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Dr. Monika Brzozowska

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Reading and watching news about atrocities in Ukraine committed by Russians one can see that all the massacres committed by the Russian soldiers are accompanied not only by the persecution and murder of Ukrainians, the deportation of whole groups of Ukrainians (in particular children) into Russia, but also by the methodical confiscation, devastation, looting and plunder of the property left behind by the victims. And the question must be asked: is there any legal chance for victims (Ukrainians) to obtain any compensation?.

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Compensation for Russian Crimes in Ukraine - How to Sue Russia?

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ABSTRACT

Reading and watching news about atrocities in Ukraine committed by Russians one can see that all the massacres committed by the Russian soldiers are accompanied not only by the persecution and murder of Ukrainians, the deportation of whole groups of Ukrainians (in particular children) into Russia, but also by the methodical confiscation, devastation, looting and plunder of the property left behind by the victims. And the question must be asked: is there any legal chance for victims (Ukrainians) to obtain any compensation?

There is not a simple task, but there is possible.

I. CRIMINAL PROCEEDINGS

First and foremost it is cliché to admit that each crime must be punished, and as a matter of principle those responsible for it should face civil or criminal charges. Every crime of homicide must be punished, in particular genocide or war crimes as crimes against all humankind.

Punishment for crimes must also involve reparations. Although the right to reparations or financial satisfaction for survivors or indirect victims (descendants of the deceased) is well established in international human right and humanitarian law, the award of compensation for victims or the enforcement of payments even when damages have been ordered frequently encounter obstacles.

The classical and most clear-cut examples concern reparations for the Rwanda genocide or the genocide committed in Bosnia and Herzegovina (BiH).

Neither the International Criminal Tribunal for Rwanda nor the International Criminal Tribunal

for the former Yugoslavia have granted the victims any compensation. Since they have no mandate to award such compensation, both Criminal Tribunals have focused on criminal punishment. The victims were only witnesses during the criminal proceedings, whose sole focus was on prosecuting the alleged perpetrators.

In Bosnia and Herzegovina many victims decided to file lawsuits against state entities because the criminal cases against actual perpetrators were stalled or had been discontinued. However courts regularly dismissed victim claims, citing statutes of limitation on civil crimes.

What is the consequence of failing to obtain financial reparations for victims? A sense of injustice felt by all of them.

In this context the interesting case adjudicated before the International Criminal Court can be mentioned. On 12 March 2021 the International Criminal Court awarded the highest financial compensation, 30 million dollars, to child soldiers and other victims of the convicted Congolese militia leader Bosco Ntaganda.

In *The Prosecutor v. Bosco Ntaganda*¹, the alleged perpetrator was accused of committing war crimes (he was charged with 18 counts) in connection with events which took place in Iutri district of the DRC from about 6 August 2002 to about 31 December 2003. In the indictment, the prosecutors made reference to many crimes including the massacre in Kobu. Ntaganda's soldiers (among of whom were children) brought groups of captured persons to buildings in Kobu, were most of the victims were raped (both men and women). Afterwards, 49 captured persons (including children and babies) were taken

¹ The Prosecutor v. Bosco Ntaganda, ICC-01/04-02/0, Judgment 21 March 2021.

outside and killed using sticks and batons as well as knives and machetes.

Ntaganda was found guilty on five counts of crimes against humanity, namely murder and attempted murder, rape, sexual slavery, persecution, and forcible transfer of people, in addition to thirteen counts of war crimes. In granting the financial compensation for victims, the ICC took an important and crucial stance. According to the judgment:

- “The reparations phase of the proceedings marks a critical juncture in the administration of justice. (..) In effect, the victims’ rights to truth, justice, and reparations are all part of the victims’ right to a remedy.
- Reparations fulfil two main purposes (..) they oblige those responsible for serious crimes to repair the harm they have caused and enable the Court to ensure that offenders account for their acts.
- Reparations also aim, to the extent possible and achievable, to relieve the suffering caused by serious crimes, afford justice to the victims by addressing the consequences of the wrongful acts committed by the convicted person, deter future violations, and enable the victims to recover their dignity.”

That was a case against a real perpetrator who was charged and sentenced. But for victims in Ukraine the real obstacle seems to establish the real perpetrators - due to their death or the attitude of Russia which may be protecting them or sometimes because the real perpetrators are unknown.

With regard to obstacle to establish, charge or sentenced the real perpetrators a Ukrainian (a victim) can consider to sue Russia whose citizens or soldiers taken, looted or stole property. It is possible due to the provisions of the Foreign Sovereign Immunity Act and the “expropriation exception”.

