The Foreign Sovereign Immunities Act and International Comity: Is Exhaustion of Domestic Remedies Required for Nazi-Looted Art Claims?

Brett A. Marek[*]

ABSTRACT: A circuit split exists on the issue of whether a plaintiff must exhaust all available domestic remedies as a matter of international comity before bringing action against a foreign entity in the United States under the Foreign Sovereign Immunities Act's ("FSIA") expropriation exception. The Seventh Circuit Court of Appeals has taken an approach in which a claimant suing under the expropriation exception must take adequate efforts to exhaust remedies in a foreign sovereign before suing that sovereign in the United States. Meanwhile, the D.C. Circuit Court of Appeals has explicitly rejected the Seventh Circuit's approach and has instead held that no such exhaustion is necessary. This circuit split is highly relevant to the international art repatriation movement and the question of whether U.S. courts can provide remedies for Holocaust victims. During the Holocaust era, the Nazi regime looted countless artworks from their legal owners, many of which have gone unrecovered. If Holocaust victims or their heirs cannot sue in the United States, they may lose their only fair shot at recovering their heritage. This Note argues that the D.C. Circuit has the superior approach, in which Holocaust-era art litigants do not need to exhaust remedies as a matter of international comity before suing in the United States. Supreme Court precedent supports such a conclusion because the FSIA is comprehensive and all sovereign immunity defenses must stand or fall on the text of the Act. Furthermore, international comity concerns can be downplayed during Holocaust art litigation, as the return of art to victims of the Nazis is a movement of international interest. Additionally, European forums often fail to provide Holocaust-era art litigants a fair chance of recovery, and U.S. courts can often be the only fair forum in which claimants can be heard on the merits of their art claims rather than losing over procedural grounds.

[*] J.D. Candidate, The University of Iowa College of Law, 2021; B.A. Economics, Creighton University, 2018.

I. INTRODUCTION

During World War II and over the course of the Holocaust, the Nazis looted over 20 percent of Europe's art.[1] These looted artworks found their way into the hands of governments, museums, and private collectors.[2] Following the war, much of this art was returned to original owners. However, over an estimated 100,000 pieces remain unaccounted for,[3] and many victims of the theft have had trouble recovering art that rightfully belongs to them.

1. Erin Blakemore, *Reclaiming Nazi-looted Art Is About to Get Easier*, SMITHSONIAN MAG. (Dec. 12, 2016), https://www.smithsonianmag.com/smart-news/new-law-will-make-it-easier-reclaim-nazi-looted-art-180961394 [https://perma.cc/AEL9-7PQE].

2. *Id.*

3. *See* Greg Bradsher, *Documenting Nazi Plunder of European Art*, NAT'L ARCHIVES (Nov. 1997), https://www.archives.gov/research/holocaust/records-and-research/documenting-nazi-plunder-of-european-art.html [https://perma.cc/VL6J-DS24].

Unrecovered pieces of art have been termed "the last prisoners of war," and they signify Europe's unfinished business in righting the wrongs of Nazi confiscation.[4]

Because much of the Nazi-looted art within Europe is kept within public museums and national collections, the process of recovering art often involves making claims against the countries that house the artwork themselves.[5] Within the United States, these suits bring up the delicate question of whether foreign sovereign immunity applies. U.S. foreign sovereign immunity law is codified in the Foreign Sovereign Immunities Act ("FSIA"), which provides for a default rule of sovereign immunity and stipulates a number of exceptions.[6] Section 1605(a)(3) of the FSIA includes the expropriation exception, which allows jurisdiction in cases involving the restitution of Nazi-looted art currently being held by foreign nations.[7]

Recently, a circuit split formed on the issue of whether, as a matter of international comity, a plaintiff must exhaust all available remedies in the defendant's own legal system before bringing action against a foreign entity in the United States under the expropriation exception. The Seventh Circuit imposes a domestic exhaustion rule and bars courts from proceeding with a claim in the United States until the plaintiff exhausts all local remedies in the courts of the foreign sovereign being sued (hereinafter referred to as "domestic remedies").[8] By contrast, the D.C. Circuit finds no room for such a rule in the FSIA.[9] This split is highly relevant to the international movement for art repatriation, as it has the potential to dictate whether victims of Nazi looting can be heard in U.S. courts—where they have a greater opportunity for their claims to be decided on the merits rather than on procedural grounds.[10]

This Note argues that Nazi-looted art litigants do not need to exhaust domestic remedies as a matter of international comity before suing in U.S. court under the expropriation exception. Part II of this Note discusses the development of U.S. foreign sovereign immunity law and the history of Nazi-looted art litigation. Part III explores the circuit split between the Seventh and

4. E.B., *How is Nazi-Looted Art Returned?*, ECONOMIST (Jan. 12, 2014), https://www.economist.com/the-economist-explains/2014/01/12/how-is-nazi-looted-art-returned [https://perma.cc/VK9C-E3AG].

5. *Id.*

6. 28 U.S.C. §§ 1604–1607 (2018).

7. *See* Simon v. Republic of Hungary, 911 F.3d 1172, 1177 (D.C. Cir. 2018).

8. Fischer v. Magyar Államvasutak Zrt., 777 F.3d 847, 856–59 (7th Cir. 2015).

9. Philipp v. Federal Republic of Germany, 894 F.3d 406, 415 (D.C. Cir. 2018), *cert. granted*, No. 19-351, 2020 WL 3578677 (U.S. July 2, 2020).

10. Mark I. Labaton, *Restoring Lost Legacies*, L.A. LAW., June 2018, at 34, 37. The United States is a favorable jurisdiction for art restitution cases in part due to "[t]he availability of contingent fee arrangements, a lack of fee-shifting, the absence of litigation bond requirements, a common-law tradition, the right to appeal, and the rule that a thief cannot obtain good title via adverse possession." *Id.*

D.C. Circuit Courts of Appeal and explains why the Supreme Court was right to grant certiorari to resolve the split. Part IV argues that the D.C. Circuit's position is correct: The FSIA's expropriation exception does not require that plaintiffs exhaust domestic remedies as a matter of international comity before being allowed to proceed with expropriation claims against foreign sovereigns in U.S. courts. Part V concludes that both Supreme Court precedent and important policy considerations allow for no domestic exhaustion rule.

II. BACKGROUND

To understand the current state of foreign sovereign immunity and how it relates to Holocaust art litigation, a brief overview of both subjects is necessary. Section II.A will discuss the development of U.S. foreign sovereign immunity law and the establishment and interpretation of the Foreign Sovereign Immunities Act. Section II.B will discuss the history of Holocaust art litigation and explore the time-sensitive nature of art restitution and the litigation challenges faced by claimants.

A. THE DEVELOPMENT OF U.S. FOREIGN SOVEREIGN IMMUNITY LAW

1. Absolute Sovereign Immunity

United States foreign sovereign immunity jurisprudence has its origin in the 1812 Supreme Court decision *Schooner Exchange v. McFaddon*, in which Chief Justice Marshall stressed that foreign sovereigns do not have a constitutional right to immunity in U.S. courts.[11] In that case, residents of the state of Maryland brought suit in U.S. District Court in Pennsylvania and set forth that they were the lawful owners of the Schooner Exchange, an armed French vessel that had harbored in the port of Philadelphia.[12] While the Supreme Court concluded that the jurisdiction of the United States "is susceptible of no limitation not imposed by itself,"[13] it also acknowledged that the United States gives an implied immunity to foreign sovereign-owned vessels that enter its ports.[14]

---

11. Republic of Austria v. Altmann, 541 U.S. 677, 688 (2004); *see also* Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812) ("The jurisdiction of the [United States] within its own territory is necessarily exclusive and absolute."), *superseded by statute*, Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611 (2018), *as recognized in* Oparti v. Republic of Sudan, 140 S. Ct. 1601 (2020).

12. *Schooner Exch.*, 11 U.S. at 117.

13. *Id.* at 136.

14. *Id.* at 138 ("Should one sovereign enter the territory of another, without the consent of that other, expressed or implied, it would present a question which does not appear to be perfectly settled, a decision of which, is not necessary to any conclusion to which the Court may come in the cause under consideration. If he did not thereby expose himself to the territorial jurisdiction of the sovereign, whose dominions he had entered, it would seem to be because all sovereigns impliedly engage not to avail themselves of a power over their equal . . . .").

Writing for the majority, the Chief Justice emphasized that "full and absolute territorial jurisdiction" was a characteristic of every sovereign.[15] However, he went on to explain that state sovereign immunity was an established standard of international customary law:

> This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to wave the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.[16]

The holding of *Schooner Exchange* was narrow and limited to the facts of the case.[17] Nonetheless, the opinion established foreign sovereign immunity as a matter of international comity within the United States, and it "came to be regarded as extending virtually absolute immunity to foreign sovereigns."[18] It also introduced the doctrine of international comity, a principle by which U.S. courts will under certain circumstances defer to foreign sovereignty and abstain from resolving issues that are entangled in international relations, as a means of resolving foreign sovereign immunity cases within the United States.[19] The absolute sovereign immunity doctrine went largely unchallenged in the United States until 1926, when the Supreme Court heard a case involving immunity for an Italian government-owned ship that had lost the cargo it was delivering en route to New York.[20] A lower court had ruled in favor of a more restrictive form of immunity because the ship in question was a merchant ship rather than a warship,[21] but the Supreme Court held that the absolute immunity doctrine was still applicable.[22] Foreign sovereigns and their property were still immune from the jurisdiction of all

15. *Id.* at 137.

