

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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<b>DAVID L. de CSEPEL, <i>et al.</i></b>	)	
	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
<b>vs.</b>	)	
	)	<b>No. 1:10-cv-01261(ESH)</b>
<b>REPUBLIC OF HUNGARY, <i>et al.</i>,</b>	)	
	)	
	)	
<b>Defendants.</b>	)	
	)	
	)	

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**REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS BY THE 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 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 (collectively “Hungary”), by and through their attorneys, hereby respectfully submit this Reply Brief in support of their Motion to Dismiss the above-captioned action.

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## I. Introduction

As discussed in the Motion to Dismiss, this Court lacks subject matter jurisdiction over this action. Further, even if the Court found that it had jurisdiction to consider Plaintiffs' claims, the Complaint should be dismissed because Plaintiffs' claims are fatally flawed.

Plaintiffs' sole basis for jurisdiction is the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1330 *et seq.* The FSIA provides that a "foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604; *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). The FSIA was adopted "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] . . . ." 28 U.S.C. § 1604; *see also Argentine Republic*, 488 U.S. at 434. Plaintiffs' claims are governed and settled by two international agreements – the Treaty of Peace with Hungary, signed February 10, 1947, 61 Stat. 2109 ("Peace Treaty") and the *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, 24 U.S.T. 522, T.I.A.S. 7569, 938 U.N.T.S. 167 ("1973 Agreement") – that extinguished Plaintiffs' claims and precludes jurisdiction by this Court.

Further, this Court lacks jurisdiction to resolve Plaintiffs' claims, because Plaintiffs cannot demonstrate a taking in violation of international law or a commercial activity sufficient to invoke an exception to the Hungary's presumptive immunity under the FSIA. Moreover, Plaintiffs' claims present non-justiciable political questions that prohibit this Court's review. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964)).

Assuming, for the sake of argument, that the Court can assert jurisdiction over Hungary, the Court should dismiss the Complaint because this Court is an improper forum. Finally, Plaintiffs' Complaint fails because the claims are barred by: (1) the relevant statute of limitations; (2) principles of international comity; and (3) the Act of State Doctrine.

## **II. Treaties And Executive Agreements Resolve Plaintiffs' Claims**

This Court lacks jurisdiction over this action because World War II and Communist-era taken property claims against Hungary and its nationals were settled, discharged, extinguished, and mooted by the Peace Treaty and the 1973 Agreement. Plaintiffs acknowledge the existence of these treaties, but fail to adequately explain why their claims are not disposed of by the treaties' terms.

### **A. The Peace Treaty of 1947 Settled All Claims Relating To Taken Property**

The Peace Treaty states that it undertakes to “*settle* questions still outstanding” between Hungary and the other signatories as a result of World War II.<sup>1</sup> Peace Treaty, intro. (emphasis added). In Article 27 of the Peace Treaty, Hungary is assigned the task of returning taken property or providing “fair compensation.” Peace Treaty, art. 27.1. Specifically, Article 27 provides:

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<sup>1</sup> The Peace Treaty notes that although Hungary “bears her share of responsibility for this war,” Hungary “on December 28, 1944, broke off relations with Germany, declared war on Germany and on January 20, 1945, concluded an Armistice with the Governments of the Union of Soviet Socialist Republics, the United Kingdom and the United States of America, acting on behalf of all the United Nations which were at war with Hungary . . . .” Peace Treaty, intro.

In addition to being signed by the Hungary and United States, the Peace Treaty was also signed by the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, Australia, the Byelorussian Soviet Socialist Republic, Canada, Czechoslovakia, India, New Zealand, the Ukrainian Soviet Socialist Republic, the Union of South Africa, and the People's Federal Republic of Yugoslavia. *See id.* As a result, adjudication of the claims in this case would not only require this Court to pass judgment on the sufficiency of an agreement entered into by the United States Government, but one entered into by a large number of sovereign nations referenced in the Peace Treaty as the “United Nations.”

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.

Peace Treaty, art. 27.1. Plaintiffs do not dispute that Article 27 addresses property taking and expropriation claims, such as those asserted here by the Plaintiffs. Instead, Plaintiffs assert that Hungary's efforts to satisfy its obligations under Article 27 have been inadequate. This assertion does not give Plaintiffs a viable cause of action; nor does it provide this Court with jurisdiction to hear Plaintiffs' claims.

Since transitioning into a Western-style parliamentary democracy in 1989, Hungary has enacted significant legislation to address wartime, post-war, and Communist-era compensation. As discussed in Hungary's prior brief, in 1991 Hungary passed a general compensation law covering losses and damages caused by the government. (Motion to Dismiss, Bánki Declaration, Exh. F.) A subsequent compensation law – focusing on Holocaust era claims – was passed in 1992.<sup>2</sup> (Mot., Bánki Decl. , Exh. G.) Further, in 1997, Hungary established the Magyarországi Zsidó Örökség Közalapítvány (Hungarian Jewish Heritage Fund) which had an initial endowment of: (1) real property valued at HUF 1,271,800,000; (2) museum materials valued at HUF 12,400,000; and (3) notes in the amount of HUF 4,000,000,000. (Reply Bánki Declaration, Exhs. A, B<sup>3</sup> (attached hereto as Exhibit 1); *see also* Opp., Lattmann Decl. ¶ 24.)

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<sup>2</sup> In the early 1990s, several members of the Herzog family, including Plaintiff Angela Maria Herzog, Plaintiff Julia Alice Herzog, John de Csepel (Plaintiff David de Csepel's father), and Ms. Nierenberg applied for, and received, compensation for the nationalization of flats, arable land, factories, and business companies.

<sup>3</sup> Pursuant to Rule 201(b)(2) of the Federal Rules of Evidence, Hungary requests that the Court take judicial notice of Exhibits A-F, attached to the Declaration of Orsolya Bánki.

In 2007, prior to the filing of this lawsuit, the Hungarian government formed an Inter-Ministerial Committee to resolve outstanding Holocaust reparation claims and to bolster the Hungarian Jewish Heritage Fund. (Reply Bánki Decl., Exh. C.) Most recently, Government Decree 1024/2011 transferred the tasks of the Inter-Ministerial Committee to the Secretary of State of the Ministry of Public Administration and Justice, as of February 12, 2011. (Reply Bánki Decl., Exh. D.) Hungary's efforts to comply with Article 27 are, however, irrelevant. By its own terms the Peace Treaty settles all questions "still outstanding" in 1947.

