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Andreas Giorgallis*

andreas-giorgallis@outlook.com
orcid.org/0000-0002-3494-1541
School of Law, University of Glasgow
10 Professors' Square, Glasgow G11 6PB
United Kingdom

The Potential of the US Courts to Adjudicate Restitution Claims Involving Colonial Cultural Objects

Abstract: Restitution claims involving colonial cultural objects are usually said to lack a sound legal basis. These claims are instead perceived more often than not as belonging solely in the realm of ethics. This article, however, calls that perception into question. It argues for the existence of a more complex picture. It does so by bringing to the forefront the potential of the US courts to adjudicate restitution claims concerning colonial cultural objects. By analysing the largely unexplored 1900 exception of the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act (2016), amending the Foreign Sovereign Immunities Act's (1976) expropriation exception, this article posits that the exception might hold the key for offering an alternative road in accessing justice. Being applicable to takings of a systematic nature against members of a targeted and vulnerable group which have taken place after 1900, this provision might provide legal recourse for those colonial takings which have occurred after the dawn of the 20th century.

* **Andreas Giorgallis** is a PhD Candidate at CREATe Centre, School of Law, University of Glasgow. He holds a Bachelor of Law and Minor Degree in History from the University of Cyprus and an LLM International Law from the University of Edinburgh. His research concerns the restitution of sacred colonial cultural objects with a particular emphasis on Ethiopia.

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Andreas Giorgallis

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Introduction

The last few years have witnessed an intensive revival of restitution claims involving colonial cultural objects.[1] More than ever before colonial powers are gradually starting to discuss the long-forgotten pages of their colonial histories – their colonial collections. Reports and guidelines on how to handle colonial cultural objects have recently made their appearance in France,[2] Germany,[3] Belgium,[4] the Netherlands,[5] and England.[6] Newspaper accounts suggest that Austria might be the next to follow.[7] Returns have also started to loom over the horizon. The Smithsonian recently returned most of its Benin Bronzes to Nigeria. Smithsonian's Undersecretary for Museums and Culture suggested that the move by the institution "will lead other institutions not just in the United States but throughout the world to reconsider their policies on ethical returns".[8]

However welcome these developments are, they appear to stem more from ethical considerations than legal ones. Objections suggesting that claims for

[1] The term "restitution" is adopted for the purposes of this article inasmuch as it examines the issue from a legal perspective. For the differences in terminology, see generally L.V. Prott, *Note on Terminology*, in: L.V. Prott (ed.), *Witnesses to History: Documents and Writings on the Return of Cultural Objects*, UNESCO Publishing, Paris 2009, pp. xxi-xxiv. For a definition of the term "colonial cultural objects", see the next section below.

[2] F. Sarr, B. Savoy, *The Restitution of African Cultural Heritage. Toward a New Relational Ethics*, November 2018, https://www.about-africa.de/images/sonstiges/2018/sarr_savoy_en.pdf [accessed: 12.11.2022].

[3] W. Ahrndt et al., *Guidelines for German Museums: Care of Collections from Colonial Contexts*, 3rd ed., February 2021, https://www.museumsbund.de/wp-content/uploads/2021/03/mb-leitfaden-en-web.pdf [accessed: 12.11.2022].

[4] V. Boele et al., *Ethical Principles for the Management and Restitution of Colonial Collections in Belgium*, June 2021, https://restitutionbelgium.be/en/report [accessed: 12.11.2022].

[5] L. Gonçalves-Ho Kang You et al., *Colonial Collections and a Recognition of Injustice*, October 2021, https://www.raadvoorcultuur.nl/documenten/adviezen/2021/01/22/colonial-collection-and-a-recognition-of-injustice [accessed: 12.11.2022].

[6] Arts Council England, *Restitution and Repatriation: A Practical Guide for Museums in England*, 2022, https://www.artscouncil.org.uk/supporting-arts-museums-and-libraries/supporting-collections-and-cultural-property/restitution-and [accessed: 12.11.2022].

[7] C. Hickley, *Austria Sets Up Expert Panel to Develop Guidelines For Repatriating Colonial Loot*, "The Art Newspaper", 21 January 2022, https://www.theartnewspaper.com/2022/01/21/austrian-expert-committee-to-develop-guidelines-for-repatriating-colonial-loot [accessed: 12.11.2022].

[8] A. Ault, *The Smithsonian's Plan to Return the Benin Bronzes Comes After Years of Relationship Building*, "Smithsonian Magazine", 11 March 2022, https://www.smithsonianmag.com/smithsonian-institution/the-smithsonians-return-of-the-benin-bronzes-comes-after-years-of-relationship-building-180979716/ [accessed: 12.11.2022]. See however the next paragraph of this article.

the restitution of colonial cultural objects constitute "yesterday's question",[9] combined with the scholarly literature,[10] create the impression of a legal vacuum.[11] Discussions are usually framed outside the realm of law or at best the law plays only a secondary or auxiliary role. To put it more succinctly, restitution claims for colonial cultural objects are considered to be not the law's business. By contrast, solutions for collections with a questionable colonial context which rely on the ethical sphere (e.g. ethical guidelines), have come into favour. However such an approach – no matter the strong moral weight it carries – is not without its flaws. Ethics, unlike law, presuppose the good will and cooperation of all the stakeholders involved. Absent any binding or enforcement force, ethical decisions rest upon the absolute discretion of the current possessors to decide. A case-by-case approach may however, in the long-run, lead to piecemeal solutions. Legal perplexities shall not also be ruled out. A lawsuit, which aptly illustrates the shortcomings of the mere reliance on an ethical approach, has been filed on 7 October 2022 before the American courts against the decision of the Smithsonian Institution to return 29 of its Benin Bronzes to Nigeria.[12] A solely ethical approach further reduces colonialism to a purely ethical phenomenon, at the same time leaving intact its legal structures.

This article questions the impression created above, i.e. that there is no judicial forum, no legal basis, nor a legal remedy for the successful adjudication of restitution claims concerning colonial cultural objects. It does so by exploring the possible application of the expropriation exception as laid down by the Foreign Sovereign Immunities Act (1976) (henceforth "FSIA 1976").[13] This exception has proven of fundamental importance for the birth of Nazi-looted art litigation before the US courts. In a number of cases for which a remedy for past injustices was not available, refuge has been sought in the expropriation exception before the US judiciary. In this context, this article argues that the largely unexplored 1900 exception, amending the expropriation exception of FSIA 1976 – which was

[9] C. Higgins, *Into Africa: British Museum's Reply to Ownership Debate*, "The Guardian", 13 April 2006, https://www.theguardian.com/world/2006/apr/13/arts.artsnews [accessed: 12.11.2022].

[10] See, indicatively, N. Kamardeen, *The Protection of Cultural Property: Post-Colonial and Post-Conflict Perspectives from Sri Lanka*, "International Journal of Cultural Property" 2017, Vol. 24(4), p. 443; M. Françozo, A. Strecker, *Caribbean Collections in European Museums and the Question of Returns*, "International Journal of Cultural Property" 2017, Vol. 24(4), p. 469.

[11] E. Campfens, *The Bangwa Queen: Artifact or Heritage?*, "International Journal of Cultural Property" 2019, Vol. 26(1), p. 107; C. Stahn, *Confronting Colonial Amnesia: Towards New Relational Engagement with Colonial Injustice and Cultural Colonial Objects*, "Journal of International Criminal Justice" 2020, Vol. 18(4), p. 815.

[12] The transfer of ownership, however, went forward as planned on 11 October 2022. The Court – three days later – denied the claim for an emergency temporary restraining order. The Judge expressed his doubts over the procedural and substantive merits of the case. Yet the Court left open the possibility of filing an amended complaint. It remains to be seen whether the case will continue further – *Deadria Farmer-Paellmann and Restitution Study Group, Inc. v. Smithsonian Institution*, Civil Case No. 1:22-cv-3048 (D.D.C. Oct. 14, 2022). For another type of legal controversy regarding Native American human remains, see *Elizabeth Weiss v. Stephen Perez, et. al.*, Case No. 22-cv-00641-BLF (N.D. Cal. Oct. 19, 2022).

[13] 21 October 1976, PL 94-583.

introduced by the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act (2016) (henceforth "2016 Clarification Act")[14] might hold the key for offering an alternative route to accessing justice. It suggests that while previous approaches might hold true for earlier colonial losses, this is not necessarily the case for relatively more recent instances of colonial takings, i.e. those beginning from the dawn of the 20th century, of a systematic nature against members of a targeted and vulnerable group.

