ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

Nos. 11-7096; 12-7025; 12-7026

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID L. de CSEPEL, et al.,

Plaintiffs-Appellees/Cross-Appellants,

v.

REPUBLIC OF HUNGARY, et al.,

Defendants-Appellants/Cross-Appellees.

On Appeal From The United States District Court
For The District of Columbia

RESPONSE/PRINCIPAL BRIEF OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellees/Cross-Appellants David L. de Csepel, Angela Maria Herzog, and Julia Alice Herzog ("Plaintiffs") request oral argument, believing that oral argument will assist in the resolution of Plaintiffs' cross-appeal as well as the appeal of Defendants-Appellants/Cross-Appellees Republic of Hungary, The Hungarian National Gallery, The Museum of Fine Arts, The Museum of Applied Arts, and The Budapest University of Technology and Economics ("Defendants").

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Plaintiffs hereby submit this certificate as to parties, rulings and related cases.

(A) Parties and Amici:

Plaintiffs-Appellees/Cross-Appellants
David L. de Csepel
Angela Maria Herzog
Julia Alice Herzog

Defendants-Appellants/Cross-Appellees
Republic of Hungary
The Hungarian National Gallery
The Museum of Fine Arts
The Museum of Applied Arts
The Budapest University of Technology and Economics

Amici

There were no amici or intervenors in the district court and Plaintiffs are aware of none before this Court now.

(B) Rulings Under Review:

This appeal is taken from the Opinion and Order of the Honorable Ellen S. Huvelle in *David L. de Csepel. v. Republic of Hungary*,, No. 10-1261, dated September 1, 2011, (ECF-33 & 34), reported at 808 F. Supp. 2d 113 (D.D.C. 2011), which denied in part and granted in part Defendants' Motion to Dismiss, as amended by the District Court's November 30, 2011 Memorandum Opinion and Order, (ECF-51), *available at* 2011 U.S. Dist. LEXIS 150696 (D.D.C. Nov. 30, 2011) which certified additional issues for interlocutory appeal pursuant to 28

U.S.C. § 1292(b). This Court subsequently granted the parties' cross-petitions for permission to appeal additional issues pursuant to 28 U.S.C. § 1292(b).

(C) Related Cases:

This case has not previously been before this Court or any other Court as defined in D.C. Circuit Rule 28(a)(1)(C) other than the district court. Currently, there are two related appeals pending in this Court, *David de Csepel v. Republic of Hungary*, No. 12-7025 and *David de Csepel v. Republic of Hungary*, No. 12-7026, both of which have been consolidated into this appeal by Order of this Court dated March 12, 2012 filed in Appeal Nos. 11-7096, 12-7025, and 12-7026.

Dated: July 27, 2012

Respectfully submitted,

/s/ Michael D. Hays

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10/20/2000 Decision	October 20, 2000 decision of the Metropolitan Court of Budapest in the Nierenberg Litigation, Varga Decl. Ex. A, ECF 22-27
11/16/05 Decision	November 16, 2005 decision of the Metropolitan Court of Budapest, Varga Decl. Ex. C, ECF 22-31
11/29/2002 Decision	November 29, 2002 decision of the Supreme Court of the Republic of Hungary in the Nierenberg Litigation, Varga Decl. Ex. B, ECF 22-29
1954 Museum Decree	Hungarian Museum Decree No. 13 of 1954, Bánki Decl. Ex. B, ECF 15-2
1955 Claims Amendment	Act of August 9, 1955, Pub. L. No. 84-285, 69 Stat. 570, 1955 U.S.C.C.A.N. 626, 638, *codified at* 22 U.S.C. §§ 1621 *et. seq*.
1973 Agreement	Agreement Between the Government of the United States of America and the Government of the Hungarian People's Republic Regarding the Settlement of Claims, signed at Washington on March 6, 1973, 24 U.S.T. 522, T.I.A.S. 7569, 938 U.N.T.S. 167
1991 Compensation Act	Act XXV of 1991 "On the Partial Compensation for Damages Unjustly Caused by the State to Private Property Owners in Order to Settle Ownership Relations", Bánki Decl. Ex. F, ECF 15-2
1992 Compensation Act	Act XXIV of 1992 "On Providing, in Order to Settle Ownership Relations, Partial Compensation for Damages Unjustly Caused by the State in the Properties of Citizens through the Enforcement of Legal Rules

	Framed from 1 May 1939 to 8 June 1949", Bánki Decl. Ex. G, ECF 15-2
1998 Delegation Statement	Washington Conference on Holocaust Era Assets (November 30 – December 3, 1998) Proceedings 271 (Delegation Statement of Hungary) (J.D. Bindenagel ed., U.S. Gov't 1999), Benenati Decl. Ex. K, ECF 22-13
2008 Final Judgment	2008 Final Judgment, F.Pf.20.499/2006/33 from the Capital City Court of Appeals regarding the Nierenberg Litigation, Bánki Decl. Ex. M, ECF 15-4
4/4/74 Transcript	Transcript of Hearing Before the Subcommittee on Europe of the Committee on Foreign Affairs of the United States House of Representatives on H.R. 13261, 93rd Cong., 2d. Sess., April 4, 1974, Benenati Decl. Ex. C, ECF 22-5
6/17/66 Tr.	Transcript of Proceedings: United States-Hungarian Negotiations, Twenty-Second Meeting, June 17, 1966, Benenati Decl. Ex. E, ECF 22-7
Bánki Decl.	Declaration of Orsolya Bánki in Support of Defendants Motion to Dismiss, filed on February 15, 2011, ECF 13-2
Benenati Decl.	Declaration of Alycia Regan Benenati in Support of Plaintiffs' Opposition to Motion to Dismiss, filed on May 5, 2011, ECF 22-2
Bettauer Letter	Letter dated September, 20, 2002 from Ronald J. Bettauer, Deputy Legal Adviser, United States Department of State to Andre L. Jagoda, Benenati Decl. Ex. F, ECF 22-8
Br.	Brief of Defendants-Appellants/Cross-Appellees

Clinton Letter	Letter dated Jan. 8, 2008 from Hillary Rodham Clinton, Alcee L. Hastings and Benjamin L. Cardin to H.E. Dr. Kinga Göncz, Hungarian Minister of Foreign Affairs, Benenati Decl. Ex. D, ECF 22-6
Commission	Foreign Claims Settlement Commission
Compl.	Complaint filed in this action on July 27, 2010, ECF 1
DADD	Defendants' Addendum of Statutes, Treaties and Other Authorities
ECF	Electronic Case Filing
FCSC Final Decision	Final Decision of the Foreign Claims Settlement Commission, Ms. Elizabeth Weiss de Csepel, (Claim No. HUNG-21,587, Decision No. HUNG-2079) dated July 7, 1959, Ramirez Decl. Ex. D, ECF 15-5
FCSC Working Draft Report	Foreign Claims Settlement Commission: Working Draft Report of the House Committee on Foreign Affairs on H.R. 6382 (May 21, 1955), Benenati Decl. Ex. B, ECF 22-4
First Hungarian Claims Program	Claims Program authorized by the 1955 Claims Amendment, *as codified at* 22 U.S.C. § 1631
FSIA	Foreign Sovereign Immunities Act
Hastings Letter	Letter of September 17, 2007 from Rep. Alcee Hastings, Sen. Benjamin Cardin, Rep. Christopher Smith, Sen. Christopher Dodd, Rep. Joseph Pitts, Sen. Hillary Rodham Clinton and Sen. Saxby Chambliss to Dr. Kinga Göncz, Hungarian Minister of Foreign Affairs, Benenati Ex. J, ECF 22-12

Herzog Collection	collection of more than two thousand paintings, sculptures, and other artworks amassed by Baron Mór Lipót Herzog, a well-known Jewish Hungarian collector of art
Herzog Heirs	Members of the Herzog family and heirs to the Herzog Collection
ICJ	International Court of Justice
JA	Joint Appendix
Kwiatek Letter	Letter dated March 27, 1973 from Fabian A. Kwiatek, Assistant Legal Adviser, United States Department of State to Alex Lowinger, Benenati Decl. Ex. G, ECF 22-9
Lattmann Decl.	Declaration of Dr. Tamás Lattman in Support of Plaintiffs' Opposition to the Motion to Dismiss, ECF 22-24
Lillich	Richard B. Lillich, The United States-Hungarian Claims Agreement of 1973, 69 Am. J. Int'l L. 534 (1975), Benenati Decl. Ex. R, ECF 22-21 and 22-22
Lowey Letter	Letter of June 14, 2007 from Rep. Nita M. Lowey to Hon. Laszlo Solyom, President of the Republic of Hungary, Benenati Ex. I, ECF 22-11
MTD	Defendants' Motion to Dismiss the Complaint, filed on February 15, 2011, ECF 15
Nierenberg Litigation	the lawsuit filed by Martha Nierenberg in Hungary in October of 1999 seeking to recover ten paintings that belonged to her mother, Elizabeth Weiss de Csepel
Opinion	*de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113 (D.D.C. 2011)

Orszag-Land Article	Thomas Orszag-Land, "New Hungarian Constitution Shirks Responsibility for the Holocaust" (September 2011), ECF 48-1
PADD	Plaintiffs' Addendum of Statutes, Treaties and Other Authorities
Pasztory Decl.	Declaration of Balazs Gabor Andras Pasztory in Support of Plaintiffs' Opposition to Motion to Dismiss, ECF 22-22
Peace Treaty	Treaty of Peace with Hungary, Feb. 10, 1947, 61 Stat. 2065, TIAS No. 1651, Benenati Decl. Ex. A, ECF 22-3
Ramirez Decl.	Declaration of Eric Ramirez in Support of Defendants' Motion to Dismiss the Complaint, ECF 15-5
Varga Decl.	Declaration of Tamás Varga in Support of Plaintiffs' Opposition to Motion to Dismiss, ECF 22-24
Wright Letter	Letter of July 24, 1973 from Marshall Wright, Assistant Secretary for Congressional Relations, United States Department of State to United States Senator Alan Cranston, Benenati Decl. Ex. H, ECF 22-10

STATEMENT OF JURISDICTION

Pursuant to Fed. R. App. P. 28(a)(4), Plaintiffs submit the following statement of jurisdiction:

a. The United States District Court for the District of Columbia had subject matter jurisdiction under 28 U.S.C. § 1330 because Defendants are not immune from suit under Sections 1605(a)(3) and 1605(a)(2) of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1605 *et seq.* ("FSIA") (DADD7).

b. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §§ 1291 and 1292(b).

STATEMENT OF ISSUES ON APPEAL AND CROSS-APPEAL

1. Whether the District Court correctly concluded that Plaintiffs' claims are not barred by treaty or executive agreement?

2. Whether the District Court correctly concluded that Defendants are not immune from suit in the United States under 28 U.S.C. § 1605(a)(3) and whether 28 U.S.C. § 1605(a)(2) also strips Hungary of its sovereign immunity?

3. Whether the District Court correctly declined to dismiss Plaintiffs' claims under the political question doctrine where Defendants raised the argument only in a footnote in their moving brief and failed to show that Plaintiffs' claims are textually committed to the Executive branch or that there is a lack of judicially discoverable and manageable standards for resolving them?

4. Whether the District Court abused its discretion in declining to dismiss Plaintiffs' claim on grounds of *forum non conveniens* where Plaintiffs' choice of forum is entitled to substantial deference and neither the private nor public interest factors favor dismissal?

5. Whether the District Court correctly concluded that the Complaint states a claim for bailment?

6. Whether the District Court correctly declined to dismiss Plaintiffs' claims on statute of limitations grounds where the defense is not supported on the face of the Complaint and Plaintiffs pleaded facts supporting equitable tolling?

7. Whether the District Court correctly declined to dismiss Plaintiffs' claims based on the act of state doctrine where Plaintiffs' claims are based on bailments, not sovereign acts, created by a government that is no longer in existence?

8. Whether the District Court erred in dismissing Plaintiffs' claims to eleven artworks that were previously the subject of litigation in Hungary on grounds of international comity when the litigation was brought only to attempt to exhaust remedies in Hungary, the Hungarian court misapplied a United States executive agreement in bad faith and in contravention of United States public policy, and Plaintiffs pleaded that the litigation was not conducted in accordance with international standards of due process?

STATUTES AND REGULATIONS

Except for the statutes and other materials reproduced in Plaintiffs' Addendum annexed hereto, all applicable statutes and regulations are contained in the Addendum annexed to the Principal Brief of Defendants-Appellants filed on June 12, 2012.

STATEMENT OF THE CASE

This action seeks to recover more than 40 valuable artworks that Defendants acknowledge they have, that do not belong to them and that they refuse to return. The artworks belong to Plaintiffs, who are the descendants of Baron Mór Lipót Herzog, a well-known Jewish Hungarian art collector, who amassed the collection from which the artworks were taken. Most of the remainder of Baron Herzog's magnificent collection of 2,000 artworks has been looted, destroyed or lost – cultural casualties of the Nazis', and Hungary's, war on the Jews.

The artworks at issue here came into Defendants' possession during or as a result of the brutal campaign of physical and cultural genocide perpetrated on Hungarian Jews during World War II by Hungary and its war-time ally Nazi Germany. Although Hungary invokes every conceivable argument to avoid returning the art, it has never owned the art, and possesses it only as a bailee for its rightful owners, the Plaintiffs. Nonetheless, Defendants simply refuse to return the artworks, which are among the most prominent in their collections, instead brazenly continuing to display them and treat them as their own.

Left with no choice, Plaintiffs commenced this action on July 27, 2010, asserting claims for bailment (Compl., ECF-1, ¶¶96-105 (JA-__)) and conversion (*Id.*, ¶¶106-110 (JA-__)), constructive trust (*Id.*, ¶¶111-113 (JA-__)), accounting

(*Id.*, ¶¶114-119 (JA-__)), declaratory relief (*Id.*, ¶¶120-24 (JA-__)), and restitution based on unjust enrichment. (*Id.*, ¶¶125-28 (JA-__).)

On February 15, 2011, Defendants moved to dismiss the Complaint under various theories, including that Plaintiffs' claims were allegedly barred by foreign sovereign immunity, executive agreement, *forum non conveniens*, the act of state doctrine, the statute of limitations, and comity. (ECF-15.) Defendants raised the political question doctrine that now features prominently in their arguments only in a footnote in their moving brief (ECF-15 n.19) and never argued that the Complaint failed to state a claim for bailment. Instead, Defendants attempted to characterize Plaintiffs' Complaint as predicated on Communist-era takings (a theory Defendants abandoned on reply).

Plaintiffs filed their opposition on May 2, 2011. (ECF-22.) Defendants filed their reply on June 15, 2011 (ECF-27) in which they for the first time addressed the political question doctrine in detail and argued that the Complaint failed to state a claim for bailment. Plaintiffs subsequently moved the District Court for permission to file a sur-reply brief to address the new arguments Defendants raised on reply. (ECF-29.) The District Court granted that motion and considered Plaintiffs' sur-reply. (ECF-34, 36.)

On September 1, 2011, the Court denied the motion to dismiss in all respects, except as to eleven paintings that had previously been the subject of

litigation in Hungary brought by Martha Nierenberg, Plaintiff de Csepel's aunt. *See de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113 (D.D.C. 2011) (hereinafter "*Opinion*"). On September 12, 2011, Defendants filed a notice of appeal of the Opinion's sovereign immunity holding pursuant to 28 U.S.C. § 1291. (ECF-37.) Defendants subsequently moved for certification of five additional issues for appeal pursuant to 28 U.S.C. § 1292(b), Plaintiffs cross-moved for certification of the comity ruling, and the District Court granted both motions on November 30, 2011. (ECF-51.)

On March 2, 2012, this Court granted Defendants' request to certify the additional five issues for interlocutory appeal and also granted Plaintiffs' request to certify the comity issue. This Court consolidated the three appeals (Nos. 11-7096, 12-7025, and 12-7026) on March 12, 2012.

STATEMENT OF FACTS

The Parties

Following the deaths of Baron Herzog and his wife in 1934 and 1940, the Herzog Collection was divided among their three children, Erzsebét (Elizabeth) Weiss de Csepel, István (Stephen) Herzog and András (Andrew) Herzog. (Compl. ¶39 (JA-__).)

Plaintiff David L. de Csepel is a United States citizen residing in Los Angeles, California. (*Id.* ¶6 (JA-__).) He is the grandson of Elizabeth, who died a

United States citizen in 1992. (*Id.* ¶¶6, 78 (JA-__).) Plaintiff de Csepel represents all of Elizabeth's heirs in this action. He also represents the heirs of István, who died in Hungary in 1966. (*Id.* ¶¶42 (JA-__).) Some of István's heirs are also United States citizens.

Plaintiffs Angela and Julia Herzog are Italian citizens residing in Rome, Italy, and are the daughters of András Herzog, who died in 1943 in forced labor. (*Id.* ¶¶7-8 (JA-__).) They represent András' heirs in this action and, together with Plaintiff de Csepel, also represent István's heirs.

Defendant Republic of Hungary is a foreign state as defined in 28 U.S.C. § 1603(a) (PADD000009). (*Id.* ¶9 (JA-__).) The Museum and University Defendants are agencies or instrumentalities of Hungary, as defined in 28 U.S.C. § 1603(b) (PADD000009). (*Id.* ¶¶10-14 (JA-__).)

Hungary's Alliance With Germany And
Campaign Of Genocide Against Hungarian Jews

In November 1940, Hungary chose to join the Axis Powers, fighting with Nazi Germany against the Soviet Union. (*Id.* ¶¶46, 48 (JA-__).) Hungary deported thousands of Jews to territories under German control, where they were brutally mistreated and massacred, and sent Jewish men into forced labor. (Compl. ¶¶49, 50 (JA-__).) By March 1944, at least 27,000 Hungarian Jewish forced laborers – including András Herzog – had perished. (*Id.* ¶50 (JA-__).) Hungary also simply murdered outright hundreds of Jews. (*Id.* ¶49 (JA-__).)

Hungary enacted various laws, modeled on Germany's infamous Nuremberg laws, eliminating or severely restricting the public, economic and social rights of Jews. (Compl. ¶47 (JA-__).) Among other things, these laws defined "Jew" in racial terms, prohibited sexual relations or marriage between Jews and non-Jews, and excluded Jews from full participation in various professions. (*Id.* ¶¶ 44-45, 47 (JA-__); Lattmann Decl., ECF-22-24, ¶¶ 6-16 (JA-__).) Hungary's acts of genocide and restrictive laws effectively nullified Hungarian citizenship for all Jews. (Lattmann Decl. ¶18 (JA-__).)

In March 1944, Hitler sent German troops into Hungary to ensure its loyalty and to assist it in resisting the advancing Russian army. (*Id.* ¶51 (JA-__).) Hungary admits that it was under German occupation during this period. (Brief of Defendants-Appellants/Cross-Appellees ("Br.") at 8.) Between May and July 1944, Hungarian authorities, working in collaboration with the infamous SS commander Adolf Eichmann, deported over 430,000 Jews – more than half of the entire pre-war Hungarian Jewish population. (*Id.* ¶52.) By early 1945, more than 500,000 Hungarian Jews were dead – out of a total pre-War population of 825,000. (*Id.*)

Hungary And Its Nazi Allies Seize the Herzog Collection

Hungary's campaign of genocide against its Jews was not limited to murder, deportation, and denial of basic human and citizenship rights. The looting of

Jewish property, including cultural property, was an integral feature of the Hungarian Jewish genocide. (Compl. ¶53 (JA-__).) Jews – including the Herzogs – were required to register their art treasures with the government. (*Id.* ¶56 (JA-__).) The Herzog family attempted to protect some of their art by hiding it in the cellar of one of the family's factories at Budafok, but the Hungarian government and its Nazi collaborators discovered the hiding place and the chests containing the art were opened in the presence of the director of the Museum of Fine Arts. (*Id.* ¶¶58-59 (JA-__).) Hungary and its Nazi collaborators seized other pieces of the Herzog Collection from the homes, safe deposit vaults, and other properties of the Herzog family. (*Id.* ¶61 (JA-__).) Art from the Herzog Collection was taken to Adolf Eichmann's headquarters at the Majestic Hotel in Budapest for his inspection. (*Id.* ¶60 (JA-__).) Eichmann selected many of the best pieces for himself and his cronies and shipped them to Germany. (*Id.* (JA-__).) The remainder of the collection was taken over by the Museum of Fine Arts for so-called "safekeeping." (*Id.* (JA-__).)