Moreover, Plaintiffs do not have standing to challenge the terms, conditions, or validity of the Peace Treaty. *See United States ex rel. Saroop v. Garcia*, 109 F.3d 165, 168 (3d Cir. 1997) ("Because treaties are agreements between nations, individuals ordinarily may not challenge treaty interpretations in the absence of an express provision within the treaty or an action brought by a signatory nation."); *Matta-Ballesteros v. Henman*, 896 F.2d 255, 256 (7th Cir. 1990) ("It is well established that individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved."); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir. 1975). Further, the Peace Treaty itself provides a mechanism for resolving "any dispute concerning the interpretation or execution of the Treaty, which is not settled by direct diplomatic negotiations . . . ." Peace Treaty, art. 40.1. Such challenges or disputes must be resolved by a three-nation committee. Peace Treaty, art. 40.1. The Peace Treaty does not provide a private right of action for an individual.

**B. The 1973 Agreement Settled Plaintiffs' Claims And Any Obligation Arising Under Article 27 Of The Peace Treaty**

As discussed in its initial motion, in exchange for a lump sum payment from Hungary, the United States and Hungary signed the 1973 Agreement which "settled and discharged" all claims against Hungary and its nationals for the taking of property prior to March 1973 for the

purpose of “*effecting a settlement of all outstanding claims* and advancing economic relations between the two Governments,” including all obligations arising out of Article 27. 1973 Agreement, intro. (emphasis added).

By its own terms, the expansive language of the 1973 Agreement settled *all claims* “of the Government and nationals of the United States against the Government and nationals of” Hungary relating to: (1) “property, rights and interests affected by Hungarian measures of nationalization, compulsory liquidation, expropriation or other taking on or before” March 1973; (2) Hungary’s obligations “under the Articles 26 and 27” of the Peace Treaty; and (3) “Hungarian property lost as a result of World War II.” 1973 Agreement, arts. 2(1), 2(2), 6(2)(iii). Such claims were discharged “whether or not they have been [previously] brought to the attention of” the parties. 1973 Agreement, art. 6(1).

Plaintiffs concede that any claims against Hungary that relate to a taking between June 23, 1952 (the date on which Elizabeth Weiss de Csepel became a U.S. citizen) and March 6, 1973, the date the 1973 Agreement was signed, are barred by the 1973 Agreement. Plaintiffs now assert, however, that any taking that pre-dated June 23, 1952, does not bar their claims. (Opp. at 42-46.) In other words, Plaintiffs contend that the 1973 Agreement only extinguishes claims of individuals who were U.S. nationals both at the time of the alleged taking *and* at the time the 1973 Agreement was signed. Plaintiffs’ interpretation is not supported by the plain language of the 1973 Agreement – particularly in light of its direct reference to Article 27 of the Peace Treaty.

Article 3 of the 1973 Agreement defines the term “nationals of the United States” (e.g., persons whose claims are settled) to include any citizen of the U.S. or anyone who owes permanent allegiance to the United States. 1973 Agreement, art. 3. The term does not require

that the individual be a U.S. citizen both at the time of the alleged taking and at the time the agreement was signed. This lack of any temporal modifier is in stark contrast to other similar agreements entered into by Hungary. Take, for example, the *Agreement Between the Government of the Hungarian People's Republic and the Government of the United Kingdom of Great Britain and Northern Ireland Relating to the Settlement of Financial Matters* (1956) (“UK Agreement”) (Mot., Bánki Decl., Exh. K). As described in the Motion to Dismiss, the UK Agreement settled, for a lump sum, “all obligations of the Hungarian Government . . . arising out of the Article 26” of the Peace Treaty and “all claims (whether presented or not at the date of signature of the present Agreement” regarding property of British nationals “affected directly or indirectly . . . by Hungarian measures of nationalization, expropriation, State administration and other similar measures . . .”). Unlike the 1973 Agreement, the UK Agreement states clearly that it resolves the claims of individuals who were “citizens of the United Kingdom and colonies” both on June 27, 1956, the day the UK Agreement was signed, *and* on the date that the claim arose. *See* UK Agreement, art. 3. This agreement was signed nearly seventeen years before the 1973 Agreement was signed.<sup>4</sup>

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<sup>4</sup> Hungary signed a similar agreement with Canada (*Agreement Between the Government of the Hungarian People's Republic and the Government of Canada Relating to the Settlement of Financial Matter* (1970) (“Canadian Agreement”) in which, for a lump sum, the parties agreed to settle property claims of Canadian citizens relating to the nationalization, expropriation, or “obligations arising out of Articles 24 and 26 of the Treaty of Peace with Hungary.” (Reply Bánki Decl., Exh. E.) Unlike the 1973 Agreement, the Canadian Agreement defines “Canadian citizens” as individuals who were (1) citizens of Canada on June 1, 1970, the date the agreement was signed, *and* (2) Canadian citizens (or their predecessors were Canadian citizens) at the time of their claims arose. This agreement was signed nearly three years before the 1973 Agreement was signed.

On April 26, 1973, the Republics of Hungary and Italy signed the *Agreement Between the Hungarian People's Republic and the Italian Republic Concerning the Settlement of Pending Financial and Patrimonial Questions* (1973) (“Italian Agreement”) (Mot., Bánki Decl., Exh. J) which, in general, mirrors both the purpose and language of the 1973 Agreement. The Italian Agreement states that

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It is a well-settled principle of contract law, that the plain and unambiguous meaning of an instrument is controlling, and the Court must determine the intentions of the parties from the language used by the parties to express their agreement. *See United States v. Baroid Corp.*, 346 F. Supp. 2d 138, 142-43 (D.D.C. 2004); *Lucas v. U.S. Army Corps of Eng'rs*, 789 F. Supp. 14, 16 (D.D.C. 1992) (“Intent is construed by an objective standard and evidenced from the words of the contract itself.”). The 1973 Agreement, unlike the UK Agreement, Canadian Agreement, or the Italian Agreement, *does not* include the clear provision that only claims of U.S. nationals who were citizens at the time of the alleged taking are covered and extinguished by the agreement. Because the text of the 1973 Agreement is clear and unambiguous – it applies to and settles *all claims* brought by U.S. nationals or arising under Article 27 – the Court should reject Plaintiffs’ assertion that the 1973 Agreement does not settle and extinguish Plaintiffs’ claims.<sup>5</sup>

Further, if the 1973 Agreement is read to apply only to individuals who were U.S. citizens both at the time the claim arose and at the time the 1973 Agreement was signed, a

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For purposes of this Agreement, Italian property, rights, and interests are such property, rights, and interests which – at the time of the entry into force of the Hungarian measures mentioned in Article I/a of this Agreement [nationalization, expropriation, compulsory liquidation, or by other similar measures] – belong, directly or indirectly, totally or partially, to the Italian State, to physical persons who were Italian citizens, or to juridical person, which had residence in Italy, provided that they still meet the same requirements at the time of the signature of this Agreement.

Italian Agreement, art. II. Thus, the Italian Agreement, which was signed approximately six weeks after the 1973 Agreement was signed, explicitly states that the Italian Agreement applies only to individuals who were Italian citizens both at the time of the taking *and* at the time the Italian Agreement was signed.

