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*Aleksander Gubrynowicz**

GERMANY ET AL. V. PHILIPP ET AL.: HUMAN RIGHTS EXCEPTION TO STATE IMMUNITY REJECTED

Abstract: *This article discusses some recent developments in the US jurisprudence concerning state immunity. Some lower courts' decisions handed down earlier suggested a more decisive departure from the rigid interpretation of the Foreign Sovereign Immunity Act (FSIA). If the US Supreme Court had accepted this new jurisprudential trend, it would possibly allow for carving out a partial acceptance of a human rights exception. However, the Supreme Court decided otherwise. In the recently handed-down decision in Germany et al. v. Philipp et al., the Justices rejected any innovations, unequivocally maintained the strict interpretation of FSIA §1603(a)(3), and by their direct reference to the International Court of Justice strengthened the existing status quo in international law as well. This note analyzes this decision's possible consequences at the domestic and international levels. In conclusion, it seeks to place Germany vs. Philipp in a broader context. It suggests that it possibly reflects more general tendencies in the contemporary US jurisprudence, which can impact both the US domestic legal order and international law.*

Keywords: domestic taking, FSIA, jurisdictional immunities, Philipp et al., state immunity

INTRODUCTION

The current stage of development of state immunity at the international level does not suggest that the concept of a so-called "human rights' exception" has found any strong echo in the international or domestic courts practice[1], except in

* Assistant Professor (dr. habil.), Faculty of Law and Administration, University of Warsaw; e-mail: a.gubrynowicz@wpia.uw.edu.pl; ORCID: 0000-0003-3003-2727.

[1] *See* ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, ICJ Rep 2012, p. 99. For more recent analysis *see* A. Peters and V. Volpe, *Reconciling State Immunity with Remedies for War Victims in a Legal Pluriverse*, in: V. Volpe, A. Peters, S. Battini (eds.), *Remedies against Immunity? Reconciling International and Domestic Law after the Italian Constitutional Court's Sentenza 238/2014,* Springer, Berlin: 2021, p. 15. The authors particularly opine that "*the early millennium's momentum towards human-rights-based exceptions to immunity has been slowed down or even cut off."* In the same vein: *cf.* H. Krieger, *Sentenza 238/14: A Good Case for Law-Reform?*, *ibidem*, p. 80.

Italy.[2] Still, over the last 15 years some US courts had seemed to be moving in the opposite direction.[3] This new jurisprudential current was the "last hope" for all those who – *spes contra spem* – believed that the US judiciary would somehow contribute to developing a new trend within the global state immunity jurisprudence, i.e. one warranting the denial of state immunity on the grounds of human rights abuses, at least in cases of serious violations of norms having a peremptory character.[4]

However the US Supreme Court's (sometime referred herein as the SCOTUS) current set of decisions, issued in proceedings against Germany and Hungary, has dashed these hopes. Notably, by taking the side of Germany in *Germany et al. v. Philipp et al.*,[5] the Justices set a precedent precluding a broad reading of § 1605(a)(3) of the Foreign Sovereign Immunity Act (FSIA). In other words, if the Justices had accepted the claimants' arguments, it would have allowed for subsuming many claims arising from "old instances" of the violation of human rights and the law of armed conflicts under the so-called "expropriation exception." The Justices, however, openly and univocally rejected these propositions. Thus, the US Supreme Court's role in maintaining the existing *status quo* has been preeminent.

This note discusses the possible effects this recent decision entails for the US judicial practice concerning state immunity and its potential consequences within international law. It is divided into three parts. Part 1 briefly recapitulates the development of state immunity in US law. Part 2 analyzes the *Philipp* decision. Part 3 considers its effects on US state immunity jurisprudence and the scope of such immunity in international law. In the conclusion, these recent developments in the US practice are placed in the broader context. It appears that the US courts' approach discussed herein plausibly reflects more general tendencies aimed at limiting the number of extraterritorial cases falling within the scope of US jurisdiction. Further, the outcome of this analysis seems to support the claim that the SCOTUS's decision under examination in this note corresponds to some degree with the political realities of the third decade of the 21st century. Still, it remains to be seen whether this latter hypothesis is correct.

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[2] *Cf.* Corte Costituzionale, Judgment, 22 October 2014, No. 238/2014. For the English translation, see https://bit.ly/3gNqraK (accessed 30 May 2021). There are at least 38 pending cases lodged against Germany before Italian courts (for more information *see* Volpe et al., *supra* note 1, p. 14).