16. *Id.*

17. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983) ("[T]he narrow holding of *The Schooner Exchange* was only that the courts of the United States lack jurisdiction over an armed ship of a foreign state found in our port . . . .").

18. *Id.*

19. *See* Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 47 (2010); *see also* Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1237 (11th Cir. 2004) ("[International comity] is an abstention doctrine: A federal court has jurisdiction but defers to the judgment of an alternative forum."); William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2090 (2015) ("While comity was the basis for enforcing foreign laws and judgments in American courts during the nineteenth century, it also served to restrain the exercise of jurisdiction over foreign sovereigns.").

20. Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562, 569–71 (1926).

21. *Id.* at 576.

22. *Id.* at 574 ("We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that war ships are.").

U.S. courts, regardless of whether the foreign sovereign was engaging in trade with the United States.[23]

2. Restrictive Sovereign Immunity

"As governments increasingly engaged in trading and various commercial activities" later in the twentieth century, the argument that the absolute sovereign immunity doctrine gave countries an unfair advantage over private commercial enterprises rose to prominence.[24] However, because "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution,"[25] the Supreme Court developed a tradition of deferring to the Executive Branch on the issue of taking jurisdiction over cases involving foreign nations.[26] In the 1940s, the Supreme Court found in a number of cases that the Executive Branch's suggestions of sovereign immunity or lack thereof must be followed by the courts, and foreign states increasingly began to petition the State Department to request that the Department of Justice suggest to the U.S. courts that they be given sovereign immunity.[27]

Up until the early 1950s, the Executive Branch's policy was to "request[] immunity in all actions against friendly sovereigns."[28] However, in 1952, "the State Department concluded that 'immunity should no longer be granted in certain types of cases.'"[29] The Acting Legal Adviser of the Department of State, Jack B. Tate, wrote a letter to the Acting Attorney General in which he explained that the State Department's policy would now be to follow the restrictive theory of foreign sovereign immunity.[30] Under this theory, sovereign

---

23. *Id.*

24. RESTATEMENT (FOURTH) OF FOREIGN RELS. L.: SOVEREIGN IMMUNITY ch. 5, subchapter A, intro. note (AM. L. INST., Tentative Draft No. 3, 2017).

25. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983).

26. *Id.* ("[T]his Court consistently has deferred to the decisions of the political branches —in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities.").

27. RESTATEMENT (FOURTH) OF FOREIGN RELS. L.: SOVEREIGN IMMUNITY ch. 5, subchapter A, intro. note (AM. L. INST., Tentative Draft No. 3, 2017).

28. Republic of Austria v. Altmann, 541 U.S. 677, 689 (2004).

29. *Id.* (citation omitted).

30. *Id.* at 690 ("A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*). . . . [I]t will hereafter be the Department's policy to follow the restrictive theory . . . in the consideration of requests of foreign governments for a grant of sovereign immunity." (quoting Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Phillip B. Perlman, Acting U.S. Attorney General (May 19, 1952), *reprinted in* 26 DEP'T STATE BULL. 984, 985 (1952))).

immunity is granted with regard to the public, or sovereign, acts of a state, but immunity does not extend to a foreign state's private, or strictly commercial, acts.[31] Thus, immunity would be denied in cases that arose out of a foreign country's trading activities or commercial transactions.[32]

Initial application of the restrictive sovereign immunity theory following the so-called Tate Letter proved difficult.[33] U.S. courts continued to defer to the Executive Branch on the issue of taking jurisdiction over cases involving foreign states, and they continued to abide by the State Department's suggestions of sovereign immunity, regardless of whether the suggestions were in compliance with the new policy outlined in the Tate Letter.[34] This practice placed diplomatic pressures on the State Department as foreign states persisted in seeking immunity, even if they did not actually qualify for it under the restrictive sovereign immunity theory.[35] Occasionally, the State Department would give in to political pressure and request that a sovereign nation be granted immunity in a case arising out of the nation's private commercial activity, thereby circumventing its own policy.[36]

The State Department faced criticism for its inconsistent handling of sovereign immunity claims.[37] In response, it began conducting hearings on whether a given claim met the requirements set out by the Tate Letter.[38] Nonetheless, many claimants argued that the rulings of some of these hearings were being influenced by foreign policy considerations.[39] An additional problem resulted from the fact that not all foreign states requested one of these hearings from the State Department.[40] Under the guidance of previous State Department decisions and judicial precedent, U.S. courts would then be required to determine for themselves whether sovereign immunity existed under the restrictive theory.[41] Further, even if previous State Department decisions pointed towards granting absolute immunity, new

31. *Id.*

32. RESTATEMENT (FOURTH) OF FOREIGN RELS. L.: SOVEREIGN IMMUNITY ch. 5, subchapter A, intro. note (AM. L. INST., Tentative Draft No. 3, 2017).

33. *See, e.g.*, Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983) ("The restrictive theory was not initially enacted into law, however, and its application proved troublesome.").

34. *Id.* ("As in the past, initial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department, and the courts abided by 'suggestions of immunity' from the State Department.").

35. *Id.*

36. *Id.* ("On occasion, political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory.").

37. RESTATEMENT (FOURTH) OF FOREIGN RELS. L.: SOVEREIGN IMMUNITY ch. 5, subchapter A, intro. note (AM. L. INST., Tentative Draft No. 3, 2017).

38. *Id.*

39. *Id.*

40. *Verlinden B.V.*, 461 U.S. at 487.

41. *Id.* ("[T]he responsibility fell to the courts to determine whether sovereign immunity existed . . . .").

Supreme Court precedent dictated that courts were no longer allowed to grant absolute immunity to sovereigns for claims arising out of purely commercial activities.[42] As the Supreme Court later explained in a discussion of the matter, "sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied."[43]

3. The Foreign Sovereign Immunities Act

In 1976, to prevent divergent standards for sovereign immunity and to liberate the State Department from diplomatic pressures, Congress passed the Foreign Sovereign Immunities Act.[44] Congress wanted to codify the restrictive theory of immunity so that its application would be consistent and that decisions would rest "on purely legal grounds and under procedures that insure due process."[45] The FSIA would also bring the United States into conformity with practically all other foreign nations, where courts exclusively hear sovereign immunity cases and executive agencies do not play a role in issuing decisions.[46]

The FSIA provided a statutory framework for the foreign sovereign immunity doctrine in Title 28 of the U.S. Code through various provisions found in different sections. As dictated in § 1604, the default immunity rule is that foreign sovereigns are immune from jurisdiction in the United States in both federal and state courts, subject to exceptions laid out in §§ 1605 and 1607.[47] Section 1605 lists a number of exceptions to immunity, such as the waiver exception, the commercial activity exception, the arbitration exception, and the expropriation exception.[48]

The expropriation exception, which involves cases concerning governmental takings of property, can be found in § 1605(a)(3).[49] The exception provides that foreign sovereigns are not immune from U.S. jurisdiction in the following cases:

> [I]n which rights in property taken in violation of international law are in issue and that 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

42. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 705 (1976).

43. *Verlinden B.V.*, 461 U.S. at 488.

44. *Id.*; *see* H.R. REP. NO. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605–06.

45. H.R. REP. NO. 94-1487, at 7.

46. *Id.*

47. 28 U.S.C. § 1604 (2018) ("[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.").

48. *Id.* § 1605.

49. *See id.* § 1605(a)(3).

> state; or that property or any property exchanged for such property 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 United States.[50]

Section 1605(a)(3) is the relevant provision that allows jurisdiction in cases involving the restitution of Nazi-looted art currently being held by foreign nations.[51] Notably, neither § 1605(a)(3) nor the rest of the FSIA contains any specific textual requirement to mandate the exhaustion of domestic remedies, in which litigants must first exhaust their claims in the courts of a foreign sovereign before bringing suit in the United States against that sovereign.[52] Nor is there any reference to international comity within the text of § 1605.[53]

The Supreme Court has discussed the FSIA in numerous decisions since the Act's passage. In 1983, the Supreme Court found that "the [FSIA] contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities."[54] In a 1989 decision, it held that the FSIA supplies "the sole basis for obtaining jurisdiction over a foreign state in federal court."[55] In 2004, the Supreme Court affirmed that "[t]he [FSIA] 'codifies, as a matter of federal law, the restrictive theory of sovereign immunity,' . . . transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch,"[56] and requires courts to comply with the rules of the FSIA when making decisions.[57] In a 2008 decision, the Court noted that carrying out the FSIA's sovereign immunity doctrine promotes the interests involved with international comity.[58] Most recently, in its 2014 opinion in *Republic of Argentina v. NML Capital, Ltd.*, the Court found that "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall."[59]

---

50. *Id.*

51. Simon v. Republic of Hungary, 911 F.3d 1172, 1177 (D.C. Cir. 2018).

52. *See* 28 U.S.C. § 1605(a)(3); *Simon*, 911 F.3d at 1181.