The argument set out in this article unfolds as follows. After an introduction, this article provides a short historical overview portraying the ways in which cultural objects have been acquired during the colonial era. It then twists around two axes: the first one examines the issue of sovereign immunity in the US context on three different levels. It starts with an analysis of the situation before the enactment of FSIA 1976, and subsequently surveys the aforementioned legislation. Next it puts emphasis on the expropriation exception and analyses how the requirements needed for a successful claim have been interpreted. The second axis focuses on the complicated and drawn-out legislative history of the 2016 Clarification Act and attempts to give some "flesh" to one of its largely unexplored exceptions: the 1900 exception. The article then discusses the recent ruling in the case *Federal Republic of Germany v. Philipp*[15] handed down by the US Supreme Court – the only judgment until now referring to the 2016 Clarification Act. Finally, concluding remarks underline the existence of a more nuanced picture than traditionally conceived, and highlight that legal avenues in the United States do exist in providing access to justice at least in some of those cases arising after 1900.

Overview of Colonial Cultural Objects

The colonial era is understood as the period spanning from the late 15th century – when Spanish and Portuguese adventurers first sailed for the Americas – until the 1960s and 1970s, which marked the onset of the period of decolonization.[16] During the colonial era a large number of cultural objects travelled from the colonial peripheries to the – primarily European – metropolitan centres. These objects were destined to grace Western European museums – in the United Kingdom and France just to note a few – as part of the broader "collective frenzy of European empires", which reached its apogee during the 19th century.[17] Recent accounts – indicatively by Jos van Beurden and Bénédicte Savoy – have brought to the forefront the

[14] 16 December 2016, PL 114-319.

[15] *Federal Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021).

[16] This article is predominantly focused on the European colonial era, but it does not exclude other forms of colonialism which "blossomed" in other regions of the world.

[17] A.F. Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, Cambridge University Press, Cambridge 2006, p. 5.

astonishing volume of objects taken during that period.[18] Other reports have also confirmed those statistics. By way of example, the Sarr-Savoy Report confirmed that 90% of Sub-Saharan African cultural objects reside outside the continent.[19]

However, the voyage of objects of sacred, historical, cultural, or other importance was neither a uniform nor a homogenous process. Rather it was a pluralistic one, with objects travelling in varying ways and times. The means of their acquisition – both "legal" and "illegal" – also contain brighter and darker tones.[20] The colonial violence employed for the acquisition of cultural objects in the course of military or private expeditions is the most notorious example. The acquisition of the Benin Bronzes is the first – but certainly not the sole – instance which comes to mind.[21] Military expeditions aside, objects ended up in the West as a result of the structural inequalities pertaining during the colonial era, often taking the form of involuntary losses where no just compensation was provided.[22]

Such a plurality, however, is not limited only to the ways in which colonial cultural objects have been acquired. It also extends to the chronological timeframe. Contrary to the common assumption, as already stated, this article perceives the colonial era as a period spanning until a few decades ago. With this in mind, this contribution emphasizes those cultural objects taken from 1900 onwards. This cut-off date is employed here precisely because of the US legislative choice. This issue is returned to and highlighted when discussing the 1900 exception of the 2016 Clarification Act. Two additional words of caution are necessary. Firstly, it must be clarified that this article deals with objects belonging to foreign state collections that travelled to the US. Secondly, this article focuses for the most part – as will later become evident – on the case law concerning Nazi-looted art. Judicial proceedings involving colonial cultural objects are almost absent. This absence can be explained by the relative new character of the 2016 Clarification Act; referred to for the first time in US courts in 2021. Nazi-looted art litigation, as such, offers an instructive context for claims involving colonial loot.

The three sections which follow comprise the first axis. They describe the situation of sovereign immunity in the US context and emphasize the expropriation exception. Such an exercise is warranted for the interpretation of the 1900 exception of the 2016 Clarification Act, which follows in the second axis since it draws upon the first one.

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18 J. van Beurden, *Treasures in Trusted Hands: Negotiating the Future of Colonial Cultural Objects*, Sidestone Press, Leiden 2017; B. Savoy, *Africa's Struggle for Its Art: History of a Postcolonial Defeat*, Princeton University Press, Princeton, NJ 2022.

19 F. Sarr, B. Savoy, op. cit., p. 3.

20 W. Ahrndt et al., op. cit., p. 66; L. Gonçalves-Ho Kang You et al., op. cit., p. 10.

21 D. Hicks, *The Brutish Museums: The Benin Bronzes, Colonial Violence and Cultural Restitution*, Pluto Press, London 2020.

22 V. Boele et al., op. cit.; J. van Beurden, *Treasures in Trusted Hands*..., p. 39.

Foreign Sovereign Immunity Before the Enactment of the Foreign Sovereign Immunities Act (1976)

Jurisdiction over cases against a foreign government was for a long time not a possibility in the United States. Foreign governments enjoyed absolute immunity before US courts, just like the US government enjoyed reciprocal protection before foreign courts.[23] The outcome for claims which involved foreign States, irrespective whether those actions were of a sovereign or private nature, was the same. The strict application of the principle of absolute immunity rendered substantive engagement with any action against a foreign government impossible.[24] US judicial practice was explicitly framed by the classic case of the US Supreme Court – the *Schooner Exchange*[25] – now considered to be "the starting point" for almost any dispute pertaining to sovereign immunity in the US context.[26] The US Supreme Court stated that the French government enjoyed immunity, based on the doctrines of implied consent and dignity of the nation.[27] Thereafter the doctrine of absolute immunity was confirmed in several other rulings. Later cases justified this rule on two grounds. The exercise of jurisdiction against a foreign State challenges the State's dignity, and affects diplomatic relations with foreign States.[28]

The rigorous application of the doctrine of absolute immunity has, however, gradually started to lose ground. Increasingly, States began to depart from the well-established rule of absolute immunity and adhere to the restrictive theory of immunity; meaning they would no longer enjoy immunity for their actions as private individuals (*jure gestionis*), in contrast to their actions of a sovereign nature (*jure imperii*).[29] The moment for change in the US came in 1952; the year when the US decided to follow the restrictive theory of sovereign immunity. This was declared in the so-called Tate Letter, a letter which Jack B. Tate – then Legal Advisor of the State Department – sent to the Attorney General expressing "the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity".[30]

This transition from the long-established holding of the *Schooner Exchange* was necessary from a practical perspective. Commercial activities ceased to be

23 N. van Woudenberg, *State Immunity and Cultural Objects on Loan*, Martinus Nijhoff Publishers, Leiden–Boston 2012, p. 108.

24 X. Yang, *State Immunity in International Law*, Cambridge University Press, Cambridge 2012, p. 7.

25 *Schooner Exchange v. M`Faddon Others*, 11 U.S. 116 (1812).

26 *Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1605 (2020).

27 *Schooner Exchange v. M`Faddon Others*, op. cit., 137-138.

28 *Mexico v. Hoffman*, 324 U.S. 30, 36 (1945).

29 *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711 (1976).

30 Ibidem, 714.

the exclusive "province" of private individuals, as States were increasingly involved in such activities.[31] However, despite the pronouncements made by the Tate Letter, engaging in practice with the doctrine of restrictive sovereign immunity proved not an easy task.[32] Various reasons have been attributed in discussions concerning this difficulty. The main exegesis seems to be the fact that the Tate Letter provided no guidance or criteria on how to implement the doctrine of restrictive immunity, nor on how to distinguish public from private acts.[33] Diplomatic pressure from sovereign governments on the US State Department was another important reason.[34] Hence the decision on whether a foreign government enjoyed immunity largely rested on the courts to decide. In their effort to apply restrictive sovereign immunity, courts reached different conclusions and even issued inconsistent rulings, as the "governing standards were neither clear nor uniformly applied".[35]

The Foreign Sovereign Immunities Act (1976)

In the wake of this fragmented picture, Congress enacted FSIA 1976 almost 25 years after the publication of the Tate Letter. Its adoption, according to its legislative history, embodies the US's will to codify and apply the restrictive theory of sovereign immunity, as well as provides a clear statutory procedure to claimants seeking to access justice.[36] Any claim, as such, asserting jurisdiction against a foreign government before US courts will be assessed on the basis of FSIA 1976.[37]

The above statements find reflection in the FSIA's 1976 text. Section 1602 indicates that foreign States do not enjoy immunity before US courts insofar as concerns their commercial activities.[38] The aforementioned provision must be read along with Section 1604, which lays down the presumption that a foreign State shall be immune before US courts "subject to certain enumerated exceptions".[39] However, before asserting the application of any exception, the first issue which the defendant must prove before the court is that it is a foreign State.[40] The burden of proof then shifts to the plaintiff to indicate that an exception applies, and that consequently the court enjoys jurisdiction. Then the foreign State has the oppor-

31 Ibidem.

32 *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983).

33 *Victory Transport Inc. v. Comisaria General*, 336 F.2d 354, 359 (2d Cir. 1964).

