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Winter 2021

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### Recommended Citation

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*, 83 U. Pitt. L. Rev. 323 (2021).

<https://larc.cardozo.yu.edu/faculty-articles/551>

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# 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

Richard H. Weisberg\*

## ABSTRACT

The Supreme Court of the United States (“SCOTUS”) very recently punted and left wide a circuit split on a key question under the Foreign Sovereign Immunities Act (“FSIA”): Do plaintiff Holocaust victims need to return to the country that wronged them in order to proceed in a United States federal court that otherwise had jurisdiction over their claims? While sending down unresolved a conflict between the D.C. and Seventh Circuits, in a companion case also involving Holocaust victims, SCOTUS essentially ended an action against Germany by taking the strong suggestion of the Executive Branch through its Solicitor General that a nation’s takings of its own nationals’ property did not amount to a violation of international law, even when the taking involved the degraded and diminished Jews of the Third Reich Period. This Article challenges the continuing, if not rising, influence of Executive Branch voices against Holocaust-related lawsuits in Article III courts by briefly reviewing the FSIA’s 1976 enactment, where Congress textually and intentionally vested full authority in judges, *not* Executive Branch officials, to determine such cases. I then review the Seventh Circuit’s treatment of “exhaustion/comity”—the remedy supported by the Executive—and another case also litigated in the Seventh Circuit (*Scalin*), where the State Department explicitly indicated through a Letter of Interest to the district court that Holocaust victims first be sent to the wrongdoing country of origin (France) before being allowed to

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proceed. This Article points to four perverse ironies in the resurgence of Executive Branch influence over judges in the FSIA cases. The first irony is that the entire motivation behind enacting the FSIA was to codify principles about sovereign immunity so as to elevate and make definitive the decisions of judges. Second, that enhanced Article III role, in the course of litigation through the years, had earlier been used with good intention and purposes by the Executive Branch, which then used its good offices to help negotiate results favorable to plaintiffs—not to end lawsuits brought by, among other genocide victims, U.S. citizen Holocaust victims. Third, U.S. courts do not always fathom the depths of difficulty such victims will encounter—both personally and legally—when they are sent from the frying pan of FSIA litigation to the fire of European jurisdictions supposedly capable of resolving their claims. And finally, in *Scalin*, plaintiffs would be sent back to seek resolution by a French agency whose powers of restitution emerged from previously successful victim-plaintiff litigation in U.S. courts (in *Bodner*), but which has not historically taken jurisdiction over railroad-related claims.

## I. A RECENT SCOTUS NON-DECISION

Several pending cases in the Seventh Circuit were apparently to be resolved, at least as to the key FSIA issues there, when SCOTUS granted certiorari in a D.C. Circuit dispute, *Simon v. Republic of Hungary*.<sup>1</sup> The pending, collaterally impacted cases, like *Simon*, arose under the Foreign Sovereign Immunities Act of 1976.<sup>2</sup> They are *Abelesz v. Magyar Nemzeti Bank a/k/a Fischer v. Allamvasutak Zrt*,<sup>3</sup> the Seventh Circuit case with significant holdings in 2012 and 2013, and *Scalin v. SNCF*,<sup>4</sup> a 2018 decision by a Chicago federal judge which was ultimately affirmed by the Seventh Circuit.<sup>5</sup> The FSIA's personal jurisdiction sections afford victims of property theft, say during the Holocaust in Europe, a chance to proceed against a sovereign or its entities by pleading and proving—a difficult step in earlier such cases<sup>6</sup>—an exception under the statute to that immunity.<sup>7</sup> The expropriation exception to sovereign immunity provides that “[a] foreign state shall not be immune from the jurisdiction [of U.S. courts where] rights in property taken in violation of international law are in issue. . . .”<sup>8</sup>

SCOTUS had certified two questions for review but only resolved one. Left hanging was the *Simon* issue, as the Court surprisingly left open a circuit split on the statutory exception, which I would phrase this way: “If plaintiff victims of Holocaust wrongdoing have otherwise successfully pleaded and proved the FSIA takings exception, should a district court nonetheless require them to go to the country of origin to exhaust a remedy there, as a matter of ‘international comity?’” As to this “exhaustion/comity” requirement—nowhere to be found in the text of the FSIA—

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<sup>1</sup> *Simon v. Republic of Hungary*, 911 F.3d 1172 (D.C. Cir. 2018), *vacated and remanded*, 141 S. Ct. 691 (2021).

<sup>2</sup> 28 U.S.C. §§ 1602–11.

