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## Challenges to Establishing Jurisdiction Over Holocaust Era Claims in Federal Court

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## COMMENT

# CHALLENGES TO ESTABLISHING JURISDICTION OVER HOLOCAUST ERA CLAIMS IN FEDERAL COURT

I take no position regarding whether these cases were correctly decided, or whether they would even apply here. Instead, I cite them as a reality check for those objectors who believe that strong moral claims are easily converted into successful legal causes of action.<sup>1</sup>

### INTRODUCTION

Imagine: sometime in the future, a law student in America finds a letter written in 1944 by her Austrian grandmother to her grandfather far away. The letter says that Nazi agents have broken into the grandmother's home and taken away her gold watch and a painting by Picasso. The letter says that if the stolen items are recovered, they should be given to the grandchildren. The next day, the law student goes to an exhibition at the San Francisco Museum of Modern Art and sees the Picasso mentioned in her grandmother's letter. The student learns that the Austrian Government owns the painting. Can she sue the Austrian government in federal court to recover this canvas?<sup>2</sup> This question will be answered when the Supreme Court decides *Altmann v. Austria* in June 2004.<sup>3</sup>

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<sup>1</sup> Judge Korman, *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d 139, 148 (E.D.N.Y. 2002).

<sup>2</sup> In 2002, Thomas Bannigson, the heir of original owners of a Picasso work entitled "Femme en Blanc" and a law student at Boalt Hall, filed suit in California state court in Los Angeles seeking to recover the painting which had hung on his grandmother's wall in Berlin before the war. The California state trial court dismissed the suit, holding that it should be filed in Chicago, where the current owner resides. As this Comment explains further, the outcome could have been different if the current owner was not an American resident but a foreign government. *See*:

In December 2002, the Ninth Circuit Court of Appeals decided *Altmann v. Austria*.<sup>4</sup> In this case, plaintiff Maria Altmann sued the Austrian government in the United States District Court for the Central District of California to recover six paintings by Gustav Klimt<sup>5</sup> that had once belonged to her family.<sup>6</sup> These canvases, one of which is the famous Portrait of Adele Bloch-Bauer (the plaintiff's aunt), had allegedly been obtained in violation of international law by the Austrian National Gallery.<sup>7</sup> They were stolen by the Nazis during the war.<sup>8</sup> Three years after Germany's defeat, the paintings were expropriated by the Austrian government.<sup>9</sup> The Austrian government demanded that the Altmanns donate six paintings to the National Gallery before it would permit them to remove the rest of their art collection from the country.<sup>10</sup>

Defendant, the Republic of Austria, filed a motion to dismiss the suit on a number of grounds.<sup>11</sup> Austria contended that as a foreign state it is immune from the jurisdiction of federal and state courts in the United States.<sup>12</sup> The district court denied Austria's motion to dismiss and the Ninth Circuit affirmed its decision.<sup>13</sup> Austria then appealed the Ninth Circuit's ruling to the Supreme Court.<sup>14</sup>

<http://www.chicagotribune.com/features/chi-reich-picasso-story,0,1245488.story?coll=chi-site-nav>,  
<http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2002/12/27/BA127626.DTL>

<sup>3</sup> Martha Lufkin, *Supreme Court to decide whether Austria can be sued in the US*, The Art Newspaper.com, at <http://www.theartnewspaper.com/news/article.asp?idart=11406>.

<sup>4</sup> *Altmann v. Republic of Austria*, 317 F.3d 954 (9<sup>th</sup> Cir. 2002).

<sup>5</sup> Nicolas Pioch, *Klimt, Gustav*, WebMuseum, Paris, at <http://www.ibiblio.org/wm/paint/auth/klimt/> (Aug 19 2002).

<sup>6</sup> *Altmann*, 317 F.3d 954.

<sup>7</sup> *Id.*

<sup>8</sup> Raphael Rubinstein, *Schiele & Klimt: Holocaust Heirs Battle On. (Court battles to determine rightful ownership of paintings by Egon Schiele and Gustav Klimt) (Brief Article)*, Art in America, at [http://www.findarticles.com/cf\\_dls/m1248/10\\_88/66306817/p1/article.jhtml](http://www.findarticles.com/cf_dls/m1248/10_88/66306817/p1/article.jhtml) (October 2002).

<sup>9</sup> *Altman v. Austria, Complaint for Damages*, page 3 at [http://www.adele.at/Complaint\\_against\\_Austria/Complaint\\_against\\_Austria.pdf](http://www.adele.at/Complaint_against_Austria/Complaint_against_Austria.pdf).

<sup>10</sup> *Altman v. Austria, Complaint for Damages*, page 3 at [http://www.adele.at/Complaint\\_against\\_Austria/Complaint\\_against\\_Austria.pdf](http://www.adele.at/Complaint_against_Austria/Complaint_against_Austria.pdf).

<sup>11</sup> Ashley Yarchin, *Brief on Republic of Austria, et. al. v. Altmann, Maria*, at <http://journalism.medill.northwestern.edu/docket/action.lasso?-database=docket&-layout=lasso&-response=%2fdocket%2fdetail.srch&-recordID=33196&-search> (last visited March 12, 2004).

<sup>12</sup> *Altmann*, 317 F.3d 954.

<sup>13</sup> *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1215 (C.D. Cal. 2001).

<sup>14</sup> *Altmann*, 317 F.3d 954.

The Court will consider only one issue: whether the Federal Sovereign Immunities Act (hereinafter "FSIA"), which allows suits against foreign nations in U.S. courts only under certain exceptions, applies retroactively to crimes that took place before the Act was passed in 1976.<sup>15</sup> Altmann brought her suit under one of these exceptions, namely, misappropriation of property in violation of international law.<sup>16</sup> The Court's decision may affect the United States' relationships with other nations because its decision will determine whether foreign governments will face suits in federal courts for other Holocaust Era crimes.<sup>17</sup>

This Comment contends that jurisdiction over Austria cannot be established retroactively by application of the Foreign Sovereign Immunities Act. The purpose of this Comment is to call the attention of the legal community and the general public to the need to resolve the remaining Holocaust Era claims. Many U.S. citizens fought to preserve democratic rights during the Second World War. Many gave their lives to protect the world from fascism. Now it is time for the legislature and the judiciary to complete this noble task. This Comment is divided into four parts. Part I provides a brief overview of Holocaust litigation in the United States and a summary of the *Altmann* case.<sup>18</sup> Part II explains FSIA's application and the legal principles of retroactivity.<sup>19</sup> Part III presents the district court's interpretation of FSIA in *Altmann*.<sup>20</sup> Part IV explores the Ninth Circuit Court of Appeals decision as well as

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<sup>15</sup> Republic of Austria v. Altmann, 124 S.Ct. 46 (2003).

<sup>16</sup> Marcia Coyle, *Battle Over Klimt paintings has Broad Implications*, The Recorder, February 5, 2004, page 3; Marcia Coyle, *A Case of Art and Law*, The National Law Journal, at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1075219841543> (Feb. 2, 2004).

<sup>17</sup> In recent years, an increasing number of U.S. citizens have turned to the federal courts seeking remedies for injuries that occurred in another nation or that were the fault of another nation. Like Altmann's claim against Austria, a number of them stem from the World War II era. Thus, the same legal issue is at the heart of three other Holocaust Era cases: *Abrams v. Societe Nationale des Chemins de Fer Francais*, 332 F.3d 173 (2<sup>nd</sup> Cir. 2003), petition for cert. filed, 72 U.S.L.W. 3154 (Aug. 19, 2003) (No. 03-284); *Garb v. Republic of Poland*, 72 Fed. Appx. 850 (2<sup>nd</sup> Cir. 2003); petition for cert. filed, 72 U.S.L.W. 3268 (Sep., 30, 2003) (No. 03-500); *Whiteman v. Federal Republic of Austria*, No. 00 Civ. 8006 (S.D.N.Y. 2002 Oct. 21, 2002), which was consolidated with *Garb*.

<sup>18</sup> See *supra* p. 3.

<sup>19</sup> See *supra* p. 15.

<sup>20</sup> See *supra* p. 20.

the underlying decision of the district court.<sup>21</sup> Finally, Part V critiques the Ninth Circuit's decision, asserting that it was made on improper legal grounds and proposes that the matter has to be resolved in the interest of public policy.<sup>22</sup>

## I. BACKGROUND

### A. HOLOCAUST ERA LITIGATION IN THE UNITED STATES

This Comment does not intend to give a complete account of Holocaust Era wrongs and their adjudication. In order to provide a historical background to the *Altmann case*, however, it is necessary to explain how the Holocaust Era claims have been resolved and why *Altmann* was filed in the United States Court approximately sixty years after the alleged events occurred.

#### 1. *Post-World War II International Treaties and Reparation Agreements Precluded Private Litigation*

Since 1945, the United States has been a party to numerous treaties and agreements addressing World War II reparations.<sup>23</sup> Treaties establishing peace with Germany and settling Nazi-era claims mandated that claims be handled on a government to government basis.<sup>24</sup> Reparation claims arising out of World War II have always been subject to resolution by the political branches.<sup>25</sup> In each case where courts established that a Holocaust Era claim was covered by a reparation treaty or by a compensation program, they abstained from adjudicating the claim.<sup>26</sup> When World War II ended, the Allies sought reparations for victims of the Nazi regime by seizing German assets, which they transferred to countries devastated by the Nazis.<sup>27</sup>

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<sup>21</sup> See *supra* p. 23.

<sup>22</sup> See *supra* p. 26.