53. *See* 28 U.S.C. § 1605.

54. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 488 (1983).

55. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439 (1989).

56. Republic of Austria v. Altmann, 541 U.S. 677, 691 (2004) (quoting *Verlinden B.V.*, 461 U.S. at 488).

57. *Id.*

58. *See* Republic of Philippines v. Pimentel, 553 U.S. 851, 866 (2008) ("Giving full effect to sovereign immunity promotes the comity interests that have contributed to the development of the immunity doctrine.").

59. Republic of Argentina v. NML Cap., Ltd., 134 S. Ct. 2250, 2256 (2014). In this case, Argentina argued that the FSIA either forbade or limited "discovery in aid of execution of a foreign-sovereign judgment debtor's assets." *Id.* Argentina conceded that, while no part of the FSIA expressly spoke to the matter, such a rule was implied. *Id.* at 2256–57. The Supreme Court declined to "draw meaning from [the FSIA's] silence." *Id.* at 2257.

In 2004, in its seminal decision in *Republic of Austria v. Altmann*, the Supreme Court held that the FSIA applies retroactively, regardless of whether alleged wrongdoing occurred before its enactment in 1976 or the State Department's adoption of the restrictive sovereign immunity theory in 1952.[60] Thus, the FSIA applies to all claims against foreign sovereigns for art looted during World War II and the Holocaust.[61] Ever since, lower courts have been applying the FSIA framework in cases involving claims for Nazi-looted art, and the FSIA has played a significant role in Holocaust art litigation.[62]

B. A HISTORY OF HOLOCAUST ART LITIGATION

1. Nazi-Looted Art History and the Revival of Repatriation

During the Holocaust era and throughout World War II, the Nazis stole an estimated 600,000 paintings in a move to enrich Nazi Germany and destroy Jewish culture.[63] Members of the Nazi elite amassed large personal collections of artwork stolen from occupied territories across Europe as part of a systematic effort to confiscate art.[64] Nazis confiscated valuable and culturally significant artworks, including extensive theft from the private collections of Jewish families, for their personal enrichment and as part of their routine habit of confiscating the property of Holocaust victims.[65] It was the largest art theft in history.[66]

Following the war, the Allies worked to return art to original owners and to prevent trafficking in looted art.[67] Nazi-looted paintings that the Allies managed to recover were sent to the countries from where they had been stolen with the assumption that those countries would be able to return them to their rightful owners.[68] However, most of these pieces instead either went to national collections or were sold to private collectors, and many rightful owners lost track of their art.[69]

---

60. *Altmann*, 541 U.S. at 700.

61. *Id.*

62. *See, e.g.*, Simon v. Republic of Hungary, 911 F.3d 1172, 1177–79 (D.C. Cir. 2018).

63. Stuart E. Eizenstat, *Art Stolen by the Nazis Is Still Missing. Here's How We Can Recover It.*, WASH. POST (Jan. 2, 2019, 5:06 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/R6DL-KCGU].

64. Courtney Suciu, *Ongoing Efforts to Recover and Return Nazi Plundered Art*, PROQUEST (June 5, 2019), https://about.proquest.com/blog/eosblog/2019/Ongoing-Efforts-to-Recover-and-Return-Nazi-Plundered-Art.html [https://perma.cc/2W7B-MX2F].

65. *Id.*

66. E.B., *supra* note 4.

67. Eizenstat, *supra* note 63.

68. *Id.*

69. *Id.*

Efforts to reclaim stolen art hit a low point during the Cold War, and many records on art theft were shrouded in secrecy behind the Iron Curtain.[70] The end of the Cold War and the resulting opening of archives, libraries, and warehouses throughout Europe brought previously concealed documents to light, giving rise to renewed interest in the 1990s of the repatriation of art that had been looted a half-century earlier.[71] Stolen artworks were termed "the last prisoners of war,"[72] and claims for the return of Holocaust loot resurfaced to international attention.[73] By the end of the twentieth century, upwards of "100,000 works of art [were] still missing."[74]

In response to renewed interest, governments initiated efforts to ease the recovery and repatriation of stolen artwork, and in 1998, 44 countries and numerous NGOs agreed to the Washington Principles on Nazi-Confiscated Art, a statement in which signers agreed to give their best attempt to return Nazi-looted art to original owners and their heirs.[75] This agreement, though not legally binding, laid the groundwork for nations to pass their own laws in pursuit of a just solution to the theft of Holocaust era assets.[76]

2. Challenges Associated with Repatriation

While many pieces of art have since been recovered and returned to their rightful owners, tens of thousands are still either missing or being held by museums and private collectors.[77] Furthermore, restitution of artwork remains no easy task, even in the rare scenarios where ownership records are clear.[78] "The process of claiming looted artwork is often opaque, ad-hoc, expensive and uncertain."[79] The great length of time that has passed since the artworks were stolen has made it difficult to trace and verify documents, and

70. *See The Restitution of Art Objects Seized by the Nazis from Holocaust Victims and Insurance Claims of Certain Holocaust Victims and Their Heirs: Hearing Before the H. Comm. on Banking & Fin. Servs.*, 105th Cong. 176 (1998) (statement of Glenn D. Lowry, Director, Museum of Modern Art, New York) ("[T]he records that survived the war were not accessible to scholars, art historians, or heirs of Holocaust victims."); *see also* Robin Gremmel, *The Tricky Process of Returning Nazi-Looted Art*, LOCAL (Nov. 5, 2017, 6:30 PM), https://www.thelocal.de/20171105/the-tricky-process-of-returning-nazi-looted-art [https://perma.cc/895L-5D3T] ("[W]orks [provisionally entrusted to museums] were exhibited from 1950 to 1954, but then, 'for 40 years, nothing happened.'").

71. Gremmel, *supra* note 70.

72. E.B., *supra* note 4.

73. *See* Bradsher, *supra* note 3.

74. *Id.*

75. William D. Cohan, *Five Countries Slow to Address Nazi-Looted Art, U.S. Expert Says*, N.Y. TIMES (Nov. 26, 2018) [hereinafter Cohan, *Five Countries*], https://www.nytimes.com/2018/11/26/arts/design/five-countries-slow-to-address-nazi-looted-art-us-expert-says.html [https://perma.cc/NQF5-G8XY].

76. Eizenstat, *supra* note 63.

77. *Id.*

78. E.B., *supra* note 4.

79. *Id.*

the procedure for claiming art varies significantly from country to country.[80] Different countries each follow their own set of rules, records on ownership claims may be written in any of several different languages and exist in various formats,[81] and no international arbitrator has been established to solve disputes.[82] To complicate matters further, disputed works have seen exponential increases in value, thereby raising the stakes for all parties involved.[83]

In the United States, redress for victims comes with its own unique set of challenges. The vast majority of American museums and art collections are privately owned, so federal and state governments generally cannot mandate restitution.[84] Recuperation of looted art has largely been hit-or-miss. When possessors of stolen artwork refuse to engage with claimants or when negotiations between claimants and possessors prove unsuccessful, claimants in the United States are primarily dependent on the judicial system for restitution, where statute of limitation defenses have been increasingly prevalent.[85] Both in the United States and in Europe, museums and collectors have a history of arguing that "time has run out" on claims for Holocaust-era art stolen some 80 years ago.[86]

In the years since the 1990s and the international renewal of interest in art repatriation, American courts have regularly heard claims for looted artwork in both U.S. and foreign collections, with mixed results.[87] In 1996, the first Nazi-looted art claim was filed in the United States, drawing national media interest to Nazi-looted art disputes and raising awareness of suits in American courts as a means of recovery.[88] A wave of Nazi-looted art cases filed

---

80. *See id.*

81. *The Restitution of Art Objects Seized by the Nazis from Holocaust Victims and Insurance Claims of Certain Holocaust Victims and Their Heirs: Hearing Before the H. Comm. on Banking & Fin. Servs.*, 105th Cong. 176 (1998) (statement of Glenn D. Lowry, Director, Museum of Modern Art, New York).

82. E.B., *supra* note 4.

83. *See id.*

84. *Id.*

85. William D. Cohan, *The Restitution Struggle: Malaise, Indifference, and Frustration*, ARTNEWS (Sept. 11, 2013, 8:00 AM) [hereinafter Cohan, *The Restitution Struggle*], https://www.artnews.com/art-news/news/the-restitution-struggle-2286 [https://perma.cc/CBL9-77DE] ("[C]ivil litigation remains the path open to museums and victims alike. Litigation, of course, is expensive, time-consuming, and—for the victims, anyway—particularly unsatisfying.").

