Civil Action No. 06 CV 1637

MATHILDE FREUND, *ET AL.*,

Appellants,

v.

SOCIÉTÉ NATIONALE DES CHEMINS DE FER FRANCAIS,

Appellees.

ON APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE OF THE HUMAN RIGHTS COMMITTEE OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION SUPPORTING REVERSAL AND REMAND

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae, the Human Rights Committee of the American Branch of the International Law Association, is composed of lawyers and professors of law who have practiced

and/or lectured and/or published widely on these and related matters.[1] This amicus memorandum sets forth their considered views. We generally oppose decisions of the District Court below. However, we focus here on five main points of international law and its incorporation as law of the United States for purposes of litigation, as explained in the Summary of Argument.

SUMMARY OF ARGUMENT

The alleged confiscations or takings of property at issue in this case would definitely violate treaties and customary international law applicable at the time of the alleged conduct of defendant appellee. More specifically, the confiscations or takings would violate treaty-based and customary laws of war. It follows that, assuming plaintiffs' allegations as true, the first element of Section 1605(a)(3) of the FSIA is clearly met – "rights in property [were] taken in violation of international law [and such rights] are in issue." 28 U.S.C. § 1605(a)(3). Moreover, there is no requirement in § 1605(a)(3) that the taking be made by the foreign state as opposed to an agency or instrumentality of a foreign state. Further, for purposes of the FSIA, "except as used in Section 1608," the phrase "foreign state ... includes ... an agency or instrumentality of a foreign state." *Id.* § 1603(a).

Furthermore, the act of state doctrine only applies to lawful "public" acts of a state. It does not apply to war crimes (in this case, unlawful takings of property in violation of the laws

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person, other than *amicus curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief. The parties have consented to the

of war) because they cannot be lawful "public," "sovereign," or "official" acts of any state and are *ultra vires*. A number of international, foreign, and U.S. cases have made these or similar recognitions. Additionally, a comity-factors approach must not be applied with respect to jurisdiction over war crimes, since they implicate universal jurisdiction and nonimmunity under international law. Congress has not chosen a comity-factors limitation of jurisdiction that pertains under the FSIA, and it would be improper for a court to legislate a new limitation that Congress has not chosen. In fact, Congress has directed the courts to decide cases in conformity with the principles set forth in the FSIA, which include attention to international law. More generally, the Supreme Court has directed that federal statutes must be interpreted in conformity with international law, which in this case provides universal jurisdiction and nonimmunity with respect to war crimes. Finally, these issues are justiciable legal issues and not political questions. § 1602 of the FSIA even directs the courts to decide these issues in conformity with the principles set forth in the FSIA.

ARGUMENT

I. CONFISCATION IS A VIOLATION OF INTERNATIONAL LAW

Although the district court opinion "assumes" that the takings of property in issue were violations of international law or, "that at least some of the alleged expropriations violated international law" (D. Ct. op. at 12-13), it should be made clear that the alleged confiscations or takings of property here in issue would definitely violate international treaties and customary international law extant at the time.

First, we note that confiscation is different than "expropriation" as such, but both can be

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takings. Confiscation is the taking of property without payment of any sort and confiscation has long been illegal under general international law. *See, e.g.*, Ware v. Hylton, 3 U.S. (3 Dall.) 199, 299 (1796); Altmann v. Republic of Austria, 317 F.3d 954, 968 (9th Cir. 2002), *aff'd*, 541 U.S. 677 (2004); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 711 (9th Cir. 1992), citing West v. Multibanco Comermex, S.A., 807 F.2d 820, 826 (9th Cir. 1987); Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 891 (2d Cir. 1981) ("the failure to pay any compensation to the victim of an expropriation constitutes a violation of international law"); Banco Nacional de Cuba v. Farr, Whitlock & Co., 383 F.2d 166, 170-72 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968); Republic of Iraq v. First National City Bank, 353 F.2d 47, 50-52 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966); Cassirer v. Kingdom of Spain, No. CV-05-3459-GAF, slip op. at 16 (C.D. Cal Aug. 30, 2006) (quoting *Sidermann*); O'Neill v. Central Leather Co., 94 A. 789 (N.J. Err. & App. 1915); Hawkins v. Nelson, 40 Ala. 553, 556 (1867) (quoted below); RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1)(c) (3 ed. 1987) (state responsibility exists under international law for a taking that "is not accompanied by provision for just compensation").