<sup>23</sup> *Burger-Fischer v. DeGussa*, 65 F.Supp.2d 248, 265-272 (D.N.J. 1999); *In re Nazi Era Cases Against German Defendants*, 129 F. Supp.2d 370, 376 (D.N.J. 2001); *Anderman v. Austria*, 256 F. Supp. 2d 1098, 1113, 1114 (C.D. Cal. 2003).

<sup>24</sup> See *Burger-Fischer*, 65 F.Supp.2d at 279; *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 484, 461 (D.N.J. 1999).

<sup>25</sup> *Iwanowa*, 67 F. Supp. at 484-486.

<sup>26</sup> *Burger-Fischer*, 65 F. Supp. 2d at 279; *Iwanowa*, 67 F. Supp. 2d at 461.

<sup>27</sup> Detlev Vagts, Peter Murray, *Litigating The Nazi Labor Claims: The Path Not Taken*, 43 Harv. Int'l L.J. 503, 507 (2002). A treaty, adopted in 1952 placed Germany

Seizures, however, were ultimately terminated under the condition that Germany compensate the victims of Nazi persecution in an amount based on Germany's ability to pay.<sup>28</sup>

In 1953, the London Agreement was adopted to restore Germany's international creditworthiness.<sup>29</sup> The London Agreement addressed claims against German governmental and private parties and postponed the discussion of further reparations payments until a final treaty.<sup>30</sup> After 1956, the West German government took up reparations to individuals harmed by the Nazi regime, including survivors remaining in Germany.<sup>31</sup> The West German government also concluded a substantial number of bilateral agreements with Israel and other countries under which it made payments in reparation for human rights violations during the Nazi period.<sup>32</sup>

These measures did not directly address all of the Holocaust claims.<sup>33</sup> For example, they did not address victims of the

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under an obligation to make good the damage done by Nazi persecution; the amount was left dependent on Germany's ability to pay. *See Convention on the Settlement of Matters Arising out of the War and the Occupation*, May 26, 1952, 6 U.S.T. 4411, 332 U.N.T.S. 219.

<sup>28</sup> *See also Agreement on German External Debts*, Feb. 27, 1953, 4 U.S.T. 443, 333 U.N.T.S. 3.

<sup>29</sup> Timothy W. Guinnane, *Financial Vergangenheitsbewältigung: The 1953 London Debt Agreement*, p. 5-6, [http://www.econ.yale.edu/growth\\_pdf/cdp880.pdf](http://www.econ.yale.edu/growth_pdf/cdp880.pdf) (last visited March 12, 2004). The Allies justified the payment of reparations on several grounds. First, German aggression had clearly triggered the conflict, and Germany was bound to pay the consequences of its crimes. Second, the European Allies were deeply in debt to each other, to their citizens, and most of all to the United States. Discharging their mutual debts without income from reparations appeared to be impossible. Third, history proved that reparations were nearly always the outcome of war. At the conclusion of virtually every European war, including World War I, the vanquished had been forced to pay the victor. *Id.*

The Second World War ravaged Germany and practically destroyed its economy. The burden of paying reparations would have delayed Germany's recovery, perhaps for decades. Fears of Soviet aggression made the western Allies reluctant to impose this burden. Rising Cold War tensions made the revival of Germany – as a potential barrier to Soviet power – a priority for western statesmen. This revival could only be effected by generous aid to the German economy. In 1952, leading politicians from the United States, France and Great Britain called a central conference of all creditors in London to negotiate Germany's pre- and post-war debts. On February 27, 1953, the London Debt Agreement was signed. About half of all demands were cancelled. The rest were rescheduled to allow for long-term repayment at fixed rates. *Id.*

<sup>30</sup> Detlev Vagts, Peter Murray, *Litigating The Nazi Labor Claims: The Path Not Taken*, 43 Harv. Int'l L.J. 503, 507 (2002).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

Nazis' forced labor programs.<sup>34</sup> Some former slave laborers received compensation because they had been imprisoned in concentration camps, but victims subjected to forced labor by German companies and businesses did not.<sup>35</sup> As a result, compensation remained a live issue into the 1990s.<sup>36</sup>

## 2. *Only Claims Not Covered by International Treaties May Be Subject to Jurisdiction in the United States Courts*

To adjudicate Holocaust Era claims, the courts must find that these claims have not been covered by any international reparations treaty and have been left open for judicial resolution.<sup>37</sup> In general, before 1996, Holocaust victims failed to win recovery in American courts.<sup>38</sup> In October 1996, however, Holocaust survivors filed a federal class action suit in New York against the two largest banks in Switzerland.<sup>39</sup> Their suit stemmed among other things from the defendants' alleged failure to return monies deposited to their accounts during World War II.<sup>40</sup> This action resulted in the largest settlement of a human rights case in the history of American litigation.<sup>41</sup> Payment of \$1.25 billion in four installments over the course of three years was agreed upon.<sup>42</sup> Since then, Holocaust Era claims litigation has intensified.<sup>43</sup> Over fifty additional law-

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *In re: Nazi Era Cases Against German Defendants Litigation*, 129 F. Supp. 2d 370, 378 (2001).

<sup>38</sup> Michael J. Bazylar, *Nuremberg In America: Litigating The Holocaust In United States Courts*, 34 U. Rich. L. Rev. 1, 8 (2000).

<sup>39</sup> *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d at 142. In late 1996 and early 1997, plaintiffs filed a series of class action lawsuits against Union Bank of Switzerland, alleging that, before and during World War II in knowingly retaining and concealing the assets of Holocaust victims, accepting and laundering illegally obtained Nazi loot and transacting in the profits of slave labor, Swiss institutions, defendants, collaborated with and aided the Nazi regime in furtherance of war crimes, crimes against humanity. *Id.*

<sup>40</sup> Bazylar, *supra* note 38.

<sup>41</sup> *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d at 142.

<sup>42</sup> Bazylar, *supra* note 38. See also *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d at 142.

<sup>43</sup> Bazylar, *supra* note 38. "In the history of American litigation, a class of cases has never appeared in which so much time had passed between the wrongful act and the filing of a lawsuit. In contrast to the recent flood of lawsuits, only ten suits were filed in American courts from 1945 to 1995 stemming from damages suffered during the Holocaust Era. The filing of such suits at the close of the twentieth century pre-

suits have been filed in both federal and state courts targeting Germany, Austria, France and Switzerland.<sup>44</sup> Soon after the case was filed, the National Association of Insurance Commissioners created a working group on Holocaust and insurance issues to develop a non-adversarial alternative to litigation (ICHEIC).<sup>45</sup> Since the reparations program for Jewish victims of Nazi rule did not cover forced labor for German companies, lawsuits were filed in the U.S. courts against companies using slave labor during World War II.<sup>46</sup> These suits were brought after 1996 and were settled successfully soon after the courts granted jurisdiction.<sup>47</sup>

### 3. *Difficulties in Obtaining Jurisdiction over Defendants in Holocaust Era Cases*

Many Holocaust Era cases involved foreign states as defendants, and U.S. courts had to grant or deny jurisdiction over a foreign sovereign. In several cases American courts dismissed claims on one or more legal grounds, including the political question doctrine, the statute of limitations, the Foreign Sovereign Immunities Act, international comity, lack of personal jurisdiction over the defendants, and failure to state a claim upon which relief may be granted.<sup>48</sup>

United States courts have generally recognized that the doctrine of sovereign immunity protects foreign states from

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sents the last opportunity for the elderly survivors of the Holocaust to have their grievances heard in a court of law." *Id.*

<sup>44</sup> In 1997, a class action suit was filed in New York against 25 European insurance carriers claiming proceeds on unpaid insurance policies. Michael J. Bazylar and Adrienne Scholz, J.D., *Holocaust Restitution Litigation In The United States and Other Claims For Historical Wrongs – An Update*. ACLU International Civil Liberties Report, [http://sdshh.com/ICLR/ICLR\\_2003/6\\_bazylar.pdf](http://sdshh.com/ICLR/ICLR_2003/6_bazylar.pdf) (last visited March 12, 2004).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Vagts, Murray, *supra* note 30, referring to United States-Germany Agreement, Remembrance, Responsibility and the Future, July 17, 2000, U.S.-Ger., 39 I.L.M. 1298. "An agreement in July 2000 involving the American and German governments, other governments, German industry, and representatives of the plaintiffs created a fund of DM10 billion (nearly \$5 billion). The German government and German industry contributed the money to a foundation responsible for disbursement." *Id.* See also Bazylar, *supra* note 38.

<sup>48</sup> *Burger-Fischer*, 65 F.Supp.2d 248; *Frumkin v. J. A. Jones, Inc.*, 129 F. Supp. 2d 370 (D.N.J. 2001); *Iwanowa* at 424; *Princz v. Germany*, 26 F.3d 1166 (D.C. Cir. 1994); *Fishel v. BASF Group*, No. 4-96-CV-10449, 1998 U.S. Dist. LEXIS 21230 (S.D. Iowa Mar. 11, 1998).



being sued for actions in which they were implicated.<sup>49</sup> For example, in *Sampson v. Federal Republic of Germany*, the plaintiff filed a claim for damages suffered during his enslavement by the Nazis during World War II.<sup>50</sup> The U. S. District Court for the Northern District of Illinois dismissed his claim against Germany, concluding that Germany was immune from suit under both the Foreign Sovereign Immunities Act and the act of state doctrine.<sup>51</sup> On appeal, the Seventh Circuit Court of Appeals affirmed, holding that Germany as a foreign sovereign was immune from jurisdiction in the U.S. courts for any act committed before 1952.<sup>52</sup>

The act of state doctrine, where it applies, precludes a U.S. court from adjudicating any case in which the plaintiff's claim requires the court to pass a judgment upon a foreign sovereign's action within its own territory.<sup>53</sup> Other defenses include the political question doctrine, forum non conveniens, and the statute of limitations.<sup>54</sup> For example, in *Burger-Fischer v. De-Gussa*, the court refused jurisdiction to former slave laborers because of the political question doctrine.<sup>55</sup> Similarly, the court rejected a claim by a woman abducted in 1942 by the Nazi army, transported to Germany and forced to perform heavy labor.<sup>56</sup> Defendants might also have appealed to comity or fo-

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<sup>49</sup> Detlev F. Vagts, *Restitution For Historic Wrongs, The American Courts And International Law*, 92 AMJIL 232, 233 (1998).