The fact is that in many cases compensation for property losses could be viewed as the only form of just satisfaction for crimes (including the killing of one’s relatives or their deportation or slave labor) available. With respect to cases relating to

disappearances or deaths caused by officials, often in conjunction with property losses, compensation for property could be of greater importance and serve as the only possible way of satisfying direct or indirect victims.

II. CIVIL PROCEEDINGS – A UKRAINIAN OWNER OF PROPERTY CAN SUE RUSSIA BEFORE AN AMERICAN COURT

First of all, it should be emphasized that for years, the entrenched and widely held notion was that countries were afforded “absolute immunity” from being sued in other countries. This rule emanates from the British common-law tradition, as seen in the old notion that the “King can do no wrong.”²

It was confirmed in American jurisprudence in the judgment in *The Schooner Exchange v. McFaddon*, handed down in 1812 during the Napoleonic era.³ It was one of the first judgments holding the line of “absolute” immunity of a foreign sovereign granted them in a United States court.

In the said court case two American citizens, John McFaddon and William Greetham, alleged to sail from Baltimore to St. Sebastian, Spain, on 27 October 1809. On 20 December 1810, their vessel was seized under decrees and orders of Napoleon by the French navy and transformed into a warship called *Balaou*. The *Balaou* sailed until August 1811 under the French flag. As a French vessel, it had to dock in Philadelphia due to damage that it sustained during a storm. The former owners filed a lawsuit seeking the return of the vessel which had been taken illegally and wrongfully. They brought a complaint against the *Schooner Exchange*, a public armed ship. At that time, France was a US trading partner and ally

On 4 October 1811, the district court rejected their claims, pointing out its lack of jurisdiction over such claims. However, the court of Appeal (The Circuit Court for the District of Pennsylvania) reversed the decision on 28 October 1811. From

² Steven Swanson, “Jurisdictional Discovery under the Foreign Sovereign Immunities Act,” *Emory International Law Review*, 13(2) p. 447.

³ *The Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812).

this sentence of reversal, the district attorney appealed to this Court, and therefore the Supreme Court had to adjudicate the dispute. Chief Justice Marshall delivered the unanimous opinion of the Supreme Court, indicating some interesting points.

The Supreme Court, dismissing the lawsuit, stressed that every sovereign enjoyed “full and complete power [...] within its own territories,” and the courts of the United States would not destroy “the dignity of [another] nation” by asserting jurisdiction over claims affecting the rights of the foreign sovereign absent that sovereign’s consent.

This iconic case is generally treated as the source of US foreign sovereign immunity jurisprudence, pointing out that foreign sovereign immunity is a matter of grace and international comity. The legal viewpoint presented by Chief Marshall was the basis for the dismissal of cases due to absolute immunity.

Over time, one can observe the evolution of the traditional perception of state immunity, stemming from the fact in some circumstances foreign states run business and commercial operations that should be treated as private rather than public. US courts faced the problem of immunity again in the context of the commercial activity of foreign states. In 1926, in *Berizzi Brothers v. The Pesaro*,⁴ the court stated that the Italian state-owned commercial vessel could be subject to US jurisdiction due to the commercial nature of the dispute.

In 1938, the US Supreme Court adjudicated the case of *Compania Espanola de Navegacion Maritima S.A. v. The Navemar*,⁵ although the doctrine of absolute immunity still existed at the time.

In 1952, what is known as the Tate Letter⁶, established the “restrictive theory” of foreign state immunity. The shift from the absolute to the restrictive theory of foreign sovereign immunity occurred i.e. due to the fact that after World War II many individuals suggested that it was no longer appropriate for a foreign state to enjoy total immunity.

Under the restrictive theory, a clear distinction had to be drawn between the commercial and public activities of a foreign state. Therefore disputes concerning foreign sovereigns had to be divided into two groups: those arising from a state’s commercial activities (“*acta jure gestionis*”) and those concerned with public activities (“*acta jure imperii*”). Only the former could be subject to a lawsuit and not immune from the jurisdiction of American courts.