<sup>3</sup> *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012), *aff'd sub nom. Fischer v. Allamvasutak Zrt.*, 777 F.3d 847 (7th Cir. 2015).

<sup>4</sup> *Scalin v. Société Nationale Des Chemins De Fer Français*, No. 15-cv-03362, 2018 WL 1469015, at \*1 (N.D. Ill. Mar. 26, 2018), *aff'd sub nom. Scalin v. Societe Nationale SNCF SA*, 8 F.4th 509 (2021)).

<sup>5</sup> *Scalin v. Société Nationale SNCF SA*, 8 F.4th 509 (7th Cir. 2021). Judge Easterbrook's affirmation was on grounds unrelated to this Article's arguments.

<sup>6</sup> *See, e.g., Freund v. Republic of France*, 592 F. Supp. 2d 540 (S.D.N.Y. 2008), *aff'd sub nom. Freund v. Société Nationale des Chemins de Fer Français*, 391 F. App'x 939 (2d Cir. 2010) (suit against the French government; the SNCF, a state-owned railroad; and a state-owned bank).

<sup>7</sup> *Abelesz*, 692 F.3d at 671.

<sup>8</sup> 28 U.S.C. § 1605(a)(3).

the circuit split divides the Seventh Circuit (in *Abelesz*, requiring exhaustion<sup>9</sup>) from the D.C. Circuit (in *Simon*<sup>10</sup>), finding that exhaustion of remedies is not mandated in cases involving genocidal takings.<sup>11</sup> Both *Simon* and *MAV* involve suits by victims of the Hungarian National Railroad for property theft in connection with deporting them and/or their families to Auschwitz/Birkenau in 1944 on those despicable Hungarian cattle cars one sees in all documentary accounts of the deaths of over half a million Hungarian Jews in just that year.<sup>12</sup>

A. *Brief Backstories to Recent Seventh Circuit Cases Affected by SCOTUS' Non-Decision in Simon*

1. The Seventh Circuit Plaintiffs in *Abelesz/Fischer*

In the suit, which I have helped litigate for victims for about a dozen years, plaintiff Holocaust survivors or their heirs took on the difficult task of suing Hungary, both its National Bank (“MAG”) and its railroad (“MAV”). Only the case against the Hungarian railroad was (collaterally) involved in the SCOTUS non-resolution. Some of our clients, then children, were pushed into the trains, had their own and their family’s property stolen en route, and lost their families to the gas chambers but survived to tell the tale to U.S. judges. In 2012, Judge Hamilton together with a three-judge panel, voted unanimously that jurisdiction under the expropriation exception had been pleaded and proven and that the case could continue; a major victory for plaintiffs and the first of its kind against a government-owned railroad for Holocaust deportations.<sup>13</sup> The decision found a violation of international law where, as there, a takings took place in the context of a genocidal plan directed at the victims of the theft, irrespective of the nationality of those victims at the time of the theft.<sup>14</sup> (Note that the latter part of the holding has been challenged

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<sup>9</sup> *Abelesz*, 692 F.3d at 697.

<sup>10</sup> *Simon v. Republic of Hungary*, 911 F.3d 1174 (D.C. Cir. 2018).

<sup>11</sup> *Id.*

<sup>12</sup> *Simon v. Republic of Hungary*, 812 F.3d 127, 132–33 (D.C. Cir. 2016).

<sup>13</sup> Compare *Abelesz*, 692 F.3d 661 (advancing the plaintiff’s case as having successfully pleaded and proven the exception), with *Freund v. Société Nationale des Chemins de Fer Francais*, 391 F. App’x 939 (2d Cir. 2010) (denying jurisdiction under the exception).

<sup>14</sup> *Abelesz*, 692 F.3d at 675. *Abelesz* in this sense became a variation on an earlier precedent, *Cassirer v. Kingdom of Spain*, which found that Jews in Hitler’s Germany were only “nominally” German citizens at the time of the expropriation. *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1023 (9th Cir. 2010); see also, e.g., Vivian Curran, *The Foreign Sovereign Immunities Act’s Evolving Genocide Exception*, 23

by the SCOTUS resolution of *Philipp*,<sup>15</sup> but it is unclear that all or even most of the *Abelesz* plaintiffs—as opposed to *Phillip*—were indeed “nationals” much less “citizens” of Hungary during 1944.<sup>16</sup> In a surprising tail-wags-dog coda, Judge Hamilton and his panel unanimously opened the question of exhaustion of remedies, instructing the lower court in Chicago to decide whether such a requirement would be—to use a short-hand here—futile.<sup>17</sup> The district court had the issue briefed and found for the defendant railroad, i.e. that plaintiffs might indeed be able to find, say before a judge in Budapest, a forum of one kind or another to handle the issues they raised in the United States.