[3] *See e.g. Simon v. the Republic of Hungary* 812 F.3d 127 (D.C. Cir. 2016) (*Simon II*); *Simon v. the Republic of Hungary*, No. 17-7146 (D. C. Cir. 2018) (*Simon IV*); *Philipp v. Federal Republic of Germany*, 248 F. Supp. 3d 59 (D.D.C. 2017); *Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018). In all these cases, the plaintiffs successfully argued against state immunity and won their cases. For other cases belonging to this current, *cf. Abelesz et al. v. Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012); *Davoyan v. Republic Turkey*, 116 F. Supp. 3d 1084 (C.D. Cal. 2013); *Claude Cassirer v. the Kingdom of Spain et al.*, 461 F. Supp. 2D 1157 (2006).

[4] *See* R. Pavoni, *An American anomaly? On the I.C.J.'s selective reading of United States practice in jurisdictional immunities of states*, 21 Italian Yearbook of International Law 143 (2011). Pavoni concedes that the German-Italy dispute outcome probably would have been the same. Still, he strongly criticized the ICJ for its alleged want of a correct analysis of the US court practice, which – according to him – could serve as support for argument on jus cogens immunity exception (pp.144 and 159).

[5] *Germany et al. v. Philipp et al.* 592 US (2021).

1. STATE IMMUNITY DEVELOPMENTS IN US LAW

The origins of the state immunity doctrine in US case law are well known. After the SCOTUS' decision in *Schooner-Exchange*,[6] over the next ca 150 years US courts followed the so-called "absolutist doctrine." This case line was abandoned with the entry into force of the FSIA (1977).[7] This Act is based on the premise that no foreign state may be sued before a US court unless a claim falls within the scope of a carefully drafted exception.[8] The FSIA as such did not explicitly provide for any human rights exception.[9] Still, according to a new body of jurisprudence on the part of some US courts, despite the Act's silence on the matter the FSIA was deemed to sometimes oblige the court to deny state immunity on the grounds of a particularly egregious breach of international law.[10] To be clear, plaintiffs considering their claims to be eligible under this category had to prove that their claims fell somehow within the scope of an exception laid down within the FSIA. This was not an easy task, for the sole FSIA provision which could eventually serve as the legal foundation for the concept of an exception in cases of a *particularly egregious breach* was the "expropriation clause." In effect, only those plaintiffs that could prove their claim(s) fulfilled these statutory clause requirements could expect that the US courts would go beyond a strict interpretation of the term "expropriation."[11] Had this new approach been accepted by the SCOTUS, the consequences would undoubtedly have been numerous. Two of them however had been made clear even before the US Justices had to pronounce themselves on this issue.[12]

Firstly, by seeking to bridge the gap between the statutory provisions and their innovation, the judges following the new approach did not want to "redraft" the FSIA or introduce a "human rights exception" through the back door. They wanted instead to achieve a new interpretation, in the light of which a US court could react, but only in cases of some qualified (most serious) human rights violations. Still, at the theoretical level, the problem arose how to establish that a breach in question is so particularly egregious that it warrants the denial of state immunity. Plausibly, the breach

[6] *The Schooner Exchange v. McFaddon*, 11 US (7 Cranch) 116 (1812).

[7] US C 28, §§ 1330, 1332, 1391(f), 1441(d), and 1602–1615.

[8] *See* US C 28, § 1605.

[9] *Cf.* F.J. Djoukeng, *Genocidal Takings and the F.S.I.A.: Jurisdictional Limitations*, 106 Georgetown Law Journal 1883 (2018), p. 1903, who points out that this omission was a deliberate political choice of the US legislators.

[10] *Restatement of the Law Fourth, Restatement of the Law, The Foreign Relations Law of The United States, Selected Topics in Treaties, Jurisdiction, and Sovereign Immunity*, The American Law Institute Publishers, Saint Paul: 2018, Part IV, Chapter 5 (Restatement IV) para. 455 point 6, p. 368 et seq.

[11] Strictly speaking, the judges would deny state immunity not solely in cases falling within the international investment law, but they would do the same in situations when the "property taking" met the standard of *an egregious breach*. For the list of judgments following this new approach, *see supra* note 3.