34 *Verlinden B.V. v. Central Bank of Nigeria*, op. cit.

35 Ibidem, 488.

36 House Rep. No. 94-1487, 94th Cong., 2nd Sess. (1976), 1976 U.S.C.C.A.N. 6604, 6605-6606 1976 WL 14078.

37 *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141-142 (2014).

38 28 U.S.C. § 1602.

39 *Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993).

40 *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993).

tunity to counter-argue the non-applicability of FSIA's 1976 exceptions.[41] If such an exception applies, the court can exercise jurisdiction. If the opposite scenario prevails, the case is rejected as lacking subject matter jurisdiction.[42]

An analysis of all the exceptions is beyond the scope of this article. Instead this article emphasizes the expropriation exception, which is one of the two commonly invoked exceptions – the other being the commercial activity exception – in cases of restitution of cultural objects against foreign governments.

The Expropriation Exception

Section 1605 (a) (3) stipulates that

> [a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case […]. (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.[43]

In order to mount an action a potential plaintiff needs to prove, in short, that: 1) rights in property are at stake; 2) that the property in issue was taken in violation of international law; and 3) that a commercial nexus exists.[44] Before delving deeper into a more detailed analysis of each requirement, it is instructive at the outset to make three general observations which run through the whole expropriation exception.

Firstly, the expropriation exception is unique. US legislation goes beyond what international, regional, or other national laws generally prescribe.[45] Such a provision cannot be found in either the relevant European or international instruments.[46] The International Court of Justice (ICJ) has even rejected the argument that immunity fades away in cases where there is a violation of a *jus cogens* rule – as put forward by Italy and Greece against Germany – in essence reversing previous Greek and Italian rulings concluding that Germany enjoyed no immunity with respect to violations of peremptory international law or crimes

41 *Swarna v. Al-Awadi*, 622 F.3d 123, 143 (2d Cir. 2010).

42 *Ledgerwood v. Iran*, 617 F. Supp. 311, 313 (D.D.C. 1985).

43 28 U.S.C. § 1605 (a) (3).

44 *Zappia Middle East Constr. Co. Ltd. v. The Emirate of Abu Dhabi*, 215 F.3d 247, 251 (2d Cir. 2000).

45 H. Fox, P. Webb, *The Law of State Immunity*, 3rd ed., Oxford University Press, Oxford 2013, p. 267.

46 European Convention on State Immunity, 16 May 1972, ETS No. 74; United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, UN Doc. A/RES/59/38.

against humanity.[47] Secondly, the expropriation exception is not applicable in instances where a claim is directed against a foreign government by one of its own nationals. A series of cases confirm this rule, generally acknowledging that such instances are of a domestic character and consequently fall under the purview of domestic law.[48] Thirdly, previous case law establishes the retroactive character of FSIA 1976 in cases even far predating its inception. That was the ruling of the probably most well-known case involving Nazi-looted art before the US judiciary: the *Republic of Austria v. Altmann*.[49]

Maria Altmann, an American-Jewish citizen, was the niece of Ferdinand Bloch-Bauer, a wealthy Czechoslovakian Jewish sugar magnate who prior to the beginning of the Second World War lived in Vienna. Her uncle owned six paintings created by the famous Gustav Klimt, two amongst them depicting his wife Adele Bloch-Bauer. Adele passed away in 1925, leaving behind a will where she expressed her desire to donate – despite not being the legal owner – the paintings to the Austrian Gallery following her husband's death. In the wake of the "Anschluss" – the annexation of Austria by the Nazis – Ferdinand fled Austria, abandoning his belongings, and moved to Switzerland where he died in 1945. Most of the Klimt paintings, after having been confiscated by the Nazis, ultimately ended up in the Austrian Gallery. The efforts of heirs to reclaim the paintings in the aftermath of the Second World War were in vain.[50] Years later, Austria enacted specific legislation, i.e. the Restitution Law of 1998, which allowed individuals to recover artworks that had been coercively donated to governmental museums in order to ensure their escape from the country. Maria Altmann thus attempted before the Austrian judiciary to reclaim those paintings. The fees for such an action, however, were prohibitive. As a result, she turned to the US courts, filing a claim in California against the Republic of Austria.[51]

Austria moved to dismiss the claim based on sovereign immunity as enshrined in FSIA 1976. The critical question before the US Supreme Court was whether FSIA 1976 applied to events which predated it. The Court stated that FSIA 1976 applied retroactively not only since 1976 – the date of its adoption – but more importantly even before the Tate Letter. The Court reached such a conclusion by looking closely at the wording of the statute which favoured retroactivity.[52]

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47 *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, ICJ Reports, 2012, p. 99, paras. 101-102. For an opposite approach, see the Greek and Italian rulings respectively: Supreme Court (Greece), *Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 11/2000, Judgment of 4 May 2000; Supreme Court (Italy), *Ferrini v. Federal Republic of Germany,* Judgment No. 5044 of 11 March 2004.

48 See for instance *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157, 1165 (C.D. Cal. 2006); *Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 943 (D.C. Cir. 2008).

49 *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240 (2004).

50 Ibidem, 2243-2244.

51 Ibidem, 2245.

52 Ibidem, 2254.

"Rights in property"

The first requirement in examining whether the expropriation exception applies is to ask whether rights in property are at issue. The starting point in interpreting this criterion is the text of FSIA 1976 itself. A careful look at the legislative text and its history offers no guidance as to its possible meaning.[53] Other sources, therefore, must be consulted. Judicial precedent can be crucial in providing some guidelines. Case law, in general terms, establishes the application of the provision to what one would normally expect it to include; that is tangible or physical property.[54] Examples cover, for instance, land expropriation[55] or artworks and paintings.[56] A person's injury, or even their death, does not extinguish these rights.[57] Neither does exclusion from negotiations considered to inflict damage on rights in property.[58]

"Taken in violation of international law"

Turning to the next subsequent criterion laid down by Section 1605 (a) (3), a claimant is required to prove that the property has been "taken in violation of international law". FSIA's 1976 text is once again silent on the interpretation of this phrase. Determination of its meaning requires looking beyond FSIA's 1976 actual text and examining its legislative history. The latter suggests that the term "taken in violation of international law" refers to instances of "nationalization or expropriation of property without the payment of prompt, adequate and effective compensation required by international law. It would also include takings which are arbitrary or discriminatory in nature".[59]

Takings which served no public purpose or were discriminatory or not accompanied by just compensation constitute a violation of international law.[60] For the satisfaction of FSIA's 1976 requirement, the Court clarified further that the word "or" does not require the cumulative fulfilment of those criteria. The satisfaction of any criterion gives rise to application of the phrase "taken in violation of international law".[61] In another ruling, the Court underlined that the validity of an expropriation depends on whether it serves a public purpose. If the answer is

53 X. Yang, op. cit., p. 305.

54 Ibidem.

55 *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 308 U.S. App. D.C. 86 (D.C. Cir. 1994).

56 *Republic of Austria v. Altmann*, op. cit.

57 *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 677 (7th Cir. 2012).

58 *Rukoro v. Federal Republic of Germany*, 363 F. Supp. 3d 436, 448 n. 4 (S.D.N.Y. 2019). See however *Abelesz v. Magyar Nemzeti Bank*, op. cit., 673 where the Court provided a more generous understanding to the term "rights in property" so as to encompass both tangible but also intangible property such as bank accounts.

59 House Rep. No. 94-1487, 94th Cong., 2nd Sess. (1976), op. cit., 6618.

60 *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 712 (9th Cir. 1992).

61 Ibidem.

negative, a violation of international law can be asserted; if the alternative scenario prevails, an ostensible unlawful taking might be justified.[62]

However, the later case law suggests that claims are not limited only to those against the State responsible for the taking, as someone would naturally expect. They transcend those instances by providing the possibility of filing a suit against a State different from the one responsible for the taking in violation of international law. Far from being a hypothetical scenario, this possibility has been confirmed in the *Cassirer* case.[63] Claude Cassirer, an American citizen, lodged a claim not against Germany but rather against Spain and a Spanish museum, which was the current location of a Pissarro painting owned by his grandmother and confiscated by the Nazis.[64] The Court confirmed that Section 1605 (a) (3) does not set limitations on such an action.[65]

More recently, a number of cases have attempted to expand the meaning of the phrase "taken in violation of international law" so as to encompass takings which accompanied genocides. In *Simon v. Republic of Hungary* – even though it was not a case concerned with the restitution of artworks – the Court concluded that the "expropriations themselves amount to genocide, they qualify as takings of property 'in violation of international law' within the meaning of the FSIA's expropriation exception".[66] The same line of thinking was endorsed in a series of cases.[67] The meaning of the phrase "taken in violation of international law" which those cases embraced has not only been criticized in the literature[68] but also as later explained in more detail, it has been reversed by the recent ruling of the Supreme Court in *Federal Republic of Germany v. Philipp*.[69]

Commercial nexus

The third element that needs to be satisfied is the so-called commercial activity nexus. Section 1605 (a) (3) suggests that a court has jurisdiction over a claim if

> that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the

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

[63] *Cassirer v. Kingdom of Spain*, 580 F.3d 1048 (9th Cir. 2009).