<sup>50</sup> *Sampson v. Federal Republic of Germany & Claims Conference*, 250 F.3d 1145 (7<sup>th</sup> Cir. 2001).

<sup>51</sup> *Sampson*, 250 F.3d at 1145.

<sup>52</sup> *Sampson*, 250 F.3d at 1145.

<sup>53</sup> Vagts, *supra* note 49. See also *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 96 S. Ct. 1854, 1876 n.18 (1976). The doctrine of sovereign immunity differs from the act of state doctrine because it goes to the issue whether a foreign state can be forced to defend a suit in the United States, while the act of state doctrine supplies the rule of decision if jurisdiction is exercised over the claim. *Id.*

<sup>54</sup> "Although *Baker v. Carr* (369 U.S. 186, 211-12 (1962)) cautions that not all foreign relations issues are political questions, it is still true that the courts regard international matters as prima facie dangerous to handle." See Vagts, *supra* note 49. As for Statute of Limitations, see Vagts, Murray, *supra* note 30. "Some plaintiffs also cited the U.N. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73. However, neither Germany nor the United States are parties to this agreement, which in any case applies only to criminal prosecutions." See *Id.*

<sup>55</sup> *Burger-Fischer*, 65 F.Supp.2d at 250. The political question doctrine holds that a federal court having jurisdiction over a dispute should decline to adjudicate it if the case raises questions that should be addressed by the political branches of government. *Id.*

<sup>56</sup> *Iwanowa*, 67 F. Supp. 2d at 434.

rum non conveniens to persuade a U.S. court that such complex and remote problems should be handled in a different forum.<sup>57</sup>

When courts rejected these defenses and asserted jurisdiction, however, the immediate threat of litigation often fostered expedited settlements. In many cases, the fact that a court accepted a claim forced defendants to settle.<sup>58</sup> For example, in *Bodner v. Banque Paribas* the U.S. District Court for the Eastern District of New York held that it had jurisdiction over the plaintiffs' claim for the defendants' expropriation of Jewish customers' assets during the Nazi occupation.<sup>59</sup> The court held that jurisdiction existed in the interest of public policy.<sup>60</sup> Although the defendant banks had illegally held the funds of Jewish victims for decades, they surrendered these assets soon after the court asserted jurisdiction.<sup>61</sup> The case settled within a few months under the threat of litigation and a special compensation fund was established.<sup>62</sup>

Many defendants in the Holocaust Era litigation created special funds to guarantee "legal peace" and deter lawsuits.<sup>63</sup> For example, in 1999, the German government entered into a settlement with representatives of Jewish organizations to resolve slave labor claims.<sup>64</sup> Austria followed the German precedent, agreeing to compensate former slaves and forced laborers.<sup>65</sup> As stated earlier, a special commission was created to develop a non-adversarial alternative to litigation related to

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<sup>57</sup> Vagts, Murray, *supra* note 30.

<sup>58</sup> *Bodner v. Banque Paribas*, 114 F.Supp.2d 117 (E.D.N.Y.2000); *In re Nazi Era Cases Against German Defendants* 198 F.R.D. 429 (D.N.J. 2000); *In re: Nazi Era Cases Against German Defendants Litigation*, 129 F.Supp. 2d 370, 378 (D.N.J. 2001); *In re Austrian and German Bank Holocaust Litigation*, Case No. 98, Civ. 3938 (S.D.N.Y.1999).

<sup>59</sup> *Bodner*, 114 F.Supp.2d 117.

<sup>60</sup> *Id.* at 133.

<sup>61</sup> *Id.* at 124.

<sup>62</sup> *Notice to Victims of Anti-Semitic Persecution in France*, Ambassade de France in Nederland, at [http://www.ambafrance-nl.org/article.php?id\\_article=633](http://www.ambafrance-nl.org/article.php?id_article=633) (last visited March 12, 2004). See also *In re: Nazi Era Cases Against German Defendants Litigation*, 129 F. Supp. 2d at 378.

<sup>63</sup> Michael J. Bazylar and Adrienne Scholz, J.D., *Holocaust Restitution Litigation In The United States and Other Claims For Historical Wrongs – An Update*. ACLU International Civil Liberties Report, [http://sdshh.com/ICLR/ICLR\\_2003/6\\_bazylar.pdf](http://sdshh.com/ICLR/ICLR_2003/6_bazylar.pdf) (last visited March 22, 2004).

<sup>64</sup> Vagts, Murray, *supra* note 30; Bazylar, *supra* note 38.

<sup>65</sup> Bazylar, *supra* note 38.

insurance claims.<sup>66</sup> But not all of the claims were subject to special funds and commissions.<sup>67</sup>

#### 4. *Looted Art Litigation in the United States Courts*

During World War II the Germans stole approximately 600,000 works of art from museums and private collections throughout Europe.<sup>68</sup> To date, only a handful of lawsuits have been filed in the United States to recover artwork looted during the war.<sup>69</sup> Since each of these lawsuits addressed a specific work of art, none was filed as a class action.<sup>70</sup> Thus far, the community of museums, galleries, and art dealers has not established a fund similar to those created by foreign governments to compensate Holocaust victims.<sup>71</sup> Instead, the professional art world has left each defendant holding stolen artwork to fend for himself.<sup>72</sup> Thus, in *Altmann* the plaintiff's claim for recovery of her family's stolen artwork is not covered by any reparations or restitution program.

#### B. FACTS OF THE CASE: *ALTMANN V. AUSTRIA*

Maria Altmann, an American citizen, now 87, claims six Gustav Klimt paintings, including a portrait of her aunt, Adele Bloch-Bauer, commissioned in the early 1900s by Ferdinand Bloch, Ms. Altmann's uncle.<sup>73</sup> Originally these paintings belonged to Adele, Ferdinand's wife, who died in 1925.<sup>74</sup> She

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<sup>66</sup> *Id.*

<sup>67</sup> Michael J. Bazylar and Adrienne Scholz, J.D., Holocaust Restitution Litigation In The United States and Other Claims For Historical Wrongs – An Update. ACLU International Civil Liberties Report, [http://sdshh.com/ICLR/ICLR\\_2003/6\\_bazylar.pdf](http://sdshh.com/ICLR/ICLR_2003/6_bazylar.pdf) (last visited March 22, 2004).

<sup>68</sup> Michael J. Bazylar, Amber L. Fitzgerald, *Trading With The Enemy: Holocaust Restitution, The United States Government, and American Industry*, 28 BROOK. J. INT'L L. 709 (2003).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Complaint for Damages at 7, *Altmann*, 142 F. Supp. 2d 1187 (No.00-08913), [http://www.adele.at/Complaint\\_against\\_Austria/Complaint\\_against\\_Austria.pdf](http://www.adele.at/Complaint_against_Austria/Complaint_against_Austria.pdf) (last visited March 12, 2004).

<sup>74</sup> *Id.* at 8. Before she died in 1925, Adele Bloch-Bauer owned six Klimt paintings: the two portraits of herself; a portrait of a friend, "Amalie Zuckermandl;" and three landscapes, "Apple Tree I," "Beechwood" and "Houses in Unterach am Attersee." *Id.*

asked Ferdinand to donate the paintings at her death to the Austrian Gallery.<sup>75</sup> The executor of Adele's estate nullified her request, and declared that the paintings were Ferdinand's property, not hers.<sup>76</sup> Thus, Ferdinand was not bound by his wife's wishes.<sup>77</sup> The Gallery was given notice of the probate proceedings.<sup>78</sup> Ferdinand initially planned to honor his wife's request, but he failed to execute any document donating the paintings to the Gallery.<sup>79</sup> He delivered one painting to the Gallery in 1936.<sup>80</sup> The other six remained in his possession until Hitler's annexation of Austria in 1938.<sup>81</sup>

Ferdinand Bloch was Jewish.<sup>82</sup> He had given his support to anti-Nazi agitation before Germany annexed Austria.<sup>83</sup> He fled the country to avoid persecution, leaving behind all his holdings, and settled in Zurich, Switzerland.<sup>84</sup> The Gestapo seized his castle in Vienna, and his trove of paintings was looted.<sup>85</sup> Some of these works wound up in Hitler's private collection.<sup>86</sup> For his services to the Third Reich,<sup>87</sup> Dr. Erich

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Altmann*, 317 F.3d at 959.

<sup>83</sup> *Altmann*, 317 F.3d at 969.

<sup>84</sup> *Suit over Nazi Looting Heads to Supreme Court: Klimt Paintings at Heart of L.A. Woman's Action*, at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2003/10/01/MN239635.DTL>

<sup>85</sup> *Altmann*, 317 F.3d 954.