86. *Id.*

87. *See* Jennifer Anglim Kreder, *Guarding the Historical Record from the Nazi–Era Art Litigation Tumbling Toward the Supreme Court*, 159 U. PA. L. REV. PENNUMBRA 253, 263–69 (2011). *See generally* Fischer v. Magyar Államvasutak Zrt., 777 F.3d 847 (7th Cir. 2015) (affirming dismissal of claims by Hungarian Holocaust survivors who sought remedies for their personal valuables being stolen); Philipp v. Federal Republic of Germany, 894 F.3d 406 (D.C. Cir. 2018) ("In this case, the heirs of several Jewish art dealers doing business in Frankfurt, Germany in the 1930s seek to recover a valuable art collection allegedly taken by the Nazis."), *cert. granted*, No. 19-351, 2020 WL 3578677 (U.S. July 2, 2020).

88. *See Case over Painting Stolen by Nazis Settled*, CNN (Aug. 14, 1998, 4:59 PM), https://www.cnn.com/US/9808/14/looted.art [https://perma.cc/BEG3-EXE6] ("The case was typical

in the United States soon followed.[89] Early cases filed in the United States did not focus on whether the FSIA's expropriation exception required the exhaustion of domestic remedies, as most cases involved disputes between rightful heirs to art pieces and the museums or art collectors in possession of them.[90]

The seminal Holocaust art case against a foreign sovereign, *Republic of Austria v. Altmann*, also did not involve a meaningful discussion of the exhaustion of domestic remedies.[91] In that case, Altmann initially planned to sue in Austria in 1998 to recover paintings that had belonged to her family but were being held in an Austrian state museum.[92] However, because court costs in Austria "are proportional to the value of the [amount] sought [to be recovered]," Altmann could not afford to litigate in Austrian courts.[93] Altmann thus filed suit in California.[94] In 2004, after seven years of litigation, the U.S. Supreme Court decided that the United States had jurisdiction in the case,[95] and the majority did not investigate the matter of exhaustion further than noting that Altmann would have had to pay significant money upfront to sue in Austria.[96]

As mentioned previously, time remains a logistical hurdle to overcome for claimants to Nazi-looted art.[97] State statutes of limitations within the United States have been inconsistent and often make recovery of art

---

of hundreds of disputes over the the [sic] rightful ownership of valuable art stolen by the Nazis during World War II. It would have been the first dispute of its kind to go to trial in the United States."); Ron Grossman, *Family Sues Collector, Says Degas Work Stolen by Nazis*, CHI. TRIB. (Mar. 24, 1997), https://www.chicagotribune.com/news/ct-xpm-1997-03-24-9703240079-story.html [https://perma.cc/5WHP-W52S].

89. Labaton, *supra* note 10, at 36–37.

90. *See* Kreder, *supra* note 87, at 265–69.

91. Republic of Austria v. Altmann, 541 U.S. 677, 688 (2004).

92. *Id.* at 684. Austrian governmental officials had originally agreed to return the paintings to Altmann but later declined to do so after a proceeding in which they allegedly misread a will on purpose, thereby determining that the paintings were freely donated to the museum. *Id.*

93. *Id.* at 684–85 ("Because Austrian court costs are proportional to the value of the recovery sought (and in this case would total several million dollars, an amount far beyond respondent's means), she requested a waiver. The court granted this request in part but still would have required respondent to pay approximately $350,000 to proceed. . . . [T]he Austrian Government appealed even this partial waiver . . . ." (citations omitted)).

94. *Id.* at 685 ("[R]espondent voluntarily dismissed her suit and filed this action in the United States District Court for the Central District of California.").

95. *Id.* at 687–88.

96. *See id.* at 684–85. In 2006, four of the Nazi-looted paintings were returned to Altmann, who then sold them for over $327 million. *See* Christopher Michaud, *Christie's Stages Record Art Sale*, REUTERS (Jan. 19, 2007, 2:13 PM), https://in.reuters.com/article/uk-arts-auction/christies-stages-record-art-sale-idUKN0920976420061109 [https://perma.cc/4Q5M-4P2G].

97. *See* Cohan, *The Restitution Struggle*, *supra* note 85.

prohibitively difficult.[98] In 2016, in response to restrictive statute of limitations that have prevented cases from being decided on their merits,[99] Congress unanimously passed the Holocaust Expropriated Art Recovery Act ("HEAR Act") to allow for Nazi-looted art claims to be fairly adjudicated.[100] The HEAR Act preempted state laws and created a cause of action for the recovery of art lost by Nazi prosecution for pending cases and for 20 years going forward.[101] While the HEAR Act serves as a welcome advancement in the area of Holocaust art litigation, the fact remains that the last Holocaust survivors are dying[102] and Holocaust awareness is fading.[103] As the years pass, restitution of Nazi-looted art risks becoming even more difficult, and any issue that involves barriers to the prompt and efficient return of art to rightful owners remains as relevant as ever.[104]

III. CURRENT CIRCUIT SPLIT ON WHETHER THE FSIA'S EXPROPRIATION EXCEPTION REQUIRES EXHAUSTION OF DOMESTIC REMEDIES

Two federal circuit courts have recently considered the question of whether the exhaustion of domestic remedies is required as a predicate for Nazi-looted art claims made under the FSIA's expropriation exception against foreign sovereigns as a matter of international comity.[105] Section III.A will

98. *See* Lauren F. Redman, *A Wakeup Call for a Uniform Statute of Limitations in Art Restitution Cases*, 15 UCLA ENT. L. REV. 203, 213–21 (2008) (describing three distinct, and often chaotic, approaches to state statutes of limitation that have led to problematic outcomes).

99. Labaton, *supra* note 10, at 37 ("Restrictive [statutes of limitations] deny claimants the opportunity to litigate their cases on the merits, deter potential claimants, and reduce the value of claims. Side litigation over SOLs also has been costly to claimants. Absent steep [statute of limitation] hurdles, courts in the United States are a favorable jurisdiction for Holocaust-era looting cases.").

100. *Id.* ("Court decisions have reduced the barrier posed by the FSIA, and similarly the HEAR Act seeks to limit [statute of limitations] barriers.").

101. *Id.* at 36 ("In particular, the HEAR Act gives victim families and their heirs a better opportunity to open the historical record, reclaim their familial and cultural legacy, and achieve a measure of justice.").

102. Deanna Paul, *Holocaust Survivors Are Dying, but Their Stories Are More Relevant than Ever*, WASH. POST (May 2, 2019, 5:00 AM), https://www.washingtonpost.com/history/2019/05/02/holocaust-survivors-are-dying-their-stories-are-more-relevant-than-ever [https://perma.cc/U4F2-HW9M].

103. Hailey Branson-Potts, *As Anti-Semitic Crimes Rise and Holocaust Awareness Fades, a Survivor Is Always Ready to Speak*, L.A. TIMES (Aug. 29, 2019, 4:00 AM), https://www.latimes.com/california/story/2019-08-28/jewish-holocaust-survivor-antisemitism.

104. *See* Labaton, *supra* note 10, at 36–37, 40 ("[T]he struggle to see justice done in the arena of Nazi-looted artwork is far from over.").

105. *See* Fischer v. Magyar Államvasutak Zrt., 777 F.3d 847, 872 (7th Cir. 2015) ("Because plaintiffs have not exhausted their Hungarian remedies and have not yet provided a legally compelling reason for their failure to do so, their claims against the national defendants were properly dismissed without prejudice."). *But see generally* Philipp v. Federal Republic of Germany, 894 F.3d 406 (D.C. Cir. 2018) (finding that German art dealers were not required to exhaust remedies in Germany to bring claim under FSIA), *cert. granted*, No. 19-351, 2020 WL 3578677 (U.S. July 2, 2020).

examine the approach taken by the Seventh Circuit as clarified in *Fischer v. Magyar Államvasutak Zrt.*, in which the court required either the exhaustion of domestic remedies or an explanation for failing to exhaust.[106] Section III.B will review the D.C. Circuit's decision in *Philipp v. Federal Republic of Germany*, in which the court held that exhaustion is not required.[107] Section III.C will discuss the importance of this circuit split and will explain why the Supreme Court should take steps to resolve it.

A. THE SEVENTH CIRCUIT REQUIRES EXHAUSTION OF REMEDIES

The Seventh Circuit has taken an approach in which a claimant suing under FSIA's expropriation exception must take adequate efforts to exhaust remedies in a foreign sovereign while suing that sovereign.[108] The Seventh Circuit first outlined its position that plaintiffs who wish to sue a foreign sovereign in U.S. courts must first exhaust remedies in that foreign sovereign before their cases can proceed in the United States in its 2012 decision *Abelesz v. Magyar Nemzeti Bank*.[109]

In *Abelesz*, Holocaust survivors and heirs of Holocaust victims sued the Hungarian national railway and the Hungarian national bank, alleging the bank and railway expropriated property from Hungarian Jews during the Holocaust[110] to finance the Holocaust within Hungary.[111] Plaintiffs sued both entities under FSIA's § 1605(a)(3) expropriation exception.[112] Defendants argued that the alleged expropriation could not be found in violation of international law because the plaintiffs did not pursue or exhaust any domestic remedies in Hungary, the foreign sovereign that had allegedly committed the expropriation.[113]

In its decision, the Seventh Circuit expressed its agreement with the Ninth and D.C. Circuits' position that neither § 1605(a)(3) nor any other provision of the FSIA contains a statutory exhaustion requirement.[114] Its

106. *See Fischer*, 777 F.3d at 856–60.