In this instance, the alleged takings of property occurred during war to which the laws of war also applied. The Vichy Government in France, and SNCF as an agency or instrumentality, were engaged in complicitous behavior – each also in support of Germany, the occupying power in France. Such complicitous behavior included the takings of property of French citizens and those of other nationalities in this instance by and with SNCF. Under Article 46 of the Annex to the Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, 18 October 1907, 36 Stat. 2277, T.S. No. 539, during occupation "[p]rivate property cannot be confiscated."

Both France and Germany were parties to the treaty by 1910. See ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR 83 (3 ed. 2003). Such confiscation is a violation of the laws of war and every violation of the laws of war is a war crime regardless of the status of the perpetrator (*e.g.*, as civilian or military). *See, e.g.*, U.S. Dep't Army, Field Manual 27-10, THE LAW OF LAND WARFARE 178, para. 499 (1956).

The U.S. Army Manual affirms the prohibition of confiscation reflected in Article 46 of the Annex to the 1907 Hague Convention and then adds: "The foregoing prohibition [of confiscation of private property] extends not only to outright taking in violation of the law of war but also to any acts which, through threats, intimidation, or pressure or by actual exploitation of the power of the occupant, permanently or temporarily deprive the owner of the use of his property, without his consent or without authority under international law." *Id.* at 152, para. 406. Although German defendants had argued that the 1907 Hague Convention No. IV was not applicable during World War II because of a "general participation" clause in Article 2 (stating that it applies "only if all the belligerents are parties to the Convention"), it was recognized by the International Military Tribunal at Nuremberg that the Convention had reflected customary international law that was universally applicable without such a treaty-based limitation by 1939, *i.e.*, by the start of World War II. See Opinion and Judgement, International Military Tribunal at Nuremberg (Oct. 1, 1946), pt. III (2) ("by 1939, these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war"), extract reprinted in JORDAN J. PAUST, M. CHERIF BASSIOUNI, *ET AL.*, INTERNATIONAL CRIMINAL LAW 458, 463 (3 ed. 2007) [hereinafter PAUST, BASSIOUNI, *ET AL.*, ICL], also noting the customary nature of the Hague Convention by 1939, *id.* at 6.

Prior to the 1907 Hague Convention, Article 37 of the influential 1863 Lieber Code had recognized that "[t]he United States acknowledge and protect ... strictly private property.... Offenses to the contrary shall be rigorously prosecuted." Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (1863), extract reprinted in PAUST, BASSIOUNI, *ET AL.*, INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT 101, 103 (2006) [hereinafter PAUST, BASSIOUNI, *ET AL.*, DOCS]. The Lieber Code was created in an attempt to reflect customary laws of war that were universally applicable. *See, e.g.*, PAUST, BASSIOUNI, *ET AL.*, ICL, *supra* at 639.

Later in the U.S., but prior to the 1907 Hague Convention, the Supreme Court recognized that certain properties of an "enemy" could be confiscated, but "the laws of war do not justify the seizure and confiscation of any private property except that of enemies." Miller v. United States, 78 U.S. 268, 310 (1870). *See also* Titus v. United States, 87 U.S. 475, 476 (1874) (regarding "confiscation of property ... requiring under the laws of war a judicial sentence of condemnation to divest title" of an enemy owner); Elrod v. Alexander, 51 Tenn. 342 (1871) ("'The laws of the United States and the general laws of war authorize, in certain cases, the seizure and conversion of private property for the subsistence, transportation and other uses of the army; but this might be distinguished from pillage, and the taking of property for public purposes is very different from its conversion to private uses...,'" quoting "Revised U.S. Army Regulations, 1863, sec. 21, p. 512; Lieber's Instructions, paras. [arts.] 37, 45; General Orders, 1863, pp. 70, 72."); Hawkins v. Nelson, 40 Ala. 553, 556 (1867) (quoting similar language as in *Elrod*, from Major-General Halleck's General Orders No. 107 (Aug. 15, 1862), which added recognition of the crimes of "pillage or plundering." *Id.* art. 52.).

