewish Holocaust victims differ in significant ways, the complexity regarding how to define their citizenship within a hostile nation is analogous. Ironically, Hitler was fascinated by the United States' application of policy

Recommendation-Advisory-Commission-Guelph-Treasure.pdf?__blob=publicationFile&v=7 [hereinafter Limbach Commission's Recommendation]. *See infra* Part II.C.i.

20. *See generally* Brief for Respondents, *supra* note 6, at 20.

21. Cherokee Nation v. Georgia., 30 U.S. 1, 17 (1831).

22. *Id.* at 15.

23. *Id*. at 2, 16.

24. *Id.* at 20.

25. *Id*. at 17.

26. *Id.*

27. Robert Longley, *Indian Citizenship Act: Granted Citizenship but Not Voting Rights*, THOUGHTCO. (July 3, 2019), https://www.thoughtco.com/indian-citizenship-act-4690867.

involving Native Americans.[28] The United States' approach to isolate and disempower Native Americans within its territory provided Hitler with a "How To" guide for the subjugation of a race.[29] Hitler envisaged America's successful expansion westward as a model for the German Empire's great expansion eastward.[30] Hitler and Nazi leaders even referred to "Jews, Poles, and Ukrainians as 'Indians.'"[31] Under Hitler's direction, Nazi scholars specifically examined U.S. Native American policies with an interest in implementing a similar approach to Jews living in Third Reich[32] territories.[33] In light of this tragic history, U.S. courts and Congress carry an additional layer of responsibility to adequately respond to cases where Jewish descendants are blocked from seeking restitution of property solely based on the manipulation of U.S. jurisdictional standards that favor the Nazi agenda.

In *Cherokee Nation v. State of Georgia*, the Supreme Court recognized that a unique approach to "citizenship" was necessary. As a result, the Court articulated a special designation for Native American tribes as "domestic dependent nations,"[34] and similar logic should be applied to Jews living in Nazi Germany. The U.S. Congress could carry the burden of this designation with an amendment to the FSIA expropriation exception for the taking of property that violates international law. Such an amendment could define Jews living in Germany from 1933-1945 as "aliens" not "citizens," thus blocking the domestic takings rule from offering Germany immunity.

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28. Robert J. Miller, *Nazi Germany's Race Laws, the United States, and American Indians,* 94 ST. JOHN'S L. REV. 751, 756 (2020) (discussing Nazi Germany's infatuation with the United States' history of land expropriation, segregation, and oppression of American Indians).

29. *Id.* at 768.

30. *Id.* at 766-67.

31. *Id.* at 756.

32. *See generally* United States Holocaust Memorial Museum, *Third Reich*, HOLOCAUST ENCYCLOPEDIA, https://encyclopedia.ushmm.org/content/en/article/third-reich (last visited Mar. 23, 2022). Hitler's government was often referred to as the Third Reich. The term was coined by writer-intellectual Arthur Moeller van den Bruck in his publication *Das Dritte Reich*. Moeller idealized an "anti-liberal, anti-Marxist Germanic Empire in which all social class[es] . . . would be reconciled in national unity under a charismatic 'Führer' (leader)." *Id*.

33. Miller, *supra* note 28, at 753-56.

34. Cherokee Nation v. Georgia, 30 U.S. 1, 10 (1831).

## II. THE UNITED STATES SUPREME COURT'S UNANIMOUS DECISION IN *PHILIPP*

The appellants in *Philipp* raised three critical questions: (1) Does the expropriation exception apply when a foreign state is accused of taking property from its own nationals? (2) Even if a U.S. court has jurisdiction, does "international comity" prohibit federal courts from resolving an art and cultural property claim? (3) Can the heir's lawsuit proceed if their ancestors were not German nationals at the time of the sale?[35] The Supreme Court only addressed the first question, whether the expropriation exception for domestic takings applied in *Philipp* because Germany "took" the property from its own nationals.[36] This article will also focus on that singular question.

On February 3, 2021, the Court unanimously held in favor of Germany when they vacated and remanded the lower court's decision.[37] Chief Justice Roberts delivered the opinion of the Court explaining, "The domestic takings rule has deep roots not only in international law, but also in United States foreign policy."[38] Germany is a strong ally of the U.S. and as such, the Court clearly recognized a national interest in maintaining friendly international relations with Germany. The Court also reasoned there were related provisions of the FSIA, in accordance with Germany's position. [39] The Court explained that where Congress intended to address human rights violations in the FSIA statute, it did so explicitly.[40] In support of this argument, Justice Roberts pointed to the noncommercial tort exception in the FISA.[41] This exception grants jurisdiction over claims "'in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property,' but only where the relevant conduct 'occurr[ed] in the United States.'" [42] The holding in *Philipp* also concluded that deciding in favor

35. Philipp v. Federal Republic of Germany, 894 F.3d at 406-10 (D.C. Cir. 2018) *vacated and remanded*, 141 S. Ct. 703 (2021).

36. *Id. at 410-11.*

37. *Id.* at 418.

38. Federal Republic of Germany v. Philipp, 141 S. Ct. 703, 710 (2021).

39. Philipp, 894 F.3d at 415.

40. *Id.*

41. Federal Republic of Germany v. Philipp, 141 S. Ct. 703, 714 (2021).

42. *Id.* (citing 28 U.S.C. §1605(a)(5)).

of the heirs, could "initiate reciprocal action" by Germany.[43] The Court theorized that Germany might choose to adjudicate claims against the U.S. for human rights violations perpetrated years ago on American soil.[44]

The Solicitor General filed an amicus curaie brief [45] in *Philipp*, on behalf of the Department of State and Department of Justice, in support of certiorari.[46] The purpose of this memorandum was to address specific issues arising from adjudicating a case involving the domestic takings rule.[47] Although an amicus brief does not advocate for either party, the Solicitor General's memorandum favored Germany's position that *Philipp* highlighted a controversy involving a nation taking property from its own citizens.[48] Thus, the domestic takings rule should apply.[49] This amicus brief's position was a significant departure from the United States' historically steadfast support of Jewish heirs seeking restitution of their ancestor's Nazi-looted art. In a September 2020 memorandum, the Conference on *Material Claims Against Germany* addressed America's shift of position.[50]

For eight decades, the U.S. has strongly advocated on behalf of Nazi victims and has shown an unwavering commitment to accurately

43. *Id.*

44. *Id.*

45. Joseph D. Kearney & Thomas W. Merrill (FNdd1), *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 745 (2000) (Some critics of the Solicitor General's amicus brief in *Philipp*, have argued that the brief should not have taken a contradictory approach to legislative history in support of Jewish Holocaust survivors. However, Kearney and Merrill present a more nuanced explanation of the purpose of an amicus brief in deciding complex controversies. "Attitudes within the legal community about the utility and impact of amicus briefs vary widely. Perhaps the most common reaction among lawyers and judges is moderately supportive. Amicus briefs, it is said, can provide valuable assistance to the Court in its deliberations. For example, they can present an argument or cite authorities not found in the briefs of the parties, and these materials can occasionally play a critical role in the Court's rationale for a decision. Alternatively, these briefs can provide important technical or background information which the parties have not supplied." ).

46. Brief for the U.S. as Amicus Curiae at I, F.R.G. v. Philipp,141 U.S. 703 (2020) (Nos. 19-351, 19-520) (Mem).

47. *See generally id*. at 1-5.

48. Claims Conference & WJRO Memorandum, *supra* note 14, at 5.

49. *Id.*

50. *Id.* at 33.

presenting the facts of the Holocaust. The Solicitor General's September 11, 2020, amicus brief in the *Philipp* matter is not reflective of the U.S. position toward Holocaust compensation and Holocaust history more generally. By reiterating that German Jews were "nationals" of Germany and that their disputes with the Nazis were "domestic" matters, the brief unfortunately threatens to give momentum to those who would distort the Holocaust.[51]

Nevertheless, the Supreme Court reasoned that: "The [*Welfenschatz*] heirs offer several counterarguments, but none can overcome the text, context, and history of the expropriation exception."[52] The Court continued, "We hold that the phrase 'rights in property taken in violation of international law,' as used in the FSIA's expropriation exception, refers to violations of the international law of expropriation and thereby incorporates the domestic takings rule."[53]

The Supreme Court articulated that "On remand, the District Court is to consider whether the sale of the *Welfenschatz* is not subject to the domestic takings rule because the consortium members were not German nationals at the time of the transaction, including whether this argument was adequately preserved in the District Court."[54] Thus, the D.C. court must consider Germany's claim that the heirs forfeited this argument.[55]

In the 2006 Nazi looted art case, *Cassirer v. Kingdom of Spain*, the California district court held that a Jew living in Nazi Germany should not be considered a German citizen.[56] In *Cassirer*, Germany was not granted immunity via the domestic takings rule expropriation

51. *Id.* at 33-34.