The Herzog Family Escapes From Hungary

Stripped of their property and livelihoods and fearing for their lives, members of the Herzog family who could manage to do so were forced to flee Hungary. (*Id.* ¶63 (JA-__).) In May 1944, Elizabeth and her children, together with other members of the Herzog and Weiss de Csepel families, fled to Portugal.

Elizabeth immigrated to the United States in 1946 and became a U.S. citizen in 1952. (*Id*. (JA-__).) Her grandson, David, brings this action. Plaintiffs Angela and Julia Herzog escaped to Argentina and eventually settled in Italy. (*Id*. ¶64 (JA-__).) They became Italian citizens in 1959 and 1960, respectively. István and some members of his family remained in Hungary, while others settled in Switzerland. (*Id*. (JA-__).)

The 1947 Peace Treaty

In 1947, Hungary and the Allies entered into a Peace Treaty. (Peace Treaty, ECF-22-3 (JA-__).) Of relevance here, Article 27(1) of the Peace Treaty provided:

> Hungary undertakes that in all cases where the property, legal rights or interests in Hungary of persons under Hungarian jurisdiction have, since September 1, 1939, been the subject of measures of sequestration, confiscation or control on account of the racial origin or religion of such persons, the said property, legal rights and interests shall be restored together with their accessories or, if restoration is impossible that fair compensation shall be made therefor.

(*Id*. (JA-__) (DADD15).) Thus, Hungary represented in the Peace Treaty that it would not claim ownership of property that had been looted from Hungarian Jews during the Holocaust, but would instead act solely as a bailee of that property until it could be restituted to its rightful owners. (Compl. ¶69 (JA-__).)

The Post-War Fate of the Herzog Collection

Defendants performed a charade of "returning" a handful of items from the Herzog Collection to the Herzog family in the years immediately following the war. Those "returns" were largely on paper or short-lived, and the vast majority of

the Herzog Collection remained in the possession of Hungary and its instrumentalities. (*Id.* ¶¶70-71 (JA-__).) Defendants acknowledged the ownership rights of the Herzog family to those pieces that remained in Defendants' custody, including by exhibiting the works as "on deposit" or expressly identifying them as coming from the Herzog Collection. (*Id*. ¶73 (JA-__).) Thus, a bailment relationship continued, or was created, with respect to that art.

While certain pieces of the Herzog Collection were physically returned to Herzog family members, Hungarian government officials repeatedly harassed and threatened them, including by bringing trumped up "smuggling" allegations, until they agreed to re-deposit the works with the museums according to new bailment agreements so that they could be displayed and exhibited by the Defendants. (*Id*. ¶¶72-73 (JA-__).) In 1948, the Museum of Fine Arts exhibited pieces of the Herzog Collection with labels expressly acknowledging that they were "on deposit." (*Id*. ¶73 (JA-__).)

The First Hungarian Claims Program

After 1947, relations between the United States and Hungary deteriorated. Pursuant to the Trading with the Enemy Act, the United States held certain Hungarian assets blocked by an Executive Order. (Lillich, ECF-22-21 and 22-22, at 536 (JA-__).) In 1955, the United States decided to use those blocked assets to compensate United States claimants and amended the International Claims

Settlement Act of 1949 to authorize the Foreign Claims Settlement Commission (the "FCSC" or "Commission") to consider claims by United States nationals against Hungary and other nations. *See* Act of August 9, 1955, Pub. L. No. 84-285, 69 Stat. 570, 1955 U.S.C.C.A.N. 626, 638 (the "1955 Claims Amendment"), *codified at* 22 U.S.C. §§ 1621 *et. seq*. (*See also* Lillich at 537 (JA-__).)

The 1955 Claims Amendment authorized the Commission to adjudicate claims of United States nationals against Hungary for Hungary's failure, *inter alia*, "to restore or pay compensation for property of United States nationals as required by Articles 26 and 27 of the Treaty of Peace" and "to pay effective compensation for the nationalization, compulsory liquidation or other taking, prior to August 9, 1955, of property of United States nationals." 22 U.S.C. § 1631 (creating the "First Hungarian Claims Program") (DADD3). The 1955 Claims Amendment defined "national of the United States" to mean "United States citizens, together with the inhabitants of certain of our island dependencies who are not citizens but who owe allegiance to the United States." 22 U.S.C. § 1641(2) (DADD5) (emphasis added).

To be eligible for compensation under the First Hungarian Claims Program, the claimant had to have been a United States citizen both in 1955 and at the time of injury. (FCSC Working Draft Report, ECF-22-4, at 4 (JA-__); 4/4/74 Transcript, ECF-22-5, at 9 (JA-__).)

An award by the Commission in the First Hungarian Claims Program did not prevent the claimant from seeking additional recovery from Hungary – including restitution – if the Commission's decision did not fully compensate the claimant. *See* 22 U.S.C. § 1641l (PADD000001) (an award would not preclude a claimant from seeking "restitution of his property").

As of August 9, 1955, the effective date of the 1955 Claims Amendment, Elizabeth Weiss de Csepel was the only United States citizen with an ownership interest in any portion of the Herzog Collection. (Compl. ¶63 (JA-__).) Elizabeth was only eligible for compensation for any taking of her property by Hungary between June 23, 1952 (the date she became a U.S. citizen) and August 9, 1955, as the Commission expressly acknowledged in its award to her. (Ramirez Decl., ECF-15-5, Ex. D (JA-__).) After fleeing Hungary to avoid extermination, the Herzog Heirs were unable to get accurate information as to what had become of their property. (Compl. ¶75 (JA-__).) Based on the limited information available to her, Elizabeth believed at the time (and, as the family discovered later, erroneously) that certain of her artworks had likely been nationalized by Hungary as a result of Hungarian Museum Decree No. 13 of 1954 (the "1954 Museum Decree") (Bánki Decl., ECF-15-2, Ex. C § 9(1) (JA-__)), which provided that museum pieces "whose owner is unknown, or has left the country without

permission," would be placed into State ownership. (Lattmann Decl. ¶¶31-32 (JA-__).)

Elizabeth submitted an affidavit to the Commission stating that she believed that Hungary would treat her as someone who "has left the country without permission" and filed a claim for compensation for twelve pieces of art she knew to be in the possession of Defendant Museum of Fine Arts. Her claim also included real property, which she believed (correctly) had been nationalized pursuant to other decrees not relevant here.[1] Hungary was not involved in the Commission process and had no input into the decisions made or the awards rendered.

On April 13, 1959, the Commission awarded Elizabeth $210,000 for the real estate and the artworks combined. Consistent with Section 313 of the 1955 Claims Amendment, the Commission's decisions expressly reserved Elizabeth's rights against the Hungarian government to recover the balance of her claim. 22 U.S.C. § 1641l (PADD000001). (Ramirez Decl., Ex. A at 2 (JA-__), Exs. C (JA-__) & D (JA-__) (same).)

The First Hungarian Claims Program was completed on August 9, 1959. The Commission determined 2,725 claims against Hungary and issued awards of

[1] The claim for real property filed by Elizabeth's daughter, Martha Nierenberg (Br. 16) is not relevant because Martha had no ownership interest in the Herzog Collection until her mother's death in 1992 (Compl. ¶78 (JA-__)).

$80,296,047 in principal and interest. (Lillich at 538 (JA-__).) With only $2,237,737.96 available in the Hungarian Claims Fund, however, claimants holding awards over $1,000 received only approximately 1.5% of their awards. (*Id*. at 539 (JA-__).)

In a January 2008 letter to the Hungarian Minister of Foreign Affairs urging the return of various pieces of the Herzog Collection to Martha Nierenberg, three members of Congress – including then-Senator Hillary Rodham Clinton – agreed that the paintings sought by Martha "were not covered at all by the 1959 decision of the Foreign Claims Settlement Commission because Elizabeth Weiss de Csepel was not a U.S. citizen at the time those paintings were stolen, and because the paintings were not considered 'nationalized, compulsorily liquidated or taken' as those terms are used in the statute governing the work of the Foreign Claims Settlement Commission." (Clinton Letter, ECF-22-6 (JA-__).)

The 1960's Negotiations and the 1973 Agreement

In 1965, the United States began negotiations with Hungary to obtain compensation for the balance of the claims that had resulted in partial awards through the First Hungarian Claims Program. (*See* Lillich at 539 (JA-__).) At a June 17, 1966 meeting, the United States chief negotiator raised the issue of certain "nationalized" art collections belonging to former Hungarian citizens who had become naturalized citizens of the United States after the seizure of the artworks.

Hungary's chief negotiator responded that "art collections had never been nationalized in Hungary." (*See* 6/17/66 Transcript, ECF-22-7, at 237 (JA-__).) He also stated that the United States had no standing to press claims on behalf of claimants who were not United States nationals at the time their paintings came into the custody of the Museum of Fine Arts; United States negotiators agreed. (*Id.* at 238 (JA-__).)

On March 6, 1973, the United States and Hungary entered into an executive agreement. *See Agreement Between the Government of the United States of America and the Government of the Hungarian People's Republic Regarding the Settlement of Claims*, Mar. 6, 1973, 24 U.S.T. 522, T.I.A.S. 7569, 938 U.N.T.S. 167 (the "1973 Agreement") (DADD17, PADD000018). The 1973 Agreement provided that, in exchange for the lump sum payment of $18,900,000 by Hungary, there would be a "full and final settlement and … discharge of all claims of the Government and nationals of the United States against the Government and nationals of the Hungarian People's Republic which are described in this Agreement." *Id.*, art. 1(1) (PADD000018). The 1973 Agreement addressed four categories of claims, including "property, rights and interests affected by Hungarian measures of nationalization, compulsory liquidation, expropriation or other taking on or before the date of this Agreement" and "obligations of the

Hungarian People's Republic under Articles 26 and 27 of the [Peace Treaty]." *Id.*, art. 2 (DADD17).

Like the 1955 Claims Amendment, the 1973 Agreement applied only to claims of persons who were United States nationals (generally defined as U.S. citizens)[2] both in 1973 and at the time their loss was suffered. (*See* Bettauer Letter, ECF-22-8 (JA-__) ("The [1973] Agreement settled and discharged certain claims against the Government of Hungary of U.S. nationals who were U.S. nationals at the time their claims arose. It did not settle or discharge claims of U.S. nationals who became U.S. nationals after their claims arose.") (emphasis added); Kwiatek Letter, ECF-22-9 (JA-__); Wright Letter, ECF-22-10 (JA-__) ("Claims of persons who were not nationals of the United States on the date their claims arose were excluded by the Congress under the provisions of Title III of the agreement. Such claims were also excluded under the agreement.").) Therefore, the 1973 Agreement did not settle claims by persons who were not United States citizens at the time their loss was suffered.

The Fall of Communism

In 1989, the Herzog Heirs learned that many pieces of the Herzog Collection were being openly exhibited by the Defendants. (Compl. ¶77 (JA-__).) Tags

[2] 1973 Agreement, arts. 1(1) (PADD000018) and 3 (DADD18).

under the paintings identified them as "From the Herzog Collection." (*Id.* (JA-__).)

Elizabeth Weiss de Csepel, then 89 years old, immediately attempted to persuade the Hungarian government to return her art. (*Id.* ¶78 (JA-__).) She was almost entirely unsuccessful, obtaining before her death in 1992 only six paintings and a wood sculpture – all attributed to little known artists. (*Id.* (JA-__).) Defendants still have not returned the identifiable masterworks described in the Complaint. (*Id.* (JA-__).)

In the early 1990s, the Hungarian Parliament enacted two compensation laws. (Br. 15-16; 1991 Compensation Act, Bánki Decl. Ex. F, ECF-15-2 (JA-__); 1992 Compensation Act, Bánki Decl. Ex. G, ECF-15-2 (JA-__).) Neither of those laws applies to Plaintiffs' claims. (Lattmann Decl. ¶¶25-30 (JA-__); Varga Decl., ECF-22-26, ¶¶16-17 (JA-__) & Ex. A, ECF-22-27, at 32 (JA-__)); Pasztory Decl., ECF-22-22, ¶¶4-6 (JA-__).)

Although the 1991 Compensation Act referenced the right of Holocaust-era claimants to receive compensation, it only provided actual compensation for Communist-era, as opposed to Holocaust-era, claims. (Lattman Decl., ¶¶25, 29 (JA-__); 1991 Compensation Act at § 1(3) (JA-__) (explaining that "[c]ompensation of damages caused by the application of regulations enacted

between May 1, 1939 and June 8, 1949 … will be effected by virtue of the provisions of a separate act to be framed by November 30, 1991.").)

The 1992 Compensation Act – which was the "separate act" referred to in the 1991 Compensation Act – allowed for limited monetary compensation to claimants based on the application of certain Holocaust-era regulations. (Lattman Decl., ¶26 (JA-__).) However, the 1992 Compensation Act made no provision for *in rem* restitution of identifiable property as Hungary had guaranteed in the Peace Treaty, nor was it specifically intended to compensate claimants for art. (*Id.*, ¶29 (JA-__).) A Hungarian court held the 1992 Compensation Act did not bar a claim for restitution by Martha Nierenberg, Plaintiff de Csepel's aunt. (*Id.*, ¶30; Varga Decl. ¶17 (JA-__).) None of the Herzog Heirs filed claims for art under the 1991 or 1992 Compensation Acts. (Pasztory Decl. ¶6 (JA-__).)

Negotiations With Hungary And The Nierenberg Litigation

Following Elizabeth's death in 1992, Martha Nierenberg continued her mother's efforts to recover the art. (Compl. ¶79 (JA-__).) In 1996, the Hungarian Minister of Culture and Education appointed a Committee of Experts to determine who legally owned the Herzog Collection. (Pasztory Decl. ¶¶7-8 (JA-__).)[3] The government appointed the Director of the Museum of Fine Arts and a legal

[3] Defendants' assertion that "[n]either Plaintiffs nor their predecessors had any communication with or took any action against Hungary between 1992 and 1996" (Br. 20) has no support in the record and, in any event, is untrue.

representative of the Ministry of Foreign Affairs to the Committee. (*Id.* ¶8 (JA-__).) The Committee met on several occasions in 1996 and 1997 and reviewed the ownership status of certain art objects that Martha asserted were the property of the heirs of Elizabeth and István Herzog. (*Id.* ¶¶7, 9-10 (JA-__).) The Experts' Committee at no point suggested that the state had acquired ownership of the art at issue by virtue of the 1954 Museum Decree (or otherwise) and the Director of the Museum of Fine Arts admitted that Hungary did not own certain of the artworks Martha claimed – including artworks identified in the Complaint. (Pasztory Decl. ¶¶8-12 (JA-__).) Despite this admission, Hungary did not return the Herzog art.

In October 1999, Martha filed a lawsuit in Hungary to recover ten paintings that belonged to her mother. (Compl. ¶79 (JA-__).) She later amended her complaint to include two additional paintings. The Museum of Fine Arts returned one painting to her shortly after the litigation commenced, without explanation. However, the litigation proceeded with respect to the rest of the paintings. Angela and Julia Herzog later intervened in the lawsuit as defendants as there was initially a dispute between them and Martha as to who owned certain of the artworks (which was later resolved). (Varga Decl., ¶¶7-8 (JA-__).)

On October 20, 2000 the Budapest Metropolitan Court ordered that all paintings except one be returned to Martha. (ECF-22-27 (JA-__).) Among other things, the court rejected the defendants' argument that they had acquired

ownership of the paintings by virtue of the 1954 Museum Decree. (*Id.* at 34-38 (JA-__).) The court agreed with Martha that the government possessed the paintings at issue only as "bailee." (*Id.* at 52 (JA-__).)

Instead of honoring the Metropolitan Court's decision and returning the art to Martha, Defendants appealed the decision. On November 29, 2002, the Supreme Court of Hungary vacated the judgment of the Metropolitan Court on the ground that the court erred in concluding that the paintings belonged to Elizabeth, rather than other Herzog Heirs, in the absence of participation in the lawsuit by all of the Herzog Heirs. (ECF-22-29, at 12-13 (JA-__).) The court remanded the case to the trial court for further proceedings. (*Id.* (JA-__).) Significantly, the Supreme Court agreed with the lower court that the defendants had not established that the paintings had become state property as a result of Section 9 of the 1954 Museum Decree and that no "nationalization … or other taking" of the paintings had occurred as provided in the 1973 Agreement. (*Id.* at 14-16 (JA-__).) However, the Supreme Court asked the lower court to consider whether, in light of the compensation received by Elizabeth from the Commission, defendants had a claim for adverse possession based on their alleged belief (even if erroneous) that they owned the art as a result of the 1973 Agreement. (*Id.* at 17-18 (JA-__).)

On remand, the Metropolitan Court on November 16, 2005 ordered the return of one painting to Martha, but otherwise dismissed the claim on the grounds

of adverse possession. (ECF-22-31, (JA-__).) However, the court agreed with the findings of the prior two courts that the 1954 Museum Decree had not given the state ownership of the art at issue. (*Id.* (JA-__).)[4]

Following that decision, various members of Congress, including then-Senator Hillary Rodham Clinton, wrote letters to Hungary supporting Martha Nierenberg's claim and urging Hungary to return the art to her. (Clinton Letter, ECF-22-6 (JA-__); Lowey Letter, ECF-22-21 (JA-__); Hastings Letter, ECF-22-12 (JA-__).) Those letters firmly rejected Hungary's argument that Martha could or should have pursued a claim in Hungary prior to the collapse of Communism. (Hastings Letter at 2 (JA-__) ("We are most troubled by reports that it has been argued in court by representatives of those currently holding the paintings that Ms. Nierenberg's claim is barred by a statute of limitations that expired in 1986, i.e., that Ms. Nierenberg's family should have expected a good-faith resolution of this matter from the totalitarian communist regime and it is her fault for not filing a claim sooner."); Clinton Letter at 2 (JA-__) ("In precisely what year could one have expected legal justice from the People's Republic of Hungary?").) The letters

[4] In light of the rulings by Hungary's own courts that the Herzog Collection was not nationalized by the 1954 Museum Decree, Defendants' continued assertions that Plaintiffs' claims are based on Communist-era nationalization (Br. 12, 24, 38, 42, 58, 61 n.17, 66) are entirely baseless.

also rejected Hungary's argument that the 1959 decision of the Commission barred Martha's claim. (*Id.* at 1 (JA-__).)

On January 10, 2008, nine years after Martha commenced her lawsuit, the Metropolitan Appellate Court dismissed her claim in its entirety, holding that Hungary had essentially "purchased" ownership of the paintings through the 1973 Agreement because the United States had awarded Elizabeth compensation through the Commission process. (1/10/2008 Final Judgment, ECF-15-4, (JA-__).) This was error because Hungary (and its courts) knew that Elizabeth's art was never "taken" during the period covered by the 1973 Agreement and her claims were therefore not settled by that agreement and the awards made by the Commission during the First Hungarian Claims Program (in which Hungary played no role) were never intended to bar later claims for restitution. *See supra* at 13-16. The court also agreed with the lower court that the state had obtained ownership via adverse possession. (1/10/2008 Final Judgment at 14-15.) No appeal was possible from that decision. (Varga Decl. ¶6 (JA-__); 1/10/2008 Final Judgment at 2 (JA-__) (stating that the decision was non-appealable).)

Hungary Agrees To The Washington Principles

In 1998, at the Washington Conference on Holocaust-Era Assets, the Hungarian delegation admitted Hungary's role in the looting of Jewish property during the Holocaust (Compl. ¶83(JA-__)) and acknowledged that Hungary "took

part in World War II as an ally of Germany" and that from March 1944 to April 1945 "[p]ersecution of Jews proliferated and the confiscation of Jewish property took place." (1998 Delegation Statement, ECF-22-13 (JA-__).) The Hungarian delegation stated Hungary's commitment "to the restitution or compensation of Holocaust victims concerning cultural assets." (*Id.* (JA-__).) Hungary promised to designate a state commissioner to manage the task, but has never done so.

