EXHAUSTING COMITY-BASED ABSTENTION IN THE FSIA'S EXPROPRIATION EXCEPTION

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"And you shall speak to him saying, 'So said the Lord, "Have you murdered and also inherited?"'"[1]

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[1] 1 *Kings* 21:19.

INTRODUCTION

The Nazis' Final Solution to eradicate the Jewish people required both the murder of Jewish persons and the plunder of Jewish property.[2] Among the property the Nazis seized were hundreds and thousands of

[2] Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 2(1), 130 Stat. 1524, 1524 (2016); Holocaust Victims Redress Act, Pub. L. No. 105-158, §§ 201–02, 112 Stat. 15, 17–18 (1998). "Property transfers, a general category that includes a range of possible actions, such as confiscation and redistribution of assets by states and individuals, looting, extortion, and even grave digging, are a crucial component of mass violence, displacement, and refugee return processes . . . ." Volha Charnysh & Evgeny Finkel, *The Death Camp Eldorado: Political and Economic Effects of Mass Violence*, 111 AM. POL. SCI. REV. 801, 801 (2017).

works of art,[3] books,[4] land,[5] personal possessions,[6] and business property.[7]

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[3] Holocaust Expropriated Art Recovery Act of 2016 § 2(1) ("Congress finds . . . that the Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe as part of their genocidal campaign against the Jewish people and other persecuted groups."); Holocaust Victims Redress Act, §§ 201–02. For example, when Jews arrived at the Treblinka death camp, the Nazis confiscated jewelry, golden dental work, money, clothing, and tools; Jews had brought these items with them, believing they were sent to Treblinka to perform agricultural work. *See* Charnysh & Finkel, *supra* note 2, at 802. The Nazis looted an estimated 600,000 paintings from Jews during World War II, with at least 100,000 paintings still missing. *See* Stuart E. Eizenstat, *Art Stolen by the Nazis Is Still Missing. Here's How We Can Recover It.*, WASH. POST (Jan. 2, 2019, 6:06 PM), https://www.washingtonpost.com/opinions/no-one-should-trade-in-or-possess-art-stolen-by-the-nazis/2019/01/02/01990232-0ed3-11e9-831f-3aa2c2be4cbd_story.html [https://perma.cc/J89M-2FL3]; *see also* Carol Vogel, *Hungary Sued in Holocaust Art Claim*, N.Y. TIMES (July 27, 2010), https://www.nytimes.com/2010/07/28/arts/design/28lawsuit.html [https://perma.cc/96TB-728R].

[4] *See, e.g.*, Elisabeth M. Yavnai, *Jewish Cultural Property and Its Postwar Recovery*, *in* CONFISCATION OF JEWISH PROPERTY IN EUROPE, 1933–1945: NEW SOURCES AND PERSPECTIVES 127 (U.S. Holocaust Mem'l Museum, Ctr. For Advanced Holocaust Stud. ed., 2003) (relating the October 1941 confiscation of the expensive private library of Sigmund Seeligmann, a Dutch bibliographer and historian, that included more than 18,000 books on Jewish subjects and was considered one of the most important Jewish libraries in Europe before World War II).

[5] Another significant component of the Holocaust was the confiscation of real property. *See, e.g.*, Laurence Weinbaum, Book Review, 27 JEWISH POL. STUD. REV. 98, 99 (2015) (reviewing DAVID SILBERKLANG, GATES OF TEARS: THE HOLOCAUST IN THE LUBLIN DISTRICT (2013)) (noting that during the German occupation of the city of Lublin, the Nazis appropriated and occupied the building of a revered yeshiva, Chachmei Lublin, for use as its administrative nerve center in the city); Janine P. Holc, *Working Through Jan Gross's "Neighbors"*, 61 SLAVIC REV. 453, 458–459 (2002) (explaining how Jews who had escaped to the Soviet Union during the Holocaust returned to their homes in Poland to find their former neighbors had expropriated their homes and property).

[6] *See* Holc, *supra* note 5, at 459; *see also* Jeanne Dingell, *Property Seizures from Poles and Jews: The Activities of the Haupttreuhandstelle Ost*, *in* CONFISCATION OF JEWISH PROPERTY IN EUROPE, 1933–1945: NEW SOURCES AND PERSPECTIVES 33, 38 (U.S. Holocaust Mem'l Museum, Ctr. For Advanced Holocaust Stud. ed., 2003). "Oberfinanzdirektion records illustrate the expropriation of Polish Jews by the [Nazis] . . . ." *Id.* "In one set of documents, a German-shipping agent refused to relinquish a Polish Jew's personal possessions that were to have been forwarded to him in Poland. These possessions included future and household effects. No possessions were too small to be confiscated . . . ." *Id.* Confiscations included "[e]verything from juice bottles to crystal objects to used kitchen utensils . . . ." *Id.* at 38–39.

[7] *See, e.g.*, Eric Laureys, *The Plundering of Antwerp's Jewish Diamond Dealers, 1940–1944*, *in* CONFISCATION OF JEWISH PROPERTY IN EUROPE, 1933–1945: NEW SOURCES AND PERSPECTIVES 57, 57–70 (U.S. Holocaust Mem'l Museum, Ctr. For Advanced Holocaust Stud. ed., 2003) (describing the Nazis' confiscation of more than 41,500 carats of raw diamonds owned by Antwerpian Jewish diamond dealers).

By 1944, with the Final Solution already in motion,[8] the Nazis were aware that they were losing World War II,[9] so they raced to eradicate the Jewish people.[10] Among them were over 430,000 Hungarian Jews who were deported in 147 trains, mostly headed to the Auschwitz death camp.[11] In an effort to transport the Hungarian Jews, the Nazis stripped them of their possessions, including cash, jewelry, heirlooms, art, valuable collectibles, gold, and silver.[12] The Hungarian Jews were then loaded onto the trains of the Hungarian State Railroad in horrid conditions.[13] They were transported to concentration camps and death

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8 *See* HELEN FRY, THE WALLS HAVE EARS: THE GREATEST INTELLIGENCE OPERATION OF WORLD WAR II 75 (2019) ("At the Wannsee Conference [in 1942], Hitler and leading members of the Third Reich ratified the Final Solution to escalate the programme of annihilating Europe's Jews."); MICHAEL POLGAR, HOLOCAUST AND HUMAN RIGHTS EDUCATION: GOOD CHOICES AND SOCIOLOGICAL PERSPECTIVES 5–6 (2019) (describing how the Final Solution was "'finalized' at the Wannsee conference in Munich, Germany, which authorized chemical gassing centers . . . . Jews and others were transported to [death camps] by rail in cattle cars" where they were "reduced . . . to corpses and ashes . . . .").

9 *See* P.M.H. BELL, TWELVE TURNING POINTS OF THE SECOND WORLD WAR 232 (2011) (explaining that by mid-1942 to mid-1943, "the balance of power titled away from Germany and Japan and in favour of the Allies, and it gradually became clear which side was going to win."). *See generally* Laurence Rees, *What Was the Turning Point of World War II?: Top Historians' Surprising Answers*, 25 WORLD WAR II 29 (2010) (noting that historians disagree as to when the turning point in World War II was and posit dates ranging from 1941 to 1944).

10 *See* SIMONE GIGLIOTTI, THE TRAIN JOURNEY: TRANSIT, CAPTIVITY, AND WITNESSING IN THE HOLOCAUST 36–39 (2009); *see also* Krisztián Ungváry, *Master Plan? The Decision-Making Process Behing the Deportations*, *in* THE HOLOCAUST IN HUNGARY: SEVENTY YEARS LATER 143–45 (Randolph L. Braham & András Kovács eds., 2016) (explaining the new haste with which Adolf Eichmann and Heinrich Himmler raced to eradicate Hungarian Jewry by deporting thousands more Jews per day to Auschwitz than initially Hungarian authorities had agreed to).

11 *See* GIGLIOTTI, *supra* note 10, at 39 ("The largest remaining national group was 450,000 Hungarian Jews. The Nazis' swift occupation of that country saw their deportation between May and August 1944 in approximately 147 trains to Auschwitz."); *see also Ungváry*, *supra* note 10, at 142–43 (describing the results of "[t]he first railway conference [that] took place in Vienna on May 4–5, at which Eichmann's team and their Hungarian intermediary, Gendarme Captain Leó Lulay" decided "to run four trains, rather than one, to Auschwitz every day, with forty-five wagons in each train" and "[i]n the end, no fewer than 437,000 [Hungarian Jewish] people were deported between May 15 and July 9 [1944].").

12 *See* GIGLIOTTI, *supra* note 10, at 39 ("Jewish deportees were not the only 'freight' being transported, as the [railways] maintained a range of commitments to the Nazi regime. These included . . . the return carriage of looted property of the deported victims to enterprises and agencies in the Third Reich . . . ."); *see also* GEORGE REINITZ & RICHARD KING, WRESTLING WITH LIFE: FROM HUNGARY TO AUSCHWITZ TO MONTREAL 35–36 (2017) ("[A] Nazi functionary told us to put our watches and jewelry into a bucket that he would hand into the [train] car. We were warned that if they found any jewelry on our persons or in our belongings that we had not put into the bucket we would be shot on the spot, so it was better to hand over our possession then and there.").

13 *See* GIGLIOTTI, *supra* note 10, at 39; *see also* REINITZ & KING, *supra* note 12, at 35–36 (describing how the train conditions were "intolerable," "crammed," "crowded," "with barely

camps where they were either murdered or forced to work as slave laborers under inhumane conditions.[14] Some of these Jews even worked for the Hungarian State Railroad right up to the minute they were deported to concentration camps.[15]

The Nazis' expropriation of the Hungarian Jews' last remaining possessions has given rise to lawsuits brought in the Seventh[16] and D.C. Circuits[17] for reparations under the expropriation exception to the Foreign Sovereign Immunities Act (FSIA).[18] These lawsuits have been brought against the Hungarian government because the Hungarian government owned the Hungarian National State Railroad in 1944.[19]

In another lawsuit filed in the D.C. Circuit, plaintiffs are suing Germany under the FSIA's expropriation exception.[20] The plaintiffs are

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any room to move," "stinking," and "[e]ach car had one little window [that] was covered with barbed wire," making it "impossible to jump off the train to escape.").

14 *See* GIGLIOTTI, *supra* note 10, at 39; *see, e.g.*, REINITZ & KING, *supra* note 12, at 37–50 (providing a personal account of how Jewish people deported to Auschwitz were either murdered or forced to work as slave laborers under inhumane conditions). *See generally* Wolf Gruner, *Jewish Forced Labor as a Basic Element of Nazi Persecution: Germany, Austria, and the Occupied Polish Territories (1938–1943)*, *in* FORCED AND SLAVE LABOR IN NAZI-DOMINATED EUROPE: SYMPOSIUM PRESENTATIONS 35 (U.S. Holocaust Mem'l Museum, Ctr. For Advanced Holocaust Stud. ed., 2004).

15 Stewart Ain, *Holocaust Railroad Case to Proceed*, N.Y. JEWISH WEEK (Sept. 4, 2012, 12:00 AM), https://jewishweek.timesofisrael.com/holocaust-railroad-case-to-proceed [https://perma.cc/A8EQ-5SQU] ("The Jews of Hungary were relatively OK until 1944, and the MAV actually employed Jews right up to the minute it deported them [to concentration camps]." (quoting Professor Richard Weisberg)).

16 *See* Fischer v. Magyar Allamvasutak Zrt (*Fischer I*), 777 F.3d 847, 852 (7th Cir. 2015).

17 *See* Simon v. Republic of Hungary (*Simon I*), 812 F.3d 127, 132 (D.C. Cir. 2016).

18 *See infra* Section I.C. The FSIA grants foreign sovereign immunity from civil liability when foreign nations are sued in United States courts. 28 U.S.C. § 1604 (2018). The FSIA is subject to a variety of exceptions, one of them being the expropriation exception. 28 U.S.C. § 1605(a)(3) (2018). Under the expropriation exception, a foreign sovereign is not immune from claims that satisfy these three elements: (1) the claim must involve property rights; (2) the property must have been taken in violation of international law; and (3) one of two commercial-activity nexuses with the United States must be satisfied. *Id.*

19 The FSIA's definition of "foreign state" includes instrumentalities of the foreign state. 28 U.S.C. § 1603(a)–(b) (2018). Accordingly, the Hungarian government could be liable for the activities committed by its instrumentalities. *See, e.g.*, *Fischer I*, 777 F.3d at 852 (explaining that the Seventh Circuit had previously held the Hungarian national railway, an instrumentality of the Hungarian government, could be sued in a United States federal court). One prominent reason why it is important that the Hungarian government itself is being sued is that the Hungarian freight railway was privatized in 2007. *See* Margit Feher, *Rail Cargo Austria Group Wins Auction of MAV Unit*, WALL ST. J. (Nov. 28, 2007, 12:01 AM), https://www.wsj.com/articles/SB119621203817105998 [https://perma.cc/VTZ6-29EL].

20 *See* David D'Arcy, *Claim on Guelph Treasure Can Go to Trial in U.S. Federal Court*, ART NEWSPAPER (July 11, 2018, 4:35 PM), https://www.theartnewspaper.com/news/guelph-treasure-case-can-go-to-trial-in-us-federal-court [https://perma.cc/FX2P-JPFB].

descendants and heirs of a group of German-Jewish art dealers.[21] They allege the German government expropriated a collection of more than eighty pieces of medieval reliquary art, known as the Welfenschatz.[22] The Jewish art dealers initially purchased the Welfenschatz in 1929[23] and resold pieces to international buyers, but were still in possession of some of the Welfenschatz when the Holocaust began in 1933.[24] Viewing the Welfenschatz as an Aryan treasure, the Nazis were disgusted that it was held by Jews and schemed to coerce the dealers into surrendering the Welfenschatz at a fraction of its value.[25] By 1935, having suffered through two years of Nazi terror, the dealers, acting under duress, conveyed the remaining collection of the Welfenschatz to a bank acting on the Nazis' behalf, at a price substantially less than its true value.[26] These art relics are the subject of a lawsuit brought against Germany under the expropriation exception to the FSIA.[27]

Hungary and Germany raised what is known as either a "comity-based abstention" or "prudential exhaustion" defense, which would require plaintiffs to exhaust foreign domestic remedies available in Hungary or Germany prior to commencing suit in the United States.[28] The D.C. Circuit rejected this defense as outside the FSIA's comprehensive set of legal standards that govern immunity in every civil action against a foreign state.[29] The Hungarian and German governments petitioned the Supreme Court of the United States to

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21 *See id.*

22 *See id.*

23 *See id.*

24 *See* Stewart Ain, *Victory for Heirs of German Jewish Art Dealers Allegedly Fleeced by Nazis*, N.Y. JEWISH WEEK (July 18, 2018, 8:53 AM), https://jewishweek.timesofisrael.com/guelph-treasure-case-can-proceed-court [https://perma.cc/3RGU-BJJD].

25 *See* Henry Rome, *Were Jews Forced to Sell Medieval Treasure to Hermann Goering?*, JERUSALEM POST (Jan. 12, 2014, 9:52 PM), https://www.jpost.com/Jewish-World/Jewish-Features/Were-Jews-forced-to-sell-medieval-treasure-to-Hermann-Goering-337941 [https://perma.cc/692E-DPP4] (explaining how in November 1933, Friedrich Krebs wrote a letter to Adolf Hitler asking him to acquire the Welfenschtaz); *see also* Brief in Opposition to Petition for Writ of Certiorari at Supp. App. 31–33, Fed. Republic of Germany v. Philipp, No. 19-351 (U.S. Oct. 17, 2019) (providing excerpts of Krebs' letter to Hitler, where Krebs writes: "[a]ccording to expert judgment, the purchase is possible *at around 1/3 of its earlier value* . . . . I therefore request that you, as Führer of the German people, create the legal and financial preconditions for the return of the Welfenschatz").

26 Spencer S. Hsu, *Germany to Appeal First Ruling Allowing Nazi-Looted Art Claim Against It in U.S. Court*, WASH. POST (Apr. 19, 2017), https://www.washingtonpost.com/local/public-safety/germany-to-appeal-first-ruling-allowing-nazi-looted-art-claim-against-it-in-us-court/2017/04/14/478df4ae-2065-11e7-be2a-3a1fb24d4671_story.html [https://perma.cc/N2HF-458W].

27 *See* Philipp v. Fed. Republic of Germany, 248 F. Supp. 3d 59 (D.D.C. 2017).

28 *See infra* Section I.E.

29 *See infra* Section I.E.

reverse the D.C. Circuit's decisions.[30] In July 2020, the Supreme Court granted Hungary and Germany's petitions for certiorari,[31] and in December 2020, the Supreme Court heard oral arguments.[32]

These two cases present a direct contrast to the Seventh Circuit's decisions in *Abelesz v. Magyar Nemzeti Bank*[33] and *Fischer v. Magar Allamvasutak Zrt*,[34] where the Seventh Circuit required the plaintiffs, who were victims of the Holocaust, to exhaust remedies available in Hungary prior to litigating in United States courts.[35] The implications of the Seventh Circuit's exhaustion of remedies requirement are not limited to cases involving Holocaust victims. As a result, victims of the

30 Petition for Writ of Certiorari, Republic of Hungary v. Simon, No. 18-1447 (U.S. May 16, 2019) [hereinafter Hungary's Petition]; Petition for Writ of Certiorari, Fed. Republic of Germany v. Philipp, No. 19-351 (U.S. Sept. 16, 2019) [hereinafter Germany's Petition].

31 Republic of Hungary v. Simon, No. 18-1447, 2020 WL 3578676, at *1 (U.S. July 2, 2020); Fed. Republic of Germany v. Philipp, No. 19-351, 2020 WL 3578677, at *1 (U.S. July 2, 2020).