107. *See Philipp*, 894 F.3d at 414–16.

108. *See* Fischer v. Magyar Államvasutak Zrt., 892 F.3d 915, 916–17 (7th Cir. 2018) (discussing the Seventh Circuit's initial position of an exhaustion mandate taken in 2012 and its clarification in 2015).

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

110. *Id.* at 665. In separate opinions, the Seventh Circuit addressed the Holocaust survivors and heirs of Holocaust victims' expropriation claims against three private banks. *Id.* The present opinion dealt with the claims against the Hungarian national bank—Magyar Nemzeti Bank—and the claims against the Hungarian national railway—Magyar Államvasutak Zrt. *Id.*

111. *Id.* at 666.

112. *Id.*

113. *Id.* at 678.

114. *Id.* The court stated:

> On the statutory exhaustion point, nothing in § 1605(a)(3) suggests that plaintiffs must exhaust domestic Hungarian remedies before bringing suit in the United States. It does not, for example, condition the exception to immunity on a claimant's

discussion thus focused on "whether international law requires exhaustion of domestic remedies before plaintiffs can establish a violation," a question to which the court answered affirmatively.[115] In giving its reasoning, the court emphasized the importance of comity in international law,[116] and it argued 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' that the United States itself has invoked."[117]

The Seventh Circuit noted that the Supreme Court had previously mentioned the possibility that the domestic exhaustion rule may be necessary to assert violations of customary international law.[118] The Seventh Circuit also noted that the United States had previously invoked the domestic exhaustion rule in international court to require plaintiffs to exhaust available U.S. remedies, and explained that "[c]omity requires that the United States be prepared to reciprocate."[119] It concluded that Hungary deserved the opportunity

---

> having first presented his claim to the courts of the country being sued or to an international tribunal. Defendants have identified no language in the FSIA and no case law indicating that the FSIA contains a statutory exhaustion requirement. The Ninth Circuit and the D.C. Circuit have both held that it does not. We agree with the Ninth and D.C. Circuits that the FSIA does not contain a statutory exhaustion requirement.

Id. (citations omitted).

115. *Id.* at 678–82.

116. *Id.* at 680.

117. *Id.* at 679. "[The domestic exhaustion] rule is based on the idea that the state where the alleged violation occurred should have an opportunity to redress it by its own means, within the framework of its own legal system." *Id.* at 680.

118. *Id.* at 679. The court stated:

> In *Sosa v. Alvarez–Machain*, the Court noted that it "would certainly consider" whether claimants must have exhausted domestic or international remedies before asserting a claim in a foreign forum "in an appropriate case." In another claim involving property expropriated during the Holocaust, Justice Breyer wrote that "a plaintiff may have to show an absence of remedies in the foreign country sufficient to compensate for any taking."

Id. (citations omitted).

119. *Id.* at 680. The court continued to emphasize the relationship between comity and reciprocity and explained that

> [t]he plaintiffs suing the bank seek as much as $75 billion. The sum of damages sought by plaintiffs would amount to nearly 40 percent of Hungary's annual gross domestic product in 2011. Divided among Hungary's current population of 10 million people, that is more than $7500 per person. We should consider how the United States would react if a foreign court ordered the U.S. Treasury or the Federal Reserve Bank to pay a group of plaintiffs 40 percent of U.S. annual gross domestic product, which would be roughly $6 trillion, or $20,000 for every resident in the United States.

Id. at 682.

to hear the claims against it,[120] and remanded the claims to the district court to further examine the exhaustion issue.[121]

In 2015, in its decision in *Fischer v. Magyar Államvasutak Zrt.*, the Seventh Circuit revisited the claims against the Hungarian national bank and railway on remand.[122] Plaintiffs appealed a judgment by the district court dismissing the instrumentalities of the Hungarian government on the grounds that the plaintiffs had failed to either exhaust available Hungarian remedies or provide a legally compelling reason for not doing so.[123] Plaintiffs argued that the district court erred in imposing an exhaustion requirement on them in the first place.[124] In its decision, the Seventh Circuit clarified its position on the domestic exhaustion rule.[125]

Specifically, plaintiffs argued that the court "should revisit the exhaustion analysis in *Abelesz v. Magyar Nemzeti Bank* because [it] did not consider that the expropriations alleged here were 'discriminatory.'"[126] For support, they relied on the Restatement (Third) of Foreign Relations Law to argue that "discriminatory" takings are violations of international law regardless of whether or not domestic remedies exist to offer just compensation.[127] Plaintiffs thus reasoned that they did not need to exhaust Hungarian remedies.[128]

The Seventh Circuit rejected this analysis for mistakenly questioning whether the domestic exhaustion rule requires remedies to be exhausted before international law claims can even be asserted.[129] The court did not

120. *Id.* ("Hungary should first have the opportunity to address these alleged takings, by its own means and under its own legal system, before a U.S. court steps in to resolve claims against a part of the Hungarian national government for these actions taken in Hungary so long ago.").

121. *Id.* at 697 ("Because plaintiffs have not exhausted their Hungarian remedies and have not yet provided a legally compelling reason for their failure to do so, they have not established that their expropriation claims fall within an exception to the FSIA's grant of sovereign immunity.").

122. Fischer v. Magyar Államvasutak Zrt., 777 F.3d 847, 852 (7th Cir. 2015).

123. *Id.*

124. *Id.* at 856 ("Plaintiffs make two principal arguments . . . . First, they argue the district court should not have imposed an exhaustion requirement in the first place. Second, they argue that they offered sufficient reasons to excuse exhaustion in these cases.").

125. *Id.* at 856–59.

126. *Id.* at 856.

127. *Id.* at 856–57 ("Plaintiffs rely on § 712(1) of the Restatement (Third) of the Foreign Relations Law of the United States, which says that a state is responsible under international law for injury resulting from a taking by the state of the property of a national of another state that (a) is not for a public purpose, or (b) is discriminatory, or (c) is not accompanied by provision for just compensation. Plaintiffs reason that § 712 teaches that a 'discriminatory' taking is always a violation of international law . . . .").

128. *Id.* at 857.

129. *Id.* ("This argument misunderstands the relationship between finding a violation of international law and whether exhaustion is required.").

dispute that plaintiffs failed to allege international law violations;[130] rather, it clarified that "the [*Abelesz*] opinion imposed an exhaustion requirement that limits *where* plaintiffs may assert their international law claims."[131] The court reiterated that "comity at the heart of international law required plaintiffs either to exhaust domestic remedies in Hungary or to show a powerful reason to excuse the requirement."[132] Thus, plaintiffs that can "get a fair shake in a domestic forum" are expected "to attempt to seek a remedy there first" under international law.[133]

Citing to sections 712 and 713 of the Third Restatement, the Seventh Circuit concluded that international comity imposes a general requirement that plaintiffs exhaust domestic remedies before suing an instrumentality of a foreign government in U.S. courts.[134] It also noted that the FSIA's silence on whether foreign sovereigns can rely on customary international law in U.S. courts, such as the "well-established" domestic exhaustion rule, does not prevent them from so relying.[135] Ultimately, the Seventh Circuit affirmed the district court's judgment.[136]

B. THE D.C. CIRCUIT DOES NOT REQUIRE EXHAUSTION OF REMEDIES

The D.C. Circuit has explicitly rejected the approach taken by the Seventh Circuit, thereby creating a circuit split on the issue.[137] In 2018, in *Philipp v. Federal Republic of Germany*, the D.C. Circuit declined to impose a

---

130. *Id.* ("Without answering that question, we found that plaintiffs had alleged violations of international law due to the genocidal nature of the expropriations.").

131. *Id.* (emphasis added); *see also id.* at 858 ("Though [the court] agree[s] . . . that violations were alleged, that does not mean that international law allows those claims to be heard in any court in the world.").

132. *Id.* at 858.

133. *Id.*

134. *Id.* The Seventh Circuit stated:

> The text and structure of the Third Restatement of Foreign Relations Law confirm this understanding of the role exhaustion plays with respect to any takings claim under international law. No matter what type of taking is alleged under § 712 —whether discriminatory or otherwise—§ 713 explains that the same remedial scheme applies. And comment f of § 713 indicates that international law typically requires exhaustion of domestic remedies before any § 712 takings claim can be heard in a foreign court. In other words, comment f's domestic exhaustion requirement applies equally to either type of taking specified in § 712, whether discriminatory or not.

Id.

135. *Id.* at 859. The Seventh Circuit concluded that the Supreme Court's ruling in *Republic of Argentina v. NML Capital, Ltd.* that "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text" was directed towards a narrow question and thus was differentiated. *Id.* (quoting Republic of Argentina v. NML Cap., Ltd., 134 S. Ct. 2250, 2256 (2014)).

136. *Id.* at 872.

