Foreign Sovereign Immunity and Historical Justice: Inside the US Supreme Court's Restrictive Turn in Holocaust-Related Cases

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On 21 February 2025, the US Supreme Court issued a ruling in *Republic of Hungary v. Simon*,[1] a Holocaust restitution case with a lengthy procedural history. Delivering this unanimous decision, Justice Sotomayor confirmed the restrictive approach to cases involving foreign states inaugurated in 2021 by *Federal Republic of Germany v. Philipp*.[2] In light of the importance of US practice for the development of customary law around sovereign immunity,[3] and its impact on questions of historical justice and transnational accountability, the *Simon* development deserves particular attention.

The Jurisdictional Treatment of Foreign States as an "American Anomaly"[4]

In 2010, a group of Holocaust survivors filed a suit before the US District Court for the District of Columbia against the Republic of Hungary, the Hungarian

State-owned national railway (Magyar Államvasutak Zrt., or MÁV) and its successor-in-interest Rail Cargo Hungaria Zrt. (RCH), seeking compensation for the Hungarian government's treatment of its Jewish population during World War II.[5] The survivors claimed that, in connection to their deportation, their properties had been expropriated and subsequently liquidated by defendants.

As the case repeatedly moved through federal courts (in fact, this was not the first time it reached the Supreme Court),[6] the possibility for the US judge to extend its adjudicative jurisdiction over the Hungarian State remained controversial. Claimants based their action on the so-called "expropriation exception" to sovereign immunity, codified by §1605(a)(3) of the 1976 Foreign Sovereign Immunities Act (FSIA).[7] This provision excludes immunity in all cases revolving around rights in property taken in violation of international law, at the condition that that property, or any property exchanged for such property: 1) is present in the US in connection with a commercial activity carried on in the US by the foreign state, or 2) is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the US.

This exception represents an *unicum* within the law of sovereign immunity, as it allows courts to extend their jurisdiction over a state's acta iure imperii (expropriations are indeed quintessential sovereign acts).[8] In recent years, this provision has often been invoked in claims of restitution of Nazi-looted art owned by European states (see, for example, Altmann v. Republic of Austria,[9] Toren v. Federal Republic of Germany,[10] Berg v. Kingdom of Netherlands,[11] Cassirer v. Kingdom of Spain).[12] Crucially, this exception also requires a commercial nexus between the initial expropriation and the US. In its *Simon* decision, the US Supreme Court addressed the standard that plaintiffs need to meet to establish this commercial nexus in cases where the expropriated property was subsequently liquidated. The Court read a "tracing requirement" in the text of the provision, thus establishing a very high threshold.

Property Taken in Violation of International Law

The Court had recently addressed the interpretation of §1605(a)(3 in *Federal Republic of Germany* v. *Philipp,* where the heirs of German Jewish art dealers sought the restitution of a collection of medieval reliquaries known as the Guelph Treasure (*Welfenschatz*), In that case, the Supreme Court focused on the opening

line of the expropriation exception, which requires that the rights in property at issue were "taken in violation of international law". By explicitly recognizing that this language incorporates the domestic takings rule,[13] the Court set in motion a trend of increasingly restrictive interpretations of the expropriation exception that is still developing today.

To reach this result, the Supreme Court interpreted the expropriation exception as referring specifically to the international law *of expropriation*. This narrow reading of §1605(a)(3) allowed the Court to assert that the domestic takings rule had "survived the advent of modern human rights law", as the two remained insulated from one another. Accordingly, even if the Nazi plunder were considered as an act of genocide, in violation of human rights law and the Genocide Convention,[14] it would not fall under §1605(a)(3), as this provision only applies to property takings against aliens (reflecting the traditional opinion that international law is concerned solely with the relations between states). From this perspective, the *Philipp* decision adhered to the International Court of Justice's highly criticized conclusion in Jurisdictional Immunities of the State (Germany v. Italy) that immunity is not excluded by serious violations of ius cogens.[15]