The Seventh Circuit affirmed this ruling in *Fischer*,<sup>18</sup> and the plaintiffs were on their way to Orban’s Hungary. The view of the court was that, although personal jurisdiction under the FSIA may well have been established by the pleadings (*Abelesz*), the court could and should use notions of “international comity” to give the victimizing country a chance to resolve the dispute itself, while still leaving the doors of U.S. courts open should that prove futile.<sup>19</sup> This was the second issue certified by SCOTUS but then left open.

## 2. The Seventh Circuit Plaintiffs in *Scalin v. SNCF*

In the most recent case testing the comity/exhaustion theory, *Scalin v. Société Nationale Des Chemins De Fer Français* (“SNCF”),<sup>20</sup> the plaintiffs, as in *Abelesz/Fischer*, are suing a governmental entity—also a railroad—for Holocaust wrongdoing. The facts of the case indicate that the SNCF expropriated property while taking Jews, who had each paid the Railroad for a ticket, eastward from Vichy-

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UCLA J. INT’L & FOREIGN AFFS. 46, 63 (2019) (finding the *Abelesz* decision “obviated the need for judicial inquiry into whether a taking was domestic” where there was a “context of genocide”).

<sup>15</sup> Federal Republic of Germany v. Philipp, 141 S. Ct. 703, 704 (2021).

<sup>16</sup> See *Abelesz*, 692 F.3d at 673–74 (discussing domestic takings law without addressing the plaintiffs’ status as “nationals”).

<sup>17</sup> *Id.* at 697.

<sup>18</sup> See *Fischer*, 777 F.3d at 850.

<sup>19</sup> Professor Curran has expressed the view that this requirement is both incorrect as a matter of international law and ultimately fatal to plaintiff’s claims, as it is likely that negative results in the home country will have res judicata effect upon a return by plaintiffs to U.S. courts. See Curran, *supra* note 14 (citing RESTATEMENT (FOURTH) OF FOREIGN RELS. L. (AM. L. INST. 2018)), for which Professor Curran is a key consultant.

<sup>20</sup> *Scalin*, 2018 WL 1469015, at \*1.

regulated France to the camps between 1942 and 1944.<sup>21</sup> At least 80,000 died there, while not to be forgotten are the 3,000 Jews who died on French soil itself in Vichy administered “special camps,” some of whom were transported there by the SNCF. The theory of the case, brought before a judge in Judge Hamilton’s circuit, is that the FSIA takings exception applies and that no remedy for these harms is plausibly available in France.<sup>22</sup>

The district court found against the plaintiffs and would have sent them to Paris, pending a potential appeal<sup>23</sup>—the effect (if any) of SCOTUS’ language in *Philipp/Simon*, and perhaps the response of knowledgeable scholars to the “whole idea” of some concept such as “comity” requiring exhaustion of remedies in the home country of Holocaust (or other) wrongdoing.

*B. Prior Judicial or Scholarly Commentary on  
“Comity/Exhaustion”*

1. The State of Play Before the Recent SCOTUS  
Litigation

Again, while the Seventh Circuit’s jurisprudence on these issues was not under direct review, the conflict on the issue of exhaustion is acute and in part led to the Solicitor General’s recommendation that SCOTUS resolve it.<sup>24</sup> The *MAV* panel had explained the need for exhaustion as follows:

[T]he requirement that domestic remedies for expropriation be exhausted before international proceedings may be instituted is a “well-established rule of customary international law.” [Failing to require exhaustion in domestic courts]

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

<sup>22</sup> *Id.* at \*2.

<sup>23</sup> *Id.* at \*12; *see supra*, note 5.