137. Philipp v. Federal Republic of Germany, 894 F.3d 406, 416 (D.C. Cir. 2018), *cert. granted*, No. 19-351, 2020 WL 3578677 (U.S. July 2, 2020).

domestic exhaustion rule for Nazi-art claims.[138] In that case, several heirs of Jewish art dealers sued in U.S. court to recover a valuable art collection that had allegedly been taken by the Nazis in the 1930s and given "to Adolf Hitler as a 'surprise gift.'"[139] Following World War II, the collection was turned over to a German agency and then displayed at a national museum in Berlin.[140] In 2014, the Jewish heirs submitted a claim to a German commission in charge of returning expropriated property, had their claim declined, and subsequently filed suit in the U.S. District Court for the District of Columbia against Germany and the agency without seeking any further relief in Germany.[141]

Among other arguments, Germany asserted "that international comity required the court to decline jurisdiction until the heirs exhaust their remedies in German courts."[142] The D.C. Circuit had previously left open the possibility that foreign sovereigns could argue for a domestic exhaustion rule like the one in *Fischer* as a matter of international comity.[143] In *Philipp*, the D.C. Circuit rejected this argument.[144]

The Supreme Court case of *Republic of Argentina v. NML Capital, Ltd.* was central to the D.C. Circuit's reasoning.[145] In that case, the Supreme Court rejected Argentina's claim for immunity from post-judgment discovery on grounds of international comity because the FSIA's plain text did not provide for such immunity.[146] The D.C. Circuit found that the Supreme Court's holding in *NML Capital* that "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text[,] [o]r it must

138. *Id.* at 408.

139. *Id.* at 409 (quoting First Amended Complaint at ¶ 179, Philipp v. Federal Republic of Germany, 248 F. Supp. 3d 59 (D.D.C. 2017) (No. 1:15-cv-00266)).

140. *Id.*

141. *Id.* at 410 ("[T]he Advisory Commission concluded 'that the sale of the [art collection] was not a compulsory sale due to persecution' and it therefore could 'not recommend the return of the [collection] to the heirs.'" (quoting ADVISORY COMM'N, RECOMMENDATION OF THE ADVISORY COMMISSION FOR THE RETURN OF THE NAZI-CONFISCATED CULTURAL ARTEFACTS 3 (2014), https://www.beratende-kommission.de/Content/06_Kommission/EN/Empfehlungen/14-03-20-Recommendation-Advisory-Commission-Guelph-Treasure.pdf?__blob=publicationFile&v=7 [https://perma.cc/G74K-64YV])).

142. *Id.*

143. Simon v. Republic of Hungary, 812 F.3d 127, 149 (D.C. Cir. 2016) ("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 found that prudential argument to be persuasive in closely similar circumstances . . . ." (citations omitted)).

144. *Philipp*, 894 F.3d at 415.

145. *Id.* (discussing the holding of Republic of Argentina v. NML Cap., Ltd., 134 S. Ct. 2250 (2014)).

146. *Id.* ("[T]he [FSIA]—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity." (quoting *NML Cap.*, 134 S. Ct. at 2256)).

fall" applied to the FSIA's expropriation exception.[147] Thus, because the text of the FSIA's expropriation exception did not require exhaustion of domestic remedies, international comity could not mandate exhaustion.[148]

The D.C. Circuit ultimately rejected Germany's attempts to differentiate *Philipp* from *NML Capital* and to rely on the rule in *Fischer*.[149] It noted that the text of the FSIA's terrorism exception grants jurisdiction only when the claimant has given the foreign sovereign "a reasonable opportunity to arbitrate the claim."[150] Because the D.C. Circuit has long recognized that the inclusion of a provision in one section suggests that its omission in a highly similar section was intentional, the *Philipp* court found that Germany could not circumvent *NML Capital*.[151] Furthermore, the court found that Germany's reliance on *Fischer* was misplaced due to the fact that the Seventh Circuit had drawn its "well-established" domestic exhaustion rule from a provision of the Restatement (Third) of Foreign Relations Law that applied to litigation between nations.[152] It noted that a tentative draft of the Fourth Restatement confirmed this understanding.[153]

Thus, because the FSIA provides Congress's "comprehensive" account of foreign sovereign immunity, and because foreign sovereign immunity is a "matter of grace and comity" granted by the United States, the D.C. Circuit concluded that the FSIA does not allow for a customary international law doctrine based on international comity.[154] The court thus affirmed the district court's denial of Germany's motion to dismiss.[155]

147. *Id.* (quoting *NML Cap.*, 134 S. Ct. at 2256). "[T]he FSIA, Congress's 'comprehensive' statement of foreign sovereign immunity, which 'is, and always has been, a "matter of grace and comity,"' . . . leaves no room for a common-law exhaustion doctrine based on the very same considerations of comity." *Id.* at 416 (quoting *NML Cap.*, 134 S. Ct. at 2255).

148. *See id.* at 415.

149. *Id.* at 415–16.

150. *Id.* at 415 (quoting 28 U.S.C. § 1605A(a)(2)(A)(iii) (2018)).

151. *Id.* The court also pointed out that Germany had tried to rely on § 1606 of the FSIA, which only permits defenses "that are equally available to 'private individual[s].'" *Id.* at 416 (alteration in original) (quoting 28 U.S.C. § 1606). The court noted that "[o]bviously a 'private individual' cannot invoke a '*sovereign's* right to resolve disputes against it.'" *Id.* (quoting Brief for Appellants at 68, *Philipp*, 894 F.3d 406 (No. 17-7064)).

152. *Id.* at 416.

153. *Id.* (explaining that a draft of the Fourth Restatement confirms that the Restatement provision cited by the Seventh Circuit applies to international proceedings).

154. *Id.* The court also noted that Germany's assertion that, as a U.S. ally, it deserved the opportunity to address the claims against it in its own courts was better directed to Congress, which serves as the authority that can amend the FSIA. *Id.*

155. *Id.* at 418.

C. THE SUPREME COURT IS RIGHT TO GRANT CERTIORARI

The Supreme Court has granted certiorari to resolve the circuit split between the D.C. and the Seventh Circuits.[156] It now has the opportunity to decide whether international comity imposes a domestic exhaustion rule on the FSIA's expropriation exception. The Supreme Court is right to grant cert because a number of reasons demand resolution of the issue and support a uniform approach in federal courts.

First, the circuit split has appeared unlikely to resolve itself. The D.C. Circuit has already evaluated and rejected the Seventh Circuit's approach that had been clarified in *Fischer*.[157] It also denied a petition to rehear *Philipp* en banc[158] and has reiterated its position that both Supreme Court and circuit precedent do not allow for any domestic exhaustion rule.[159] The Seventh Circuit also appears firmly committed to its approach and has followed the requirements of its exhaustion rule.[160] Consequently, no majority rule or consensus among the circuit courts appears likely anytime soon, and the disputes at issue with regards to international comity and the domestic exhaustion rule will likely not resolve themselves without Supreme Court guidance.[161]

Second, Nazi-art repatriation is a matter of both international and U.S. interest.[162] Scholars have emphasized that every country has a moral obligation to assist in Nazi-looted art repatriation efforts,[163] and "Congress has twice made clear that it considers Nazi art-looting part of the Holocaust."[164]

---

156. Federal Republic of Germany v. Philipp, No. 19-351, 2020 WL 3578677, at *1 (U.S. July 2, 2020).

157. *Philipp*, 894 F.3d at 416.

158. Philipp v. Federal Republic of Germany, 925 F.3d 1349, 1349 (D.C. Cir. 2019) (order denying rehearing en banc). Circuit Judge Katsas provided a strong dissent on the denial and emphasized the importance of domestic exhaustion. *Id.* at 1355–59 (Katsas, J., dissenting).

159. Simon v. Republic of Hungary, 911 F.3d 1172, 1180–81 (D.C. Cir. 2018). The D.C. Circuit has repeatedly emphasized that, when statutory immunity exceptions apply, the FSIA mandates that a foreign sovereign shall not be immune from the jurisdiction of U.S. courts. *See id.* at 1181.

160. *See* Fischer v. Magyar Államvasutak Zrt., 892 F.3d 915, 918–19 (7th Cir. 2018).

161. Both the Seventh Circuit and the D.C. Circuit have maintained that the Supreme Court's ruling in *NML Capital* favors their position. *See* Fischer v. Magyar Államvasutak Zrt., 777 F.3d 847, 859 (7th Cir. 2015); *Philipp*, 894 F.3d at 415.

162. *See* Maarit Hakkarainen & Tiina Koivulahti, *Research into Art Looted by the Nazis—An Important International Task*, 1 NORDISK MUSEOLOGI 58, 58 (2007); *see also* Eizenstat, *supra* note 63 (discussing the international impact of the Washington Principles on Nazi-Confiscated Art).

163. Shira T. Shapiro, Note, *How* Republic of Austria v. Altmann *and* United States v. Portrait of Wally *Relay the Past and Forecast the Future of Nazi Looted-Art Restitution Litigation*, 34 WM. MITCHELL L. REV. 1147, 1172 (2008) (citing MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS 301–02 (2003)). *See generally* Hakkarainen & Koivulahti, *supra* note 162 (noting that because many pieces of Nazi-looted art are still spread throughout the world, all countries are morally obligated to locate and return stolen art).

164. *Philipp*, 894 F.3d at 411.