32 Transcript of Oral Argument, Republic of Hungary v. Simon, No. 18-1447 (U.S. Dec. 7, 2020) [hereinafter *Simon*'s Oral Argument]; Transcript of Oral Argument, Fed. Republic of Germany v. Philipp, No. 19-351 (U.S. Dec. 7, 2020) [hereinafter *Philipp*'s Oral Argument].

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

34 *Fischer I*, 777 F.3d 847 (7th Cir. 2015).

35 *See Abelesz*, 692 F.3d at 678–85; *Fischer I*, 777 F.3d at 856–66.

Armenian,[36] Ugandan,[37] and Ovaherero and Nama[38] genocides may also be left without any recourse—or recourse involving a substantial

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36 *See, e.g.*, Davoyan v. Republic of Turkey, 116 F. Supp. 3d 1084, 1094, 1102 (C.D. Cal. 2013) (arguing that the expropriation exception applied to a case where "the Ottoman Empire and later the Republic of Turkey stripped ethnic Armenians of their property"); *see also* Vivian Grosswald Curran, *The Foreign Sovereign Immunities Act's Evolving Genocide Exception*, 23 UCLA J. INT'L L. & FOREIGN AFFS. 46, 50 (2019) ("[P]laintiffs who had been victims of the . . . Armenian genocide tend to frame claims for property expropriation where the property at issue might be of trivial value, but coexisted with physical and moral atrocities the victim had undergone, but for which the FSIA provides no recourse."); Ümit Kurt, *Legal and Official Plunder of Armenian and Jewish Properties in Comparative Perspective: The Armenian Genocide and the Holocaust*, 17 J. GENOCIDE RES. 305, 308 (2015) ("[T]he acquired wealth from the Armenians, including their money, [jewelry], livestock, clothing and numerous other valuables, was either kept by perpetrators or sold for profit."). Interestingly, the J. Paul Getty Museum in Los Angeles was sued over the ownership rights of eight illustrated pages of a thirteenth-century manuscript, known as the Canon Tables, from Zeyt'un Gospels, by T'oros Roslin, which came into the Getty's possession as a result of the Armenian Genocide. *See* Press Release, J. Paul Getty Museum and the Western Prelacy of the Armenian Apostolic Church of America Announce Agreement in Armenian Art Restitution Case (Sept. 21, 2015), http://westernprelacy.org/en/j-paul-getty-museum-and-the-western-prelacy-of-the-armenian-apostolic-church-of-america-announce-agreement-in-armenian-art-restitution-case [https://perma.cc/UNH4-645N]; *Canon Tables from the Zeyt'un Gospels*, J. PAUL GETTY MUSEUM (Sept. 21, 2015), http://www.getty.edu/art/collection/objects/5253/t'oros-roslin-t'oros-roslin-canon-tables-from-the-zeyt'un-gospels-armenian-1256 [https://perma.cc/N5ZY-89QG]. Although the Getty settled the lawsuit, and this case probably would not have involved the FSIA's expropriation exception, it demonstrates the types of property expropriated during the Armenian genocide that might become the subject of such litigation.

37 *See, e.g.*, MYRA GIBEROVITCH, RECOVERING FROM GENOCIDAL TRAUMA: AN INFORMATION AND PRACTICE GUIDE FOR WORKING WITH HOLOCAUST SURVIVORS 299 (2014) (explaining that when Idi Amin seized power in Uganda in the early 1970s, he "ordered the expulsion of Uganda's seventy thousand Asian citizens and [expropriated] their property holdings and personal goods").

38 In *Rukoro v. Fed. Republic of Germany*, 363 F. Supp. 3d 436, 441–43 (S.D.N.Y. 2019), *aff'd*, 976 F.3d 218 (2d Cir. 2020), members and direct descendants of the Ovaherero and Nama Indigenous peoples sued the German government, seeking relief for the genocidal crimes committed against them. The plaintiffs alleged that the Germans had expropriated their "land, livestock, and other personal property." *Id.*; *see also* Declaration of Matthias Goldmann at 7–8, Rukoro v. Fed. Republic of Germany, 363 F. Supp. 436 (S.D.N.Y. 2019) (No. 17-0062) ("The German colonial administration issued two public confiscation orders concerning the property of the Ovaherero and Nama, respectively. These confiscations covered the entire movable and immovable property of these peoples. . . . [N]o just compensation was offered for these acts, which amounted to expropriations."). In this case, the plaintiffs did raise claims under the FSIA's expropriation exception. *See Rukoro*, 363 F. Supp. 3d at 444 ("Plaintiffs argue that their claims fall within . . . the takings exception, 28 U.S.C. § 1605(a)(3)."). In September 2020, the Second Circuit affirmed the district court's dismissal of the plaintiffs' claims. Rukoro v. Fed. Republic of Germany, 976 F.3d 218 (2d Cir. 2020). The Second Circuit held that the expropriation exception did not apply to the plaintiffs' claims because their "conclusory allegations" were insufficient to validly argue "that property converted into currency and comingled with other monies in Germany's general treasury account can be traced to the purchase of property in New York decades later." *Id.* at 225.

burden that may be nearly impossible to overcome[39]—to secure justice in U.S. courts.[40]

Although the Supreme Court vacated and remanded both cases (*Federal Republic of Germany v. Philipp* and *Republic of Hungary v. Simon*) in February 2021,[41] at least one of these two cases (most likely *Simon*) will inevitably make its way back to the Supreme Court, and the Court will have to decide whether "comity-based abstention" and "prudential exhaustion" fall outside the FSIA.[42]

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39 *See* Brief of Victims of the Hungarian Holocaust as Amici Curiae at 9–13, Republic of Hungary v. Simon, No. 18-1447 (U.S. Oct. 29, 2020) [hereinafter Hungarian Holocaust Victims' Brief] for a narrative of Ms. Irene Gittel Kellner's "experimental" attempt to exhaust remedies in Hungary. See *id.* at 16–17 for a brief discussion on the pitfalls of prudential exhaustion in "claims [brought] by Vichy France victims against the French National Railroad SNCF." *See* Brief of the Florida Holocaust Museum, Rabbi Joshua Kalev, Rabbi Toive Weitman, the Sao Paulo Memorial of Jewish Immigration and the Holocaust, & the Institute for the Development and Preservation of Culture and Self-Sufficiency as Amici Curiae at 24–26, Fed. Republic of Germany v. Philipp, No. 19-351 (U.S. Oct. 27, 2020) for the Philipp plaintiffs' adventures in seeking restitution of the Welfenschatz.

40 Additional victims of genocide that may be left without recourse include, inter alia, victims of the Cambodian genocide and of the conflicts in the eastern regions of Congo, the southern region of Sudan, Myanmar, Rwanda, Bosnia and Herzegovina, and most recently, the Yezidis in Iraq, and the Uyghurs in China. *See* Brief of Davis R. Robinson, Abraham D. Sofaer, David P. Stewart, & Edwin Williamson as Amici Curiae at 7, Fed. Republic of Germany v. Philipp, No. 19-351 (U.S. Sept. 10, 2020); *see also Country Case Studies*, U.S. HOLOCAUST MEM'L MUSEUM, https://www.ushmm.org/genocide-prevention/countries [https://perma.cc/8JSN-EPQT] (providing case studies on a non-exhaustive list of genocides and mass atrocities). To the extent that these victims of genocides and other atrocities have had tangible property taken from them, they may be able to sustain a claim under the expropriation exception against those who seized their property.

41 *See generally* Fed. Republic of Germany v. Philipp, 131 S. Ct. 703 (2021); Republic of Hungary v. Simon, 141 S. Ct. 691 (2021).

42 In its *Philipp* decision, the Supreme Court declined to address whether plaintiffs bringing claims under the FSIA's expropriation exception are required to exhaust foreign domestic remedies. *Philipp*, 131 S. Ct. at 715 ("We do not address Germany's argument that the District Court was obligated to abstain from deciding the case on international comity grounds."). The Court only addressed whether § 1605(a)(3)'s phrase "rights in property taken in violation of international law" incorporates domestic takings, and the Court held that it does not. *Id.* ("We hold 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 of expropriation and thereby incorporates the domestic takings rule."). As such, on remand, the district court will have to decide whether the citizens in *Simon* and *Philipp* were respectively Hungarian and German citizens at the time when their property was taken from them. At least with respect to *Simon*, some of the named plaintiffs were not Hungarian citizens before, during, and after the Holocaust, and the attorneys representing the plaintiffs "maintain that those plaintiffs who were Hungarian citizens before the war had been stripped of their citizenship by the time of the [Holocaust], and therefore also should be characterized as non-citizens of Hungary for purposes of FSIA jurisdiction." *See* E-mail from Charles S. Fax, Of Counsel, Rifkin Weiner Livingston LLC, to author (Feb. 15, 2021, 1:59 PM) (on file with author). Accordingly, if the *Simon* plaintiffs can successfully assert that at least some of their plaintiffs were not Hungarian citizens, the case

This Note argues that when the Supreme Court is presented with this issue, the Court should follow the D.C. Circuit's approach and not impose an exhaustion of remedies requirement upon plaintiffs seeking to litigate their claims under the expropriation exception of the FSIA, and that a comity-based abstention defense is inconsistent with congressional intent when enacting the FSIA.[43]

Part I of this Note begins by tracking the development of the FSIA.[44] Part I will: (1) describe the procedures courts used to determine foreign sovereign immunity decisions, which eventually gave rise to the FSIA's enactment;[45] (2) outline the expropriation exception to the FSIA and its development as it relates to cases involving victims of genocide;[46] (3) define the underlying principles of comity-based abstention and exhaustion and the role of international comity in these theories of exhaustion;[47] and (4) describe and track the relevant decisions in the Seventh and D.C. Circuits.[48] Part II of this Note will analyze: (1) whether prudential comity-based exhaustion or abstention fit into the expropriation exception;[49] (2) the difference between comity-based abstention in the FSIA context and other comity-based abstention doctrines;[50] (3) whether such a requirement amounts to a grant of foreign sovereign immunity;[51] (4) how prudential exhaustion and comity-based abstention doctrines, in the FSIA context, founded on *Interhandel* and the Third Restatement of Foreign Relations Law of the United States are based on misunderstandings of *Interhandel* and the Third Restatement;[52] and (5) the likelihood that res judicata bars plaintiffs who exhaust foreign domestic remedies from relitigating their claims in United States courts.[53] Part III discusses the Supreme Court's recent orders in *Philipp* and *Simon*.[54]

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should be able to proceed, and the parties could expect to re-argue at the Supreme Court whether the plaintiffs are required to exhaust foreign domestic remedies.

43 *See infra* Part II.

44 *See infra* Part I.

45 *See infra* Section I.A.

46 *See infra* Sections I.B–C.

47 *See infra* Section I.D.

48 The Seventh Circuit created a prudential exhaustion requirement for claims brought under the FSIA's expropriation exception, while the D.C. Circuit rejected this requirement. *See infra* Section I.E.

49 *See infra* Subsection II.A.1.

50 *See infra* Subsection II.A.2.

51 *See infra* Subsection II.A.3.

52 *See infra* Section II.B.

53 *See infra* Section II.C.

54 *See infra* Part III.

I. BACKGROUND

A. *Development of the Foreign Sovereign Immunities Act*

In 1976, Congress passed the Foreign Sovereign Immunities Act (FSIA) and enacted a comprehensive set of guiding principles to help courts evaluate foreign states' claims of immunity from the jurisdiction of United States courts.[55] The United States Constitution does not create or impose any restrictions on foreign sovereign immunity.[56] Rather, the origins of foreign sovereign immunity stem from the principles of grace and comity.[57]

Prior to 1952, the executive branch was charged with determining whether foreign sovereigns should be granted immunity in the United States courts.[58] Accordingly, the executive branch's practice was typically to request immunity in all claims brought against friendly nations.[59] However, in 1952, in what is known as the "Tate Letter," the State Department changed course and embraced a "restrictive" theory of sovereign immunity.[60] Pursuant to this theory, foreign sovereigns were shielded in their public, noncommercial acts, but not their commercial activities.[61] From the federal courts' viewpoint, the change in policy had little impact on their approach to sovereign immunity.[62] The executive branch, acting through the State Department, still maintained the initial responsibility of deciding issues of foreign

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55 Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–11 (2018) ("The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts.").

56 Republic of Argentina v. NML Capital, Ltd, 573 U.S. 134, 140 (2014).

57 *Id.* ("Foreign sovereign immunity is, and always has been, 'a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution.'" (quoting Verlinden B. V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983))).

58 *Id.* ("[T]his Court's practice has been to 'defe[r] to the decisions of the political branches' about whether and when to exercise judicial power over foreign states. For the better part of the last two centuries, the political branch making the determination was the Executive . . . ." (alteration in original)).

59 *Id.*

60 26 Dept. State Bull. 984–85 (1952); *see also* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711–15 (1976) (reprinting the so-called Tate Letter, drafted by Jack B. Tate, Acting Legal Adviser, U.S. Dept. of State to Acting U.S. Attorney General Phillip B. Perlman, and stating that "it will hereafter be the Department [of State]'s policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.").

61 *Alfred Dunhill of London, Inc.*, 425 U.S. at 711–12.

62 Republic of Austria v. Altmann, 541 U.S. 677, 690 (2004).

sovereign immunity, and the courts continued to abide by the State Department's suggestions.[63]

Notwithstanding the fact that federal courts experienced little impact, in immunity determinations in general, the change in policy created overall chaos and disarray because foreign nations applied diplomatic pressure upon the State Department.[64] Often, political considerations influenced the State Department to recommend immunity in cases where immunity was not otherwise available under the restrictive theory.[65] Complicating matters further, foreign nations did not always request an immunity recommendation from the State Department.[66] In such cases, the courts were left with the responsibility to ascertain whether sovereign immunity existed, and they generally relied on previous State Department decisions.[67] In this way, the Tate Letter created a system where two distinct branches of government were both involved in sovereign immunity determinations, and their respective decisions were subject to a variety of factors influenced by diplomatic considerations[68] and common law.[69] Consequently, the standards governing foreign sovereign immunity after 1952 were neither clear nor uniformly applied.[70]

To remedy these issues, Congress enacted the FSIA in 1976.[71] Subsequently, the Supreme Court in *Republic of Austria v. Altmann* described the FSIA as a "comprehensive statute" that sets forth the legal standards controlling claims of immunity by a foreign state and its political subdivisions, agencies, and instrumentalities in every civil

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63 *Id.*

64 *Id.*

65 *Id.* ("'[F]oreign nations [began] plac[ing] diplomatic pressure on the State Department,' and political considerations sometimes led the Department to file 'suggestions of immunity in cases where immunity would not have been available under the restrictive theory.'" (quoting Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487–88 (1983))).

66 Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487.

67 *Id.* ("In such cases, the responsibility fell to the courts to determine whether sovereign immunity existed, generally by reference to prior State Department decisions.").

68 *Id.* at 488 ("Thus, sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations.").

69 Republic of Argentina v. NML Cap., Ltd., 573 U.S. 134, 141 (2014) (describing the pre-FSIA foreign sovereign immunity regime as "executive-driven, factor-intensive, [and] loosely common-law based").

70 Republic of Austria v. Altmann, 541 U.S. 677, 691 (2004) ("Not surprisingly, the governing standards were neither clear nor uniformly applied." (quoting *Verlinden*, 461 U.S. at 488)).

71 Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976); *see also Altmann*, 541 U.S. at 691.

action.[72] In *Republic of Argentina v. NML Capital*, the Supreme Court again emphasized that "[t]he key word . . . is *comprehensive*"[73]—meaning the FSIA established a rigorous framework for courts to resolve *any* claim of sovereign immunity. Accordingly, the FSIA *itself* indisputably governs determinations over whether a foreign sovereign is entitled to immunity.[74] The FSIA instructs courts to resolve foreign states' claims to immunity in accord with the tenets outlined in the statute.[75] The *NML Capital* Court explicitly stated, "[A]ny sort of immunity defense made by a foreign sovereign in [a U.S.] court must stand on the Act's text. Or it must fall."[76]

B. *The Expropriation Exception to the Foreign Sovereign Immunities Act*

The FSIA's grant of immunity from civil liability to foreign sovereigns who are sued in the United States is subject to several exceptions delineated in § 1605.[77] Pursuant to § 1605(a)(3), foreign states do not have immunity in cases where the state has expropriated property in violation of international law.[78] To overcome foreign sovereign immunity via the FSIA's expropriation exception, a plaintiff must satisfy three elements.[79] First, the claim must be one in which property rights are in issue.[80] Second, the property in question must have been taken in violation of international law.[81] Third, one of two commercial-activity nexuses with the United States must exist.[82]

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72 *Altmann*, 541 U.S. at 691 ("FSIA, a comprehensive statute containing a 'set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.'" (quoting *Verlinden*, 461 U.S. at 488)).

73 *NML Cap.*, 573 U.S. at 141 (emphasis in original).

74 *Id.* ("This means that '[a]fter the enactment of the FSIA, the Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity.'" (alteration in original) (quoting Samantar v. Yousuf, 560 U.S. 305, 313 (2010)).

75 28 U.S.C. § 1602 ("Claims of foreign states to immunity should henceforth be decided by courts of the United States . . . in conformity with the principles set forth in [the FSIA].").

76 *NML Capital*, 573 U.S. at 141–42.

77 28 U.S.C. § 1604 ("[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.").

78 28 U.S.C. § 1605(a)(3).

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.* It bears noting that the expropriation exception is remarkable in the sense that no provision comparable to it has yet been adopted in the domestic immunity statutes of other

C. *Development of the Expropriation Exception to the Foreign Sovereign Immunities Act as It Relates to Cases Involving Victims of Genocide*

The expropriation exception to the FSIA has been a focal point in genocide-related suits and has been subject to judicial interpretations that have taken it a considerable distance from the FSIA's text.[83] Genocide victims tend to frame their claims as ones for property expropriation, even where property at issue might be of trivial value, but where the expropriation coexisted with physical and moral atrocities the victims suffered.[84] They resort to the expropriation exception because the FSIA's exception for non-commercial torts does not assist victims of foreign state abuse.[85] That exception requires that those torts be committed in United States territory.[86] Although bills have been proposed to Congress to amend the FSIA and provide courts with jurisdiction to hear tort suits in cases where the gravest of human rights violations have occurred regardless of location, Congress never enacted these bills.[87] Nevertheless, Congress has repeatedly reaffirmed its intent to provide an avenue for genocide victims to seek justice in the United States for atrocities designed to make it easier for Holocaust

countries. *See* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 455, reporters' note 15 (AM. L. INST. 2018).