<sup>24</sup> Certiorari Stage Brief for the United States as Amicus Curiae at 8, *Republic of Hungary v. Simon*, 141 S. Ct. 691 (No. 18-1447) [hereinafter Government’s Certiorari Stage Amicus Br. in *Simon*] (“Certiorari is warranted to resolve the conflict on that important question [exhaustion/comity], which may have significant foreign-policy consequences.”). *See generally* Merits Stage Brief for the United States as Amicus Curiae Supporting Petitioners, *Republic of Hungary v. Simon*, 141 S. Ct. 691 (No. 18-1447) [hereinafter Government’s Merits Stage Amicus Br. in *Simon*].

would conflict with the comity and reciprocity between sovereign nations that dominate international law.<sup>25</sup>

*Fischer* elaborated by holding that “exhaustion of domestic remedies is preferred in international law as a matter of comity.”<sup>26</sup> As the D.C. district court in *Simon*—whose view was reversed by the D.C. Circuit—put it: “[A] plaintiff seeking to overcome that consideration must show that they have exhausted the foreign sovereign’s own domestic remedies, or that to do so would be futile.”<sup>27</sup> The D.C. district court’s adoption of the Seventh Circuit’s approach to “prudential exhaustion” requirements based on “comity” was short-lived but, in arguments before SCOTUS gained an articulate advocate from the Executive Branch of the United States. As we shall see, the intervention of Executive Branch officials in the work of the Federal Judiciary is hardly new and often works against the interests of U.S. citizen plaintiffs who, as in *Fischer* and *Scalin*, seek U.S. judicial remedies for Holocaust wrongdoing under the FSIA. We shall also see that, once plaintiffs have successfully begun litigation, the Executive can be a force for good, but this has been a haphazard occurrence through the years. The FSIA contemplates no other role for Article II intervention.

What is “comity” in this context? Generally, scholars have demurred, confessing that they do not completely understand it,<sup>28</sup> and that it is “an amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith.”<sup>29</sup> In a quite recent and comprehensive note on the FSIA exception

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<sup>25</sup> *Abelesz*, 692 F.3d at 679, 682.

<sup>26</sup> *Fischer*, 777 F.3d at 859.

<sup>27</sup> *Simon v. Republic of Hungary*, 277 F. Supp. 3d 42, 54 (D.D.C. 2017), *rev’d*, 911 F.3d 1172 (D.C. Cir. 2018).

<sup>28</sup> See, e.g., William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2073 (2015).

<sup>29</sup> 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); see also 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.”).



discussed here, a skeptical view of comity is taken.<sup>30</sup> Courts in their turn have complained about comity's vague, slippery and haphazardly defined qualities.<sup>31</sup>

## 2. Oral Argument and the Solicitor General on Comity in *Philipp/Simon*

Anyone listening to the Justices during oral argument in *Simon* on December 7, 2020, could emerge predicting that their own internal confusion on the "doctrine" of comity might result either in a total rejection of it under the FSIA takings exception jurisprudence or—as actually happened—no resolution of the conflict in the circuits whatsoever. The non-resolution of the conflict may have had as much to do with an internal SCOTUS respect for the Executive Branch's advocacy of "comity," even while the Court discernibly exhibited in open court great confusion about what comity is or—if any meaning is graspable—how it plays into the takings exception of the FSIA. In the words of Trump's Solicitor General's brief in *Simon*:

This Court [SCOTUS] has long recognized the doctrine of international comity, which permits U.S. courts to take account of the "legislative, executive or judicial acts of another nation," in ways that show "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."<sup>32</sup>

Thus, in the recent SCOTUS cases, the U.S. Executive Branch counseled judicial deference to a foreign country's potential venue in lieu of straightforward judicial decision-making, which is apparently dictated by the text of the FSIA, despite many U.S. citizens being among the plaintiffs, and the Holocaust lurking in the factual background.

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<sup>30</sup> Michael Cooper, *Comity & Calamity: Deference to the Executive and the Uncertain Future of the FSIA*, 45 BROOK. J. INT'L L. 913, 914 (2020).

<sup>31</sup> See, e.g., *JP Morgan Chase Bank v. Altos Hornos de Mex.*, 412 F.3d 418, 423 (2d Cir. 2005) ("has never been well-defined"); *Turner Entertainment Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1518 (11th Cir. 1994) ("vague"); *Microsoft Corp. v. Motorola Inc.*, 696 F.3d 872, 886 (9th Cir. 2012) ("elusive").

<sup>32</sup> Government's Merits Stage Amicus Br. in *Simon* at 15 (quoting *Hilton v. Guyot*, 159 US 113, 164 (1895)). But see Silvia D'Ascoli & Kathrin Maria Scherr, *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection* (Eur. Univ. Inst., Working Paper Law 2007/02), <http://ssrn.com/abstract=964195> [<https://perma.cc/8QJL-B728>] (arguing that exhaustion is a throwback to days in which adjudication on human rights issues (such as genocide) reflects a standard not intended for or suited to the private action, but it instead "should be regarded differently in the two diverse contexts of diplomatic and human rights protection").