[12] *See* notably *The Restatement IV*, *supra* note 10, p. 369.

of any *jus cogens* norm (notably the prohibition of genocide)[13] would have met this standard, but was there anything else? Inasmuch as courts are rather poorly positioned to answer abstract questions in the US political system, this problem had to remain unresolved. Secondly, and more importantly: the courts accepting the concept of an exception for a *particularly egregious breach* usually reinterpreted the issue of citizenship. Thus, contrary to the previous line of cases (which the SCOTUS confirmed in *Maria Altmann*),[14] in the new approach followers were not interested in whether or not the property was taken from the US nationals. Once they established that all the §1605(a)(3) requirements had been met and that the violation of international law was indeed particularly egregious, they denied state immunity, even if at the moment of taking the property the claimants or their ancestors were nationals of the respondent state.[15]

In hindsight, it seems that both these ambiguities could not go unnoticed. In practical terms, these propositions exposed the US courts to the genuine risk of facing an uncontrollable flood of claims lodged by all victims of human rights violations, no matter whether committed on US territory or abroad. These fears did not seem to be exaggerated. Over the last decade, some plaintiffs successfully argued before the US courts in accordance with this new doctrine.[16] The US Supreme Court – up to

[13] As regards what constitutes the crime of genocide as a peremptory norm *see* ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment (2006) ICJ Rep 64.

[14] *See Republic of Austria v. Altmann,* 41 US 677. In this case, the Holocaust Survivor Maria Altmann, heiress to the late steel-industrial magnate Ferdinand Bloch-Bauer, claimed Gustav Klimt's paintings. The Nazis confiscated these works of art, and then they were illegally appropriated by the Austrian State Gallery. As Mrs. Altmann gained knowledge about all circumstances of the case, she instituted proceedings against Austria before the US court. Even though she was successful in her case, the Supreme Court affirmed the ruling of the Appellate Court based on significantly different reasons than those accepted by the lower instance court. Essentially the Appellate Court sought to decouple Austria's state immunity and take in the framework of the "Aryanization policy" on the grounds of the latter's gravity of the breach. The SCOTUS openly distanced itself from this proposition (*ibidem* 700). Moreover, the fact that Mrs. Altmann had acquired US citizenship as early as in 1945 (that is – even before Austrian State Gallery illegally appropriated the paintings) was not deprived of significance, although the majority did not consider this issue in their opinion (*cf.* however Justice Breyer's concurring opinion *ibidem*, p. 713)

[15] In the erosion of nationality as a factor in state immunity proceedings, the *Cassirer* case played a pioneering role (*see supra* note 3). Still, the lower instance courts handling *Simon et al. v. Hungary* or *Philipp et al. v. Germany et al.* adopted the same line of reasoning.

[16] The most notable case of this kind was the Judge Srinivassan decision in *Simon II*. The plaintiffs, all of them Holocaust Survivors, lodged the putative class action against Hungary for the role its organs had played in Holocaust perpetration, notably in the property confiscation that had preceded deportation to Auschwitz. The plaintiffs argued that having regard to the specific character of Hungarian state involvement in the Nazi genocidal "Final Solution" policy, Hungary could not claim immunity. Judge Srinivasan agreed with the claimants. He directly referred to Art. II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and qualified the property taking that occurred during Holocaust as "genocidal taking" – *cf. Simon II* (*supra* note 3) pp. 142-144. Srinivasan's views have not been isolated (cf. Prof. Dodge's opinion in favor of claimants produced at the later stage of the same proceedings, Dodge, William S., *Brief of Professor William S. Dodge as Amicus Curiae in Support of Plaintiffs-Appellants, Simon*

now – remained silent, but this legal uncertainty has dramatically changed during the last year, and *Philipp* played the pivotal role. Thus we now turn to this particular case.

2. *GERMANY ET AL. V. PHILIPP ET AL.*

The factual background of the case was quite simple. In the 1920s, a consortium owned by Jewish art dealers – all German nationals – acquired an art collection, the so-called *Welffenschatz*. When the Nazis came to power in 1933, they coerced the owners to sell it to them for a third of its actual market value. After World War II, the US Army found the collection, but instead of giving it back to the legitimate proprietors, the US authorities in Germany decided to transfer it to SPK (*Stiftung Preußischer Kulturbesitz*), a German state instrumentality. In 2017, the heirs to the owners of the *Welfenschatz* instituted legal proceedings before the US courts against Germany. They underlined that the taking of the disputed object occurred within the framework of the Nazi's anti-Jewish policies, preceding the main phase of the Holocaust. Arguing along the lines of the new approach discussed above, the plaintiffs demanded a denial of Germany's immunity.[17] Inasmuch as the District Court agreed[18] and the Circuit Court of Appeals upheld this decision,[19] Germany filed a petition for *certiorari* with the US Supreme Court. The following paragraph presents the most important reasoning contained in the opinion, authored by Chief Justice Roberts for the majority.