Despite paying lip-service to these and other international standards for restitution of Nazi-era looted art, Hungary has steadfastly avoided actually restoring the Holocaust-era art in its possession. (Varga Decl., ¶¶18-23 (JA-__).)

Hungary's New Constitution

On January 1, 2012, Hungary's new constitution came into effect in which Hungary stated that it lost its "self-determination" from March 19, 1944 until May 2, 1990 (*i.e.*, from the beginning of the Nazi German occupation until the fall of Communism). (Lattmann Decl. ¶39 (JA-__); Orszag-Land Article, ECF-48-1 (JA-__).) The new constitution also states, *inter alia*, that "[w]e do not accept that the heinous crimes committed against the Hungarian nation and its citizens during the Nazi and the Communist dictatorships can be subject to any statute of limitations." (Orszag-Land Article at 2 (JA-__).)

SUMMARY OF ARGUMENT

The District Court correctly rejected Defendants' attempts to re-characterize Plaintiffs' claims as anything more than straightforward bailment claims that are cognizable in a United States court.

Contrary to Defendants' assertions, neither the Peace Treaty nor the 1973 Agreement applies to Plaintiffs' claims, much less divests this Court of subject matter jurisdiction. The District Court correctly held that Plaintiffs' claims are predicated on bailments that are consistent with, but not based upon, the Peace Treaty, and which were not settled therein. Nothing in the Peace Treaty precludes private claims for restitution such as those asserted here. Likewise, the District Court correctly held that Plaintiffs' claims are not predicated on the 1973 Agreement, nor were they settled therein. The 1973 Agreement settled only claims of persons who were United States citizens both in 1973 and when their claims arose; none of the Herzog Heirs meets that criteria.

This Court has subject matter jurisdiction over this action because at least two exceptions to immunity under the FSIA are satisfied. First – as the District Court correctly held – jurisdiction is proper under 28 U.S.C. § 1605(a)(3) (DADD7) because the seizure of Jewish property by Hungary and its Nazi collaborators during the Holocaust unquestionably violated international law, it is undisputed that Defendants and their instrumentalities continue to possess the

artworks identified in the Complaint, and the Museums and the University are engaged in commercial activity in the United States. Jurisdiction is also proper under 28 U.S.C. § 1605(a)(2) (DADD7) because the creation (and repudiation) of a bailment is a commercial, rather than sovereign, act in which any private museum or university could engage. Defendants' creation (and breach) of those bailments caused direct effects in the United States because Hungary at all relevant times owed duties to the Herzog heirs residing in the United States.

Defendants' remaining grounds for reversal are also meritless. Defendants' argument that the political question doctrine bars Plaintiffs' claims was correctly rejected by the District Court because Defendants failed to properly raise it, and because Defendants failed to show any valid basis for the court to abstain from exercising jurisdiction. Defendants cannot show that the District Court abused its discretion in holding that neither the private nor public interest factors favor dismissal on grounds of *forum non conveniens*. Nor can they show that the District Court erred in holding that the complaint adequately states a claim for bailment. As the District Court correctly recognized, Defendants' statute of limitations defense is not evident on the face of the Complaint and would require the Court to resolve issues of fact – an inappropriate exercise at the motion to dismiss stage. Finally, the District Court correctly rejected Defendants' act of state doctrine defense because the "acts" at issue here – bailments – are not sovereign in nature

and the doctrine therefore does not apply. Accordingly, the District Court's decision should be affirmed in all of these respects.

The District Court's decision to dismiss Plaintiffs' claims to eleven artworks on grounds of international comity, however, was error. The court improperly penalized Plaintiffs for Martha's attempt to exhaust her remedies in Hungary. The court should have declined to defer to the Hungarian court's indefensible interpretation of the 1973 Agreement because it contravened United States public policy and international law. The District Court also disregarded the Complaint's allegations of bias and that the Nierenberg Litigation was not conducted in accordance with internationally recognized standards of due process in dismissing Plaintiffs' claims at the Rule 12 stage. This aspect of the District Court's ruling should be reversed.

ARGUMENT

I. STANDARDS OF REVIEW

This Court reviews questions of law *de novo*, including whether Defendants are immune from the jurisdiction of the United States courts under the FSIA. *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1127 (D.C. Cir. 2004). However, a District Court's *forum non conveniens* determination will not be reversed unless there has been a "clear abuse of discretion." *Agudas Chasidei Chabad v. Russian Fed'n*, 528 F.3d 934, 950 (D.C. Cir. 2008).

Where, as here, a defendant challenges only the legal sufficiency of the plaintiff's jurisdictional allegations under Rule 12(b)(1), the court must assume the truth of the factual allegations pleaded in the complaint and construe them in the light most favorable to the plaintiff. *Republic of Austria v. Altmann*, 541 U.S. 677, 681 (2004); *Phoenix Consulting v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000). If there is a factual dispute concerning the jurisdictional facts alleged by the plaintiff, the court may rely on materials outside the pleadings to determine whether it has jurisdiction. *Phoenix Consulting*, 216 F.3d at 40.

To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" such that a court may "'draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (the complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level"). The court may consider "only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [courts] may take judicial notice" and must construe the facts in the light most favorable to the Plaintiffs. *E.E.O.C. v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997).

II. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS' CLAIMS ARE NOT BARRED BY TREATY OR EXECUTIVE AGREEMENT

Defendants argue that United States Courts lack jurisdiction over this action because Plaintiffs' claims are allegedly barred by the Peace Treaty and the 1973 Agreement. (Br. 28-37.) As the District Court correctly recognized, however, neither the Peace Treaty nor the 1973 Agreement applies, much less divests this Court of subject matter jurisdiction. *Opinion* at 135.

A. The Peace Treaty Does Not Bar Plaintiffs' Claims

Defendants never raised the Peace Treaty as a ground for dismissal under Rule 12(b)(1) or 12(b)(6) in their moving brief in the District Court. (ECF-15.) Instead, Defendants belatedly argued for the first time on reply – as they do here – that Article 27 of the Peace Treaty, in which Hungary committed to restore or pay fair compensation for property in Hungary of "persons under Hungarian jurisdiction" bars Plaintiffs' claims and divests this Court of subject matter jurisdiction. (Peace Treaty, art. 27 (JA-__) (DADD15); Br. 28-34.) Contrary to Defendants' assertions, the Peace Treaty did not "settle" or otherwise resolve Plaintiffs' claims.

Defendants mischaracterize Plaintiffs' claims as based on an "alleged bailment created by the Peace Treaty." (Br. 24, 34.) However, as the District court correctly recognized, Plaintiffs' claims are not based upon a breach of

Hungary's obligations under Article 27 of the Peace Treaty. *Opinion* at 135 ("Plaintiffs' bailment claims … do not depend on the existence of a bailment created by the Peace Treaty itself. Rather, the Complaint alleges breach of express and/or implied bailment agreements between defendants and the Herzog family.") (emphasis added). The Complaint alleges that, after the war, "Hungary, the Museums and University arranged with representatives of the Herzog Heirs to retain possession of most of the Herzog Collection … so that the works could continue to be displayed in Hungary." (Compl. ¶¶36, 99 (JA-__) ("the Herzog Heirs and their representatives had no choice but to re-deliver possession or consent to Defendants' retention of possession" of the various pieces of the Herzog Collection after the war), ¶¶70-73 (JA-__) (Defendants "recogniz[ed] the ownership rights of the Herzog Heirs to the Herzog Collection" and displayed the works with labels acknowledging that they were "on deposit;" Defendants "physically returned" some pieces, but then harassed and threatened the family's representatives "until they agreed to allow the artworks to be 'returned' to the Museums or the University for safekeeping").) As the District Court correctly recognized, "while plaintiffs' bailment claim is *consistent* with Hungary's representations in the 1947 Peace Treaty …, plaintiffs do not assert that the bailment was created by virtue of the Peace Treaty." *Opinion* at 136.

Neither Article 27 – nor any other provision of the Peace Treaty – settled or otherwise resolved claims against Hungary of "persons under Hungarian jurisdiction." (DADD15.)[5] Article 27 instead simply stated Hungary's obligation to compensate such claimants prospectively. By contrast, Hungary expressly waived all claims against the Allies on behalf of itself or its nationals arising out of the war (Peace Treaty, art. 32 (JA-__) (PADD000016-17).) This one-sided waiver is not surprising given Hungary's status at the time as a defeated enemy nation.

Nor does the dispute resolution procedure described in Article 40 of the Peace Treaty apply to Plaintiffs' private bailment claims. (DADD16.) Article 40 created an arbitration procedure that covered diplomatic disputes among the signatory nations concerning the Treaty (a procedure that Hungary ultimately avoided participating in by refusing to appoint its representative to the Commission that was supposed to adjudicate disputes). Advisory Opinion of the I.C.J., 1950 I.C.J. 221, at 9 (July 18, 1950) (DADD76).[6] Article 40 does not, on its face, apply to private bailment claims that arose after the Peace Treaty was signed, such as those asserted here. *See McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d

[5] Such settlements have been entirely inconsistent with the principle of espousal, pursuant to which a state acts on behalf of its own citizens only and advances their claims against another state. The United States can only espouse or settle claims by persons who were United States citizens at the time of their injury. *Dayton v. Czechoslovak Socialist Republic*, 834 F.2d 203, 206 (D.C. Cir. 1987).

[6] The ICJ opinions cited by Defendants (Br. 13-15) necessarily involved state-to-state disputes among sovereigns.

1066, 1079 (D.C. Cir. 2012) (clause in treaty that provided that disputes between the parties would be resolved by the I.C.J. did not expressly preclude a national from seeking judicial redress from either country's courts).

Because the relevant provisions of the Peace Treaty do not apply to – much less bar – Plaintiffs' claims, there is no "express[] conflic[t]" between the Peace Treaty and the relevant provisions of the FSIA that would divest this Court of subject matter jurisdiction. *See* 28 U.S.C. § 1604 (DADD7) (FSIA applies "[s]ubject to existing international agreements to which the United States is a party at the time of enactment…."); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989) (the "subject to" clause in Section 1604 applies only "when international agreements *'expressly conflic[t]'* with the immunity provisions of the FSIA.").[7]

Because Plaintiffs do not rely upon or challenge the terms, conditions, or validity of the Peace Treaty, the cases relied on by Defendants (Br. 34-35) are entirely inapposite. Nor are Plaintiffs required to show that the Peace Treaty provides individuals with a private right of action (Br. 34-35) when Plaintiffs do not seek to claim directly under the Peace Treaty. *Opinion* at 135; *see also Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank*, 807 F. Supp. 2d 689,

[7] By contrast, in *Moore v. United Kingdom*, 384 F.3d 1079 (9th Cir. 2004) (cited at Br. 29), the treaty at issue applied to plaintiff's claims.

693 (N.D. Ill. 2011) (issue of whether treaties were self-executing was not dispositive where plaintiffs based claims "upon a violation of the historical norms established by the treaties, customary international law, and the limited area of law governing areas such as genocide").

In any event, even if Plaintiffs' claims were based on the Peace Treaty (which they are not), Hungary adjudicated claims by Hungarian citizens in its Constitutional Court based on Hungary's failure to comply with its obligations under the Peace Treaty. (Lattman Decl. ¶¶23-24 (JA-__); Br. 19.) The existence of a private right of action under the Peace Treaty under Hungarian law can sustain a claim under the Peace Treaty in a United States court. *See McKesson Corp.*, 672 F.3d at 1080 (plaintiff could bring claim against Iran in U.S. court where Iranian law created a private right of action under treaty even where same treaty did not provide a cause of action under U.S. law).

B. The 1973 Agreement Does Not Bar Plaintiffs' Claims

Defendants' argument that the 1973 Agreement applies and divests this Court of subject matter jurisdiction (Br. 35-37) is equally meritless.

The 1973 Agreement – like the Peace Treaty – was "based on the concept of espousal." *Opinion* at 133. Both Hungary and the United States expressly recognized this limitation on their authority during the negotiations of the 1973 Agreement. (6/17/66 Transcript at 238 (JA-__).) Moreover, after the 1973

Agreement was signed, both the Department of State and Congress recognized that the 1973 Agreement covered only claims of persons who were United States citizens both in 1973 and at the time of their injury. *Opinion* at 133-34. (Bettauer Letter (JA-__); Kwiatek Letter (JA-__) (explaining that the State Department could not assist persons who were Hungarian nationals at the time of the taking); Wright Letter (JA-__) (explaining to Congress that claims of persons who were not nationals of the United States on the date their claims arose were excluded under the Agreement).) *See also* 22 U.S.C. § 1641b (DADD6) (compensating only the taking of "property of nationals of the United States" in Hungary).[8]

In analyzing the 1973 Agreement, courts may consider this "negotiation and drafting history of the treaty as well as 'the postratification understanding of signatory nations.'" *Medellin v. Texas*, 552 U.S. 491, 507 (2008); *Sumitomo Shoji Am., Inc., v. Avagliano*, 457 U.S. 176, 185 & n.10 (1982) (letter written by the Office of the Legal Adviser of the Department of State was "evidence of the later interpretation of the State Department as the agency of the United States charged

[8] Likewise, the Commission clearly understood both the First and Second Hungarian Claims Programs to be available only to persons who were United States citizens both at the time the Programs were implemented and when their claims arose. (FCSC Working Draft Report at 4 (JA-__); 4/7/74 Transcript at 9 (JA-__); FCSC Final Decision (JA-__).)

with interpreting and enforcing the Treaty" and was "entitled to great weight.") (emphasis added).

Defendants ignore this history completely and instead argue that the textual reference to Article 27 of the Peace Treaty in the 1973 Agreement, and the Agreement's definition of "nationals of the United States" (DADD18) as including both citizens of the U.S. and those who owed permanent allegiance to the United States as of 1973, mean that the 1973 Agreement settled not only claims by United States citizens arising prior to 1973, but also claims by all persons who were under Hungarian jurisdiction at the time of the taking and who later became United States nationals before 1973 – such as Elizabeth Weiss de Csepel. Defendants are wrong.[9]

Defendants ignore Annex B of the 1973 Agreement in which Hungary represented to the United States that "all the obligations of the Government of the Hungarian People's Republic set out in Article 27 of the Treaty of Peace with Hungary signed in Paris on February 10, 1947 have already been fulfilled." (PADD000019-20.) Because Hungary represented to the United States that there

[9] The 1973 Agreement cannot bar the claims of the non-United States citizen plaintiffs, Angela and Julia Herzog, under any circumstances because neither they nor their father were ever United States citizens. (Compl. ¶41 (JA-__).) Nor can it bar the claims derived from István's interests as none of his heirs was a United States citizen prior to 1973.

were no Article 27 claims to be included in the proposed settlement, it is clear that the United States could not have valued those claims for purposes of the 1973 Agreement, much less "settled" such claims. Even if the 1973 Agreement were ambiguous on this point, further evidence would be required on the issue to dispose of it as Defendants request.

Defendants' suggestion that Article 27 cannot apply to U.S. citizens or that the District Court has somehow "render[ed] null" a portion of the 1973 Agreement is wrong. (Br. 37 n.7.) While Article 26 of the Peace Treaty covered only claims of "the United Nations and their nationals" (DADD12), Article 27 of the Peace Treaty applied to "persons under Hungarian jurisdiction" (DADD15) and was therefore not limited to Hungarian nationals – a term used elsewhere in the Peace Treaty. (*Compare* Peace Treaty, art. 27 (JA-__) (DADD15) *with id.*, art. 29 (JA-__) (PADD000014-15) & art. 30 (JA-__) (PADD000015-16) (referring to "Hungarian nationals").) Article 27 of the Peace Treaty applied to United States nationals who otherwise met the criteria for property restoration or compensation set forth in Article 27. Indeed, only Article 27 specifically addressed property, legal rights and interests affected by "measures of sequestration, confiscation or control on account of the racial origin or religion of such persons." (*Id.* at art.

27(1) (JA-__) (DADD15) (emphasis added).)[10] Moreover, while Article 26 limited compensation to "two-thirds of the sum necessary … to purchase similar property or to make good the loss suffered" in the event that property could not be returned (JA__) (DADD13), Article 27 provided more generally for "fair compensation" for property subject to measures taken "on account of the racial origin or religion of such persons" (JA-__) (DADD15).[11]

The absence of a temporal modifier in the 1973 Agreement's definition of "nationals of the United States" (Br. 37) (DADD18) does not support Defendants' construction. In a recent decision involving another executive agreement, the Commission held that even where a claims settlement agreement is silent as to whether a claimant must be a United States national at the time of injury to be eligible for compensation, "the Commission must look to United States practice

[10] Article 26(2)(1) referred more generally to "all measures, including seizures, sequestration or control." ((JA-__) (DADD12).)

[11] United States citizens may also have had claims as heirs who did not receive property to which they were entitled (Peace Treaty, art. 27(2) (JA-__) (providing for the transfer of property by the Hungarian Government to various organizations in Hungary of property "remaining heirlesss or unclaimed for six months after the coming into force of the present Treaty")) or as persons who received compensation for wartime losses through the First Hungarian Claims Program, but who did not technically satisfy the definition of "United Nations national" in Article 26 of the Peace Treaty because they became United States citizens between 1945 (the Armistice) and 1947 (when the Peace Treaty took effect). *See* 22 U.S.C. § 1641b (DADD6) (giving the Commission authority to receive and determine claims under both Articles 26 and 27 of the Peace Treaty). (FCSC Working Draft Report (JA-__).)

and the applicable principles of international law, justice and equity" and noted that "[i]t is a well-established principle of the law of international claims, which has been applied without exception by both this Commission and its predecessors … that a claim may be found compensable only if it was owned by a United States national at the time the claim arose. (In the Matter of the Claim of [Redacted] Against the Great Socialist People's Libyan Arab Jamahiriya, Claim no. LIB-I-052, Decision No. LIB-I-023 (Oct. 16, 2009), ECF-29-2 (JA-__) (emphasis added).) *See also*, 22 U.S.C. note prec. § 1642(6)(a)(2)(B) (2006) (PADD000004) (reaffirming the "principle and practice of the United States to seek compensation from foreign governments on behalf only of persons who were nationals of the United States at the time" of loss).

Finally, Defendants' interpretation of the 1973 Agreement is wholly inconsistent with the 1991 and 1992 Compensation Acts enacted by Hungary, pursuant to which United States citizens – including Plaintiff de Csepel's father and aunt – received compensation for the nationalization of real property. *See supra* at 19-20. (Br. 18-19.) If Hungary really believed that all pre-1973 claims of United States citizens were resolved by the 1973 Agreement, there would have been no reason for it to allow such claims.

In any event, even if the 1973 Agreement applied to Plaintiffs' claims (which it does not), it would not divest this Court of subject matter jurisdiction

because there is no express conflict between the 1973 Agreement and the FSIA. *See Amerada Hess*, 488 U.S. at 422. The 1973 Agreement provides, in relevant part, that

> [N]either Government will present to the other on its behalf or on behalf of any person included in the definition of the United States or Hungarian nationals any claims which have been referred to in this Agreement and neither Government will support such claims. In the event that such claims are presented directly by nationals of one country to the Government of the other, such Government will refer them to the Government of the national concerned.

1973 Agreement, art. 6(3) (DADD19). Thus, the United States agreed not to espouse certain claims of its citizens that were resolved by the 1973 Agreement. However, the Agreement is silent on the question of sovereign immunity. Thus, there is no express conflict between the 1973 Agreement and the FSIA, and this Court should evaluate subject matter jurisdiction over Defendants under the FSIA.

III. THE DISTRICT COURT CORRECTLY FOUND THAT IT HAD JURISDICTION UNDER THE FSIA

The District Court correctly held that United States courts have subject matter jurisdiction over Plaintiffs' claims under 28 U.S.C. § 1605(a)(3) (DADD7). *Opinion* at 128.[12]

[12] As discussed *infra*, this Court also has subject matter jurisdiction under 28 U.S.C. § 1605(a)(2) (DADD7).