In other words, a foreign state enjoys immunity only in respect of its public acts. When acts arising out of a state’s commercial or private activity are at issue, the foreign state can be deprived of immunity from American court jurisdiction.⁷

As a result of the Tate Letter, the Executive Branch participated in lawsuits, providing its assessment of the possibility or lack thereof of citing immunity from suit before American courts. Because the Executive Branch, acting through the State Department, communicated to the judiciary its opinion via “suggestions of immunity,” and the American courts often relied on the US State Department’s opinion as to whether immunity should be conferred, diplomatic pressure on the State Department to submit suggestions of immunity to courts increased. The foreign state being sued before an American court could make a formal diplomatic request asking the State Department to “suggest” to the court that the lawsuit be dismissed on grounds of immunity.⁸

⁶ Letter from Jack B. Tate, Acting Legal Adviser, U.S. Department of State, to Philip B. Perlman, Acting U.S. Attorney General (May 19, 1952) [Tate Letter].

⁷ Michael A. Tessitore, “Immunity and the Foreign Sovereign: An Introduction to the Foreign Sovereign Immunities Act,” *Florida Bar Journal*, 73(10), p. 48.

⁸ Simmons, K. P. (1977). The foreign sovereign immunities act of 1976: Giving the plaintiff his day in court. *Fordham Law Review*, 46(3), p. 543-572.

⁴ *Berizzi Brothers v. the Pesaro*, 271 U.S 662 (1926).

⁵ *Compania Espanola de Navegacion Maritima S.A. v. The Navemar*, 303 U.S. (1938).

The fact that two different branches (the Judiciary and the Executive Branch) could grant or not grant immunity in the same case was an inconvenience. Additionally, the Executive standards were neither clear nor uniformly applied, and the matter often depended on a variety of factors, including diplomatic pressure.⁹

In order to remedy this situation, Congress decided to codify the provisions governing the immunity of foreign countries in one act – the Foreign Sovereign Immunities Act. The act, sponsored by the Departments of State and Justice, was enacted on 21 October 1976 and entered into force on 21 January 1977.

As a matter of principle the FSIA has granted immunity to foreign states from the jurisdiction of American courts. However the provisions set down a number of exceptions from this general principle.

The most important, for Ukrainians victims, exception - laid down in art. 28 USC § 1605 (a) (3) - reads as follows:

“A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States connection with a commercial activity on in the United States 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;

This exception – called the “expropriation exception” has been invoked in cases concerned stolen, seized or taken property by a foreign state.

⁹ Weber, “The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect,” 3 Yale Studies in World Public Order 1, 11-13, 15-17 (1976).

The expropriation exception allows for jurisdiction when the following conditions are met:

- The property of the victims was taken in violation of international law.
- The illegal seizure was made by a foreign state (foreign for the victims) or an agency or instrumentality thereof – therefore the taker must have been a foreign state or its agency or instrumentality.
- The taken property must have a connection to a commercial activity in the United States carried out by the foreign state – therefore the commercial interest harmed directly affects the United States, in other words must be one engaged in the United States.¹⁰

Any foreign-based plaintiff who would like to sue a foreign state before American courts by virtue of the expropriation exception must provide evidence and comply with all abovementioned requirements.

A. THE PLAINTIFF – A UKRAINE OWNER

The main issue in such a litigation against a state seems to be that of jurisdiction and of the parties to the proceedings. One needs to keep in mind that suing a foreign state and executing compensation after a judgment has been delivered may trigger diplomatic tensions. On the other hand, if there is any forum for seeking compensation in US courts, and if any provisions make it possible to sue a foreign state in the United States, US courts must take these provisions into account and address the lawsuits.

In light of the above, the first question we must ask is who can be a plaintiff in such cases? The answer is simple - the plaintiff can be the ex-owner of the property taken in violation of international law, notwithstanding the status of this owner (an entity such as a museum or an individual, who needs to prove their ownership) or their citizenship.

¹⁰ Travers, J.. “Bolivarian Republic of Venezuela Helmerich & Payne Int’l Drilling Co.: The Need for a Valid-Argument Standard of Review for Expropriation Exception Claims,” Maryland Journal of International Law, 33(1), 2018, p. 314.

Therefore the plaintiff can be each Ukraine owner whose property was taken (stolen, looted, expropriated etc.) notwithstanding its status (natural person or entity).

In order to sue Russia, the plaintiff must bear the burden of proving four crucial elements:

1. Rights in property which are at issue
2. The fact that property was taken
3. The fact that the taking violated international law.
4. “Nexus” required by the FSIA’s exception

What is important, the plaintiff must demonstrate in their complaint that each element of the “takings exception” applies.