Among a 1919 List of War Crimes prepared by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties that was presented to the Preliminary Peace Conference after World War I in Paris on March 29, 1919, were the customary war crimes of "[p]illage" and "[c]onfiscation of property." Crimes Nos. 13 & 14, List of War Crimes, Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (Mar. 29, 1919), reprinted in PAUST, BASSIOUNI, *ET AL.*, DOCS, *supra* at 111. France was a member of the Commission. *Id.*

II. THE ALLEGED TAKINGS FIT WITHIN SECTION 1605(A)(3) OF THE FSIA

In view of the fact that confiscation and pillage of private property were takings of property in violation of customary international law at the time of the alleged takings in this case, and assuming plaintiffs' allegations as true, the first element of Section 1605(a)(3) of the FSIA is clearly met, *i.e.*, "rights in property taken in violation of international law are in issue." Furthermore, since complicity creates criminal responsibility under the laws of war that is subject to criminal and civil sanctions (*see, e.g.*, PAUST, BASSIOUNI, *ET AL.*, ICL, *supra* at 44-49; FM 27-10, *supra* at 178, para. 500), we see no reason to read Section 1605(a)(3) restrictively. Also *compare* Altmann v. Republic of Austria, 317 F.3d 954 (9th Cir. 2002) (the FSIA applies to Nazi era "complicity in and perpetuation of the discriminatory" takings of art works in violation of the 1907 Hague Convention); *see also* Alperin v. Vatican Bank, 410 F.3d 532 (9th Cir. 2005) (bank was involved in conversion and unjust enrichment).

The first element in § 1605(a)(3) merely requires that the property in issue be "taken in violation of international law." Unfortunately, the district court below engaged in an activist effort at judicial legislation when using a "'presumption of separateness'" of a foreign state and

its entities in an attempt to rewrite the FSIA as if it "prevents the 'takings' exception from being used to exert jurisdiction over 'foreign states' on the basis of conduct by entities with separate juridical status." D.Ct. op. at 12. There is no such limit in the statute or in its legislative history. If anything, § 1603(a) generally treats a foreign state agency or instrumentality as the "foreign state." For purposes of the FSIA, "except as used in Section 1608," the phrase "foreign state ... includes ... an agency or instrumentality of a foreign state." *Id.* § 1603(a). Although § 1605(a)(3) does not mention a requirement that the taking be by a foreign state and no such limitation exists, had Congress used the phrase "foreign state" to limit the class of takers of property, the phrase would have to be interpreted in accordance with the express language used in § 1603(a) to also cover takings by "an agency or instrumentality." It also happens that a covered agency or instrumentality must be "a separate legal person" (§ 1603(b)(1)), but this does not affect the fact that for purposes of the FSIA (outside of § 1608) a "foreign state" includes an agency or instrumentality of the state.

We note also that under international law, which is the relevant criterion under 1605(a)(3), separate juridic entities and persons can each be responsible as complicitors in the taking of property in violation of international law or with respect to any international crime or violation even though some other entity or person is the direct perpetrator. Furthermore, under international law, a taking of property in violation of international law can occur at the hands of a state or private actor. The fact that brief legislative history mentions "nationalization or expropriation" as a non-exclusive example and then addresses "takings that are arbitrary or discriminatory" as further examples of takings covered in the legislation cannot rightly lead to the conclusion that 1605(a)(3) was meant to apply only to takings "by a sovereign." *But see* D.

Ct. op. at 11. Congress chose no such limiting words and it would be improper for a court to rewrite a federal statute in a way that Congress has not chosen. Moreover, "takings that are arbitrary or discriminatory" can occur at the hands of private actors (including juridic persons) and the phrase quoted is, therefore, not proof of an intent to limit § 1605(a)(3) to "sovereign" takings.

III. THE ACT OF STATE DOCTRINE DOES NOT APPLY TO WAR CRIMES

The act of state doctrine can only apply to "public" acts of a state. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) ("public acts") (a case that is sometimes misunderstood as if the act of state doctrine can apply with respect to a violation of international law, but the Court stressed that customary international law concerning a standard of compensation was not proven where "[]here are few if any issues in international law today on which opinion seems to be so divided" [*id*. at 428] and there are areas where "consensus as to standards" exist and "do not represent a battleground for conflicting ideologies. This decision in no way intimates that the courts ... are broadly foreclosed from considering questions of international law" where such law exists. *Id*. at 430 n.34.).

The act of state doctrine does not apply to war crimes, because such crimes cannot be lawful "public," "sovereign," or "official" acts of any state and are *ultra vires*. As the International Military Tribunal at Nuremberg ruled:

> "the doctrine of sovereignty of the State ... cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position.... He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorising

action moves outside its competence under international law."

