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DOI:10.1017/ilm.2022.54

BRIEFLY NOTED
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Judicial and Similar Proceedings

1. Scalin v. Société Nationale SNCF SA (U.S. Court of Appeals for the Seventh Circuit – August 6, 2021)

<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2021/D08-06/C:18-1887:J:Easterbrook:aut:T:fnOp:N:2744612:S:0>

On August 6, 2021, the U.S. Court of Appeals for the Seventh Circuit issued its judgment in *Scalin*. The case involved descendants of Jewish people in France who were sent to concentration camps on trains operated by the defendant railroad company. The descendants sued the railroad for personal property stolen by the railroad workers an given to the Nazis, arguing that the expropriation exception in the Foreign Sovereign Immunities Act (FSIA) for cases applied and that therefore, the case could be heard by U.S. courts. The district court dismissed the complaint, holding that the plaintiff descendants should pursue their complaint within the French administrative claims framework set up specifically to compensate victims of the Nazi regime. The district court relied on precedent permitting U.S. courts to abstain in favor of compensation systems based in the state where the harm occurred. In the meantime, the DC District Court disagreed with that precedent, holding that abstention is never proper and the Seventh Circuit suspended the appeal while the Supreme Court considered the *Philipp* case. After that judgment, the plaintiffs in this case asked the Court to remand the case to the district court so that the district court could determine whether any of the plaintiffs' predecessors in interest were not French citizens at the time the property was taken. The Court opined that a remand of this nature would omit consideration of the essential question in this case: "what is the plaintiffs' claim in the first place?" The Court noted that this "is a triple-foreign suit: plaintiffs allege that nationals of a country other than the United States were injured by a foreign entity (SNCF) in a foreign nation (France)." Although one of the plaintiffs is a U.S. citizen, the case nonetheless involves a foreign claim.

The Court then waited for the Supreme Court's decision in *Nestlé v. Doe* (involving extraterritorial application of the Alien Tort Statute (ATS)) to see whether triple-foreign suits may be litigated. The answer was no—the Statute "does not provide a remedy for triple-foreign events and does not apply when the wrongful acts are unconnected to the United State or its citizens." Just as *Nestlé* stands for the proposition "that this rule cannot be sidestepped by asserting that a company in the United States aided and abetted foreign wrongs," "it cannot be sidestepped by transferring to a U.S. citizen a foreign national's claim against a foreign entity for injury suffered abroad." Furthermore, the decision in *Jesner v. Arab Bank* prevents a foreign corporation from being a defendant in a §1330 suit. Then plaintiffs argued that the *Nestlé* and *Jesner* line of cases (and thus the ATS) are inapplicable because their suit is based on the FSIA. The Court rejected this argument, holding that "a waiver of sovereign immunity does not create a substantive claim." The expropriation exception does not create a substantive claim, it is jurisdictional. Section 1350 (the ATS) is the only basis for a remedy in an alien's tort action, but in this case even the plaintiffs concede it doesn't apply. District Court judgment affirmed. The case did not go to the Supreme Court.

2. Taganrog LRO v. Russia (European Court of Human Rights – June 7, 2022)

<https://hudoc.echr.coe.int/eng?i=001-217535>

On June 7, the European Court of Human Rights issued its judgment in the above case concerning the persecution by Russia of Jehovah's Witnesses over a ten-year period. In 2007, after a Deputy Prosecutor claimed that Jehovah's Witnesses conducted "activities harmful to the moral, mental, and physical health of their members," inspections of the local chapters were undertaken to unearth "extremist material" and measures were taken in response to alleged violations of law, such as the forced dissolution of JW organizations, bans on and confiscations of their religious publications, and the prosecution of hundreds of individuals for distributing "extremist literature" as well as the confiscation of their property. As a result, 20 applications were lodged at the Court between June 2010 and August 2019, from individuals and local JW chapters

https://doi.org/10.1017/ilm.2022.54 Published online by Cambridge University Press

alleging various violations of the Convention, mostly focused on violations of their rights to freedom of religion, expression, and association under Articles 9, 10, and 11. Some relied on Article 1 of Protocol No. 1 (on the protection of property) to argue that the confiscation of their publications, other property, and places of worship violated their right to the peaceful enjoyment of their possessions. Finally, one applicant claimed that his pre-trial detention violated the right to liberty and security under Article 5.