## II. THE BALEFUL RE-EMERGENCE OF THE EXECUTIVE, CONTRADICTING FSIA

### A. *What Did Congress Intend to Do in 1976?*

Prior to the FSIA (1976), the Executive Branch played a key but confusing role in litigation against foreign sovereigns. This haphazard role provoked Congress' 1976 statute. That role should be suspect, because in the words of a recent analyst, looking both at the explicit statutory language and the holdings of SCOTUS across the spectrum of its FSIA exception cases:

[T]he deference shown to the executive once a case brought under the FSIA reaches the Supreme Court [has been] overwhelming . . . [T]he Supreme Court has maintained a broad avenue for the Executive Branch to influence immunity decisions seemingly in conflict with Congress' express intent in passing the act.<sup>33</sup>

Congress explicitly replaced a confusing process of judicial decision-making on foreign sovereignty when it promulgated the FSIA in 1976. That story of definitively and statutorily replacing a haphazard interplay between the executive and the judiciary on sovereignty issues has been told many times, both before and after promulgation of the statute. The older approach centered on a mechanism called the "Tate Letter," which (significantly) arose from litigation, not Congressional action. A Legal Advisor to the State Department in 1949 named Jack B. Tate responded to a negative 1947 Second Circuit disposition of a Holocaust related claim by declaring the State Department's favoritism towards such claims.<sup>34</sup> This in turn led that same Circuit to reverse itself and allow such a claim as supported by the Executive Branch seven years later.<sup>35</sup> This interplay between litigation and an eventual positive effect on Executive Branch action is a part of the background of this Article.<sup>36</sup> But, as we have seen in the recent SCOTUS cases, and consistently between 1947 and 1976, Executive Branch intervention is an ad hoc phenomenon too often pitting the State Department, for example, *against* Holocaust victims as a class.

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<sup>33</sup> Cooper, *supra* note 30, at 939, 943.

<sup>34</sup> See *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954).

<sup>35</sup> Compare *Bernstein v. Van Heyghen Freres Société Anonyme*, 163 F.2d 646 (2d Cir. 1947), with *Bernstein*, 210 F.2d 375 (same case post "Tate Letter").

<sup>36</sup> See generally STUART E. EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* (2004).

Perhaps not envisioning and certainly not accepting Executive behavior such as the Solicitor General's brief in *Simon/Philipp*, or as we shall see the State Department's advice to the Chicago district court in *Scalin*, Congress explicitly abjured Executive Branch intervention when promulgating the FSIA, stating:

A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial determinations are made on purely legal grounds and under procedures that ensure due process. The Department of State would be freed from any adverse consequence resulting from an unwillingness of the Department to support that immunity.<sup>37</sup>

The encroachment of the Executive Branch on the Federal Judiciary is paradoxical if not perverse.

#### B. *Requiring Plaintiffs to Return to the Wrongdoers' Venue*

Let's return to the two cases in question where deference to foreign entities arose out of "comity": *Abelesz/Fischer*, which recognized the reciprocal needs of sovereigns on both sides of the Atlantic;<sup>38</sup> and *Scalin*, where the State Department has intervened in order to convince an Article III judge to give France a chance.<sup>39</sup>

In *MAV*, the U.S. government did not formally intervene, but by then its frequent aversion to Holocaust lawsuits was well known.<sup>40</sup> In fact, I faced this aversion personally while unsuccessfully seeking the Department's support as one

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<sup>37</sup> H.R. REP. NO. 94-1487 at 6 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6606; see also *id.* at 12 ("This bill, entitled the 'Foreign Sovereign Immunities Act of 1976,' sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States. It is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities. It is also designed to bring U.S. practice into conformity with that of most other nations by leaving sovereign immunity decisions exclusively to the courts, thereby discontinuing the practice of judicial deference to 'suggestions of immunity' from the Executive Branch.") (citation omitted).

<sup>38</sup> See *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012).

<sup>39</sup> *Scalin*, 2018 WL 1469015, at \*7.