Opinion and Judgment, International Military Tribunal at Nuremberg (Oct. 1, 1946).

A similar lack of immunity formed a basis for the prosecution of a German Ambassador for war crimes in the French case of *Otto Abetz*. Cour d'Cassation (Ch. crim.), 28 July 1950, extract in 46 AM. J. INT'L L. 161 (1952). A 1997 decision of a Greek court allowed litigation to proceed against Germany with respect to atrocities committed by German occupation forces during WWII partly because "acts of a state that violates *jus cogens* norms do not have the character of sovereign acts" and are "null and void, and cannot constitute a source of legal ... privileges, such as the claim to immunity." Prefecture of Voiotia v. Federal Republic of Germany, extract addressed in JORDAN J. PAUST, JON M. VAN DYKE, LINDA A. MALONE, INTERNATIONAL LAW AND LITIGATION IN THE U.S. 731-32 (2 ed. 2005). In 2000, the Hellenic Supreme Court affirmed nonimmunity, noting that the murders in question were crimes against humanity and an abuse of sovereign power that were not protectable acts under customary international law as well as acts "in breach of rules of peremptory international law (Article 46 of the [1907 Hague Convention No. IV, Annex] Regulations, and they were not acts *jure imperii*" (or "public" acts). *Id.* (S.Ct. 2000), extract reprinted in PAUST, VAN DYKE, MALONE, *supra* at 732.

Since no state has authority to participate in international crimes and state sovereignty is not relevant when international crimes have been committed, "foreign policy" should also be irrelevant. States are on notice that international criminal conduct is without authority, and no state can rightly be embarrassed by inquiry into its international criminal activity or *acta contra omnes*. *See also* Prefecture of Voiotia v. Federal Republic of Germany (Greece 1997), *supra*;

Princz v. Federal Republic of Germany, 26 F.3d 1166, 1182, 1184 (D.C. Cir. 1994) (Wald, J., dissenting) ("a state is never entitled to immunity for any act that contravenes a *jus cogens* norm, regardless of where or against whom that act was perpetrated ... the state cannot be performing a sovereign act entitled to immunity" and "Germany could not have helped but realize that it might one day be held accountable for its heinous actions by any other state, including the United States"); Filartiga v. Pena-Irala, 577 F. Supp. 860, 862 (E.D.N.Y. 1984) ("there is no ... justifiable offense to" a foreign state when jurisdiction is exercised over torture); EMERICH DE VATTEL, THE LAW OF NATIONS bk. I, chpt. IV, sec. 54 (1758) ("The Prince ... who would in his transports of fury take away the life of an innocent person, divests himself of his character, and is not longer to be considered in any other light than that of an unjust and outrageous enemy").

Several U.S. cases have also recognized the unavoidable fact that war crimes and other violations of international criminal law and human rights law cannot be lawful "official" or "public" acts of state and are not entitled to immunity. *See, e.g.*, Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1210 (9th Cir. 2007) ("acts of racial discrimination cannot constitute official sovereign acts," also quoting Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 718 (9th Cir. 1992) ("[i]nternational law does not recognize an act that violates *jus cogens* as a sovereign act")); Enahoro v. Abubakar, 408 F.3d 877, 893 (7th Cir. 2005) (Cudahy, J., dissenting) ("officials receive no immunity for acts that violate international *jus cogens* human rights norms (which by definition are not legally authorized acts.)"); Doe I v. Unocal Corp., 395 F.3d 932, 958-59 (9th Cir. 2002); Altmann v. Republic of Argentina, 317 F.3d 954, 967 (9th Cir. 2002), quoting West v. Multibanco Comermex, S.A., 807 F.2d 820, 826 (9th Cir. 1987) ("violations of international law are not 'sovereign' acts"); *In re* Estate of Ferdinand Marcos,