Contrary to the conviction reflected in the lower instances' judgments quoted above,[20] the SCOTUS openly rejected the new approach *in toto*. In its opinion, the "domestic taking" may not be accepted as a valid ground for a denial of state immunity. This is not possible because historically international law, as the law regulating the relations between states, could protect only aliens' rights against foreign sovereigns, and never the foreign nationals' rights against their own governments' actions.[21] In effect, neither the increase of individuals' international protection nor international criminal law can inform the US courts' reading of FSIA and international law when handling state immunity cases.[22]

v. Republic of Hungary (February 5, 2018), available at: https://ssrn.com/abstract=3118607, http://dx.doi.org/10.2139/ssrn.3118607 (accessed 30 May 2021).

[17] For a description of the factual background, *see Germany et al. v. Philipp et al.*, Part I, pp. 1-4.

[18] 248 F. Supp. 3d 59, 70–74 (DC 2017).

[19] 894 F. 3d 406 (2018).

[20] *See supra* notes 3 and 19.

[21] *Germany et al. v. Philipp et al.*, Part II A, pp. 5-7.

[22] "We 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 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" (*ibidem*, Part II B, p. 9).

Interestingly, when analyzing the *Philipp* case, the Justices directly referred to the International Court of Justice's (ICJ) *Jurisdictional immunities* judgment.[23] They quoted a short passage, taken from its point 91, where the ICJ had observed that a state is not deprived of immunity because it is accused of serious violations of international human rights law.[24] The question whether, by this token, the US Supreme Court took the ICJ's reasoning as its own is a complex one. Presumably, by this short reference the Justices wished to add an "international pedigree" to their reasoning and the outcome they reached. Therefore, they found it convenient to refer – albeit very briefly – to some authorities other than the SCOTUS's own jurisprudence. Still, it is difficult to escape the impression that in quoting the relevant ICJ judgment they took a cherry-picking approach based on a cursory reading.

The reasons behind this "judicial tactic" seem to be rather obvious. By avoiding an in-depth analysis of the *Jurisdictional immunities* case and absorbing just one sentence from the long ICJ judgment, the SCOTUS probably wanted to conceal the existing doctrinal differences between the ICJ and its own position in state immunity matters. At the same time, by applying this "user-friendly" interpretation, the Justices could send a pretty strong signal of its partial acceptance of *Jurisdictional immunities* without weakening their position in the ongoing dispute over the sources of state immunity, understood as an institution of international law.[25] Against this backdrop, however, another question arises: whether the interpretative zig-zags led to fulfilment of the presumed goal stated above. An affirmative answer seems to be contradicted by the sentence (ironically, the one immediately following the above-mentioned quotation), wherein the Justices openly called state immunity "a rule" of international law.[26] If in *Philipp* the Supreme Court stopped short of unconditionally joining the general state practice, which usually derives state immunity from custom, nonetheless after *Philipp* the SCOTUS's position seems to be a bit closer to it.[27]

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[23] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, pts 99 and 139.

[24] *Germany et al. v. Philipp et al.*, Part II B, p. 11.

[25] The way the Justices made the quotation is open to criticism. They cited only a short fragment of the longer phrase laid down in point 91, apparently omitting the part where the ICJ indicated this institution's source, that is international custom. Therefore, *Germany et al. v. Philipp et al.* cannot be read as a clear backtrack from the Supreme Court's earlier positions wherein state immunity derived from comity, not from the international custom (*see Verlinden B.V. v. Central Bank of Nigeria,* 461 US 480 (1983), pp. 486 et seq.).

[26] "Respondents would overturn that rule whenever a violation of international human rights law is accompanied by a taking of property" (*Germany et al. v. Philipp et al.*, Part II B, p. 11, emphasis added).