83 Professor Vivian Curran explains that the expropriation exception "has been the object of genocide-related suits" and "[o]ver time, it has been subject to a series of judicial interpretations [that] have taken it a good distance from the FSIA's text." Curran, *supra* note 36, at 49–50. Professor Curran is a Distinguished Professor of Law at the University of Pittsburgh and serves as Vice-President of the International Academy of Comparative Law and as Honorary President of the American Society of Comparative Law. *Faculty Directory / Vivian Curran*, UNIV. PITTSBURGH SCH. L., https://www.law.pitt.edu/people/vivian-curran [https://perma.cc/TZ55-Q2TP]. Professor Curran is also a member of the American Law Institute and served on the Members Consultative Group for the Restatement (Fourth) on Foreign Relations. *Id.*

84 Curran, *supra* note 36, at 50; *see also* Simon v. Republic of Hungary, 443 F. Supp. 3d 88, 96 n.3 (D.D.C. 2020).

85 Curran, *supra* note 36, at 50.

86 *Id.*

87 *Id.* For example, Florida Congressman Lawrence J. Smith introduced an amendment to the FSIA in the 102nd Congress to add an exception to the FSIA that would allow United States courts to consider lawsuits against foreign sovereigns for human rights violations. *See* H.R. 2357, 102d Cong. (1992). Congressman Smith's amendment would have permitted victims of human rights violations to sue foreign sovereigns if the accused official "act[ed] within the scope of [their] office or employment." *Id.* § 1. Although the House Judiciary Committee favored the bill, it was not enacted after substantial objection was raised on the House floor that it would "not [be] consistent with the general terms of international law nor with the basic tenets of legal jurisdiction." H.R. REP. NO. 102-900, at 11 (1992). For a more definitive discussion of this proposed amendment, see David J. Bederman, *Dead Man's Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 GA. J. INT'L & COMPAR. L. 255, 282–84 (1996).

victims and their heirs to bring claims for restitution in the United States.[88]

Initially, courts found the expropriation exception to be inapplicable to cases involving a foreign state that had expropriated property from its own citizens under a domestic takings exception to the expropriation exception.[89] Under the domestic takings exception, a foreign state's expropriation of property from its own citizens was considered outside the purview of international law and did not involve violations of international law within the meaning of § 1605(a)(3).[90] As a result, many victims of horrors committed by foreign states were left with no recourse against those foreign actors under the FSIA.[91] Eventually, the courts created a carve-out to this domestic takings exception for cases "in which the defendant state had expropriated property of people only nominally its citizens, such as those whom it had not considered or treated as full citizens at the time of the expropriations."[92]

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88 *See, e.g.*, Justice for Uncompensated Survivors Today (JUST) Act, Pub. L. No. 115-171, 132 Stat. 1288 (2018); Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (2016); Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15 (1998); *see also* Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, Pub. L. No. 114-319, § 2(a)(1)–(2), 130 Stat. 1618, 1618–19 (2016) (providing foreign sovereign immunity under 28 U.S.C. § 1605 for claims involving artwork that is temporarily imported into the United States for temporary exhibit, but delineating an express exception for claims involving artwork confiscated by the Nazis); Brief for Members of the United States House of Representatives as Amici Curiae at 1–2, 9–14, Fed. Republic of Germany v. Philipp, No. 19-351 (U.S. Oct. 29, 2020) [hereinafter House's Amicus Brief] (emphasizing that permitting Holocaust victims and their descendants to pursue actions in the United States to recover property seized during a genocide is consistent with "Congress's clear legislative intent"). For a well-supported argument demonstrating the interests of the United States in post-genocidal justice, see Brief of American Association of Jewish Lawyers and Jurists (AAJLJ) and Other Advocates for Holocaust Restitution as Amici Curiae at 21–30, Fed. Republic of Germany v. Philipp, No. 19-351 (U.S. Oct. 29, 2020).

89 *See, e.g.*, Jafari v. Islamic Republic of Iran, 539 F. Supp. 209, 215 (N.D. Ill. 1982) ("[A] sharp conflict of views exists in the world as to such expropriation, mainly between capital-exporting and capital-importing nations, and between socialist and capitalist nations. We cannot elevate our American-centered view of governmental taking of property without compensation into a rule that binds all 'civilized nations.'" (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428–30 (1964))); Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1105 (9th Cir. 1990) (holding that actions taken by a state against its own citizens in respect to property rights "does not implicate settled principles of international law"); *see also* Curran, *supra* note 36, at 52–57, 60–63.

90 *See Chuidian*, 912 F.2d at 1105.

91 Curran, *supra* note 36, at 50–51.

92 *Id.* at 51; *see also, e.g.*, de Csepel v. Republic of Hungary (*de Csepel I*), 808 F. Supp. 2d 113, 130 (D.D.C. 2011) ("[Although] Ms. Nierenberg still considered herself to be a Hungarian citizen in 1944, it is clear that . . . Hungary thought otherwise and had *de facto* stripped her . . . of [her] citizenship rights. Consequently, the alleged Hungarian 'citizenship' of plaintiffs' predecessors does not preclude the application of the expropriation exception in this case." (citing Cassirer v.

Additionally, the Seventh Circuit created an exception to sovereign immunity that does not take victim's nationality into account and found jurisdiction under the FSIA where the alleged expropriation related to a policy of genocide, without any further inquiry.[93] The D.C. Circuit later extended this reasoning to equate the act of property expropriation with genocide, meaning that the very act of seizure and disposition of property constitutes genocide under the FSIA.[94]

However, in February 2021, when considering *Philipp v. Federal Republic of Germany*, the Supreme Court overturned the circuits' equation of expropriation with genocide, without taking the victim's nationality into account.[95] The Court held that § 1605(a)(3)'s phrase "rights in property taken in violation of international law" pertains to "violations of the international law of expropriation."[96] Accordingly, § 1605(a)(3) incorporates the domestic takes rule, which assumes that a country's conduct with regard to its own citizen's property "within its own borders, is not the subject of international law."[97] Going forward, in order to bring a claim under the expropriation exception, plaintiffs will likely have to prove that they were not citizens of the country that expropriated their property.[98] One of the more recent Seventh Circuit "interpretations" of the FSIA has been a requirement to exhaust foreign domestic remedies.[99] That means, in expropriation cases, plaintiffs are

Kingdom of Spain, 461 F. Supp. 2d 1157, 1165–66 (C.D. Cal. 2006))); Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1023 n.2 (9th Cir. 2010).

93 Curran, *supra* note 36, at 51. Curran explains that *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012) and *Fischer I*, 777 F.3d 847 (7th Cir. 2015), "stand for the proposition that the domestic takings exception is unnecessary and inapplicable where the expropriation is part of a defendant state's policy of genocide." *Id.* at 65.

94 *Simon I*, 812 F.3d 127, 142 (D.C. Cir. 2016) ("It is undisputed that genocide itself is a violation of international law. The question then becomes whether the takings of property [at issue] bear a sufficient connection to genocide that they amount to takings 'in violation of international law' [under the FSIA]. We hold that they do. In our view, the alleged takings did more than effectuate genocide or serve as a means of carrying out genocide. Rather, we see the expropriations *as themselves genocide*." (emphasis in original) (internal citations omitted)).

95 Fed. Republic of Germany v. Philipp, 141 S. Ct. 703, 715 (2021) ("We hold 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 of expropriation and thereby incorporates the domestic takings rule.").

96 *Id.*

97 *Id.* at 709, 715.

98 This Note is not intended to provide a thorough analysis of the "domestic takings" rule. For a discussion on citizenship and how it relates to domestic takings within the ambit of the FSIA's expropriation exception, see generally Curran, *supra* note 36, at 52–63.

99 *See Abelesz*, 692 F.3d at 679; *Fischer I*, 777 F.3d at 854–55. This "interpretation" is not an interpretation of the FSIA itself but rather of the interplay of the Third Restatement of the Foreign Relations Law of the United States and *Switz. v. United States* (*Interhandel*), 1959 I.C.J. Rep. 6 (March 21) with the FSIA. *See infra* Section I.E.

required to exhaust foreign domestic remedies prior to instituting suit in a United States court.[100] As a result, genocide victims seeking relief for property taken from them are being sent to foreign courts, where their chances of success are very slim, and their only hope of being reheard in the United States will depend on their ability to persuade a court to grant a new trial notwithstanding a foreign judgment.[101]

D. *The Role of International Comity in Theories of Exhaustion*

This Section will: (1) set forth the underlying principles to prudential doctrines of exhaustion and how they relate to comity-based exhaustion and comity-based abstention;[102] (2) illustrate the Supreme Court's definition of "international comity" and the lower courts' difficulties in applying this concept;[103] and (3) explain that the Supreme Court has never authorized comity-based abstention in favor of foreign courts, and that circuits recognizing international comity-based abstention have done so as an extension of *Colorado River Water Conservation District v. United States* (*Colorado River*), a case limited to pending and parallel proceedings.[104]

1. Comity-Based Theories of Exhaustion vs. Prudential Theories of Exhaustion

A prudential theory of exhaustion is an overarching principle upon which a court might dismiss a case in favor of resolution in a different forum.[105] Prudential theories of exhaustion fall outside the standard procedural devices courts employ in service of Federal Rule of Civil Procedure 1's mandate that disputes be resolved in a just, speedy, and

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100 *Abelesz*, 692 F.3d at 679–80.

101 Curran, *supra* note 36, at 51–52 ("[P]laintiffs are being sent to foreign courts where their chances of succeeding are exceedingly slim, and their sole hope of being reheard in the United States is meeting the extremely high bar of persuading a US court to proceed with a new trial in the face of a foreign judgment.").

102 *See infra* Subsection I.D.1.

103 *See infra* Subsection I.D.2.

104 *See infra* Subsection I.D.3.

105 *See, e.g.*, Younger v. Harris, 401 U.S. 37, 45 (1971) (requiring federal courts to abstain from enjoining pending state criminal proceedings unless there is a showing of a great and immediate threat of irreparable injury due to an unconstitutional statute); R.R. Comm'n. of Tex. v. Pullman Co., 312 U.S. 496, 500–01 (1941) (requiring that federal courts act with great restraint when asked to employ the extraordinary remedy of granting an injunction to enjoin a ruling under state law).

inexpensive manner.[106] The power to dismiss a case in favor of resolution in a different forum derives from common law.[107] The Supreme Court has long recognized that district courts possess inherent powers that are not governed by rules or statutes, but by the control vested in the courts to manage their own affairs so as to achieve orderly and expeditious disposition of cases.[108]

Among the forums a U.S. district court may consider dismissing a case in favor of is a foreign government actor, such as a foreign court or agency.[109] The U.S. court might direct a plaintiff to exhaust its remedies in a foreign forum prior to litigating in a U.S. court.[110] Courts have referred to this alternatively as "comity-based exhaustion"[111] or "comity-based abstention,"[112] i.e., the principles of comity require the courts to abstain from resolving the dispute, in favor of resolution in a foreign forum.[113] The underlying concept balances the principle of international comity, or the recognition of a foreign nation's legislative, executive, or judicial acts, with a nation's international duty, convenience, and the rights of its own citizens and other people under

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106 *See* Simon v. Republic of Hungary (*Simon II*), 277 F. Supp. 3d 42, 52 (D.D.C. 2017) ("Both *forum non conveniens* and exhaustion are prudential doctrines that fall outside the 'standard procedural devices trial courts around the country use every day in service of [Federal Rule of Civil Procedure] Rule 1's paramount command: the just, speedy, and inexpensive resolution of disputes.'" (quoting Dietz v. Bouldin, 136 S. Ct. 1885, 1891 (2016))); *accord* FED. R. CIV. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts . . . . They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.").

107 Dietz v. Bouldin, 136 S. Ct. 1885, 1891 ("The Federal Rules of Civil Procedure set out many of the specific powers of a federal district court. But they are not all encompassing. They make no provision, for example, for the power of a judge to hear a motion *in limine*, a motion to dismiss for *forum non conveniens*, or many other standard procedural devices trial courts around the country use every day in service of Rule 1's paramount command: the just, speedy, and inexpensive resolution of disputes."); *see also Simon II*, 277 F. Supp. 3d at 52–53.

108 *Dietz*, 136 S. Ct. at 1891 ("[T]his Court has long recognized that a district court possesses inherent powers that are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962))).

109 *See, e.g.*, *Fischer I*, 777 F.3d 847, 856–66, 872 (7th Cir. 2015) (dismissing plaintiffs' claims under the FSIA's expropriation exception in favor of resolution in Hungary).

110 *See, e.g.*, *id.* (directing plaintiffs to exhaust remedies available in Hungary prior to seeking resolution in a United States court).

111 *See, e.g.*, *id.* at 854 ("This exhaustion principle, based on comity, is a well-established rule of customary international law.").

112 *See, e.g.*, Philipp v. Fed. Republic of Germany (*Philipp II*), 925 F.3d 1349, 1351 (D.C. Cir. 2019) (Katsas, J., dissenting).

113 *See id.* at 1350–57 (arguing that the principles of comity require that the court abstain from resolving the dispute in favor of an adequate forum in the offending country).

the protection of its laws.[114] In functional terms, comity-based exhaustion and comity-based abstention provides deference to foreign government actors, which is not required by law, but incorporated into domestic law.[115]

2. International Comity

The Supreme Court has frequently described foreign sovereign immunity as a "gesture of comity."[116] In its 1895 *Hilton v. Guyot* opinion, the Court insisted that comity is "neither a matter of absolute obligation . . . nor of mere courtesy and good will."[117] Rather, the *Hilton* Court defined comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."[118] Several leading scholars have called this definition incomplete and ambiguous.[119] Further, courts and legal scholars have repeatedly confessed they still do not completely understand the concept of comity.[120] Courts complain that comity "has never been well-defined,"[121] is "vague,"[122] and is "elusive."[123] Legal scholars echo these concerns.[124] They point out that courts do not

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114 Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

115 *See* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2078 (2015).

116 *See, e.g.*, Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 766 (2019); Rubin v. Islamic Republic of Iran, 138 S. Ct. 816, 821 (2018); Republic of Argentina v. NML Cap., Ltd., 573 U.S. 134, 140 (2014); Republic of Austria v. Altmann, 541 U.S. 677, 696 (2004); Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983).

117 *Hilton*, 159 U.S. at 163–64.

118 *Id.* at 164.

119 *See, e.g.*, Dodge, *supra* note 115, at 2075; Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 34 (2010) ("The [Supreme] Court's statement of comity in *Hilton* is . . . woefully inadequate . . . .").

120 *See* Dodge, *supra* note 115, at 2073.

121 JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V., 412 F.3d 418, 423 (2d Cir. 2005).

122 Turner Ent. Co. v. Degeto Film GmbH, 25 F.3d 1512, 1518 (11th Cir. 1994).

123 *E.g.*, Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 886 (9th Cir. 2012); Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 18 (1st Cir. 2004); Republic of the Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, 75 (3d Cir. 1994); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984).

124 *See* Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 281 (1982) ("The doctrine of comity is . . . an amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith."); Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 4

clearly or consistently apply comity principles,[125] appearing to have an insufficient understanding of what comity consists of and how much weight to afford each factor within a comity analysis.[126] Justice Benjamin N. Cardozo, while a judge on the N.Y. Court of Appeals, described comity as a "misleading word" that "has been responsible for much . . . trouble."[127] Nevertheless, international comity has long played a central role in United States foreign relations law and served as the basis for the conflicts of laws and the enforcement of foreign judgments in the United States.[128]

3. Comity-Based Abstention

Comity-based abstention is a form of adjudicative comity, whereby a court exercises restraint in favor of another court.[129] The Supreme Court recognized this in the context of abstention in favor of

(1991) ("[D]espite ubiquitous invocation of the doctrine of comity, its meaning is surprisingly elusive."); Anne-Marie Slaughter, *Court to Court*, 92 AM. J. INT'L L. 708, 708 (1998) ("Comity . . . is a concept with almost as many meanings as sovereignty.").

125 Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1103 (2015) ("Courts . . . often cite international comity . . . as a justification for avoidance doctrines. What courts mean by this is not always clear or consistent."); *see also* Michael D. Ramsey, *Escaping "International Comity"*, 83 IOWA L. REV. 893, 893 (1998) ("'International comity' is frequently invoked by courts but rarely defined with precision.").

126 Austen L. Parrish, *Duplicative Foreign Litigation*, 78 GEO. WASH. L. REV. 237, 260 (2010) ("[A]lthough courts routinely pay lip service to adjudicatory comity, courts appear to have little understanding of what exactly comity consists of, or what weight to afford it in the final analysis."). The most notorious example is the Ninth Circuit's eight-factor analysis set forth in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 614 (9th Cir. 1976) ("The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business or corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.").

127 Loucks v. Standard Oil Co. of N.Y., 120 N.E. 198, 201 (N.Y. 1918).

128 *See* Dodge, *supra* note 115, at 2072; *accord* Bank of Augusta v. Earle, 38 U.S. 519, 589 (1839) ("It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the one, will, by the comity of nations, be recognised and executed in another, where the right of individuals are concerned."); Hilton v. Guyot, 159 U.S. 113, 163 (1895) ("The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.'").