A. Jurisdiction Exists Under Section 1605(a)(3)

The second clause of 28 U.S.C. § 1605(a)(3) (DADD7), relevant here, provides that a "foreign state" is not immune from the jurisdiction of United States courts in any case "in which rights in property taken in violation of international law are in issue and … 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." 28 U.S.C. § 1605(a)(3) (DADD7) (emphasis added). Defendants do not dispute on appeal that the artworks at issue are "owned or operated by an agency or instrumentality of the foreign state" or that such "agency or instrumentality is engaged in a commercial activity in the United States." (Br. 38-39.) *See Opinion* at 128. Nor do Defendants dispute that "rights in property" are "in issue" in this action. *Id.* at 128. Instead, Defendants argue only that there was no taking "in violation of international law" because "a sovereign's taking of property from its own nationals does not violate international law." (Br. 38.)

As the District Court correctly recognized, at the motion to dismiss stage, this Court need not find that a taking actually violated international law; all that is required are substantial, non-frivolous allegations of an international law violation. *See Chabad*, 528 F.3d at 941; *Opinion* at 128. The Complaint alleges the incontrovertible fact that Defendants collaborated with the Nazis – including the

infamous Adolf Eichmann – and seized the Herzog Collection as part of an organized campaign of genocide against Hungarian Jews.[13] (Compl. ¶¶29, 59 (JA-__).) Therefore, the District Court correctly held that "[t]he Complaint clearly alleges substantial and non-frivolous claims that the Herzog Collection was taken without just compensation and for discriminatory purposes." *Opinion* at 128; *see also Agudas Chasidei Chabad v. Russian Fed'n*, 729 F. Supp. 2d 141, 145 (D.D.C. 2010) ("An expropriation is a violation of international law if the taking is not for a public purpose, is discriminatory, or does not provide for just compensation."). *Accord Altmann v. Republic of Austria*, 317 F.3d 954, 967-68 (9th Cir. 2002), *amended by*, 327 F.3d 1246 (9th Cir. 2003), *aff'd on other grounds*, 541 U.S. 677 (2004).

[13] These takings constituted war crimes and crimes against humanity. *See* Convention on the Prevention and Punishment of the Crime of Genocide (1948) (PADD000021) ("genocide, whether committed in time of peace or in time of war, is a crime under international law."); *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1203 (C.D. Cal. 2001) ("[T]he Nazi's aryanization of art collections was part of a larger scheme of the genocide of Europe's Jewish population."), *aff'd*, 317 F.3d 954 (9th Cir. 2002). Under international law, genocide includes the taking of property from a persecuted group. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, Aug. 8, 1945, pt. II, art. 6(b), 59 Stat. 1544, 1547 (the "Nuremberg Charter") (PADD000028) (defining "war crimes" as including plunder of public or private property and "crimes against humanity" as including "persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal.").

Defendants' argument that there was no taking "in violation of international law" because Plaintiffs' predecessors were purportedly citizens of Hungary at the time of the takings is meritless, as the District Court correctly held. *See Opinion* at 129. The record shows that Hungary murdered and deported thousands of Jews. (Compl. ¶¶49-52 (JA__).) The record further shows that Hungary, after allying with Nazi Germany, enacted various laws, modeled on Germany's Nuremberg laws, eliminating or severely restricting the public, economic and social rights of Jews. (Compl. ¶¶44-47 (JA__).) Hungary's genocidal acts and restrictive laws *de facto* removed the citizenship rights of Hungarian Jews. (Lattmann Decl. ¶¶16-18 (JA__).) *Opinion* at 129-30. Defendants made no showing to the contrary.

Whether Martha Nierenberg later considered herself to have remained a Hungarian citizen (Br. 38) has no legal bearing on the question of whether Hungary's genocidal acts or Nuremberg-type laws divested her of the rights of citizenship. As the District Court correctly recognized, "the government of Hungary thought otherwise and had *de facto* stripped her, Ms. Weiss de Csepel, and all Hungarian Jews of their citizenship rights." *Opinion* at 130.

Other courts have held that the taking of Jewish property by the Nazis during World War II violated international law. *See Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157, 1165-66 (C.D. Cal. 2006) (expropriation exception applied to Nazi Germany's seizure of German national's property where plaintiff argued that Nazi

citizenship laws precluded citizenship for Jews), *aff'd in part*, 616 F.3d 1019, 1023 (9th Cir. 2010) ("In [1939] German Jews had been deprived of their civil rights, including their German citizenship."); *see also Altmann*, 142 F. Supp. 2d at 1203 (Nazi takings of Klimt paintings from a Jewish collector were "undeniably a taking in violation of international law"). *Cf. Roboz v. Kennedy*, 219 F. Supp. 892, 894 (D.D.C. 1963) (plaintiffs were not "domiciled in, or a subject, citizen or resident of Hungary" under the International Claims Settlement Act, because they had a firm intent to leave Hungary, had lost their home, had no rights in law, and could not vote); *Kaku Nagano v. McGrath*, 187 F.2d 759, 768 (7th Cir. 1951), *aff'd sub nom. McGrath v. Nagano*, 342 U.S. 916 (1952) ("[O]ur concept of a citizen is one who has the right to exercise all the political and civil privileges extended by his government.... Citizenship conveys the idea of a membership in a nation.").

Hungary admits that it was under Nazi German occupation when the Herzog Collection was seized. (Br. 8.) Hungary's own Constitution, which took effect on January 1, 2012, asserts that Hungary lost its "self-determination" while under German occupation. (Lattman Decl. ¶¶39 (JA__).) For Hungary to suggest that its actions during this period should be considered valid sovereign acts of expropriation is unconscionable.

Other courts have expressed skepticism that the actions of nations under Nazi control or occupation could be considered valid sovereign acts. Indeed, the

State Department has expressly freed courts to "pass upon the validity of the acts of Nazi officials" in the context of the application of the act of state doctrine. *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvart-Maatschappij*, 210 F.2d 375, 375-76 (2d Cir. 1954) (per curiam). *See also Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 134 (E.D.N.Y. 2000) ("[T]he confiscation of private property during the Holocaust was a violation of customary international law" with respect to claims involving property taken during World War II in Vichy France); *Vineberg v. Bissonnette*, 529 F. Supp. 2d 300, 307 (D. R.I. 2007) (Nazi party's forced liquidation of Jewish art dealer's gallery inventory was properly classified as looting or stealing), *aff'd*, 548 F.3d 50 (1st Cir. 2008); *Menzel v. List*, 267 N.Y.S.2d 804, 811 (N.Y. Sup. Ct. 1966) (Nazi party could not convey good title to art taken during World War II because seizure of art during wartime constituted "[p]illage, or plunder … [which is the] taking of private property not necessary for the immediate prosecution of [the] war effort, and is unlawful"); *Weiss v. Lustig*, 58 N.Y.S.2d 547, 549 (N.Y. Sup. Ct. 1945) ("[W]e are not dealing with the laws of a sovereign State, but with a country overrun by bandits, who were issuing their own decrees. To recognize these decrees as the laws of a sovereign State, would do violence to every fundamental principle of human justice.").[14]

[14] The cases relied on by Defendants (Br. 38-39) do not compel a different conclusion. Justice Breyer's concurrence in *Republic of Austria v. Altmann*, 541 U.S. 677, 713 (2004) simply notes that the number of lawsuits brought in U.S.

In any event, as the District Court correctly recognized, the Complaint also pleads the active involvement of German Nazi officials in the seizure of the Herzog Collection. (Compl. ¶¶59-62 (JA__).) *See Opinion* at 130. Therefore, even if Defendants were correct (which they are not) that the looting of the Herzog Collection by Hungary alone would not constitute a colorable violation of international law because the Herzog Collection was owned by Hungarian citizens in 1944, the Complaint states a "substantial and non-frivolous" taking in violation of international law based on the involvement of the German Nazis in the taking of Plaintiffs' property. *Id.*[15]

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courts as a result of the majority's conclusion that the FSIA applies retroactively "will be further limited if the lower courts are correct in their consensus view that § 1605(a)(3)'s reference to 'violation of international law' does not cover expropriations of property belonging to a country's own nationals." (DADD7.) Neither Justice Breyer nor the majority opinion holds that the view is correct. *Dreyfus v. Von Finck*, 534 F.2d 24, 31 (2d Cir. 1976) involved looting by private citizens. The other cases relied on by Defendants are wholly inapposite. *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1105 (9th Cir. 1990), *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1396-98 (5th Cir. 1985) and *Verlinden B.V. v. Cent. Bank of Nigeria*, 647 F.2d 320, 325 n.16 (2d Cir. 1981) each involved suits for breaches of letters of credit or failures to pay on checks. *United States v. Belmont*, 301 U.S. 324, 332 (1937) involved the dissolution and nationalization of a Russian corporation. Defendants' suggestion that "the FSIA's expropriation exception conflicts with customary international law" based on a recent decision by the ICJ involving Germany and Italy (Br. 39 n.8) is also meritless. Decisions of the ICJ involve only state-to-state disputes and are not binding on United States courts. The FSIA – lawfully enacted by Congress in 1976 – binds United States courts.

[15] This Court may properly exercise jurisdiction over Hungary even if Hungary itself did not perform the unlawful "taking" but instead acquired property that was

B. Jurisdiction Exists Under Section 1605(a)(2)

Although the District Court did not reach the issue in light of its conclusion that it had subject matter jurisdiction under Section 1605(a)(3) (DADD7), *Opinion* at 133 n.4, this Court also has subject matter jurisdiction over Plaintiffs' claims under Section 1605(a)(2) (DADD7), which provides, in relevant part, that a "foreign state" is not immune from jurisdiction in any case: "in which the action is based upon … an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2) (DADD7). Here, Defendants' creation and repudiation of bailment agreements had a direct effect in the United States.

1. Plaintiffs' Claims Are "Based Upon" Bailments Created In Connection With Defendants' Commercial Activity In Hungary

"[C]ommercial activity" under the FSIA is "either a regular course of commercial conduct or a particular commercial transaction or act," the "commercial character of [which] shall be determined by reference to" its "nature," rather than its "purpose." 28 U.S.C. § 1603(d) (PADD000009); *Saudi Arabia v.*

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previously seized by another sovereign (*i.e.*, Germany) in violation of international law. *See* 28 U.S.C. § 1605(a)(3) (DADD7) (use of passive voice emphasizes act of taking rather than the actor); *Agudas Chasidei Chabad v. Russian Fed'n*, 466 F. Supp. 2d 6, 19 (D.D.C. 2006); *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1022 (9th Cir. 2010) (*en banc*) (same), *cert. denied*, 131 S. Ct. 3057 (2011); *see also Altmann*, 317 F.3d at 968.

Nelson, 507 U.S. 349, 360 (1993) (a state engaged in commercial activity where it exercises "only those powers that can also be exercised by private citizens," or "acts in the manner of a private player within the market."); *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1549 (D.C. Cir. 1987) ("[I]f the activity is one in which a private person could engage, it is not entitled to immunity.").

"[B]ased upon," for purposes of Section 1605(a)(2) (DADD7), means "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Saudi Arabia*, 507 U.S. at 356. Therefore, the relevant question is whether Plaintiffs' claims are "based upon an act … in connection with [Defendants'] commercial activity" in Hungary and whether that act caused a direct effect in the United States. *See* 28 U.S.C. § 1605(a)(2) (DADD7). The "act" itself need not constitute commercial activity. *Doe v. Unocal Corp.*, 395 F.3d 932, 957 (9th Cir. 2002) (citing *Saudi Arabia*, 507 U.S. at 357-58), *vacated on other grounds*, 395 F.3d 978 (9th Cir. 2003).

Here, the relevant "act" or "acts" for purposes of Section 1605(a)(2) (DADD7) is the creation of a bailment with respect to each of the artworks described in the Complaint. Defendants do not dispute that the creation of a bailment with respect to works of art is an act in which any private museum or university could engage. *See Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 314 (D.D.C. 2005) (there was "nothing sovereign about the act of lending art

pieces, even though the pieces themselves might belong to a sovereign."). Instead, Defendants mischaracterize the relevant "act" as the Peace Treaty – not the bailments. (Br. 41.) As the District Court correctly recognized, however, Plaintiffs "do not 'rely upon or challenge the terms, conditions or validity or the Peace Treaty' or 'seek to claim directly under the Peace Treaty.'" *Opinion* at 136 n.6. Therefore, the relevant "act," is the bailments, not the Treaty.[16]

2. Defendants' Breach Of The Bailments Caused A Direct Effect In The United States

Defendants' argument that Plaintiffs cannot show the requisite "direct effect" in the United States also fails. (Br. 42-43.) An effect is "direct" if "it follows 'as an immediate consequence of the defendant's … activity.'" *Republic of Argentina v. Weltover*, 504 U.S. 607, 618 (1992) (Section 1605(a)(2) contains no requirement of "foreseeability."); *see also Cruise Connections Charter Mgmt. 1, L.P. v. AG of Can.*, 600 F.3d 661, 665 (D.C. Cir. 2010) ("The FSIA … requires

[16] The cases relied on by Defendants (Br. 41-42) are easily distinguished because in each, the plaintiffs sought to assert claims for war-time damages and reparations directly under various treaties and international agreements. *See Burger-Fischer v. DeGussa AG*, 65 F. Supp. 2d 248, 281 (D.N.J. 1999) (claims for compensation for forced labor and damages); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 485 (1999) (same); *Wolf v. F.R.G.*, 95 F.3d 536, 543-44 (7th Cir. 1996) (claims for failure to pay reparations from funds established for victims of Nazi Germany); *Anderman v. Fed. Republic of Austria*, 256 F. Supp. 2d 1098, 1107-08 (C.D. Cal. 2003) (claim for failure to pay reparations); *Sampson v. F.R.G.*, 975 F. Supp. 1108, 1116-17 (N.D. Ill. 1997) (claims for damages resulting from imprisonment in concentration camp and for failure to pay reparations). Nor does this case involve the nationalization of property by a Communist State. *See Dayton*, 834 F.2d at 206 (claims for nationalization of factory).

only that effect be 'direct,' not that the foreign sovereign agree that the effect would occur).

Contrary to Defendants' assertions (Br. 42-43), the bailments had the requisite "direct effect" in the United States because United States residents owned portions of the Herzog Collection both at the time the bailments were created, and at the time of their breach. Elizabeth Weiss de Csepel was already residing in the United States as of 1946 and Defendants knew that to be the case when they created bailment agreements with respect to her art. Defendants breached duties owed to a United States citizen when they refused to return Elizabeth's art to her daughter, Martha, in 2008. David de Csepel – a United States citizen – has an ownership interest in the artworks belonging to his uncle, István, as well as the art belonging to his grandmother, Elizabeth, that was not previously the subject of litigation in Hungary.[17] *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711-12 (9th Cir. 1992) (citing "the general rule that 'a direct effect occurs at the locus of the injury directly resulting from the sovereign defendant's wrongful acts'" and finding that the alleged seizure and continued operation of the plaintiffs' property by the defendants had direct effects in the United States); *Cruise*

[17] Because Plaintiffs' de Csepel's ownership interest in the art at issue in this litigation is not limited to the eleven paintings that were the subject of the Nierenberg litigation in Hungary and the District Court's comity ruling, Defendants' statements that Plaintiff de Csepel's claims "were dismissed by the district court" (Br. 24, 43, 54-55) are simply wrong. *Opinion* at 144.

Connections Charter Management, 600 F.3d at 665 (Canada's termination of a contract with a United States corporation had a direct effect in the United States where it caused the corporation to lose revenues under third-party agreements).[18]

IV. THE DISTRICT COURT CORRECTLY HELD THAT THE POLITICAL QUESTION DOCTRINE DOES NOT BAR PLAINTIFFS' CLAIMS

The District Court correctly held that Defendants waived the political question doctrine as a ground for dismissal of the Complaint by relegating the argument in their moving brief to "a single footnote that cited no supporting authority." *Opinion* at 143; *see also Sugarcane Growers Coop. of Florida v. Veneman*, 289 F.3d 89, 93 n.3 (D.C. Cir. 2002) (argument waived when relegated to footnote in opening brief); *Hutchins v. Dist. of Columbia*, 188 F.3d 531, 539 n.3 (D.C. Cir. 1999) (en banc). The District Court further held that "even if the Court were to consider this argument, it would reject it," finding that "plaintiffs' claims do not implicate separation-of-powers concerns that would justify invocation of the political question doctrine" because Plaintiffs "charge that Hungary has breached certain agreements regarding specific artwork in a manner that does not implicate

[18] By contrast, in the cases cited by Defendants (Br. 42-43), the "effects" of defendants' alleged commercial conduct were significantly more attenuated. *See Princz v. F.R.G.*, 26 F.3d 1166, 1172 (D.C. Cir. 1994) (Nazi enslavement of American plaintiff in Slovakia did not cause "direct effects" in the United States where "[m]any events and actors" intervened); *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1238 (10th Cir. 1994) (bank transfers in the United States were "simply too attenuated" from the defendants' actions to be considered a direct effect).

existing international compensatory frameworks at all." *Opinion* at 144. The District Court's ruling should be affirmed.

The Supreme Court recently reiterated that the political question doctrine is a "narrow exception" to the general rule that the judiciary has the responsibility to decide cases properly before it. *See Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012). A controversy only "involves a political question … where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Id.* (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993) and *Baker v. Carr*, 369 U.S. 186, 217 (1962)). None of those circumstances are present here.

A. Plaintiffs' Claims Are Not Committed Exclusively To The Executive Branch

Defendants' argument that the resolution of Holocaust-related claims is "committed to the Executive branch" (Br. 45) is unpersuasive, and belied by the numerous decisions that have adjudicated such claims. *See, e.g., Chabad*, 466 F. Supp. 2d at 30 (acknowledging a "strong public interest in the United States in the outcome" of litigation concerning the return of cultural artifacts to American citizens); *Bodner*, 114 F. Supp. 2d at 133 ("Public policy favors providing a forum in which United States citizens may seek to redress an alleged wrong."); *Altmann*, 317 F.3d at 974 (litigation concerning art work looted by the Nazis was properly

brought in the United States). Defendants' reliance on *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) is misplaced. In *Garamendi*, the Supreme Court found that certain legislation passed by the state of California was in direct conflict with, and thus preempted by, executive orders that sought to address Holocaust insurance claims. *Id.* at 424-25. No such preemption or conflict is present here.[19] Nor can Plaintiffs' claims be fairly characterized as "reparations" claims (Br. 46 n.10) because Plaintiffs' do not seek tort damages for war-time injuries – they seek restitution of specifically identifiable property pursuant to bailment agreements.

Defendants' argument that the Peace Treaty and the 1973 Agreement show that Plaintiffs' claims are committed to the Executive branch also fails. (Br. 46-48.) As discussed *supra* at 34-39, and as the District Court correctly noted in its decision, Plaintiffs' claims do not arise under the Peace Treaty or the 1973 Agreement, nor do they require the court to evaluate the "sufficiency" of these agreements; rather, "such measures do not apply to them at all." *Opinion* at 144 (emphasis in original). It is precisely the courts' role to construe treaties and agreements to determine whether they preclude claims such as those asserted here, and such construction does not implicate the political question doctrine. *See Japan Whaling Co. v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (examining the

[19] *In re Assicurazioni Generali, S.p.A.*, 592 F.3d 113, 118 (2d Cir. 2010) (Br. 45) and *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1073 (9th Cir. 2012) (Br. 50) also involved the doctrine of preemption.

merits of the claims despite "significant political overtones" because courts have the authority to construe treaties and executive agreements notwithstanding the political question doctrine); *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 388 (3d Cir. 2006) ("We note that even where significant foreign policy concerns are implicated, a case does not present a political question … so long as it involves … normal principles of treaty or executive agreement construction") (internal citations omitted). *See also Zivotofsky*, 132 S. Ct. at 1430-31 (request that court enforce a specific statutory right and decide whether statute is constitutional does not implicate the political question doctrine). The cases relied on by Defendants (Br. 47-48) do not hold otherwise.[20]

Defendants' argument that resolution of Plaintiffs' claims would require this Court to "evaluate U.S. foreign policy as well as the sufficiency of the compensation schemes put in place by the United States, Hungary, and other United Nations" (Br. 48) is also meritless. Plaintiffs' claim for restitution of specifically identifiable artworks that Defendants have always known belonged to

[20] *Zivkovich v. Vatican Bank*, 242 F. Supp. 2d 659, 669 (N.D. Cal. 2002) did not involve claims for breach of post-war bailments, such as those asserted here. While *Zivkovich* contained broad language concerning the justiciability of war-time reparations claims, the Ninth Circuit later clarified in *Alperin v. Vatican Bank*, 410 F.3d 532, 538, 551 (9th Cir. 2005) that the political question doctrine does not bar property claims. This post-*Zivkovich* holding is consistent with the decision of the Supreme Court to allow Maria Altmann's similar claims against Austria to proceed. *See Alperin*, 410 F.3d at 551 (citing *Altmann*, 541 U.S. at 680).