[64] Ibidem, 1052-1053.

[65] Ibidem, 1056.

[66] *Simon v. Republic of Hungary*, 812 F.3d 127, 132 (D.C. Cir. 2016).

[67] *De Csepel v. Republic of Hungary*, 859 F.3d 1094, 1102 (D.C. Cir. 2017); *Philipp v. Federal Republic of Germany*, 248 F. Supp. 3d 59, 71 (D.D.C. 2017); *Philipp v. Federal Republic of Germany*, 894 F.3d 406, 414 (D.C. Cir. 2018).

[68] L. Tattersall, *Derailing State Immunity: A Broad-Brush Approach to Jurisdiction under Claims for the Expropriation of Cultural Property*, "International Journal of Cultural Property" 2019, Vol. 26(2), p. 186.

[69] *Federal Republic of Germany v. Philipp*, op. cit.

> foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.[70]

Unlike the phraseology "taken in violation of international law", FSIA 1976 provides a definition of the term "commercial activity" in Section 1603. Accordingly, "commercial activity"

> means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.[71]

However, before going further into the case law interpreting the aforementioned provisions, it is necessary to examine a closely-related piece of legislation; the Immunity from Seizure Under Judicial Process of Cultural Objects Imported for Temporary Exhibition or Display Act (1965) (henceforth "IFSA 1965").[72] Sending collections on loan is a process which inherently entails some amount of risk. Lenders want to make sure that their works of art return intact from the borrowing State. Hence statutory rules are put in place in many States to guarantee their safe return. Such rules usually take the form of immunity from seizure, i.e. not allowing the seizure of the artwork and/or immunity from suit, i.e. not allowing a lawsuit to proceed.[73] In this regard IFSA 1965 was the first legislation of its kind in the world.[74] It had been enacted to assure hesitant foreign lenders – mostly from the then-Soviet Union – that their artworks would be secure without having to concern themselves about the possibility of long-term litigation before the American courts.[75] The protection afforded by IFSA 1965 to foreign lenders is not, however, automatic. IFSA 1965 sets forth specific criteria which, if fulfilled, grant such protection. In order to gain safeguard, an artwork: 1) must be of cultural significance; 2) must be for display without profit; and 3) the exhibition or display must be for the national interest.[76] All necessary arrangements, nonetheless, must be done *a priori*; an *ex post facto* application does not afford protection.[77]

[70] 28 U.S.C. § 1605 (a) (3).

[71] 28 U.S.C. § 1603 (d).

[72] 22 U.S.C. § 2459.

[73] For a detailed discussion, see in general N. van Woudenberg, *State Immunity…*

[74] P. Gerstenblith, *Art, Cultural Heritage, and the Law: Cases and Materials*, 4th ed., Carolina Academic Press, Durham 2019, p. 680.

[75] R.M. Zerbe, *Immunity from Seizure for Artworks on Loan to United States Museums*, "Northwestern Journal of International Law" 1984, Vol. 6(4), p. 1124.

[76] 22 U.S.C. § 2459 (a).

[77] Ibidem.

A case which illustrates well the tensions at play pertaining to art loans is the so-called *Portrait of Wally* case.[78] Egon Schiele's famous painting *Portrait of Wally* had travelled from the Leopold Museum of Vienna to the Museum of Modern Art (MoMA) for an exhibition occurring between October 1997 and January 1998.[79] The painting was temporarily seized by the US authorities after the heirs of an Austrian Jewish art dealer – Lea Bondi – filed a claim suggesting that the painting was stolen by a Nazi agent in 1939 during her efforts to flee from Austria.[80] The case – although it was settled in 2010 after more than a decade of litigation before the American courts – created the very first cracks in the otherwise solid assumption that artworks could not be seized while on loan in the US.

An even more important decision was *Malewicz v. City of Amsterdam*.[81] Kazimir Malewicz, the famous Russian artist, took with him more than 100 of his artworks on the occasion of an exhibition taking place in Berlin in 1927. Before his sudden return to Russia, he entrusted the safety of his paintings to four German friends, since their return to the Soviet Union would have probably led to their confiscation by the Stalinist regime. In 1935, Malewicz passed away, leaving the entrusted paintings to his friends. In 1956, one of his friends, Hugo Häring, agreed to lend the paintings to the Stedelijk Museum of Amsterdam. The agreement included a provision which offered the possibility of purchasing the collection. Two years later, the museum made use of this provision.[82] In 1996, Malewicz's heirs requested the return of the paintings housed in the Stedelijk Museum of Amsterdam. The latter responded negatively. After more than a half decade, the Stedelijk Museum of Amsterdam arranged an art exhibition of 14 Malewicz paintings at the Solomon R. Guggenheim Museum in New York and Menil Collection in Houston. The heirs took advantage of the opportunity and two days before the lapse of the exhibition filed a claim against the City of Amsterdam; the owner of the museum and consequently the owner of the paintings. The City of Amsterdam moved to dismiss the claim based on the protection afforded by FSIA 1976 and IFSA 1965.[83]

The District Court which was asked to decide the case reached two important conclusions; conclusions which would have a lasting impact on later cases. With regard to sovereign immunity, the Court suggested that "[t]here is nothing 'sovereign' about the act of lending art pieces, even though the pieces themselves might belong to a sovereign".[84] Art loans, in other words, are not the exclusive "province"

78 *United States of America v. Portrait of Wally, a Painting by Egon Schiele, Defendant in Rem*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009).

79 Ibidem, 246.

80 Ibidem, 238.

81 *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298 (D.D.C. 2005).

82 Ibidem, 301-303.

83 Ibidem, 303-304.

84 Ibidem, 314.

of a sovereign; rather, artworks are commonly loaned between private individuals. Neither do educational or cultural reasons alter the commercial character of the act.[85] Hence a mere exhibition in the US by foreign lenders could confer jurisdiction upon the US courts, since it is considered a commercial activity. The Court moved next to address the argument that the paintings were not present in the US in relation to a commercial activity, as Section 1603 (d) suggests, since they had immunity under IFSA 1965. The Court rejected that approach and observed that immunity from seizure does not entail immunity from suit. Even if an object is protected under IFSA 1965, this does not preclude the possibility of filing a suit before a court.[86] By reaching such a conclusion, the Court called into question the previous *status quo*, which rested on the assumption that IFSA 1965 provides a blanket protection and thereby prevents any possible claim(s).[87]

Coming back to the meaning of "commercial activity", in *Republic of Argentina v. Weltover* the Court suggested that commercial activity refers to cases "when a foreign government acts, not as a regulator of a market, but in the manner of a private player within it".[88] Judicial precedent has interpreted commercial activity as encompassing a wide spectrum of activities. The following activities, as Pavoni summarizes, have been considered as commercial:

> the publication and sale of museums' guidebooks in the US (e.g. *Altmann*, *Philipp*), the management of a museum's website accessible by US citizens to buy admissions tickets and view collections (*Cassirer*), contracts with US companies for duplication and ensuing sales of exhibited cultural materials (*Chabad*), and loans of art with museums in the US (*Malewicz*, *de Csepel*, *Philipp*).[89]

The remainder of this article is devoted to the second axis. The section which follows describes the complex history of the adoption of the 2016 Clarification Act, as well as analyses its content.

The Legislative Odyssey of the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act (2016)

More than a half decade after the *Malewicz* ruling, its legal significance remains. By suggesting that a foreign temporary exhibition, even if immunized under IFSA 1965,

[85] Ibidem.

[86] Ibidem, 311.

[87] N. van Woudenberg, *Developments Concerning Immunity from Seizure for Cultural State Property on Loan*, in: A.M. Carstens, E. Varner (eds.), *Intersections in International Cultural Heritage Law*, Oxford University Press, Oxford 2020, pp. 352-353.

[88] *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992).

[89] R. Pavoni, *Cultural Heritage and State Immunity*, in: F. Francioni, A.F. Vrdoljak (eds.), *The Oxford Handbook of International Cultural Heritage Law*, Oxford University Press, Oxford 2020, p. 565.

can be considered a commercial activity and consequently does not preclude the right of a plaintiff to sue, the Court's decision had a "chilling effect" on art mobility.[90] Foreign lenders became hesitant to temporarily loan artworks to the US due to a fear of becoming entangled in legal complexities.[91] To ensure that the US would remain a centre of international cultural exchange and the mobility of collections, as well as to erase any inconsistencies between IFSA 1965 and FSIA 1976, the US attempted to pass specific legislation. That piece of legislation, however, did not have a smooth journey from the very start, as highlighted below.