<sup>5</sup> Finding that the plain language of the 1973 Agreement settled and extinguished claims brought by individuals who were U.S. citizens at the time the agreement was signed, Hungary’s appellate courts rejected Martha Nierenberg’s claims. (Mot., Bánki Decl., Exh. M.)

portion of the 1973 Agreement is rendered null. The 1973 Agreement specifically covered “obligations of the Hungarian People’s Republic under Articles 26 and 27” of the Peace Treaty. 1973 Agreement, art. 2(3). Article 26 of the Peace Treaty is addressed to United Nations nationals, which includes U.S. nationals (and nationals of any of the United Nations) who were also U.S. citizens at the time Hungary signed the Armistice on January 20, 1945. Peace Treaty, art. 26.9.<sup>6</sup> Article 27, however, is addressed to Hungarian citizens and “persons under Hungarian jurisdiction” who have “been the subject of measures of sequestration, confiscation or control on account of the racial origin or religion,” “since September 1, 1939.” Peace Treaty, art. 27.1. Thus, if the 1973 Agreement covers only individuals who were U.S. citizens at the time their claim arose and at the time the agreement was signed, but does not cover claims by individuals who were Hungarian citizens or “persons under Hungarian jurisdiction” on January 20, 1945, and February 10, 1947, the clear statement in the 1973 Agreement that the agreement covers Hungary’s obligations under Article 27 of the Peace Treaty is an affirmative misstatement.

Courts in the District of Columbia recognize that contracts must be read in such a way that all terms and provisions are given meaning. *See Fudali v. Pivotal Corp.*, 623 F. Supp. 2d 11, 15 (D.D.C. 2008); *Air Line Pilots Ass’n Int’l v. Pension Benefit Guar. Corp.*, 193 F. Supp. 2d 209, 218 n.4 (D.D.C. 2002) (noting that contracts are to be read “so that no word, clause,

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<sup>6</sup> The U.K. Agreement, discussed above, states on its face that it settles the claims of individuals who were British nationals both at the time of the taking and at the time the U.K. Agreement was signed in 1956. Unlike the 1973 Agreement which specifically references Article 27 of the Peace Treaty, the U.K. Agreement resolves Hungary’s obligations arising out of Article 26 (no mention of Article 27) which addresses the claims of U.K. nationals (and nationals of any of the United Nations). That the 1973 Agreement references Article 27 while the UK Agreements references Article 26 underscores Hungary’s assertion that the absence of a temporal modifier was intentional. *See also* Canadian Agreement (referencing Article 26 – not Article 27 – in determining scope of settled claims). If the 1973 Agreement only settled claims of individuals who were U.S. nationals at the time of the agreement was signed, the agreement necessarily would have referenced Article 26, as the UK and Canadian Agreements did.

sentence, or phrase is rendered surplusage, superfluous, meaningless or nugatory”) (internal quotation omitted); *1010 Potomac Associates v. Grocery Mfrs of America, Inc.*, 485 A.2d 199, 205 (D.C. 1984) (recognizing that a writing must be interpreted as a whole, giving a reasonable, lawful meaning to all its terms). Because Plaintiffs’ proffered interpretation of the 1973 Agreement requires that reference to Article 27 be improperly excised, the Court should reject Plaintiffs’ assertion that the 1973 Agreement applies only to individuals who were U.S. citizens at the time of the taking at the time the 1973 Agreement was signed.

### **III. Plaintiffs Cannot Demonstrate That An FSIA Exception Applies**

#### **A. Plaintiffs Cannot Demonstrate A Taking In Violation of International Law As Required By Section 1605(a)(3)**

Plaintiffs assert that in 1944, Hungary discovered and took artworks belonging to the Plaintiffs’ family that were hidden in the cellar of one of the family’s factories. (Opp. at 4, 7; Compl. ¶ 1.) Any alleged taking by Hungary, however, did not violate international law because Plaintiffs’ predecessors were Hungarian citizens at the time of the alleged taking.<sup>7</sup>

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<sup>7</sup> Plaintiffs did not assert in their complaint that their predecessors were not Hungarian citizens at the time of the taking in 1944. Citing only to a declaration, that contains no references to any legal authority, Plaintiffs now contend that their predecessors were not Hungarian citizens because anti-Semitic laws introduced between 1939 and 1944 “effectively nullified Hungarian citizenship for all Jews.” (Opp. at 6). Plaintiffs own statements and submissions undercut this assertion. Papers filed by Dr. Varga, Plaintiffs’ declarant and Mr. Nierenberg’s attorney in the Hungarian litigation, made a formal submission to the Hungarian courts that Ms. Nierenberg was, and always had been, a Hungarian citizen. (Reply Bánki Decl., Exh. F (“Martha Nierenberg did not surrender her Hungarian citizenship; she was not deprived of it; she was not dismissed from the ties of Hungarian citizenship.”)) As noted in the Hungarian court decisions attached to Plaintiffs’ opposition, the Hungarian courts recognized this fact that Elizabeth Weiss de Csepel and Martha Nierenberg were Hungarian citizens at the time of the taking. (Opp. at 20-21 (citing Varga Decl., Exh. C)). The court’s decision states:

Since [Martha Nierenberg’s] predecessor [Elizabeth Weiss de Csepel] only gained U.S. citizenship in 1952, and until that date – and according to the available data, thereafter as well – she was a Hungarian citizen, the provisions of Article 26 of the Paris Peace Treaty are not applicable to her and her artworks.

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“International law, as its name suggests, deals with relations between sovereign states, not between states and individuals.” *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1396 (5th Cir. 1985). Case law clearly establishes that a sovereign’s taking of property from its own nationals does not violate international law. *See Republic of Austria v. Altmann*, 541 U.S. 677, 713 (2004) (noting “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”); *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1105 (9th Cir. 1990); *De Sanchez*, 770 F.2d at 1396-98; *Verlinden B.V. v. Central Bank of Nigeria*, 647 F.2d 320, 325 n.16 (2d Cir. 1981); *Dreyfus v. Von Finck*, 534 F.2d 24, 30-31 (2d Cir. 1976) (recognizing that “violations of international law do not occur when the aggrieved parties are nationals of the acting state”); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975); *Jafari v. Islamic Republic of Iran*, 539 F. Supp. 209, 215 (N.D. Ill. 1982); *see also United States v. Belmont*, 301 U.S. 324, 332 (1937) (“What another country has done in the way of taking over property of its nationals . . . is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled.”); *F. Palicio y Compania, S.A. v. Brush*, 256 F. Supp. 481, 487 (S.D.N.Y. 1966).<sup>8</sup>

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(Opp., Varga Decl., Exh. C at 21.) Finally, Plaintiffs do not dispute that Article 26 of the Peace Treaty (which applied to “United Nations Nationals” and not Hungarian nationals) *does not* apply to this action. (Opp. at 8, n.3.) Rather, Article 27, which covered Hungarians, is relevant to Plaintiffs’ claims.