Plaintiffs does not require this Court to do anything more than evaluate the relationship and agreements between Plaintiffs and Defendants – not Hungary's decades-long history of avoiding compliance with Article 27 of the Peace Treaty as a general matter. Nor does it require this Court to evaluate, much less question, the United States' practice of external restitution. (Br. 29-34.) Nor, as the District Court correctly recognized, do Plaintiffs' claims implicate Hungary's compensation schemes where Plaintiffs never applied for, nor received such compensation. *Opinion* at 131; *see supra* at 20.[21] In any event, as the Supreme Court recently observed in *Zivotofsky*, 132 S. Ct. at 1428, "courts cannot avoid their responsibility merely 'because the issues have political implications.'"

B. Plaintiffs' Claims Do Not Lack Judicially Discoverable And Manageable Standards For Resolving Them

The cases relied on by Defendants in which the political question doctrine was construed to bar Holocaust-era or other analogous claims (Br. 48-51) are

[21] Defendants point to the amicus brief filed by the United States in *Von Saher v. Norton Simon Museum of Art*, (09-1254) as evidence that "[c]urrent U.S. foreign policy promotes the negotiation, rather than litigation, of claims." (Br. 22.) However, the United States made clear in its amicus brief in *Von Saher* that it "does not contend that the fact that the paintings were returned to the Dutch government pursuant to [United States] external restitution policy would be sufficient of its own force to bar litigation if, for example, the art had not been subject (or potentially subject) to bona fide internal restitution proceedings in the Netherlands," including proceedings following implementation of the Washington Principles in 1998. *See* http://www.justice.gov/osg/briefs/2010/2pet/6invit/2009-1254.pet.ami.inv.pdf at 17 n.3. Here, there were no such proceedings and the United States has never expressed the view that Plaintiffs' claims should be dismissed.

easily distinguishable. Each of those cases generally involved large classes of claimants who sought monetary damages for the actions of various defendants – sovereign and otherwise – during World War II under treaties and customary international law, and many involved Statements of Interest submitted by the United States recommending dismissal in light of newly negotiated executive agreements that endeavored to resolve the plaintiffs' claims against Austria and Germany.[22] Defendants have shown no valid ground for applying the political question doctrine to Plaintiffs' narrow claims against Defendants (which, as discussed *supra*, are not covered by existing treaties or executive agreements), particularly in the absence of a Statement of Interest from the United States. *See Alperin*, 410 F.3d at 558; *Holocaust Victims of Bank Theft*, 807 F. Supp. 2d at 696 (rejecting application of the political question doctrine to plaintiffs' claims against various banks that did business in Hungary during World War II, including the state bank of Hungary).

[22] The dismissal of Plaintiffs' claims in *Alperin*, 242 F. Supp. 2d at 689 (cited at Br. 51) on political question grounds was reversed by the Ninth Circuit with respect to Plaintiffs' claims for conversion, unjust enrichment, restitution and an accounting – property claims analogous to those asserted here. *See Alperin*, 410 F.3d 532. *Kelberine v. Societe Internationale*, 363 F.2d 989, 995 (D.C. Cir. 1966) is particularly inapposite as it addressed the manageability of class-action litigation prior to modern-day Rule 23 and has been correctly described as "anachronistic." *Alperin*, 410 F.3d at 554.

V. THE DISTRICT COURT CORRECTLY HELD THAT THE DOCTRINE OF *FORUM NON CONVENIENS* DOES NOT WARRANT DISMISSAL

It is well-settled that a district court's *forum non conveniens* determination "may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981); *see also Agudas Chasidei Chabad v. Russian Fed'n*, 528 F.3d at 950. Defendants have shown no valid ground for reversing the District Court's holding.

A. Hungary Is Not An Adequate Alternative Forum

The District Court assumed, without expressly deciding, that Hungary is an adequate alternative forum for resolution of Plaintiffs' claims. *Opinion* at 138. Therefore, Defendants' statement that "there is no dispute that Hungary is an available alternative forum" (Br. 52) is inaccurate.

"[A]n alternative forum in which the plaintiff can recover nothing for a valid claim is not adequate." *Malewicz*, 362 F. Supp. 2d at 308; *see also Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322, 334-35 (D.D.C. 2007) (because plaintiffs' claims in The Netherlands would be barred by liberative or acquisitive prescription, any remedy in The Netherlands would be non-existent and inadequate). Hungary has a long history of resisting Holocaust-era claims.

(Compl. ¶84 (JA__); Varga Decl. ¶¶20-23 (JA__).) Its new constitution – which took effect in January 2012 – disclaims responsibility for the Holocaust by suggesting that that Hungary was under occupation from March 1944 when the Nazis invaded until 1990 when the Communists lost power. *See supra* at 25-26.[23]

B. The District Court's Balancing Of The Public and Private Interest Factors Was Reasonable

Regardless, the District Court's decision should be affirmed because the balancing of the private and public interest factors was entirely reasonable and not an abuse of discretion. While the District Court acknowledged Defendants' argument that relevant documents and witnesses are likely to be located in Hungary, the court correctly found that the private interest factors did not favor dismissal where "relevant depositions and documents would require translation regardless of where this matter is heard." *Opinion* at 139. Indeed, relevant documents are also located in the United States and Italy where Plaintiffs reside. Advances in modern technology make the physical location of original documents far less significant than it used to be. *See Chabad*, 466 F. Supp. 2d at 28-29 ("the location of documents is not a significant factor."); *Bodner*, 114 F. Supp. 2d at 133 ("The costs involved to defendants in defending this action in New York are

[23] Provisions in the new constitution and recent Hungarian laws enacted as a result thereof have prompted the Venice Commission, an advisory body to the Council of Europe, among others, to question the independence of Hungary's judiciary. *See, e.g.*, Opinion 663/2012 on the Judicial System of Hungary, *available at* http://www.venice.coe.int/docs/2012/CDL-AD(2012)001-e.pdf.

significantly mitigated by the time- and money-saving tools including e-mail, fax, scanners, digital photography, and global access to the internet."). Nor does the cost of translating documents weigh in favor of dismissal. *See Chabad*, 466 F. Supp. 2d at 29.

The District Court correctly recognized that "the Court has the power to attach Hungary's property in the United States in aid of executing any judgment rendered under the FSIA." *Opinion* at 139; *see also* 28 U.S.C. §§ 1610(a)(3) (PADD000010), 1610(b)(2) (PADD000011). This Court rejected Russia's similar claim that enforcement of a judgment in the United States would be futile because the court has the power to attach a sovereign's property in the United States. *See Chabad*, 528 F.3d at 951.

The District Court's balancing of the public interest factors was also reasonable. As the District Court correctly recognized, *Opinion* at 140, the District of Columbia is the designated United States forum for all actions brought under the FSIA. *See* 28 U.S.C. § 1391(f)(4) (PADD000008). Courts in this Circuit are familiar with most of the issues of law that are implicated in this action. *See, e.g.*, *Chabad*, 466 F. Supp. 2d at 14-31 (evaluating jurisdiction under the FSIA, the act of state doctrine, and *forum non conveniens*); *Malewicz*, 517 F. Supp. 2d at 339-40 (evaluating jurisdiction under the FSIA, exhaustion, statute of limitations, act of state doctrine, and *forum non conveniens*). To the extent Hungarian law is

implicated by Plaintiffs' claims, United States courts are experienced in applying foreign law and should not be reluctant to do so. *See Transamerica Leasing, Inc. v. La Republica de Venezuela*, 21 F. Supp. 2d 47, 54 (D.D.C. 1998), *rev'd on other grounds*, 200 F.3d 843 (D.C. Cir. 2000).

The District Court correctly found that Hungary's showing with regard to the public interest factors did little more than state them and falls "far short" of demonstrating that the strong presumption in favor of plaintiffs' choice of forum should be disturbed. *Opinion* at 140 (recognizing that either Hungary or the United States would have to deal with foreign legal concepts). This holding is entirely consistent with the decisions in *Chabad*, 466 F. Supp. 2d at 30, *Altmann*, 317 F.3d at 973-74, and *Malewicz*, 517 F. Supp. 2d at 339-40, each of which declined to dismiss similar claims for looted art or other property on grounds of *forum non conveniens*, recognizing the United States' interest in adjudicating such claims.

Defendants' suggestion that the District Court's dismissal of claims to eleven artworks that were previously the subject of litigation in Hungary somehow diminishes Plaintiff de Csepel's connection to this litigation, or the presumption to be afforded to Plaintiffs' choice of forum, is wrong. (Br. 54-55.) Defendants wrongly assume that the eleven artworks dismissed are the only ones as to which Plaintiff de Csepel (or any other United States heir) has a direct interest. (Br. 55.)

That is not the case. (Compl. ¶¶6, 40-42 (JA__) (alleging that all remaining heirs to the Herzog collection have assigned their right, title and interest in the Herzog Collection to Plaintiff de Csepel).) Plaintiff de Csepel has a direct interest in numerous artworks remaining in this case, both as the representative of the heirs of Elizabeth and as the representative of the heirs of István, some of whom are also United States citizens. Defendants never challenged Plaintiffs' authority or standing to represent all the Herzog heirs in their motion to dismiss and should not be permitted to do so for the first time on appeal.

Finally, Defendants' suggestion that "foreign policy considerations weigh against courts of this country presuming to act as world courts" (Br. 56) is meritless. The District Court agreed to hear a dispute that included claims by a *United States citizen* against Hungary – that is hardly acting "as a world court" as Defendants imply, and numerous other courts have agreed to hear similar suits. *See supra* at 43-44.[24] Indeed, United States courts have expressed a strong interest in providing a forum for the resolution of Holocaust-era property claims. *See supra* at 44-45, 52.

[24] The cases Defendants cite (Br. 56) are wholly inapposite. *Blanco v. Banco Industrial De Venezuela, S.A.*, 997 F.2d 974, 982 (2d Cir. 1993) involved commercial claims between Venezuelan parties. *Chesley v. Union Carbide Corp.*, 927 F.2d 60, 66 (2d Cir. 1991) involved an attorney lien with respect to litigation that had previously been dismissed in favor of an Indian forum.

VI. THE DISTRICT COURT CORRECTLY HELD THAT THE COMPLAINT STATES A CLAIM UPON WHICH RELIEF MAY BE GRANTED

Defendants wrongly argue that Plaintiffs' bailment claims are "vague" and do not satisfy *Twombly* and *Iqbal*. (Br. 57 n.15.) The District Court correctly rejected these thin arguments, *Opinion* at 137, and held that Plaintiffs had adequately stated a claim for bailment.

The elements of a bailment claim generally include: (1) delivery, (2) acceptance, (3) possession, and (4) control. *Opinion* at 136 (citing *Bernstein v. Noble*, 487 A.2d 231, 234 (D.C. 1985). Defendants argue that Plaintiffs cannot show that Hungary or its instrumentalities consented to the creation of a bailment. (Br. 57-59.) However, the consent of parties to a bailment may be implied from the parties' conduct. *Hoffman v. United States*, 266 F. Supp. 2d 27, 39 (D.D.C. 2003) ("An implied-in-fact bailment contract with the Government is created if property is seized and there is a promise, representation or statement by an authorized government official that the seized property will be returned.").[25]

[25] While the claim in *Hoffman* was ultimately dismissed as time-barred under the Little Tucker Act, that dismissal occurred only at the summary judgment stage, and only in the face of an "unambiguous" letter by plaintiff acknowledging that the bailment contract had been breached in 1949. *See Hoffman*, 266 F. Supp. 2d at 41. Defendants' reliance on *Mac'Avoy v. Smithsonian Inst.*, 757 F. Supp. 60 (D.D.C. 1991) (cited at Br. 57) is misplaced. There, a third party sought to establish a bailment relationship between a deceased artist and the museum, but there was no evidence that either of the parties to the alleged bailment agreements had ever

Courts have also recognized that there may be a constructive bailment or "quasi-bailment" which involves "no direct contract with the bailor" and may include "bailments arising otherwise than upon a direct delivery," including "bailments which arise by theft, fraud or finding." Norman Palmer, Palmer on Bailment ¶23-011 at 1255 (3d ed. 2009); *First Am. Bank v. Dist. of Columbia*, 583 A.2d 993, 996 (D.C. 1990) (recognizing that "there may exist what we call a *quasi* bailment or bailment not strictly upon contract.") (quoting J. Schouler, A Treaties on the Law of Bailments § 94 (1897)).

The Complaint alleges that Hungary sought to retain possession of the Herzog Collection to exhibit the works (Compl. ¶¶70-73(JA__)) and exhibited certain works "on deposit" (Compl. ¶73 (JA__)). The Complaint also expressly alleges that Plaintiffs "agreed to allow the artworks to be 'returned' to the Museums or University for safekeeping." (*Id.* ¶72 (JA__).) Plaintiffs' allegations are sufficient to show at the motion to dismiss stage (when the allegations of the Complaint must be assumed true) that Hungary agreed – explicitly or implicitly – to various bailments with Plaintiffs' predecessors. *See Rosner v. United States*, 231 F. Supp. 2d 1202, 1214 (S.D. Fla. 2002) (complaint stated claim for

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assented to a bailment as opposed to an outright donation of the works to the museum.

bailment).[26] Hungary's representations in the Peace Treaty that it would act solely as a custodian (or bailee) with respect to Holocaust looted property (Compl. ¶69 (JA__)) are consistent with Plaintiffs' allegations.

Defendants' argument that Plaintiffs' other claims should be dismissed (Br. 59-60) is equally meritless. Defendants' sole basis for dismissing these claims is that "they are not independent causes of action." (*Id.* at 59.) Because the Complaint states a claim for bailment, Defendants' argument fails. Regardless, the Complaint also states a claim for conversion, constructive trust, accounting, declaratory relief, and restitution. (Compl. ¶¶94, 107-110 (JA__).) *See Cassirer*, 461 F. Supp. 2d at 1177-78; *Bates v. Northwestern Human Serv., Inc.*, 466 F. Supp. 2d 69, 93 (D.D.C. 2006); *Federal Trade Comm'n v. Capital City Mortgage Corp.*, 321 F. Supp. 2d 16, 19 (D.D.C. 2004); *McWilliams Ballar, Inc. v. Broadway Mgmt. Co.*, 636 F. Supp. 2d 1, 9 n.10 (D.D.C. 2009).

[26] Defendants' suggestion that "Plaintiffs' claim is factually impossible" because the Complaint pleads that during the Communist era, Hungary did not recognize individual property rights (Br. 58 (quoting Compl. ¶93)) is meritless. As Hungary's own courts held in the Nierenberg Litigation, the Herzog Collection was never nationalized. *See supra* at 23. Hungary's lead negotiator represented as much in negotiating the 1973 Agreement. *See supra* at 17. The Complaint pleads that Defendants always recognized Plaintiffs' ownership of the artworks in question (Compl. ¶3 (JA__)) and does not plead that any conversion of Plaintiffs' property occurred during the Communist era.

VII. THE DISTRICT COURT CORRECTLY REJECTED DEFENDANTS' STATUTE OF LIMITATION DEFENSE

The District Court correctly rejected Defendants' statute of limitations affirmative defense. *Opinion* at 142. Determining whether the statute of limitations has run is an intensely factual inquiry, which many courts – like the District Court here – have found inappropriate for determination at the Rule 12 motion to dismiss stage unless, unlike here, the defense appears clearly on the face of the complaint. *See Firestone v. Firestone*, 76 F.3d 1205, 1208-09 (D.C. Cir. 1996) ("As we have repeatedly held, courts should hesitate to dismiss a complaint on statute of limitations grounds based solely on the face of the complaint."); *Richards v. Mileski*, 662 F.2d 65, 73 n.13 (D.C. Cir. 1981) (citing to "an overwhelming line of authority" declining to resolve statute of limitations defense at the motion to dismiss stage); *Malewicz*, 517 F. Supp. 2d at 335.

The District Court correctly recognized that there was no demand or refusal sufficient to trigger the running of a statute of limitations for bailment as to each of the artworks at issue prior to the commencement of this action. *See Opinion* at 141 ("plaintiffs' bailment action could not have arisen during the period in which they were engaged in good-faith negotiations with the Hungarian government, as defendants had not yet 'absolutely and unconditionally' refused plaintiffs' demand for return of the Collection."); *In re Estate of McCagg*, 450 A.2d 414, 416 (D.C. 1982) (the loan of paintings, without any limit on the time for demanding their

return, constituted a bailment for an indefinite term and a cause of action does not arise until a demand has been made and refused); *Malewicz*, 517 F. Supp. 2d at 335 ("If a defendant lawfully acquires the property in the first instance (*e.g.*, through a bailment), a claim for conversion accrues when the plaintiff demands the return of the property and the defendant refuses, or when the defendant takes some action that a reasonable person would understand to be either an act of conversion or inconsistent with a bailment.").

Defendants' argument that the statute of limitations has expired depends principally on their self-serving (and factually disputed) position that there was a "taking" or nationalization of Plaintiffs' property at some point during the Communist era. (Br. 60-61.) The District Court correctly recognized that the Complaint pleads no such taking and that the court cannot decide without development of a full factual record whether the 1954 Museum Decree – the only Communist-era statute Defendants have ever claimed applied to Plaintiffs' art – applied to any, much less all, of the pieces of the Herzog Collection described in the Complaint (and Plaintiffs submit it applied to none of them). *See Opinion* at 140; *Malewicz*, 517 F. Supp. 2d at 356.[27]

[27] Defendants' argument that the discovery rule bars Plaintiffs' claims (Br. 60) also raises issues of fact that are not appropriate for resolution on a motion to dismiss.

The Complaint does not support the inference that Plaintiffs "knew" at any point that Defendants had nationalized or otherwise taken ownership of Plaintiffs' art (which they had not) prior to 2008. (Br. 63-64.) Hungary's own Committee of Experts found otherwise in the mid-1990s, as did the Hungarian courts in the Nierenberg litigation. *See supra* at 21-24. The Complaint alleges that the family spent years diligently negotiating with Defendants for the return of the Herzog Collection after the collapse of Communism, and that Defendants did not absolutely and unconditionally refuse to return any portion of the Herzog Collection until 2008. (Compl. ¶ 94 (JA__).) *See* 90 C.J.S. Trover & Conversion § 45 (2006) ("Where a demand and refusal are relied on to show a conversion, the refusal must be absolute and unconditional … A refusal which is not absolute, but is qualified by certain conditions which are reasonable and justifiable … is not a sufficient basis for a conversion action."); Restatement (Second) Torts § 240 (1965) ("One in possession of a chattel who is in reasonable doubt as to the right of a claimant to its immediate possession does not become a converter by making a qualified refusal to surrender the chattel to the claimant for the purpose of affording a reasonable opportunity to inquire into such right.").[28]

[28] Nor were Plaintiffs required to make a demand earlier because, as the District Court correctly recognized, the law is now clear that exhaustion of remedies in Hungary was not required. *See Chabad*, 528 F.3d at 948 (declining to impose exhaustion requirement on claims for recovery of property in Russia); *see also*

Defendants' suggestion that there was a demand and refusal sufficient to trigger the running of the statute of limitations because Elizabeth filed a claim with the Commission in 1955 is wrong. (Br. 61.) The Commission is a United States entity; Elizabeth's claim was not presented to Hungary, nor was Hungary involved in its resolution, and the decision of the Commission expressly reserved her right to seek restitution of her property. *See supra* at 15-16.

