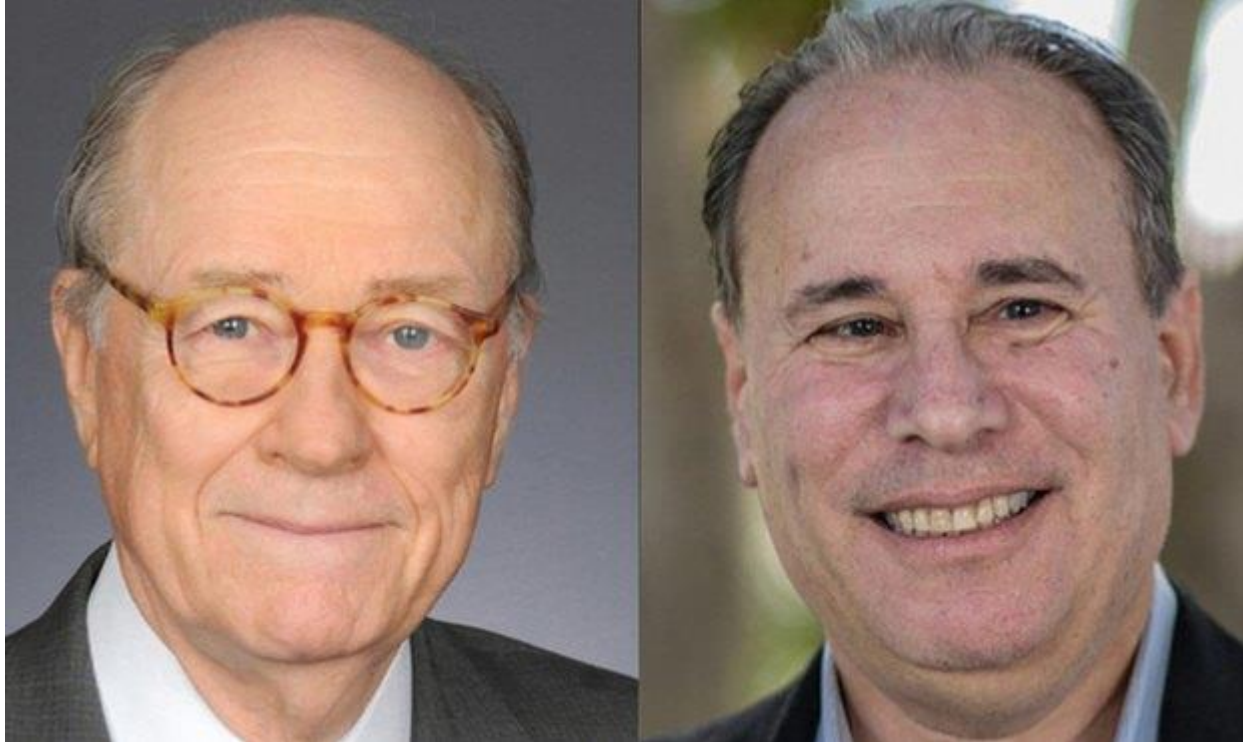


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## The Ghosts of Sovereignty: Holocaust Restitution and the FSIA

In their International Litigation column, Lawrence W. Newman and David Zaslowky look at Supreme Court decisions that, in interpreting the Foreign Sovereign Immunities Act, have significantly limited the ability of Holocaust victims to seek redress in the U.S. courts for property stolen by the Nazi regime.

By **Lawrence W. Newman and David Zaslowky** | April 11, 2025 at 10:03 AM



The Holocaust is one of the darkest chapters in human history. As the courts have properly noted, legal remedies are profoundly inadequate for the atrocities committed during the Holocaust.

And yet, it is understandable why Holocaust victims and their heirs have turned to courts to seek restitution for property and assets seized by the Nazis (and other governments) during the Holocaust.

In the United States, the Foreign Sovereign Immunities Act (FSIA), designed to balance the principles of sovereign immunity with the need for justice, has presented significant hurdles to these claims.

This article looks at the pivotal U.S. Supreme Court decisions that have shaped the legal landscape in this area, including its recent decision in *Republic of Hungary v. Simon*, 604 U.S. \_\_\_\_ (Feb. 21, 2025), which significantly limited the ability of Holocaust victims to bring their claims to court.

At the same time, it should be noted that the United States has been a world leader in supporting compensation for [Holocaust victims](#).

The FSIA generally grants foreign states immunity from the jurisdiction of courts in the United States. However, Congress carved out specific exceptions to this immunity, allowing lawsuits under certain circumstances.