<sup>8</sup> Plaintiffs assert, as an afterthought, that “even if Defendants were correct 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 nonetheless contains 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.” (Opp. at 30.) Whether a sovereign nation can be haled into the court of another sovereign to answer for the unlawful acts of a third party sovereign is the subject of a petition for a writ of certiorari

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The fact that this “taking” claim may involve property taken during the Holocaust does not change this fundamental principle.

At present, the taking by a state of its national’s property does not contravene the international law of minimum human rights. This has been held to be true in much more egregious situations than the present, including cases where the plaintiff had had his property taken pursuant to Nazi racial decrees.

*De Sanchez*, 770 F.2d at 1397 (citing *Dreyfus*, 534 F.2d at 30-31); *Altmann v. Republic of Austria*, 317 F.3d 954, 968 (9th Cir. 2002) (recognizing that for Section 1605(a)(3)’s expropriation exception to apply, “the plaintiff cannot be a citizen of the defendant country at the time of the expropriation, because ‘expropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law,’” and applying expropriation exception because taking victim was a Czech (not Austrian) citizen at the time of the taking) (quoting *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711 (9th Cir. 1992)); *see also Chuidian*, 912 F.2d at 1105. No court has held that a government’s taking of the property of its own nationals could, under *any* circumstance, violate international law.

Because Plaintiffs’ predecessors were Hungarian citizens at the time of the alleged taking, Plaintiffs cannot allege a violation of international law as required by Section 1605(a)(3) of the FSIA.

**B. Plaintiffs Cannot Demonstrate A Commercial Activity As Required By Section 1605(a)(2)**

As noted by Plaintiffs, Section 1605(a)(2) limits sovereign immunity in a case where the action is based on “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

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currently being considered by the U.S. Supreme Court in *Kingdom of Spain, et al. v. Estate of Cassirer* (No. 10-786).

States.” (Compl. ¶ 35.) Plaintiffs *only* basis for invoking Section 1605(a)(2)’s commercial activities exception is premised on a bailment and subsequent conversion theory. (Compl. at 30-31; Opp. at 2.)

For a sovereign’s act to be considered commercial, “it must be the type [of act] that a private person could engage.” *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 149-50 (2d Cir. 1991); *Rush-Presbyterian-St. Luke’s Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 578 (7th Cir. 1989). The “agreement” which is alleged to have created the bailment is not a commercial activity, but an international treaty, the Peace Treaty. Treaty participation is a sovereign, not commercial, activity. *See, e.g., Garcia*, 109 F.3d at 168 (recognizing that “treaties are agreements between nations”); *Miller v. United States*, 67 Fed. Cl. 195, 200 (2005) (“[T]his court lacks jurisdiction over claims, such as plaintiff’s treaty law claim, in which the government acts in its sovereign capacity”). Courts have recognized that the failure to adequately address war reparations as required by a treaty does not constitute a commercial activity. *See Wolf v. Fed. Republic of Germany*, 95 F.3d 536, 543-44 (7th Cir. 1996); *Anderman v. Fed. Republic of Austria*, 256 F. Supp. 2d 1098, 1107-08 (C.D. Cal. 2003); *Sampson v. Fed. Republic of Germany*, 975 F. Supp. 1108, 1116-17 (N.D. Ill. 1997).

Plaintiffs contend that Hungary’s possession of the artwork at issue in this case constitutes a bailment. Specifically, Plaintiffs contend that by signing the Peace Treaty in 1947, Hungary entered into a bailment agreement with Plaintiffs’ predecessors.<sup>9</sup> (Opp. at 9.) As demonstrated below, Plaintiffs’ argument, while creative, is fatally flawed.

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<sup>9</sup> Plaintiffs do not (and cannot) assert that the 1944 taking was a commercial activity, as the taking was a sovereign, not commercial, activity. *See, e.g., Haven v. Rzeczpospolita Polska (Republic of Poland)*, 68 F. Supp. 2d 947 (N.D. Ill 1999) (“It is obvious that government expropriation of private property under governmental authority – whether legitimate or illegitimate – is the classic type of [sovereign activity]”); *Magnus Elecs., Inc. v. Royal Bank of* (Footnote continued on next page)

Federal courts across this country have recognized that “[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.” *Medellin v. Texas*, 552 U.S. 491, 506 n.3 (2008) (quoting 2 Restatement (Third) of Foreign Relations Law of the United States § 907, Comment a, p. 395 (1986)); *see also Mora v. New York*, 524 F.3d 183, 201-02 (2d Cir. 2008) (“Our precedents recognize a presumption against inferring individual rights from treaties.”); *United States v. Li*, 206 F.3d 56, 60 (1st Cir. 2000) (en banc) (“[T]reaties do not generally create rights that are privately enforceable in the federal courts.”); *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992) (“International treaties are not presumed to create rights that are privately enforceable.”); *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (5th Cir. 2001); *United States v. Emuegbunam*, 268 F.3d 377, 389 (6th Cir. 2001); *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980) (“[A] treaty must be interpreted in accord with the rule that treaty violations are normally to be redressed outside the courtroom.”); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979).

That treaties do not create privately enforceable rights is presumed “in the absence of express language to the contrary.” *Medellin*, 552 U.S. at 506 n.3; *see also Mora*, 524 F.3d at 201. If a party to a treaty wishes to create a private right of action, “[courts] ordinarily expect expression of these obligations to be unambiguous.” *Id.* at 202. Neither Article 27 nor any other provision of the Peace Treaty includes *any* language providing for a private cause of action. Consequently, Plaintiffs’ theory that the Peace Treaty purports to provide them with a private cause of action (bailment) against Hungary fails.

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*Canada*, 620 F. Supp. 387, 390 (N.D. Ill. 1985) (recognizing seizure of goods by Argentine Air Force was a sovereign activity rather than a commercial activity).

Even if, however, specific language allowing a private cause of action in connection was grafted onto the Peace Treaty, Plaintiffs' bailment theory fails as a matter of law. "Bailments are defined by state law," *Mac'Avoy v. Smithsonian Inst.*, 757 F. Supp. 60, 65 (D.D.C. 1991), and this Court must look to the law of the District of Columbia to determine whether a bailment exists in this action. In the District of Columbia, a bailment requires "delivery by the bailor and acceptance by the bailee of the subject matter of the bailment." *Dumlao v. Atl. Garage, Inc.*, 259 A.2d 360, 362 (D.C. 1969). Thus, a bailment requires a change of possession and control. *See Black Beret Lounge & Rest. v. Meisnere*, 336 A.2d 532 (D.C. 1975) (recognizing that a bailment requires a delivery by the bailor to the bailee "resulting in a change of possession and control"); *see also McClellan v. Allstate Ins. Co.*, 247 A.2d 58, 62 (D.C. 1968) ("The very nature of the bailment requires that possession and control pass from the bailor to the bailee."). In 1947, when the theoretical bailment was created, the artworks at issue were already in Hungary's possession. Plaintiffs do not dispute this point. Because Hungary possessed the artwork at the time the Peace Treaty was signed, a bailment is a legal impossibility.