The impact of this restrictive turn has already emerged in a couple of cases adjudicated after *Philipp*. In order to circumvent the domestic takings rule, claimants have tried to argue that the persecutory treatment of Jewish individuals by several states during the Holocaust deprived them of their nationality, rendering them either *de iure* or *de facto* stateless. In the wake of *Philipp*, courts have been sceptical of this statelessness theory – although they appear to have left the door ajar for stronger arguments in its support.[16] A recent decision by the District Court for the District of Columbia has gone so far as to exclude the expropriation exception in cases involving a states' taking of property from nationals of an enemy state in times of war.[17] The District Court followed the same reasoning as in *Philipp*: if §1605(a)(3) refers to the international law of expropriation, not only human rights law but also international humanitarian law are excluded by its scope of application. As I noted elsewhere,[18] post-*Philipp* court practice now excludes the expropriation exception in the vast majority of takings by sovereign actors, regardless of whether they targeted their own nationals, the nationals of an enemy state or stateless individuals.

The Commercial Nexus and the Commingling Theory

The recent *Simon* decision adopts the same restrictive approach as *Philipp,* but shifts focus to the expropriation exception's second requirement: the commercial nexus with the US. Under §1605(a)(3), the property that was taken in violation of international law, or *any* property exchanged for such property (emphasis added), needs to have a connection with a commercial activity carried by the foreign state, or one of its agencies or instrumentalities, in the US. Crucially, the Hungarian government liquidated the assets allegedly expropriated from defendants. The Supreme Court was asked to decide whether the claimants' allegation that Hungary used the proceedings to issue bonds in the US met the commercial nexus requirement. Complicating matters further, the proceeds were absorbed into the national treasury where, over the years, they had mingled with billions in other revenues.

The *Simon* question concerns an important portion of expropriation cases, since property is often taken for its monetary rather than intrinsic value. Therefore, with some specific exceptions (such as takings of artworks or land), expropriated properties are likely going to be liquidated, and the proceeds are bound to be commingled with other funds. Years after the initial liquidation, proving the location of the money originally exchanged for those properties is extremely challenging, if not impossible. In 2023, the Circuit Court had indeed concluded that "[r]equiring plaintiffs whose property was liquidated to allege and prove that they have traced funds in the foreign state's or instrumentality's possession to proceeds of the sale of their property would render the FSIA's expropriation exception a nullity for virtually all claims involving liquidation".[19]

The *Simon* claimants thus proposed a "commingling theory", arguing that instead of tracing the initial proceeds, it is enough to show that they eventually mixed with funds later used in commercial activity in the US. Delivering the opinion of the Court, Justice Sotomayor rejected this theory, reading a specific tracing requirement into the wording of the expropriation exception. In order to meet this requirement, claimants can identify a US account holding proceeds from expropriated property, or allege that a foreign sovereign spent *all* funds from a commingled account in the United States. As clarified by the Justice, these are but some examples of how a claimant might chose to proceed. Rather than examining various common law tracing principles, however, the Court here simply ruled that alleging that a foreign sovereign liquidated the expropriated property, commingled the proceeds with general funds, and later used *some*

portion of those funds for commercial activities in the US does not establish a plausible commercial nexus. Although this ruling imposes a high bar for claimants seeking to invoke the expropriation exception, the Court found this outcome less detrimental to the FSIA's rationale than accepting the "attenuated fiction" that commingled accounts still contain funds from the original property's liquidation. In *Simon*, for example, while the initial commingling of funds occurred in the 1940s, the suit was only brought in the 2010s, after "several institutional collapses and regime changes".

A Restrictive Parable

The Supreme Court based its *Simon* decision on a textual interpretation of the expropriation exception, which identifies "*that* property or *any* property exchanged for such property", without providing a specific alternative criterion for property exchanged for money. The Court also looked at the legislative history of the FSIA, rooted in the 1964 B*anco Nacional de Cuba v. Sabbatino* decision.[20] *The Sabbatino* case prompted US Congress to pass the FSIA's predecessor, the Second Hickenlooper Amendment to the Foreign Assistance Act of 1964, "to permit adjudication of claims the Sabbatino decision had avoided".[21] In *Simon*, the Court read its *Sabbatino* precedent as part of the FSIA's history, and as such relevant to its interpretation – especially considering that *Sabbatino* also revolved around property that had been liquidated. Crucially in *Sabbatino* "the proceeds . . . in controversy" could be clearly traced to a New York account, aligning the case with the tracing requirement identified in *Simon*.