52. Federal Republic of Germany v. Philipp, 141 S. Ct. *703,* 714 (2021).

53. *Id. at* 715.

54. Philipp v. Federal Republic of Germany, 839 F. App'x 574, 574 (Mem) (D.C. Cir. 2021).

55. COLPA Brief, *supra* note 5, at 19 (The plaintiffs in Philipp contest Germany's assertion that the heirs' forfeited the argument that the Welfenschatz owners were not German citizens. "None of the record citations specified in Germany's brief supports [the] assertion that this legal argument—which we make in our amicus brief regardless of the legal contentions made by the plaintiff-respondents—has been 'forfeited' by the plaintiffs or waived in any way.").

56. Cassirer v. Kingdom of Spain, 461 F. Supp. 2d 1157, 1165-66 (C.D. Cal. 2006).

exception.[57] Although the decision is not binding authority, it indicates that the issue of Jewish citizenship in Nazi Germany will persist in similar looted art cases. An estimated 100,000 pieces of art and cultural property pillaged by the Third Reich remain missing.[58] Cases involving Nazi looted art will continue to knock on district courthouse doors for decades to come. Rather than place the burden of interpreting the complexities of the FSIA expropriation exception on district courts, the legislature should amend the language of the FSIA, allowing expediated legal proceedings surrounding looted art controversies. If Congress creates an express exception that the FISA domestic takings rule does not apply to art and cultural property claims involving Jewish German nationals during the Nazi-era, it will eliminate confusion as to whether it is proper for a U.S. court to adjudicate such claims.

The Supreme Court's decision in *Philipp* did not provide a clear answer to the question of whether German Jews living in Nazi Germany were legal citizens. Accordingly, the D.C. District Court is now tasked with deciding if Jews living in Germany between 1933-1945, were actually citizens of Germany. If the district court decides the *Philipp* ancestors were not citizens of Nazi Germany at the time of the *Welfenschatz* taking, the case against Germany will finally proceed to trial. Conversely, if after hearing the facts in *Philipp*, the D.C. District Court finds that Jews living in Nazi Germany were legal German citizens, the first brick in a legal wall blocking future Nazi looted art claims will be firmly placed in support of Germany's position.[59]

57. *Id.*

58. *See infra* Section II.D.i.

59. The question of whether German Jews in Nazi Germany were legally "aliens" or "citizens," is a topic that Germany would like to avoid. *See* Philipp v. Stiftung Preussischer Kulturbesitz, Civil Action No. 15-00266 (CKK), 2021 U.S. Dist. LEXIS 138228, at *19-23 (D.D.C. July 26, 2021). After the Supreme Court decision in Philipp, in July of 2021, the *Welfenschatz* heirs filed a Motion for Leave to Amend their original complaint against Germany to include a new section titled, "The Nazis and the Question of German Nationality." *Id*. at 7. The *Welfenschatz* heirs alleged that the purpose of adding "'allegations about Nazi German's policies with regard to nationality, and specific allegations about the nationality of the specific victims in this case' [was] based on the 'recent change in governing law.'" *Id*. Germany argued vigorously against allowing this amendment by contradicting the Philipp heirs' assertion that governing law regarding German Jewish nationality had in-fact changed. *Id*. at 9-10. Ultimately, the District Court denied the Philipp heirs' motion for Leave to Amend the original complaint because on remand, the Supreme Court mandated that the District Court consider the question of whether the

Based on a legacy of statutes spanning more than forty years, U.S. legislative intent unified in effort to return art, culture, and dignity to persecuted Jews that suffered the atrocities and depravations of the Holocaust. Therefore, it is unethical to designate Jews living in Germany during the decimation of their culture as citizens for the sake of barring adjudication of legitimate property claims. Such a designation would benefit the legacy of the Nazis and U.S. legislative history contradicts this approach.

### *A. The Legal Definition of Nazi-Looted Art*

Nazi-looted art covers a broad category of property confiscated by the Third Reich between January 30, 1933, and May 8, 1945.[60] After World War II, the Allies [61] agreed upon a body of laws to govern defeated Germany, referred to as the Military Government Laws ("MGL").[62] Notably, the MGL included a section titled "Restitution of Identifiable Property."[63] In an effort to clarify what constituted an unlawful taking of art or cultural property, the Allies enacted MGL No. 59.[64] Property is considered "confiscated" if it was "(1) [not] acquired in good faith, under duress, or otherwise an unlawful taking; (2) seized

consortium members were German citizens at the time of the taking *and* "whether this argument was adequately preserved in the District Court." *Id*. at 9, 25.

60. Brief for Respondents, *supra* note 6, at 20.

61. "In World War II the chief Allied powers were Great Britain, France (except during the German occupation, 1940–44), the Soviet Union (after its entry in June 1941), the United States (after its entry on December 8, 1941), and China. More generally, the Allies included all the wartime members of the United Nations, the signatories to the Declaration of the United Nations. The original signers of January 1, 1942, were Australia, Belgium, Canada, China, Costa Rica, Cuba, Czechoslovakia, the Dominican Republic, El Salvador, Greece, Guatemala, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Nicaragua, Norway, Panama, Poland, South Africa, the Soviet Union, the United Kingdom, the United States, and Yugoslavia. Subsequent wartime signers were (in chronological order) Mexico, the Philippines, Ethiopia, Iraq, Brazil, Bolivia, Iran, Colombia, Liberia, France, Ecuador, Peru, Chile, Paraguay, Venezuela, Uruguay, Turkey, Egypt, Syria, and Lebanon." The Editors of Encyclopedia, *Allied* Powers, ENCYC. BRITANNICA, https://www.britannica.com/topic/Allied-Powers-international-alliance (last visited Mar. 31, 2022).

62. Brief for Respondents, *supra* note 6, at 20.

63. *Id.*

64. *Id*.

by government act or in abuse of a government act; or (3) seized as a result of measures taken by the Nazis."[65] Article 3 establishes a presumption in favor of claimants of transactions between January 30, 1933, and May 8, 1954.[66] Article 3 further reads:

> Any transfer or relinquishment of property made during a period of persecution by any person who was directly exposed to persecutory measures on any of the grounds set forth in Article 1:
>
> Any transfer or relinquishment of property made by a person who belonged to a class of persons which on any of the grounds set forth in Article 1 was to be eliminated in its entirety from the cultural and economic life of Germany by measures taken by the State or the [Nazi Party].[67]

In harmony with MGL No. 59, Congress enacted the FSIA.[68] Since 1976, all suits brought in U.S. courts addressing the issue of Nazi looted art opined that "the organized plunder of art—including forced 'sales'—by Nazis, their puppets, and their allies meet[s] the threshold [of the] takings requirement."[69] Thus, if the plaintiffs in *Philipp* produced evidence that the Jewish art consortium was coerced into selling the *Welfenschatz* collection for one-third of its value, they will satisfy the definition of a taking under the FSIA.

### *B. Jewish German Citizenship & Genocide*

In *Philipp*, Germany argues that Holocaust-era Jews were German citizens.[70] This is significant because even if the *Philipp* heirs could prove the sale of the *Welfenschatz* was actually an unlawful taking, their case could not make it to trial in a U.S. courtroom. A citizen "[f]or purposes of international law, [is an] individual [who] has the nationality of a state that confers it, but other states need not accept that nationality when it is not based on a genuine link between the state and

65. *Id*.
66. *Id*.
67. *Id*.
68. *See infra* Section III.A.
69. Brief for Respondents, supra note 6, at 12; *see also* Federal Republic of Germany v. Philipp, 141 S. Ct. 703, 709 (2021).
70. COPLA Brief, *supra* note 5.

the individual."[71] More generally, a "citizen" is defined as "[s]omeone who, by either birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections; a member of the civil state, entitled to all its privileges."[72] Additionally, "[a] person may . . . become stateless if the state of which he had been a national deprives him of nationality."[73] Based on this language, it is a misnomer to define a Jew living in Nazi Germany as a "citizen" by any definition.