Human Rights Litigation Hilao v. Estate of Ferdinand Marcos, 25 F.3d 1467, 1471 (9th Cir. 1994) (human rights violations, including torture, are not lawful public acts of state); Liu v. Republic of China, 892 F.2d 1419, 1432-33 (9th Cir. 1989) (act of state doctrine not applied to assassination, which is not in the "public interest" and a strong international consensus exists that it is illegal), *cert. dismissed*, 497 U.S. 1058 (1990); Bowoto v. Chevron Corp., 2007 WL 2349345 (N.D. Cal. 2007) (quoting *Siderman*, quoted above in *Sarei*); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp.2d 289, 344-35 (S.D.N.Y. 2003) (adjudication of genocide, war crimes, enslavement, and torture is not barred by the act of state doctrine); Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996) (defendant could not argue that torture fell within the scope of his authority); Xuncax v. Gramajo, 886 F. Supp 162, 176 (D. Mass. 1995) ("these actions exceed anything that might be considered to have been lawfully within the scope of Gramajo's official authority," and quoting Letelier v. Republic of Chile, 488 F. Supp. 665, 673 (D.D.C. 1980) (assassination is "clearly contrary to precepts of humanity as recognized in both national and international law" and so cannot be part of official's "discretionary" authority), *cert. denied*, 471 U.S. 1125 (1985)); Paul v. Avril, 812 F. Supp. 207, 212 (S.D. Fla. 1993) (defendant's argument regarding "the act of state and political question doctrines is completely devoid of merit. The acts ... [of torture, cruel, inhuman and degrading treatment, and arbitrary detention in violation of customary international law] hardly qualify as official public acts" and regarding the political question doctrine, the claims present "clearly justiciable legal issues"); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987) (torture, arbitrary detention, and summary execution "are not public official acts"); *see also* Johnson v. Eisentrager, 339 U.S. 763, 765, 789 (1950) (no form of immunity exists for war

crimes in violation of Geneva law); Berg v. British and African Steam Navigation Co. (The Prize Ship "Appam"), 243 U.S. 124, 153-56 (1917) (jurisdiction recognized regarding German government's violation of the law of nations and relevant treaties and nonimmunity existed because "an illegal capture would be invested with the character of a tort" [*id*. at 154] and jurisdiction is not obviated despite the intervention of the German ambassador and a claim that since proceedings had been instituted in Germany that the U.S. court should decline. *Id*. at 147, 152.); The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 350-55 (1822) (property taken by a foreign ship of war in violation of the law of nations is not immune and "is liable to the jurisdiction of our Courts"); Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) (regarding the political question doctrine, "[i]n Linder v. Portocarrero, 963 F.2d 332, 337 (11th Cir. 1992), we held that the political question doctrine did not bar a tort action instituted against Nicaraguan Contra leaders [for war crimes in violation of common Article 3 of the Geneva Conventions]. Consequently, we reject Negewo's contention in light of *Linder*."); Daventree, Ltd. v. Republic of Azerbaijan, 349 F. Supp.2d 736, 755 n.4 (S.D.N.Y. 2004) ("the Act of State doctrine only applies to valid acts of state"); Doe v. Unocal Corp., 963 F. Supp. 880, 892-95 (C.D. Cal. 1997) ("Because nations do not, and cannot under international law, claim a right to torture..., a finding that a nation committed such acts ... should have no detrimental effect on the policies underlying the act of state doctrine. Accordingly, the Court need not apply the act of state doctrine in this case"); United States v. La Jeune Eugenie, 26 F. Cas. 832, 847-51 (C.C.D. Mass. 1821) (No. 15,551) (regarding "an offence against the universal law of society," "no nation can rightly permit its subjects to carry in on, or exempt them ... [and] no nation can privilege itself to commit a crime against the law of nations"); Senate Report, S.Rep. No. 249, 102nd Cong., 1st

Sess. 8 (1991) (the act of state doctrine "applies only to 'public' acts, and no state commits torture as a matter of public policy," adding: "[a] state that practices torture and summary execution is not one that adheres to the rule of law. Consequently, the [TVPA] is designed to respond to this situation by providing a civil cause of action in US courts," and the Senate Judiciary "Committee does not intend the 'act of state' doctrine to provide a shield from lawsuit...."); 9 Op. Att'y Gen. 356, 357 (1859) ("A sovereign who tramples upon the public law of the world cannot excuse himself by pointing to a provision of his own municipal code").

More generally, Justice Breyer has recognized that universal jurisdiction with respect to "war crimes," among others, "necessarily contemplates a significant degree of civil tort recovery." Sosa v. Alvarez-Machain, 542 U.S. 692, 762 (2004) (Breyer, J., concurring).