The District Court also correctly held that any applicable statute of limitation should be equitably tolled. The Supreme Court has held that limitations periods are customarily subject to equitable tolling. *Young v. United States*, 535 U.S. 43, 49 (2002). "The essence of the doctrine of equitable tolling of a statute of limitations is that a statute of limitations does not run against a plaintiff who is unaware of his cause of action." *Bodner*, 114 F. supp. 2d at 135. *See also Chung v. DOJ*, 333 F.3d 273, 278 (D.C. Cir. 2003) (the statute of limitations may be equitably tolled "when the plaintiff despite all due diligence … is unable to obtain vital information bearing on the existence of his claim.").

The District Court correctly held that Plaintiffs' claims should be tolled after the fall of Communism and during the pendency of the Nierenberg litigation because Plaintiffs – including Angela and Julia Herzog – were misled into

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Cassirer, 616 F.3d at 1037 (exhaustion is not a statutory prerequisite to jurisdiction under the FSIA).

believing that the Hungarian government would restitute their art. *See Opinion* at 141. (Varga Decl. ¶5 (JA__); Pasztory Decl. ¶¶7-10 (JA__).)[29] *See also Rosner*, 231 F. Supp. 2d at 1209 (permitting equitable tolling where complaint alleged that "plaintiffs and other members of the class have been kept in ignorance of vital information essential to pursue their claims, without any fault or lack of diligence on their part").[30] Any applicable statute of limitations was also properly tolled during the Communist era as Plaintiffs were unable to obtain information concerning the art (Compl. ¶ 75 (JA__)) and Hungary's admitted "socialist style judiciary" (Br. 18) would not have entertained their claims in any event. (Clinton Letter (JA__).)

Equitable tolling is further supported by the fact that Hungary has agreed to the Washington Principles and the Terezin Declaration, each of which provide that Holocaust-era art claims should be resolved on their merits. (Varga Decl. ¶18 (JA__).) Hungary should be estopped from arguing otherwise.

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[29] Defendants' claim that "[n]either Plaintiffs nor their predecessors had any communication with or took any action in Hungary between 1992 and 1996" (Br. 62) is unsupported by the Complaint, wrong, and in any event raises issues of fact not appropriate for resolution on a motion to dismiss.

[30] Nor should Plaintiffs be penalized for Martha Nierenberg's attempts to exhaust remedies in Hungary because she reasonably believed at the time that such exhaustion was required. *Opinion* at 141-42; *Owens v. Dist. of Columbia*, 631 F. Supp. 2d 48, 57 (D.D.C. 2009) (holding that equitable tolling is appropriate where plaintiffs first sought to exhaust their administrative remedies).

VIII. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE ACT OF STATE DOCTRINE

The District Court's rejection of Defendants' act of state doctrine defense should also be affirmed. The act of state doctrine generally prohibits United States courts from "examin[ing] the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964); *Chabad*, 528 F.3d at 951.

As the District Court correctly recognized, Defendants' breach of bailments are not "sovereign acts," but rather "*commercial* acts that could be committed by any private university or museum" and, as such, do not implicate the act of state doctrine. *See Opinion* at 143; *McKesson Corp.*, 672 F.3d at 1073 (act of state doctrine applies to "conduct that is by nature distinctly sovereign, *i.e.*, conduct that cannot be undertaken by a private individual or entity."); *Malewicz*, 517 F. Supp. 2d at 339 (same).[31]

The District Court also correctly rejected any application of the act of state doctrine to the Court's examination of the taking of property during the Holocaust

[31] As discussed *supra*, Defendants' suggestion that the relevant "act" is "[e]ntering into a treaty and the nationalization of property of a Communist state" (Br. 66) is simply wrong.

as part of its jurisdictional analysis under 28 U.S.C. § 1605(a)(3) (DADD7). *See Opinion* at 143. The District Court recognized that "courts have consistently held that the act of state doctrine does not apply to the Nazi taking of Jewish property during the Holocaust." *Id.* (citing *Chabad*, 466 F. Supp. 2d at 26 and *Bodner*, 114 F. Supp. 2d at 130 ("The wholesale rejection of the Vichy government at the close of World War II render[s] the Act of State doctrine wholly inapplicable to this case."); *see also Bernstein*, 210 F.2d at 375-76 (discussing letter received from the U.S. Dep't of State freeing courts to pass on acts of Nazi German officials during WWII).

Finally, Hungary recently stated in its new Constitution that it lost its "self-determination" from March 19, 1944 until May 2, 1990, implying that its actions during that period were dictated by others and cannot be considered truly "sovereign" acts. (Lattmann Decl. ¶39 (JA__).) The Supreme Court has held that the balance of factors weighs against applying the act of state doctrine where, as here, "the government which perpetrated the challenged act of state is no longer in existence." *Sabbatino*, 376 U.S. at 428 (citing the Nazi government at issue in the *Bernstein* case as an example of a government that was no longer "extant"); *Chabad*, 528 F.3d at 954 ("[W]hatever flexibility *Sabbatino* preserves is at its apex where the taking government has been succeeded by a radically different regime.").

IX. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIMS TO ELEVEN ARTWORKS ON GROUNDS OF INTERNATIONAL COMITY

The District Court erred in dismissing Plaintiffs' claims to eleven artworks that were previously the subject of litigation in Hungary on grounds of international comity. *See Opinion* at 145. Unlike domestic judgments, foreign judgments are not automatically entitled to *res judicata* effect in United States courts. *See Hilton v. Guyot*, 159 U.S. 113, 164 (1895). Instead, "the theory often used to account for the *res judicata* effects of foreign judgments is that of comity." *Int'l Bechtel Co. v. Dep't of Civ. Aviation of the Gov't of Dubai*, 300 F. Supp. 2d 112, 117 (D.D.C. 2004); *Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 937 (D.C. Cir. 1984) ("'Comity' summarizes in a brief word a complex and elusive concept – the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum.").

"The doctrine of international comity neither impels nor obliges the United States district court to decline jurisdiction in a particular case." *Bodner*, 114 F. Supp. 2d at 129; *see also Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907, 913 (D.D.C. 1996) ("Comity never obligates a national forum to ignore the rights of its own citizens or of other persons who are under the protection of its laws.") (emphasis in original).

Martha Nierenberg, a United States citizen, brought an action in Hungary because – and only because – domestic law suggested at the time that exhaustion of remedies in the foreign state was required before a United States court would hear her claim. *See, e.g., Millicom Int'l Cellular S.A. v. Republic of Costa Rica*, 995 F. Supp. 14, 23 (D.D.C. 1998). In other words, she reasonably understood that she had no choice but to sue in Hungary first for a United States court to have jurisdiction over her claims, but that she would have the subsequent opportunity to pursue her claims in United States courts if necessary. While this Court has since clarified that exhaustion is not a prerequisite to jurisdiction under the FSIA, *see supra* at 68, this Court should not penalize Plaintiffs for Martha Nierenberg's efforts to preserve United States jurisdiction by deferring to a (clearly erroneous) decision of a foreign court. To hold as the District Court did that comity requires such deference would eviscerate the doctrine of exhaustion of remedies by making it impossible for litigants to have their claims heard in a United States forum regardless of how the foreign court rules.

It is well-settled that "[t]he obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act." *Laker Airways Ltd.*, 731 F.2d at 937; Restatement (Third) Foreign Relations Law § 482(2) ("A court in the United States need not recognize a judgment of the court of a foreign state if … (d) the cause of action on which the judgment was based, or the judgment itself, is

repugnant to the public policy of the United States or of the State where recognition is sought."). Here, the judgment of the Hungarian court was repugnant to United States public policy as it was based on the courts' bad faith interpretation of a United States executive agreement. (2008 Final Judgment at 15 (JA__).) *See also Opinion* at 135 (holding, contrary to findings of Hungarian court, that the 1973 Agreement does not bar Plaintiffs' claims). The Hungarian court's construction of the 1973 Agreement, and its use of the Agreement to support denial of Martha's claim on grounds of adverse possession, was indefensible and was itself a violation of international law. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U. N. T. S. 331, 340, Art. 31 (PADD000037) ("A treaty shall be interpreted in good faith"). *See also id.* Art. 26 (PADD000036) (every treaty must be performed in good faith).

American courts have expressed a clear view that the United States has a strong public interest in resolving claims concerning the looting of cultural property, and particularly with respect to the looting of Jewish property during World War II. *See, e.g.*, *Chabad*, 466 F. Supp. 2d at 30 (acknowledging a "strong public interest in the United States in the outcome" of litigation concerning the return of cultural artifacts to American citizens); *Bodner*, 114 F. Supp. 2d at 133 ("Public policy favors providing a forum in which United States citizens may seek to redress an alleged wrong"); *Altmann*, 317 F.3d at 974 (finding that litigation

concerning art work looted by the Nazis was properly brought in the United States). The United States also has a strong public interest in ensuring that its executive agreements – such as the 1973 Agreement – are interpreted correctly in accordance with American law and applicable standards of international law. *See Laker Airways*, 731 F.2d at 939 (refusing to extend international comity to British injunction, the sole purpose of which was to interfere with American court's interest in interpreting and enforcing American antitrust laws).

The District Court's conclusion that "Plaintiffs do not assert, as they must, that there has not been an 'opportunity for a full and fair trial' in Hungary 'before a court of competent jurisdiction, conducting the trial upon regular proceedings'" was wrong. *Opinion* at 145. The District Court wrongly found that "the record is devoid of evidence of 'either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect." *Id.* However, the Complaint alleges that the Nierenberg litigation was not conducted in accordance with internationally recognized standards of due process. (Compl. ¶79 (JA__).) Plaintiffs submitted an affidavit explaining that Martha Nierenberg was unable to obtain relevant evidence during that litigation from Defendants, who had control of all relevant documents. (Varga Decl. ¶5 (JA__).) Other claimants have faced similar hurdles in Hungary as Hungary has diligently avoided other Holocaust

restitution claims. (*Id.* ¶¶20-23 (JA__).) Plaintiffs should have been given the opportunity to develop this factual record further past the Rule 12 stage particularly where, as here, the ruling at issue came about in a proceeding where the foreign state itself was the Defendant. *See* Restatement (Third) Foreign Relations Law § 482, comment b ("Evidence that the judiciary was dominated by the political branches of government or by an opposing litigant, or that a party was unable … to secure documents … would support a conclusion that the legal system was one whose judgments are not entitled to recognition. A judicial system may fail to meet the criteria of fairness in general, or in its treatment of particular classes of litigation, such as those involving Jews in Germany under Hitler.").

CONCLUSION

WHEREFORE, for the reasons set forth above, Plaintiffs respectfully request that this Court reverse the decision of the District Court to the extent that it granted Defendants' motion to dismiss Plaintiffs' claims to eleven artworks that were previously the subject of litigation in Hungary and otherwise affirm the decision of the District Court denying the remainder of Defendants' motion to dismiss in its entirety. Should this Court decide to reverse any aspect of the District Court's Opinion other than its comity holding, Plaintiffs respectfully request leave to re-plead.

Dated: July 27, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(B) as extended by the per curiam Order of the Court dated July 19, 2012 because this brief contains 17,932 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2012, I caused to be filed with the Court through the CM/ECF system the foregoing RESPONSE/PRINCIPAL BRIEF OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit using the appellate CM/ECF system. I also hereby certify that five copies of the brief will be hand-delivered to the Clerk's Office within two business days of its electronic filing.

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ADDENDUM OF STATUTES, TREATIES AND OTHER AUTHORITIES

Except for the following listed documents, all applicable statutes, treaties and authorities are contained in the Brief for Defendants.

*** Current through PL 112-144 with a gap of 112-141, approved 7/9/12 ***

TITLE 22. FOREIGN RELATIONS AND INTERCOURSE
CHAPTER 21. SETTLEMENT OF INTERNATIONAL CLAIMS
CLAIMS AGAINST BULGARIA, HUNGARY, RUMANIA, ITALY, AND THE SOVIET UNION

Go to the United States Code Service Archive Directory

22 USCS § 1641l

§ 1641l. Unpaid balance of claim; claims of United States unaffected

Payment of any award made pursuant to section 303 [*22 USCS § 1641b*] or 305 [*22 USCS § 1641d*] shall not, unless such payment is for the full amount of the claim, as determined by the Commission to be valid, with respect to which the award is made, extinguish such claim, or to be construed to have divested any claimant, or the United States on his behalf, of any rights against the appropriate foreign government or national for the unpaid balance of his claim or for restitution of his property. All awards or payments made pursuant to this *title [22 USCS §§ 1641* et seq.] shall be without prejudice to the claims of the United States against any foreign government.

HISTORY:
(March 10, 1950, ch 54, Title III, § 313, as added Aug. 9, 1955, ch 645, § 3, 69 Stat. 574.)

1 of 1 DOCUMENT

*** Current through PL 112-144 with a gap of 112-141, approved 7/9/12 ***

TITLE 22. FOREIGN RELATIONS AND INTERCOURSE
CHAPTER 21. SETTLEMENT OF INTERNATIONAL CLAIMS
CLAIMS AGAINST CZECHOSLOVAKIA

Go to the United States Code Service Archive Directory

22 USCS prec § 1642

Preceding § 1642

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Czechoslovakian Claims Settlement Act of 1981. Act Dec. 29, 1981, P.L. 97-127. 95 Stat. 1675, provides:

"Short Title

"Section 1. This Act may be cited as the 'Czechoslovakian Claims Settlement Act of 1981'.

"Approval of Agreement

"Sec. 2.

(a) The Congress hereby approves the Agreement between the Government of the United States of America and the Government of the Czechoslovak Socialist Republic on the Settlement of Certain Outstanding Claims and Financial Issues, initialed at Prague, Czechoslovakia on November 6, 1981.

"(b) The President may, without further approval by the Congress, execute such technical revisions of the Agreement approved by subsection (a) of this section as in his judgment may from time to time be required to facilitate the implementation of that Agreement. Nothing in this subsection shall be construed to authorize any revision of that Agreement to reduce any amount to be paid by the Government of the Czechoslovak Socialist Republic to the United States Government under the Agreement, or to defer the payment of any such amount.

"Definitions

"Sec. 3. For the purposes of this Act--

"(1) 'Agreement' means the Agreement on the Settlement of Certain Outstanding Claims and Financial Issues approved by section 2(a) of this Act;

"(2) 'national of the United States' has the meaning given such term by section 401(1) of the International Claims Settlement Act of 1949 [*22 USCS § 1642(1)*];

"(3) 'Commission' means the Foreign Claims Settlement Commission of the United States;

"(4) 'Fund' means the Czechoslovakian Claims Fund established by section 402(b) of the International Claims Settlement Act of 1949 [*22 USCS § 1642a(b)*];

"(5) 'Secretary' means the Secretary of the Treasury; and

"(6) 'property' means any property, right, or interest.

"The Fund

"Sec. 4.

(a) The Secretary shall cover into the Fund the amount paid by the Government of the Czechoslovak Socialist Republic in settlement and discharge of claims of nationals of the United States pursuant to article 1(1) of the Agreement, and shall deduct from that amount $ 50,000 for reimbursement to the United States Government for expenses incurred by the Department of the Treasury and the Commission in the administration of this Act and title IV of the International Claims Settlement Act of 1949 [*22 USCS §§ 1642* et seq.]. The amount so deducted shall be covered into the Treasury to the credit of miscellaneous receipts. The deduction required by this subsection shall be made in lieu of the deduction provided in section 402(e) of the International Claims Settlement Act of 1949 [*22 USCS § 1642a(e)*]; however, it is the sense of the Congress that the United States Government is entitled to a larger percentage of the total award (generally presumed to be 5 percent) and that the ex gratia payment hereinafter provided to certain claimants, who were otherwise excluded from sharing in this claims settlement under generally-accepted principles of international law and United States practice, is justified only by the extraordinary circumstances of this case and does not establish any precedent for future claims negotiations or payments.

"(b) The Secretary shall establish three accounts in the Fund into which the amount covered into the Fund pursuant to subsection (a) of this section, less the deduction required by that subsection, shall be covered as follows:

"(1) An account into which $ 74,550,000 shall be covered, to be available for payment in accordance with section 8 of this Act on account of awards certified pursuant to section 410 of the International Claims Settlement Act of 1949 [*22 USCS § 1642i*].

"(2) An account into which $ 1,500,000 shall be covered, to be available for payment in accordance with section 8 of this Act on account of awards determined pursuant to section 5 of this Act.

"(3) An account into which the remainder of amounts in the Fund shall be covered, to be available for payment in accordance with section 8 of this ct on account of awards determined pursuant to section 6 of this Act.

"Determination of Certain Claims

"Sec. 5.

(a) The Commission shall receive and determine, in accordance with applicable substantive law, including international law, the validity and amount of claims by nationals of the United States against the Government of the Czechoslovak Socialist Republic for losses resulting from the nationalization or other taking of property owned at the time by nationals of the United States, which nationalization or other taking occurred between August 8, 1958, and the date on which the Agreement enters into force. In making the determination with respect to the validity and amount of any such claim and the value of the property taken, the Commission is authorized to accept the fair or proved value of such property as of the time when the property taken was last operated, used, managed, or controlled by the national or nationals of the United States asserting the claim, regardless of whether such time is prior to the actual date of nationalization or other taking by the Government of the Czechoslovak Socialist Republic.

"(b) The Commission shall certify to the Secretary the amount of any award determined pursuant to subsection (a).

"Determination of Other Claims

"Sec. 6.

"(a)

(1) The Congress finds that--

"(A) in the case of certain persons holding claims against the Czechoslovakian Government who became

nationals of the United States by February 26, 1948, the date on which the current Communist Government of Czechoslovakia assumed power; and

"(B) while the Commission had the authority to deny those claims described in subparagraph (A) on the basis that the properties involved had been taken by the Benes Government while the claimants were not yet nationals of the United States, the effect of that denial is to withhold compensation to persons who have been United States citizens for many years and whose expropriated property has benefited the Communist Government of Czechoslovakia no less than properties expropriated more directly and clearly by the Communist Government.

"(2)

(A) It is therefore the purpose of this section, in accordance with the intent of the Congress in enacting title IV of the International Claims Settlement Act of 1949 [*22 USCS §§ 1642* et seq.] and in the interests of equity, to make ex gratia payments to the claimants described in paragraph (1) of this subsection.

"(B) The Congress reaffirms the principle and practice of the United States to seek compensation from foreign governments on behalf only of persons who were nationals of the United States at the time they sustained losses by the nationalization or other taking of their property by those foreign governments. In making payments under this section, the Congress does not establish any precedent for future claims payments.

"(b) The Commission shall reopen and redetermine the validity and amount of any claim against the Government of Czechoslovakia which was filed with the Commission in accordance with the provisions of title IV of the International Claims Settlement Act of 1949 [*22 USCS §§ 1642* et seq.], which was based on property found by the Commission to have been nationalized or taken by the Government of Czechoslovakia on or after January 1, 1945, and before February 26, 1948, and which was denied by the Commission because such property was not owned by a person who was a national of the United States on the date of such nationalization or taking. The provisions of section 405 of the International Claims Settlement Act of 1949 [*22 USCS § 1642d*] requiring that the property upon which a claim is based must have been owned by a national of the United States on the date of nationalization or other taking by the Government of Czechoslovakia shall be deemed to be met if such property was owned on such date by a person who became a national of the United States on or before February 26, 1948. The Commission shall certify to the Secretary the amount of any award determined pursuant to this subsection.

"Procedures

"Sec. 7.

(a) The provisions of sections 401, 403, 405, 406, 407, 408, 409, 414, 415, and 416 of the International Claims Settlement Act of 1949 [*22 USCS §§ 1642*, *1642b*, *1642d*, *1642e*, *1642f*, *1642g*, *1642h*, *1642m*, *1642n*, and *1642o*, respectively], to the extent that such provisions are not inconsistent with this Act, together with such regulations as the Commission may prescribe, shall apply with respect to any claim determined pursuant to section 5(a) of this Act or redetermined pursuant to section 6(b) of this Act.