Beginning in 1933, Nazis started the process of segregating Jewish people from the rest of German society.[74] By 1935, the plan to decimate the Jewish culture was in full swing.[75] Among a slew of deprivations, Jews were barred from any legal profession, teaching at universities, or maintaining ownership of their businesses.[76] On September 15, 1935, Hitler and Nazi officials signed the Nuremberg Laws, memorializing the lawful persecution of Jews.[77] These laws were the foundation for stripping Jews of their German citizenship. The Nuremberg Laws amended the Nationality Law of the German Empire and States of 1913 ("Nationality Law"), which previously specified that citizenship from a German state or via the Reich government established German citizenship.[78] In 1935, the Nazi Third Reich government amended the

71. RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 211 (AM. L. INST. 1987). Additionally, comment *d* supports the argument that "*Involuntary Nationality"* should not be forced on Jews essentially held against their will in Germany. *Id*. at (d). In relevant part, the text states: "Nor is another state required to recognize nationality which the individual has renounced. For a state to impose its nationality on a person against his will, or to insist on a nationality that the individual has renounced, may violate international law." *Id*.

72. *Citizen*, BLACK'S LAW DICTIONARY (11th ed. 2019).

73. RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 211.

74. *See Anti-Jewish Legislation in Prewar Germany*, *supra* note 7.

75. *See generally id*. (Beginning in April 1993, several Jewish students were restricted from German schools. Moreover, Jewish participation in the medical and legal professions was reduced. By 1935, The Nuremberg Laws allowed for the immediate segregation of Jewish individuals.)

76. *Id.*

77. *Nuremberg Race Laws*, *supra* note 1.

78. *See* Nationality Act, July 22,1913, REICH L. GAZETTE I at 583, last amended by Article 3 of the First Act to Amend the Federal Act on Registration and other legislation of 11 October 2016, FEDERAL L. GAZETTE I at 2218 (Ger.), https://www.refworld.org/docid/4e64c7ce2.html [hereinafter Nationality Act].

German Nationality Law to abolish individual state citizenship in favor of a singular Reich citizenship. This allocation gave Reich authorities absolute power to grant or withdraw German nationality. The second of the Nuremburg Laws, the Reich Citizenship Law of 1935, established a new designation for Jews as "subjects" of the state.[79] Although the Nuremberg Laws only specified Jewish people as racial aliens, eventually Germany used these race laws in their campaign to persecute Roma, Sinti (Gypsies) and Black people.[80] Finally, on November 25, 1941, the Eleventh Decree to the Law on the Citizenship of the Reich ("Eleventh Decree") removed any remaining vestiges of Jew's rights as citizens.[81] This final roadblock to Jewish German citizenship even revoked the passports of German Jews living in other countries.[82] Additionally, by 1941, many nations dependent on Germany as well as German allies enacted their own versions of the Nuremburg race laws.[83]

After the collapse of the Nazi government in 1945, the Allied Control Council revoked the 1934 Nazi amendments to German citizenship, the 1935 Nuremberg Laws, and the Eleventh Decree.[84] The 1913 German Nationality Law remained in place until the 1999

79. *Nuremberg Race Laws*, *supra* note 1.

80. *Id.* Initially, the language of the Nuremberg laws focused on Jewish people. However, the Nazi government eventually clarified that the Nuremberg Laws would be extended to include Roma (Gypsies) Black people, and their descendants. People from these ethnic groups were not permitted to marry or have intercourse with a person of "German or related blood," nor could they be considered full German citizens. United States Holocaust Memorial Museum, *Did the Nuremberg Laws Apply to Other Groups?,* HOLOCAUST ENCYCLOPEDIA, https://encyclopedia.ushmm.org/content/en/article/the-nuremberg-race-laws#did-the-nuremberg-laws-apply-to-other-groups-5 (last visited Apr. 3, 2022).

81. *Anne Frank*, U.S. HOLOCAUST MEM'L MUSEUM (Mar. 13, 2022), https://www.ushmm.org/m/pdfs/USHMM-Anne-Frank-Timeline.pdf.

82. Nationality Act, *supra* note 78 (highlighting the procedure for acquisition of German citizenship abroad). *See also Holocaust Survivors and Victims Database: Revoked German Citizenship and Property Seizures 1933-1945*, U.S. HOLOCAUST MEM'L MUSEUM (Mar. 13, 2022), https://www.ushmm.org/online/hsv/source_view.php?SourceId=49495.

83. *Nuremberg Race Laws*, *supra* note 1. That list included Italy, Hungary, Romania, Slovakia, Bulgaria, Vichy France, and Croatia.

84. Allied Control Council Law No. 1, Repealing Nazi Laws, art. I, §§1(k), (l), (s), (v), Aug. 30, 1945.

reforms.[85] The Allies MGL No. 59, Paragraph 3, refers to Jewish Germans being "a class of persons" that while physically located in Germany were not treated as equal citizens during Hitler's government.[86]

U.S. courts have strict jurisdictional limitations specifying when they can adjudicate controversies involving a foreign state. The heirs in *Phillip*—U.S. Citizens—are relying on the expropriation exception to the FISA to satisfy jurisdictional requirements.[87] A foreign sovereign is not immune from U.S. jurisdiction in cases where property has been "taken in violation of international law."[88] Under 28 U.S.C. § 1605(a)(3) the Legislature specified that controversies involving Nazi looted art, taken between January 30, 1933 and May 8, 1945, are subject to jurisdiction under FISA.[89] The *Welfenschatz* heirs claimed the FSIA's expropriation exception applied to their case because Nazis perpetrated genocide against Jews, and taking cultural property was an element of the Nazi plan to eradicate Jewish lives and culture.[90] The D.C. District Court agreed with this argument.[91] The judge rejected Germany's assertion of immunity from the suit under American law.[92] Germany responded by filing an interlocutory appeal[93] and moved for

85. Matthias Bös, *The Legal Construction of Membership: Nationality Law in Germany and the United States* 9 (Univ. of Heidelberg, Program for the Study of Germany and Europe, Working Paper, Series No. 00.5, 2000). aei.pitt.edu/63702/ (citing Fahrmeir, Andreas, 1999: Unwandelbares Erbe der Vergangenheit? Die Staatsangehörigkeit in Deutschland und ihre Geschichte, in Frankfurter Rundschau 9. 2. 1999.).

86. *See generally* Brief for Respondents, *supra* note 6, at 20-21.

87. *Id*. *See also* Philipp v. Federal Republic of Germany, 894 F.3d 406, 410 (D.C. Cir. 2018), *vacated and remanded*, 141 S. Ct. 703 (2021).

88. 28 U.S.C. § 1605(a)(3).

89. Brief for Respondents, *supra* note 6, at 14.

90. Philipp v. Federal Republic of Germany, 894 F.3d 406, 410-11 (D.C. Cir. 2018), *vacated and remanded*, 141 S. Ct. 703 (2021).

91. *Id.* at *414.*

92. *Id.*

93. Interlocutory Appeals, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Some interlocutory appeals involve legal points necessary to the determination of the case, while others involve collateral orders that are wholly separate from the merits of the action."); see also Interlocutory Appeals Act, 28 USCA § 1292(b) (1847) (discussing the court of appeals jurisdiction to hear interlocutory appeals).

a stay of further proceedings.[94] Germany did not address whether the Holocaust was an act of genocide.[95] Instead, they focused on the domestic takings rule and argued that German citizens owned the *Welfenschatz* collection, therefore, the government's taking of property of its own citizens did not violate international law per the domestic takings rule.[96] Germany's attorneys diverted attention from the issue of genocide by arguing that coercing the sale of art does not kill anyone; therefore, looting art is not an act of genocide.[97] However, in July 2018, a panel of three experienced appellate judges summarily disagreed with Germany's argument.[98] Their opinion reasoned that, although a foreign state's taking of its citizens' property does not violate international takings law, the foreign state can still be subject to a lawsuit in a U.S. court if the taking was an act of genocide.[99] According to the opinion of the U.S. Court of Appeals for the D.C. Circuit, "'[g]enocide perpetrated by a state,' even 'against its own nationals[,] . . . is a violation of international law.'"[100]

Furthermore, the Nazi campaign to eradicate Jewish life and culture clearly fit the Genocide Convention definition of the extermination of a race, which was adopted by the United Nations.[101] Genocide is defined 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.'"[102] The appellate court did not address whether the *Welfenschatz* owners were actually German

94. *See generally* Philipp*,* 894 F.3d at 410-14.