<sup>86</sup> Complaint for Damages at 9, *Altmann*, 142 F. Supp. 2d 1187 (No.00-08913), [http://www.adele.at/Complaint\\_against\\_Austria/Complaint\\_against\\_Austria.pdf](http://www.adele.at/Complaint_against_Austria/Complaint_against_Austria.pdf) (last visited March 12, 2004).

<sup>87</sup> *Third Reich*, Wikipedia The Free Encyclopedia, at [http://en.wikipedia.org/wiki/Third\\_Reich](http://en.wikipedia.org/wiki/Third_Reich) (last modified on 12:16, Feb. 29, 2004).

"The Third Reich is an anglication of the German expression "Das Dritte Reich", and is used as a synonym for Nazi Germany. The term was introduced by Nazi propaganda, which counted the Holy Roman Empire as the first Reich, the 1871 German Empire the second, and its own regime as the third. This was done in order to suggest a return to alleged former German glory after the perceived failure of the 1919 Weimar Republic.

The Third Reich was sometimes also referred to as the "Thousand Year Reich", as it was intended by its founder, Adolf Hitler, to stand for one thousand years. *Id.*

The Nazi Party attempted to combine traditional symbols of Germany with Nazi Party symbols in an effort to reinforce the perception of them as being one and the same. Thus the Nazi Party used the terms "Third Reich" and "Thousand Year Reich" to connect the allegedly glorious past to its supposedly glorious future. Initially Hitler's plans seemed to be well on their way to fruition. At its height, the Third Reich

Führer, the Nazi lawyer who liquidated Bloch's estate, received permission from Hitler's museum director Hans Posse to add some of Bloch's paintings to his own personal collection.<sup>88</sup>

A refugee in Switzerland, Ferdinand died on November 13, 1945, six months after the war ended.<sup>89</sup> He had taken preliminary steps to retrieve his stolen property.<sup>90</sup> In his last will, dated October 22, 1945, he revoked all prior wills and left his entire estate to two nieces (including plaintiff Altmann) and one nephew.<sup>91</sup> He made no bequest to the Austrian Gallery.<sup>92</sup>

Austria was an independent democratic republic until 1938.<sup>93</sup> In that year, the Nazis occupied and annexed Austria (the "Anschluss"), relying on the claim that Austria was an integral part of Germany.<sup>94</sup> After the invasion, the Nazis enacted anti-Jewish laws that severely restricted the property rights of Jewish citizens.<sup>95</sup> Property belonging to Jews was "Aryanized," i.e., given to non-Jewish individuals.<sup>96</sup> After the war, the Second Republic of Austria was established.<sup>97</sup> In 1946, it declared that all transactions dictated by the Nazis were void.<sup>98</sup> Yet, despite official Austrian policy, Altmann and her family members recovered only one of the stolen Klimt paintings.<sup>99</sup>

In 1947, Ferdinand's heirs retained a Vienna attorney, a family friend whom Ferdinand had retained not long before his death, to locate and retrieve property stolen from Ferdinand by the Nazis.<sup>100</sup> In February 1948, the Austrian Gallery assured this attorney that Adele Bloch Bauer had bequeathed six Klimt

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controlled the greater part of Europe. However, due to the defeat by the Allied powers in World War II, the Thousand Year Reich in fact lasted only 12 years (from 1933 through to 1945)." *Id.*

<sup>88</sup> *Altmann*, 317 F.3d at 960.

<sup>89</sup> Complaint for Damages at 11, *Altmann*, 142 F. Supp. 2d 1187 (No.00-08913), [http://www.adele.at/Complaint\\_against\\_Austria/Complaint\\_against\\_Austria.pdf](http://www.adele.at/Complaint_against_Austria/Complaint_against_Austria.pdf) (last visited March 12, 2004).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Altmann*, 142 F. Supp. 2d at 1192.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Altmann*, 317 F.3d at 959.

<sup>99</sup> *Altmann v. Austria, Complaint Against the Republic of Austria and the Austrian Gallery*, page 13, at [http://www.adele.at/Complaint\\_against\\_Austria/Complaint\\_against\\_Austria.pdf](http://www.adele.at/Complaint_against_Austria/Complaint_against_Austria.pdf) (March 12, 2004).

<sup>100</sup> *Id.*

paintings to the museum in 1925.<sup>101</sup> The Gallery also informed him that Adele's husband Ferdinand had asked permission from the museum to keep the paintings during his lifetime.<sup>102</sup> In April 1948, the Gallery asked the attorney to sign a document donating the Klimt paintings to the museum in exchange for a permit to export other items of Ferdinand's estate.<sup>103</sup>

Ms. Altmann never saw any documents related to Ferdinand's estate until January 1999.<sup>104</sup> She mistakenly believed that her Aunt Adele and her Uncle Ferdinand had freely donated the Klimt paintings to the Austrian Gallery before the War.<sup>105</sup> She didn't know that the paintings had been stolen from her uncle.<sup>106</sup> She didn't know that it was only through the unauthorized "donation," purportedly made on her behalf, that the Austrian Gallery had claimed ownership of the paintings.<sup>107</sup> She learned the truth only after 1998.<sup>108</sup>

In that year, U.S. authorities seized two Egon Schiele paintings that the Austrian Government had loaned to the Museum of Modern Art because these paintings had allegedly been looted by the Nazis.<sup>109</sup> After this seizure, the Austrian Minister for Education and Culture opened her ministry's archives to prove that no other looted artwork remained in Austria.<sup>110</sup> An Austrian journalist published a series of articles showing that Austrian museums had kept artwork extorted from exiled Jewish families long after the war ended.<sup>111</sup> In several instances – as with the Klimt paintings from the Bloch-Bauer collection – the origin of artwork was falsified to hide the fact that the

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 17.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 20.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> See *United States v. Portrait of Wally*, 2000 U.S. Dist. LEXIS 18713 (*U.S. v. Portrait of Wally, A Painting By Egon Schiele*. Not Reported in F.Supp.2d S.D.N.Y. (2002) (Action brought by United States to forfeit painting on loan from Austria that had been looted during the Nazi era).

<sup>110</sup> *Altmann v. Austria*, Complaint Against the Republic of Austria and the Austrian Gallery, page 21.

[http://www.adele.at/Complaint\\_against\\_Austria/Complaint\\_against\\_Austria.pdf](http://www.adele.at/Complaint_against_Austria/Complaint_against_Austria.pdf).

<sup>111</sup> *Altmann v. Austria*, Complaint Against the Republic of Austria and the Austrian Gallery, page 21.

[http://www.adele.at/Complaint\\_against\\_Austria/Complaint\\_against\\_Austria.pdf](http://www.adele.at/Complaint_against_Austria/Complaint_against_Austria.pdf).

paintings had been stolen during the war.<sup>112</sup> Klimt's portrait of Adele Bloch-Bauer I, which was allegedly donated to the Austrian Gallery in 1936, actually was transferred to the gallery in 1941.<sup>113</sup> A letter effecting the transfer was signed "Heil Hitler."<sup>114</sup> Many valuable works of art "donated" to the Gallery – that is, extorted from their rightful owners by Austrian government officials after the war – were never restored to the owners or their heirs.<sup>115</sup>

Austria admits that the paintings were illegally confiscated by the Nazis in 1938-1942, but contends that its right of ownership rests on events that occurred before and after (not during) World War II and most importantly under Adele's will.<sup>116</sup> Altmann claims that since Austria received the paintings from the Nazis and their Austrian accomplices, it had the legal and moral obligation to deliver them to Ferdinand's heirs upon probate of Ferdinand's will.<sup>117</sup> Altmann alleged that the Austrian Gallery violated international law by receiving property stolen from Ferdinand Bloch-Bauer; by refusing to return such property to his rightful heirs; and by using deceit and duress to obtain artwork that should have been restored to Ferdinand's heirs during the post-war period.<sup>118</sup>

Altmann, first brought suit in Austria, but laws there required her to pay fees amounting to a percentage of the property in question which would have resulted in a \$1.6 million

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<sup>112</sup> *Altmann*, 142 F. Supp. 2d at 1195. In January 1999, the Austrian government permitted this journalist to copy documents from the Gallery archives. He provided copies of these documents to Altmann's lawyer, and Altmann learned how the Klimt paintings came to be in the Austrian Gallery's possession. *Id.*

<sup>113</sup> Complaint for Damages at 20, *Altmann v. Austria*, 142 F. Supp. 2d 1187 (2001) (No. 00-08913), at [http://www.adele.at/Complaint\\_against\\_Austria/Complaint\\_against\\_Austria.pdf](http://www.adele.at/Complaint_against_Austria/Complaint_against_Austria.pdf) (March 12, 2004).

<sup>114</sup> *Id.* at 21.