2012 Clarification Bill

The earliest attempt to introduce such legislation goes back to 2012. The Bill was introduced in the House of Representatives on 24 February 2012 by Reps. Steve Chabot (R-OH), Steve Cohen (D-TN), John Conyers (D-MI), and Lamar Smith (R-TX), under the title "Foreign Cultural Exchange Jurisdictional Immunity Clarification Act" (H.R. 4086). The Bill made its way to a Committee, which decided to further examine the issue.[92] Once it passed the House, it continued to the Senate for further consideration on 20 March 2012 (S. 2212). Sens. Dianne Feinstein (D-CA), Orrin Hatch (R-UT), Charles Schumer (D-NY), Thomas Coburn (R-OK), Christopher Coons (D-DE), and John Cornyn (R-TX) co-sponsored the Bill.[93]

The Bill was intended to serve two purposes. Firstly, to assure foreign lenders that art exhibitions and loans in the US would not be in danger of being exposed to expensive and long-term litigation proceedings before the American courts. To the drafters, as a result the Bill would allow American citizens to encounter and enjoy "the richness of world history and culture".[94] Other supporters of the legislation thought that the Bill might alter the Russian position, which had stalled any exhibitions to the US in the aftermath of the unfavourable ruling of *Chabad*.[95] On a second level, the legislation was intended to restore the harmony between the two pieces of legislation; IFSA 1965 and FSIA 1976. Their relationship had been, according to Sen. Hatch, disturbed by the previous Court ruling in the case of *Malewicz*.[96]

90 N. van Woudenberg, *State Immunity…*, p. 200.

91 Ibidem.

92 H.R. 4086: Foreign Cultural Exchange Jurisdictional Immunity Clarification Act.

93 S. 2212: Foreign Cultural Exchange Jurisdictional Immunity Clarification Act.

94 Sen. Dianne Feinstein about S. 2212: Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, 20 March 2012, p. 1848, https://www.congress.gov/112/crec/2012/03/20/CREC-2012-03-20-pt1-PgS1848-3.pdf [accessed: 12.11.2022].

95 D. Carvajal, *Dispute Over Bill on Borrowed Art*, "The New York Times", 21 May 2012.

96 Sen. Orrin Hatch about S. 2212: Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, 20 March 2012, p. 1850, https://www.congress.gov/112/crec/2012/03/20/CREC-2012-03-20-pt1-PgS1848-3.pdf [accessed: 12.11.2022].

The Bill, in essence, altered the legal precedent of *Malewicz* by introducing a presumption that artworks on loan to the US should no longer be considered as commercial activities for the purposes of Section 1605 (a) (3).[97] Yet such a rule was not absolute. It acknowledged an important exception; overseas loans involving a Nazi-era context were exempted from such a presumption.[98] They could be considered, as the *Malewicz* case had suggested, commercial activities according to the wording of Section 1605 (a) (3).

At the same time, the Bill attracted much criticism. Objections were made at two levels: on the Nazi-looted art exception *per se*; and on a more abstract level. Despite agreeing about the necessity of codifying an exception for confiscations which took place during the Nazi-era, critics suggested that the wording of the exception was quite narrow and as a result applicable only to a handful of cases.[99] In addition, the Bill left several questions unanswered, or in some cases not even posed. Takings from the Allies, the issue of forced sales, and the temporal limitations of the exception were some of the other criticisms.[100]

The Bill, at a second level, was criticized due to its sole emphasis on Nazi-looted art. To its sceptics, it adopted a favourable policy for cases concerning Nazi-looted art, while at the same time it turned a blind-eye and consequently disregarded many other injustices involving cultural objects on loan.[101] Marc Masurovsky succulently wondered in an article published by *The New York Times* "[h]ow can you excuse 28 different kinds of plunder and only outlaw one subset of one subset? […] So we're basically saying it's fine to plunder?".[102] Two NGOs – Saving Antiquities for Everyone (SAFE) and The Lawyers' Committee for Cultural Heritage Preservation (LCCHP) – underlined that the Bill would legitimize American museums' displays of illicitly-acquired cultural objects.[103] In the end, the Bill did not successfully pass the Senate Committee.

2014 Clarification Bill

Almost two years after the first initiative, another attempt to adopt such legislation was made. On 25 March 2014, an exact duplicate was introduced in the House

[97] S. 2212: Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, op. cit., § 2 (a) (h) (1).

[98] Ibidem, § 2 (a) (h) (2).

[99] J.M. Shield, *Curator Congress: How Proposed Legislation Adds Protection to Cultural Object Loans from Foreign States*, "DePaul Journal of Art, Technology and Intellectual Property" 2012, Vol. 23(2), pp. 455-456.

[100] N. Georgopoulos, *Revisiting Senate Bill 2212 – Part One*, "Plundered Art", 18 October 2012, https://plundered-art.blogspot.com/2012/10/revisiting-senate-bill-2212part-one.html [accessed: 12.11.2022].

[101] J.M. Shield, op. cit., p. 456.

[102] D. Carvajal, op. cit.

[103] N. Georgopoulos, *Revisiting Senate Bill 2212, Part Two*, "Plundered Art", 10 November 2012, https://plundered-art.blogspot.com/2012/11/revisiting-senate-bill-2212-part-two.html [accessed: 12.11.2022].

of Representatives under the title "Foreign Cultural Exchange Jurisdictional Immunity Clarification Act" (H.R. 4292). It was co-sponsored by Reps. Steve Chabot (R-OH), Steve Cohen (D-TN), John Conyers (D-MI), and Bob Goodlatte (R-VA). The Bill, according to Rep. Goodlatte, like its previous version would strengthen the "diplomatic" role of art and bring the desired harmony between the two instruments; IFSA 1965 and FSIA 1976.[104] On 2 April 2014, a Committee ordered the further consideration of the legislation, and more than a month later the legislation passed the House of Representatives in an almost unanimous vote.[105] Nonetheless, in the end the Bill met the same fate as its predecessor.

2015 Clarification Bill

The following year experienced the final unsuccessful attempt. Another version of the previous legislation was introduced in the House of Representatives on 11 February 2015 with the title "Foreign Cultural Exchange Jurisdictional Immunity Clarification Act" (H.R. 889). The text was supported yet again by Reps. Steve Chabot (R-OH), Steve Cohen (D-TN), John Conyers (D-MI), and Bob Goodlatte (R-VA). The attempt in 2015 was essentially a carbon copy of the previous ones; its aim was to bridge the gap between IFSA 1965 and FSIA 1976 and strengthen the international mobility of cultural objects and artworks. The 2015 attempt was passed by the House of Representatives on 9 June 2015.[106]

Like the two previous efforts, the Bill had both supporters and met strong opposition. For Rep. Goodlatte, the Bill was necessary in order to strengthen cultural exchange after the consequences of recent rulings.[107] The American Alliance of Museums shared a similar understanding.[108] More interestingly, Rep. Cohen – one of the co-sponsors of the Bill – suggested that the Bill would be unacceptable without a specific and sufficient exception for Nazi-looted art; a provision which had been the result of a consultation with the Conference on Jewish Material Claims Against Germany.[109] On the other hand, for the LCCHP this legislation would dis-

[104] Rep. Bob Goodlatte about H.R. 4292: Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, 6 May 2014, pp. 2-3, 6, https://www.congress.gov/113/crpt/hrpt435/CRPT-113hrpt435.pdf [accessed: 12.11.2022].

[105] H.R. 4292: Foreign Cultural Exchange Jurisdictional Immunity Clarification Act.

[106] H.R. 889: Foreign Cultural Exchange Jurisdictional Immunity Clarification Act.

[107] Rep. Bob Goodlatte about H.R. 889: Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, 9 June 2015, p. 3957, https://www.congress.gov/114/crec/2015/06/09/CREC-2015-06-09-pt1-PgH3956.pdf [accessed: 12.11.2022].

[108] Letter from the President of American Alliance of Museums, Ford W. Bell, to Rep. Steve Chabot, 16 April 2015, https://www.aam-us.org/wp-content/uploads/2018/01/John-Lennon-20150416101441.pdf [accessed: 12.11.2022].