<sup>40</sup> See generally *American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 402–08 (2003) (providing a historical overview of attempts to provide restitution to victims of Nazi persecution).

of the plaintiffs' counsel in *Abrams v. SNCF*.<sup>41</sup> On the other hand, President Clinton's Treasury Department had earlier taken up a case we had prevailed in—*Bodner v. Banque Paribas*<sup>42</sup>—and we benefitted tremendously from Stuart Eizenstat's role in bringing about a settlement.<sup>43</sup> This is another example of litigation leading to beneficial Executive Branch action—instead of the tail wagging the dog—and also a testimonial to Eizenstat's legendary negotiating skills. Perhaps underlying the U.S. government's position on comity is the threat, brought out during oral argument in *Fischer* by Judge Hamilton, that U.S. actors, including sovereigns, may be hauled in front of foreign courts for domestic human rights violations and have no equivalent doctrine upon which to fall back.<sup>44</sup> This concern had already been articulated by SCOTUS in *Kiobel v. Royal Dutch Petroleum*, a case having nothing to do with the FSIA.<sup>45</sup>

But such restraint has never been explicitly authorized by SCOTUS,<sup>46</sup> and certainly not in cases involving the FSIA. The more common uses of comity/abstention have been to defer to domestic state courts,<sup>47</sup> but attention on this has to be paid to Justice Breyer's concurrence in what is still the leading SCOTUS case on the FSIA (and may now have to share part of the stage with *Philipp*), *Republic of Austria v. Altmann*.<sup>48</sup>

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<sup>41</sup> *Abrams v. Société Nationale Des Chemins De Fer Francais*, 389 F.3d 61 (2d Cir. 2004).

<sup>42</sup> *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000). The resolution of this case through negotiation—once plaintiffs prevailed in federal court, and *only then* were assisted by the Executive—is recounted in EIZENSTAT, *supra* note 36, ch. 16. Interestingly, Mr. Eizenstat styles this success as “the French exception,” giving in my view a bit too much credit to the recalcitrant French side of the negotiations he led. *Id.* To the point of this Article, I would call this story “A Beneficial Exception brought about by litigation and only then Executive Branch intervention;” see also MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS (2005).

<sup>43</sup> EIZENSTAT, *supra* note 36, at 80, 319.

<sup>44</sup> Oral Argument, *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012) (No. 11-2387). It is also true that at that same oral argument, Judge Hamilton with great difficulty elicited a promise from MAV's defense counsel that, upon any lawsuit brought in Budapest for these claims, the statute of limitations in no form was to be offered in defense, a promise that was broken in the event. *Id.*

<sup>45</sup> *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 124 (2013) (involving the ATCA). See also Dodge, *supra* note 28, at 2105, 2109–14 (describing adjudicative comity as a principle of restraint exercised by U.S. courts in favor of foreign courts).

<sup>46</sup> Dodge, *supra* note 28, at 2110.

<sup>47</sup> See, e.g., *Younger v. Harris*, 401 U.S. 37, 44–46 (1971).

<sup>48</sup> 541 U.S. 677 (2004). I was in the Court that day, tracking the oral argument because a case I was helping with against the SNCF depended on the resolution of the key question: Is the FSIA retroactive to events

Justice Breyer suggested in dictum that such deference to foreign international courts might be appropriate, even in the special area of Holocaust related claims under the FSIA.<sup>49</sup> “[A] plaintiff may have to show an absence of remedies in the foreign country sufficient to compensate for any taking.”<sup>50</sup>

Justice Breyer cites for this proposition the *Third* Restatement of Foreign Relations, which has been clarified in the Fourth Restatement to make the now-authoritative contrary point about exhaustion.<sup>51</sup>

A requirement of exhausting remedies in the foreign state that performed the original wrongdoing—especially where that wrongdoing was in the context of genocide (and recall that the Seventh Circuit preceded the D.C. Circuit in so describing it)—may seem bizarre on its face. Puzzling, too, would be SCOTUS downplaying the anomaly produced by reading the FSIA in full, because outside of (a)(3)—the takings exception—there is an explicit mention of affording “a foreign state a reasonable opportunity to arbitrate.”<sup>52</sup> And nothing in the statute besides this separate provision (the “terrorism exception”) remotely points to Congress requiring exhaustion of remedies under the FSIA.

### III. FRYING PAN TO FIRE: PLAINTIFF’S BUDAPEST EXPERIENCE IN *FISCHER* AND LIKELY PARIS EXPERIENCE IN *SCALIN*

#### A. *Orban’s Courts*

Following the marching orders at the tail of *Abelesz*,<sup>53</sup> plaintiffs pursued remedies in a Budapest court. They retained excellent local counsel who pleaded out the case (in Hungarian jurisdictional and substantive terms) for Holocaust-related

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occurring prior to its 1976 enactment? The Court answered in the affirmative, which had the ironic effect of at least temporarily putting a halt to our case, which had until that moment successfully made its way to and through the Second Circuit. *See Abrams v. Société Nationale Des Chemins De Fer Francais*, 389 F.3d 61 (2d Cir. 2004).