129 *See* Dodge, *supra* note 115, at 2105, 2109–14.

proceedings in state court.[130] Three cases where the Supreme Court recognized this are: *Colorado River*,[131] *Younger v. Harris*,[132] and *Railroad Commission of Texas v. Pullman Co.*[133] However, outside of forum non conveniens, the Supreme Court never authorized such restraint in favor of foreign courts.[134]

Several lower courts have gone further and developed comity-based abstention doctrines in international cases.[135] The Seventh Circuit did so in *Abelesz* and *Fischer*.[136] The Ninth Circuit, inspired by a footnote in the Supreme Court's *Sosa v. Alvarez-Machain*[137] decision, developed such a doctrine in the context of human rights claims under the Alien Tort Statute.[138] The Ninth Circuit later expanded it to an expropriation claim brought under the FSIA, but that decision was ultimately vacated.[139]

Several other circuits have recognized international comity abstention doctrine as an application or extension of *Colorado River* to foreign proceedings.[140] Canonically, federal courts may exercise discretion to stay proceedings in deference to other federal courts.[141] However, in *Colorado River*, the Supreme Court clarified that under *Landis v. North American Co.*, district courts only have the authority to

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130 *See, e.g.*, Colo. River Water Conservation Dist. v. United States (*Colorado River*), 424 U.S. 800, 813–18 (1976); Younger v. Harris, 401 U.S. 37, 44 (1971); R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941).

131 *Colorado River*, 424 U.S. at 813–18.

132 *Younger*, 401 U.S. at 44.

133 *Pullman*, 312 U.S. at 501.

134 *See* Dodge, *supra* note 115, at 2105, 2110.

135 *Id.*

136 *See infra* Section I.E.

137 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) ("[T]he European Commission argues as *amicus curiae* that basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other forums such as international claims tribunals. . . . We would certainly consider this requirement in an appropriate case.").

138 *See* Sarei v. Rio Tinto, PLC, 550 F.3d 822, 831 (9th Cir. 2008) (plurality opinion) (McKeown, J.) ("[I]n ATS cases where the United States 'nexus' is weak, courts should carefully consider the question of exhaustion . . . .").

139 *See* Cassirer v. Kingdom of Spain, 580 F.3d 1048, 1062 (9th Cir. 2009) (holding that prudential exhaustion applies to cases brought against foreign nations under the FSIA), *vacated* 616 F.3d 1019, 1037 (9th Cir. 2010) (en banc) ("[W]e do not consider whether exhaustion *may* apply to claims asserted in this case.").

140 *See* sources cited *infra* note 147.

141 *See* Landis v. N. Am. Co., 299 U.S. 248, 254–55 (1936); *see also* Brief for William S. Dodge as Amicus Curiae at 18, Simon v. Republic of Hungary, 911 F.3d 1172 (D.C. Cir. 2018) (No. 17–7146) [hereinafter Professor Dodge's Amicus Brief] ("It is well established that federal courts have discretion to stay proceedings in deference to other federal courts.").

decline jurisdiction in favor of other federal courts.[142] While the Supreme Court has developed several abstention doctrines that permit federal courts to abstain from jurisdiction in favor of state courts,[143] and the *Colorado River* Court recognized the possibility of additional circumstances in which abstention would be appropriate,[144] the Court emphasized that abstention must be justified by exceptional circumstances.[145] The circuit courts have limited *Colorado River* abstention to instances of pending and parallel state court proceedings,[146] and those circuits that have applied or extended *Colorado River* to foreign proceedings have held that international comity abstention is only appropriate where there are pending parallel proceedings.[147]

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142 Colo. River Water Conservation Dist. V. United States (*Colo. River*), 424 U.S. 800, 817 (1976) ("Generally, as between states and federal courts, the rule is that the 'pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . . .' As between federal district courts, however, though no precise rule has evolved, the general principle is to avoid duplicative litigation." (internal citations omitted)); *see also* Professor Dodge's Amicus Brief, *supra* note 141, at 18.

143 *See, e.g.*, Younger v. Harris, 401 U.S. 37, 44–46 (1971) (holding that federal courts should abstain from state-court criminal proceedings); Burford v. Sun Oil Co., 319 U.S. 315, 317–18 (1943) (permitting abstention when the exercise of jurisdiction may be "prejudicial . . . to public interest" with respect to a state government's implementation of its domestic policy); R.R. Comm'n. of Tex. v. Pullman Co., 312 U.S. 496, 500–01 (1941) (abstaining when a federal constitutional issue might be rendered moot in light of a state law determination in a separate state-court proceeding); *see also* Professor Dodge's Amicus Brief, *supra* note 141, at 18–19.

144 *Colo. River*, 424 U.S. at 813 ("Abstention from the exercise of federal jurisdiction is the exception, not the rule. The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it."); *see also* Professor Dodge's Amicus Brief, *supra* note 141, at 19.

145 *See Colo. River*, 424 U.S. at 813 ("Abdication of the obligation to decide cases can be justified under this doctrine *only in the exceptional circumstances* . . . ." (emphasis added)); *see also* Professor Dodge's Amicus Brief, *supra* note 141, at 19.

146 *See, e.g.*, Chase Brexton Health Servs. v. Maryland, 411 F.3d 457, 463 (4th Cir. 2005) ("The threshold question in deciding whether *Colorado River* abstention is appropriate is whether there are parallel federal and state suits."); Hoai v. Sun Refin. & Mtg Co., 866 F.2d 1515, 1518 (D.C. Cir. 1989) ("The . . . *Colorado River* doctrine[] [is] focused principally on situations involving parallel or concurrent proceedings in federal and state courts."); *see also* Professor Dodge's Amicus Brief, *supra* note 141, at 19.

147 *See, e.g.*, Gross v. German Found. Indus. Initiative, 456 F.3d 363, 393–94 (3d Cir. 2006) (rejecting abstention based on international comity absent a pending foreign proceeding); AAR Int'l, Inc. v. Nimelias Enters. S.A., 250 F.3d 510, 518 (7th Cir. 2001) ("In evaluating the propriety of the district court's decision to abstain under *Colorado River*, we must first determine whether the federal and foreign proceedings are parallel."); Al-Abood v. Elshamari, 217 F.3d 225, 232 (4th Cir. 2000) ("The threshold question in deciding whether *Colorado River* abstention is appropriate is whether there are parallel suits."); Finova Cap. Corp. v. Ryan Helicopters U.S.A., Inc., 180 F.3d 896, 898 (7th Cir. 1999) (holding that "in the interests of international comity, we apply the same general principles [of *Colorado River* abstention] with respect to parallel proceedings in a foreign court."); *see also* Dodge, *supra* note 115, at 2113 n.253.

E. *The Circuit Split over Whether the Foreign Sovereign Immunity Act's Expropriation Exception Requires Plaintiffs to Exhaust Foreign Domestic Remedies Prior to Commencing Litigation in United States Courts*

1. The Seventh Circuit's Development and Creation of a Prudential Exhaustion Requirement

The Seventh Circuit initially took up the exhaustion of remedies requirement in 2012 when it decided *Abelesz*.[148] There, more than twenty plaintiffs filed a class action lawsuit against the Hungarian National Railway, which had transported them from Hungary to Auschwitz and other concentration camps and had confiscated their personal possessions.[149] The Seventh Circuit based its exhaustion requirement on "the comity between sovereign nations that lies close to the heart of most international law."[150] The court explained that its exhaustion requirement is "a well-established rule of customary international law" that the United States itself invoked in *Switzerland v. United States* (*Interhandel*).[151] The Circuit reasoned that *Interhandel* was helpful because it laid the foundation for "the sovereignty and comity concerns underlying the domestic exhaustion principle."[152] In *Interhandel*, the United States had requested that the International Court of Justice abstain from deciding a claim as the plaintiffs had failed to exhaust remedies available in the United States.[153] The Seventh Circuit noted that principles of comity required that the United States would reciprocate if the circumstances arose.[154] Additionally, the Seventh Circuit relied on the Third Restatement of Foreign Relations

148 Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 684 (7th Cir. 2012).

149 Fischer v. Magyar Államvasutak Zrt. (*Fischer II*), 892 F.3d 915, 915–16 (7th Cir. 2018).

150 *Abelesz*, 692 F.3d at 684.

151 *Id.* at 679. The *Interhandel* case arose over events occurring in 1942 when the United States vested shares owned by the General Aniline and Film Corporation, a Swiss corporation that was in one way or another controlled by Germany's I.G. Farben. Switz. v. United States (*Interhandel*), Judgement, 1959 I.C.J. Rep. 6 (1959). In 1957, Switzerland applied to the International Court of Justice for a declaration that the United States was obligated to return the vested assets to Interhandel. *Id.* at 7, 10. In defense, the United States objected that the International Court did not have jurisdiction over the claim because Interhandel "ha[d] not exhausted local remedies available to it in the United States courts." *Id.* at 24.

152 *Abelesz*, 692 F.3d at 680.

153 *See supra* note 151.

154 *Abelesz*, 692 F.3d at 680. ("The *Interhandel* case is helpful [because] . . . it is a case in which the United States requested that an international court refrain from adjudicating a claim because the plaintiffs had not exhausted available U.S. remedies. Comity requires that the United States be prepared to reciprocate.").

Law of the United States (Third Restatement), stating that under international law, a domestic state is usually under no obligation to consider a claim for an injury to its citizen that is inflicted by a foreign state until that individual has exhausted foreign domestic remedies.[155]

In 2015, the Seventh Circuit clarified in *Fischer I*[156] that exhaustion was not a substantive requirement under the FSIA, but rather a procedural limitation on where such claims may be brought.[157] The court portrayed this limitation as a prudential exhaustion requirement based on principles of international comity.[158]

Subsequently, the *Fischer I* plaintiffs sought remedy in Hungary by filing a complaint in Budapest's Capital Regional Court, but the Hungarian court dismissed the case in October 2016.[159] The Hungarian court determined that national law required plaintiffs to support their claim to recover for any losses of personal property with evidence independent of their own testimony.[160] Moreover, the Hungarian court concluded that any Holocaust-related claim for noneconomic damages based upon events alleged to have occurred before March 1978 was not cognizable under the applicable provision of the Hungarian Civil

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155 *Id.*; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 713 cmt. f (AM. LAW. INST. 1987) ("Under international law, ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged."). The Seventh Circuit misapplied the Restatement. *See infra* Subsection I.D.2; Section II.B.

156 The *Abelesz* and *Fischer* cases were consolidated. *Fischer I,* 777 F.3d 847, 853–55 (7th Cir. 2015).

157 *Id.* at 857 ("Understood correctly, however, the prior opinion imposed an exhaustion requirement that limits where plaintiffs may assert their international law claims. We did not hold that plaintiffs failed to allege violations of international law in the first instance.").

158 *Id.* at 859 (characterizing the exhaustion requirement as "a prudential exhaustion requirement based on international comity concerns").

159 *Fischer II*, 892 F.3d 915, 917 (7th Cir. 2018). The claim was brought in the Budapest Capital Regional Court/Metropolitan Tribunal by Ms. Irene Gittel Kellner, a ninety-two-year-old Holocaust survivor who had all of her valuables stolen from her while aboard a Hungarian train to Auschwitz. Hungarian Holocaust Victims' Brief, *supra* note 39, at 9. Ms. Kellner had not previously filed a suit in the United States but was part of the *Fischer* putative class. *Id.*

160 *Fischer II*, 892 F.3d at 917.

Code.[161] Ultimately, Fischer's 2018 appeal to the Seventh Circuit was dismissed on other grounds.[162]

Additionally, in *Scalin v. Société Nationale des Chemins de Fer Français*, plaintiffs litigated claims similar to those of *Fischer*.[163] The *Scalin* plaintiffs attempted to prove that the remedies available in France were inadequate and that it would take an "unreasonably prolonged" amount of time for them to receive any such remedy in their effort to establish that they had exhausted their remedies under *Abelesz*.[164] However, they were unsuccessful.[165]

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161 *Id.* Not only did the Hungarian court summarily dismiss Ms. Kellner's complaint because her claims arose from conduct preceding March 1978 and her sworn unrebutted testimony was uncorroborated, but the Hungarian court also assessed court costs and Hungary's attorneys' fees on Ms. Kellner as part of the judgment against her. Hungarian Holocaust Victims' Brief, *supra* note 39, at 10–12. Ms. Kellner's Hungarian counsel subsequently advised her that an appeal would be fruitless and detrimental as "there is 'no reasonable chance that the order would . . . be[] reversed on appeal' and . . . [it] would expose [her] to further sanctions and payment of [Hungary's] additional legal expenses." *Id.* at 12. The Hungarian court also barred her from proceeding pro se on appeal, effectively barring her from appealing the judgment in Hungary. *Id.*

162 *Fischer II*, 892 F.3d 917, 918–19. Fischer's appeal was dismissed for lack of jurisdiction because the Hungarian lawsuit had been brought by one of the members of the class, rather than Fischer, the named plaintiff, and it was Fischer, rather than the other member, who sought appeal from the Seventh Circuit. *See id.*

163 Scalin v. Société Nationale des Chemins de Fer Français, No. 15-CV-03362, 2018 WL 1469015 (N.D. Ill. Mar. 26, 2018). Plaintiffs alleged that in connection with World War II deportations, the national railway of France had confiscated personal property, such as cash, jewelry, and artwork, for its own benefit or turned it over to the Nazis. *Id.* at *1. Plaintiffs brought their claims under the expropriation exception of the FSIA. *Id.* at *2.

164 *Id.* at *3–8. Plaintiffs argued that "[a]ll legal remedies of any nature in France permitting victims to seek redress against [the national railway of France] have been exhausted." *Id.* at *3. In support, "[p]laintiffs . . . submitted [a] declaration [from] a lawyer in France who ha[d] been working on Holocaust claims for 20 years" that stated "'it is highly probable, if not absolutely mandated' that [p]laintiffs' claims against [the national railway of France] are not viable in any court—criminal, civil, or administrative—in France." *Id.* at *3 n.3; *see also* Hungarian Holocaust Victims' Brief, *supra* note 39, at 16–17.

165 *Scalin*, 2018 WL 1469015, at *3 n.3. The District Court found that France had established the Commission for the Compensation of Victims of Spoliations Resulting from the Anti-Semitic Legislation in Force During the Occupation as a means "to compensate the victims of confiscations carried out of the Nazis and the Vichy authorities during World War II," and "[p]laintiffs ha[d] failed to show convincingly that [the remedies available to them were] clearly a sham or inadequate or that their application is unreasonably prolonged." *Id.* at *4, *8 (internal citation omitted); *see also* Hungarian Holocaust Victims' Brief, *supra* note 39, at 16–17. An appeal is pending before the Seventh Circuit. *See* Scalin v. Société Nationale des Chemins de Fer Français, No. 18-1887 (7th Cir. filed Apr. 24, 2018). The Seventh Circuit deferred proceedings in this appeal until after the Supreme Court renders decisions in *Fed. Republic of Germany v. Philipp*, No. 19-351, 2020 WL 3578677, at *1 (U.S. July 2, 2020) and *Republic of Hungary v. Simon*, No. 18-1447, 2020 WL 3578676, at *1 (U.S. July 2, 2020). *See* Order, *Scalin*, No. 18-1887 (7th Cir. July 29, 2020).

2. The D.C. Circuit's Antithesis of a Prudential Exhaustion Requirement

a. *Agudas Chasidei Chabad v. Russian Federation*

The D.C. Circuit first addressed whether § 1605(a)(3) requires plaintiffs to exhaust local remedies in *Agudas Chasidei Chabad v. Russian Federation.*[166] There, Chabad[167] sought to reclaim a collection of religious books, manuscripts, and documents that were assembled by their religious leaders throughout Chabad's history and comprise the textual basis for the group's core teachings and traditions.[168] Among the arguments raised by Russia and considered by the D.C. Circuit was whether Chabad was required to exhaust remedies available in Russia.[169]

In its analysis, the D.C. Circuit pointed out that there is nothing in § 1605(a)(3)'s expropriation exception to suggest that a plaintiff is required to exhaust foreign domestic remedies prior to commencing a lawsuit in the United States.[170] Additionally, the circuit applied statutory construction to infer that Congress's inclusion of an exhaustion requirement in a closely related section indicates Congress's

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166 Agudas Chasidei Chabad v. Russian Fed'n, 528 F.3d 934, 948–50 (D.C. Cir. 2008).

167 Chabad is "a worldwide Chasidic spiritual movement, philosophy, and organization founded in Russia in the late 18th century." *Id.* at 938.

168 *Id.* According to Chabad, Russia's Bolshevik government seized a portion of the collection during the October Revolution of 1917 and by 1925 was refusing to return it. *Id.* Another trove of documents was then seized in 1939 by Nazi German forces in Poland. *Id.* By 1945, the Nazi portion also ended up in the possession of Soviet military forces, who proclaimed them "trophy documents" and brought them to Moscow. *Id.* This portion is now held by the Russian State Military Historical Archive. Paul Berger, *What I Found in Library Rebbe Schneerson Claimed as His—and Why Chabad Feud Rages*, FORWARD (Feb. 18, 2014), https://forward.com/news/192846/what-i-found-in-library-rebbe-schneerson-claimed-a [https://perma.cc/J2LS-ZAYK]. In recent years, the Russian government agreed to move the collection to Moscow's Jewish Museum and Tolerance Center, a Chabad-controlled institution, but with a significant caveat: The part of the museum housing the collection would be an official "department of the Russian State Library." *Id.* This "compromise" would hardly be sufficient as Chabad's headquarters are in Brooklyn, New York. *See id.* As of November 2020, the D.C. Circuit, having previously rendered a judgment in favor of Chabad, and imposing contempt sanctions against the Russian government for failing to comply with its order, issued an order that effectively permits Chabad "to identify and seize . . . financial assets" belonging to a Maryland corporation owned "wholly but indirectly . . . by Russia's state nuclear agency." *Judge Allows Chabad to Pursue Russian Assets Until Books Are Freed*, COLLIVE (Nov. 7, 2020), https://collive.com/judge-allows-chabad-to-pursue-russian-assets-until-books-are-freed [https://perma.cc/QQ5Y-GFH7]; *accord* Agudas Chasidei Chabad v. Russian Fed'n, No. 1:05-cv-1548-RCL, at 1–2, 11–12, 54 (D.D.C. Nov. 6, 2020).