The Court found violations of Article 9 and 10 with respect to the dissolution of local JW chapters, underlining that the Suppression of Extremism Act upon which the state's actions were based was overly broad in its definition of "extremism" and that the Act was misused to prosecute individuals on the basis of their beliefs alone. Also based on the overly broad definition of "extremist," the Court found a violation of Article 10 for Russia's ban on and confiscation of JW publications. Additional Article 9 and 10 violations were found regarding the designation of the JW international website as "extremist"; the criminal prosecution of JW individuals; and the withdrawal of distribution permits. The Court also accepted the Article 5 claim, holding that the pre-trial detention was not based on a reasonable suspicion of having committed an offense. The property confiscation claims under Article 1 of Protocol No. 1 were also successful.

The Court ordered Russia to ensure the return of all confiscated property within three months of the judgment becoming final or to pay specified amounts of compensation if return was not effected. In addition, Russia was ordered to pay EUR 15,000 to each applicant resident in Russia who had been convicted in criminal proceedings; EUR 7,500 to dissolved or banned chapters and the applicants convicted in administrative proceedings; and EUR 125,000 jointly to all applicants for costs and expenses. This is likely one of the last opportunities for the Court to address violations of the Convention by the Russian Federation, as its status as a High Contracting Party to the Convention ceased on September 16, 2022. However, applicants will still be permitted to bring cases against Russia before the Court as long as they are based on facts that arose prior to that date.

3. Golan v. Saada (U.S. Supreme Court – March 22, 2022)

<https://www.supremecourt.gov/opinions/21pdf/20-1034_b8dg.pdf>

On March 22, 2022, the U.S. Supreme Court decided the above case which concerned the interpretation of "grave risk" under the Hague Child Abduction Convention. In the case, an Italian citizen sought to compel his child's return to Italy after the U.S. citizen mother took the child to New York and did not return. Under the Convention, children who are wrongfully taken from their country of residence must be returned there so that custody disputes can be resolved in that jurisdiction. However, the Convention makes an exception to this return rule where there is a "grave risk" that returning the child would expose him or her to physical or psychological harm. In light of the alleged physical of the wife by the husband, the district court acknowledged that the child would face a grave risk of harm if returned, but after "examin[ing] the full range of options that might make possible the safe return of the child" concluded that ameliorative measures could be put in place to reduce the risk and ordered the child's return. The Second Circuit vacated the return order after finding that the ameliorative measures were insufficient and remanded the case to the district court to consider whether any such measures existed. After identifying new measures, the District Court ordered the child's return again, and the Second Circuit affirmed. The issue before the Supreme Court was whether a court is required to examine all possible ameliorative measures before denying a Hague Convention petition to return a child to a foreign country. In short, the Supreme Court answered in the negative: a court is not required to examine all possible ameliorative measures before denying a petition for return under the Convention based on a finding of grave risk of harm. Indeed, "[n]othing in the Convention's text either forbids or requires consideration of ameliorative measures in exercising this discretion." Moreover, "the court's consideration of ameliorative measures must be guided by the legal principles and other requirements as set forth in the Convention and [the International Child Abduction Remedies Act] ICARA." Court should not prioritize return over the Convention's other objectives, and "any consideration of ameliorative measures must prioritize the child's physical and psychological safety." The Court also noted that even where ameliorative measures exist a court may decline to impose them if "it is clear that they would not work because the risk is so grave" or where the court "reasonably expects that they will not be followed." Finally, ameliorative measures should be limited "in time and scope to conditions that would permit safe return."

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