Further, even if a bailment was legally possible, Plaintiffs cannot show that Hungary (or any other sovereign) consented to the creation of a bailment. Under the laws of the District of Columbia, a bailment is a form of contract "and, thus, requires a mutual consent of the parties." *Mac'Avoy*, 757 F. Supp. at 65 (recognizing that "[t]here must be a 'meeting of the minds' so to speak" in the creation of the bailment). The rule that the "assent of both parties is necessary before a contract, either express or implied in fact, can come into existence, is applicable to the ordinary case of a contract of bailment." *Id.* (quoting *H.S. Crocker Co. v. McFaddin*, 307 P.2d 429, 432 (Cal. Ct. App. 1957)). The document that Plaintiffs' cite as their only support for their bailment theory is not a contract with or for the Herzog family, but the Peace Treaty which was

signed by more than a dozen sovereigns to establish peace and normalized relations with Hungary.<sup>10</sup> Clearly, there is no express agreement that the artworks will be held for a period of time on behalf of the Plaintiffs or their predecessors.

If there is no language evidencing an express agreement, “an implied in fact bailment can be found only if it appears from the circumstances that such was the intent of the parties.” *Mac’Avoy*, 757 F. Supp. at 65 (quoting *H.S. Crocker Co.*, 307 P.2d at 433). Article 27, to which Plaintiffs point, states that Hungary should restore “property, legal rights, and interests . . . or, if restoration is impossible, that fair compensation shall be made therefor” to Hungarians. Peace Treaty, art. 27.1. Nothing in this language implies that Hungary should retain possession of items unless, and until, the Herzog family (or any other individuals) request them.

If Hungary failed to return property (or provide compensation) as required by Article 27, then Hungary is in breach of its obligations under the Peace Treaty.<sup>11</sup> Nothing in the Peace Treaty itself can be read to convert a failure to adequately comply with Article 27 into a bailment with a private cause of action for individuals. “No bailment can be implied where it appears it was the intention of the parties . . . that the property was to be held by the party in possession in

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<sup>10</sup> The stated purposes of this treaty were to revise Hungary’s border, (Peace Treaty, Part I,) re-establish certain political freedoms and guidelines, (Peace Treaty, Part II,) address military needs and surpluses, (Peace Treaty Part III,) provide a timeline for withdrawal of Allied forces, (Peace Treaty Part IV,) calculate reparations and restitution for certain sovereigns, (Peace Treaty, Part V,) address economic losses, (Peace Treaty, Part VI,) remove navigation restrictions to the Danube River, (Peace Treaty, Part VII,), and provide a mechanism for resolving disputes relating to the Peace Treaty, (Peace Treaty, Part VIII).

<sup>11</sup> Discussed below, Article 40 contains specific directions for sovereigns to resolve any disputes regarding Article 27. Such a dispute resolution procedures can only be employed by sovereigns. Peace Treaty, art. 40.

some capacity other than as bailee.” Because the Peace Treaty does not provide that Hungary possess property as a bailee, no bailment can be implied from the Peace Treaty.<sup>12</sup>

Unable to bring a viable claim in connection with any commercial activity, Plaintiffs cannot invoke 28 U.S.C. § 1605(a)(2) and, consequently, this Court lacks jurisdiction to adjudicate this action.

#### **IV. Plaintiffs’ Complaint Does Not State A Viable Cause Action**

Plaintiffs complaint contains six enumerated causes of action: (1) bailment; (2) conversion; (3) constructive trust; (4) accounting; (5) declaratory relief; (6) restitution based on unjust enrichment. (Compl. at 30-34.) Plaintiffs’ bailment claim, discussed above, fails because the Peace Treaty does not create a cause of action and Plaintiffs cannot satisfy the elements of a

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<sup>12</sup> Plaintiffs contend that their complaint alleges a “a separate, substantial and non-frivolous ‘taking’ of certain of Plaintiffs’ property in 2008 when Defendants repudiated Martha Nierenberg’s demand for a dissolution of the bailments that had come into effect after World War II as a result of the Peace Treaty and otherwise.” (Opp. at 30, n.15.) Plaintiffs’ argument is specious and is offered as an attempt to avoid the District’s three-year statute of limitations. There was no repudiation in 2008. Plaintiffs’ purported bailment was created in 1947 and repudiated in 1997 or October 1999, at the latest, when, according to Plaintiffs, “after months of silence from the government,” it was “apparent that Hungary had no genuine intention of returning the art.” (Compl. ¶ 79.)

Plaintiffs’ reliance on *Agudas Chasidei Chabad of United States v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008), is misplaced. *Chabad* involved multiple takings at different times. Relevant to Plaintiffs’ argument, the U.S. court found that there was a post-war taking when Russia refused to recognize a Russian Executive Order that mandated the return of the property and instead attempted to legislate a reversal of the order. *See Chabad*, 528 F.3d at 945-46.

In this action, the Hungarian appellate courts reversed a finding by the lower Hungarian court that Ms. Nierenberg was the owner of certain artworks because the Hungarian court had failed to properly apply certain legal theories. As is evident from a review of the court decisions attached to the briefs filed both by Plaintiffs and Hungary, the Hungarian courts openly and thoroughly examined Ms. Nierenberg’s claims and the legal theories put forth by both parties. Unlike the *Chabad* case, the Hungarian government is not refusing to recognize or enforce a decision issued by another branch of government. Hungary is no longer a Communist country and, unlike Russia, Hungarian courts do not bow to another branch of government. Plaintiffs are unhappy that Hungary’s appellate courts disagreed with certain aspects of the lower court’s decision – that does not constitute a new repudiation.

bailment. Plaintiffs' conversion claim is predicated on an alleged bailment. (Compl. ¶ 107 (asserting that by refusing to return the Herzog collection to the Herzog heirs "pursuant to the bailment relationship among the parties, Defendants knowingly converted the Herzog Collection")). Because Plaintiffs cannot state a claim for bailment, they cannot state a claim for conversion.

Plaintiffs' remaining claims: (1) constructive trust; (2) accounting; (3) declaratory relief; and (4) restitution, fail because they are not independent causes of action. A constructive trust is a remedy, not a cause of action. *See Macharia v. United States*, 238 F. Supp. 2d 13, 31 (D.D.C. 2002) (dismissing claim because "a constructive trust is not an independent cause of action"); *see United States v. BCCI Holdings (Lux.), S.A.*, 46 F.3d 1185, 1190 (D.C. Cir. 1995) ("A constructive trust is a remedy that a court devises after litigation."); *Harrington v. Emmerman*, 186 F.2d 757, 761 (D.C. Cir. 1950); *Ross v. Hacienda Co-op., Inc.*, 686 A.2d 186, 191 (D.C. 1996) ("The imposition of a constructive trust is an equitable remedy.").