169 *Chabad*, 528 F.3d at 948.

170 *Id.* ("[N]othing in § 1605(a)(3) suggests that [a] plaintiff must exhaust foreign remedies before bringing suit in the United States.").

omission of such a requirement in the expropriation exception was intentional,[171] and so Congress intended for § 1605(a)(3) not to have an exhaustion requirement.[172]

Addressing the Third Restatement, the *Chabad* court explained that Restatement section 713, comment f does not create an exhaustion requirement for § 1605(a)(3).[173] This is because this comment addresses claims of one state against another.[174] Comment f's logic is that before *a nation* decides to litigate against another nation, the individual being represented by the plaintiff nation should first attempt to resolve the dispute in the domestic courts of the defendant nation, provided the defendant nation's domestic courts offer an adequate remedy.[175] However, § 1605(a)(3) involves suits that pit *an individual* of one nation against another nation.[176] In this type of case, there is no reason apparent "for systematically preferring the courts of the defendant state."[177]

However, the D.C. Circuit did acknowledge "a more compelling theory" to support an exhaustion requirement based on Justice Breyer's concurrence in *Republic of Austria v. Altmann*.[178] In *Altmann*, Justice Breyer noted that a plaintiff seeking relief under § 1605(a)(3) might be required to demonstrate "an absence of remedies in the foreign country

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171 *Id.* The terrorism exception to the FSIA conditions jurisdiction on the claimant "afford[ing] the foreign states a reasonable opportunity to arbitrate the claim." *See* Philipp v. Fed. Republic of Germany (*Philipp I*), 894 F.3d 406, 415 (D.C. Cir. 2018); 28 U.S.C. § 1605A(a)(2)(A)(iii) (2018). This requirement was originally part of 28 U.S.C. § 1605(a)(7), which has been repealed and reenacted in different form in 28 U.S.C. § 1605A. *See* Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1034 n.21 (9th Cir. 2010); *see also* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(b)(1)(A)(iii) (2008) (repealing 28 U.S.C. § 1605(a)(7)).

172 *Chabad*, 528 F.3d at 948–49 ("[T]he FSIA previously contained one exception with a local exhaustion requirement, § 1605(a)(7), which for certain suits required that the foreign state be granted 'a reasonably opportunity to arbitrate the claim in accordance with accepted international rules of arbitration.' Congress repealed that exception [in 2008]. Obviously, before deletion of subsection (7) it would have been quite plausible to apply the standard notion that Congress's inclusion of a provision in one section strengthens the inference that its omission from a closely related section must have been intentional; we do not see that the inference is any weaker just because Congress has, for independent reasons, removed the entire exhaustion-requiring provision." (internal citations omitted)).

173 *Id.* at 949.

174 *Id.*

175 *Id.* ("[The Restatement's] logic appears to be that before a country moves to a procedure as full of potential tension as nation vs. nation litigation, the person on whose behalf the plaintiff country seeks relief should first attempt to resolve his dispute in the domestic courts of the putative defendant country (if they provide an adequate remedy).").

176 *Id.*

177 *Id.*

178 *Id.*

sufficient to compensate for any taking."[179] Justice Breyer reasoned that one who sues under the expropriation exception in the United States in disregard of postdeprivation remedies available in the offending country may have difficulty showing a taking in violation of international law.[180] The D.C. Circuit explained that Justice Breyer drew upon a substantive constitutional theory that there cannot be an "unlawful taking if a [foreign nation]'s courts provide adequate postdeprivation remedies."[181]

Nevertheless, the D.C. Circuit held that even if an exhaustion requirement exists, the only remedy Russia identified was inadequate.[182] The remedy Russia identified amounted to selling the property back to the plaintiff.[183]

b. The Aftermath of Chabad and Resulting District Court Split in the D.C. Circuit

Following *Chabad*, several plaintiffs filed claims against Hungary and Germany in the D.C. District Court under the expropriation exception seeking recompense for atrocities committed against Jews during the Holocaust.[184] Plaintiffs filed *Simon v. Republic of Hungary*[185] and *de Csepel v. Republic of Hungary*[186] in 2010 and *Philipp v. Federal*

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179 *Id.* (quoting Republic of Austria v. Altmann, 541 U.S. 677, 714 (2004) (Breyer, J., concurring)).

180 *Id.* ("Justice Breyer's concurrence . . . noted that a plaintiff seeking relief under § 1605(a)(3) 'may have to show an absence of remedies in the foreign country sufficient to compensate for any taking' and that a 'plaintiff who chooses to litigate in this country in disregard of the postdeprivation remedies in the "expropriating" state may have trouble showing a "tak[ing] in violation of international law."'"). As we will soon see, for cases involving genocide, the D.C. Circuit later held in *Simon I* that takings that constitute genocide violate international law "regardless of whether the plaintiffs exhausted [local] remedies." *Simon I*, 812 F.3d 127, 149 (D.C. Cir. 2016).

181 *Chabad*, 528 F.3d at 949.

182 *Id.* at 949–50.

183 *Id.* (noting the post-deprivation law Russia relied upon amounted to *selling* the property back to the plaintiff, which clearly would not "remedy the alleged wrong").

184 *See* Complaint at 2–3, 10, de Csepel v. Republic of Hungary, 808 F. Supp. 2d 113 (D.D.C. 2011) (No. 10 Civ. 01261) [hereinafter *de Csepel*'s Complaint]); Amended Complaint at 3–4, 25, Simon v. Republic of Hungary, 37 F. Supp. 3d 381 (D.D.C. 2014) (No. 10 Civ. 01770) [hereinafter *Simon*'s Complaint]; Amended Complaint at 1–6, 8–13, Philipp v. Fed. Republic of Germany, 248 F. Supp. 3d 59 (D.D.C. 2017) (No. 15 Civ. 00266) [hereinafter *Philipp*'s Complaint].

185 *Simon*'s plaintiffs sought relief from Hungary and the Hungarian National Railway for their role in confiscating personal possessions from Hungarian Jewish victims en route to concentration camps and death camps. *See Simon*'s Complaint, *supra* note 184, at 3–4.

186 In *de Csepel*, plaintiffs sought recovery of valuable artworks that belonged to Baron Herzog and his family, who had collected more than 2,000 pieces of artwork, including works of El Greco, Francisco de Zurbaran, and Lucas Cranach the Elder, among others. *See de Csepel*'s Complaint, *supra* note 184, at 1; *see also* Vogel, *supra* note 3. *De Csepel* alleged more than forty works of art

Republic of Germany in 2015.[187] The defendants in each of these suits asserted the plaintiffs were required to exhaust foreign domestic remedies prior to litigating in the United States.[188] The defendants have posited three possible bases for an exhaustion requirement: (1) exhaustion is required based on the expropriation exception itself; (2) exhaustion is required based upon Justice Breyer's *Altmann* concurrence; and (3) the principles of comity require plaintiffs to prudentially exhaust foreign domestic remedies.[189]

The D.C. Circuit resolved the first two arguments in *Simon v. Republic of Hungary* (*Simon I*).[190] First, the D.C. Circuit explicitly stated that there is no exhaustion requirement under the expropriation exception itself.[191] Second, the Court found the reasoning of Justice Breyer's *Altmann* concurrence inapplicable to cases of genocidal takings.[192] The Breyer logic would only apply in cases involving basic international law expropriation claims, where the claim is of a taking without just compensation—without the genocidal component.[193] In genocidal takings cases, the international law violation is not the basic prohibition against a taking without just compensation, but rather, the mere taking of property violates international law as an act of

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from Herzog's collection were in the wrongful possession of the Museum of Fine Arts, the Hungarian National Gallery, and the Museum of Applied Arts, who came into possession of these artworks during the genocidal campaign directed at Hungarian Jews during World War II. *See de Csepel*'s Complaint, *supra* note 184, at 2.

187 *Philipp*'s plaintiffs sued to recover the Welfenschatz that Germany had acquired for a fraction of its value because of the campaign to eradicate German Jewry. *See Philipp*'s Complaint, *supra* note 184, at 1–6.

188 Simon v. Republic of Hungary (*Simon II*), 911 F.3d 1172, 1180–82 (D.C. Cir. 2018); *Philipp I*, 894 F.3d 406, 414–16 (D.C. Cir. 2018); de Csepel v. Republic of Hungary (*de Csepel I*), 808 F. Supp. 2d 113, 142.

189 *See* Simon v. Republic of Hungary (*Simon I*), 812 F.3d 127, 148–49 (D.C. Cir. 2016) (addressing the merits of the first two arguments and declining to address the merits of the third).

190 *Simon I*, 812 F.3d at 148. At the district level, Judge Howell asserted in a footnote that the expropriation exception might require plaintiffs to exhaust foreign domestic remedies before commencing suit in a U.S. court. *See* Simon v. Republic of Hungary, 37 F. Supp. 3d 381, 407 n.21 (D.D.C. 2014) ("[T]here remains an open question whether the expropriation exception is available absent a showing that the plaintiffs have exhausted any domestic remedy in the country alleged to have expropriated the subject property."). In support, Judge Howell cited the Seventh Circuit's decision in *Abelesz* and the Ninth Circuit decision in *Cassierer* but did not cite to *Chabad*—direct binding authority to the contrary—for this proposition, even though Judge Howell cited to *Chabad* in the preceding paragraph of the footnote for a different proposition. *See id.*

191 *Simon I*, 812 F.3d at 148 ("This court . . . has held that the FSIA itself imposes no exhaustion requirement." (citing Agudas Chasidei Chabad v. Russian Fed'n., 528 F.3d 934, 948–49 (D.C. Cir. 2008))).

192 *Id.* at 148–49 (citing Republic of Austria v. Altmann, 541 U.S. 677, 714 (2004) (Breyer, J., concurring)).

193 *Id.*

genocide.[194] The violation being challenged is the genocide itself, which occurred at the moment of the taking.[195] Accordingly, genocidal takings violate international law within the meaning of the expropriation exception regardless of whether the plaintiff has exhausted domestic remedies.[196] However, regarding a prudential exhaustion requirement, the D.C. Circuit acknowledged that the Seventh Circuit had adopted such a requirement but declined to address its merits as it was not raised on appeal.[197]

Following the D.C. Circuit's decision in *Simon I*, three district judges addressed the merits of a prudential exhaustion requirement.[198] First, Judge Huvelle, in *de Csepel v. Republic of Hungary* rejected prudential exhaustion by relying upon *Chabad*.[199] Similarly, Judge Kollar-Kotelly in *Philipp v. Federal Republic of Germany*, endorsed the position taken by Judge Huvelle and pointed out that the *Chabad* court had opined that it was "likely correct" that a plaintiff was not required to exhaust foreign domestic remedies before litigating in a United States court.[200] However, on remand in *Simon*, Judge Howell adopted the

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194 *Id.*

195 *Id.*

196 *Id.*

197 *Id.* While "[t]he plaintiffs briefly contend[ed] in their reply brief that no exhaustion requirement should apply . . . because of the inadequacy of available Hungarian remedies, . . . the defendants have not argued . . . the point in this court." *Id.* at 149.

198 *See de Csepel II*, 169 F. Supp. 3d 143, 167–69 (D.D.C. 2016); Philipp v. Fed. Republic of Germany, 248 F. Supp. 3d 59, 80–83 (D.D.C. 2017); Simon v. Republic of Hungary (*Simon I*), 277 F. Supp. 3d 42, 54–56 (D.D.C. 2017).

199 *de Csepel II,* 169 F. Supp. 3d at 167–69 (D.D.C. 2016) (citing Agudas Chasidei Chabad v. Russian Fed'n., 528 F.3d 934, 949). Judge Huvelle reiterated *Chabad*'s explanations that section 713, comment f of the Restatement pertains to claims by one state against another whereas § 1605(a)(3) involves lawsuits that pit an individual of one nation against another nation, in a court that cannot be in *both* the interested states. *Id.* at 169. Therefore, there is no apparent reason for systematically preferring the courts of the defendant nation in adjudicating a claim under the expropriation exception to the FSIA. *Id.*

200 *See Philipp*, 248 F. Supp. 3d at 80–83 (citing *Chabad*, 528 F.3d at 948). Judge Kollar-Kotelly also noted that in *Simon I*, the D.C. Circuit had touched on the issue of a prudential exhaustion requirement, but that it had not addressed the issue and had instructed the district court to consider it on remand if raised by the defendants. *Id.* (citing *Simon I*, 812 F.3d at 149). At this point, the *Simon* district court had not yet considered a prudential exhaustion requirement on remand. *Id.* Judge Kollar-Kotelly found *de Csepel II* persuasive and "agree[d] that the prudential exhaustion requirement based on international comity is not applicable to cases . . . which are brought by individuals against . . . a foreign state." *Id.* at 83. Following Judge Kollar-Kotelly's rejection of prudential exhaustion in *Philipp*, *de Csepel* went up on appeal to the D.C. Circuit. De Csepel v. Republic of Hungary (*de Csepel II*), 859 F.3d 1094 (D.C. Cir. 2017). The D.C. Circuit had previously considered an appeal on this case in 2013 which did not relate to exhaustion of remedies under the FSIA. *See* de Csepel v. Republic of Hungary (*de Csepel I*), 714 F.3d 591, 607 (D.C. Cir. 2013). This time, Hungary attempted to argue that the plaintiffs should be required to exhaust their claims in Hungarian courts through a formal claims process that had recently been

position taken by the Seventh Circuit.[201] Judge Howell reasoned that the D.C. Circuit in *Simon I* had referenced *Fischer I*'s application of the "prudential exhaustion doctrine" to very similar claims, arising from the same genocide, with approval.[202] As a result, Judge Howell applied the prudential exhaustion requirement[203] and dismissed the case for failure to exhaust prudential remedies available in Hungary.[204]

c. The D.C. Circuit's Rejection of Comity-Based Prudential Exhaustion and Judge Katsas's Dissenting Opinion

The D.C. Circuit finally rejected prudential exhaustion in July 2018, in its *Philipp I* decision.[205] There, the D.C. Circuit held that plaintiffs are not required to exhaust foreign domestic remedies as a

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created. *de Csepel II*, 859 F.3d at 1109. However, the D.C. Circuit punted yet again and declined to address the issue, dismissing this argument for lack of appellate jurisdiction. *Id.* at 1109–10. It explained that "[a]s a general rule, appellate jurisdiction extends only to 'final decisions' of a district court . . . ." *Id.* at 1109. While there is a well-settled rule "that denial of a motion to dismiss on the ground of sovereign immunity is 'final' by application of the collateral order doctrine and 'therefore subject to interlocutory review,'" Hungary had not made an "argument that the collateral order doctrine applies to a denial of a motion to dismiss on freestanding exhaustion grounds." *Id.*

201 *See Simon II*, 277 F. Supp. 3d at 54–56. This position is contrary to those set forth by Judge Huvelle in *de Csepel* and Judge Kollar-Kotelly in *Philipp*, as well as the hints laid out by the D.C. Circuit in *Chabad*. *See* Agudas Chasidei Chabad v. Russian Fed'n., 528 F.3d 934, 948–49 (D.C. Cir. 2008); *de Csepel II*, 169 F. Supp 3d 143, 167–69 (D.D.C. 2016); *Philipp*, 248 F. Supp. 3d at 80–83.

202 *See Simon II*, 277 F. Supp. 3d at 55 (internal citations omitted) (quoting *Simon II*, 812 F.3d at 146, 149) ("[T]he D.C. Circuit left unresolved whether this Court 'should decline to exercise jurisdiction' over the plaintiffs' expropriation claims 'as a matter of international comity unless the plaintiffs first exhaust domestic remedies.' The D.C. Circuit's approving reference to *Fischer*'s application of the prudential exhaustion doctrine 'to parallel claims arising from the Hungarian Holocaust,' and 'in closely similar circumstances,' makes plain that application of this doctrine to the facts of this case, at a minimum, warrants consideration."). In reality, it is a stretch to assert that the D.C. Circuit cited *Fischer* with "approval." *Cf. Simon I*, 812 F.3d at 149 ("The defendants could contend that, even if the claims at issue fit within § 1605(a)(3) so as to enable the exercise of jurisdiction, the court nonetheless should decline to exercise jurisdiction as a matter of international comity unless the plaintiffs first exhaust domestic remedies (or demonstrate that they need not do so). The Seventh Circuit [in *Fischer*] found that prudential argument to be persuasive in closely similar circumstances, but the argument is not before us in this appeal."). Rather, *Simon I* merely pointed out that the Seventh Circuit had addressed a very similar claim under similar circumstances in *Fischer I*, but that since the argument was not before them, they left the issue for the district courts to resolve. *See id.* ("We leave it to the district court to consider on remand, should the defendants assert it, [prudential] exhaustion argument: whether, as a matter of international comity, the court should decline to exercise jurisdiction unless and until the plaintiffs exhaust available Hungarian remedies.").

203 *See Simon II*, 277 F. Supp. 3d at 56 ("[T]he factors counseling application of the prudential exhaustion doctrine here outweighs those against. . . . Accordingly, the Court finds that the prudential exhaustion doctrine applies here.").

204 *See id.* at 67.

