

# IFAR Journal



INTERNATIONAL FOUNDATION FOR ART RESEARCH

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## HERZOG HEIRS CAN PROCEED WITH U.S. ACTION TO RECOVER ALL BUT 11 ARTWORKS

### HUNGARY SAYS “NOT SO FAST”; SEEKS IMMEDIATE APPEAL

There is both good news and bad news for descendants of Baron Mór Lipót Herzog in their longstanding and complicated claim against the Republic of Hungary, and three Hungarian museums and a university, to recover artworks looted from the Baron's extraordinary collection. The good news is that a suit spearheaded by Herzog's American great-grandson, David de Csepel, will be allowed to proceed against Hungary in U.S. court.<sup>1</sup> The bad news is that, in that same ruling, the court affirmed as valid a 2008 Hungarian court decision holding that eleven of the works from the collection had become the property of Hungary under the doctrine of adverse possession. Immediately after the ruling, Hungary filed notice that it intended to seek an interlocutory review of the district court decision.

#### THE COLLECTION DURING THE NAZI AND COMMUNIST ERAS

Baron Herzog was a renowned Jewish Hungarian art collector and banker who, prior his death in 1934, had amassed an enormous collection estimated at around 2,500 art objects, the largest private collection in the nation. It included paintings by El Greco, Zurbaran, Cranach, and Courbet. Shortly after the collection passed to Herzog's three children, however, Hungary joined the Second World War on the side of the Axis Powers and instituted a series of anti-Jewish

<sup>1</sup> *De Csepel v. Republic of Hungary*, No. 10-1261 (ESH), slip op. (Sept. 1, 2011, D. D.C.).

“There is both good news and bad news for descendants of Baron Mór Lipót Herzog in their longstanding and complicated claim against the Republic of Hungary . . .”

laws. One of Herzog's sons, András, perished in a forced labor camp for Jews in 1943. In 1944, after Hungary attempted to surrender to the Allies, Nazi Germany sent troops to Hungary to ensure its loyalty and to assist in the fight against the advancing Russian army. The Nazis, along with Hungarian forces, sent more than 440,000 Hungarian Jews to Auschwitz and other death camps and stripped Jews of their possessions. The surviving Herzog son, István, escaped from a camp-bound train. Herzog's daughter, Erzsébet (Elizabeth) de Csepel, fled Hungary in May 1944, ultimately settling in the United States.

In 1944, Hungarian officials aided by Nazi collaborators discovered the collection, most of which the family had hidden in a factory cellar. The artworks were taken to Adolf Eichmann's Budapest hotel for his inspection, where he chose some of the best pieces to be sent to Germany as “trophy” (Germany restituted a work to Herzog's heirs in 2010).

After the war, Hungary returned a few items to the Herzog family — apparently pursuant to the 1947 Peace Treaty between Hungary and the

Allies<sup>2</sup> — but held on to the majority of the works, placing them in the state-owned Museum of Fine Arts, the Hungarian National Gallery, the Museum of Applied Arts (the “Museums”), and the Budapest University of Technology and Economics (the “University”). Hungarian officials, the family says, continued to harass and threaten the Herzogs — leveling, for instance, false claims of smuggling — until they agreed under new bailment agreements to re-deposit the few works that had been restituted, some of which were then exhibited with labels indicating that they were “on deposit” from the Herzog collection.

When the Communists took control of Hungary in 1947, the government simply retained many pieces, including those once belonging to the Herzogs. The United States essentially severed diplomatic ties with Hungary in 1951, and in 1955, it decided to use Hungarian assets it had frozen to partially compensate U.S. nationals for claims against Hungary for, among other things, property that had been nationalized. Erzsébet (Herzog)

<sup>2</sup> Article 27 of the peace treaty required Hungary to restore, or when impossible, to provide fair compensation for property confiscated after 1939 “on account of [a person's] racial origin or religion.”



de Csepel, who had emigrated to the U.S. in 1946 and became a naturalized U.S. citizen in 1952, filed a claim for twelve artworks in the collection of the Hungarian Museum of Fine Arts, seven of which she said she owned out-right, and the others jointly with her siblings. She received a payment of \$210,000 on her claim for both real estate and artworks and reserved her rights to proceed against Hungary for additional amounts. In March 1973, the U.S. and Hungary entered into an agreement (the “1973 Agreement”) pursuant to which Hungary paid \$18,900,000 to the U.S. for a “full and final settlement” of claims by the U.S. or its nationals against the Hungarian government.<sup>3</sup>

### THE HUNGARIAN COURT CASE

After the collapse of Hungary’s Communist government in 1989, Erzsébet, then 89 years old and living in California, resumed her attempts to negotiate the return of the family’s artworks. As a result of those efforts, Hungary returned seven minor pieces to Erzsébet before her death in 1992, but kept the collection’s masterworks in the Museum of Fine Arts and the Hungarian Gallery, both in Budapest.