A request for an accounting is a remedy, not a cause of action. *See Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 (1962) (noting that a suit for an accounting is equitable in nature); *see also American Universal Ins. Co. v. Pugh*, 821 F.2d 1352, 1356 (9th Cir. 1987) ("An accounting is an equitable remedy.") (citation omitted); *First Commodity Traders, Inc. v. Heinold Commodities, Inc.*, 766 F.2d 1007, 1011 (7th Cir. 1985).

A claim for declaratory relief is a remedy, not a cause of action. *See First Fed. Sav. & Loan Ass'n v. Anderson*, 681 F.2d 528, 533 (8th Cir. 1982) ("It is well settled that the declaratory judgment statute is strictly remedial in nature and does not provide a separate basis for subject matter jurisdiction."); *see also Smith v. World Sav. & Loan Ass'n*, No. 2:10-CV-02855 JAM-JFM, 2011 U.S. Dist. LEXIS 11576, at \*8 (E.D. Cal. Jan. 28, 2011); *Warren v. Sierra Pac.*

*Mortg. Servs. FN*, No. CV-10-02095-PHX-NVW, 2011 U.S. Dist. LEXIS 44407, at \*10 (D. Ariz. Apr. 22, 2011).

A claim for restitution is a remedy, not a cause of action.<sup>13</sup> See *Wesley Theol. Seminary of the United Methodist Church v. United States Gypsum Co.*, No. 85-1606, 1986 U.S. Dist. LEXIS 22246, \*\*10-11 (D.D.C. July 25, 1986) (dismissing restitution claim because it is not an independent cause of action, but “is merely a type of remedy that an injured plaintiff may request under certain circumstances”); see also *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1017 (N.D. Ill. 2000). Because Plaintiffs’ complaint does not state a viable cause of action, this Court should grant Hungary’s motion to dismiss.<sup>14</sup>

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<sup>13</sup> Plaintiffs’ restitution claim is based on a theory of unjust enrichment. Even if the claim could be styled as a cause of action, rather than a remedy, the claim fails. The District of Columbia recognizes a cause of action for unjust enrichment as an implied contract claim where there is no express contract between the parties but contractual obligations are implied in law. See *Plesha v. Ferguson*, 725 F. Supp. 2d 106, 111-112 (D.D.C. 2010); *Schiff v. AARP*, 697 A.2d 1193, 1194 (D.C. 1997). “[U]njust enrichment provides a party with a remedy ‘to unwind entanglements’ that may have arisen from a failed agreement . . . .” *Vila v. Inter-American Inv., Corp.*, 570 F.3d 274, 280 (D.C. Cir. 2009) (citation omitted). A claim for unjust enrichment requires proof that “(1) the plaintiff conferred a benefit on the defendant; (2) the defendant retain[ed] the benefit; and (3) under the circumstances, the defendant’s retention of the benefit is unjust.” *Vila v. Inter-American Inv., Corp.*, 536 F. Supp. 2d 41, 51 (D.D.C. 2008) (quoting *New World Commc’ns, Inc. v. Thompsen*, 878 A.2d 1218, 1223 (D.C. 2005)).

Plaintiffs are unable to plead the elements necessary to demonstrate a cause of action for unjust enrichment. As discussed above, Plaintiffs cannot show that they have an implied contract with Hungary. Because there was no agreement between Plaintiffs’ predecessors and Hungary regarding the artwork, there are no “entanglements” to “unwind.” *Vila*, 570 F.3d at 280. Further, Plaintiffs did not “confer a benefit” on Hungary. *Vila*, 536 F. Supp. 2d at 51; see also *Amtrak v. Veolia Transp. Servs.*, No. 1:07-1263 (RBW), 2011 U.S. Dist. LEXIS 49215, \*98-99 (D.D.C. May 9, 2011) (finding no claim for unjust enrichment where plaintiff did not allege that it conferred a benefit on defendant, but instead asserted that the benefit was stolen by defendant). Rather, Plaintiffs allege that Hungary stole the artwork (the 1944 taking) or that a bailment was created by the Peace Treaty (bailment). Because the artworks were not the subject of an agreement between Plaintiffs’ predecessors and Hungary, Plaintiffs cannot state a claim for unjust enrichment.

<sup>14</sup> Plaintiffs reference the Washington Principles and asserts that Hungary has not complied with the actions recommended by the statement. Hungary notes, however, that the Washington  
(Footnote continued on next page)

## V. Plaintiffs' Claims Involve Non-Justiciable Political Questions

From its earliest days, the federal judiciary has held “political questions” to be committed by the Constitution to another branch of government, and therefore not justiciable by any court. *Ware v. Hylton*, 3 U.S. 199, 259-61 (1796); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918); *Baker v. Carr*, 369 U.S. 186, 210-11 (1962); *Kelberine v. Societe Internationale, Etc.*, 363 F.2d 989, 995 (D.C. Cir. 1966). This doctrine is firmly rooted in separation of powers principles and obliges a court to decline to adjudicate claims that call on the court to infringe on or disregard the constitutionally-granted discretion of the political branches. *See Baker*, 369 U.S. at 210. It follows that this Court need not determine whether it has jurisdiction before it dismisses this action on political question grounds. *See Oryszak v. Sullivan*, 576 F.3d 522, 527 (D.C. Cir. 2009); *Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005).

In *Baker*, the Supreme Court identified six factors, the presence of any one of which renders a dispute a non-justiciable political question. Under *Baker*, courts must consider whether the controversy: (1) is committed, under the U.S. Constitution, to the Executive or Legislature for resolution; *or* (2) does not allow for judicially discoverable and manageable standards for resolution; *or* (3) cannot be decided without an initial policy determination involving non-judicial discretion; *or* (4) cannot be decided without expressing a lack of respect to the Executive

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*(Footnote continued from previous page)*

Principles are a “non-binding,” *Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 578 n.2 (5th Cir. 2010), and do not provide Plaintiffs with a cause of action. *See also Museum of Fine Arts v. Seger-Thomschitz*, 623 F.3d 1, 13 (1st Cir. 2010); U.S. Dep’t of State, The Washington Conference on Holocaust Era Assets, Washington Conference Principles on Nazi-Confiscated Art (Dec. 3, 1998), Appendix G, <http://www.state.gov/www/regions/eur/holocaust/heacappen.pdf> (noting “that among participating nations there are differing legal systems and that countries act within the context of their own laws”).

or Legislature; *or* (5) presents a special need to adhere to a political decision already made; *or* (6) would result in potential embarrassment if there were varying pronouncements by different branches of government. *See Baker*, 369 U.S. at 210. Again, a case is a non-justiciable political question if any one of the six factors is “inextricable from the case.” *Alperin v. Vatican Bank*, 410 F.3d 532, 689 (9th Cir. 2005) (citing *Baker*, 369 U.S. at 217).