[27] It is worth noting that the SCOTUS did not subscribe to the interpretation of the ICJ judgment limiting its practical effects solely to cases of serious human rights violations originating from war crimes committed by armed forces operating on foreign territory (*Germany et al. v. Philipp et al.,* Part II B, pp. 10 et seq.). *Cf. also* W.S. Dodge, *The Meaning of the Supreme Court's Ruling in Germany v. Philipp, Just Security* (8 February 2021), available at: https://bit.ly/3gPnN4o (accessed 30 May 2021). Dodge opines that the Supreme Court erred in its reading of *Jurisdictional Immunities*, considering it as an authority supporting the view in the light of which international state immunity protects all governmental acts,

Thus, despite some incoherence and the lack of consequence, it seems that the SCOTUS is very near to having made an open admission: state immunity protects *acta iure imperii*, even in a case of the gravest human rights violations. This conclusion (still presumed, not declared), and the Supreme Court's position on the current stance of international law, makes it possible to understand the shift in the US Supreme Court's reading of §1605(a)(3) FSIA, which was openly declared "unique" in the sense that no other country has adopted a comparable limitation on sovereign immunity.[28] Moreover, the Justices stated that the German interpretation of this provision is more consistent with the classic division between public and private acts, and declared that it took this classification seriously.[29]

What the practical effect of this shift amounts to is discussed in Part 3 below. However, it is legitimate to think that these fragmentary quotes can be understood as a signal by the Supreme Court that international law may (and perhaps even should) inform the reading of the FSIA, at least whenever US courts apply the *expropriation exception*.

At the end of their analysis, the Supreme Court went on to say that the phrase "rights in property taken in violation of international law," as used in the FSIA's expropriation exception, refers to violations of the international law on expropriation, and thereby incorporates the domestic takings rule.[30] Thus, for the US Supreme Court human rights and property rights protected by investment law are two different realms that do not infringe on each other. Logically, by confirming the correctness of the findings in *Maria Altmann*, the Justices even more strongly conditioned the application of § 1605(a)(3) on the claimants' nationality, and they excluded domestic takings from the scope of the FSIA exceptions.[31]

3. EFFECTS OF THE PHILIPP DECISION ON THE US STATE IMMUNITY JURISPRUDENCE

Undoubtedly, the legacy of *Philipp* will strongly impact the US courts' practice on state immunity, although its effects will not be the same for all state immunity proceedings. On the contrary: in the analyzed case the Justices reconfirmed that if the claim falls within the FSIA's provisions, state immunity is denied according to the previous practice.[32] Moreover, *Philipp*'s bottom line concerned only the extent of the

even if they have a criminal character. Nonetheless, he concedes that Justices accepted this allegedly erroneous *Jurisdictional Immunities* interpretation as a correct view on the current stage of state immunity development.

[28] *Germany et al. v. Philipp et al.,* Part II B, pp. 11 et seq.

[29] *Ibidem*, p. 12.

[30] *Ibidem*, Part IV, p. 15.

[31] *Ibidem*, Part II A, p. 8; Part III, p. 14.

[32] Notably, the Justices reconfirmed their readiness to waive state immunity in cases of torts (§ 1605(a)(5)) and the artistic exhibition clause (§ 1605(h)(2)(A)). They also maintained the controversial terrorist

expropriation exception. Therefore, plausibly it may not inform the interpretation in cases where the other FSIA exceptions are invoked. Furthermore, as of now it is not fully clear how to read the last part of Part II B, where the Supreme Court underlines the expropriation exception's unique character. Should this be interpreted as a signal to limit the scope of application of §1605(a)(3) to cases when US citizens' interests are at stake? It could be, but even if this hypothesis is correct it means that the Supreme Court will not deem the expropriation exception inadmissible whenever the conditions of §1605(a)(3) are met.[33] After *Philipp*, the SCOTUS's reading of the "exception clause" will be – to put it mildly – strict. This strictness will probably lessen the controversies arising whenever US courts deny state immunity in disputes over governmental acts purported to be expropriation. However, owing to the FSIA's structure these controversies will not be avoided entirely.