[109] Rep. Steve Cohen about H.R. 889: Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, 9 June 2015, p. 3957, https://www.congress.gov/114/crec/2015/06/09/CREC-2015-06-09-pt1-PgH3956.pdf [accessed: 12.11.2022].

turb the delicate balance between the cultural mobility of collections and the right of dispossessed victims to access justice.[110]

2016 Clarification Act

The legislative odyssey came to an end in December 2016 when an initiative proposing an additional version of the legislation was undertaken one last time. This time the Bill was introduced and subsequently passed unanimously through the stage of its review by the House of Representatives on 8 December 2016 (H.R. 6477). It was supported once more by the same persons who supported the previous versions: Reps. Steve Chabot (R-OH), Steve Cohen (D-TN), John Conyers (D-MI), and Bob Goodlatte (R-VA).[111] Two days later, the Bill was adopted by the Senate without amendments and sent to the President for either his signature or veto. On 16 December of the same year, President Obama signed the Bill, which became official legislation under the name "Foreign Cultural Exchange Jurisdictional Immunity Clarification Act".[112]

The 2016 Clarification Act, like all the previous versions, met with both strong support and strong criticism. For some of its supporters, the Act would assure foreign lenders to loan artworks to the US without the threat of being involved in legal proceedings before the US courts.[113] Others expressed the hope that the adoption of the Act would open the gates for Russian loans, which had been stalled after the ruling of *Chabad*.[114] On the other side of the coin, Ori Z. Soltes, Chair of the Holocaust Art Restitution Project, suggested that the Act would only hinder historic cases involving the Nazi-era, the Bolshevik and Cuban Revolutions, as well as impede claims concerning antiquities which had been recently plundered by the Islamic State of Iraq and Syria (ISIS).[115] Marc Masurovsky highlighted that the legislation had been framed, discussed, and adopted without any consultation with the actual stakeholders affected; that is communities, States, and individuals. Hence, he characterized the 2016 Clarification Act as "unacceptable, indecent, unethical, and unnecessary".[116]

110 Letter from The Lawyers' Committee for Cultural Heritage Preservation to the Co-Sponsors of the Legislation, 22 March 2015, https://www.culturalheritagelaw.org/resources/Documents/Immunity%20from%20Jurisdiction%20Bill.pdf [accessed: 12.11.2022].

111 H.R. 6477: Foreign Cultural Exchange Jurisdictional Immunity Clarification Act.

112 16 December 2016, PL 114-319.

113 E. Campfens, *Restitution of Looted Art: What About Access to Justice?*, "Santander Art and Culture Law Review" 2018, Vol. 4(2), p. 194.

114 A. Buffenstein, *Obama Signs Law that Could Reopen Cultural Exchange With Russia*, "Artnet", 5 January 2017, https://news.artnet.com/art-world/obama-signs-law-cultural-exchange-russia-805304 [accessed: 12.11.2022].

115 Ibidem.

116 M. Masurovsky, *Oppose Senate Bill 3155 Which Legalizes the Display of Looted Art in the United States*, Holocaust Art Restitution Project, 4 December 2016, https://plunderedart.org/2016/12/04/oppose-senate-bill-3155-which-legalizes-the-display-of-looted-art-in-the-united-states/ [accessed: 12.11.2022].

Its purpose, like all earlier attempts, was to strengthen international cultural exchange and the cultural mobility of collections, as well as ameliorate the disharmony between IFSA 1965 and FSIA 1976 after the *Malewicz* ruling.[117] The 2016 Clarification Act introduces a presumption which suggests that foreign State temporary exhibitions to the US shall no longer be considered as a commercial activity for the purposes of the expropriation exception.[118] Such a characterization is not automatic however. The following three criteria must be fulfilled: 1) there must be an agreement between the foreign State and the US Government or a cultural or educational institution, 2) the US President or its designee must determine that the artwork at hand is of cultural significance that serves the national interest; and 3) there must be a notice according to IFSA 1965.[119] If this is the case, the loan shall not be considered a commercial activity.

However, this presumption is not a *carte blanche* for all circumstances. The provision carves out two important exceptions for: 1) Nazi-era claims covering the period between 30 January 1933 to 8 May 1945 for artworks taken by Germany or any other European government occupied by, assisted, or allied with the German government ("the Nazi-looted art exception")[120]; and 2) other culturally significant works, the claims to which occurred after 1900 and were "taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group" ("the 1900 exception").[121]

Unlike the Nazi-looted art exception, the 1900 exception did not appear from the very start of the drafting process. A glance at the previous documents and their legislative history, as previously analysed, makes no reference to such an exception. On the contrary, it surfaced much later. A possible exegesis, as Kristina Daugirdas and Julian D. Mortenson have rightly observed, was the fierce criticism against distinguishing Nazi-looted art claims.[122] The two exceptions share a similar structure. A preliminary comparison between them indicates that they differentiate only with respect to three criteria, set out in paragraph (ii) of the Nazi-looted art exception and paragraphs (ii) and (iii) of the 1900 exception – provisions which have more to do with the specific characteristics of each exception.

However, the spirit of *Malewicz* case, which in essence the 2016 Clarification Act attempted to erase, continues to be very much alive in both those instances.

117 It is interesting to recall that the *Malewicz* case found no conflict between IFSA 1965 and FSIA 1976.

118 28 U.S.C. § 1605 (h) (1).

119 Ibidem.

120 28 U.S.C. § 1605 (h) (2) (A) & 3 (B) and (C).

121 28 U.S.C. § 1605 (h) (2) (B).

122 K. Daugirdas, J.D. Mortenson, *New Legislation Seeks to Confirm Immunity of Artwork and Facilitate Cultural Exchange*, "The American Journal of International Law" 2017, Vol. 111(2), p. 513.

To put it simply, if an artwork falls into these categories the loan to the US can be still considered a commercial activity for the purposes of Section 1605 (a) (3). The approach adopted by the US in a way moves closer to the international standards. For example, The United Nations Convention on Jurisdictional Immunities of States and Their Property introduces a presumption of the non-commercial character of governmental loans of cultural objects and archives, subject to the requirement that those are not intended to be sold.[123] The enumerated exceptions which the 2016 Clarification Act sets forth seem to share common elements with the recent attempt of the International Law Association to sketch a Draft Convention regarding immunities for cultural objects on loan,[124] and conforms with the recent findings in the literature.[125] The *Federal Republic of Germany v. Philip* – which will be examined later – also seems to favour this approach, expressly mentioning the 2012 ICJ ruling.[126]

So in what follows this article focuses on the 1900 exception. It explores the possible content of the 1900 exception by analysing each of its components with specific reference to the restitution of colonial cultural objects. In the course of the analysis, some comparative remarks will be made with respect to the Nazi-looted art exception. They are made because elements of the latter may assist in discovering the possible meaning of the otherwise mystic provisions of the 1900 exception. The article next discusses the recent US Supreme Court decision in *Federal Republic of Germany v. Philipp* and its possible impact on the interpretation of the 1900 exception. This is followed by some concluding remarks.

"The property at issue is the work described in Paragraph (1)"

The first paragraph suggests that property must be at issue. The provision makes explicit reference to Paragraph (1) which defines the word "work" as a "work of art or other object of cultural significance". The same conclusion can be ascertained if one looks at the heading of the 1900 exception, which reads "Other Culturally Significant Works". That element appears to be similar to the previously analysed part on "rights in property" found in the expropriation exception of Section 1605 (a) (3). It is, hence, sensible to assume by analogy that those standards retain their relevance for the purposes of this provision. An equivalent provision can be also traced in the case of the Nazi-looted art exception.

123 Article 21(1)(d).

124 Article 5 of the Draft Convention on Immunity from Suit and Seizure for Cultural Objects Temporarily Abroad for Cultural, Educational or Scientific Purposes (2014).

125 N. van Woudenberg, *Developments…*, p. 356.

126 *Federal Republic of Germany v. Philipp*, op. cit., 713.

"The action is based upon a claim that such work was taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group"

The most challenging provision in terms of legal interpretation is Paragraph (ii). Its length visibly contrasts with the laconic articulation of the other provisions, a characteristic which betrays its complexity. Almost every single word of the provision is susceptible to evaluation. Yet some possible guidelines for its interpretation might include the following.