<sup>115</sup> See generally The Commission for Art Recovery web site (last visited March 12, 2004), at <http://www.comartrecovery.org/accomplishments/austria/text/austria1.htm>. The Commission for Art Recovery is a public organization established to spur restitution efforts by European governments to help families whose art was wrongfully taken as a result of the policies of the Nazi Germany. *Id.*

<sup>116</sup> Petition for Cert. at 8, *Altmann v. Austria*, 327 F.3d 1246 (9th Cir. 2003), at <http://www.cprotonet.net/Austria-Altman.pdf> (March 12, 2004).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 36.

payment just to prosecute the case.<sup>119</sup> She qualified for a reduced fee but abandoned the case because it still would have required too much money to bring the suit.<sup>120</sup> Instead, she brought suit in the U.S. District Court for the Central District of California.<sup>121</sup>

## II. THE FEDERAL SOVEREIGN IMMUNITIES ACT AND GENERAL LEGAL PRINCIPLES GOVERNING RETROACTIVITY

### A. THE FEDERAL SOVEREIGN IMMUNITIES ACT

Federal courts have limited subject matter jurisdiction; they can hear only those cases that Congress directs and the Constitution permits them to hear.<sup>122</sup> Since *Altmann* was filed in federal court, the claim it presents must fall within the class of cases that federal courts can hear. Defendant Austria is a foreign sovereign, and its status presents a challenge to establishing jurisdiction. Although the Constitution explicitly includes suits against "foreign states" within the subject matter jurisdiction of federal courts, until 1952, foreign sovereigns enjoyed almost absolute immunity from suits in United States courts.<sup>123</sup> The State Department ordinarily requested immunity in all actions against friendly foreign sovereigns because the United States had impliedly waived jurisdiction over foreign sovereigns under the doctrine of absolute sovereign immunity.<sup>124</sup> This doctrine resulted from judicial unwillingness to interfere with foreign affairs.<sup>125</sup> In 1952, however, the U.S.

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<sup>119</sup> See Robert Greene, *Suit Permitted Against Austria Over Art Allegedly Stolen by Nazis*, Metropolitan News-Enterprise, December 13, 2002, Page 1, <http://www.metnews.com/articles/altm121302.htm>.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Federal courts are courts of limited jurisdiction. Unlike state courts of general jurisdiction (e.g., the Superior Courts of California), that have jurisdiction over the subject matter of a wide variety of lawsuits, federal jurisdiction is limited in nature. Federal courts only exercise the limited subject matter jurisdiction conferred by the Constitution and Congress. See also: *Patrickson v. Dole Food Co.*, 251 F.3d 795, 798 (9<sup>th</sup> Cir. 2001); *Owen Equipment & Erection Co. v. Kroger*, 98 S. Ct. 2396 (1978).

<sup>123</sup> *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). "For more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country." *Id.*

<sup>124</sup> "Foreign sovereign immunity is a matter of grace and comity on the part of the United States" *Id.*

<sup>125</sup> *Banco Nacional de Cuba v. Sabbatino*, 84 S.Ct. 923, 938 (1964). "The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that



position changed. The State Department adopted a “restrictive” theory of foreign sovereign immunity.<sup>126</sup> This theory was set forth in a State Department document known as the Tate Letter.<sup>127</sup>

The restrictive theory of foreign sovereign immunity held that a foreign state was immune from suits involving its sovereign or public acts, but had *no* immunity from suits stemming from its commercial activities.<sup>128</sup> The State Department's new policy did not give courts definite standards for determining whether to assert jurisdiction over suits against foreign states.<sup>129</sup> As a result, decisions regarding immunity were inconsistent because they often hinged on politics or foreign policy rather than Congressional statutes.<sup>130</sup> In 1976, Congress codified the theory of restrictive sovereign immunity by adopting the Foreign Sovereign Immunities Act.<sup>131</sup> This Act was adopted to assure that decisions were made on legal – not political – grounds under Due Process, and to shift the determi-

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its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.” *Id.*

<sup>126</sup> Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952) (reprinted in 26 Dep't of State Bull. 984-985 (1952) and in *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711(1976)). Tate cited the following reasons for adopting the theory of restricted immunity: (i) most civil law countries had already adopted it; (ii) the Government of the United States did not claim immunity when sued in foreign courts in contract or tort; and (iii) the increasing practice of engaging in commercial activities between private parties and foreign governments made it necessary to have their rights determined in the courts.

<sup>127</sup> Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952) (cited in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976)).

<sup>128</sup> Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952). “It will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity. ...It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so.” *Id.*

<sup>129</sup> *Siderman de Blake v. Republic of Argentina*, 965 F. 2d 699, 705 (9<sup>th</sup> Cir. 1992); *Verlinden B.V.*, 461 U.S. at 487; *Altmann*, 142 F.Supp.2d at 1198.

<sup>130</sup> *Verlinden*, 461 U.S. at 487.

<sup>131</sup> 28 U.S.C. § 1602 (1990).

nation of sovereign immunity from the executive to the judicial branch.<sup>132</sup>

FSIA provides the sole basis for subject matter jurisdiction over suits involving foreign states and their agencies.<sup>133</sup> Under its provisions, foreign states are immune from jurisdiction in United States courts, unless one of several exceptions applies.<sup>134</sup> The Act contains exceptions for certain situations, including those "in which rights in property taken in violation of international law are in issue" (Section 1605(a)(3)), and in which commercial activities of the foreign sovereign are carried on in the United States or cause a direct effect in the United States (Section 1605(a)(2)).<sup>135</sup> When one of these exceptions applies, the foreign state becomes liable to the same extent as a private individual under similar circumstances and district courts have original jurisdiction over the action.<sup>136</sup>

Ms. Altmann brought her claim under FSIA's expropriation exception. That exception confers jurisdiction over claims against foreign governments to adjudicate rights of property taken in violation of international law.<sup>137</sup> The events giving rise to her claim took place before FSIA was enacted in 1976, and even before the Tate letter was issued in 1952.<sup>138</sup> Naturally,

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<sup>132</sup> *Verlinden B.V.*, 461 U.S. at 488. (citing H.R.Rep. No. 94-1487, p. 7 (1976)), See also Mark B. Feldman, *Foreign Sovereign Immunity In The United States Courts 1976-1986*, 19 Vand. J. Transnat'l L.19 (1986).

<sup>133</sup> *Verlinden B.V.*, 461 U.S. at 488. "For the most part, the Act codifies, as a matter of federal law, the restrictive theory of sovereign immunity. A foreign state is normally immune from the jurisdiction of federal and state courts, 28 U.S.C. § 1604, subject to a set of exceptions specified in §§ 1605 and 1607. Those exceptions include actions in which the foreign state has explicitly or impliedly waived its immunity, § 1605(a)(1), and actions based upon commercial activities of the foreign sovereign carried on in the United States or causing a direct effect in the United States, § 1605(a)(2)." *Id.*

<sup>134</sup> 28 U.S.C. § 1604 (1977); see also *id.* §§ 1330, 1605.

<sup>135</sup> The other exceptions include actions for certain noncommercial torts within the United States, 28 U.S.C. §1605(a)(5); certain actions involving maritime liens, § 1605(b); and certain counterclaims, §1607.

<sup>136</sup> 28 USCS § 1606 states: "As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances. . ." See also: 28 USCS § 1330(a) which states: "The district courts shall have original jurisdiction without regard to the amount in controversy of any non-jury civil action against a foreign state as defined in section 1603(a) of this title."

<sup>137</sup> 28 U.S.C. § 1605(a)(3) (1986).

<sup>138</sup> Tate Letter, *supra note 124, 126.*

whether FSIA applies retroactively is the key issue in the *Altmann* case.

## B. RETROACTIVITY IN THE UNITED STATES SUPREME COURT'S DECISIONS

The legal principles for deciding the retroactivity of a statute are set forth in *Landgraf v. USI Film Products, et al.*<sup>139</sup> There the court held:

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern..<sup>140</sup>

Thus, in *Landgraf*, the Court established a two-step approach to determine whether a statute applies to events predating its enactment.<sup>141</sup> First, because Congress sometimes indicates that a statute's proper reach implies its application to events predating its enactment, the court must first ask whether Congress has expressly prescribed the proper reach of the statute in question.<sup>142</sup> If Congress has done so, the inquiry ends and the statute applies.<sup>143</sup> Second, if Congress did not expressly permit retroactive application, the court must determine whether applying the statute to pre-enactment events would have an impermissible retroactive effect.<sup>144</sup> That is, the court must determine whether applying the statute would "impair rights a party possessed when she acted, increase a party's liability for past conduct, or impose new duties with respect to

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<sup>139</sup> *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

<sup>140</sup> *Landgraf*, 511 U.S. at 280.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 261.

<sup>144</sup> *Id.* at 261-262.

transactions already completed.”<sup>145</sup> If applying the statute changes the liabilities of the parties, then it would be unjust to impose such an unforeseeable obligation to conduct occurring before the effective date of the statute.<sup>146</sup> In *Landgraf* the Court addressed jurisdictional statutes, stating that: “Application of a new jurisdictional rule usually takes away no substantive right but simply changes the tribunal that is to hear the case. Present law normally governs in such situations because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties.”<sup>147</sup> Several lower courts’ decisions later concluded that this statement permitted retroactive application of all jurisdictional statutes and FSIA in particular.<sup>148</sup>

*Hughes Aircraft Co. v. United States ex rel. Schumer* clarified *Landgraf*.<sup>149</sup> *Hughes Aircraft* held that although a new jurisdictional rule usually “takes away no substantive right but simply changes the tribunal that is to hear the case,” sometimes it may create jurisdiction where none previously existed, and thus speak not just to the power of a particular court but to the substantive rights of the parties.<sup>150</sup> Under *Hughes Aircraft*, when a jurisdictional statute affects nothing more than where a suit may be brought, not whether it may be brought at all, retroactive application is permissible.<sup>151</sup> If, however, it creates jurisdiction where none previously existed, and thus affects the substantive rights of the parties, then such a statute, even though phrased in “jurisdictional” terms, is subject to a presumption against retroactivity.<sup>152</sup>

In light of *Landgraf* and *Hughes*, FSIA would apply in *Altmann* if 1) Congress clearly intended that it apply to events predating FSIA’s enactment; or 2) application of FSIA would not change the substantive rights and responsibilities of the

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Landgraf*, 511 U.S. at 274 (emphasis added, citations omitted).