205 *See* Philipp v. Fed. Republic of Germany, 894 F.3d 406, 415 (D.C. Cir. 2018).

matter of international comity because Congress's underlying objective in enacting the FSIA does not accommodate such a prudential requirement.[206] Five months later, the D.C. Circuit reconsidered prudential exhaustion in *Simon II* and rejected the doctrine again.[207] This time, the D.C. Circuit also explained that, as a preliminary matter, the fundamental concept of exhaustion requires plaintiffs to press their claims through a decisional forum whose decision is then subject to review by a federal court; but when plaintiffs litigate their claims in a foreign court, the foreign court's decision likely precludes judicial review in a U.S. court by operation of res judicata.[208]

Germany then petitioned for a rehearing en banc, but the D.C. Circuit denied the petition.[209] Judge Katsas dissented from the denial of rehearing en banc.[210] Judge Katsas argued the FSIA does accommodate prudential exhaustion or a comity-based abstention defense under § 1606 and that res judicata would not bar federal court review in the same way that abstention in favor of state courts and in favor of tribal courts are not barred from federal court review.[211]

In *Philipp I*, Germany asserted that plaintiffs were required to exhaust foreign domestic remedies as a matter of international comity.[212] However, the D.C. Circuit pointed out that the "key case" of *NML Capital*[213] explained that: (1) nothing in the FSIA's text authorizes immunity as a matter of international comity; and (2) Congress enacted the FSIA as a means to *comprehensively* replace the "old executive-driven, factor-intensive, loosely common-law-based . . . regime" extant prior to the FSIA.[214] Since its enactment, the FSIA, not common law, indisputably governs determinations over a foreign nation's entitlement to sovereign immunity.[215] The D.C. Circuit held that *NML Capital* had

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206 *See id.*

207 *See* Simon v. Republic of Hungary (*Simon II*), 911 F.3d 1172, 1180–81 (D.C. Cir. 2018).

208 *See id.* at 1180.

209 *See* Philipp v. Fed. Republic of Germany, 925 F.3d 1349, 1349 (D.C. Cir. 2019).

210 *See id.* (Katsas, J., dissenting).

211 *See id.* at 1349–50, 1355–57.

212 Philipp v. Fed. Republic of Germany, 894 F.3d 406, 414–16 (D.C. Cir. 2018).

213 *See id.* at 415 ("The key case is the Supreme Court decision in [*NML Capital*], where Argentina claimed immunity from post-judgment discovery as a matter of international comity. The [Supreme] Court rejected that claim . . . .").

214 *Id.* ("As the [*NML Capital*] Court explained, although courts once decided on a case-by-case basis whether to grant foreign states immunity as a matter of international comity, 'Congress abated the bedlam in 1976, replacing the old executive-driven, factor-intensive, loosely common-law-based immunity regime with the [FSIA]'s "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state."'" (quoting Republic of Argentina v. NML Cap., Ltd., 573 U.S. 134, 141 (2014))).

215 *Id.* (quoting *NML Cap.*, 573 U.S. at 141).

concluded that any immunity defense raised by a foreign state in a United States court "must stand on the Act's text. Or it must fall."[216]

Germany attempted to circumvent *NML Capital* by appealing to 28 U.S.C. § 1606, which provides that a foreign state not entitled to immunity "shall be liable in the same manner and to the same extent as a private individual under like circumstances."[217] Germany posited that exhaustion is a non-jurisdictional common law doctrine like forum non conveniens, which remains applicable in FSIA cases.[218] However, the D.C. Circuit was not persuaded.[219] Citing *Chabad*, it reasoned that Congress's inclusion of an exhaustion requirement in the terrorism exception to the FSIA strengthened the inference that its omission from the expropriation exception was intentional.[220] Moreover, § 1606's terms only permit defenses "equally available to 'private individual[s]'"; surely "a 'private individual' cannot invoke a '*sovereign's* right to resolve a dispute against itself.'"[221]

In addressing the Seventh Circuit's contrary position, the D.C. Circuit explained that *Fischer I* relied on the Third Restatement, which the *Chabad* court had previously defined as addressing claims of one state against another, rather than those of an individual against a state.[222] Furthermore, the Fourth Restatement clarifies that the rule cited by the Seventh Circuit applies to international proceedings in nation-against-nation litigation.[223]

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216 *Id.* (quoting *NML Cap.*, 573 U.S. at 141–42).

217 *Id.*; *see also* 28 U.S.C. § 1606.

218 The Supreme Court in *Verlinden B.V. v. Central Bank of Nigeria* pointed out in a footnote that the FSIA "does not appear to affect the traditional doctrine of *forum non conveniens*." Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 490 n.15 (1983). Here, Germany sought to equate exhaustion to forum non conveniens. *See Philipp I*, 894 F.3d at 415.

219 *See Philipp I*, 894 F.3d at 415.

220 *See id.* (citing Agudas Chasidei Chabad v. Russian Fed'n, 528 F.3d 934, 948); *see also supra* notes 171–172 and accompanying text.

221 *Philipp I*, 894 F.3d at 415–16 ("[T]he very . . . provision that Germany relies on, section 1606, forecloses [the] possibility [that the FSIA leaves room for an exhaustion requirement]. By its terms, that provision permits only defenses, such as forum non conveniens, that are equally available to 'private individual[s].' Obviously a 'private individual' cannot invoke a '*sovereign's* right to resolve disputes against it.'" (alteration in original)).

222 *See id.* at 416 (first quoting *Fischer I*, 777 F.3d 847, 859 (7th Cir. 2015); and then quoting *Chabad*, 528 F.3d at 949) ("The Seventh Circuit drew that 'well-established rule' from a provision of the Third Restatement . . . but as [*Chabad*] explain[s], that 'provision addresses claims of one state against another.'").

223 *Id.*; *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 455 reporter's note 11 (AM. L. INST. 2018) ("Section 1605(a)(3) makes no reference to a requirement that a claimant first attempt to exhaust available local remedies before bringing an action against the foreign state under the 'expropriation' exception. [The Ninth Circuit in *Cassirer* and the D.C. Circuit in *Chabad*] have explicitly declined to read such a requirement into the statute. [The Seventh Circuit], however, has held that exhaustion may be required in cases brought under the

In *Simon II*,[224] Hungary also asserted that plaintiffs were required to prudentially exhaust foreign domestic remedies as a matter of international comity.[225] However, Judge Millett, writing for the majority,[226] explained that as a preliminary matter, the concept of "exhaustion" required clarification.[227] "Exhaustion involves pressing claims through a decisional forum . . . whose decision is then subject to the review of a federal court."[228] Accordingly, when a plaintiff is required to exhaust remedies available in another forum, the plaintiff "retains the legal right to judicial review of the underlying decision."[229] However, the prudential exhaustion requirement "Hungary invoke[d] omits [this] crucial element of traditional 'exhaustion.'"[230] When a plaintiff prudentially exhausts remedies in a foreign court, any remedy the foreign court affords them is likely to preclude judicial review in the United States by operation of the doctrine of res judicata.[231]

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expropriation exception on the basis that 'the requirement that domestic remedies for expropriation be exhausted before international proceedings may be instituted is a "well-established rule of customary international law."' These decisions add a substantive requirement for jurisdiction that is not supported by the statute or its legislative history. . . . [T]he rule cited by the [Seventh Circuit in] *Abelesz* . . . applies by its terms to 'international,' not domestic, proceedings." (internal citations omitted)).

224 *Simon II*, 911 F.3d 1172 (D.C. Cir. 2018).

225 *See id.* at 1180 ("Hungary . . . argue[s] . . . that, even if the FSIA provides jurisdiction, the [plaintiffs] were required as a matter of international comity to first 'exhaust' or 'prudential[ly] exhaust[]' their claims in the Hungarian courts.").

226 Judge Gregory G. Katsas dissented on other grounds. *See id.* at 1190–95 (Katsas, J., dissenting) (disagreeing with the majority's decision on forum non conveniens grounds).

227 *See id.* at 1180 (majority opinion) ("Before addressing [Hungary's] argument, some clarification of language is in order.").

228 *Id.* (citing Woodford v. Ngo, 548 U.S. 81, 90, 92 (2006)). The Supreme Court in *Woodford* described exhaustion as requiring a plaintiff to "us[e] all steps that the agency holds out, and do[] so *properly* (so that the agency addresses the issues on the merits)," *Woodford*, 548 U.S. at 90 (emphasis in original) (quoting Pozo v. McCaughtry, 286 F.3d 1022, 1024), or "requir[ing] a state prisoner to exhaust state remedies before filing a habeas petition in federal court," *id.* at 92.

229 *See Simon II*, 911 F.3d at 1180.

230 *See id.*

231 *See id.* (citing *de Csepel I*, 714 F.3d 591, 606–08 (D.C. Cir. 2013)) ("The doctrine that Hungary invokes omits a crucial element of traditional 'exhaustion'—the [plaintiffs'] right to subsequent judicial review here of the Hungarian forum's decision. Indeed, while we need not definitely resolve the question, there is a substantial risk that the [plaintiffs'] exhaustion of any Hungarian remedy could preclude them by operation of *res judicata* from ever bringing their claims in the United States."). This position is supported by the Fourth Restatement, which states that "a final, conclusive, and enforceable judgment of a court of a foreign state granting or denying recovery of a sum of money, or determining a legal controversy, is entitled to recognition by courts in the United States" and such a judgment "is given the same preclusive effect by a court in the United States as the judgment of a sister State entitled to full faith and credit." RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. §§ 481, 487 (AM. L. INST. 2018). Additionally, in his Amicus Brief at the D.C. Circuit, Professor Dodge explained that a decision from a Hungarian court is likely to preclude relitigation in a federal court in the District of

Judge Millett then reiterated the position taken in *Philipp I*: when Congress intends a statute to include an exhaustion requirement, Congress includes it in the statute's text.[232] Accordingly, the FSIA is explicit; if there is an applicable statutory exception to immunity, a foreign state is not immune from jurisdiction of the United States courts, and courts cannot circumvent that by "relabeling an immunity claim as 'prudential exhaustion.'"[233] Finally, Judge Millett explained that § 1606 does not save any sort of "common law" doctrine of exhaustion for sovereigns whose immunity claims fail under § 1605(a)(3).[234] Judge Millett reasoned that prudential exhaustion is not among those historical legal doctrines, such as forum non conveniens, that Congress decided to preserve when it enacted the FSIA.[235]

In *Philipp II*, Judge Katsas dissented from the majority's decision to deny Germany's petition for a rehearing en banc.[236] Judge Katsas referred to "prudential exhaustion" as an "exhaustion or comity-based abstention defense."[237] Judge Katsas's primary argument was that the FSIA affirmatively accommodates such a defense via § 1606.[238] Under § 1606, a foreign sovereign not entitled to immunity under any of the exceptions is "liable in the same manner and to the same extent as a

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Columbia because the District of Columbia has adopted the Uniform Foreign-Country Money Judgments Recognition Act and in the United States, "state law generally governs the recognition and enforcement of foreign judgments." *See* Professor Dodge's Amicus Brief, *supra* note 141, at 15–16, 16 n.7; *see also* D.C. CODE § 15-367 (2020).

232 *See Simon II*, 911 F.3d at 1181 (citing *Philipp I*, 894 F.3d 406, 415 (D.C. Cir. 2018)). The court pointed out the Torture Victim Protection Act of 1991 is a prime example that demonstrates that when Congress intends a statute to include an exhaustion requirement, Congress includes it in the statute's text. *See id.* (citing *Philipp I*, 894 F.3d at 415). Pursuant to the Torture Victim Protection Act of 1991, "[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." 28 U.S.C. § 1350 § 2(b).

233 *Simon II*, 911 F.3d at 1181.

234 *See Simon II*, 911 F.3d at 1181.

235 *See id.* ("Nor is Hungary's form of judicially granted immunity among those historical legal doctrines, like *forum non conveniens*, that Congress chose to preserve when it enacted the FSIA. *Forum non conveniens* predates the FSIA by centuries, and it was an embedded principle of the common-law jurisprudential backdrop against which the FSIA was written." (internal citations omitted)). As a result, the prudential exhaustion requirement "lacks any pedigree in domestic or international common law." *Id.*

236 *See Philipp II*, 925 F.3d 1349, 1349–50, 1355–57 (D.C. Cir. 2019) (Katsas, J., dissenting from denial of petition for rehearing en banc). In Judge Katsas's view, the D.C. Circuit's decisions in *Philipp I*, *Simon I*, and *Simon II* make the D.C. district court essentially "sit as a war crimes tribunal to adjudicate claims of genocide arising in Europe during World War II." *Id.* at 1349–50 (characterizing this as a "remarkable scheme" resting on shaky foundations with dramatic consequences).

237 *Id.* at 1355.

238 *Id.* ("But far from foreclosing . . . defenses [such as exhaustion or comity-based abstention], the FSIA affirmatively accommodates them.").

private individual under like circumstances."[239] Private individuals, under like circumstances, would ordinarily litigate their claims under the Alien Tort Statute, which allows defendants to raise exhaustion and abstention defenses.[240]

In response to the majority's view that the FSIA comprehensively sets forth immunity defenses and does not expressly provide for a comity-based abstention defense, Judge Katsas posited that this defense is no different than other judge-made defenses, including forum non conveniens, the act-of-state doctrine, and political-question doctrine.[241] These defenses are available to foreign sovereigns even though the FSIA does not expressly include them.[242]

In response to the position that res judicata would bar plaintiffs who attempt to exhaust remedies available in foreign countries, Judge Katsas pointed to *England v. Louisiana State Board of Medical*

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239 *Id.* (explaining that under § 1606, "[a] 'private individual' under 'like circumstances' would be one facing claims for aiding and abetting violations of international human-rights law[, which] would be brought under the ATS, . . . [or] might involve private individuals sued for wrongful death, battery or conversion[, and i]n either instance, exhaustion and abstention defenses would likely be available."). *But see supra* notes 226–235 and accompanying text (setting forth the majority's arguments demonstrating why the FSIA does not accommodate a prudential exhaustion requirement despite § 1606).

240 *Philipp II*, 925 F.3d at 1355.

241 *See id.* at 1356 ("[F]oreign sovereign *immunity*—which eliminates subject-matter *jurisdiction*—is distinct from non-jurisdictional defenses such as exhaustion and abstention[, which] are less akin to immunity than to generally applicable, judge-made defenses such as *forum non conveniens*, the act-of-state doctrine, and the political question doctrine—none of which is mentioned in the text of the FSIA, but all of which survived its enactment." (emphasis in original)).

242 *See id.*

Examiners[243] and *Iowa Mutual Insurance Co. v. LaPlante*[244] as examples of abstention doctrines where subsequent judicial review in federal district courts was not barred under res judicata.[245]

II. ANALYSIS

A. *Whether There Is Room Within the FSIA for a Comity-Based Abstention or Prudential Exhaustion Requirement*

This Section resolves the circuit split in favor of the D.C. Circuit as follows. First, it will explain why comity-based abstention doctrines do not fit into the FSIA's expropriation exception.[246] Second, it will describe the fallacy inherent in analogizing comity-based abstention in the foreign sovereign immunity context to other comity-based abstention doctrines.[247] Third, it will explain that prudential comity-

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243 England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 413–19 (1964) (holding that a federal court that had abstained from exercising jurisdiction in favor of a state court, under the *Pullman* abstention doctrine, is not precluded from relitigating the issue in federal court under res judicata). *But see* Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 926–27 (D.C. Cir. 1984) (explaining that even in the context of parallel proceedings, the presumption is that both cases "should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other"). *See also* Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 642 (1977) (plurality opinion) (citing Kline v. Burke Construction Co., 260 U.S. 226, 230 (1922) (explaining that in an action subject to parallel jurisdiction, "[e]ach court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court," but "[w]henever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of res adjudicata"); N.J. Educ. Ass'n v. Burke, 579 F.2d 764, 774 (3d Cir. 1978) (considering *England* and Justice Rehnquist's opinion in *Vendo* and holding that "where a federal suit is commenced before a final decision by [a] state court, the proper rule is that . . . a state court judgment forecloses a . . . litigant from raising grievances in federal court" when the state court has rendered a decision); RESTATEMENT (SECOND) OF JUDGMENTS § 86 cmt. f (AM. LAW INST. 1982) ("On the problem posed by the interaction of the requirement of exhaustion of state remedies and the rule of res judicata, see [*N.J. Educ. Ass'n.*]"); Professor Dodge's Amicus Brief, *supra* note 141, at 16–17.

244 Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987) ("Although petitioner must exhaust available tribal remedies before instituting suit in federal court, the Blackfeet Tribal Courts' determination of tribal jurisdiction is ultimately subject to review."). *But see id.* at 21 (Stevens, J., dissenting) (pointing out that the majority's decision grants tribal courts greater deference on the merits than state courts ,and "[i]t is not unusual for a state court and a federal court to have concurrent jurisdiction over the same dispute").

245 *See Philipp II*, 925 F.3d at 1357.

246 *See infra* Subsection II.A.1.

247 *See infra* Subsection II.A.2.

based abstention or exhaustion amounts to a grant of sovereign immunity due to the obstacle of res judicata.[248]

1. There Is No Room in the FSIA's Expropriation Exception for Common Law Doctrines Like Comity-Based Abstention

Congressional intent in enacting the FSIA and the Supreme Court's subsequent decisions leave no room for common law doctrines like comity-based abstention. While the underpinnings of foreign sovereign immunity, and ultimately the FSIA itself, is international comity,[249] the FSIA was enacted to abate the Tate Letter-era bedlam associated with immunity determinations.[250] During that era, foreign sovereign immunity decisions were under disarray, subject to various factors, and loosely based on common law.[251] Yet, today, when courts consider abstention arguments within the principle of "international comity," courts still use a variety of factors, and their decisions are loosely based on common law.[252] Even the cases Hungary cited in its petition for certiorari as "close cousin[s]" to their "prudential abstention doctrine[]"[253] engage in lengthy analyses that evaluate the interests at stake and create common law authority upon which lower courts may base their decisions.[254] However, Hungary, Germany, and

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248 *See infra* Subsection II.A.3.

249 *See* Republic of Austria v. Altmann, 541 U.S. 677, 689, 696 (2004) (describing foreign sovereign immunity as a matter of "grace and comity.").