95. *Id*.

96. *Id*. at 411. *See also* Nathan Lewin, German Jews 'sold' Silver to the Nazis. Why Does the U.S. Want Germany to Keep it?, THE WASH. POST (June 19, 2020), https://www.washingtonpost.com/outlook/2020/06/19/nazi-welfenschatz-guelph-treasure

97. Philipp v. Federal Republic of Germany, 894 F.3d 406, 410-11 (D.C. Cir. 2018), vacated and remanded, 141 S. Ct. 703 (2021).

98. Lewin, *supra* note 96.

99. Philipp, 894 F.3d at 411.

100. *Id*. (quoting Simon v. Republic of Hungary, 812 F.3d 127, 145 (D.C. Cir. 2016), *abrogated by* Federal Republic of Germany v. Philipp, 141 S. Ct. 703 (2021)).

101. *Id.* at 410-14. The Genocide Convention was adopted by the United Nations.

102. *Id.* at 411 (quoting the Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948, 78 U.N.T.S. 277.)

citizens because Germany had "outlawed" Jews by the time of the alleged sale of the collection.[103] Instead the court's opinion denied Germany's immunity argument agreeing with the *Welfenschatz* heirs that looting art was part and parcel of the genocide of Jews in World War II.[104] Germany appealed to the Supreme Court.[105]

### *C. History of Possession of the Welfenschatz Collection*

The *Welfenschatz*, also known as the Guelph Treasure, is a collection of ecclesiastical art made of gold (some documents also describe it as silver) dating back to the 17th Century.[106] The *Welfenschatz* was housed in the Brunswick Cathedral and originally owned by the Princely House of *Braunschweig-Lüneburg*.[107] In the 1920s, the Princely House attempted to sell the collection with an estimated price varying between 6 million and 42 million Reich marks.[108] On October 5, 1929, prior to the world economic crisis, a consortium of three authorized Jewish art dealers[109] purchased the *Welfenschatz*.[110] The proprietors based in Frankfurt purchased the collection for 7.5 million Reich marks. At the time of the original purchase, the collection consisted of eighty-two individual items.[111] The consortium toured the collection around the U.S. and Europe, eventually selling approximately half of the relics in the collection for 2.7 million Reich marks to various private collectors and art dealers.[112]

In 1934, Friedrich Krebs (mayor of Frankfurt from 1933 to 1945) wrote a letter to Hitler regarding the *Welfenschatz* collection: "according to expert judgment, the purchase is possible at around 1/3 of its earlier value . . . I therefore request that you, as *Fuhrer* of the

103. Lewin, *supra* note 96.

104. *Philipp,* 894 F.3d at 413-14.

105. *Id*. at 410.

106. Lewin, *supra* note 96. *See also* Limbach Commission's Recommendation, *supra* note 19, at 1.

107. Limbach Commission's Recommendation, *supra* note 19, at 1.

108. *Id.*

109. *Id.* The Jewish art dealers were named J.S. Golschmidt, I. Rosenbaum, and Z.M. Hackenbroch.

110. *Id*.

111. *Id.*

112. *Id*.

German people, create the legal and financial preconditions for the return of the *Welfenschatz*."[113] Krebs, a zealous anti-Semite,[114] further wrote, "To restore this honor in the area of the arts, I would regard the retrieval and final purchase of these irreplaceable medieval treasures . . . as a decisive step."[115]

According to the response from Hitler's office, there were not sufficient funds to purchase the collection at that time.[116] Yet, a little over a month later, negotiations between the Jewish art dealers and the Prussian government began.[117] In early 1933, Hitler took control of Prussia and appointed Hermann Goering as Premier.[118] Hitler issued a decree in January of 1934, eradicating German political units; thus absorbing Prussia into Germany.[119] During this time, the Third Reich was fervently pursuing an anti-Semitic campaign.

Additionally, in 1934, the Dresdner Bank (linked to funding the Jewish death-camp, Auschwitz)[120] presented themselves as a buyer and expressed interest in purchasing the collection.[121] Unbeknownst to the consortium, the Dresdner bank was surreptitiously acting on behalf of the State of Prussia.[122] For purposes of considering a domestic takings exception to FISA, it is worth noting that at the time of the alleged coerced sale of the *Welfenschatz*, the Dresdner Bank was located in

113. Brief in Opposition to Petition for Writ of Certiorari at 31-33, Federal Republic of Germany v. Philipp, (No. 19-351), 2019 WL 5391187, at *6 U.S. Supp. App. (2019).

114. *See generally id.* at 5.

115. Rome, *supra* note 117.

116. *Id*.

117. *Id*.

118. PRUSSIA: HISTORY, THE COLUM. ELEC. ENCYCLOPEDIA (6th ed. Colum. Univ. Press 2012), https://www.infoplease.com/encyclopedia/places/north-europe/germany/prussia/history.

119. *Id*.

120. John Schmid, *Deutsche Bank Linked to Auschwitz Funding*, N.Y. TIMES (Feb. 5, 1999), https://www.nytimes.com/1999/02/05/news/deutsche-bank-linked-to-auschwitz-funding.html ("The newly unearthed documents could put the bank under renewed pressure to settle outstanding class-action lawsuits filed by concentration camp survivors in U.S. courts. In the $18 billion actions, which also name Dresdner Bank AG, the survivors contend that the two German banks profited from gold and property looted from Holocaust victims.").

121. Limbach Commission's Recommendation, *supra* note 19, at 1.

122. *Id.*

Amsterdam, and not Germany.[123] If the sale of the collection was effectuated by a Dutch bank, there may be a plausible argument that this coerced sale was an expropriation made by the Netherlands on behalf of Germany.

The consortium allegedly agreed to sell the collection to Dresdner Bank for 4.25 million Reich marks on June 14, 1935.[124] Five months after Prussia "purchased" the *Welfenschatz*, Hermann Goering gifted the collection to Hitler.[125] These relics are now considered a German national treasure and remain on display in a Berlin museum.[126] The collection is managed by the Stiftung Preussischer Kulturbesitz (SPK) for the Federal Republic of Germany.[127]

### *D. Procedural History of Philipp v. Federal Republic of Germany*

#### *1. The Limbach Commission*

The heirs initially attempted to obtain reparations for their relative's property under Germany's Advisory Commission on the Return of Cultural Property Seized as a Result of Nazi Persecution, also known as the Limbach Commission.[128] Nazi's plundered an estimated 600,000 artworks from European Jews during World War II.[129] Approximately 100,000 pieces of looted art remain missing.[130] Over the last twenty years, Germany has returned 16,000 art works, books and

123. *Id*.

124. *Id*.

125. Rome, *supra* note 17.

126. Lewin, *supra* note 96.

127. Limbach Commission's Recommendation, *supra* note 19, at 2. (The Stiftung Preussischer Kulturbesitz is also knows as The Prussian Cultural Heritage Foundation.)

128. *See id*. (Excerpt referencing why the Commission began to be called the Limbach Commission. "The Advisory Commission for the return of Nazi-confiscated cultural artefacts, especially from Jewish possession, stated its position on the 'Welfenschatz' case today under the chairmanship of Prof. Dr. Limbach.").

129. U.S. Dep't of State, Office of the Special Envoy for Holocuast Issues Bureau of European and Eurasian Affairs, Justice for Uncompensated Survivors Today (JUST) Act Report, S. Rep. No. 115-447, at 3, 74 (Mar. 2020), https://www.state.gov/wp-content/uploads/2020/02/JUST-Act5.pdf [hereinafter JUST Act Report].