<sup>148</sup> *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512 (9<sup>th</sup> Cir. 1995) vacated and remanded by *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997); *Altmann*, 142 F. Supp. 2d at 1200; *Altmann*, 317 F.3d at 959.

<sup>149</sup> *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997).

<sup>150</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

## 178 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 34

parties.<sup>153</sup> As this Comment maintains, even if Austria confiscated the Altmann family's property in violation of international law, and enjoyed immunity from the jurisdiction of U.S. courts prior to FSIA's enactment, it should not be deprived of this immunity under FSIA.

### III. THE DISTRICT COURTS INTERPRETATION OF THE FEDERAL SOVEREIGN IMMUNITIES ACT AND THE *ALTMANN* DECISION

#### A. THE EXPROPRIATION EXCEPTION TO FSIA

Altmann claims that FSIA's "expropriation exception" applies to her case and therefore the U.S. district court has jurisdiction.<sup>154</sup> The U.S. District Court for the Central District of California, where the claim was filed, examined the application of this exception to FSIA.<sup>155</sup> The expropriation exception provides:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case ... (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.(emphasis added)...<sup>156</sup>

This exception has two clauses.<sup>157</sup> The first clause refers to cases where the property in question or any property exchanged for such property is "present in the United States."<sup>158</sup> Because the Klimt paintings are not present in the United States, only the second clause applies.<sup>159</sup> This clause has three requirements. First, there must be property taken in violation

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<sup>153</sup> *Landgraf*, 511 U.S. at 280.

<sup>154</sup> *Altmann*, 142 F. Supp. 2d at 1197.

<sup>155</sup> *Id.* at 1202.

<sup>156</sup> 28 U.S.C. § 1605(a)(3)

<sup>157</sup> See H.R. Rep. No. 94-1487, at 6613 (1976).

<sup>158</sup> *Id.*

<sup>159</sup> *Altmann*, 142 F. Supp. 2d at 1202.

of international law; second, this property must be owned or operated by a foreign state or its agency; third, the foreign sovereign must engage in commercial activity in the United States.<sup>160</sup> The taking of property is valid under international law if 1) it serves a public purpose, 2) aliens are not singled out for regulation by the state, and 3) compensation is made.<sup>161</sup>

## B. FACTS SUPPORTING THE EXPROPRIATION EXCEPTION

Altmann's argument that her family's property was taken in violation of international law rests on the fact that Austria obtained her family's paintings as a result of the Nazis' "Aryanization" of Ferdinand's art collection and on the fact that these works of art were withheld after the war.<sup>162</sup> Austria used the export permit laws to force Jews to donate artworks to the Austrian Gallery in exchange for export permits for other works.<sup>163</sup> This practice itself was an act in furtherance of the expropriations in violation of international law.<sup>164</sup> Altmann's argument that the Austrian government has engaged in commercial activity in the United States rests on the Austrian Gallery's use and exploitation of the family's stolen paintings.<sup>165</sup>

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<sup>160</sup> At the jurisdictional stage, a court need not determine if property was taken in violation of international law if the plaintiff's claims are substantial and non-frivolous. *Id.*

<sup>161</sup> *Id.* (citing *Siderman*, 965 F.2d at 711-12).

<sup>162</sup> *Altmann*, 142 F. Supp. 2d at 1203. The Nazis' "Aryanization" of Ferdinand's art collection was obviously a taking in violation of international law. It was emphatically not done for a valid public purpose, but was part of a larger scheme for the annihilation of European Jewry. To say this singled out "aliens" for regulation by the state is a gross understatement. The Nazis certainly had no desire to redress their victims' injuries; no payment of just compensation was ever made. *Id.*

<sup>163</sup> "After the war, the Allies sent looted artworks to the Art Collecting Point in Munich, Germany. Individual applicants were not permitted to retrieve this property, however. Instead, the artworks were returned to their country of origin, which then decided whether the artworks should be restored to their rightful owners. Artworks deemed important to Austria's heritage could not be exported without the permission of the Austrian government. Austria's "cultural heritage" law, enacted soon after the war's end, forced its citizens, typically Jews, to give up some of their artworks in order to obtain a government permit to export other works in their possession", at <http://www.comartrecovery.org/accomplishments/austria/text/austria1.htm> (last visited March 12, 2004).

<sup>164</sup> Petition for Cert. at 33, *Altmann v. Austria*, 327 F.3d 1246 (9th Cir. 2003), at <http://www.cprotonet.net/Austria-Altman.pdf> (March 12, 2004).

See also *Austria*, at <http://www.comartrecovery.org/accomplishments/austria/text/austria1.htm>. In 1998, Austria enacted a law requiring the return of artworks "donated" to federal museums under duress or in exchange for export permits. *Id.*

<sup>165</sup> *Altmann*, 142 F. Supp. 2d at 1203.

## 180 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 34

Evidence of the exploitation and commercial activity by the Austrian Gallery is its published catalogs and guidebooks with the portrait of Altmann's aunt, Adele Block-Bauer I, on the covers.<sup>166</sup> Furthermore, the Austrian Gallery accepts admission fees from U.S. visitors and sells memorabilia, including images of the looted artworks, to U.S. citizens.<sup>167</sup> Altmann contends that the operation of the Austrian Gallery, including its ticket sales and publication of a catalogue and book containing images of her family's stolen paintings, is a commercial activity exempt from immunity under the Foreign Sovereign Immunities Act.<sup>168</sup>

## C. THE DISTRICT COURT'S REASONING AND DECISION

The United States District Court for the Central District of California agreed with Altmann and applied FSIA retroactively.<sup>169</sup> The court held that FSIA applied to the pre- and post-war acts of the Nazis and the Austrian government.<sup>170</sup> Its decision was based on the presumption that existing legal principles permitted retroactive application of FSIA.<sup>171</sup> Austria claimed absolute sovereign immunity in accordance with the State Department's policy prior to the issuance of the Tate Letter.<sup>172</sup> To bolster its argument, Austria cited decisions by other federal circuits that held that FSIA could not be applied to pre-1952 events.<sup>173</sup> The District Court for the Central District of California questioned the viability of the authorities Austria

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<sup>166</sup> *Id.* at 1205.

<sup>167</sup> *Id.*

<sup>168</sup> Kenneth Ofgang, *Austria's Lawyer Urges Court to Throw Out Suit Over Plundered Art*, Metropolitan News Enterprise, at <http://www.metnews.com/articles/altm030802.htm> (last visited March 12, 2004).

<sup>169</sup> *Altmann*, 142 F. Supp. 2d 1215.

<sup>170</sup> *Altmann*, 142 F. Supp. 2d 1187; *Altmann*, 317 F.3d at 962.

<sup>171</sup> *Altmann*, 142 F. Supp. 2d at 1200.

<sup>172</sup> *Id.* at 1187.

<sup>173</sup> *Id.* at 1201. (referring to *Jackson v. People's Republic of China*, 794 F.2d 1490 (11<sup>th</sup> Cir. 1986), *Carl Marks & Co. v. Union of Soviet Socialist Republics*, 841 F.2d 26 (2<sup>nd</sup> Cir. 1988). See *Carl Marks & Co.*, 841 F.2d at 27 ("We believe, as did the district court, that only after 1952 was it reasonable for a foreign sovereign to anticipate being sued in the United States courts on commercial transactions."); *Jackson*, 794 F.2d at 1497-98 ("We agree that to give the Act retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns (and also with antecedent principles of law that the United States followed until 1952)."); *Slade v. U.S. of Mexico*, 617 F. Supp. 351, 356 (D.C. 1985). "[T]he Court finds that FSIA cannot be applied retroactively to this case where all the operative events occurred before 1952."

submitted, misinterpreting the meaning of *Landgraf*.<sup>174</sup> The district court upheld jurisdiction, concluding that FSIA does not affect any substantive law determining the liability of a foreign state and, being a jurisdictional statute, does not have an impermissibly retroactive effect.<sup>175</sup> Since the district court's reasoning was incorporated in the Ninth Circuit's analysis, further discussion will address the district court's reasoning only through the prism of the Ninth Circuit's analysis.

#### IV. THE NINTH CIRCUIT'S ANALYSIS AND DECISION IN *ALTMANN*

##### A. APPLYING THE FIRST PRONG OF THE *LANDGRAF* TEST, THE NINTH CIRCUIT HELD THAT FSIA'S STATEMENT OF PURPOSE MANIFESTED CONGRESS' INTENT THAT FSIA BE RETROACTIVELY APPLIED

In determining whether the district court properly held that FSIA could be applied to Austria's expropriation of the Altmann family's property, the Ninth Circuit examined the issue of FSIA's retroactivity. In doing so, the Ninth Circuit applied the two-prong test set forth in *Landgraf*. The court first considered whether Congress had intended that FSIA should apply retroactively.<sup>176</sup> The Ninth Circuit relied on dicta in *Princz v. Federal Republic of Germany*.<sup>177</sup> The court found Congressional intent in the statute's statement of purpose, which declared that "Claims of foreign states to immunity should henceforth be decided by courts of the United States

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<sup>174</sup> *Altmann*, 142 F. Supp. at 1200. This conclusion was later rejected by the Ninth Circuit, which declared that "We need not reach the broad conclusion of the district court that FSIA may be generally applied to events predating the 1952 Tate Letter." *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Altmann*, 317 F.3d at 963.