The *Simon* Court also echoed the foreign relations concerns that it already discussed in *Philipp*, justifying its restrictive interpretation of the FSIA on the Act's potential to cause international friction, and trigger reciprocity among other states' courts. In this regard, the *Philipp* and *Simon* decisions seem particularly keen to do some "damage control" on the effects of the expropriation exception, reducing its scope from a "radical" to a "limited" departure from the restrictive theory of foreign sovereign immunity.

This restrictive turn mirrors the trajectory of human rights litigation under the Alien Tort Statute (ATS).[22] Starting with the Second Circuit's decision in *Filártiga v. Peña-Irala*,[23] the 1789 ATS was used by US courts to extend their jurisdiction on human rights claims brought by aliens. In 2004 (the same year as the seminal Altmann decision on the FSIA's retroactive application),[24] the

Supreme Court rejected the interpretation of the ATS as a gateway for "foreign-cubed" human rights cases.[25] Warning against the risk of "adverse foreign policy consequences", the Court provided a narrow interpretation of the ATS. This conservative approach has been framed as part of the shift in attitudes that marked the passage from the Third to the Fourth Restatement of the Foreign Relations Law of the United States.[26] The decision to restrict the reach of the ATS was in fact rooted in political considerations, as testified by the pressure exercised by the Bush administration to hear the case.[27] The new geopolitical landscape had diminished the strategic importance of vindicating international human rights law, and the use of domestic courts to advance public rights agendas had faced severe criticism, with US courts being accused of acting as judges of world history.[28] The *Philipp* and *Simon* interpretations of the FSIA reproduce this passage from an offensive to a defensive approach within the law of foreign sovereign immunity.

Conclusion

Since *Philipp*, the expropriation exception has been limited to property takings by foreign sovereigns against aliens during peacetime. This development has arguably returned the FSIA to its original intent: to protect the property of US citizens abroad, as an expression of "America's free enterprise system". With *Simon*, this provision's application has been further restricted where the expropriated property was liquidated. This approach explicitly aims at aligning US law with international law. In this process, however, the US judiciary's controversial yet proactive contribution to human rights litigation, with its potential to influence the development of customary law, is taking a more conservative and isolationist stance.

[1] *Republic of Hungary v. Simon,* 604 U. S. ___ (2025).

[2] *Federal Republic of Germany* v. *Philipp,* 592 U. S. 169 (2021).

[3] Thomas Giegerich, 'The Holy See, a Former Somalian Prime Minister, and a Confiscated Pissarro Painting: Recent Us Case Law on Foreign Sovereign Immunity' in Anne Peters and others (eds), *Immunities in the Age of Global Constitutionalism* (Brill | Nijhoff 2014) 52. <https://brill.com/view/book/edcoll/9789004251632/B9789004251632_006.xml> accessed 11 December 2024. An important conference on the state of the art on

the international law of foreign sovereign immunity recently took place at Villa Vigoni (Italy), under the auspices of the Max Planck Institute for Comparative Public Law and International Law. The full program of the event can be found here: https://www.mpil.de/en/pub/news/conferences-workshops/the-future-of-remedies-against.cfm.

[4] As described by Riccardo Pavoni, 'An American Anomaly? On the ICJ's Selective Reading of United States Practice in Jurisdictional Immunities of the State' (2011) 21 *The Italian Yearbook of International Law Online* 143.

[5] For an historical contextualization, see Szabolcs Szita, 'It Happened Seventy Years Ago, in Hungary' [2014] Témoigner. Entre histoire et mémoire. Revue pluridisciplinaire de la Fondation Auschwitz 146.

[6] See *Republic of Hungary v. Simon*, 592 U. S. 207 (2021) (per curiam) (Supreme Court of the United States).

[7] The FSIA, enacted through Public Law 94-583 on October 21 on 1976, is codified in Title 28 of the U.S. Code, Chapter 97, Part IV – Jurisdictional Immunities of Foreign States.