IV. A COMITY-FACTORS APPROACH MUST NOT BE APPLIED TO WAR CRIMES

A comity-factors approach must not be applied with respect to jurisdiction over war crimes, since they implicate universal jurisdiction and nonimmunity under international law. Concerning universal jurisdiction over and nonimmunity with respect to customary international crime, *see, e.g.*, PAUST, BASSIOUNI, *ET AL.*, ICL, *supra* at 31-34, 155-74. The comity-factors approach suggested by the RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (3 ed. 1987), if ever preferable, would only apply to jurisdictional bases listed in § 402 (*e.g.*, territorial, nationality, and protective) and expressly does not reach or limit the exercise of universal jurisdiction under § 404. *See also* PAUST, BASSIOUNI, *ET AL.*, ICL, *supra* at 210-11. It was error, therefore, to attempt to deny jurisdiction through a comity-factors approach under § 403 in this case. *But see* D. Ct. op. at 23-24, 32-33.

Moreover, Congress and the courts generally ignore such a limiting approach to

jurisdiction, especially if nationality or protective jurisdiction pertains. *See, e.g.*, PAUST, BASSIOUNI, *ET AL.*, ICL, *supra* at 208, 210. It is not a requirement of customary international law (or any relevant treaty) and it is an ad hoc, slot-machine approach using vague factors without guidance as to what factors should be weighted, how, and in what circumstances. *Id.* at 208-09. Moreover, Congress has not chosen a comity-factors limitation of jurisdiction over foreign states and foreign state entities under the FSIA and it would be inappropriate for courts to add limits that Congress has not chosen.

In fact, under Section 1602 of the FSIA, Congress has expressly declared that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." "[T]he central purpose of the bill" to create the FSIA was to ensure "[t]hat decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law." House Report No. 94-1487, at 6613 (1976). It is not for the courts to deny jurisdiction where Congress has authorized jurisdiction and has declared that issues are to be decided by courts on the basis of the principles set forth in its legislation.

When interpreting the FSIA, in addition to the fact that Congress has directed the courts to use "the principles set forth" (which also incorporate "standards recognized under international law"), it must be emphasized that the Supreme Court has mandated more generally that federal statutes must be interpreted consistently with international law. *See, e.g.*, The Charming Betsy, 6 U.S. (2 Cranch) 64, 117-18 (1804) (Marshall, C.J.) ("An Act of Congress ought never to be construed to violate the law of nations if any other possible construction

remains, and, consequently can never be construed to violate ... rights ... further than is warranted by the law of nations.”). There were other early recognitions of this fundamental rule of construction. *See, e.g.*, Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 43 (1801); 1 Op. Att’y Gen. 26, 27 (1792); *see also id.* at 53 (stating that the municipal law is strengthened by the law of nations); Ross v. Rittenhouse, 2 U.S. (2 Dall.) 160, 162 (Pa. 1792); The Resolution, 2 U.S. (2 Dall.) 1, 4 (1781); 11 Op. Att’y Gen. 297, 299–300 (1865); 9 Op. Att’y Gen. 356, 362–63 (1859); The Ship Rose, 36 Ct. Cl. 290, 301 (1901); The Schooner Nancy, 27 Ct. Cl. 99, 109 (1892); PAUST, VAN DYKE, MALONE, *supra* at 153-54. The rule has modern recognition. *See, e.g.*, *id*. at 154. As noted, international law recognizes universal jurisdiction and nonimmunity (including the fact that violations of international criminal law are not public, sovereign or official acts of state with respect to sovereign immunity or act of state doctrines) and does not recognize a comity-factors limitation of universal jurisdiction.

V. ISSUES WHETHER WAR CRIME RESPONSIBILITY EXISTS ARE NOT “POLITICAL” BUT LEGAL QUESTIONS

As noted more generally in *Abebe-Jira*, *Linder*, and *Paul v. Avril* (each quoted above in Part III), the political question doctrine must not bar a claim addressing war crimes or other serious violations of international law (which are beyond the lawful authority of any state) and claims regarding such violations present justiciable legal issues, not political questions. *See also* The Peterhoff, 72 U.S. (5 Wall.) 28, 57 (1866) (“we administer the public law of nations, and are not at liberty to inquire what is for the particular ... disadvantage of our own or another country”); Alperin v. Vatican Bank, 410 F.3d 532, 548 (9th Cir. 2005) (the political question doctrine did not bar claims regarding Nazi era unlawful conversion of property and such claims

are within judicial power and "are not committed to the political branches); *cf* Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995) ("[w]e disagree" that war crimes, genocide, torture, and so forth "present nonjusticiable political questions" because the issues have been constitutionally committed to the courts and norms of customary "international law provide judicially discoverable and manageable standards").