Plaintiffs assert that Hungary has shown “no valid ground for applying the political question doctrine here . . . .” (Opp. at 65-66.) Plaintiffs are mistaken as their claims implicate several *Baker* factors.<sup>15</sup>

#### **A. Plaintiffs’ Claims Conclusively Are Committed To The Executive Branch**

The first political question consideration (commitment under the U.S. Constitution to the Executive) is present here because the resolution of Holocaust-related claims directly implicate the conduct of foreign policy, which is committed to the Executive branch. Indeed, the Supreme Court held that resolution of Holocaust-era compensation claims are a matter:

well within the Executive’s responsibility for foreign affairs. Since claims remaining in the aftermath of hostilities may be ‘sources of friction’ acting as an ‘impediment to resumption of friendly relations’ between the countries involved, there is a ‘longstanding practice’ of the national Executive to settle them in discharging its responsibilities to maintain the Nation’s relationships with other countries. The issue of restitution for [Holocaust era] crimes has in fact been addressed in Executive Branch diplomacy and formalized in treaties and

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<sup>15</sup> The cases Plaintiffs cite in support of their argument that these types of claims are not the exclusive province of the Executive Branch are not persuasive. In *Alperin*, the defendant was not a sovereign entity with whom the United States had undertaken negotiations to resolve World War II-related claims like occurred with Hungary. Therefore, the circumstances that are present in those cases that have been dismissed on political question grounds relating to World War II and the Holocaust – negotiation and agreements by the Executive Branch discussing war reparations and restitution – was not present in that case. Likewise, Plaintiffs’ reliance on *Rosner v. United States*, 231 F. Supp. 2d 1202 (S.D. Fla. 2002) (Opp. at 65) is misplaced because that case involved claims against the U.S. for its mishandling and disposition of property expropriated from Hungarian Jews that was captured by U.S. forces – foreign policy was not directly implicated as no foreign sovereign was a defendant.

Executive agreements over the last half century, and although resolution of private claims was postponed by the Cold War, securing private interests is an express object of diplomacy today. . . .

*American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420-21 (2003) (internal citations omitted; “the consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds [to resolve Holocaust claims] in preference to litigation or coercive sanctions”); *see also Weiss v. Assicurazioni Generali, S.p.A. (In re Assicurazioni Generali, S.p.A.)*, 592 F.3d 113, 118 (2d Cir. 2010); *Hearings on H.R. 293 before the Subcommittee of Government Efficiency, Financial Management and Intergovernmental Relations of the House Committee on Government Reform, 107th Cong., 2d Sess., 24* (2002) (statement of Ambassador Randolph Bell that it is the “policy of the U.S. Government to resolve matters of Holocaust-era restitution and compensation through dialogue, negotiation and cooperation”).

#### **1. The 1947 Peace Treaty And 1973 Agreement Express U.S. Foreign Policy**

The foreign policy considerations attendant to resolving Holocaust and Communist-era claims against Hungary and its nationals were made explicit in treaties between the U.S. and Hungary, both of which address compensation for taken property. The Peace Treaty, (discussed above in section II.A), formally ended World War II hostilities between the signatories, expressly states that the U.S. and the United Nations sought to “*settle questions still outstanding as a result of*” World War II in order to “form the basis of friendly relations between them . . . .” Peace Treaty, intro. (emphasis added). As part of this foreign policy effort to restore “friendly relations,” the U.S. and its allies assigned to Hungary, itself, the task of returning property taken from Jews and others, or providing “fair compensation” therefor. Peace Treaty, art. 27.

Likewise, the U.S. and Hungary subsequently entered into the 1973 Agreement which released Hungary and its nationals from certain claims by U.S. nationals concerning the taking of

property prior to March 1973 (explicitly including claims concerning Hungary’s obligations under Article 27 of the Peace Treaty) – because the U.S. and Hungary were “desirous of effecting a settlement of all outstanding claims and *advancing economic relations between the two Governments . . .*” 1973 Agreement, intro. (emphasis added). Thus, Plaintiffs’ claims clearly involve review of foreign policy considerations that are the exclusive provenance of the Executive.

## **2. The Relevant Treaties Commit Matters To The Executive**

The Peace Treaty and the 1973 Agreement also firmly committed resolution of World War II and Communist-era taking claims against Hungary and its nationals to the U.S. Executive and created Executive branch mechanisms for resolving compensation claims. Article 40 of the Peace Treaty explicitly requires that any dispute regarding implementation of Hungary’s treaty obligations (which would include Hungary’s obligations under Article 27 to return taken property or pay compensation therefor) be resolved by Executive branch negotiation via the diplomatic missions of the affected nations – not litigation in U.S. federal courts. Thus, while Plaintiffs may allege that Hungary did not fulfill its compensation obligations under the 1947 Treaty, the treaty presupposes that litigation in U.S. courts is not the appropriate manner for resolving such claims, and expressly provides for non-judicial dispute resolution through Executive, intergovernmental negotiation.

In the 1973 Agreement, Congress codified the Executive branch’s dominion over Hungarian Holocaust reparations claims by having the U.S. Foreign Claims Settlement Commission (“FCSC”) administer the claims process and distribute payments (22 U.S.C. § 1641

*et seq.*), without allowing for judicial oversight.<sup>16</sup> *See* 22 U.S.C. § 1641m (stating that the FCSC’s decisions are not reviewable by any court, and leaving Hungary out of the claims analysis and decision-making process.) Further, Article 6(3) of the 1973 Agreement provides that, if Hungary is presented with a covered claim by a U.S. national, Hungary is to refer such claims to the U.S. government. *See* 1973 Agreement, art. 6(3).

Thus, the historical record is clear that the United States has made the affirmative decision to specifically address claims against Hungary arising out of the Holocaust and Communism through international negotiation.<sup>17</sup>

### **3. Consistent Executive Practice Of Handling Hungarian Claims Non-Judicially**

Claims for compensation from Hungary for World War II-era injuries have been handled by the political branches of government since the inception of hostilities. Congress has worked with the Executive since 1941 to marshal and manage Hungarian assets to be used to satisfy claims, to determine whether Hungary has provided Holocaust victims with sufficient compensation, and to provide claimants with appropriate relief.

In 1941, President Franklin D. Roosevelt froze Hungarian property present in the United States pursuant to Executive Order 8711, as authorized by Congress under the Trading with the Enemy Act. Exec. Order No. 8711, 6 FR 1443 (March 13, 1941) (amending Exec. Order No.