130. *Id*. at 3.

objects to Jewish survivors and heirs, but thousands of lost art works are still missing.[131] The German government established the Limbach Commission in 2003 to facilitate mediation for disputes involving Nazi-looted art.[132] As of March 2020, the Commission recommended the return of (or compensation for) looted property in only sixteen claimants' cases.[133] The Commission's recommendations are based on the Washington Principles[134] of mutual compromise agreements and compensation.[135]

Commission members of up to ten individuals serve on a voluntary basis and are appointed by the Federal Government Commissioner for Culture and Media in Germany.[136] Currently, the members come from backgrounds in law, art history, philosophy, and higher education.[137] The President of the World Jewish Congress (WJC) found issue with the lack of Jewish members on the advisory commission, which was the catalyst for the Commissioner of the Limbach Commission to add two Jewish members in 2016.[138] However, these Jewish members were not yet appointed at the time of the Limbach Commission's decision in the *Welfenschatz* claim.[139] The WJC President also criticized the Limbach Commission for a "lack of transparency" related to its decision making process.[140]

131. *Id*. at 73.

132. Michael Franz, *The Limbach Commission: What is it and Will Reforms Make a Difference?* APOLLO THE INT'L ART MAG. (Sept. 26, 2016), https://www.apollo-magazine.com/the-limbach-commission-what-is-it-and-will-reforms-make-a-difference/.

133. JUST Act Report*, supra* note 129, at 75.

134. *See infra* Part V, and note 232.

135. Franz, *supra* note 132.

136. *Advisory Commission*, ADVISORY COMMISSION ON THE RETURN OF CULTURAL PROPERTY SEIZED AS A RESULT OF NAZI PERSECUTION, ESPECIALLY JEWISH PROPERTY (Jan. 14, 2022), www.beratende-kommission.de/Webs_BK/DE/Mitglieder/Index.html;jsessionid=86E7B68F4DB5DD955DABE3E57DD2776D.m0.

137. Franz, *supra* note 132.

138. JUST Act Report, *supra* note 129, at 75.

139. *See id.; see also* Limbach Commission's Recommendation, *supra* note 19, at 1 (detailing the date of the Limbach Commission's Recommendation as March 3, 2014, which was two years before the appointment of the two Jewish members to the commission).

140. JUST ACT REPORT, *supra* note 129, at 75.

Normally, the Commission is only consulted in especially complex or difficult cases.[141] The role of the Commission is to mediate between former owners or heirs of cultural property and the institutions in current possession of the property.[142] Although the Commission's recommendations are not legally binding, they have been accepted by numerous museums and public collections.[143]

In 2008, the heirs of the art dealers demanded that the SPK return the forty-two remaining pieces of the *Welfenschatz*.[144] The SPK refused the heirs request.[145] The heirs claimed the Dresdner Bank and the Prussian state government pressured the Jewish art dealers to sell the collection by exploiting their difficult economic situation caused by the Nazi persecution of Jews.[146] The claimants viewed the sale of the collection as "a case of confiscation due to persecution."[147] They also claimed Prussian Prime Minister Goering, a fervent anti-Semite and notorious "art plunderer," was the puppet master behind this sale.[148] The purchase price of the collection was a mere 4.25 million Reich marks approximately 35% of its true value.[149] According to the Limbach Commission, experts estimated a purchase price for the 42 remaining pieces of the *Welfenschatz* would be between 6 to 7 million Reich marks at a minimum during 1935.[150] However, Germany argued that due to an economic downturn, the Jewish art consortium had to sell the collection for a reduced price and 4.25 million Reich marks was a fair price in light of the struggling economy.[151] In 2014, the Limbach Commission agreed with this assertion, and declared that the

141. Franz, *supra* note 132.
142. *Id.*
143. *Id.*
144. Limbach Commission's Recommendation, *supra* note 19, at 2.
145. *Id*.
146. *Id*.
147. *Id. See also* Philipp v. Federal Republic of Germany*,* 894 F.3d at 406, 409 (D.C. Cir. 2018), *vacated and remanded*, 141 S. Ct. 703 (2021).
148. Philipp, 894 F.3d at 406.
149. Limbach Commission's Recommendation, *supra* note 19, at 2.
150. *Id*.
151. *Id*.

consortium of Jewish art dealers voluntarily sold the *Welfenschatz* for a fair price based on the economy at the time.[152]

Generally, most people agree that it is an oxymoron to use the word "fair" in any context involving Jews and Nazis—especially in light of Hitler's personal interest in the destruction of the Jewish culture and art looting—but the Limbach Commission interpreted the transaction differently.[153] As of 2016, the *Welfenschatz* controversy is one of only two cases where the Limbach Commission rejected the claimants request for restitution and the case was brought before a court of law.[154]

*2. The Welfenschatz Controversy Enters a U.S. Courtroom*

After the heirs' unsuccessful attempts to obtain the *Welfenschatz* via the Limbach Commission, the heirs brought several common law property claims in the United States Court of Appeals for the District of Columbia Circuit against Germany and SPK (collectively "Germany"). Germany moved to dismiss, arguing that it was immune from suit under FSIA. The heirs in *Philipp* sought damages for the return of their property or the "loss" of their inheritance.[155] The heirs allege that their Jewish relatives were forced under duress to sell the *Welfenschatz* collection at one-third of its actual value to Prussia; they sued Germany for the return of their property or its value.[156]

There are two major points of contention in this case. First, was the *sale* of the *Welfenschatz* a case of Nazi-looted art or a fair-market sale of cultural property? Second, considering the domestic takings rule of international law, do U.S. federal courts have jurisdiction to adjudicate cases involving the heirs of art looted by Nazis from German Jews?

*E. United States Supreme Court Commentary on Philipp*

In *Philipp*, the Supreme Court held the U.S. did not have jurisdiction to decide whether Jewish art dealers were coerced into

152. *Id*. at 3.

153. *Id*.

154. *See generally id*. (showing the Limbach Commission rejected the claimants request for restitution in the Welfenschatz controversy.)

155. Philipp v. Federal Republic of Germany*,* 894 F.3d at 406, 410 (D.C. Cir. 2018), *vacated and remanded*, 141 S. Ct. 703 (2021).

156. *Id*.

selling the *Welfenschatz* based on the expropriation exception to the FSIA.[157] The Court explained that although the expropriation exception provides an opportunity for U.S. jurisdiction when the taking of property has been an act of genocide, "the expropriation exception is best read as referencing international law of expropriation rather than human rights."[158] The plaintiffs argued that "the forced sale of their ancestors' art constituted an act of genocide because the confiscation of property was one of the conditions the Third Reich inflicted on the Jewish population to bring about their destruction."[159] However, this argument did not overcome the Court's position on the question of whether the forced sale of art could be considered an act of genocide, and was therefore beyond the jurisdictional pull of the expropriation exception of the FSIA. Essentially, the Court reasoned that although Jewish human rights were clearly violated when the Nazis looted Jewish cultural property and art, the FSIA expropriation exception could not provide a jurisdictional "catch all" for an alleged coerced sale of property perpetrated by a nation on its own citizens.[160] Despite significant debate regarding the semantics involved with German Jewish citizenship during the reign of the Third Reich, the Supreme Court chose not to weigh-in on this controversy. [161]

The Court's commentary in *Philipp* relied squarely on the holding in *Altmann v. Republic of Austria* stating, "Based on this historical and legal background, courts arrived at a "consensus" that the expropriation exception's "reference to 'violation of international law' does not cover expropriations of property belonging to a country's own nationals."[162] "Germany's interpretation of the exception is also more consistent with the FSIA's express goal of codifying the restrictive theory of sovereign immunity."[163] Under the classical theory of

157. Federal Republic of Germany v. Philipp, 141 S. Ct. 703, 715 (2021).

158. *Id.* at 711-12.

159. *Id*. at 712.

160. *Id*. at 705-07, 714.

161. *Id*. at 715-16.

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

163. *Id.* at 706.

sovereign immunity, foreign nations are absolutely immune from suit.[164]

The *Altmann* case is one of the most well-known controversies involving Nazi looted art.[165] The *Altmann* decision explained a jurisdictional limitation for Nazi looted art claims by articulating that "takings could be brought under the expropriation exception where the claims involve the taking of a *foreign* national's property."[166]

Ms. Altmann was a Jewish U.S. citizen residing in California when she sued Austria for five valuable paintings owned by her ancestors.[167] She alleged that Austrian Nazi's unlawfully seized these paintings from her uncle, an Austrian citizen.[168] The domestic takings rule could not bar U.S. jurisdiction because this case was carried into U.S. courts based on section 1605(a)(3) of the FSIA expropriation exception.[169] Foreign states do not retain immunity in cases involving "rights in property taken in violation of international law," if the possessor of that property uses it for some commercial activity in the U.S.[170]

*Altmann* broadcast to the world that the way for a foreign state to maintain immunity was to avoid any commercial activity in the U.S. related to the looted art or cultural property at issue. If Austria had not engaged in commercial activity connected to Ms. Altmann's Klimt paintings, it is likely that her case would have been barred from a U.S. court based on the FSIA expropriation exception domestic takings rule. However, because Austria sought to profit from the paintings within the

164. *Id.* at 713 (citing Republic of Austria v. Altmann, 541 U.S. 667, 690 (2004)).