<sup>49</sup> *Altmann*, 541 U.S. at 714 (Breyer, J., concurring).

<sup>50</sup> *Id.*

<sup>51</sup> Compare RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 713 (AM. L. INST. 1987), with RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 455 (AM. L. INST. 2018). *See also* Curran, *supra* note 14.

<sup>52</sup> 28 U.S.C. § 1605A(a)(2)(A)(iii) (referencing the terrorism exception to immunity within the FSIA).

<sup>53</sup> *See Abelesz*, 692 F.3d at 689.

relief.<sup>54</sup> Not surprisingly, the Hungarian court rejected all claims, stating, in pertinent part, that it could not rely alone on the affidavit of plaintiff, who was as a child actually pushed on a MAV deportation train with her parents, but instead needed corroborating witnesses.<sup>55</sup> Despite the promises of defense counsel at oral argument before Judge Hamilton in *Fischer*, not to raise statute of limitations-type defenses, its associates in Budapest did so, and this, too, proved fatal to the claims.<sup>56</sup> Finally, the Hungarian court explained that an appeal would cost an exorbitant amount for the plaintiff and that there was a risk defense counsels' fees might be charged to the plaintiff as well.<sup>57</sup>

Back in Chicago, counsel for plaintiffs in *Abelesz/Fischer* received a full record of the Budapest proceedings. To us, the proceedings evidenced the futility of seeking any resolution in Orban-controlled Hungary relative to claims by Jewish victims of Holocaust wrongdoing. The substantive argument in the district court in Chicago on this point has still not been heard.<sup>58</sup> Plaintiffs intend to proceed in that court.

*B. Get thee to Paris: The Irony of the Scalin Approach to Exhaustion*

Also, in the Northern District of Illinois, there lay pending—and without assistance from SCOTUS in *Simon*—the newest “exhaustion”-related case. Highly relevant to many aspects of this Article, the 2018 decision in *Scalin v. SNCF*<sup>59</sup> involves further attempts by counsel in *Abrams*<sup>60</sup> and *Freund*<sup>61</sup> to move ahead in U.S. courts with claims against the French National Railroad. Perhaps encouraged by some of the Chicago courts' rulings in *Abelesz/Fischer* relative to Hungary, those

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<sup>54</sup> Brief of Victims of the Hungarian Holocaust as Amicus Curiae at 9–10, *Republic of Hungary v. Simon*, 141 S. Ct. 691 (No. 18-1447) [hereinafter *Hungarian Victims' Brief*] (citing Second Amended Complaint, Exhibit D: Affidavit of Istvan Fekete at 1–2, *Victims of Hungarian Holocaust v. Hungarian State Railways*, 798 F. Supp. 2d 934 (N.D. Ill. 2011) (No. 1:10-cv-00868), ECF No. 163–2 [hereinafter *Fekete Affidavit*]).

<sup>55</sup> *Hungarian Victims' Brief* at 10–11 (citing *Fekete Affidavit* at 2–3).

<sup>56</sup> *Id.* at 10 (citing *Fekete Affidavit* at 3).

<sup>57</sup> *Id.* at 11–12 (citing *Fekete Affidavit* at 4–5).

<sup>58</sup> Order of the Northern District of Illinois, Minute Entry per J. Coleman of July 21, 2020.

<sup>59</sup> *Scalin v. Société Nationale des Chemins de fer Français*, No. 15-cv-03362, 2018 WL 1469015 (N.D. Ill. Mar. 26, 2018), *affirmed on other grounds see supra* note 5.

<sup>60</sup> *Abrams v. Société Nationale Des Chemins De Fer Français*, 389 F.3d 61 (2d Cir. 2004).

<sup>61</sup> *Freund v. Republic of France*, 592 F. Supp. 2d 540 (S.D.N.Y., 2008), *aff'd sub nom. Freund v. Societe Nationale des Chemins de Fer Français*, 391 F. App'x 939 (2d Cir. 2010).

plaintiffs unfortunately were waylaid by the Seventh Circuit's requirement of exhaustion.<sup>62</sup> The argument for an appropriate venue in France involved a restitution organization in Paris (the CIVS, a quasi-governmental administrative agency) with which I have been working amicably for almost two decades to provide relief for banking and material claims.<sup>63</sup> But the CIVS, as was agreed to by defendants in *Scalin*, had never focused on rail-related claims throughout its long history, as such day-to-day experts on the agency as Professor Eric Freedman were informing the court.<sup>64</sup> Furthermore, it was ironic that a French agency set into motion by successful U.S. court decisions to do justice to certain categories of plaintiffs, for example *Bodner*,<sup>65</sup> now was being weaponized by the American sovereign *against* the pursuit of such claims in those very courts! Finally, despite much that is admirable in the French agency's work (and I am intimately familiar with that side of the picture), scholarly inquiries have questioned whether its approach—even if CIVS began to investigate railroad related claims such as the ones in *Scalin*—would bring about fair results commensurate with, say the protections of due process in U.S. courts.<sup>66</sup>

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<sup>62</sup> *Scalin*, 2018 WL 1469015, at \*3 (citing *Abelesz*, 692 F.3d at 678–82).