The provision first indicates that such an action must have a connection with the acts of a foreign government. It must, in other words, be attributable to a foreign government. It does not, however, explain what is the required level of connection. The Nazi-looted art exception employs a similar phraseology in suggesting that the work "was taken in connection with the acts of a covered government". Most likely both provisions require the same level of affiliation. Next, the provision adds that such an action must be part of a larger parcel; i.e. of a "systemic campaign". Once again, the legislative text provides no definition. Nor is the legislative history of particular assistance. A grammatical interpretation of the phrase "systematic campaign" would seem to require some level of organization. Such a criterion seems to have never seriously been questioned in cases regarding confiscations undertaken by the Nazis or the Soviets.[127] More recently, reports concerning the acquisition of colonial cultural objects have made specific reference to its systematic characteristics. The Sarr-Savoy Report, for instance, has suggested that the transfer of colonial cultural objects from the colonial periphery to the colonial metropolises was "in fact at the heart of – and not at the margins – of the colonial enterprise".[128] The Dutch Report also refers to the systematic collection of cultural objects from Belgium in the Congo Free State.[129]

Subsequently, provision (ii) indicates that such a systematic campaign must be one "of coercive confiscation or misappropriation of works". Note that the pairing of "confiscation" and "misappropriation" is separated with the word "or", which indicates that either type of campaign is enough for the provision to apply. The last part of the provision underlines that such a campaign must be directed against "members of a targeted and vulnerable group". Like most requirements of FSIA 1976, no guidance is offered as to their interpretation. The phraseology utilised has given rise to some critical commentary in the relevant literature. Doubts have been expressed about the ambiguous and unclear nature of the phrase.[130] Others sug-

127 See generally *Republic of Austria v. Altmann*, op. cit.; *Chabad of U.S. v. Russian Federation*, op. cit.

128 F. Sarr, B. Savoy, op. cit., p. 13.

129 L. Gonçalves-Ho Kang You et al., op. cit., p. 48.

130 P. Gerstenblith, op. cit., p. 704.

gested that the phrase is susceptible to abuse since it holds the potential to cover many instances of takings – spanning from cases of national, political, racial, ethnic, religious, or other misappropriations to cover even genocide takings.[131] One commentator has argued that had Congress intended the exception to be applicable to genocide takings and human rights violations, it would have drafted a specific and explicit provision to that effect.[132]

Earlier US case law, however, has underlined – and it is worthy citing at some length – that:

> [a]s the systematic attempt to annihilate the Jews in Nazi Germany conclusively demonstrates, the persecution of an entire group can render proof of individual targeting entirely superfluous. Certainly, it would not have been necessary for each individual Jew to await a personal visit to his door by Nazi storm troopers in order to show a well-founded fear of persecution. Similarly, it would be unnecessary for members of other systematically persecuted groups to show that they have been selected on an individual basis as subjects of persecution.[133]

The last passage is particularly important, since it suggests that the vulnerability of a person belonging to a systematically persecuted group must not be proven for each and every individual. It creates, in other words, a presumption of vulnerability not limited only to cases involving the context of the Holocaust. Such a wording has been confirmed in other similar cases.[134] One might argue that the colonial era constitutes another such period.

"The taking occurred after 1900"

Paragraph (iii) codifies the retroactive character of the exception. It works, in essence, as a chronological denominator limiting the scope of the provision to claims involving events that occurred only after the dawn of the 20th century. The provision, as previously analysed, has been criticized for its cut-off nature and its chronological restraints. Claims for objects acquired before 1900 cannot benefit from this provision.[135] Unfortunately, the time restraints chosen exclude a large propor-

131 K. Daugirdas, J.D. Mortenson, op. cit., p. 513; I. Wuerth, *An Art Museum Amendment to the Foreign Sovereign Immunities Act*, "Lawfare", 2 January 2017, https://www.lawfareblog.com/art-museum-amendment-foreign-sovereign-immunities-act [accessed: 12.11.2022].

132 F.N. Djoukeng, *Genocidal Takings and the FSIA: Jurisdictional Limitations*, "Georgetown Law Journal" 2017, Vol. 106(6), p. 1902.

133 *Kotasz v. INS*, 31 F.3d 847, 852 (9th Cir. 1994).

134 See *Knezevic v. Ashcroft*, 367 F.3d 1206, 1213 (9th Cir. 2004); *Vakeesan v. Holder*, 343 F. App'x 117, 126 (6th Cir. 2009).

135 A recent unsuccessful restitution claim involving events prior 1900, yet not referring to the 2016 Clarification Act, is *Taylor v. Kingdom of Sweden*, Civil Case No. 18-1133 (RJL) (D.D.C. Aug. 1, 2019) (Roy Taylor – the eldest descendant of an American Indian performer named White Fox from the Pawnee Nation (Oklahoma) who travelled in Sweden in 1874 and died shortly afterwards – filed a claim against Sweden and the National Museums of World Culture demanding the return of White Fox's human remains and personal belongings. These were allegedly taken by a Swedish scientist without the consent of his relatives.

tion of cultural objects which were acquired in earlier times. One can recall here, for example, the looting of the Beijing Summer Palace (1860); the plunder of the Magdala Treasures (1868); the sack of the Gold Treasure of Ashanti (1874); the destruction of Dahomey (1892); or the looting of the Benin Bronzes (1897).[136]

This does not mean, however, that the exception is void of any assistance. The exception is broad enough to secure its application to several historical incidents. A quick glance at the relevant rulings concerning the restitution of artworks and cultural objects suggests that the 20th century has been at the epicentre of US litigation. Historical events such as the Holocaust,[137] the Russian Revolution, as well as the Soviet takings[138] and the Armenian Genocide[139] have all unfolded during the 20th century. Indicative examples where the provision might find application include, *inter alia*, the Pillage of Beijing by the Eight-Nation Alliance (1900);[140] the German colonial rule in Africa (e.g. Herero and Nama Genocide [1904-1907]);[141] the Italian colonial presence in Africa;[142] the British and Dutch colonial wars and expeditions,[143] or the Japanese colonial period.[144] Loans of colonial cultural objects to US institutions with a questionable provenance are not a figment of this author's imagination. The 2011 loan of the Bangwa Queen – a sacred wooden sculpture plundered by the Germans from modern-day Cameroon during the second half of 1899 – from the Parisian Musée du Quai Branly-Jacques Chirac to MoMA for an exhibition with the name "Heroic Africans: Legendary Leaders, Iconic Sculptures" is just one such example.[145] Such a conclusion is also being reinforced by the Nazi-looted art litigation which has arisen to date before the US courts.

The Court – with respect solely to the allegation of the expropriation exception – responded negatively since the contested human remains and belongings were in Sweden).

136 See, however, the recent litigation which has arisen before the US courts concerning the Benin Bronzes – *Deadria Farmer-Paellmann and Restitution Study Group, Inc. v. Smithsonian Institution*, op. cit.

137 See for instance *Republic of Austria v. Altmann*, op. cit.

138 See for instance *Chabad of U.S. v. Russian Federation*, op. cit.

139 *Western Prelacy of the Armenian Apostolic Church of America v. The J. Paul Getty Museum*, No. BC438824 (1 June 2010) (settled in 2015).

140 J. Hevia, *Looting Beijing: 1860, 1900*, in: L.H. Liu (ed.), *Tokens of Exchange: The Problems of Translation in Global Circulations*, Duke University Press, Durham–London 1999.

141 See generally *Rukoro v. Federal Republic of Germany*, op. cit.; *Rukoro v. Federal Republic of Germany*, 976 F.3d 218 (2d Cir. 2020).

142 See, for example, the return of the Venus of Cyrene (removed in 1915) to Libya and the return of the Axum Obelisk (taken in 1937) to Ethiopia – A. Visconti, *Between "Colonial Amnesia" and "Victimization Biases": Double Standards in Italian Cultural Heritage Law*, "International Journal of Cultural Property" 2021, Vol. 28(4), pp. 565-568.

143 J. van Beurden, *Inconvenient Heritage: Colonial Collections and Restitution in the Netherlands and Belgium*, Amsterdam University Press, Amsterdam 2022, p. 36.

144 See, for example, the Japanese looting of a Tang-era stele from the Chinese city of Lushun in 1905 – H. Zhong, *China, Cultural Heritage, and International Law*, Routledge, New York 2017, p. 28.

145 E. Campfens, *The Bangwa Queen…*, p. 79.

Commercial nexus

The last two paragraphs, Paragraph (iv) and Paragraph (v), lay down the requirements of establishing a commercial nexus. The first one indicates that a court must determine "that the activity associated with the exhibition or display is a commercial activity, as that term is defined in section 1603 (d)". The latter, as previously seen, defines the meaning of commercial activity. Once again, it seems safe to assume that the meaning of this provision is similar to the notion of commercial activity found in Section 1605 (a) (3).

The subsequent paragraph adds that this determination "is necessary for the court to exercise jurisdiction over the foreign state under subsection (a) (3)". The absence of this determination is tantamount to the non-application of the exception provision. The use of the word "and" at the end of Paragraph (iv) contributes to this cumulative interpretation. Such a requirement, as set down in Paragraph (v), can be crucial for a court to decide whether or not to exercise jurisdiction against a foreign government. This is evident in instances where a foreign State hardly retains any commercial relations with the US. Mari-Claudia Jiménez has suggested that this could be the case of a possible art loan from Cuba to the US.[146] In such a case, the sole act of lending could potentially constitute its only commercial activity in the US. It is not difficult to imagine a similar scenario involving other States such as Iran or North Korea.[147] An analogous provision is contained in the Nazi-looted art exception.