250 Republic of Argentina v. NML Cap., Ltd, 573 U.S. 134, 141 (2014).

251 *Id.*

252 For example, in *Simon II*, Judge Howell incorporated a litany of factors in his analysis. *Simon II*, 277 F. Supp. 3d 42, 53–55 (D.D.C. 2017). Judge Howell divided his analysis into a two-factor approach—comity and futility. *See id.* The "futility" factor itself contained "[s]everal factors." *Id.* at 54–55. Among the factors Judge Howell considered were: "(1) whether Hungarian law provided sufficiently congruent judicial remedies; (2) the existence of 'procedural obstacles' to those remedies, such that 'the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all,' a high bar borrowed from 'the related context of *forum non conveniens*;' and (3) the 'adequacy of Hungarian courts' in light of recent 'limits on judicial independence.'" *Id.* (internal citations omitted). As a result of his analysis, Judge Howell concluded "the *factors* counseling application of the prudential exhaustion doctrine here outweigh those against." *Id.* at 56 (emphasis added).

253 Hungary's Petition, *supra* note 30, at 32.

254 *See* Burford v. Sun Oil Co., 319 U.S. 315, 327–34 (1943) (explaining that whether abstention in favor of a state court is proper is based upon careful consideration of the federal interests in retaining jurisdiction over the dispute and the competing concern for the independence of state action); Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 728 (1996) (applying *Burford* and stating that the question under *Burford* requires a balancing of "the strong federal interest in having certain classes of cases, and certain federal rights, adjudicated in federal court, against the State's interests in maintaining 'uniformity in the treatment of an "essentially

Judge Katsas overlook the very purpose of the FSIA: to enact a "comprehensive set of legal standards" to resolve all claims of sovereign immunity.[255] The Supreme Court in *NML Capital* explicitly stated the keyword in the FSIA is "comprehensive."[256] This means Congress enacted the FSIA for the very purpose of "abat[ing] the bedlam" caused by the factor-driven, "loosely common-law-based" immunity determinations.[257] Accordingly, it would seem illogical to suggest that, despite Congress's abolishment of immunity decisions based on amorphous factors and loosely based on common law, Congress intended the courts to enjoy another factor-driven, loosely common-law-based means to grant foreign sovereigns a comity-based abstention defense that amounts to a grant of immunity.[258] It logically follows that any newfound proposal seeking to implement a multi-factored balancing test for claims brought within the ambit of the FSIA would be in direct conflict with the FSIA and decades of well-settled Supreme Court case law.[259]

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local problem,'" and retaining local control over 'difficult questions of state law bearing on policy problems of substantial public import.'" (citations omitted)).

255 *NML Capital*, 573 U.S. at 141. In their amicus brief, members of the U.S House of Representatives emphasized that this interpretation of the FSIA is correct: "Congress could not have been clearer under the FSIA, '[a] foreign state *shall not be immune from the jurisdiction* of courts of the United States or of the States in *any case*' in which an enumerated exception applies . . . ." House's Amicus Brief, *supra* note 88, at 15–20 (alteration in original) (emphasis in original).

256 *NML Capital*, 573 U.S. at 141.

257 *Id.*; *see also* House's Amicus Brief, *supra* note 88, at 3–9.

258 Hungary argues that the *NML Capital* court stated that "[a court] may appropriately consider comity interests" in the context of discovery requests. Hungary's Petition, *supra* note 30, at 35 (quoting *NML Capital*, 573 U.S. at 146 n.6). However, matters of discovery are clearly distinct from matters of immunity. Congress enacted the FSIA as a comprehensive means to decide decisions pertaining to foreign sovereign immunity, not discovery decisions in cases that fall within its exceptions. *Cf.* 28 U.S.C. § 1602 (2018); *NML Capital*, 573 U.S. at 141–43. In fact, FSIA contains only one limitation on discovery. *See* 28 U.S.C. § 1605(g)(1) (2018). Pursuant to § 1605(g)(1)(A), federal courts are required to grant stays of discovery upon request of the Attorney General, certifying that discovery at issue "would significantly interfere with a criminal investigation or prosecution, or a national security operation . . . ." *Id.* Perhaps, because the FSIA is generally silent on discovery issues, and because it is not clear "whether the FSIA applies to discovery requests directed at non-parties that may be entitled to immunity," there may be room for comity interests to be considered in the context of discovery. *See* DAVID P. STEWART, THE FOREIGN SOVEREIGN IMMUNITIES ACT: A GUIDE FOR JUDGES 29 (2d ed. 2018), https://www.fjc.gov/sites/default/files/materials/41/FSIA_Guide_2d_ed_2018.pdf [https://perma.cc/93AB-X2CT]. However, the FSIA is comprehensive with respect to sovereign immunity. *NML Capital*, 573 U.S. at 141.

259 Professor Samuel Estreicher of New York University School of Law and Professor Thomas H. Lee of Fordham University School of Law propose that the Supreme Court adopt a four-pronged, "workable" balancing test for courts to apply in cases implicating international comity abstention. Brief of Professors Samuel Estreicher & Thomas H. Lee as Amici Curiae at 20–28, Republic of Hungary v. Simon, No. 18-1447 (U.S. Sept. 11, 2020). Under the professors' proposal,

2. The Fallacy Inherent in Analogizing Comity-Based Abstention in the Foreign Sovereign Immunity Context to Other Comity-Based Abstention Doctrines

Hungary inappropriately calls "comity-based abstention" in the context of the FSIA "a close cousin to other prudential abstention doctrines."[260] However, comity-based abstention in the FSIA is not analogous to other prudential abstention doctrines. The doctrines Hungary refers to pertain to abstention in favor of state courts[261] and tribal courts.[262] While the Supreme Court might have previously held or stated that exhaustion might be appropriate in certain cases,[263] those cases do not implicate a substantive and comprehensive federal statute that dictates precisely which disputes may be litigated in federal courts.[264] Accordingly, since Congress enacted a *comprehensive* set of criteria to determine whether federal courts are permitted to hear cases against foreign sovereigns,[265] the courts—even the Supreme Court—may not create new criteria upon which to prevent the federal courts from exercising jurisdiction in claims against foreign sovereigns. Finally, and crucially, any suggestion that these judicially created exhaustion doctrines apply here overlooks the fact that those doctrines apply to circumstances where there is no federal statute. Here, Hungary

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this test would apply even in cases implicating the FSIA. *See generally id.* They propose: (1) "a court must afford deference to the well-considered views of the Executive branch"; (2) "the court must consider the general practice of other nations"; (3) "the court must respect U.S. statutes or treaties"; and (4) "the court must assess whether parallel proceedings have been commenced or concluded in alternative foreign forums . . . ." *Id.* at 21. Although this test may be more "workable" than those previously used in lower courts, such as the Ninth Circuit's eight-factor test in *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 614–15 (9th Cir. 1976), it remains a multi-factored, loosely common-law-based test. *See also* Samuel Estreicher & Thomas H. Lee, *In Defense of International Comity*, 93 S. CAL. L. REV. 169 (2020). For this reason, there is no room for it in the FSIA's expropriation exception.

260 Hungary's Petition, *supra* note 30, at 32.

261 *See* Burford v. Sun Oil Co., 319 U.S. 315, 331–34 (1943).

262 *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 n.8 (1987).

263 *Burford*, 319 U.S. at 317–18 ("Although a federal equity court does have jurisdiction of a particular proceeding, it may in its sound discretion . . . refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest . . . ."); City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 174 (1997) ("[T]here may be situations in which a district court should abstain from reviewing local administrative determinations even if the jurisdictional prerequisites are otherwise satisfied."); *Iowa Mut. Ins. Co.*, 480 U.S. at 16 n.8 ("[T]he [tribal] exhaustion rule . . . is required as a matter of comity . . . .").

264 *Compare Burford*, 319 U.S. at 334 *and Iowa Mut. Ins. Co.*, 480 U.S. at 16 n.8 *with* 28 U.S.C. § 1605(a)(3) (2018) *and NML Capital*, 573 U.S. at 141–42.

265 *See* 28 U.S.C. § 1605(a)(3); *NML Capital*, 573 U.S. at 141.

stands in direct opposition to a congressional determination, the FSIA.[266]

Conflating these fundamentally different abstention doctrines creates two problems.[267] First, conflating comity-based abstention with other comity doctrines "may undermine state and congressional interests that these other comity doctrines are [attempting] to protect."[268] Second, this conflation creates confusion because "the transplanted factors often do not map logically onto the question of abstention."[269] This "muddling decreases the transparency of judicial reasoning" and "increase[s] error rates."[270] What Hungary forgets is that "[c]omity is not a single doctrine, but [rather] a [set of] principle[s] that inflects a variety of doctrines."[271] Each doctrine requires its own analysis, which "involve[s] different starting presumptions" and results in differing conclusions.[272]

3. Comity-Based Abstention Amounts to Foreign Sovereign Immunity

Immunity, in the foreign sovereign sense, constitutes an exemption from litigation in U.S. courts.[273] Hungary mistakenly argues that "prudential abstention doctrines," such as comity-based abstention, are not de facto forms of sovereign immunity from jurisdiction.[274] Rather, prudential abstention recognizes that in some instances, even if the U.S. courts do have jurisdiction, deference should be shown to another sovereign with a greater interest in the controversy,[275] and would require plaintiffs to exhaust remedies in such nation rather than suing in the United States.[276] According to Germany and Judge Katsas, foreign sovereign immunity is distinct from exhaustion because foreign sovereign immunity eliminates subject

266 *See* 28 U.S.C. § 1605(a)(3).

267 Maggie Gardner, *Abstention at the Border*, 105 VA. L. REV. 63, 93 (2019).

268 *Id.*

269 *Id.*

270 *Id.*

271 *Id.*

272 *Id.*

273 *Immunity*, BLACK'S LAW DICTIONARY (11th ed. 2019).

274 Hungary's Petition, *supra* note 30, at 31.

275 *Id.*

276 *See Fischer I*, 777 F.3d 847, 854–55 (7th Cir. 2015).

matter jurisdiction, while abstention and exhaustion are non-jurisdictional defenses.[277]

However, here, a prudential-based abstention or exhaustion requirement amounts to a grant of sovereign immunity.[278] A plaintiff who is forced to exhaust remedies in a foreign nation prior to commencing suit in the United States will face the obstacle of res judicata.[279] Germany, Hungary, and Judge Katsas overlook that the Fourth Restatement makes this clear: a final, conclusive, and enforceable judgment rendered by a foreign court is entitled to recognition in U.S. courts and is afforded the same preclusive effect as judgments rendered by other domestic courts.[280] As a result, a plaintiff who seeks to exhaust remedies in a foreign nation will likely be barred from relitigating in a U.S. court.[281] In this roundabout way the "prudential abstention doctrine" that Hungary invokes,[282] and the "non-jurisdictional defense" of abstention and exhaustion that Germany raises[283] amount to foreign sovereign immunity.

B. *Prudential Exhaustion and Comity-Based Abstention Doctrines Are Based on a Misunderstanding of* Interhandel *and the Third Restatement*

The Seventh Circuit's reliance on *Interhandel* and the Third Restatement to support its prudential exhaustion requirement lacks

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277 Germany's Petition, *supra* note 30, at 36; Brief for Petitioners at 40–55, Fed. Republic of Germany v. Philipp, No. 19-351 (U.S. Sept. 4, 2020) [hereinafter Germany's Brief]; *see also Philipp II*, 925 F.3d 1349, 1356 (D.C. Cir. 2019) (Katsas, J., dissenting from denial of petition for rehearing en banc) ("[F]oreign sovereign *immunity*—which eliminates subject-matter *jurisdiction*—is distinct from non-jurisdictional defenses such as exhaustion and abstention.").

278 *See Simon II*, 911 F.3d 1172, 1180 (D.C. Cir. 2018) ("[E]nforcing what Hungary calls 'prudential exhaustion' would in actuality amount to a judicial grant of immunity from jurisdiction in United States courts.").

279 *See* Professor Dodge's Amicus Brief, *supra* note 141, at 14–15 ("When applied to U.S. domestic courts, . . . a local remedies rule effectively denies an injured party its choice of forum because the foreign court's decision on the merits will bind U.S. courts as *res judicata*."); *see also Simon II*, 911 F.3d at 1180 (admitting that "there is a substantial risk that [plaintiffs'] exhaustion of any Hungarian remedy could preclude them by operation of *res judicata* from ever bringing their claims in the United States.").

280 RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. §§ 481, 487 (AM. L. INST. 2019) ("[A] final, conclusive, and enforceable judgment of a court of a foreign state . . . is entitled to recognition by courts in the United States [and] is given the same preclusive effect . . . as the judgment of a sister State entitled to full faith and credit.").

281 *See id.*

282 Hungary's Petition, *supra* note 30, at 31.

283 Germany's Petition, *supra* note 30, at 36; Germany's Brief, *supra* note 277, at 40–55.

muster.[284] In *Abelesz*, the Seventh Circuit correctly interpreted *Interhandel* as requiring exhaustion prior to instituting international proceedings,[285] and section 713, comment f as applying to state-versus-state claims.[286] However, *Abelesz* incorrectly relied upon these authorities to hold that *private* plaintiffs are required to exhaust remedies prior to initiating *domestic* proceedings.[287] *Fischer I* then inappropriately invoked section 713, comment f[288] for the proposition "that international law typically requires exhaustion of domestic remedies before any . . . takings claim can be heard *in a foreign court*."[289]

The Seventh Circuit erroneously invoked both *Interhandel* and section 713, comment f[290] for at least three reasons. First, the *Interhandel* proceedings were brought in an international court, not a domestic court, giving it no binding authority.[291] Second, though there may be compelling reasons to find *Interhandel* persuasive,[292] the FSIA renders the *Interhandel* decision moot with respect to cases brought under the FSIA as *Interhandel* predates the FSIA.[293] Third, the Seventh Circuit's misguided reliance on section 713, comment f overlooks that the section addresses claims by one state against another, not claims by a private individual against another state.[294] The Fourth Restatement explicitly stated the expropriation exception does not contain an exhaustion requirement[295] and chastised the Seventh Circuit for

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284 *See* Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 679–81 (7th Cir. 2012); *Fischer I*, 777 F.3d 847, 855 (7th Cir. 2015).

285 *See Abelesz*, 692 F.3d at 679.

286 *See id.* at 682–83.

287 *See id.* at 684; *see also* Professor Dodge's Amicus Brief, *supra* note 141, at 10–11 (arguing that *Abelesz* misinterpreted *Interhandel* and section 713 comment f).

288 *See Fischer I*, 777 F.3d at 855.

289 *See id.* at 858 (emphasis added).

290 *See Abelesz*, 692 F.3d at 681 (invoking *Interhandel* and the Third Restatement); *Fischer I*, 777 F.3d at 855 (invoking the Third Restatement).

291 *See supra* note 151 and accompanying text.

292 The Seventh Circuit found *Interhandel* persuasive for two reasons. *See Abelesz*, 692 F.3d at 680–81. First, the FSIA lays out sovereign and comity concerns, and second, because the United States had requested the Interhandel court to refrain from adjudicating a claim due to the plaintiffs' failure to exhaust domestically available remedies, it seemed logical and fair to require the United States to reciprocate, and abstain on the basis of comity. *Id.*

293 *Compare* Interhandel (Switz. v. United States), Judgment, 1959 I.C.J. 6 (March 21) *with* 28 U.S.C. § 1602 (2018).

294 *See* RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 713 cmt. f (AM. L. INST. 1987) ("[O]rdinarily a *state* is not required to consider a claim *by another state* for an injury to its national until that person has exhausted domestic remedies . . . ."); Agudas Chasidei Chabad v. Russian Fed'n., 528 F.3d 934, 949 (D.C. Cir. 2008).

295 RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 455, reporter's note 11 (AM. L. INST. 2019).

creating[296] an additional substantive requirement for jurisdiction unsupported by the FSIA or its legislative history.[297]

C. *Contrary to Judge Katsas's Dissent, Res Judicata Would Likely Bar Plaintiffs Who Exhaust Foreign Domestic Remedies from Relitigating Their Claims in U.S. Courts*

In his misguided *Philipp II* dissent, Judge Katsas was unconvinced that plaintiffs who exhaust remedies in a foreign nation for their domestic torts would be later barred from ever bringing their claims in the United States.[298] In support, Judge Katsas erroneously pointed to *England v. Louisiana State Board of Medical Examiners*[299] and *Iowa Mutual Insurance Co. v. LaPlante*.[300]

In the context of international proceedings, where international law requires plaintiffs to first exhaust domestic remedies prior to litigating in an international forum, res judicata does not bind a domestic ruling upon an international tribunal.[301] However, in the context of proceedings in U.S. courts, res judicata would likely bind a foreign court's decision on the merits upon a U.S. district court.[302]

In *Hilton v. Guyot*, the Supreme Court explained that "*the merits of the case should not*, in an action brought in this country upon the judgment, *be tried afresh*" provided that "there has been opportunity

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296 *Abelesz*, 692 F.3d at 679; Fischer v. Magyar Államvasutak Zrt., 777 F.3d 847, 852 (7th Cir. 2015).

297 RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 455, reporter's note 11 (AM. L. INST. 2019).

298 Phillip v. Fed. Republic of Germany, 925 F.3d 1349, 1357 (D.C. Cir. 2019) (Katsas, J., dissenting).

299 England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 413–19 (1964) (holding that a federal court that had abstained from exercising jurisdiction in favor of a state court is not precluded from relitigating the issue under res judicata).

300 Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987) ("Although petitioner must exhaust available tribal remedies before instituting suit in federal court, the Blackfeet Tribal Courts' determination of tribal jurisdiction is ultimately subject to review."). *But see id.* at 21 (Stevens, J., dissenting) (pointing out that the majority's decision grants tribal courts greater deference on the merits than state courts and "[i]t is not unusual for a state court and a federal court to have concurrent jurisdiction over the same dispute").

301 William S. Dodge, *National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven of NAFTA*, 23 HASTINGS INT'L & COMPAR. L. REV. 357, 365–70 (2000) (explaining that res judicata does not bind domestic court decisions upon an international tribunal).