Erzsébet’s daughter, Martha Nierenberg, continued her mother’s efforts to have the art returned. After a Hungarian commission tasked with determining the ownership status of the works failed to reach a decision, Martha filed a Hungarian court lawsuit in 1999 for the return of 12 paintings that had belonged to her mother (one, a Munkácsy,

was returned to her without explanation prior to trial). The Budapest Metropolitan Court initially ruled in her favor and ordered all but one of the paintings to be returned. Hungary appealed, and in 2002, the Supreme Court of Hungary vacated the ruling. After yet another court decision and appeal, the Metropolitan Appellate Court ultimately ruled on January 10, 2008 that Erzsébet’s claim was barred because she had received compensation from the U.S. government in 1959, and that, thereafter, Hungary had obtained ownership of the artworks through adverse possession.

### DE CSEPEL SEEKS U.S. HEARING

In 2010, the Herzog heirs — de Csepel (Erzsébet’s grandson) and András Herzog’s daughters, Italian nationals Angela Maria Herzog and Julia Alice Herzog (collectively, the “Herzog heirs”) — filed suit against Hungary, the Museums and the University (collectively, “Hungary”) in U.S. federal district court in Washington, D.C. The suit, which is based on the theory that Hungary holds the artworks not as owners but as “bailees,” sought the return of more



**FIGURE 1. EL GRECO (Domenikos Theotokopoulos).** *Agony in the Garden*, ca. 1608. Oil on canvas, 170 x 112.5 cm. Museum of Fine Arts, Budapest. Claimed by the heirs of Baron Herzog in a federal lawsuit in Washington, D.C.



**FIGURE 2. FRANCISCO DE ZURBARÁN.** *Saint Andrew*, ca. 1630-34. Oil on canvas, 146.7 x 61 cm. Museum of Fine Arts, Budapest. Claimed by the heirs of Baron Herzog in a federal lawsuit in Washington, D.C.

than three dozen paintings and sculptures, plus other artworks — together said by the family to be worth more than \$100 million. These include El Greco’s *Agony in the Garden*, and other masterworks by Francisco de Zurbarán, Gustave Courbet and Camille Corot (**FIGS. 1-3 and cover**). Significantly — and exceptionally — the suit also seeks a full and transparent accounting of all works from the Herzog collection in Hungarian possession. Charles A. Goldstein, Counsel to the Commission for Art Recovery, which is supporting the family’s claim, told IFAR that “the family believes that there are many other Herzog works in the possession of the government.” The Herzog heirs also believe that their claim represents the “last unresolved Holocaust art claim of this magnitude.”<sup>4</sup>

<sup>4</sup> See: <http://www.hungarylootedart.com>, a website set up by the Herzog family attorneys, for many relevant legal documents and a full listing of the claimed artworks.

<sup>3</sup> Agreement between the Government of the United States of America and the Government of the Hungarian People’s Republic Regarding the Settlement of Claims, March 6, 1973, 27 U.S.T. 522 (the “1973 Agreement”).

## NEWS & UPDATES

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De Csepel, a California-based marketing consultant in his 40s (and husband of Joy Chen, former deputy mayor of Los Angeles), explained the rationale for the suit to the *Los Angeles Times*: “It’s not like I want to have the paintings hanging in my home . . . . It’s more of a feeling of wanting justice for my family . . . . My family was forced at gunpoint to leave Hungary, and some didn’t make it . . . . We can’t of course redo the past, but there are some areas where justice can be done.”<sup>5</sup>

### HUNGARY’S RESPONSE

Hungary filed a motion to dismiss de Csepel’s claim on February 15, 2010, arguing its sovereign immunity protects it from being sued in the United States and that the Herzog heirs’ claim was covered by the 1973 Agreement, thus bringing it outside of the court’s jurisdiction. Hungary also contended that the United States is not the proper forum to resolve the claim; and that the suit is barred by the statute of limitations, international comity, the Act of State Doctrine, and claim and issue preclusion. Hungary’s decision to pursue what many people considered largely technical (although not insignificant) defenses was met with rancor in some quarters, given that at the 2009 Prague Conference on Holocaust looted property, Hungary, along with 47 other nations, agreed in principle

5 Jori Finkel, “Jewish banker’s heirs sue Hungary for return of looted art,” *Los Angeles Times* (July 29, 2010).



**FIGURE 3. CAMILLE COROT.** *Portrait of a Woman (Lady with a Marguerite)*, ca. 1868-70. Oil on canvas, 78 x 57.7 cm. Museum of Fine Arts, Budapest. Claimed by the heirs of Baron Herzog in a federal lawsuit in Washington, D.C.

to the Terezin Declaration, that Holocaust claims should be decided on the merits and not on technical grounds. That agreement, as well as the 1998 Washington Principles, to which Hungary also agreed, was not binding, however, and Hungary’s defenses are fully available to it under U.S. law.

This September, the D.C. federal district court ruled on Hungary’s motion, producing mixed results for the Herzog heirs. Significantly, it found that Hungary’s status as a sovereign did *not* immunize it from this particular suit in the United States; Hungary’s acts with respect to the artworks, the court ruled, fell within the “expropriation exception” to the Foreign Sovereign Immunity Act, 28 U.S.C. § 1605(a)(3). That is, Hungary’s behavior was actionable in U.S. court because the Complaint made “substantial and non-frivolous claims” that the art had been taken in “violation of international law.” In so finding, the court rejected Hungary’s argument that the taking had been

carried out by Hungary against the Herzog family as “Hungarian citizens” and thus did not violate international law.<sup>6</sup> As the Herzog heirs pointed out, and the court agreed, Hungary did not consider the Herzog family, as Jews, to be Hungarian citizens at the time of the taking. The court also noted that, in any event, German Nazis were involved in the art takings as well, making the looting an “international” event.