"(b) Not later than sixty days after the date of the enactment of this Act, the Commission shall establish and publish in the Federal Register a period of time within which claims described in section 5 of the Act must be filed with the Commission, and the date for the completion of the Commission's affairs in connection with the determination of those such claims and claims described in section 6 of this Act. Such filing period shall be not more than one year after the date of such publication in the Federal Register, and such completion date shall be not more than two years after the final date for the filing of claims under section 5. No person holding a claim to which section 6 of this Act applies shall be required to refile that claim before the Commission makes the redetermination required by that section.

"Payment of Awards

"Sec. 8.

(a) As soon as practicable after the date of the enactment of this Act, the Secretary shall make payments from amounts in the account established pursuant to section 4(b)(1) of this Act on the unpaid balance of each award certified by the Commission pursuant to section 410 of the International Claims Settlement Act of 1949 [*22 USCS § 1642i*].

"(b) As soon as practicable after the Commission has completed the certification of awards pursuant to section 5(b) of this Act, the Secretary shall make payments on account of each such award from the amounts in the account established pursuant to section 4(b)(2) of this Act.

"(c) As soon as practicable after the Commission has completed the certification of awards pursuant to section 6(b) of this Act, the Secretary shall make payments on account of each such award from the amounts in the account established pursuant to section 4(b)(3) of this Act.

"(d) In the event that--

"(1) the amounts in the account established pursuant to section 4(b)(2) of this Act exceed the aggregate total of all awards certified by the Commission pursuant to section 5(b) of this Act, or

"(2) the amounts in the account established pursuant to section 4(b)(3) of this Act exceed the aggregate total of all awards certified by the Commission pursuant to section 6(b) of this Act,

the Secretary shall cover such excess amounts into the account established pursuant to section 4(b)(1) of this Act. The Secretary shall make payments pursuant to subsection (a) of this section, from such excess amounts, on the unpaid balance of awards certified by the Commission pursuant to section 410 of the International Claims Settlement Act of 1949 [*22 USCS § 1642i*].

"(e) Payments under this section shall be made on the unpaid balance of each award which bear to such unpaid balance the same proportion as the total amount in the account in the Fund from which the payments are made bears to the aggregate unpaid balance of all awards payable from that account. Payments under this section, and applications for such payments, shall be made in accordance with such regulations as the Secretary may prescribe.

"(f) In the event that--

"(1) the Secretary is unable, within three years after the date of the establishment of the account prescribed by section 4(b)(1) of this Act, to locate any person entitled to receive payment under this section on account of an award certified by the Commission pursuant to section 410 of the International Claims Settlement Act of 1949 [*22 USCS § 1642i*] or to locate any lawful heirs, successors, or legal representatives of that person, or if no valid application for payment is made by or on behalf of that person within six months after the Secretary has located that person or that person's heirs, successors, or legal representatives; or

"(2) within six months after the Commission has completed the certification of awards pursuant to sections 5(b) and 6(b) of this Act, no valid application for payment is made by or on behalf of any person entitled to receive payment under this section on account of an award certified by the Commission pursuant to either such section,

the Secretary shall give notice by publication in the Federal Register and in such other publications as the Secretary may determine that, unless valid application for payment is made within sixty days after the date of such publication, that person's award under title IV of the International Claims Settlement Act of 1949 [*22 USCS § 1642* et seq.] or this Act, as the case may be, and that person's right to receive payment on account of such award, shall lapse. Upon the expiration of such sixty-day period that person's award and right to receive payment shall lapse, and the amounts payable to that person shall be paid pro rata by the Secretary on account of all other awards under title IV of the International Claims Settlement Act of 1949 [*22 USCS §§ 1642* et seq.] or this Act, as the case may be.

"Investment of Funds

"Sec. 9. The Secretary shall invest and hold in separate accounts the amounts held respectively in the accounts established by section 4 of this Act. Such investment shall be in public debt securities with maturities suitable for the needs of the separate accounts and bearing interest at rates determined by the Secretary, taking into consideration the average market yield on outstanding marketable obligations of the United States of comparable maturities. The interest earned on the amounts in each account established by section 4 of this Act shall be used to make payments, in accordance with section 8(e) of this Act, on awards payable from that account.

"Implementation of Agreement

"Sec. 10.

(a) If, within sixty days after the date of the enactment of this Act--

"(1) the Government of the Czechoslovak Socialist Republic does not make the payments to the United States Government described in article 6(2) of the Agreement, or

"(2) the Czechoslovak Government does not receive the gold provided in article 6(1) of the Agreement, the provisions of this Act shall cease to be effective, and the provisions of the Agreement may not be implemented unless the Congress approves the Agreement after the end of that sixty-day period.

"(b) The sixty-day period for implementation of the Agreement required by subsection (a) shall be extended by an additional period of thirty calendar days if, before the expiration of that sixty-day period, the Secretary of State certifies in writing that such extension is consistent with the purposes of this Act and reports that certification to the Speaker of the House of Representatives and to the Chairman of the Committee on Foreign Relations of the Senate, together with a detailed statement of the reasons for the extension. If at the end of that additional thirty-day period the events set forth in paragraphs (1) and (2) of subsection (a) have not occurred, the provisions of this Act shall cease to be effective and the provisions of the Agreement may not be implemented unless the Congress approves the Agreement after the end of that thirty-day period or unless the Congress, before the expiration of that thirty-day period, authorizes by joint resolution a further extension of time for implementation of the Agreement. Such joint resolution shall be considered in the Senate in accordance with the provisions of section 601(b) of the International Security Assistance and Arms Export Control Act of 1976 [unclassified], and in the House of Representatives a motion to proceed to the consideration of such joint resolution after it has been reported by the appropriate committee shall be treated as highly privileged.

"Social Security Agreement

"Sec. 11. The Secretary of State shall conduct a detailed review of the exchange of letters between the United States and Czechoslovakia providing for reciprocal social security payments to residents of the two countries. Such review should include an examination of the extent to which Czechoslovakia is complying with the spirit and provisions of the letters, a comparison of the benefits being realized by residents of Czechoslovakia and of the United States under the letters, and an evaluation of the basis of differences in such benefits. The Secretary of State, in consultation with the Department of Health and Human Services, shall report to the Congress, not later than six months after the date of the enactment of this Act, the results of such review, together with any recommendations for legislation or changes in the agreement made by the letters that may be necessary to achieve greater comparability and equity of benefits for the residents of the two countries. Such report should include specific assessments of the feasibility, likely effects, and advisability of terminating United States social security payments to residents of Czechoslovakia in response to inequities and incomparabilities of benefits payments under the exchange of letters.".

*** Current through PL 112-144 with a gap of 112-141, approved 7/9/12 ***

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 87. DISTRICT COURTS; VENUE

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28 USCS § 1391

§ 1391. Venue generally [Caution: For provisions effective prior to Jan. 6, 2012, see 2011 amendment note below.]

(a) Applicability of section. Except as otherwise provided by law--
(1) this section shall govern the venue of all civil actions brought in district courts of the United States; and
(2) the proper venue for a civil action shall be determined without regard to whether the action is local or transitory in nature.

(b) Venue in general. A civil action may be brought in--
(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
(3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

(c) Residency. For all venue purposes--
(1) a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled;
(2) an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business; and
(3) a defendant not resident in the United States may be sued in any judicial district, and the joinder of such a defendant shall be disregarded in determining where the action may be brought with respect to other defendants.

(d) Residency of corporations in States with multiple districts. For purposes of venue under this chapter, in a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal

jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

(e) Actions where defendant is officer or employee of the United States.

(1) In general. A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

(2) Service. The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

(f) Civil actions against a foreign state. A civil action against a foreign state as defined in section 1603(a) of this *title [28 USCS § 1603(a)*] may be brought--

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this *title [28 USCS § 1605(b)*];

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this *title [28 USCS § 1603(b)*]; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

(g) Multiparty, multiforum litigation. A civil action in which jurisdiction of the district court is based upon section 1369 of this *title [28 USCS § 1369*] may be brought in any district in which any defendant resides or in which a substantial part of the accident giving rise to the action took place.

HISTORY:

(June 25, 1948, ch. 646, 62 Stat. 935; Oct. 5, 1962, P.L. 87-748, § 2, 76 Stat. 744; Dec. 23, 1963, P.L. 88-234, 77 Stat. 473; Nov. 2, 1966, P.L. 89-714, §§ 1, 2, 80 Stat. 1111; Oct. 21, 1976, P.L. 94-583, §§ 3, 5, 90 Stat. 2721, 2897; Nov. 19, 1988, P.L. 100-702, Title X, § 1013(a), 102 Stat. 4669; Dec. 1, 1990, P.L. 101-650, Title III, § 311, 104 Stat. 5114; Dec. 9, 1991, P.L. 102-198, § 3, 105 Stat. 1623; Oct. 29, 1992, P.L. 102-572, Title V, § 504, 106 Stat. 4513; Oct. 3, 1995, P.L. 104-34, § 1, 109 Stat. 293; Nov. 2, 2002, P.L. 107-273, Div C, Title I, Subtitle A, § 11020(b)(2), 116 Stat. 1827; Dec. 7, 2011, P.L. 112-63, Title II, § 202, 125 Stat. 763.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Based on *title 28, U.S.C., 1940 ed., § 111, 112* (Mar. 3, 1911, ch. 231, § 50, 51, 36 Stat. 1101; Sept. 19, 1922, ch. 345, 42 Stat. 849; Mar. 4, 1925, ch. 526, § 1, 43 Stat. 1264; Apr. 16, 1936, ch. 230, 49 Stat. 1213).

Section consolidates *section 111 of title 28, U.S.C.*, 1940 ed., with part of section 112 of such title.

*** Current through PL 112-144 with a gap of 112-141, approved 7/9/12 ***

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 97. JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

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28 USCS § 1603

§ 1603. Definitions

For purposes of this chapter [*28 USCS §§ 1602* et seq.]--

(a) A "foreign state", except as used in section 1608 of this *title [28 USCS § 1608*], includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this *title [28 USCS § 1332(c)* and (e)] nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

HISTORY:

(Added Oct. 21, 1976, P.L. 94-583, § 4(a), 90 Stat. 2892.)

(As amended Feb. 18, 2005, P.L. 109-2, § 4(b)(2), 119 Stat. 12.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

*** Current through PL 112-144 with a gap of 112-141, approved 7/9/12 ***

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 97. JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

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28 USCS § 1610

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter [*28 USCS § 1603(a)*], used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property--

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided,* That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A [*28 USCS § 1605A*], regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act if--

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), 1605(b), or 1605A of this chapter [*28 USCS § 1605(a)(2)*, (3), or (5), 1605(b), or 1605A], regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter [*28 USCS § 1608(e)*].

(d) The property of a foreign state, as defined in section 1603(a) of this chapter [*28 USCS § 1603(a)*], used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if--

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d) [*28 USCS § 1605(d)*].

(f) (1) (A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (*22 U.S.C. 4308(f)*), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (*50 U.S.C. App. 5(b)*), section 620(a) of the Foreign Assistance Act of 1961 (*22 U.S.C. 2370(a)*), sections 202 and 203 of the International Emergency Economic Powers Act (*50 U.S.C. 1701-1702*), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) [*28 USCS § 1605(a)(7)*] (as in effect before the enactment of section 1605A [enacted Jan. 28, 2008]) or section 1605A [*28 USCS § 1605A*].

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2) (A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) [*28 USCS § 1605(a)(7)*] (as in effect before the enactment of section 1605A [enacted Jan. 28, 2008]) or section 1605A [*28 USCS § 1605A*], the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries--

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver. The President may waive any provision of paragraph (1) in the interest of national security.

(g) Property in certain actions.

(1) In general. Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A [*28 USCS § 1605A*], and the property of an agency or instrumentality of such a state, including property

that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of--

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) United States sovereign immunity inapplicable. Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A [*28 USCS § 1605A*] because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act [*50 USCS Appx §§ 1* et seq.] or the International Emergency Economic Powers Act [*50 USCS §§ 1701* et seq.].

(3) Third-party joint property holders. Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

HISTORY:

(Added Oct. 21, 1976, P.L. 94-583, § 4(a), 90 Stat. 2896; Nov. 9, 1988, P.L. 100-640, § 2, 102 Stat. 3333; Nov. 16, 1988, P.L. 100-669, § 3, 102 Stat. 3969; Dec. 1, 1990, P.L. 101-650, Title III, § 325(b)(9), 104 Stat. 5121; April 24, 1996, P.L. 104-132, Title II, Subtitle B, § 221(b), 110 Stat. 1242; Oct. 21, 1998, P.L. 105-277, Div A, § 101(h) [Title I, § 117(a)], 112 Stat. 2681-491; Oct. 28, 2000, P.L. 106-386, Div C, § 2002(g)[(f)](1), 114 Stat. 1543; Nov. 26, 2002, P.L. 107-297, Title II, § 201(c)(3), 116 Stat. 2337.)

(As amended Jan. 28, 2008, P.L. 110-181, Div A, Title X, Subtitle F, § 1083(b)(3), 122 Stat. 341.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

The "effective date of this Act", referred to in this section, is 90 days after enactment of Act Oct. 21, 1976, P.L. 94-583, as provided by § 8 of such Act which appears as *28 USCS § 1602* note.

Effective date of section:

This section took effect ninety days after enactment, pursuant to § 8 of Act Oct. 21, 1976, P.L. 94-583, which appears as *28 USCS § 1602* note.

Amendments:

1988. Act Nov. 9, 1988 (applicable as provided by § 3 of such Act, which appears as *28 USCS § 1605* note) added subsec. (e).

Act Nov. 16, 1988, in subsec. (a), in para. (5), substituted ", or" for the concluding period, and added para. (6).

1990. Act Dec. 1, 1990, in subsecs. (a)(6) and (e), substituted "state" for "State".

TREATY OF PEACE
WITH
HUNGARY

1947

Article 28

Hungary recognizes that the Soviet Union is entitled to all German assets in Hungary transferred to the Soviet Union by the Control Council for Germany and undertakes to take all necessary measures to facilitate such transfers.

Article 29

1. Each of the Allied and Associated Powers shall have the right to seize, retain, liquidate or take any other action with respect to all property, rights and interests which at the coming into force of the present Treaty are within its territory and belong to Hungary or to Hungarian nationals, and to apply such property or the proceeds thereof to such purposes as it may desire, within the limits of its claims and those of its nationals against Hungary or Hungarian nationals, including debts, other than claims fully satisfied under other Articles of the present Treaty. All Hungarian property, or the proceeds thereof, in excess of the amount of such claims, shall be returned.

2. The liquidation and disposition of Hungarian property shall be carried out in accordance with the law of the Allied or Associated Power concerned. The Hungarian owner shall have no rights with respect to such property except those which may be given him by that law.

3. The Hungarian Government undertakes to compensate Hungarian nationals whose property is taken under this Article and not returned to them.

4. No obligation is created by this Article on any Allied or Associated Power to return industrial property to the Hungarian Government or Hungarian nationals, or to include such property in determining the amounts which may be retained under paragraph 1 of this Article. The Government of each of the Allied and Associated Powers shall have the right to impose such limitations, conditions and restrictions on rights or interests with respect to industrial property in the territory of that Allied or Associated Power, acquired prior to the coming into force of the present Treaty by the Government or nationals of Hungary, as may be deemed by the Government of the Allied or Associated Power to be necessary in the national interest.

5. The property covered by paragraph 1 of this Article shall be deemed to include Hungarian property which has been subject to control

by reason of a state of war existing between Hungary and the Allied or Associated Power having jurisdiction over the property, but shall not include:

(a) Property of the Hungarian Government used for consular or diplomatic purposes;

(b) Property belonging to religious bodies or private charitable institutions and used for religious or charitable purposes;

(c) Property of natural persons who are Hungarian nationals permitted to reside within the territory of the country in which the property is located or to reside elsewhere in United Nations territory, other than Hungarian property which at any time during the war was subjected to measures not generally applicable to the property of Hungarian nationals resident in the same territory;

(d) Property rights arising since the resumption of trade and financial relations between the Allied and Associated Powers and Hungary, or arising out of transactions between the Government of any Allied or Associated Power and Hungary since January 20, 1945;

(e) Literary and artistic property rights.

Article 30

1. From the coming into force of the present Treaty, property in Germany of Hungary and of Hungarian nationals shall no longer be treated as enemy property and all restrictions based on such treatment shall be removed.

2. Identifiable property of Hungary and of Hungarian nationals removed by force or duress from Hungarian territory to Germany by German forces or authorities after January 20, 1945, shall be eligible for restitution.

3. The restoration and restitution of Hungarian property in Germany shall be effected in accordance with measures which will be determined by the Powers in occupation of Germany.

4. Without prejudice to these and to any other dispositions in favour of Hungary and Hungarian nationals by the Powers occupying Germany, Hungary waives on its own behalf and on behalf of Hungarian nationals all claims against Germany and German nationals outstanding on May 8, 1945,

except those arising out of contracts and other obligations entered into, and rights acquired, before September 1, 1939. This waiver shall be deemed to include debts, all inter-governmental claims in respect of arrangements entered into in the course of the war and all claims for loss or damage arising during the war.

Article 31

1. The existence of the state of war shall not, in itself, be regarded as affecting the obligation to pay pecuniary debts arising out of obligations and contracts which existed, and rights which were acquired, before the existence of the state of war, which became payable prior to the coming into force of the present Treaty, and which are due by the Government or nationals of Hungary to the Government or nationals of one of the Allied and Associated Powers or are due by the Government or nationals of one of the Allied and Associated Powers to the Government or nationals of Hungary.

2. Except as otherwise expressly provided in the present Treaty, nothing therein shall be construed as impairing debtor-creditor relationships arising out of pre-war contracts concluded either by the Government or nationals of Hungary.

Article 32

1. Hungary waives all claims of any description against the Allied and Associated Powers on behalf of the Hungarian Government or Hungarian nationals arising directly out of the war or out of actions taken because of the existence of a state of war in Europe after September 1, 1939, whether or not the Allied or Associated Power was at war with Hungary at the time, including the following:

(a) Claims for losses or damages sustained as a consequence of acts of forces or authorities of Allied or Associated Powers;

(b) Claims arising from the presence, operations or actions of forces or authorities of Allied or Associated Powers in Hungarian territory;

(c) Claims with respect to the decrees or orders of Prize Courts of Allied or Associated Powers, Hungary agreeing to accept as valid and binding all decrees and orders of such Prize Courts on or after September 1, 1939, concerning Hungarian ships or Hungarian goods or the payment of costs;

(d) Claims arising out of the exercise or purported exercise of belligerent rights.

2. The provisions of this Article shall bar, completely and finally, all claims of the nature referred to herein, which will be henceforward extinguished, whoever may be the parties in interest. The Hungarian Government agrees to make equitable compensation in Hungarian currency to persons who furnished supplies or services on requisition to the forces of Allied or Associated Powers in Hungarian territory and in satisfaction of non-combat damage claims against the forces of Allied or Associated Powers arising in Hungarian territory.

3. Hungary likewise waives all claims of the nature covered by paragraph 1 of this Article on behalf of the Hungarian Government or Hungarian nationals against any of the United Nations whose diplomatic relations with Hungary were broken off during the war and which took action in co-operation with the Allied and Associated Powers.

4. The Hungarian Government shall assume full responsibility for all Allied military currency issued in Hungary by the Allied military authorities, including all such currency in circulation at the coming into force of the present Treaty.

5. The waiver of claims by Hungary under paragraph 1 of this Article includes any claims arising out of actions taken by any of the Allied and Associated Powers with respect to Hungarian ships between September 1, 1939, and the coming into force of the present Treaty, as well as any claims and debts arising out of the Conventions on prisoners of war now in force.