The burden-shifting framework of the FSIA can be presented in the following steps:

1. First and foremost a plaintiff must show that the case concerns a property and, as a jurisdictional matter, that the plaintiff, rather than someone else, owned the property at issue. That is part of the merits of the case.
2. Then a plaintiff must submit that the property at issue was taken in violation of international law. This means that the plaintiff presents a relevant factual allegation that a certain kind of right is at issue and that the relevant property was taken in a certain way (in violation of international law).
3. A defendant seeking sovereign immunity bears the burden of establishing a *prima facie* case that it is a foreign sovereign.
4. The burden next shifts to the plaintiff to demonstrate that the FSIA exemption applies. The plaintiff “bear[s] the burden of producing evidence to show that there is no immunity and that the court therefore has jurisdiction over the claims.”¹¹ In other words to overturn the FSIA presumption of immunity, a complaint must set forth “sufficient facts to support a reasonable inference that [the]

claims” satisfy one of the 8 specific exceptions enumerated in the FSIA.¹²

5. If a plaintiff satisfies one of the FSIA’s statutory exceptions, a defendant must then bear the burden of proving, by a preponderance of the evidence, that the alleged exception does not apply in a particular case.

It seems that the most difficult issue in these types of cases is determining and producing evidence satisfying one of the nexus requirements. In *Zappia Middle East Constr. Co. v. Emirate of Abu Dhabi*,¹³ the Court stated: “As to the nexus requirement, a plaintiff must show either that ‘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 ‘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.’”

B. THE DEFENDANT

According to the FSIA defendants can be a foreign state and/or its agency or instrumentality. However, the terms used in the provision as to “e foreign state”, “political subdivision” of the foreign state and “agency or instrumentality” of a foreign state should be explained.

The FSIA in 28 U.S. Code § 1603 provides that:

“A “foreign state”, except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state.

“An “agency and instrumentality of a foreign state” means any entity which is a separate legal person, corporate or otherwise, and which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof,

¹¹ See: *Drexel Burnham Lambert Group Inc. v. Comm. of Receivers for Galadari*, 12 F.3d 317, 325 (2d Cir.1993); *Cargill Int’l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2nd Cir.1993).

¹² *Rux v. Republic of Sudan*, 461 F.3d 461, 468 (4th Cir. 2006).

¹³ *Zappia Middle East Constr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 251 (2d Cir. 2000).

and

which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country”.

The interpretation of the provision 28 U.S. Code § 1603 and §1605 must be read as follows:

"under the FSIA . . . actions taken by foreign states, or their instrumentalities are sovereign acts and thus protected from the exercise of [the court's] jurisdiction, unless one of the exceptions to FSIA applies.¹⁴«.

Nevertheless, the FSIA distinguishes foreign states (including its political subdivision) from their agencies and instrumentalities.

The simplest explanation can be presented for a term of a “foreign state”. In the case *Lehigh Valley R. Co. v. State of Russia*¹⁵ the U.S. Court of Appeals for the Second Circuit noted that the foreign state is:

“the community or assemblage of men, and the government the political agency through which it acts in international relations (...). The foreign state is the true or real owner of its property, and the agency the representative of the national sovereignty. (...) Who may be the sovereign de jure or de facto of a territory is a political question; not judicial”.

The term of a “foreign state” indicates a body politic that governs a particular territory. In the Restatement §4 the definition of the state is as follows: “an entity that has a defined territory and population under the control of a government and that engages in foreign relations”.

However, it should be noted that in the FSIA, the term “foreign state” has a broader meaning, by mandating the inclusion of the state’s political subdivisions, agencies, and instrumentalities.

¹⁴ West v. Multibanco Comermex, S.A., 807 F.2d 820, 824 (9th Cir. 1987)

¹⁵ *Lehigh Valley R. Co. v. State of Russia*, 21 F.2d 396 (2d Cir. 1927) 21 F.2d 396 (2d Cir. 1927)

The term “political subdivision” includes all governmental units beneath the central government.

As a political subdivision of a foreign state courts have admitted the following entities: a city of a foreign state¹⁶, armed forces of a foreign state¹⁷, a provincial government¹⁸

As to the instrumentality of a foreign state courts have admitted that the following entities could be counted to be them: a bank¹⁹, the national railway²⁰, a foundation²¹.

C. THE TERM “PROPERTY”

One cannot miss the fact that the term “property” can be treated in broader sense than only tangible items. American courts in the recent judgments move away from considering that the expropriation exception concerns only tangible property. This thesis is based on the language of the FSIA. In the case *Nemariam v. Federal Democratic Republic of Ethiopia*²², the court explained in depth the issue of broad scope of property (including intangible property) under the FSIA stating:

“Neither the plain language of section 1605(a)(3) nor its legislative history expressly states that the expropriation exception applies only to tangible property. Moreover, “the tangible/intangible characterization of property interests . . . is a distinction without a difference” and “is not generally recognized in international, federal, or state law. (...)”