The “expropriation exception” allows suits based on “rights in property taken in violation of international law.” 28 U.S.C §1605(a)(3). Holocaust-related lawsuits often allege that foreign states, or entities controlled by them, illegally confiscated property, art, and other assets from Jewish victims during the Nazi era. Plaintiffs argue that these actions constitute violations of international law and thus fall within the FSIA's expropriation exception.

A seminal Supreme Court case in this area, *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), involved Maria Altmann's claim for the return of six Gustav Klimt paintings. Prior to the Nazi invasion of Austria, the paintings had hung in the Vienna home of Altmann's uncle, Ferdinand Bloch-Bauer, a Czechoslovakian Jew.

Altmann claimed ownership of the paintings under a will executed by her uncle after he fled Austria in 1938. She sued Austria and its instrumentality that held the paintings, the Austrian Gallery, alleging they obtained possession of the paintings through wrongful conduct in the years during and after World War II.

Austria argued that, as of 1948, when much of their alleged wrongdoing took place, they would have enjoyed absolute sovereign immunity from suit in United States courts and that nothing in the FSIA retroactively divested them of that immunity.

The Supreme Court held that the FSIA applies retroactively. By allowing Altmann to sue Austria for the return of the paintings, the Supreme Court demonstrated a willingness to consider Holocaust-era claims under the FSIA. It did not, however, resolve the fundamental question of whether the expropriation of Jewish property constituted a violation of international law.

*Federal Republic of Germany v. Philipp*, 592 U.S. 169 (2021), concerned German Jewish art dealers who formed a consortium during the waning years of the Weimar Republic to purchase a collection of medieval relics known as the Welfenschatz.

Theirs heirs alleged that when the Nazi government rose to power, it unlawfully coerced the consortium into selling the collection to the Nazi-controlled Prussian government in 1935 for a third of its value. The heirs sued Germany and Stiftung Preussischer Kulturbesitz (SPK), a German governmental institution that holds the cultural artifacts of former Prussia, including the Welfenschatz.

Germany contended that the U.S. court lacked jurisdiction, arguing that the “property taken in violation of international law” exception did not apply because a sovereign's taking of its own nationals' property is not unlawful under the international law of expropriation – the so-called “domestic takings” rule.

The heirs conceded that the international law of expropriation retained the domestic takings rule at the time the FSIA was enacted. But they read the “rights in property taken in violation of international law” language to be broader than merely the international law of expropriation and to incorporate *any* international norm, including international human rights law.

A unanimous Supreme Court agreed with Germany. It noted that the language of the exception places repeated emphasis on “property” and property-related rights, without any mention of injuries and acts associated with violations of human rights law, such as genocide.

The court considered this “a remarkable omission” if the provision was intended to provide relief for atrocities such as the Holocaust. The Supreme Court also said that the heirs' position would arguably force courts themselves to violate international law, not only by ignoring the domestic takings rule, but also by derogating international law's preservation of sovereign immunity for violations of human rights law.

In the case of the Welfenschatz, because the actions taken by Nazi-Germany took place within its borders, the domestic taking exception applied and the case therefore had to be dismissed. *Philipp* dealt a significant blow to many Holocaust restitution claims, as many of the expropriations occurred within the borders of the offending states.

The recent *Simon* decision has limited Holocaust claims even further. Two-thirds of Hungary's pre-war Jewish population was systematically exterminated during the Holocaust. In addition, as stated in Simon's brief, in November 1944, "the Hungarian government declared all valuable objects owned by Jews—except for their most personal items—part of the national wealth of Hungary."

Hungary thereafter confiscated and liquidated much of that property, which gave rise to the lawsuit. This 2010 case has had years of motion and appellate practice, including an earlier visit to the Supreme Court, in which, alongside the *Philipp* decision, the court held that the expropriation exception did not apply to a foreign sovereign's taking of its own nationals' property. *Republic of Hungary v. Simon*, 592 U. S. 207 (2021).

To overcome the *Philipp* holding, the plaintiffs asserted they were either stateless or Czechoslovakian nationals at the time of the takings, not Hungarian nationals.

The case therefore pivoted so that the central issue focused on the other part of the expropriation exception, which requires that the expropriated "property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state."

To satisfy that requirement, the plaintiffs argued that the expropriated property had a commercial nexus to the United States because the Hungarian defendants liquidated it, commingled the proceeds from that property with money in a government treasury account, and, decades later, used the funds from that account in connection with commercial activity in the United States.

In the words of the Supreme Court, "the issue presented in this case is whether alleging commingling of funds alone can satisfy the commercial nexus requirement of the expropriation exception of the FSIA." Both lower courts determined that this "commingling theory" satisfied the statute's commercial nexus requirement. A unanimous Supreme Court disagreed.

