The Foreign Sovereign Immunities Act’s Evolving Genocide Exception to Immunity

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Abstract

The Foreign Sovereign Immunities Act (FSIA) was passed by Congress as a comprehensive statute to cover all instances when foreign states are to be immune from suit in the courts of the United States, as well as when foreign state immunity is to be abrogated. Judicial interpretation of one of the FSIA’s exceptions to immunity has undergone significant evolution over the years with respect to foreign state property expropriations committed in violation of international law. U.S. courts initially construed this FSIA exception to immunity to accept jurisdiction only if the defendant state had expropriated property of a citizen of a nation other than itself. Later, such suits also were allowed where the plaintiff was deemed by the court to have been a formal citizen but had not been treated as such at the time of the expropriation. More recently, nationality has been discarded entirely as a criterion to abrogate immunity if a court considers the defendant state’s expropriation to have been part of a policy of genocide. Most recently, the courts have equated the act of expropriation with genocide. While courts initially interpreting the FSIA cases left plaintiffs without recourse in the aftermath of grave suffering at the hands of the defendant states they tried to sue, current interpretation poses other problems, such as a potential trivialization of the concept of genocide. Moreover, the underlying issue of the FSIA’s not permitting tort claims for harm occurring outside of the United States has not been solved. Even under the latest interpretations, what otherwise would be suits for personal injury and death must be fashioned into property expropriation claims in order to be justiciable.