With Congress's passage of the HEAR Act in 2016, Congress expressly conveyed its goal that art repatriation claims "be resolved on [their] merits rather than on procedural grounds."[165] To eliminate ambiguity and promote unanimity of approaches, the Supreme Court can now take steps to clarify whether the procedural domestic exhaustion rule is mandated or not. As the number of Holocaust survivors is declining and their factual records that serve the basis for their claims risk fading with them,[166] the Supreme Court is right in not waiting to resolve the circuit split. Ultimately, the question of whether art claimants must first exhaust remedies in foreign sovereigns before suing in the United States is highly relevant to the international movement for art repatriation.[167]

Furthermore, the circuit split involves a sensitive foreign policy question. American-based lawsuits over extremely valuable art pieces currently held by foreign countries could pose significant challenges to countries that may not be able to afford the monetary cost of restitution.[168]

International comity is also an international concern, and the United States has in recent cases advanced through amicus briefs the position that the FSIA does not foreclose the dismissal of expropriation claims on international comity grounds, thereby voicing its concern that litigation against foreign sovereigns in U.S. courts might put foreign policy at risk.[169] The Executive Branch thus also has a potentially urgent interest in clarification on the FSIA's expropriation exception. Because the Executive Branch no longer decides issues of foreign sovereign immunity since the advent of the FSIA,[170] the Supreme Court's interpretation on the FSIA and international comity is increasingly relevant to foreign policy.[171] Consequently, resolution of the circuit split is the optimal way to interpret the FSIA without needing Congress to engage in the process of rewriting it.

---

165. *Can You Hear Me Now?: Holocaust Expropriated Art Recovery (HEAR) Act*, SHEPPARD MULLIN (Apr. 25, 2017), https://www.artlawgallery.com/2017/04/articles/changes-in-law/hear-act [https://perma.cc/LGJ7-2HV8].

166. Shapiro, *supra* note 163, at 1174 ("[M]uch of [the] vital record may fade along with the generation that bore witness to it.").

167. *See* Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 682 (7th Cir. 2012).

168. Philipp v. Federal Republic of Germany, 925 F.3d 1349, 1357 (D.C. Cir. 2019) (order denying rehearing en banc) (Katsas, J., dissenting) ("After describing the nearly existential threat of a $ 75 billion lawsuit, the Seventh Circuit held that 'Hungary, a modern republic and member of the European Union, deserves a chance to address these claims.'").

169. *See Philipp*, 894 F.3d at 416–17; *Philipp*, 925 F.3d at 1357–58 (Katsas, J., dissenting) ("[T]he United States argued at length that '[d]ismissal on international comity grounds' was consistent with the FSIA and 'can play a critical role in ensuring that litigation in U.S. courts does not conflict with or cause harm to the foreign policy of the United States.'" (second alteration in original) (citation omitted)).

170. *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 488 (1983).

171. *See* Republic of Austria v. Altmann, 541 U.S. 677, 691 (2004).

IV. THERE SHOULD BE NO EXHAUSTION REQUIREMENT

The better interpretation of the FSIA's expropriation exception appears to belong to the D.C. Circuit. Plaintiffs should not be expected to exhaust domestic remedies before suing the instrumentality of a foreign sovereign in U.S. court under the FSIA's expropriation exception. The reasoning for such a conclusion lies with prior Supreme Court precedent, international considerations unique to Holocaust-era art claims, and potential burdens to litigation that deprive art claimants the opportunity to litigate fairly in European courts. Section IV.A will argue that the D.C. Circuit correctly interpreted *Republic of Argentina v. NML Capital, Ltd.* and the text of the FSIA. Section IV.B will discuss international comity concerns and explain why Holocaust art litigation is not a solely domestic dispute. Section IV.C will contend that European forums often fail to offer Holocaust-era art litigants a fair chance of recovery and that U.S. courts are often better positioned to resolve art disputes on the merits rather than on procedural grounds.

A. TEXTUAL ARGUMENT

The D.C. Circuit appears correct in its argument that *NML Capital* precludes reading the domestic exhaustion rule into the text of the FSIA's expropriation exception.[172] The Supreme Court has indeed interpreted the FSIA to be comprehensive on the matter of U.S. foreign sovereign immunity doctrine and exceptions to that doctrine.[173] In *NML Capital*, the Court noted that the FSIA itself instructs that claims of sovereign immunity should be resolved in accordance with the Act's provisions.[174] The Court also maintained that "*any* sort of immunity defense" asserted by foreign countries in the United States must rest on the text of the Act.[175] It seems illogical that a defense to an immunity exception entirely absent in the FSIA's expropriation exception, but present elsewhere in the Act,[176] could be considered to stand on the text of the FSIA.

---

172. *Philipp*, 894 F.3d at 415 ("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."'" (third alteration in original) (quoting Republic of Argentina v. NML Cap., Ltd., 134 S. Ct. 2250, 2255 (2014))).

173. *NML Cap.*, 134 S. Ct. at 2255–56 ("The key word there—which goes a long way toward deciding this case—is *comprehensive*. We have used that term often and advisedly to describe the Act's sweep . . . .").

174. *Id.* at 2256. Section 1602 of the FSIA reads, "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this [Act]." 28 U.S.C. § 1602 (2018).

175. *NML Cap.*, 134 S. Ct. at 2256 (emphasis added).

176. 28 U.S.C. § 1605.

In *NML Capital*, the Supreme Court rejected a foreign sovereign's claim for immunity from post-judgment discovery because the "plain statement" of the text of the FSIA stipulated for no such immunity.[177] Rather, "the Act sa[id] not a word on the subject."[178] The Court rejected an argument to "draw meaning from . . . silence,"[179] and it declined to see "a gap in the statute."[180] Thus, Supreme Court precedent in *NML Capital* appears to mandate that a domestic exhaustion rule imposed as a matter of international comity cannot be drawn from the silence of the statute.

The Seventh Circuit's conclusion that international comity necessitates a domestic exhaustion rule for Nazi-looted art litigants therefore falls flat because international comity commitments are not mentioned in the statute. Moreover, it would seem that the Seventh Circuit's exhaustion rule cannot be drawn from international customary law without a finding that the FSIA is not "comprehensive," thereby contradicting Supreme Court precedent that the FSIA is complete and standalone. First in *Abelesz* and again in *Fischer*, the Seventh Circuit appeared to see a gap in the FSIA's text where international customary law and principles of comity could fit. Under this approach, the sovereign immunity defense no longer stood "on the Act's text." Conversely, the D.C. Circuit's approach, which does not impose unmentioned exhaustion requirements, can stand on the plain text of the FSIA.

Further support for this position can be found in the Reporters' Notes of the Restatement (Fourth) of Foreign Relations Law. The Notes from the Fourth Restatement rebuff the Seventh Circuit's textual analysis of the FSIA and disagree with its decision to impose a domestic exhaustion rule.[181] Because the FSIA's terrorism exception included an "opportunity to arbitrate" precondition—a rule similar to the domestic exhaustion rule—and the Seventh Circuit cited to a Restatement provision that applies to international and not domestic proceedings, the notes conclude that "the interpretation of the [expropriation exception] that does not require exhaustion appears to be the proper one."[182] The D.C. Circuit's approach therefore appears consistent

177. *NML Cap.*, 134 S. Ct. at 2256 (holding that the FSIA did not "contain[] the 'plain statement' necessary to preclude application of federal discovery rules"). "The Court rejected that claim because nothing in the FSIA's plain text provided for such immunity." *Philipp*, 894 F.3d at 415.

178. *NML Cap.*, 134 S. Ct. at 2256–57.

179. *Id.* at 2257.

180. *See id.* at 2258. "[That] riddle is not ours to solve (if it can be solved at all). . . . Either way, '[what is relevant] . . . is not what Congress "would have wanted" but what Congress enacted in the FSIA.'" *Id.* (quoting Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 618 (1992)).

181. RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 455 reporters' 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.").

182. *Id.* ("By comparison, consider the 'opportunity to arbitrate' precondition that was explicitly included in the text of the state-sponsored terrorism exception at

with Supreme Court precedent and accurate in reading the FSIA's plain text. As a result, the Supreme Court should adopt the D.C. Circuit's finding that international comity does not impose any exhaustion requirement for Nazi-looted art litigants.

B. INTERNATIONAL COMITY

International comity is indeed a relevant concern when foreign nations are sued.[183] Mutual respect between nations for their respective judicial processes can serve as an important recognition of their own sovereignty.[184] Nonetheless, comity should not be construed as imposing a domestic exhaustion rule on the expropriation exception to sovereign immunity. In finding an exhaustion rule, the Seventh Circuit noted that the United States had previously requested that an international tribunal refrain from hearing a case in which plaintiffs had not yet exhausted U.S. remedies, and it observed that the United States must be ready to reciprocate due to comity.[185] However, while international customary law does impose an exhaustion of domestic remedies standard in international tribunals, it does not require this standard to be applied to domestic courts,[186] regardless of whether individual countries choose to adopt their own domestic exhaustion requirements. The exhaustion rule in international tribunals serves to increase the likelihood that individual states will follow the decisions of the international court system.[187] The same considerations are not pertinent to litigation occurring in domestic courts. Thus, even if the FSIA were not a comprehensive text on foreign sovereign immunity in the United States, international customary law would not automatically impose a domestic exhaustion rule.