165. The case of Altmann v. Austria was made famous by the 2015 movie, "Woman in Gold." The film is based on the life of Maria Altmann, an elderly Jewish refugee living in Cheviot Hills, Los Angeles, who teamed up with a young lawyer, Randy Schoenberg, in an effort to reclaim a painting of her aunt by the famous artist, Gustov Klimt. The painting was stolen by the Nazi's in Vienna just prior to World War II. Ms. Altman and Mr. Schoenberg fought the Austrian government for almost a decade attempting to win back the valuable painting. Eventually, the case made it all the way to the U.S. Supreme Court in Republic of Austria v. Altmann (2004). *See* WOMAN IN GOLD (BBC Films, Origin Pictures 2015).

166. Philipp, 141 S. Ct. at 706 (emphasis added).

167. *See* Republic of Austria v. Altman, 541 U.S. 677, 781 (2004). These five paintings were painted by Klimt.

168. *Id.* at 680.

169. *Id.* at 706 (Breyer, J., concurring).

170. *Id.*

U.S., a door to the courts opened to Ms. Altmann, and she was awarded the return of all five Klimt paintings. [171]

## III. FOREIGN SOVEREIGN IMMUNITIES ACT & EXPROPRIATED ART

Despite the Supreme Court's unanimous decision in *Philipp* favoring Germany, legislators on both sides of the isle agree that reparations should be made to the heirs of Holocaust victims.[172]

### *A. Foreign Sovereign Immunities Act of 1976*

The FSIA is codified in Title 28 of the United States Code.[173] It defines the parameters as to whether a foreign sovereign nation or its instrumentalities may be sued in a U.S. state or federal court.[174] The FSIA defines "the jurisdiction of United States courts in suits against foreign states, the circumstances in which foreign states are immune from suit and in which execution may not be levied on their property."[175] The Supreme Court in *Philipp* considered whether the FSIA expropriation exception for taking property in conflict with international law applied in this case such that the heirs could justify bringing their suit in a U.S. district court.[176]

171. *See id* at 687-88, 697-702.

172. *See* Claims Conference & WJRO Memorandum, *supra* note 14.

173. Foreign Sovereign Immunities Act of 1976 (FSIA), Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C.S §§ 1330, 1332, 1391, 1441, 1602-1611). ("The FSIA grants foreign sovereign immunity from civil liability when foreign nations are sued in United States courts. 28 U.S.C. § 1604 (2018). FSIA is subject to several exceptions, including the expropriation exception. 28 U.S.C. § 1605(a)(3) (2018). The expropriation exception articulates that foreign states are not immune from claims that meet three elements: (1) a property rights claim; (2) where property has been taken in violation of international law; and (3) there is a commercial-activity involving this property within the United States.")

174. *Id.*

175. *Id.*

176. Federal Republic of Germany v. Philipp, 141 S. Ct. 703, 707-8 (2021).

### *B. Foreign Sovereign Immunities Act Expropriation Exception and the Domestic Takings Rule as Applied to the Holding in Federal Republic of Germany v. Philipp*

The Supreme Court's decision in *Philipp* did not address the controversy of whether Jews living in Nazi Germany should be considered German citizens.[177] Instead, the Court passed the baton back to the D.C. District Court to make that designation.[178] In its holding, the Supreme Court only addressed the question of whether the FSIA expropriation exception could shield Germany from the *Welfenschatz* heir's claim.[179] The heirs argued that looting Jewish art and culture should be seen as an act related to genocide in violation of international law, thus precluding Germany from claiming immunity under the FSIA.[180] The Court responded that it was not necessary to decide whether looting art was an act of genocide because "the expropriation exception is best read as referencing the international law of expropriation rather than of human rights."[181] Therefore, the Court explained that the FSIA expropriation exception is best interpreted in light of property law and not human rights law.[182] This decision refocused attention back on the question of whether Holocaust survivors should be considered citizens of Nazi Germany such that the domestic takings rule cannot shield Germany from suit.[183]

There is international consensus that the FSIA exception referencing a "violation of international law" does not provide jurisdiction for property claims where a country has taken property from its own nationals.[184] Accordingly, Germany argued immunity from suit in *Philipp* because of the domestic takings rule.[185] Since international law is not an explicit and absolute codification of laws overseen by one governing body, it is often based on a general

177. *Id*. at 715.
178. *Id*. at 711-12.
179. *Id*.
180. *Id*.
181. *Id*. at 712.
182. *Id*. at 712-13.
183. *Id*.
184. *Id.* at 711 (quoting Republic of Austria v. Altmann, 541 U. S. 677, 713 (2004)).
185. *Id*. at 710.

consensus in the international community.[186] The most concrete language applied to this nebulous "rule" is an "assum[ption] that what a country does to property belonging to its own citizens within its own borders is not the subject of international law."[187]

"Historically, a sovereign's taking of a foreigner's property, like any injury to a foreign national, implicated the international legal system because it 'constituted an injury to the state of the alien's nationality.'"[188] There is a general international acknowledgement that Jews living in Germany during the Nazi-era, were not "citizens" of Germany based on the Nuremberg Laws.[189] However, this acknowledgement has not been strong enough to provide the legal grounds to overcome the language of the FSIA expropriation exception domestic takings rule.

Another potential avenue for the heirs in *Philipp* to obtain jurisdiction under the FSIA might be to address which country did the actual "taking" of the *Welfenschatz*. There is no mystery as to where the remaining collection is held or how the museum came to acquire it. However, the channels by which the collection came to be in Hitler's possession should be considered. The FSIA expropriation exception domestic takings rule would not provide Germany with immunity in the *Philipp* case if the plaintiffs were able to show that the *Welfenschatz* was originally taken from the Jewish art consortium by the Netherlands via the Dresdner Bank.[190] If the *Philipp* case was permitted to proceed to trial, the details of the collection's sale could be viewed with forensic precision. Germany may not be able to hang its hat on the domestic takings rule exception of the FSIA if the Dresdner Bank—based in the

186. *Id*. at 709-11. ("Known at the founding as the "law of nations," what we now refer to as international law customarily concerns relations among sovereign states, not relations between states and individuals). *See also* Banco Nacional de Cuba v. Sabbatino, 376 U. S. 398, 422 (1964) ("The traditional view of international law is that it establishes substantive principles for determining whether one country has wronged another.").

187. Federal Republic of Germany v. Philipp, 141 S. Ct. 703, 709 (2021).

188. *Id.* at 710 (quoting Bradley & Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 831, n. 106 (1997)).

189. *Greg Bradsher, The Nuremberg Laws Archives Receives Original Nazi Documents That "Legalized" Persecution of Jews*, NAT'L ARCHIVES PROLOGUE MAG., Winter 2010, Vol. 42, No. 4.

190. *See id*. at 709-11.

Netherlands—was the initial broker of the sale of the *Welfenschatz* collection. If the Netherlands funded or brokered the coerced sale independently, and passed the collection to Prussia, who then passed it to Hitler, the paper trail of the purchase may contradict Germany's argument that U.S. courts do not have jurisdiction because the *Welfenschatz* was a taking by Germany from German citizens, even if Jews in Nazi Germany are designated as citizens.

## IV. THE UNITED STATES CONGRESSIONAL APPROACH TO REPARATIONS OF NAZI LOOTED ART

### *A. Foreign Cultural Exchange Jurisdictional Immunity Clarification Act*

In 2016, Congress created an exception to the FISA with the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act ("Clarification Act").[191] The Clarification Act promotes a continued cultural exchange between the U.S. and other foreign nations.[192] It allows foreign museums to lend their works to the U.S. without the threat of a jurisdictional pull if the art has been found to be stolen.[193] However, the Clarification Act makes an explicit exception for Nazi looted art.[194] If art lent to a museum in the U.S., even in good faith, is claimed as Nazi looted art, then U.S. courts have jurisdiction to hear the case.[195] The Clarification Act supports the argument that Congress intended to abrogate immunity for all Nazi-era stolen property.