Questions arising under international law are within constitutionally-based judicial power as well as federal question and subject matter jurisdiction allocated to the courts. *See, e.g.*, U.S. Const., art. III, § 2; 28 U.S.C. § 1331; PAUST, VAN DYKE, MALONE, *supra* at 125-33; RESTATEMENT, *supra* § 111 & cmnts. c-e; Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 514-24 (2003); Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. DAVIS J. INT'L L. & POL'Y 205, 231-39 (2008). As Chief Justice Marshall recognized concerning the textual commitment to the judiciary of authority to decide cases arising under treaties and a test for self operative status and treaty-based remedies, "[t]he reason for inserting that clause [in Article III of the Constitution] was, that all persons who have real claims under a treaty should have their causes decided" by the judiciary and that "[w]henever a right grows out of, or is protected by, a treaty, ... whoever may have this right, it is to be protected" by the judiciary.[2]

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[2] Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344, 348-49 (1809) (Marshall, C.J.). Clearly, a right that "grows out of" or is "protected by" a treaty can be an implied right, an express right, and a right that is evident even though the treaty contains no mention of various forms of remedy that might attach. This type of test was reiterated by Justice Miller in 1884. *See* Edye v. Robertson, 112 U.S. 580, 598-99 (1884) (Miller, J., opinion) ("whenever its provisions prescribe a rule by which the rights of the private citizen or subject *may be*

One year later, he confirmed a fundamental expectation of the Framers with respect to judicial power and human rights when recognizing that our judicial tribunals "are established ... to decide on human rights."[3] With respect to judicial power and the laws of war in particular, the Supreme Court has stressed, "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes ... the status, rights and duties of ... individuals." *Ex parte* Quirin, 317 U.S. 1, 27 (1942).

Additionally, as noted in Part IV, Congress has directed the courts to decide claims to immunity and to do so in accordance "with the principles set forth" in the FSIA. There, Congress also determined that judicial resolution will "serve the interests of justice and would protect the rights of both foreign states and litigants." 28 U.S.C. § 1602.

CONCLUSION

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determined." (emphasis added)).

A number of Supreme Court cases have also recognized that treaties are to be construed in a broad manner to protect express and implied rights. *See, e.g.*, Factor v. Laubenheimer, 290 U.S. 276, 293–94 (1933); Nielsen v. Johnson, 279 U.S. 47, 51 (1929); Jordan v. Tashiro, 278 U.S. 123, 127 (1928); Asakura v. City of Seattle, 265 U.S. 332, 342 (1924) ("Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred."); United States v. Payne, 264 U.S. 446, 448 (1924) ("Construing the treaty liberally in favor of the rights claimed under it, as we are bound to do...."); De Geofroy v. Riggs, 133 U.S. 258, 271 (1890) ("where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred."); Hauenstein v. Lynham, 100 U.S. 483, 487 (1879) ("Where a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred."), *citing* Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 249 (1830) ("If the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude private rights; why should not the most liberal exposition be adopted?").

[3] Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 133 (1810) (Marshall, C.J.). Concerning the rich history of Founder, Framer, and judicial attention to human rights (which are generally at stake in these cases) and their use in thousands of federal and state cases, *see, e.g.*, PAUST, *supra* at 193-223.

Plaintiff Appellants have rights under treaty-based and customary international law that would be violated by the alleged confiscations or takings of property, assuming that their allegations are true. The violations of international law in this instance are war crimes over which there is universal jurisdiction without limitation and nonimmunity under international law. If plaintiffs' allegations are true, the confiscations or takings fit within Section 1605(a)(3) of the FSIA and there should not be any limitation of jurisdiction under the act of state doctrine, a comity-factors approach, or the political question doctrine when international crimes have allegedly occurred.

Amicus Curiae the Human Right Committee of the American Branch of the International Law Association respectfully request that the Circuit Court reverse the decision of the District Court regarding Section 1605(a)(3) of the FSIA, the act of state doctrine, use of a comity-factors approach when universal jurisdiction pertains, and the political question doctrine, and remand the case for further proceedings.

Respectfully submitted,

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