¹⁶ *Malewicz v. City of Amsterdam* 362 F. Supp. 2d 298 (D.D.C. 2005) and *Malewicz v. City of Amsterdam* 517 F.Supp.2d 322 (2007)

¹⁷ *Transareo, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724 (1998)

¹⁸ *Yang Rong, et al., Appellants v. Liaoning Province Government, a Subdivision of the People's Republic of China, a Foreign State*, 452 F.3d 883 (D.C. Cir. 2006)

¹⁹ *West v. Multibanco Comermex, S.A.*, 807 F.2d 820 (9th Cir. 1987)

²⁰ *Scalin v. Société Nationale Des Chemins De Fer Français*, No. 15-cv-03362 (N.D. Ill. Mar. 26, 2018)

²¹ *Magness v. Russian Federation*, 247 F.3d 609 (5th Cir. 2001)

²² *Nemariam v. Federal Democratic Republic of Ethiopia*, 491 F.3d 470 (D.C. Cir. 2007)

The plain language of section 1605(a)(3) — as well as its legislative history — does not limit its application to tangible property. Moreover, there seems to us to be no reason to distinguish between tangible and intangible property when the operative phrase is "rights in property."

Therefore as property in the FSIA's meaning can be treated

Tangible property including:

1. Property stolen and sent into Russia (from household items, personal belongings and money to valuable masterpieces or pieces of art)
2. Property used or changed and modified by Russians (as real estates, religious buildings, public offices etc.)

Intangible ones as: assess frozen in banks²³, intellectual property²⁴, trademark²⁵, patent and copyrights.

D. THE TERM "TAKEN"

The FSIA requires the property in issue must be "taken with the violation of international law" therefore the term "taken" should be defined. The FSIA does not define the term "taken," but analyzing the existing cases of law one can observe that "taken in violation of international law" refers to "the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law."

The deep analysis of the term "taken" was presented in the case *Williams v. Nat'l Gallery of Art*²⁶. Plaintiffs were Oliver Williams, Iris Filmer, and Margarete Green, heirs of Margaret Moll ("Greta Mol"). Regarding the term "taken" the Williams court stated:

"to take" has many definitions, but the one applicable here is "to get into one's hands or into

one's possession, power, or control," such as "to seize or capture physically" or "to acquire by eminent domain."

In the context of word "taken" under the FSIA the court stated that "a taking is [c]onduct attributable to a state that is intended to, and does, effectively deprive an alien of substantially all the benefits of his interest in property."²⁷

E. THE NEXUS

In the cases concerning the FSIA's expropriation exception one of the requirements that needed to be met is a jurisdictional nexus with the United States.

The FSIA in § 28 U.S. Code § 1605 (a) (3) provides that :

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

The provisions must be read as follows:

1. If the defendant is a foreign state – the plaintiff must prove the first nexus what means that the property at issue or any property exchanged for such property is present in the United States in connection with a commercial activity in the United States by the foreign state
2. If the defendant is an agency or instrumentality of a foreign state – the second nexus must be satisfied what means that the property in question is owned or operated by an agency or?

²³ *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012)

²⁴ *France.com INC against French Republic* 992 F.3d 248 (4th Cir. 2021)

²⁵ *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

²⁶ *Williams v. Nat'l Gallery of Art*, No. 16-CV-6978 (VEC), 2017 WL 4221084, at *1 (S.D.N.Y. Sept. 21, 2017)

²⁷ *Banco Nacional de Cuba v. 12 Chem. Bank N.Y. Tr. Co.*, 822 F.2d 230, 239 (2d Cir. 1987)

In the case *De Csepel v. Federal Republic of Hungary*²⁸, the D.C. Circuit has held that the two parts of the “commercial nexus” requirement must be read disjunctively.

The term “commercial activity carried out in the United States by a foreign state” must be regarded as commercial activity of such state having substantial contact with the United States²⁹.

It is obvious that if a property is in the USA, the plaintiff could reclaim it, what stated the court in *Bernstaien v. Van Heyghen Freres Société Anonyme*³⁰.

The problem for Ukrainian plaintiff is how to prove that the property in issue is present in the USA and is used in the USA in connection with a commercial activity carried out by a foreign state in the United States if the property was seized or taken or expropriated? The attempts were many and, in several cases, courts held in favor of plaintiff.