The Supreme Court provided the following example of how the statute can be satisfied. If the tangible property was artwork of a plaintiff that the sovereign retained for its collection, the plaintiff would have to put forth some facts that support tracing that artwork to a location in the United States.

If the sovereign trades the expropriated artwork for a different piece of art and the plaintiff alleges facts sufficient to reasonably conclude that the different piece of art can be traced to the United States, the commercial nexus requirement would be satisfied. The plaintiff could not, however, merely allege that the foreign sovereign maintains an art collection in the United States.

The Supreme Court said that the plaintiffs accepted these principles, but posited that there was an exception that applies when a foreign sovereign converts expropriated property into money or other fungible property.

In that situation, according to the plaintiffs, it is not necessary to identify the specific funds for which their property was exchanged. Instead, a plaintiff need only identify any fund that, at some time, was commingled with the proceeds of the foreign sovereign's sale of the expropriated property.

The Supreme Court did not accept this interpretation, explaining that the plaintiffs' commingling theory would effectively do away with the tracing requirement implicit in the phrase "exchanged for" within §1605(a)(3).

The court found there was no exception in the statute because the plain text of the expropriation exception treats all "property" alike, whether that property is tangible (like a piece of art) or fungible (like cash).

The court also questioned the reasonableness of the commingling theory because it "requires accepting the idea that the entire account with commingled funds should be regarded as property 'exchanged for' the expropriated property, even if that account's assets far outweigh what the foreign sovereign received for selling the expropriated property."

There were also the political aspects of the statute. The Supreme Court specifically noted that, it “interpret[s] the FSIA as we do other statutes affecting international relations: to avoid, where possible, ‘producing friction in our relations with [other] nations and leading some to reciprocate by granting their courts permission to embroil the United States in expensive and difficult litigation.’”

That concern seems especially cogent in the context of the expropriation exception, which the Supreme Court said is “unique”(id.) in that the “restrictive” theory of foreign sovereign immunity removes immunity for a sovereign’s “commercial” acts, whereas the expropriation exception applies to acts that are, by definition, “sovereign.”

The Supreme Court said they were not ruling that plaintiffs involved in situations in which expropriated property is exchanged for cash may never sue. As examples of where a suit could be brought the court said a plaintiff could identify a United States account holding proceeds from expropriated property, or could show that a foreign sovereign spent all funds from a commingled account in the United States shortly after the commingling occurred.

As it relates to Holocaust claims, however, *Simon* is a significant blow because of the seemingly practical impossibility of tracing specific U.S. assets back to property expropriated so many years ago.

There is one other Supreme Court decision relating to Holocaust claims that merits discussion. The Cassirer litigation revolves around a painting by French Impressionist Camille Pissarro, which the Nazis stole in 1939 from Lilly Neubauer, a Jewish woman who was attempting to flee the Nazi regime.

The painting eventually came into the possession of the Thyssen-Bornemisza Collection Foundation (TBC), an instrumentality of the Kingdom of Spain, and has been publicly displayed in Madrid since 1993. Lilly’s heirs, and others, sued TBC, seeking the return of the painting. Choice-of-law was the dispositive issue in the case because, if California law applied, the Cassirers would win but if Spanish law applied, TBC would win.

The case reached the Supreme Court for the first time in 2022, with the court holding that, in an FSIA suit raising non-federal claims against a foreign state or instrumentality, the district court should use the same choice-of-law rule applicable in a similar suit against a private party. *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 596 U.S. 107 (2022).

The court thus vacated the Ninth Circuit’s decision holding that Spanish law should apply. On remand, the Ninth Circuit held once again that Spanish law applies, even under the Supreme Court’s opinion.

Thereafter, California enacted a statute mandating the application of California law in cases brought by state residents to recover artwork stolen during the Holocaust.

The Cassirers petitioned the Supreme Court again, arguing that California’s enactment of a statutory choice-of-law requirement precluded the result below and that the court should therefore vacate the judgment and remand for application of the new choice-of-law statute, which Petitioners said was the typical practice when an intervening change in law occurs.

On March 10, 2025, the Supreme Court granted the Petition, vacated the judgement and remanded the case for further consideration in light of the new California statute.

The *Cassirer* decision stands in stark contrast to *Philipp* and *Simon* in that it favors the victims of the Nazi theft. But the reason for the difference seems clear. *Cassirer* was a *choice-of-law* case, whereas the other two implicated the *jurisdictional* reach of the FSIA.

On that issue, the Supreme Court was clearly of a mind to limit the reach of the expropriation exception under the FSIA, even though these decisions have significantly limited the ability of Holocaust victims to seek recompense in the U.S. courts.

These decisions also highlight the importance of keeping open other avenues of compensation, such as those established by the German Federal Ministry of Culture.

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