The court went on to hold that, contrary to Hungary’s assertion, the 1973 Agreement between Hungary and the United States had not settled the matter. For one thing, it did not cover claims of individuals—such as the Herzog heirs’ Italian predecessors—who were not U.S. citizens. For another, the 1973 Agreement only purported to settle claims arising between 1952 and 1973 (essentially, Communist-era nationalizations), whereas the taking at issue here occurred during the Holocaust. The court also rejected Hungary’s claim that the compensation that Erzsébet had received in 1959 from the frozen Hungarian assets at least partially precluded the new U.S. claims, noting that the 1959 award explicitly allowed her to seek additional recovery, including restitution, from Hungary.

The court further upheld the Herzog heirs’ “bailment” theory of the case—that Hungary held the works as “bailees,” and rejected Hungary’s “*forum non conveniens*” argument that U.S. courts are too impractical a location. It also found that the allegations in the Complaint supported the argument that the statute of limitations had been “equitably

6 The court pointed out that “it is well-settled that a state’s taking of the property of its own citizens, no matter how egregious, does not constitute an international law violation.”



**FIGURE 4. LUCAS CRANACH THE ELDER.** *The Annunciation to Saint Joachim.* Oil on panel, 61 x 51 cm. Museum of Fine Arts, Budapest. A district court in Washington, D.C. has ruled that the painting cannot be part of the ongoing Herzog claim in the U.S.

tolled”—that is, the clock stopped running—during the Communist era as well as during the pendency of the Hungarian litigation, a ruling in stark contrast to another recent statute of limitations ruling, in New York, regarding the claim of the family of the artist George Grosz to recover works in the collection of the Museum of Modern Art. In terms of the Act of State Doctrine—which “precludes the courts of this country from inquiring into the validity of public acts of a recognized foreign sovereign power committed within its territory”—the court noted that when the alleged “sovereign” is “Nazi Germany” and its allies, “courts have consistently held that the act of state doctrine does not apply to the Nazi taking of Jewish property during the Holocaust.” Moreover, as an issue in this case is whether a bailment was created between Hungary and the Herzog heirs, and that is a “purely commercial” interaction as opposed to a sovereign act, the Act of State



**FIGURE 5. ALONSO CANO.** *Infante Don Baltasar Carlos.* Oil on canvas, 144 x 109 cm. Museum of Fine Arts, Budapest. A district court in Washington, D.C. has ruled that the painting cannot be part of the ongoing Herzog claim in the U.S.

Doctrine, the court said, is irrelevant. Finally, the court rejected Hungary’s theory that plaintiffs’ claims had been settled in full by the U.S. government pursuant to the 1947 Peace Treaty and the 1973 Agreement.

In spite of the court’s almost uniform rejection of Hungary’s arguments for dismissal, its decision ended on an up-tick for Hungary: it held that the Hungarian court proceeding brought by Martha Nierenberg in 1999 and decided in 2008 had fairly and finally decided the fate of the eleven paintings that were at issue in that case and are still in Hungary, including works by Alonso Cano and Lucas Cranach the Elder (FIGS. 4 & 5). The U.S. courts, therefore, would not allow a second suit to re-litigate their fate. Hungary’s lead attorney, Thaddeus J. Stauber, not surprisingly, took that as a good omen, noting in a press release that: “As the District Court recognized the firmness and legitimacy of the Hungarian courts, the

District Court should likewise have issued a decision that the remaining claims were long ago resolved or should be litigated in Hungary.” And whether the case proceeds in the U.S. or Hungary, he predicted “that the Republic of Hungary’s rightful ownership to the remaining artworks [would] likewise be confirmed.”

### WHAT HAPPENS NEXT

On September 9, Hungary informed the Court of Appeals for the D.C. Circuit of its intention to seek so-called “interlocutory” review of the district court’s decision, meaning that it intends to appeal aspects of the case even before it goes to trial.<sup>7</sup> While Hungary has the automatic right to an interlocutory appeal concerning its sovereign immunity defense, it needs the court’s permission to appeal other issues. On September 26, Hungary sought such permission to immediately appeal the court’s rulings as to (1) choice of forum; (2) the statute of limitations; (3) whether the dispute is a non-justiciable political question; (4) whether the plaintiffs had adequately stated a bailment claim; and (5) whether the case is barred by the Act of State Doctrine. A decision on whether to allow the appeal is not expected before November. In the meantime, the trial court has halted all proceedings.

— SHARON FLESCHER  
AND  
MARY MORABITO ROSEWATER  
IFAR LEGAL ASSOCIATE

<sup>7</sup> See 28 U.S.C. § 1292 (b), which provides for interlocutory appeals in situations that involve “a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.”

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