In the case *Simon v. Republic of Hungary*³¹, the D.C. Circuit stated that this commercial-above nexus requires that the defendants possess the expropriated property or proceeds thereof; and that the defendants participate in some kind of commercial activity in the United States.

Nevertheless, the Circuit cautioned that the plaintiffs ultimately “may or may not be able to prove the point,” and emphasized the limitation of its holding to whether the plaintiffs’ allegations were sufficient as a matter of law”.

In the case *Rukoro v. Federal Republic of Germany*, where the victims of genocide committed by Germans in today’s Namibia at the eve of XX century sought compensation, the plaintiffs presented the nexus in that way:

1. Germans – committing a genocide - stole land, livestock and property of two Namibian tribes

²⁸ *De Csepel v. Federal Republic of Hungary*, 859 F.3d 1094, 1107 (D.C. Cir. 2017)

²⁹ See *Malweicz v. City of Amsterdam* 362 F. Supp. 2d 298, 304 (D.D.C. 2005)

³⁰ *Bernstein v. Van Heyghen Freres Société Anonyme* 163 F.2d 246 (2d Cir. 1947)

³¹ *Simon v. Republic Hungary*. 812 F.3d at 146

2. German colonial authorities either sold or leased the properties to private parties having imposed fees, customs, tariffs, and taxes on commercial operations in the territory,
3. The money deposited directly into the German treasury and mixed with other money in the German treasury
4. Germany used some of this comingled money to buy four real estate properties in New York City
5. Each of the New York Properties is "used in connection with [Germany's] commercial activities" including, among other things, the housing of German officials and employees and "cultural propagation, German-language programs, and other programs to develop American interest in the German people, language, culture, and country with the goal of commercial growth through cultural growth.

The *Rukolo* District Court admitted this interpretation of “commercial activities” of Germany (dismissing the whole case on the other grounds) pointing out that “property exchanged for the expropriated property” was presented in the United States. The Court of Appeal did not agree with that observation. The court stated that the plaintiffs must point out the circumstances to trace the proceeds that a sovereign received from expropriated property to funds spent on property present in the United States.

With regard to the second nexus (concerning the agencies or instrumentalities of a foreign state) it must be read as follows: that 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 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”.

The property must be present in the United States as the time of filling the civil action

In the case *Schubart v. Federal Republic Of Germany And Bvvg Bodenverwertungs-Und*

-*Verwaltungs* GMBH³² the court emphasized that the ongoing commercial activities must have been presented by the plaintiff at the time of suing a foreign state even when in the passage of time a foreign state or its agency or instrumentality decided to close their activities after the bringing the lawsuit in a court.

In existing judgment plaintiffs have demonstrated inter aliae that nexus pointing out

1. Entering transactions for joint publishing and sales in the United States
2. Entering financial transaction in the USA (the bank transactions)
3. Shipping lands, gift, tickets
4. Selling tickets, booking reservations, and conducting similar business
5. Publishing books and selling them in the USA
6. Placing advertisement in magazines distributed in the USA
7. Contracting with the U.S. entity,
8. Sending employees to the United States
9. Having own office in the USA
10. Licensing reproductions, paying United States citizens to write for catalogues,
11. Borrowing and lending art

III. CONCLUSION

Ukrainians seeking compensation for property losses (stolen or used by Russians) can choose to file their claims with American courts. The American judiciary is widely reputed for its independence and seen as a system that allows class-action and makes room for punitive damages. The public is often convinced that Americans and American judges have a strong sense of fairness, comprehension and sympathy for victims of crimes. Needless to say, in many cases the victims have fruitlessly sought compensation even before international tribunals. Therefore American courts with their sense of justice are perceived as their last resort in the fight for redress (including compensation).

³² *Schubarth v. Fed. Republic of Germany* 891 F.3d 392 (D.C. Cir. 2018)

In the end it is important to keep in mind that the FSIA's expropriation exception cannot include compensation for enslavement, genocide, rape, atrocities, murdering, slave labor, personal injury and death inflicted in genocide when the events occur outside of the United States (the thesis stems from the text of provisions stipulated in 28 U.S.C. § 1605 (a) (5) that allows to seek compensation "*for personal injury or death, or damage to or loss of property, occurring in the United States*"). Therefore, as far as above-mentioned criminal acts are concerned, no US Courts jurisdiction is available unless the entire tort *occurs in the United States*.

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