<sup>177</sup> *Princz*, 26 F.3d at 1178-79. (Wald, J., dissenting on other grounds), *cert. denied*, 513 U.S. 1121, 130 L. Ed. 2d 803, 115 S. Ct. 923 (1995) Hugo Princz, a Holocaust survivor, sued Germany to recover damages for injuries he suffered in Nazi concentration camps. Prinz advanced tort and quasi-contract claims. The district court asserted subject matter jurisdiction over these claims, holding that FSIA did not apply to cases involving undisputed acts of barbarism committed by former outlaw nations. The United States Court of Appeals For The District of Columbia Circuit reversed the district court's assertion of subject matter jurisdiction. The court held that if the FSIA applied, no exception to defendant's sovereign immunity existed, and even if the FSIA did not apply and defendant was not immune from suit, no jurisdiction could be exercised over plaintiff's tort and quasi contract claims.



and of the States in conformity with the principles set forth in this chapter."<sup>178</sup> The majority interpreted Congress' use of the word "henceforth" to mean that "FSIA is to be applied to all cases decided after its enactment, i.e., regardless of when the plaintiff's cause of action accrued."<sup>179</sup> Following the *Princz* court's dicta, the Ninth Circuit declared that it was possible that Congress intended FSIA to apply retroactively and proceeded to the second prong of the *Landgraf* test.<sup>180</sup>

B. APPLYING THE SECOND PRONG OF THE *LANDGRAF* TEST, THE NINTH CIRCUIT HELD THAT FSIA'S APPLICATION IN *ALTMANN'S* CLAIM OF WRONGFUL APPROPRIATION WAS NOT IMPERMISSIBLY RETROACTIVE

Under the second prong of the *Landgraf* test, the Ninth Circuit reasoned that Austria could have had no reasonable expectation of immunity in a foreign court because the Nuremberg trials of 1945-1946 signaled that the international community would not support immunity "to shroud the atrocities committed during the Holocaust."<sup>181</sup> Thus, the Ninth Circuit found that a U.S. court should apply the international law of takings, which would be applied in any foreign court.<sup>182</sup> Therefore, the court said, FSIA's retroactive application to the *Altmann* case would only address which court should have jurisdiction not whether the case could be brought at all.<sup>183</sup>

The court gave three reasons for its conclusion. First, by the 1920s, Austria itself had adopted the restrictive theory of sovereign immunity.<sup>184</sup> Austria was therefore on notice regarding restrictions on immunity.<sup>185</sup> Second, the cases holding FSIA inapplicable to pre-1952 events involved economic transactions entered into prior to the defendant country's acceptance of the restrictive principle of sovereign immunity.<sup>186</sup> Third, the disputes in sister circuits ruling against FSIA's retroactivity in-

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<sup>178</sup> *Princz*, 26 F.3d at 1170.

<sup>179</sup> *Princz*, 26 F.3d at 1170.

<sup>180</sup> *Altmann*, 317 F.3d at 964 (citing *Slade*, 617 F. Supp. at 356), *Jackson*, 794 F.2d 1490, *Carl Marks & Co*, 841 F.2d 26.

<sup>181</sup> *Altmann*, 317 F.3d at 967.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 966-967.

<sup>185</sup> *Id.* at 967.

<sup>186</sup> *Id.* at 966-967.

volved contracts.<sup>187</sup> In contract cases, courts have traditionally deferred to the "settled expectations" of the parties at the time of contracting.<sup>188</sup> Applying FSIA retroactively in those cases would impair rights a party possessed at the time of contracting.<sup>189</sup> The Ninth Circuit emphasized, however, that such presumptions do not apply to a claim of violation of international law.<sup>190</sup> Thus, even if Austria expected that it would not be sued in a foreign court at the time it acted, its expectation would be unreasonable.<sup>191</sup> For these reasons, the court held that application of FSIA to the pre-1952 actions of the Republic of Austria was not impermissibly retroactive.<sup>192</sup>

#### C. THE NINTH CIRCUIT HELD THAT AUSTRIA'S COMMERCIAL ACTIVITY IN THE UNITED STATES SUFFICED TO SATISFY FSIA'S APPLICATION

Finally, the Ninth Circuit concurred with the district court in recognizing that at the jurisdictional stage, it did not need to decide whether the taking of property actually violated international law so long as the claim was substantial and non-frivolous.<sup>193</sup> The court held that the alleged facts were sufficient to conclude that Austria obtained the Altmann family's property in violation of international law.<sup>194</sup> Thus, the court declared, the Austrian Gallery's alleged commercial activity involving the Altmann family's paintings was enough to justify jurisdiction under FSIA.<sup>195</sup>

#### D. MORAL GROUNDS

While the Ninth Circuit never said that its decision was based on ethical and humanitarian reasons, the language of its opinion is saturated with emotional appeal and empathy for the extraordinary suffering of the Jewish people.<sup>196</sup> The opinion

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<sup>187</sup> *Id.* at 967.

<sup>188</sup> *Id.* at 966-967.

<sup>189</sup> *Id.* at 966-967.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 968.

<sup>193</sup> *Id.* at 966-967.

<sup>194</sup> *Id.* at 968.

<sup>195</sup> *Id.* at 964.

<sup>196</sup> *Id.* at 965.

is animated by a horror of the hideous crimes committed by the Nazis – crimes that the Republic of Austria did little to redress.<sup>197</sup> The court declared that “the deprivation of private property, while discriminatory and indeed dehumanizing, pales in comparison with the horrors inflicted upon those who, unlike Ferdinand, were unable to escape the slavery, torture, and mass murder of the Nazi concentration camps.”<sup>198</sup> The Ninth Circuit went on to assert that “Austrians could not have had any expectation, much less a settled expectation, that the State Department would have recommended immunity as a matter of “grace and comity”<sup>199</sup> for the wrongful appropriation of Jewish property.”<sup>200</sup> The court decided that applying FSIA would not “impair rights a party possessed when he acted,” because Austria would not have been entitled to immunity for its alleged “complicity in the pillaging and retention of treasured paintings from the home of a Jewish alien who was forced to flee for his life.”<sup>201</sup> Ultimately, the Ninth Circuit opinion provides a very convincing argument to resolve the Altmann’s claim based on strong moral grounds.

## V. THE ARGUMENT AGAINST THE NINTH CIRCUIT’S DECISION

### A. THE NINTH CIRCUIT DID NOT PROVE THAT CONGRESS INTENDED TO APPLY FSIA RETROACTIVELY

The Ninth Circuit examined two approaches to prove its contention that Congress intended to apply FSIA retroactively. First, as discussed above, the Ninth Circuit disagreed with the holdings of other circuits that denied FSIA retroactivity.<sup>202</sup> It distinguished the cases decided by other circuits – notably *Carl*

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<sup>197</sup> *Id.* at 968.

<sup>198</sup> *Altmann*, 317 F.3d 954.

<sup>199</sup> Under the case law preceding FSIA U.S. courts did not exercise jurisdiction over foreign sovereigns as a matter of grace and comity. *See: Verlinden*, 461 U.S. 480, 486. In *The Schooner Exchange v. M'Faddon*, 11 U.S. 116, 117 (Mem) U.S.(1812), Chief Justice Marshall concluded that the jurisdiction of a nation within its own territory “is susceptible of no limitation not imposed by itself”. In *Verlinden*, the Court said: “As *The Schooner Exchange* made clear, however foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution.” *Verlinden*, at. 486.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 965.

<sup>202</sup> *Altmann*, 317 F.3d at 964.

*Marks*,<sup>203</sup> *Jackson*,<sup>204</sup> and *Slade*<sup>205</sup> – as cases that dealt, not with violations of international law, but with contractual disputes in which the substantive rights of the contracting parties would have been impermissibly affected by FSIA's retroactive application.<sup>206</sup> Second, the Ninth Circuit claimed that the courts in *Carl Marks*, *Jackson*, and *Slade* never relied, in reaching their decisions, on Congress' alleged failure to clearly express its intent that FSIA be applied retroactively. Had they believed that Congress never intended retroactive application, the Ninth Circuit said, these courts would have concluded that FSIA could not be applied to events predating its 1976 enactment.<sup>207</sup> Instead, the Ninth Circuit noted, its sister circuits "recognized that FSIA would properly apply to events occurring after the issuance of the 1952 Tate Letter" but before 1976.<sup>208</sup> These Ninth Circuit's arguments are unsatisfactory, however, to prove Congress' intent to apply FSIA retroactively.<sup>209</sup>

The Ninth Circuit relied only on the District of Columbia Circuit's *Princz* dicta in determining that FSIA could be applied retroactively to Holocaust Era claims.<sup>210</sup> But, in the recently decided case of *Joo v. Japan*, the District of Columbia Circuit reversed its position and rejected its dicta in *Princz*, holding that FSIA could not be applied to pre-1952 events.<sup>211</sup> In *Joo*, the court held that a foreign sovereign justifiably expected any suit filed in a U.S. court before 1952 to be dismissed unless it consented to the suit.<sup>212</sup> The *Joo* case did not concern a contractual dispute, but involved a claim by women alleging that between 1931 and 1945 the Japanese government, in a flagrant violation of international law, forced them to serve as "comfort women" – a euphemism for sex slaves.<sup>213</sup> Despite the Ninth

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<sup>203</sup> *Carl Marks & Co.*, 841 F.2d 26.

<sup>204</sup> *Jackson*, 794 F.2d 1490.