Furthermore, Supreme Court precedent suggests that international comity concerns with regard to the exceptions laid out in the FSIA are misdirected when aimed at U.S. courts. As the Supreme Court noted in *NML Capital*, "the worrisome international-relations consequences of [not finding a grant of immunity within the FSIA] . . . are better directed to that branch of

§ 1605A(a)(2)(A)(iii). Whether the substantive international law governing expropriation itself requires some direct effort by a claimant to obtain compensation before seeking judicial recourse in another country is beyond the scope of this Section, but the rule cited by the *Abelesz* court applies by its terms to 'international,' not domestic, proceedings.").

183. Luke Tattersall, *Derailing State Immunity: A Broad-Brush Approach to Jurisdiction Under Claims for the Expropriation of Cultural Property*, 26 INT'L J. CULTURAL PROP. 181, 190 (2019) ("[F]or the US courts to proceed in hearing [such cases] creates a risk of infringing upon the principles of comity recognized between states.").

184. *Id.* at 190–91. "Sovereignty, whilst admittedly related to the values underpinning comity, is nevertheless distinct from comity, which is understood as demonstrating mutual respect for the judicial processes of foreign states." *Id.* at 191.

185. Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 680 (7th Cir. 2012).

186. Vivian Grosswald Curran, *The Foreign Sovereign Immunities Act's Evolving Genocide Exception*, 23 UCLA J. INT'L L. & FOREIGN AFFS. 46, 70 (2019).

187. *Id.*

government with authority to amend the Act."[188] Since the implementation of the FSIA, the federal courts no longer have the ability to balance whether foreign states should receive sovereign immunity, so understandably only Congress can properly engage with the worries associated with the absence of a domestic exhaustion rule. Because Congress specifically took away the ability of U.S. courts to determine for themselves whether sovereign immunity existed, courts cannot reasonably be expected to deviate from the text of the FSIA as a matter of international comity when the text does not allow it. All arguments on reciprocity and the potential danger to foreign relations are best aimed at Congress, which can then weigh the merits of those concerns and adjust the FSIA if it so chooses.

Finally, Nazi-looted art repatriation has different, unique considerations compared to other cases involving international comity. The Holocaust is widely regarded as one of the worst atrocities in world history; it was genocide.[189] While foreign sovereigns arguing for a domestic exhaustion rule out of international comity may claim that they wish to resolve Nazi-looted art claims against them domestically as a local matter,[190] the entire world could be said to have an interest in ensuring that art forcefully taken from Holocaust victims during history's largest collective art theft is returned to rightful owners. The moral imperative behind freeing the so-called "last prisoners of war" and ensuring restitution of culturally significant artworks to Nazi victims could diminish international comity concerns. The enormity of the Jewish Holocaust carries heavy weight,[191] and foreign courts may be less likely to retaliate against the United States for emphasizing the importance of recovering Nazi-looted artwork. All countries could be said to have a moral obligation to assist in the repatriation of art forcefully looted by the Nazis. Existing joint statements by countries and NGOs urging that countries develop just solutions to the theft of Holocaust era assets, such as the Washington Principles,[192] further support the idea that Holocaust art litigation is not a solely domestic dispute. Accordingly, global public policy reasons suggest that international comity is not served by an exhaustion rule in Nazi-looted art cases.

---

188. Republic of Argentina v. NML Cap., Ltd., 134 S. Ct. 2250, 2258 (2014). The Court also noted that the United States' belief, expressed in an amicus brief, that international comity could be undermined and that the United States could receive "reciprocal adverse treatment . . . in foreign courts" would be better directed to Congress, which had taken away the Court's ability to consider otherwise. *Id.* (quoting Brief for the United States as Amicus Curiae in Support of Petitioner at 20, *NML Cap.*, 134 S. Ct. 2250 (No. 12-842)).

189. *See* Thérèse O'Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?*, 22 EUR. J. INT'L L. 49, 70 (2011).

190. *See, e.g.*, *Abelesz*, 692 F.3d at 679; Philipp v. Federal Republic of Germany, 894 F.3d 406, 415 (D.C. Cir. 2018), *cert. granted*, No. 19-351, 2020 WL 3578677 (U.S. July 2, 2020).

191. O'Donnell, *supra* note 189, at 70–71.

192. Eizenstat, *supra* note 63.

C. BURDEN OF REQUIRING DOMESTIC EXHAUSTION

Additional considerations regarding the state of Holocaust art litigation within Europe indicate that plaintiffs should not be expected to exhaust domestic remedies before suing foreign instrumentalities in U.S. court under the FSIA's expropriation exception. In many cases, European forums do not offer Holocaust-era art litigants a fair chance at reclaiming their families' lost artworks.[193] Courts in Europe have a history of favoring defendants on issues relating to Holocaust litigation, and American courts are often left as the only viable option for restitution.[194] Nonetheless, U.S. courts often fail to consider the fact that the odds of restitution in Europe have historically tended to be low.[195]

Europe does not currently have a comprehensive legal framework to deal with Nazi-looted art claims.[196] Often, multiple countries will have jurisdiction over the same recovery claim for a piece of art, prompting a lack of uniformity.[197] Additionally, numerous European countries have engaged in "foot-dragging" when faced with claims for restitution.[198] European laws and customs also do not tend to give art claimants a fair chance of recovery. Within Europe, harsh statutes of limitations are the norm, and art restitution claims are regularly heard first by governmental restitution commissions that have developed a reputation for being unfavorable to claimants.[199] Meanwhile, in the United States, statute of limitations barriers are limited, contingent fee arrangements are available, litigation bonds are not a prerequisite to litigation, a right to appeal exists, and thieves cannot obtain title through adverse possession.[200] In the United States, claims are in a unique position to be decided on their merits, more so than in European courts.

Whereas European courts may engage in "foot-dragging," American courts provide an efficient and effective method of art restitution that would

193. Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust—Era Litigation in American Courts*, 80 WASH. U. L.Q. 795, 832 (2002) ("The legal systems of Switzerland and Germany are so stacked in favor of defendants and so hostile to the claims set forth in the Holocaust cases that it would have been suicidal to litigate in those forums . . . . [T]he European courtroom is not currently a level playing field; it is a fortress for the powerful. Until European justice evolves into a level playing field, lawyers have no choice but to resort to an American courtroom as the only game in town.").

194. *Id.*

195. Kreder, *supra* note 87, at 266 ("In applying seemingly neutral legal doctrine in Holocaust-era-art cases, courts have failed to take into account the fact that prospects for restitution immediately after the War were grim.").

196. Angela Saltarelli, *Restitution of Looted Art in Europe: Few Cases, Many Obstacles*, 25 REV. LA PROPIEDAD INMATERIAL 141, 144 (2018).

197. *Id.* at 146.

198. Cohan, *Five Countries*, *supra* note 75.

199. *See* Labaton, *supra* note 10, at 37 (describing various litigation ending unfavorably for plaintiffs).

200. *Id.*

be hampered by a domestic exhaustion rule. Plaintiffs might have a difficult time convincing federal courts to rehear claims that have been denied in Europe,[201] and, with European remedies often being inadequate and dependent upon clearing procedural hurdles, mandating domestic exhaustion will waste valuable time and pose higher costs to claimants. However, Holocaust art claimants do not have time to waste.[202]

Imposing an exhaustion requirement also goes against the desire of Congress "[t]o provide the victims of Holocaust-era persecution and their heirs a fair opportunity to recover works of art confiscated or misappropriated by the Nazis" as expressed in the HEAR Act.[203] Ultimately, U.S. courts are frequently the only option for Nazi victims seeking their "fair opportunity" to regain their cultural heritage. American courts have a unique opportunity to further the international goal of seeking the fair repatriation of Nazi-looted art. A finding that international comity requires the exhaustion of domestic remedies before claimants can bring suit in the United States under the expropriation exception will put many Nazi victims' "fair opportunity" for repatriation at risk.

V. CONCLUSION

International comity does not require the exhaustion of all available domestic remedies when suing a foreign state under the FSIA's expropriation exception. The D.C. Circuit correctly recognizes that Supreme Court precedent precludes reading immunity defenses into the FSIA that do not exist within the text, and international comity's status as a concern is diminished by international interest in freeing the so-called "last prisoners of war." Furthermore, U.S. courts are often the only viable method for restitution for Nazi art theft victims. Absent the development of effective systems of art arbitration, U.S. courts currently appear to be in a unique position to right the wrongs of Nazi rule. So long as federal courts do not impose a domestic exhaustion rule, the United States will be in a position to achieve justice for Holocaust victims at a time when Holocaust rectification efforts remain strong.

201. Curran, *supra* note 186, at 75.

202. *See* Shapiro, *supra* note 163, at 1174 ("Not much time remains for even the youngest survivors, who remain capable of contributing the necessary factual information to relay their stories. Thus, much of this vital record may fade along with the generation that bore witness to it.").

203. Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524, 1524.