[8] Charlene Sun and Aloysius Llamzon, 'Acta Iure Gestionis and Acta Iure Imperii' (*Oxford Constitutions – Max Planck Encyclopedia of Comparative Constitutional Law [MPECCoL]*) <https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e188> accessed 30 April 2025.

[9] *Altmann v Republic of Austria* [2001] 142 F. Supp. 2d 1187 (United States District Court, CD California).

[10] *Toren v Federal Republic of Germany* 2023 WL 7103263 (United States Court of Appeals, District of Columbia Circuit) (unreported).

[11] *Berg v Kingdom of the Netherlands* 2020 WL 2829757 (United States District Court, D. South Carolina, Charleston Division) (unreported).

[12] *Cassirer v Kingdom of Spain* [2006] 461 F.Supp.2d 1157 (United States District Court, CD California).

[13] Mayer Brown, '"Domestic Takings" Rule Bars Suit Against Foreign Nations in U.S. Court' (*Lexology*, 3 February 2021) <https://www.lexology.com/library/detail.aspx?g=1d4af991-a497-47be-80f2-dd78c184baa1> accessed 30 April 2025.

[14] UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, United Nations, Treaty Series, vol. 78, p. 277, 9 December 1948, https://www.refworld.org/legal/agreements/unga/1948/en/13495 [accessed 29 April 2025].

[15] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012. For a critical discussion of this judgment, see Benedetto Conforti, 'The Judgment of the International Court of Justice on the Immunity of Foreign States: A Missed Opportunity' (2011) 21 *The Italian Yearbook of International Law Online* 133.

[16] See *Simon v Republic of Hungary* [2023] 77 F4th 1077 (United States Court of Appeals, District of Columbia Circuit). The court here clarified that its decision did not "foreclose the possibility that such support exists in sources of international law not before us in this case or based on arguments not advanced here"> Ibid, para 1098.

[17] *de Csepel v Republic of Hungary* 2024 WL 4345811 (United States District Court, District of Columbia).

[18] Livia Solaro, 'US Case Further Restricts Holocaust-Related Art Claims' (*The Institute of Art & Law*, 11 November 2024) <https://ial.uk.com/author/livia-solaro/> accessed 30 April 2025.

[19] *Simon v Republic of Hungary* (n 16) para 1118.

[20] *Banco Nacional de Cuba v. Sabbatino,* 376 U. S. 398 (1964) (Supreme Court of the United States).This case revolved around the expropriation of sugar by Cuba against a private company in protest for the reduction of the US sugar quota for this country. After the sugar in question was delivered to a customer in Morocco, both the Cuban state and the private company claimed the payment of the price, which in the meantime had been transferred to a New York commodity broker. The case eventually was adjudicated in favour of the National Bank of Cuba, based on the Act of State doctrine.

[21] As noted by the Court in *Republic of Hungary* v. *Simon,* 604 U. S. ___ (2025) (Supreme Court of the United States) 15–16.

[22] 28 U.S. Code § 1350.

[23] *Filartiga v Pena-Irala* [1980] 630 F.2d 876 (United States Court of Appeals, Second Circuit).

[24] *Republic of Austria v. Altmann,* 541 U. S. 677 (2004) (Supreme Court of the United States).

[25] *Sosa v. Alvarez-Machain,* 542 U. S. 692 (2004) (Supreme Court of the United States); for a definition of 'foreign-cubed' claims, see Robert S Wiener, 'Foreign Jurisdictional Algebra and Kiobel v. Royal Dutch Petroleum: Foreign Cubed And Foreign Squared Cases' (2014) 32 *North East Journal of Legal Studies* 156, 157.

[26] See Thomas H Lee, 'Customary International Law and U.S. Judicial Power: From the Third to the Fourth Restatements', *SSRN Electronic Journal* (2020) <https://www.ssrn.com/abstract=3629791> accessed 14 March 2025.

[27] Naomi Norberg, 'The US Supreme Court Affirms the Filartiga Paradigm' (2006) 4 *Journal of International Criminal Justice* 387, 390.

[28] Ugo Mattei, 'A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance' (2003) 10 *Indiana Journal of Global Legal Indiana Journal of Global Legal Studies* 67, 420.