<sup>205</sup> *Slade*, 617 F. Supp. 351.

<sup>206</sup> *See supra* p. 24.

<sup>207</sup> *Altmann*, 317 F.3d at 966-967.

<sup>208</sup> *Id.*

<sup>209</sup> Courts held that FSIA cannot be applied retroactively in recent cases dealing with human rights violations and claims stemming from the Holocaust Era. *See Sampson*, 250 F.3d at 1150, *Garb*, 72 Fed. Appx. 850, *Whiteman v. Federal Republic of Austria*, 2002 WL 31368236 (S.D.N.Y. 2002), *Abrams v. Societe Nationale des Chemins de Fer Francais*, 332 F.3d 173 (2<sup>nd</sup> Cir. 2003).

<sup>210</sup> *Princz*, 26 F.3d 1166.

<sup>211</sup> *Hwang Geum Joo v. Japan*, 332 F.3d 679, 684 (D.C. Cir. 2003).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

Circuit's position, other Circuit Courts generally agreed that Congress did not intend to apply FSIA retroactively, no matter whether the issue in question was a contract dispute or a violation of international law.

The Ninth Circuit virtually admitted that it could not pass the first prong of the *Landgraf* test. Its opinion declared: "Assuming, without deciding, that, . . . Congressional intent to allow application of FSIA to pre-enactment facts is not manifest in the statutory language, we turn to the second prong of the *Landgraf* test [to determine] whether applying FSIA would 'impair rights a party possessed when he acted.'<sup>214</sup> The Ninth Circuit premised its ruling on the second prong of the retroactivity analysis rather than the first.<sup>215</sup> In doing so, it ultimately dodged an attempt to prove that Congress intended retroactive application of FSIA.

#### B. THE SECOND PRONG OF THE *LANDGRAF* TEST DOES NOT PERMIT RETROACTIVE APPLICATION OF FSIA IN *ALTMANN*

The Ninth Circuit's decision directly conflicts with holdings of the United States Supreme Court, the legislative history of FSIA, the history of sovereign immunity in the United States, and the position of the Executive Branch in matters concerning foreign relations.<sup>216</sup> Addressing the second prong of the *Landgraf* test, the Ninth Circuit erred in concluding that Austria could not have had a settled expectation of sovereign immunity before 1952. Austria's adoption of the theory of restrictive immunity in its own courts before 1952 would not have precluded it from asserting absolute immunity in other countries.<sup>217</sup> Whether a foreign state is entitled to immunity from suit in the United States has never depended on the law of the foreign state.<sup>218</sup> Throughout the 1960s, the U.S. continued to invoke absolute immunity in countries that followed that theory, even though it had applied restrictive immunity

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<sup>214</sup> *Altmann*, 317 F.3d at 964.

<sup>215</sup> *Id.*.

<sup>216</sup> Brief For The United States as Amicus Curiae Supporting Petitioners, *Altmann v. Austria*, 327 F.3d 1246 (9th Cir. 2003) (No.03-13) at <http://www.usdoj.gov/osg/briefs/2003/3mer/1ami/2003-0013.mer.ami.html> (March 12, 2004).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

principles since 1952.<sup>219</sup> Austria was therefore entitled to sovereign immunity from claims of expropriation in U.S. courts – at least until FSIA’s passage in 1976.<sup>220</sup> Clearly, until the issuance of the Tate letter, Austria was not even on notice about restrictions on sovereign immunity in the United States.<sup>221</sup> Thus, before 1952, when the Tate Letter announced the United States’ adoption of the doctrine of restrictive immunity, a foreign sovereign would have justifiably expected any suit filed in a U.S. court to be dismissed.

It is true that the Nuremberg trials signaled “that the international community and particularly the United States would not have supported a broad enough immunity to shroud the atrocities committed during the Holocaust.”<sup>222</sup> The United States never would have supported immunity for atrocities, but it is questionable whether U.S. courts would have granted jurisdiction. The Ninth Circuit reasoned that:

Because a United States court would apply the international law of takings, which presumably would be applied in any foreign court, the application of FSIA to the facts of this case “merely addresses which court shall have jurisdiction” and thus “can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties.”<sup>223</sup>

The Ninth Circuit’s reasoning is incorrect because it is based on the presumption that a United States court would hear the case. It is self-evident that before a court can apply any law, the case in question must be properly before it. No authority supports a contention that the United States courts exercised jurisdiction over foreign sovereigns before 1952.

The Ninth Circuit failed to consider that FSIA is not simply a jurisdictional statute. The application of this statute may change the rights and responsibilities of parties, making application of FSIA in *Altmann* impermissibly retroactive. In *Ver-*

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<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* “The expropriation exception very clearly did not exist in 1952 and, indeed, was a new development in the doctrine of sovereign immunity when FSIA was enacted 24 years later.” *Id.*

<sup>222</sup> *Altmann*, 317 F.3d at 967 (citing *Princz*, 26 F. 3d at 1196).

<sup>223</sup> *Altmann*, 317 F.3d at 967.

*linden B.V. v. Cent. Bank of Nigeria*, the United States Supreme Court addressed FSIA's application and held that it does not merely concern access to the federal courts.<sup>224</sup> Rather, the Court stressed that FSIA governs the types of actions for which foreign sovereigns may be held liable in a court in the United States.<sup>225</sup> Specifically, FSIA codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law, and applying those standards will require interpretation of numerous points of federal law.<sup>226</sup> In light of *Verlinden*, application of FSIA's expropriation exception to events that occurred prior to 1952, would impose new obligations upon foreign sovereigns such as Austria.

In *Hughes Aircraft Co. v. United States ex Rel. Schumer*, the Court explained that "the fact that courts often apply newly enacted jurisdiction-allocating statutes to pending cases merely evidences certain limited circumstances failing to meet the conditions for our generally applicable presumption against retroactivity, not an exception to the rule itself..."<sup>227</sup> This quote demonstrates that the Ninth Circuit's understanding of statutory retroactivity conflicts with that of the Court in *Hughes*.<sup>228</sup> Unless the Court changes its opinion, the Ninth Circuit will be deemed incorrect in holding that FSIA applies in *Altmann*.

Austria also had a legitimate expectation of immunity from suits in U.S. courts based on the political climate in Europe before and after World War II.<sup>229</sup> After 1945, the United States' defense of Austrian sovereignty triggered one of the first diplomatic battles of the Cold War.<sup>230</sup> From 1946 to 1955, the United States continuously pressed the Soviet Union to end its occupation of Austria and to recognize Austria's sovereignty.<sup>231</sup> Such protection may have raised a legitimate ex-

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<sup>224</sup> *Verlinden*, 461 U.S. 480.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Hughes Aircraft Co.*, 520 U.S. at 951.

<sup>228</sup> *Hughes Aircraft Co.*, 520 U.S. at 950. The Court specifically stated that "the Ninth Circuit held that, absent a clear statement of congressional intent, there is a strong presumption in favor of retroactivity for jurisdictional statutes. . . . The Ninth Circuit simply misread our decision in *Landgraf*, for the only "presumption" mentioned in that opinion is a general presumption against retroactivity." *Id.*

<sup>229</sup> Petition for Cert. at 16, *Altmann v. Austria*, 327 F.3d 1246 (9th Cir. 2003), at <http://www.cprotonet.net/Austria-Altman.pdf> (March 12, 2004).

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

pectation of immunity from the jurisdiction of U.S. courts. "Given the Cold War's history, it is inconceivable that the United States would have advocated in 1948 that Austria not enjoy sovereign immunity in United States courts – especially on the subject of reparations, which was at the heart of the Soviet Union's belligerence toward Austria at the time."<sup>232</sup> Subjecting Austria to U.S. civil suits at that time would have interfered with the United States' determined foreign policy of supporting the emerging post-war democracies and holding back Soviet expansion.<sup>233</sup>

In sum, based on facts, FSIA's legislative history, and well established legal principles, FSIA's retroactive application in *Altmann* is impermissible. Since the Ninth Circuit's view of FSIA's retroactive application in general is incorrect, the applicability of the expropriation exception is irrelevant. The moral grounds, however, to adjudicate the *Altmann* case remain unquestionable and deserve special attention.

## VI. CONCLUSION

In all likelihood, the Ninth Circuit was fully aware of the challenges to retroactive application of FSIA. Nevertheless, the court chose to assert jurisdiction. The Ninth Circuit's decision in *Altmann* is a morally correct decision based on improper legal grounds. This case arose from Holocaust atrocities, and it would be moral and just to hear it on the merits. If the Supreme Court denies jurisdiction over Austria in *Altmann*, its decision will become *res judicata*.<sup>234</sup> Hence, it will be impossible to reopen this case in any federal court under FSIA, Austria will retain the paintings that Nazi agents stole from the Altmann family, and Maria Altmann will never have her day in court.

In the interests of public policy, it is necessary to address Altmann's claim and resolve other Holocaust Era cases. The United States tried to halt Nazi atrocities during the Second

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<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *res judicata* (rayz judy-cot-ah) n. Latin for "the thing has been judged," meaning the issue before the court has already been decided by another court, between the same parties.

See: <http://dictionary.law.com/definition2.asp?selected=1825&bold=>



190 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 34

World War. After Hitler's regime was destroyed, it sought to rectify the enormous wrongs done by the Nazis and their accomplices. Resolving the remaining Holocaust Era cases will demonstrate to the world that the United States is still devoted to fighting genocide and will not tolerate injustice. Resolving this dilemma would require joint efforts the legislature, judiciary and public organizations.

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