Undoubtedly, for pending cases and future litigations originating from violations of international law committed before the enactment of FSIA, such as e.g. Holocaust or colonial crimes, the *Philipp* case is a tremendous blow. The same is true of some future litigations which will arise from some instances of human rights violations. Unless they are/will be covered by the FSIA exceptions discussed above – the claims based on them will be presumably rejected on the ground of state immunity. For while dismissing the *particularly egregious crime* doctrine, by the same token the Justices refuted any attempts to seek additional interpretative guidelines in Holocaust restitution legislation (at least those aiming to inform the reading of §1605(a)(3)).[34] Secondly, one should not forget that according to US law *Philipp* now serves as a precedent controlling other pending state immunity disputes. Thus, even though in its outcome the dispute between the US judiciary and the rest of the world on the sources of actual state immunity has not been fully settled, nonetheless the practical importance of this difference became significantly smaller than it had been before. The doctrine of *stare decisis* makes the theses in *Philipp* binding on lower courts. The approach asserted by this precedent has a good chance to remain in force for the upcoming decades, unless the US Congress decides to introduce some modifications to the FSIA. After *Philipp*, plausibly no interpretation going beyond the strict limits set out in the statute will be accepted by the US Supreme

exception (which encompasses not only acts of terror but also tortures, extrajudicial killings, aircraft sabotage, and hostage-taking) (*cf. Germany et al. v. Philipp et al.,* Part II C, p.12). For more on the terrorist exception, *see* H. Fox, P. Webb, *The Law of State Immunity* (3rd ed.), Oxford University Press, Oxford: 2013, pp. 278, 281et seq., and 466.

[33] It is worth noting that the passage in *Philipp* refers directly to the *Restatement IV* analysis, which takes note of the controversy existing between generally accepted practice, but considers § 1605(a)(3) as being under international law (*Restatement IV* § 455, *Reporters' Note* 15 (2017)).

[34] The Supreme Court rejected any suggestion to seek any clarifications in *the Holocaust Victims Redress Act* of 1998, 112 Stat. 15; *the Holocaust Expropriated Art Recovery Act of 2016*, 130 Stat. 1524*; and the Justice for Uncompensated Survivors Today (JUST) Act of 2017, Pub. L. 115–171, 132 Stat. 1288* (*Germany et al. v. Philipp et al.,* Part III, p. 15). For reasons concerning citizenship, the SCOTUS rejected the proposition to interpret the FSIA in light of the *Foreign Cultural Exchange Jurisdictional Immunity Clarification Act* H. R. 4292 (*ibidem*).

Court. In other words, if a serious human rights violation is claimed before a US court as a ground to waive the immunity of a state, and such claim does not fall, beyond any reasonable doubt, within a FSIA exception, then the chances to win the case are almost non-existent.[35] Against this backdrop, it comes as little surprise then that the ruling in the *Philipp* case was handed down on the same day the Supreme Court quashed the Appellate Court's ruling in *Simon et al.* and ordered the case sent back for further proceedings consistent with the *Philipp* theses.[36]

Some commentators have criticized the SCOTUS for failing to address Germany's argument, submitted in the alternative, concerning the US courts' competence to reject a claim directed against a foreign state(s) on the ground of *comity*.[37] Still, placed in the context of the *Philipp* ruling, this allegation is problematic. On the one hand, it is true that in the recent past some US courts abused this doctrine to deny US jurisdiction without solid justification anchored in the American legislation. However, it remains unclear if it would have been prudent to settle this controversy in a state immunity case. For *comity* as a ground for denial of jurisdiction finds its application where the private litigant is a defendant or respondent, so perhaps Justices acted prudently when they decided – at least for now – to leave aside this issue in the proceedings against a foreign state. Such a step does not exclude that the SCOTUS will grant *certiorari* if this problem re-emerges on a larger scale in the future. Secondly, even those who criticized the Justices for their lack of clear stance on this issue admit that the *Philipp* judgment lessens this controversy, even though it does not eliminate it.[38] As *Philipp* strengthens foreign states' position before the US courts, presumably they will be less interested in seeking an alternative ground for denial of jurisdiction in the years to come. Thus, without denying the existence of the "*comity* expansion" problem, it is not excluded that this trend will be effectively hampered in the wake of the *Philipp* ruling.

Assuredly, *Philipp's* impact on state immunity as an institution of international law may be considered non-negligible. It strengthens the existing *status quo* in domestic courts' jurisprudence, which usually rejects any claims based on an alleged human rights exception.[39] Undoubtedly, this current stage in the development of state immunity is beneficial for global peace and the harmonious relations between states. Nonetheless, in the ongoing discussion on effective remedies for serious human rights violations, the case analyzed herein does have its specific dimension. In short, *Philipp* is good news for all those states which operated in a twilight zone where they might be sued before national courts for "dark legacies of the past." At the same time, it is very bad news for

[35] *Germany et al. v. Philipp et al.*, Part II B, pp. 12 et seq.