Article 33

1. Pending the conclusion of commercial treaties or agreements between individual United Nations and Hungary, the Hungarian Government shall, during a period of eighteen months from the coming into force of the present Treaty, grant the following treatment to each of the United Nations which, in fact, reciprocally grants similar treatment in like matters to Hungary:

(a) In all that concerns duties and charges on importation or exportation, the internal taxation of imported goods and all regulations pertaining thereto, the United Nations shall be granted unconditional most-favoured-nation treatment;

AGREEMENT[1] BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE HUNGARIAN PEOPLE'S REPUBLIC REGARDING THE SETTLEMENT OF CLAIMS

The Government of the United States of America and the Government of the Hungarian People's Republic, being desirous of effecting a settlement of all outstanding claims and advancing economic relations between the two Governments, have agreed upon the following articles:

Article 1. (1) The Government of the Hungarian People's Republic agrees to pay, and the Government of the United States agrees to accept, the lump sum of $18,900,000 (eighteen million nine hundred thousand dollars) in United States currency in full and final settlement and in discharge of all claims of the Government and nationals of the United States against the Government and nationals of the Hungarian People's Republic which are described in this Agreement.

(2) Such payment shall be made by the Government of the Hungarian People's Republic as provided in article 4 of this Agreement.

Article 2. The claims which are referred to in article 1, and which are being settled and discharged by this Agreement, are claims of nationals and the Government of the United States for:

(1) property, rights and interests affected by Hungarian measures of nationalization, compulsory liquidation, expropriation, or other taking on or before the date of this Agreement, excepting real property owned by the Government of the United States;

(2) obligations expressed in currency of the United States arising out of contractual or other rights acquired by nationals of the United States prior to September 1, 1939, and which became payable prior to September 15, 1947;

(3) obligations of the Hungarian People's Republic under articles 26 and 27 of the Treaty of Peace between the United States and Hungary dated February 10, 1947,[2] and

(4) losses referred to in the note of December 10, 1952, of the Government of the United States to the Government of the Hungarian People's Republic.

Article 3. For the Purposes of this Agreement:

(1) The term "national of the United States" means (*a*) a natural person who is a citizen of the United States, or who owes permanent allegiance to the United States, and (*b*) a corporation or other legal entity which is organized under the laws of the United States, any State or Territory thereof, or the District of Columbia, if natural persons who are nationals of the United States

[1] Came into force on 6 March 1973 by signature, in accordance with article 9.
[2] United Nations, *Treaty Series*, vol. 41, p. 135.

ANNEX A

March 6, 1973

Dear Mr. Secretary:

With respect to expropriation claims by nationals of the United States which arose subsequent to August 9, 1955, and which are settled and discharged by virtue of article 2 (1) of the claims settlement agreement between our two countries concluded today, the Government of the Hungarian People's Republic wishes to convey its understanding to the Government of the United States of America that this settlement in no way constitutes a precedent for the Government of the Hungarian People's Republic for similar claims arising after the date of this Agreement.

Sincerely,

[*Signed*]
PÉTER VALYI
Deputy Prime Minister

His Excellency William P. Rogers
Secretary of State of the United States of America
Washington, D.C.

March 6, 1973

Dear Mr. Deputy Prime Minister:

In reply to your letter of today's date, the Government of the United States of America wishes to confirm the understanding of the Government of the Hungarian People's Republic that with respect to expropriation claims by nationals of the United States which arose subsequent to August 9, 1955, and which are settled and discharged by virtue of article 2 (1) of the claims settlement agreement between our two countries concluded today, this settlement in no way constitutes a precedent for the Government of the Hungarian People's Republic for similar claims arising after the date of this Agreement.

Sincerely,

[*Signed*]
WILLIAM P. ROGERS
Secretary of State

His Excellency Péter Vályi
Deputy Prime Minister of the Hungarian People's Republic

ANNEX B

March 6, 1973

Dear Mr. Secretary:

With reference to article 2, paragraph 3, of the Agreement regarding claims of today's date I wish to inform you that all the obligations of the Government of the

Hungarian People's Republic set out in article 27 of the Treaty of Peace with Hungary signed in Paris on February 10, 1947, have already been fulfilled.

Sincerely,

[*Signed*]
PÉTER VÁLYI
Deputy Prime Minister

His Excellency William P. Rogers
Secretary of State of the United States of America
Washington, D.C.

March 6, 1973

Dear Mr. Deputy Prime Minister:

In response to your letter of today's date concerning article 2, paragraph 3, of the Agreement regarding claims of today's date, the Government of the United States of America has taken note of the statement of the Government of the Hungarian People's Republic on article 27 of the Treaty of Peace with Hungary.

Sincerely,

[*Signed*]
WILLIAM P. ROGERS
Secretary of State

His Excellency Péter Vályi
Deputy Prime Minister of the Hungarian People's Republic

ANNEX C

March 6, 1973

Dear Mr. Secretary:

With reference to article 6, paragraph (2) (iii), of the Agreement regarding claims of today's date, the Government of the Hungarian People's Republic states that this provision is confined to the settlement of claims by the Hungarian People's Republic against the United States and in no way prejudices claims of the Government of the Hungarian People's Republic based on international law practice against those countries in which such property was used.

Sincerely,

[*Signed*]
PÉTER VÁLYI
Deputy Prime Minister

His Excellency William P. Rogers
Secretary of State of the United States of America
Washington, D.C.

Convention on the Prevention and Punishment of the Crime of Genocide

Adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948.

Article 1

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article 2

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Article 3

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

Article 4

Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article 5

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3.

Article 6

Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article 7

Genocide and the other acts enumerated in Article 3 shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article 8

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article 3.

Article 9

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Article 10

The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

Article 11

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 12

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

Article 13

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a proces-verbal and transmit a copy of it to each Member of the United Nations and to each of the non-member States contemplated in Article 11.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effected subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

Article 14

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

Article 15

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

Article 16

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

Article 17

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in Article 11 of the following:

- (a) Signatures, ratifications and accessions received in accordance with Article 11;
- (b) Notifications received in accordance with Article 12;
- (c) The date upon which the present Convention comes into force in accordance with Article 13;
- (d) Denunciations received in accordance with Article 14;
- (e) The abrogation of the Convention in accordance with Article 15;
- (f) Notifications received in accordance with Article 16.

Article 18

The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to all Members of the United Nations and to the non-member States contemplated in Article 11.

Article 19

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

August 8 and October 6, 1945
[E. A. S. 472]

Agreement between the United States of America and the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics respecting the prosecution and punishment of the major war criminals of the European Axis. Signed at London August 8, 1945; effective August 8, 1945. And protocol signed at Berlin October 6, 1945.

AGREEMENT BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA, THE PROVISIONAL GOVERNMENT OF THE FRENCH REPUBLIC, THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE UNION OF SOVIET SOCIALIST REPUBLICS FOR THE PROSECUTION AND PUNISHMENT OF THE MAJOR WAR CRIMINALS OF THE EUROPEAN AXIS.

WHEREAS the United Nations have from time to time made declarations of their intention that War Criminals shall be brought to justice;

AND WHEREAS the Moscow Declaration of the 30th October 1943 on German atrocities in Occupied Europe stated that those German Officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in atrocities and crimes will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free Governments that will be created therein:

AND WHEREAS this Declaration was stated to be without prejudice to the case of major criminals whose offenses have no particular geographical location and who will be punished by the joint decision of the Governments of the Allies;

NOW THEREFORE the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics (hereinafter called "the Signatories") acting in the interests of all the United Nations and by their representatives duly authorized thereto have concluded this Agreement.

Article 1.

International Military Tribunal.

There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities.

Article 2.

Constitution, jurisdiction, functions.

The constitution, jurisdiction and functions of the International Military Tribunal shall be those set out in the Charter annexed to this

Agreement, which Charter shall form an integral part of this Agreement.

Article 3.

Each of the Signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal. The Signatories shall also use their best endeavors to make available for investigation of the charges against and the trial before the International Military Tribunal such of the major war criminals as are not in the territories of any of the Signatories. Investigation.

Article 4.

Nothing in this Agreement shall prejudice the provisions established by the Moscow Declaration concerning the return of war criminals to the countries where they committed their crimes.

Article 5.

Any Government of the United Nations may adhere to this Agreement by notice given through the diplomatic channel to the Government of the United Kingdom, who shall inform the other signatory and adhering Governments of each such adherence. Adherence to Agreement.

Article 6.

Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any allied territory or in Germany for the trial of war criminals.

Article 7.

This Agreement shall come into force on the day of signature and shall remain in force for the period of one year and shall continue thereafter, subject to the right of any Signatory to give, through the diplomatic channel, one month's notice of intention to terminate it. Such termination shall not prejudice any proceedings already taken or any findings already made in pursuance of this Agreement. Entry into force; duration.

IN WITNESS WHEREOF the Undersigned have signed the present Agreement.

DONE in quadruplicate in London this 8th day of August 1945 each in English, French and Russian, and each text to have equal authenticity.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

ROBERT H. JACKSON

FOR THE PROVISIONAL GOVERNMENT OF THE FRENCH REPUBLIC

ROBERT FALCO

FOR THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

JOWITT C.

FOR THE GOVERNMENT OF THE UNION OF SOVIET SOCIALIST REPUBLICS

И. Никитченко

А. Трайнин

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CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL

I. CONSTITUTION OF THE INTERNATIONAL MILITARY TRIBUNAL

Article 1.

Establishment.

In pursuance of the Agreement signed on the 8th day of August 1945 by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics, there shall be established an International Military Tribunal (hereinafter called "the Tribunal") for the just and prompt trial and punishment of the major war criminals of the European Axis.

Article 2.

Members.

The Tribunal shall consist of four members, each with an alternate. One member and one alternate shall be appointed by each of the Signatories. The alternates shall, so far as they are able, be present at all sessions of the Tribunal. In case of illness of any member of the Tribunal or his incapacity for some other reason to fulfill his functions, his alternate shall take his place.

Article 3.

Replacements.

Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Counsel. Each Signatory may replace its member of the Tribunal or his alternate for reasons of health or for other good reasons, except that no replacement may take place during a Trial, other than by an alternate.

Article 4.

Quorum.

(a) The presence of all four members of the Tribunal or the alternate for any absent member shall be necessary to constitute the quorum.

Selection of President.

(b) The members of the Tribunal shall, before any trial begins, agree among themselves upon the selection from their number of a President, and the President shall hold office during that trial, or as may otherwise be agreed by a vote of not less than three members. The principle of rotation of presidency for successive trials is agreed. If, however, a session of the Tribunal takes place on the territory of one of the four Signatories, the representative of that Signatory on the Tribunal shall preside.

Majority vote.

(c) Save as aforesaid the Tribunal shall take decisions by a majority vote and in case the votes are evenly divided, the vote of the President shall be decisive: provided always that convictions and sentences shall only be imposed by affirmative votes of at least three members of the Tribunal.

Article 5.

In case of need and depending on the number of the matters to be tried, other Tribunals may be set up; and the establishment, functions, and procedure of each Tribunal shall be identical, and shall be governed by this Charter. Other Tribunals.

II. JURISDICTION AND GENERAL PRINCIPLES

Article 6.

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes. Powers of Tribunal.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: Crimes.

(a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; [1] or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan. Responsibility of leaders, organizers, etc.

[1] [The contracting governments signed a protocol at Berlin on Oct. 6, 1945 (*post*, p. 1586) which provides that this semicolon in the English text should be changed to a comma.]

Article 7.

Official position of defendants.

The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8.

Action under orders.

The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Article 9.

Criminal organizations.

At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.

After receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

Article 10.

Individuals.

In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

Article 11.

Punishment.

Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization.

Article 12.

Proceedings in absence of person.

The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.

Article 13.

Rules of Tribunal.

The Tribunal shall draw up rules for its procedure. These rules shall not be inconsistent with the provisions of this Charter.

III. COMMITTEE FOR THE INVESTIGATION AND PROSECUTION OF MAJOR WAR CRIMINALS

Article 14.

Chief Prosecutors.

Each Signatory shall appoint a Chief Prosecutor for the investigation of the charges against and the prosecution of major war criminals.

Duties of committee.

The Chief Prosecutors shall act as a committee for the following purposes:

(a) to agree upon a plan of the individual work of each of the Chief Prosecutors and his staff,
(b) to settle the final designation of major war criminals to be tried by the Tribunal,
(c) to approve the Indictment and the documents to be submitted therewith,
(d) to lodge the Indictment and the accompanying documents with the Tribunal,
(e) to draw up and recommend to the Tribunal for its approval draft rules of procedure, contemplated by Article 13 of this Charter. The Tribunal shall have power to accept, with or without amendments, or to reject, the rules so recommended.

The Committee shall act in all the above matters by a majority vote and shall appoint a Chairman as may be convenient and in accordance with the principle of rotation: provided that if there is an equal division of vote concerning the designation of a Defendant to be tried by the Tribunal, or the crimes with which he shall be charged, that proposal will be adopted which was made by the party which proposed that the particular Defendant be tried, or the particular charges be preferred against him.

Article 15.

Duties.

The Chief Prosecutors shall individually, and acting in collaboration with one another, also undertake the following duties:

(a) investigation, collection and production before or at the Trial of all necessary evidence,
(b) the preparation of the Indictment for approval by the Committee in accordance with paragraph (c) of Article 14 hereof,
(c) the preliminary examination of all necessary witnesses and of the Defendants,
(d) to act as prosecutor at the Trial,
(e) to appoint representatives to carry out such duties as may be assigned to them,
(f) to undertake such other matters as may appear necessary to them for the purposes of the preparation for and conduct of the Trial.

It is understood that no witness or Defendant detained by any Signatory shall be taken out of the possession of that Signatory without its assent.

IV. Fair Trial for Defendants

Article 16.

Procedure.

In order to ensure fair trial for the Defendants, the following procedure shall be followed:

(a) The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at a reasonable time before the Trial.

(b) During any preliminary examination or trial of a Defendant he shall have the right to give any explanation relevant to the charges made against him.

(c) A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands.

(d) A defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of Counsel.

(e) A defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defense, and to cross-examine any witness called by the Prosecution.

V. Powers of the Tribunal and Conduct of the Trial

Article 17.

Powers.

The Tribunal shall have the power

(a) to summon witnesses to the Trial and to require their attendance and testimony and to put questions to them,

(b) to interrogate any Defendant,

(c) to require the production of documents and other evidentiary material,

(d) to administer oaths to witnesses,

(e) to appoint officers for the carrying out of any task designated by the Tribunal including the power to have evidence taken on commission.

Article 18.

Duties.

The Tribunal shall

(a) confine the Trial strictly to an expeditious hearing of the issues raised by the charges,

(b) take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever,

(c) deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any Defendant or his Counsel from some or all further proceedings, but without prejudice to the determination of the charges.

Article 19.

Evidence.

The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.

Article 20.

The Tribunal may require to be informed of the nature of any evidence before it is offered so that it may rule upon the relevance thereof.

Article 21.

The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof. It shall also take judicial notice of official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various allied countries for the investigation of war crimes, and the records and findings of military or other Tribunals of any of the United Nations.

Article 22.

Seat of Tribunal.

The permanent seat of the Tribunal shall be in Berlin. The first meetings of the members of the Tribunal and of the Chief Prosecutors shall be held at Berlin in a place to be designated by the Control Council for Germany. The first trial shall be held at Nuremberg, and any subsequent trials shall be held at such places as the Tribunal may decide.

Article 23.

Prosecution.

One or more of the Chief Prosecutors may take part in the prosecution at each Trial. The function of any Chief Prosecutor may be discharged by him personally, or by any person or persons authorized by him.

The function of Counsel for a Defendant may be discharged at the Defendant's request by any Counsel professionally qualified to conduct cases before the Courts of his own country, or by any other person who may be specially authorized thereto by the Tribunal.

Article 24.

Trial proceedings.

The proceedings at the Trial shall take the following course:

(a) The Indictment shall be read in court.

(b) The Tribunal shall ask each Defendant whether he pleads "guilty" or "not guilty".

(c) The prosecution shall make an opening statement.

(d) The Tribunal shall ask the prosecution and the defense what evidence (if any) they wish to submit to the Tribunal, and the Tribunal shall rule upon the admissibility of any such evidence.

(e) The witnesses for the Prosecution shall be examined and after that the witnesses for the Defense. Thereafter such rebutting evidence as may be held by the Tribunal to be admissible shall be called by either the Prosecution or the Defense.

(f) The Tribunal may put any question to any witness and to any Defendant, at any time.

(g) The Prosecution and the Defense shall interrogate and may cross-examine any witnesses and any Defendant who gives testimony.

(h) The Defense shall address the court.

(i) The Prosecution shall address the court.

(j) Each Defendant may make a statement to the Tribunal.

(k) The Tribunal shall deliver judgment and pronounce sentence.

Article 25.

Languages.

All official documents shall be produced, and all court proceedings conducted, in English, French and Russian, and in the language of the Defendant. So much of the record and of the proceedings may also be translated into the language of any country in which the Tribunal is sitting, as the Tribunal considers desirable in the interests of justice and public opinion.

VI. JUDGMENT AND SENTENCE

Article 26.

Judgment.

The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review.

Article 27.

Punishment.

The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just.

Article 28.

Stolen property.

In addition to any punishment imposed by it, the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany.

Article 29.

Sentences.

In case of guilt, sentences shall be carried out in accordance with the orders of the Control Council for Germany, which may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof. If the Control Council for Germany, after any Defendant has been convicted and sentenced, discovers fresh evidence which, in its opinion, would found a fresh charge against him, the Council shall report accordingly to the Committee established under Article 14 hereof, for such action as they may consider proper, having regard to the interests of justice.

VII. EXPENSES

Article 30.

Expenses.

The expenses of the Tribunal and of the Trials, shall be charged by the Signatories against the funds allotted for maintenance of the Control Council for Germany.

AGREEMENT BY THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, THE GOVERNMENT OF THE UNITED STATES OF AMERICA, THE PROVISIONAL GOVERNMENT OF THE FRENCH REPUBLIC AND THE GOVERNMENT OF THE UNION OF SOVIET SOCIALIST REPUBLICS FOR THE PROSECUTION AND PUNISHMENT OF THE MAJOR WAR CRIMINALS OF THE EUROPEAN AXIS.

WHEREAS the United Nations have from time to time made declarations of their intention that War Criminals shall be brought to justice;

AND WHEREAS the Moscow Declaration of the 30th October 1943 on German atrocities in Occupied Europe stated that those German officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in atrocities and crimes will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free Governments that will be created therein;

AND WHEREAS this Declaration was stated to be without prejudice to the case of major criminals whose offences have no particular geographical location and who will be punished by the joint decision of the Governments of the Allies;

NOW THEREFORE the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics (hereinafter called "the Signatories") acting in the interests of all the United Nations and by their representatives duly authorised thereto have concluded this Agreement.

Article 1.

There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organisations or groups or in both capacities.

Article 2.

The constitution, jurisdiction and functions of the International Military Tribunal shall be those set out in the Charter annexed to this Agreement, which Charter shall form an integral part of this Agreement.

Article 3.

Each of the Signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war

Vienna Convention on the Law of Treaties
1969

Done at Vienna on 23 May 1969. Entered into force on 27 January 1980.
United Nations, *Treaty Series*, vol. 1155, p. 331

Article 25
Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(*a*) the treaty itself so provides; or

(*b*) the negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

PART III.
OBSERVANCE, APPLICATION AND
INTERPRETATION OF TREATIES
SECTION 1. OBSERVANCE OF TREATIES

Article 26
"Pacta sunt servanda"

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27
Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

SECTION 2. APPLICATION OF TREATIES

Article 28
Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Article 29
Territorial scope of treaties

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

Article 30
Application of successive treaties relating to the same subject matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(*a*) as between States Parties to both treaties the same rule applies as in paragraph 3;

(*b*) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

SECTION 3. INTERPRETATION OF TREATIES

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(*c*) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(*a*) leaves the meaning ambiguous or obscure; or

(*b*) leads to a result which is manifestly absurd or unreasonable.

Article 33
Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

SECTION 4. TREATIES AND THIRD STATES

Article 34
General rule regarding third States

A treaty does not create either obligations or rights for a third State without its consent.