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

The 2016 Clarification Act has only been cited on one occasion – as of the time of this writing – the case before the US Supreme Court of the *Federal Republic of Germany v. Philipp*, or the *Guelph Treasure* case.[148] The facts of the case are the following: a consortium of three German Jewish art dealers purchased, at the lapse of the 1920s, a collection of medieval relics, collectively known as "Welfenschatz".[149] Two years after the original acquisition, that is in 1931, the consortium decided to sell approximately half of the collection to buyers abroad, in Europe and the US.[150] What was left from the collection, however, had a different fate. The remaining pieces of the collection were, according to the art dealers' heirs, sold under coercion orchestrated by Hermann Göring at the price of one third of their actual value

[146] N. O'Donnell, *Foreign Cultural Exchange Jurisdictional Clarification Act Returns*, Lootedart.com, 10 June 2015, https://www.lootedart.com/news.php?r=RAPJN9873051 [accessed: 12.11.2022].

[147] Ibidem.

[148] *Federal Republic of Germany v. Philipp*, op. cit.

[149] Ibidem, 708.

[150] Ibidem.

in 1935.[151] The collection is currently held and displayed by the German State in Berlin.[152]

The heirs, in 2014, first turned to the German Advisory Commission for the Return of Cultural Property Seized as a Result of Nazi Persecution, Especially Jewish Property. The latter concluded that the sale was a fair transaction containing "no indication […] that points to the art dealers and their business partners having been pressured during negotiations".[153] Instead of following the judicial path before the German judiciary, the heirs filed a claim before the US courts. Following decisions by the lower Federal Courts,[154] the case made its way to the US Supreme Court. The Supreme Court made some observations insofar as concerns the 2016 Clarification Act which are important for its future interpretation. It confirmed the reasons for adopting the 2016 Clarification Act: 1) the inconsistencies between IFSA 1965 and FSIA 1976 after the *Malewicz* case; and 2) the "fear that the work's presence in the United States will subject them to litigation".[155] The Supreme Court went on to further examine the amendment which was introduced by the 2016 Clarification Act – the presumption that a foreign art loan shall no longer be qualified as a commercial activity.[156] The Court also highlighted the Nazi-looted art exception which the 2016 Clarification Act lays down.[157] It made no reference to the 1900 exception.

More importantly, the Supreme Court underlined that "[t]he Clarification Act did not purport to amend the critical phrase here – 'taken in violation of international law'".[158] For its interpretation of the phrase "taken in violation of international law", the Supreme Court explained that

> [w]e need not decide whether the sale of the consortium's property was an act of genocide, because the expropriation exception is best read as referencing the international law of expropriation rather than of human rights. We do not look to the law of genocide to determine if we have jurisdiction over the heirs' common law property claims. We look to the law of property.[159]

151 Ibidem.

152 Ibidem.

153 Recommendation of the Advisory Commission for the Return of Cultural Property Seized as a Result of Nazi Persecution, Especially Jewish Property, 20 March 2014, p. 3.

154 *Philipp v. Federal Republic of Germany*, 248 F. Supp. 3d 59 (D.D.C. 2017), op. cit.; *Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018), op. cit.

155 *Federal Republic of Germany v. Philipp*, op. cit., 714-715.

156 Ibidem, 714.

157 Ibidem, 715.

158 Ibidem.

159 Ibidem, 712.

By reaching such a conclusion, the Supreme Court essentially deviated from the judicially-constructed expansion of the term "taken in violation of international law", which interpreted the phrase broadly to include genocide takings. The Court argued that to suggest otherwise would transform "the expropriation exception into an all-purpose jurisdictional hook for adjudicating human rights violations".[160] It further clarified that the expropriation exception "incorporates the domestic takings rule".[161] As such, FSIA 1976 is only applicable to property takings against alien nationals. Takings from a State's own nationals do not fall within its scope.[162]

From the perspective of the claimants, the Supreme Court's ruling is an unfortunate one; while on the contrary it was a welcome development for governments anxious about confronting their "dark legacies of the past".[163] Yet the case, despite its negative outcome, is still important since it constitutes the only supreme judicial elaboration on the 2016 Clarification Act. In light of the *Philipp* case, it appears *prima facie* appropriate to interpret the 2016 Clarification Act, along with its exceptions – especially Paragraph (ii) of the 1900 exception as well as the Nazi-looted art exception – as referring to property takings. Since the Supreme Court's ruling, further proceedings took place in a lower Federal Court. A District Court was asked to decide whether the Consortium's art dealers were German citizens or not at the time of the taking. The Court suggested it did not enjoy jurisdiction to hear the case since domestic takings do not fall within the ambit of FSIA's 1976 expropriation exception.[164] Judge Colleen Kollar-Kotelly reached such a conclusion while noting, *inter alia*, the heirs' failure to present sufficient information which evidenced that they "were not German nationals at the time of the sale".[165] It remains to be seen whether the Guelph Treasure's saga will continue further in the US courtrooms.

Concluding Remarks

The underlying proposition of this article has been to challenge the default view, which portrays the matter of restitution of colonial cultural objects as only a canvas of ethics drained of any legal shades. The analysis pursued above has attempted to cast some doubt on the almost standard objection which suggests that there are no judicial fora, no legal basis, nor a legal remedy for such cases. It has done so by ex-

160 Ibidem, 713.

161 Ibidem, 715.

162 Ibidem.

163 A. Gubrynowicz, *Germany et al. v. Philipp et al.: Human Rights Exception to State Immunity Rejected*, "Polish Yearbook of International Law" 2020, Vol. 40, p. 251.

164 *Philipp, et al., v. Stiftung Preussischer Kulturbesitz*, Civil Action No. 15-00266 (CKK) (D.D.C. Aug. 25, 2022), p. 32.

165 Ibidem, p. 31.

ploring the possibility of a legal claim before the US courts. For instances of takings which have taken place relatively late in terms of the colonial era – meaning from the dawn of the 20th century – a legal path should not be excluded *a priori*, as the doors to the US courts may still be open.

At the same time, the author has no illusions about the practical implementation and/or the chances of success of this proposal. In other words, it does not suggest that this is a path paved with rose petals. On the contrary, it is one with many thorns ahead. Important interpretations are still pending. The exact content, for instance, of the phrases "systematic campaign" and "members of a targeted and vulnerable group" still remains unknown. Engagement with colonialism makes the situation even more complex. Could, for example, a member of a targeted and vulnerable group be considered a citizen of the former colonial power for the purposes of FSIA 1976? Cases involving Nazi-looted art establish that Jewish people had been deprived of their citizenship by the Third Reich.[166] That appears highly unlikely for the colonial era. Historical research provides plenty of examples of the double standards pertaining to citizenship in the metropolitan centres and in the colonies.[167]

Simultaneously, one must not forget that this article has only touched one aspect of a possible claim. It has only examined the procedural issue of gaining jurisdiction before the US courts under the new amendment of FSIA 1976, because that is the first difficulty that one would encounter. But gaining jurisdiction by no means signals a successful ending. Even assuming jurisdiction is granted, further challenges remain, such as issues of private international law[168] and so on, along with the high costs of litigation and time-consuming procedures. What past practice shows however – at least in the cases of Nazi-looted art – is that a legal approach has played an important role in reaching amicable solutions, especially in cases where a spirit of compromise and co-operation was earlier lacking.[169]

In the meantime, until another such case is brought before the US courts and litigated, we can only engage in speculation. Time will tell how US courts will interpret the 2016 Clarification Act, and particularly the 1900 exception, which still largely remains – six years after its adoption – a *terra incognita*. Yet this article submits that the said exception can play a role in delivering justice in at least some of those cases for which it has for so long been denied.

166 See for example *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157, op. cit., 1165-1166.

167 For the Portuguese, Dutch, and German examples, see P. Jerónimo, M.P. Vink, *Citizenship in a Post-Colonial Context: Comparing Portugal and Netherlands*, "Portuguese Journal of Political Science and International Relations" 2011, Vol. 6; J. Zollman, *German Colonial Law and Comparative Law, 1884-1919*, in: T. Duve (ed.), *Entanglements in Legal History: Conceptual Approaches*, Max Planck Institute for Legal History and Legal Theory, Frankfurt am Main 2014.

168 C. Roodt, *Private International Law, Art and Cultural Heritage*, Edward Elgar Publishing, Cheltenham 2015.

169 C. Roodt, *State Courts or ADR in Nazi-Era Art Disputes: A Choice "More Apparent Than Real"?*, "Cardozo Journal of Conflict Resolution" 2013, Vol. 14(2), p. 443.

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