[36] Supreme Court decision in the *Simon* case (3 February 2021), 592 US (2021), available at: https://bit.ly/3d9bGNd (accessed 30 May 2021).

[37] Dodge, *supra note 28.*

[38] *Ibidem*.

[39] *Cf. Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, pp. 134 et seq. (point 77).

states seeking remedies for damages or crimes and basing their strategies upon the double sword tactic (that is, conducting diplomatic negotiations coupled with the exertion of additional pressure via the threat of instituting court proceedings).[40] As *Philipp* openly backed the current state of state immunity practice, such a tactic does not seem to have a very promising future. Following this decision, negotiations between the interested states seem to be the sole solution. It is safe to say that by cutting the ground out from under such claimants, *Philipp* indirectly reinforces the position of states from which compensation is sought, and weakens the negotiation positions of states seeking to be compensated.

Moreover, the *Philipp judgment* – albeit indirectly – reinforces the ICJ, whose judgment in *Jurisdictional Immunities* still awaits execution by Italy. At the very least, while deciding in favor of Germany the Justices at the same time sent a clear signal that they do not support those views which could weaken the effectiveness of ICJ judgments. Finally, Germany's success before the SCOTUS is also a sort of double victory for Berlin diplomacy as *Philipp,* to a very considerable extent, confirms Germany's arguments in the ongoing dispute with Italy. After *Philipp,* it becomes more and more complicated to indicate any jurisdiction in the world which could give concrete support for the views expressed in *Sentenza 238/14*, which allowed for the lifting of state immunity in some situations when the claim arises from human rights violations. As of now, the Italian judicial practice remains isolated.

CONCLUSIONS

Philipp is an important milestone in the history US jurisprudence with respect to state immunity. Still, against the background provided above another question arises: How important are these recent developments in the American jurisprudence, given that in some instances their impacts do not go beyond the strict operation of state immunity? Or should we place *Phillip* within a broader context, i.e. consider it as a manifestation of a US backtrack from earlier tendencies extending the American courts' jurisdiction well beyond the limits of the US territory? The answer to these questions is complicated, but the final remark made in Part II C of the *Phillip* opinion, in which the Justices directly referred to *Kiobel*[41] and quoted its famous passage ("United States law governs domestically but does not rule the world") speaks in favor of the latter presumption. If this hypothesis is correct; then not only will claims directed against foreign states allegedly arising from human rights abuses be declared inadmissible by the US judiciary, but the US courts could also deem claims against transnational companies (including those incorporated under the US law) for damages inflicted abroad as falling outside the scope of their jurisdiction. However, the American judiciary's attitude

[40] *See* Pavoni, *supra* note 1, pp. 104 et seq.
[41] *Kiobel v. Royal Dutch Petroleum Co.,* 569 US 108, 115 (2013).

in these matters has not been fully crystallized yet, and the future of Supreme Court jurisprudence in this respect remains to be seen.[42]

Wherever the truth may lie, the approach endorsed in *Philipp* strictly reflects Zeitgeist when rivalry instead of cooperation characterizes international relations.[43] The US-China competition, Russia's aggressive policy, and complicated connections between Washington and Brussels – these are factors which do not favor any courageous court decisions in such a sensitive area as state immunity. Considering the US's diminishing influence in the world, one can understand the Justices. Having in mind the increasing tensions in international relations, they found no other alternative but to follow John Marshall's footsteps[44] and adopted a similarly deferential stance towards the Executive Power when state immunity issues are at stake.[45]

[42] *Cf. Nestlé U.S.A., Inc., Petitioner v. John Doe I, et al.* (17-55435), Docket number: 19-416 and 19-453.

[43] *See* Krieger, *supra* note 1, pp. 78 et seq.

[44] *See The Schooner Exchange v. McFaddon*, p. 146.

[45] This deference is almost openly admitted in Part II C, p. 13 of *Germany et al. v. Philipp et al.*, where the Justices, once against quoting *Kiobel*, declared it their duty to avoid adopting an interpretation of US law that has foreign policy consequences not intended by the political branches.