### *B. The Holocaust Expropriated Art Recovery Act*

In April of 2016, a bi-partisan group of senators proposed the Holocaust Expropriated Art Recover Act ("HEAR Act") during a

191. Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, Pub. L. No. 114-319, § 2(a)(1)-(2), 130 Stat. 1618, 1618-19 (2016) (extending immunity to foreign states under 28 U.S.C. § 1605 for any claims brought against owners of artwork that was leant to museums in the U.S. except for Nazi looted artwork).

192. 28 U.S.C § 1602.

193. *Id.* § 1605.

194. *Id.* § 1605(h)(2).

195. *Id.*

hearing titled "Reuniting Victims with Their Lost Heritage."[196] In a rare show of unity among congressional leaders, Republican Senators Ted Cruz and John Cornyn coupled with Democratic Senators Chuck Schumer and Richard Blumenthal, created the HEAR Act.[197] The HEAR Act was passed by a unanimous vote in the Senate and enacted on December 16, 2016.[198] The purpose of the HEAR Act is to "supplant state statutes of limitations for Nazi-confiscated artwork with a national six-year statute of limitations."[199] Congress found that victims of Nazi persecution and their heirs "have faced significant procedural obstacles, due in part to State statutes of limitation, to lawsuits brought in the United States to recover misappropriated artworks and other property, and that relief is necessary due to the unique and horrific circumstances of the Holocaust and the difficulty of documenting claims"[200]

The HEAR Act provides claimants the option to bring an action in *replevin*, where the statute of limitations does not begin to toll until the claimant has become aware of the property and establishes possessory rights.[201] According to Senator Cruz, the goal of the HEAR Act is to "ensure that claims for the restitution of Nazi-looted art are adjudicated based on the facts and merits, and are not short-circuited by technical or non-merits defenses that often work to the disadvantage of Holocaust victims and their families."[202]

196. Press Release, Senator Ted Cruz, U.S. Senator for Texas, ICYMI: Sen. Cruz Leads Efforts to Return Nazi-Stolen Art to Rightful Heirs (June 6, 2016), https://www.cruz.senate.gov/newsroom/press-releases/icymi-sen-cruz-leads-efforts-to-return-nazi-stolen-art-to-rightful-heirs.

197. JTA, *supra* note 15.

198. *See* Holocaust . Art Recovery Act of 2016, Pub. L. No. 114- 308, 130 Stat. 1524 (2016).

199. Fallon S. Sheridan, Note, *The Sunset of the Holocaust Expropriated Art Recovery Act of 2016 and the Rise of the Demand and Refusal Rule*, 89 FORDHAM L. REV. 2841, 2843 (2021) (discussing the sunset provision of the HEAR act).

200. Reif v. Nagy, 61 Misc. 3d 319, 324-25, 80 N.Y.S. 3d 629,637 (Sup. Ct. N.Y. Co. 2018) 175 A.D.3d 107, 109, 106 N.Y.S. 3d 5 (2019), *leave to appeal dismissed*, 35 N.Y.3d 986, 148 N.E.3d 540 (2020).

201. Holocaust Expropriated Art Recovery Act § 5(a).

202. Emmarie Huetteman, *Senate Bill Would Help Recover Art Stolen by Nazis*, N.Y. TIMES (June 7, 2016), https://www.nytimes.com/2016/06/08/arts/design/senate-bill-would-help-recover-art-stolen-by-nazis.html?searchResultPosition. (The House passed the same bill on Dec. 7, 2016.)

Notably, the HEAR Act has a sunset provision outlining that the availability of a federal extension of statute of limitations will expire on January 1, 2027.[203] Unless the HEAR Act is amended, the federal statute of limitations that applies to Nazi-looted art will revert to state statutes.[204]

### *C. Justice for Uncompensated Survivors Today Act of 2017*

In May 2018, Congress enacted the Justice for Uncompensated Survivors Today ("JUST Act"), which requires the Secretary of State to compose a report on the progress of "covered countries" in addressing Holocaust restitution.[205] The JUST Act extends the meaning of ''wrongfully seized or transferred'' to include "confiscations, expropriations, nationalizations, forced sales or transfers, and sales or transfers under duress during the Holocaust era . . . ."[206] The term "covered countries" refers to the participants of the 2009 Holocaust Era Assets Conference,[207] also known as the Terezin Declaration.[208] The United States, Germany, and the Netherlands are three of the forty-six participating countries named in the Terezin Declaration.[209] The Terezin Declaration, in concert with a 2010 directive for best practices and guidelines, set a standard for forthright and "comprehensive claims processes that do not discriminate based on *citizenship* or *residency*," and are "expeditious, simple, accessible, transparent, and neither burdensome nor costly to the individual claimant.[210] Compensation for and restitution of looted art remains a work in progress.

U.S. legislators have repeatedly enacted laws supporting efforts to restore Jewish Holocaust survivors and their heirs, with Nazi-looted art

203. Sheridan, *supra* note 199.

204. *Id.*

205. JUST ACT REPORT, *supra* note 129.

206. *Id.* at 110.

207. *Id.* at 3.

208. U.S. DEP'T OF STATE, BUREAU OF EUROPEAN AND EURASIAN AFFAIRS, PRAGUE HOLOCAUST ERA ASSETS CONFERENCE: TEREZIN DECLARATION 2009, (June 30, 2009) https://2009-2017.state.gov/p/eur/rls/or/126162.htm [hereinafter TEREZIN DECLARATION].

209. *Id.*

210. JUST ACT REPORT, *supra* note 129, at 4 (emphasis added on citizenship and residency).

and cultural property. The JUST Act is only the most recent example of the consensus among U.S. lawmakers reaffirming their support for Jewish heirs in their recovery of cultural and artistic property.

### *D. Never Again Education Act of 2020*

As recently as 2020, the U.S. government showed a continued commitment to Holocaust survivors and their heirs, when President Trump signed the Never Again Education Act ("The Act") on May 29, 2020.[211] This act provides funding to the United States Holocaust Memorial Museum for the creation of educational resources.[212] The Act "requires the museum to develop and nationally disseminate accurate, relevant, and accessible resources" to "improve awareness and understanding of the Holocaust."[213] Although The Act does not tackle the legalities of adjudicating a Nazi looted art case, its enactment demonstrates U.S. congressional commitment to addressing the wounds the Holocaust left in its wake.

## V. INTERNATIONAL CONSENSUS

A significant number of states in the international community have supported efforts to return art and cultural property confiscated by the Nazis. In 1998, forty-four nations and thirteen non-governmental agencies (NGO's) came together to develop *The Washington Principles on Nazi-Confiscated Art*.[214] This conference established international support for reparations to Jewish heirs for issues involving the unlawful taking of artwork and cultural property during the Holocaust.[215] *The*

211. Never Again Education Act of 2020, Pub. L. No. 116-141, 134 Stat. 636 (The Senate voted unanimously in favor of this bill. The House of Representatives' vote was 393 to 5 in favor of passage).

212. John Levine, *President Trump Signs Never Again Education Act to Promote Holocaust Education*, N.Y. POST (May 30, 2020, 2:17 PM), https://nypost.com/2020/05/30/president-trump-signs-bill-to-promote-holocaust-education/.

213. Never Again Education Act §§ 4(c)(1), (5)(a).

214. *See generally* U.S. DEP'T OF STATE, WASHINGTON CONFERENCE ON HOLOCAUST-ERA ASSETS 1998, U.S. DEP'T OF STATE ARCHIVES (Jan. 13, 2022), https:// 997-2001.state.gov/regions/eur/wash_conf_material.html.

215. *Id*.