302 RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. §§ 481, 487 (AM. L. INST. 2019) ("[A] final, conclusive, and enforceable judgment of a court of a foreign state . . . is entitled to recognition by courts in the United States [and] is given the same preclusive effect . . . as the judgment of a sister State entitled to full faith and credit.").

for a full and fair trial abroad before a court of competent jurisdiction . . . after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial" non-prejudicial administration of justice.[303] More recently, the Supreme Court explained that generally, in an action subject to parallel jurisdiction, both courts are permitted to entertain proceedings at their own pace and without reference to the other court's proceedings.[304] However, when "a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of res adjudicata."[305] Moreover, the Fourth Restatement undeniably asserts that a decision on the merits rendered by a court of a foreign state is subject to the principles of res judicata.[306]

In practice, if plaintiffs were to exhaust remedies and a foreign court rendered a decision on the merits, the Uniform Foreign-Country Money Judgments Recognition Act would bar the plaintiffs from relitigating their claims in the D.C. Circuit.[307] The District of Columbia adopted the Uniform Foreign-Country Money Judgments Recognition Act in 2012.[308] Under this Act, foreign judgments are entitled to recognition and full faith and credit.[309] Although there are grounds for

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303 Hilton v. Guyot, 159 U.S. 113, 202–03 (1895) (emphasis added); *see also* de Csepel v. Republic of Hungary, 714 F.3d 591, 606 (D.C. Cir. 2013); Professor Dodge's Amicus Brief, *supra* note 141, at 15.

304 Vendo Co. v. Lektro Vend Corp., 433 U.S. 623, 642 (1977) (plurality opinion) (citing Kline v. Burke Constr. Co., 260 U.S. 226 (1922); *see also* Laker Airways Ltd. v. Sabema, Belgian World Airlines, 731 F.2d 909, 926–27 (D.C. Cir. 1984); Professor Dodge's Amicus Brief, *supra* note 141, at 16–17.

305 *Vendo Co.*, 433 U.S. at 642 (citing *Kline*, 260 U.S. at 226); *see also Laker Airways, Ltd.*, 731 F.2d at 926–27 (explaining that even in the context of parallel proceedings, the presumption is that both cases "should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other"); N.J. Educ. Ass'n v. Burke, 579 F.2d 764, 774 (3d Cir. 1978) (considering *England* and Justice Rehnquist's opinion in *Vendo* and holding that "where a federal suit is commenced before a final decision by [a] state court, the proper rule is that . . . a state court judgment forecloses a . . . litigant from raising grievances in federal court" when the state court has rendered a decision); RESTATEMENT (SECOND) OF JUDGMENTS § 86 cmt. f (AM. LAW INST. 1982) ("On the problem posed by the interaction of the requirement of exhaustion of state remedies and the rule of res judicata, see [*N.J. Educ. Ass'n*].");
Professor Dodge's Amicus Brief, *supra* note 141, at 16–17.

306 RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. §§ 481, 487 (AM. L. INST. 2019) ("[A] final, conclusive, and enforceable judgment of a court of a foreign state . . . is entitled to recognition by . . . United States [courts and has] . . . the same preclusive effect . . . as the judgment of a sister State entitled to full faith and credit.").

307 *See* UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 7 (2005); D.C. CODE ANN. § 15-367(1) (West 2020).

308 D.C. CODE ANN. § 15-367(1) (West 2020).

309 *Id.*

non-recognition, they are narrow and they do not permit review of the merits.[310] Accordingly, a plaintiff who attempts to exhaust foreign domestic remedies[311] and receives a determination on the merits by a foreign domestic court will likely be barred from raising the same issues in a U.S. district court under the principles of res judicata.[312]

Judge Katsas not only overlooks the current state of the law, but he also erroneously assumes that the Supreme Court will likely create an exception to res judicata, as it did in *England v. Louisiana State Board*

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310 *Cf.* D.C. CODE ANN. § 15-364(c) (West 2020) (outlining eight specific and narrow grounds for non-recognition of a foreign country's judgment).

311 To better understand what is likely to occur in Germany should the Philipp plaintiffs be required to exhaust German-domestic remedies, one can look to recent events in the Netherlands with regard to Wassily Kandinsky's 1909 painting titled "Painting with Houses." *See* Nina Siegal, *Dutch Court Rules Against Jewish Heirs on Claim for Kandinsky Work*, N.Y. TIMES (Dec. 16, 2020), https://www.nytimes.com/2020/12/16/arts/design/kandinsky-stedelijk-museum-restitution.html [https://perma.cc/7MF2-49EZ]. In 1923, Emanuel Lewenstein, an Amsterdam Jew, purchased the Kandinsky for five hundred guilders. *Id.* Five months after the Nazis invaded the Netherlands, Robert Lewenstein, the prewar owner of the Kandinsky, fled to France and the painting was sold at auction at the Frederik Muller auction house in Amsterdam for 160 guilders—that is about thirty percent of the price the elder Lewenstein had paid for it seventeen years earlier. *Id.* It is not clear who sold the painting, but the Stedelijk Museum, the buyer of the painting, acknowledged that it is "possible that [the sale] had been . . . involuntary." *Id.* In evaluating the Lewenstein heirs' claim, the Dutch Restitutions Commission rejected their claim and used a "balance of interests" test to "weigh the value of the work to the museum against that of the heirs." *Id.* Following international criticism of the Netherlands's treatment of claimants for Nazi-looted art, the Dutch government appointed an evaluation panel. Catherine Hickley, *Dutch Policy on Nazi-Looted Art Should Be More Humane and Transparent, Panel Finds*, ART NEWSPAPER (Dec. 7, 2020, 12:10 PM), https://www.theartnewspaper.com/news/dutch-nazi-looted-art-policy-should-be-more-humane-and-transparent-panel-finds [https://perma.cc/7ZWR-BBC8]. As a result of the panel's findings, the chairman of the Dutch Restitutions Committee resigned, and the panel recommended that the Committee scrap the "balance of interests" policy and create a new policy that is "oriented more towards humanity, transparency, and goodwill." *Id.* Despite that the panel's recommendation, the Amsterdam District Court rejected the Lewenstein heirs' claim because "[i]t found that the advice of the commission 'cannot be annulled' because the court found no 'serious defects' in its reasoning." Siegal, *supra*. Lewenstein's heirs also argued, but to no avail, "that the Restitutions Committee was biased because four members had links to the Stedelijk [Museum]." Catherine Hickley, *Amsterdam Court Rejects Heirs' Claim for Kandinsky Painting in the Stedelijk Museum*, ART NEWSPAPER (Dec. 16, 2020, 6:22 PM), https://www.theartnewspaper.com/news/amsterdam-court-rejects-heirs-claim-for-kandinsky-painting-sold-in-nazi-occupied-netherlands [https://perma.cc/68MM-9TK2]. Although Germany and the Netherlands are two different countries with different judicial systems, the Kandinsky case demonstrates how difficult it is for a claimant to successfully obtain justice via foreign domestic remedies.

312 *See* Professor Dodge's Amicus Brief, *supra* note 141, at 15–17; *see also* Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675, 715–16 (2003).

of Medical Examiners[313] and *Iowa Mutual Insurance Co. v. LaPlante*.[314] The stark difference between exhausting remedies in a foreign nation's tribunal and exhausting remedies in a domestic state or tribal court is that in the former, subsequent review by a federal court risks offending a foreign nation and upsetting foreign policy.[315] Accordingly, it is unlikely that the Supreme Court would create an exception to res judicata in cases where plaintiffs exhaust foreign domestic remedies.

III. Exhausting Victims by "Kicking the Can Down the Road."

In *Simon* and *Philipp*, the Supreme Court had an opportunity to decide whether an individual suing a foreign nation under the expropriation exception to the FSIA is required to prudentially exhaust remedies in the foreign nation prior to litigating in the United States.[316] Instead of resolving this issue—which has led to confusion among courts in the Seventh and D.C. circuits[317]—the Supreme Court punted.[318] Chief Justice Roberts penned a narrow and unanimous opinion in *Philipp* with respect to whether § 1605(a)(3)'s phrase "rights in property taken in violation of international law" incorporates domestic takings.[319] The Court then vacated and remanded *Philipp* and

313 England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 413–19 (1964) (holding that a federal court that had abstained from exercising jurisdiction in favor of a state court is not precluded from relitigating the issue under res judicata).

314 Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987) ("Although petitioner must exhaust available tribal remedies before instituting suit in federal court, the Blackfeet Tribal Courts' determination of tribal jurisdiction is ultimately subject to review."). *But see id.* at 21 (Stevens, J., dissenting) (pointing out that the majority's decision grants tribal courts greater deference on the merits than state courts and "[i]t is not unusual for a state court and a federal court to have concurrent jurisdiction over the same dispute").

315 *See* Curran, *supra* note 36, at 52 (explaining that an exhaustion requirement "may produce inconsistent judgments and the possible unpleasantness of a U[.]S[.] court's offending the contemporaneous foreign state whose judiciary has dismissed the case or ruled in favor of its state"); *cf.* Alford, *supra* note 312, at 719–20 ("The primary reason for giving effect to the rulings of foreign tribunals is that such recognition factors international cooperation and encourages reciprocity.").

316 *See generally* Fed. Republic of Germany v. Philipp, 141 S. Ct. 703 (2020); Republic of Hungary v. Simon, 141 S. Ct. 691 (2021); *see also* Hungary's Petition, *supra* note 30; Germany's Petition, *supra* note 30.

317 *See* discussion *supra* Subsection I.D.2.; *see also* William S. Dodge, *The Meaning of the Supreme Court's Ruling in* Germany v. Philipp, JUST SEC. (Feb. 8, 2021), https://www.justsecurity.org/74598/the-meaning-of-the-supreme-courts-ruling-in-germany-v-philipp [https://perma.cc/C2JG-T6SM].

318 *See generally Philipp*, 141 S. Ct. 703; *Simon*, 141 S. Ct. 691.

319 *See generally Philipp*, 141 S. Ct. 703.

Simon for proceedings consistent with its opinion without addressing the comity issue.[320]

On remand, the district court will presumably evaluate whether the plaintiffs in *Simon* and *Philipp* were respectively Hungarian and German citizens when their property was taken from them.[321] The district court will probably find that some of *Simon*'s named plaintiffs were not Hungarian citizens before, during, and after World War II,[322] meaning their claims are unlikely to be barred under the "domestic takings rule" the Supreme Court articulated in *Philipp*.[323] Accordingly, the comity issue remains, and, at least, *Simon* will inevitably to make its way back up to the Supreme Court.[324]

The fallout of the Roberts Court's reluctance to "face the music,"[325] is that after more than ten years of litigation (with Hungary yet to file an answer), *Simon*'s plaintiffs are bound to face years of further litigation, and two more trips to the Supreme Court.[326] With only a handful of Holocaust victims still alive,[327] it is becoming exceedingly unlikely that the *Simon* plaintiffs will live to see justice in the United States courts for the atrocities committed against them.[328]

Nevertheless, when the Supreme Court finally does "face the music," the Justices'—both liberal and conservative—line of questioning during *Simon*'s oral argument instills optimism that the Court will not impose an exhaustion requirement upon plaintiffs

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320 *See generally id.*; *Simon*, 141 S. Ct. 691.

321 *See* discussion *supra* notes 42 and 98 and accompanying text.

322 *See* discussion *supra* notes 42 and 98 and accompanying text.

323 *Philipp*, 141 S. Ct. 703.

324 *See* discussion *supra* notes 42 and 98 and accompanying text.

325 See Jonathan H. Adler, *This is the Real John Roberts*, N.Y. TIMES (July 7, 2020), https://www.nytimes.com/2020/07/07/opinion/john-roberts-supreme-court.html [https://perma.cc/UL6J-R325] for a critique of Chief Justice Roberts's voting pattern that has resulted in a litany of narrow decisions.

326 The *Simon* plaintiffs first filed their complaint on October 20, 2010. Complaint, Simon v. Republic of Hungary, 37 F. Supp. 3d 381 (D.D.C. 2014) (No. 10 Civ. 01770).

327 *See* Olivia B. Waxman, *Many Holocaust Survivors Are Struggling Amid the Pandemic. Here's How Virtual Gatherings Are Helping*, TIME (June 4, 2020, 11:02 AM), https://time.com/5842484/holocaust-survivors-coronavirus [https://perma.cc/GZZ6-FBJV].

328 As for the *Philipp* plaintiffs, the Court effectively terminated their suit by adopting the Solicitor General's suggestion that a nation does not violate international law by committing a taking of its own national's property, even when the taking was part of a genocide. *See* Richard H. Weisberg, *From the Frying Pan to the Fire: SCOTUS' FSIA Inaction as Further Permitting Executive Branch Intervention in "Takings Exception" Cases and its Consequences in Forcing Holocaust Plaintiffs to Return to Europe*, U. PITT. L. REV. (forthcoming). The *Philipp* plaintiffs will not only be forced to spend years continuing to litigate their claims but will likely be forced to go "back to the site of the Holocaust wrongdoing" to obtain some sort of justice for the atrocities committed against them. *See id.* at 10.

bringing claims under the expropriation exception.[329] During *Simon*'s oral argument, the justices expressed doubt as to whether the FSIA could accommodate a comity-based abstention or exhaustion doctrine.[330] The justices questioned: (1) the historical basis of such a doctrine;[331] (2) whether such a doctrine would recreate pre-FSIA factor-driven immunity determinations and, accordingly, the pre-FISA "bedlam" the FSIA was designed to eradicate;[332] (3) whether, if the Court believed that comity did not exist prior to the FSIA's 1976 enactment, did the Court have the authority to create such a doctrine;[333] and (4) whether it was prudent to have the nearly seven hundred U.S. district court judges assess, under a multifactor test, whether a particular case implicates foreign relations concerns.[334]

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329 *See infra* notes 331–334.

330 *See infra* notes 331–334.

331 *Simon*'s Oral Argument, *supra* note 32, at 16, 40 (Kagan, J.).

332 *Id.* at 8 ("But wouldn't that . . . get us back to where we were pre-FSIA and . . . having these [FSIA determinations] decided on a case-by-case basis?"); *id.* at 31 ("[D]oesn't it seem that your suggestion . . . takes us right back to the case-by-case approach that FSIA was supposed to remedy?"); *id.* at 17–18 (Kagan, J.) ("You said . . . [comity-based abstention would] not be going back to the old immunity doctrine, the one that was supposed to have been displaced by the FSIA, because that was executive-driven. But I would think the fact that it was executive-driven would cut the other way. At least the executive knew something about foreign affairs and were politically accountable. And . . . it seems like much of the unhappiness about that doctrine had to do with the fact that it was kind of a kitchen sink approach and nobody could predict it. And isn't that what you're asking us to replicate?"); *id.* at 19 (Gorsuch, J.) ("[P]rior to the FSIA, we . . . did have what this Court has described as bedlam in a multifactor balancing test on the convenience of the parties as one thing but also international friction and . . . a sense about foreign . . . dignity and all that, which, as Justice Kagan pointed out, was channeled through the State Department. And, here, you're asking us to do it directly. And I . . . guess I'm still struggling with what's the difference between the regime you'd have us create and the regime that Congress wished to displace because it was producing 'bedlam'?"); *id.* at 36 (Sotomayor, J.) (questioning counsel representing the United States: "I understood that the FSIA was passed to remove the pressure on the Department of State to decide whether or not . . . immunity should be granted or not. I, like my . . . predecessor colleagues' questions indicate, don't know how that pressure would stop in this situation . . . .").

333 *Id.* at 7 (Thomas, J.).

334 *Id.* at 34–35 (Alito, J.) ("If [comity-based abstention] is all about the effect on foreign relations, if I were a district judge and I received a motion asking me to abstain on comity grounds, my first question would be, what does the government of the United States think about the foreign relations impact of this . . . lawsuit? So won't you be in the position of having to answer that question every time this doctrine is asserted? . . . I mean, there are almost 700 district judges. You want every one of them to assess whether a particular lawsuit raises foreign relations concerns?").

CONCLUSION

The Supreme Court will eventually have to decide whether a plaintiff suing a foreign nation under the expropriation exception to the FSIA is required to prudentially exhaust remedies in the foreign nation prior to litigating in the United States.[335] It is this Note's position that such a plaintiff should not be required to first exhaust foreign domestic remedies.[336] Should plaintiffs inevitably be required to exhaust foreign domestic remedies prior to attempting to litigate further in the United States, the consequences of such a requirement will leave a significant impact upon the remaining survivors of the horrors inflicted by the Nazis during World War II and their victims' heirs.[337] Indeed, an exhaustion requirement would likely extend to all survivors of genocides from whom property has been expropriated, including those of the Armenian,[338] Ugandan,[339] and Ovaherero and Nama[340] genocides—the latter of which have sought to sue foreign sovereigns in U.S. courts to recover property expropriated from them under the FSIA's expropriation exception.[341] When the Supreme Court ultimately decides this issue, the Court should not require the plaintiffs to exhaust foreign domestic remedies.[342]

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335 *See supra* Section I.E; *see also* Republic of Hungary v. Simon, No. 18-1447, 2020 WL 3578676, at *1 (U.S. July 2, 2020); Fed. Republic of Germany v. Philipp, No. 19-351, 2020 WL 3578677, at *1 (U.S. July 2, 2020).

336 *See supra* Part II.

337 *See supra* notes 2–7, 12, 16–17, 20–27 and accompanying text.

338 *See supra* note 36 and accompanying text.

339 *See supra* note 37 and accompanying text.

340 *See supra* note 38 and accompanying text.

341 *See, e.g.*, Rukoro v. Fed. Republic of Germany, 363 F. Supp. 3d 436 (S.D.N.Y. 2019), *aff'd*, 976 F.3d 218 (2d Cir. 2020).

342 *See Simon II*, 911 F.3d 1172, 1180–81 (D.C. Cir. 2018) (holding that plaintiffs litigating under the FSIA's expropriation exception are not required to exhaust foreign domestic remedies); *Philipp I*, 894 F.3d 406, 414–16 (D.C. Cir. 2018) (same).