<sup>63</sup> See, e.g., PREMIER MINISTRE LIBERTÉ ÉGALITÉ FRATERNITÉ, REPORT TO THE PUBLIC ON THE WORK OF THE CIVS 78–81 (2019) (speech by Author, Professor Richard Weisberg, entitled “The Role of the American Side to the Washington Accord”). Sylviane Rochotte, a key CIVS figure in processing banking (not railroad!) claims over many years with whom I work closely, gives a helpful introduction, as she put it of the U.S. judicial role that resulted in amicable work to enforce and enhance the Washington Accord:

When CIVS was created in 1999, it had no mechanism for individual restitution of banking claims. It could not bring in banks—private companies—to restore monies they had perhaps retained [from WWII spoliation of Jews]. At the end of the '90's, the situation was complex: litigation took place in the US against banks that were in operation during the Occupation. The solution was diplomatic. Representatives of the French and American governments, the banks, and lawyers for the plaintiffs, including Richard Weisberg, sat around the table and tried to find a global and definitive solution, and to give to CIVS the means to bring individualized responses to claims (as opposed to the collective memory approach of the Foundation for the Memorial of the Shoah).

*Id.* at 78–79. The work of CIVS has been more than commendable but it involved banking and material claims, not claims directly against the SNCF.

<sup>64</sup> *Scalin*, 2018 WL 1469015, at \*5.

<sup>65</sup> See *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000); see also *supra* text accompanying note 42.

<sup>66</sup> See, e.g., Eric Freedman & Richard Weisberg, *The French Holocaust Era Claims Process*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 133 (Michael J. Bazylar & Roger P. Alford eds., N.Y. Univ. Press 2006); Claire Estry, Eric Freedman & Richard Weisberg, *The*

Despite this, Judge Wood required the SNCF plaintiffs to try their luck before the CIVS. The Executive Branch, in urging this outcome, was contradicting the entire text and intent of the FSIA.<sup>67</sup>

In reading the full case, note that the U.S. government (as the Solicitor General, or, as in this case, the State Department),<sup>68</sup> often sides with defendants in these matters, whether formally by offering the courts a “statement of interest,” or briefing the cases for SCOTUS, or informally by offering no affirmative assistance to its own citizens who form part of the Holocaust-related plaintiff class.

#### IV. CONCLUSION

The involvement of the U.S. Executive Branch to dissuade the U.S. Federal Judiciary from proceeding with FSIA claims if they can find any alternative, such as exhaustion of remedies abroad, both delays litigation otherwise successfully pleaded under the (a)(3) takings exception and paradoxically sends plaintiffs back to the site of Holocaust wrongdoing. Many elderly plaintiffs will die during these delays, such as the courageous direct victim of Hungary’s railroad who (predictably) was rebuffed by Orban’s courts. The influence of the United States upon pending litigation is demonstrated in the unresolved *Simon v. Hungary* case and in the statement of interest sent to the court in *Scalin*.

Distinguishable are the successful efforts of U.S. diplomats such as Stuart Eizenstat, the keynote speaker of the Sovereignty, Humanity, and Law Symposium, who worked with plaintiffs already successful in U.S. courts to bring relief for Holocaust related claims through the negotiation process, instead of laying the heavy hand of the sovereign against such individual human rights claims brought in civil courts by American citizens (and others) against Holocaust-era wrongdoers.

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*Administration of ‘Equity’ in the French Holocaust-Era Claims Process, in THE CONCEPT OF EQUITY: AN INTERDISCIPLINARY ASSESSMENT 21 (Daniela Carpi ed., Universittsverlag Winter 2007).*

<sup>67</sup> See H.R. REP. NO. 94-1487 at 6, 12 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6606, 6610 (elucidating Congress’ legislative intent in promulgating the FSIA in 1976). See generally Cooper, *supra* note 30, at 913.

<sup>68</sup> *Scalin*, 2018 WL 1469015, at \*9–12.