*Washington Principles*[216] were created as an ethical guidepost to encourage nations to create a fair restitution process for issues related to art stolen or confiscated by the Nazi regime before and during World War II.[217] These principles are non-binding and were voluntarily agreed-upon by foreign states and international organizations.[218]

The international community addressed Holocaust reparations again in 2009 during the *Terezín Declaration on Holocaust Era Assets*

216. U.S. DEP'T OF STATE, OFFICE OF THE SPECIAL ENVOY FOR HOLOCAUST ISSUES, WASHINGTON PRINCIPLES ON NAZI-CONFISCATED ART (1998), www.state.gov/washington-conference-principles-on-nazi-confiscated-art/. (The following are the eleven Washington Principles, which encourage cooperating countries to make every effort to return Nazi-confiscated art or cultural property.) "In developing a consensus on non-binding principles to assist in resolving issues relating to Nazi confiscated art, the Conference recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws. 1. Art that had been confiscated by the Nazis and not subsequently restituted should be identified. 2. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives. 3. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted. 4. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era. 5. Every effort should be made to publicize art that is found to have been confiscated by the Nazi and not subsequently restituted in order to locate its pre-War owners or their heirs. 6. Efforts should be made to establish a central registry of such information. 7. Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted. 8. If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case. 9. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, cannot be identified, steps should be taken expeditiously to achieve a just and fair solution. 10. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership. 11. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues." *See also* JUST ACT REPORT, *supra* note 129.

217. *Id.*

218. Philipp v. Federal Republic of Germany 248 F. Supp. 3d 59, 79 (2017).

*and Related Issues*.[219] Forty-six nations came together in Prague to brainstorm solutions to on-going Holocaust-related issues, such as the need for restitution of confiscated art and Jewish cultural property.[220] NGO's and experts also made declarations of ethical obligations governments owed the heirs of Nazi looted art and cultural property.[221] *The Washington Principals* and *Terezín Declaration* are widely supported, and serve to unite nations in the ongoing effort to return Holocaust victim's property.

Over the last seventy-five years, Germany has taken significant steps to compensate Holocaust survivors and their heirs by taking responsibility for the atrocities of the Holocaust.[222] In 2015, Germany established the German Lost Art Foundation to support efforts to implement *The Washington Principles*.[223] The foundation is in Magdeburg, Germany, and serves as a national and international central

219. TEREZIN DECLARATION, *supra* note 208. (For reference, the resolutions of the Terezin Declaration are as follows; "1.We reaffirm our support of the Washington Conference Principles on Nazi-Confiscated Art and we encourage all parties including public and private institutions and individuals to apply them as well, 2. In particular, recognizing that restitution cannot be accomplished without knowledge of potentially looted art and cultural property, we stress the importance for all stakeholders to continue and support intensified systematic provenance research, with due regard to legislation, in both public and private archives, and where relevant to make the results of this research, including ongoing updates, available via the internet, with due regard to privacy rules and regulations. Where it has not already been done, we also recommend the establishment of mechanisms to assist claimants and others in their efforts, 3. Keeping in mind the Washington Conference Principles on Nazi-Confiscated Art, and considering the experience acquired since the Washington Conference, we urge all stakeholders to ensure that their legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties. 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.")

220. *Id.*

221. *Id.*

222. JUST ACT REPORT, *supra* note 129, at 7.

223. Annabelle Steffes-Halmer & Gaby Reucher, *Nazi-Looted Art: Restitution Process a 'Permanent Task*,' DEUTSCHE WELLE (Jan. 22, 2020), https://p.dw.com/p/3We7N.

point of contact for issues involving Nazi looted art.[224] Moreover, as of 2018, the German government provided approximately $86.8 billion in compensation and reparations to Jewish survivors and their heirs.[225] In 2020, Germany created a "Help Desk" located in Berlin, where victims of Nazi looted art and assets could report their losses.[226] Although Germany's efforts to make reparations and honor Holocaust survivors are commendable, healing the Nazi wounds remains a work-in-progress. According to the President of the WJC, Germany is still reluctant when it comes to returning works of art.[227]

## VI. PROPOSED AMENDMENT TO THE FOREIGN SOVEREIGN IMMUNITIES ACT

On remand of *Philipp*, the D.C. District Court will have to consider Germany's argument that the domestic takings rule provides Germany with immunity from suit.[228] If the D.C. District Court agrees with Germany's argument that the Jewish art dealers were German citizens at the time of the alleged taking, then the heirs in *Philipp* will not be able to satisfy jurisdictional requirements due to the expropriation exception domestic takings rule. Unless there is an amendment to the FISA expropriation exception domestic takings rule articulating that Jewish Germans in the Nazi-era were not legally citizens of Germany, heirs seeking restitution of their ancestor's property may continue to be robbed of their Jewish heritage.

There is no doubt that Hitler, and German law in the Nazi-era, did not consider Jews citizens of Germany.[229] The Nazi regime aimed to utterly annihilate Jewish life and culture within the territory of the Third Reich.[230] Accordingly, it would be nonsensical to reason that Jews in Germany lost all rights of liberty and property during the Holocaust, but their heirs are barred from seeking justice in a U.S. court because

224. *Id.*

225. JUST ACT REPORT, *supra* note 129, at 73.

226. Steffes-Halmer & Reucher, *supra* note 229

227. *Germany Dragging Heels Over Nazi Looted Art: World Jewish Congress*, DEUTSCHE WELLE (Nov. 18, 2018), https://p.dw.com/p/38TBZ.

228. Philipp v. Federal Republic of Germany, 839 F. App'x 574, 574 (Mem) (D.C. Cir. 2021).

229. RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 211 (AM. L. INST. 1987).

230. *Anti-Jewish Legislation in Prewar Germany*, *supra* note 7.

their ancestors were "technically" German citizens. Jews living in Germany during 1935, without logical historic context, should not be designated as German nationals based solely on geography and the German government's interpretation of U.S. law. A more accurate legal definition of the Jewish Germans in Nazi Germany would be "aliens." An alien is "someone who resides within the borders of a country but is not a citizen or subject of that country; a person not owing allegiance to a particular country." [231]

## CONCLUSION

Averting justice by attempting to convince the world that Jews were citizens of Nazi Germany only supports the idea that Germany is still trying to rob Jews of their heritage. History tells the world that Jews lost their property, families, identities, and lives *en masse* during World War II.[232] In that era, Jews in Germany were not afforded any of the benefits or privileges enjoyed by Arian Germans.[233] Most importantly, German Jewish citizenship in the Nazi-era was a legal impossibility according to the laws of their government.[234] Historical records make it clear that the Nazis wanted the *Welfenschatz* collection. There is a strong possibility that Nazi leaders took this collection through the fiction of an uncoerced sale and the heirs of the collection should not be denied their day in court on a legal technicality that favors the Nazis.

The Supreme Court in *Philipp* unanimously agreed that a property claim against Germany for Nazi looted art could not find jurisdictional footing in a U.S. court via the FSIA expropriation exception based solely on the argument that the Nazi government's campaign to loot Jewish art and culture was an act of genocide.[235] This holding does not mean that U.S. courts should refrain from adjudicating such claims where its citizens are involved. However, this holding does suggest that

231. M. Anderson Berry, *Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute*, BERKELEY J. INT'L L. 316, 319 (2009) (discussing the legal definition of an "alien").

232. *See generally* United States Holocaust Memorial Museum, *Introduction to the Holocaust*. HOLOCAUST ENCYCLOPEDIA (Nov. 5, 2021), https://encyclopedia.ushmm.org/content/en/article/introduction-to-the-holocaust.

233. *Nuremberg Race Laws*, *supra* note 1.

234. *See id*.

235. Federal Republic of Germany v. Philipp, 141 S. Ct. 703, 712-15 (2021).

American law has reached the boundaries of its jurisdictional limit to provide a fair and just forum for Jewish heirs living in Nazi Germany that bring property claims against Germany. A simple amendment to the FSIA expropriation exception domestic takings rule, specifying that Jews living in Germany between 1933 and 1945 were *aliens* and not *citizens*, would solve this legal puzzle and remove any ambiguity for our courts. The fictional assertion that Jews living in Nazi Germany were actually German citizens is an irrational defense[236] created for the singular purpose of Germany attempting to evade justice for stealing Jewish art and culture. This unjust approach to Nazi looted art claims, favoring and rewarding the legacy of the Third Reich, could easily be eradicated by Congress with the stroke of a pen. Let it be true that "the pen is mightier than the sword."[237]

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236. Foreign Sovereign Immunities Act, of 1976 (FSIA), Pub. L. No. 94-583, 90 Stat. 2891.

237. EDWARD BULWER-LYTTON, RICHELIEU; OR, THE CONSPIRACY: A PLAY IN FIVE ACTS, 5 (Saunders & Otley, 1st ed. 1839).

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