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<sup>16</sup> Plaintiffs’ predecessor, Ms. Weiss de Csepel filed for and received compensation under this program. (Mot. at 8-10.)

<sup>17</sup> Constitutional separation of powers principles and the political question doctrine dictate that a core foreign policy issue such as post-war reparations is the province of the political branches of government. *See Baker*, 369 U.S. at 211-13; *Oetjen*, 246 U.S. at 302 (holding that conduct of foreign affairs “is committed by the Constitution to the Executive and Legislative – ‘the political’ – Departments of the Government”); *United States v. Martinez*, 904 F.2d 601, 602 (11th Cir. 1990). Case law demonstrates clearly that one area of foreign affairs that is particularly within the realm of presidential authority is the settlement and compromise of foreign claims. *See Dames & Moore v. Regan*, 453 U.S. 654, 680-83 (1981).

8389, 5 FR 1400 (April 10, 1940)). The political branches later negotiated and ratified the terms of the Peace Treaty which, as noted above, required Hungary to compensate those whose property was taken during World War II. Peace Treaty, arts. 26, 27. To address concerns about the adequacy of compensation, Congress amended the International Claims Settlement Act of 1949 to distribute previously frozen Hungarian assets to persons claiming property damage and expropriation. *See* Pub. L. No. 84-285, §§ 202, 303 (codified at 22 U.S.C. §§ 1631, 1641); S. Rep. No. 84-1050, *as reprinted in* 1955 U.S.C.C.A.N. 2745, 2745-46, 2749. Congress outlined the means by which persons claiming Holocaust and Communist-era injury could seek a portion of the frozen Hungarian assets through the FCSC – while insulating the FCSC’s findings and decisions from judicial review. The political branches continued to vest unto themselves resolution of World War II-era claims when, as described above, the Executive brokered the 1973 Agreement, whereby Hungary provided additional funds in satisfaction of taking claims. 1973 Agreement, art.1. Thus, resolution of Plaintiffs’ World War II and Communist-era taking claim fall squarely within the political branch’s exclusive prerogatives.

**B. Resolution Of Plaintiffs’ Claims Would Require The Court To Pass Judgment On The Political Decisions Of The United States, United Nations, And Hungary**

Resolution of Plaintiffs’ claims would require this Court to evaluate the U.S. foreign policy as well as the sufficiency of the compensation schemes put in place by the United States, other United Nations, and Hungary. The Peace Treaty was specifically designed to address questions of compensation following World War II, including restitution of property taken during World War II. The Executive Branch of the United States, along with the United Nations, made the policy decision to make Hungary responsible for those determinations.

Moreover, as discussed in its moving brief – and acknowledged by Plaintiffs – Hungary has enacted a number of compensation programs in an effort to comply with the obligations it

undertook in the Peace Treaty.<sup>18</sup> (Mot. at 15-17.) By considering Plaintiffs' claims, the Court would implicitly be finding that it did not agree with the Executive Branch and the United Nations' decision to make Hungary responsible for such claims and that the compensation schemes developed by Hungary are insufficient. Therefore, not only would resolution of the Plaintiffs' claims infringe on the United States and United Nations' foreign policy interests and decisions, but it would infringe upon the interests of the Hungarian Government – and second guess Hungary's decisions – in determining how to carry out its responsibilities under the Peace Treaty. Additionally, it would require this Court to second guess the Hungarian Government's many actions to fulfill its obligations under the Peace Treaty.

To the extent the Hungarian Government is deemed to have failed to live up to its obligations under Article 27 of the Peace Treaty, that is an issue to be negotiated and resolved through diplomatic negotiations between the United States Executive Branch, the United Nations, and the Hungarian Government.<sup>19</sup> Peace Treaty, art. 40. Issues surrounding Hungary's responsibility for actions taken against Hungarian Jews during the Holocaust have already been the subject of negotiations between Hungary, the United States, and numerous other nations, and Plaintiffs' attempts to have a U.S. court pass judgment on those negotiations is the type of

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<sup>18</sup> In their papers, Plaintiffs concede that Hungary has taken measures to compensate individuals, but assert that these measures were insufficient to adequately compensate Plaintiffs because the 1992 Compensation Act “made no provision for the restitution of identifiable property.” (Opp. at 18 (citing Lattmann Decl. ¶ 29)). Plaintiffs further acknowledge that despite the availability of compensation under Hungary's compensation programs, “[n]one of the Herzog Heirs filed claims for art under the 1991 or 1992 Compensation Acts.” (Opp. at 18.) Thus, this action is an attempt by Plaintiffs to obtain what they consider to be appropriate compensation (e.g. specific restitution of artwork) based on their dissatisfaction with the remedies provided by Hungary itself and as the result of international agreements negotiated between Hungary and numerous other nations, including the United States.

<sup>19</sup> This is precisely what the United States Government did in negotiating the 1973 Agreement with respect to claims by the United States and its citizens.

second guessing about the resolution of World War II claims that numerous courts have previously refused to do. *See Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 285 (D.N.J. 1999) (“One need only consider the damage which would be created if foreign nations negotiating with the United States were confronted with a situation in which a solemn pact reached with the Executive Department and ratified by the Senate could be undone by a court.”).<sup>20</sup>

Thus, the Peace Treaty, the various compensation programs enacted by the Hungarian Government, the 1973 Agreement, and the many other bilateral agreements entered into by Hungary (e.g., the UK Agreement, the Canadian Agreement, etc.) when taken together, establish a comprehensive scheme designed to resolve all World War II and Communist-era compensation claims through government-to-government negotiations, not litigation. These compensation vehicles are the product of governmental negotiations and determinations; under the political question doctrine, they are not a proper subject for second guessing by this Court.

**C. Courts Recognize The Need To Adhere To And Respect Prior Political Determinations**

The fourth, fifth and sixth political question considerations (need to adhere to, and respect, prior political decisions) inextricably are implicated in light of the aforementioned: (i) consistent and longstanding Executive branch foreign policy of resolving World War II-era claims by intergovernmental negotiation and avoiding litigation; and (ii) treaties with Hungary and other political branch action, which expressly address compensation for taken property. For a court to evaluate whether U.S. foreign policy, political branch efforts and/or U.S. treaties

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<sup>20</sup> In addition to second guessing the actions taken by the Hungarian Government, evaluation of Plaintiffs’ claims would also require the Court to second guess the Hungarian court’s decisions evaluating the adequacy of Hungary’s actions.

“made adequate provision for the victims of [Holocaust] oppression and whether the agreements have been adequately implemented” would be to express the ultimate lack of respect for both the Executive branch (which formulated the foreign policy and negotiated the treaties), and the Legislature (which ratified the 1947 Treaty and implemented the 1973 Treaty and other Executive actions). *Burger-Fischer*, 65 F. Supp. 2d at 282, 284; *see also Rozenkier v. A.G. Schering (In re Nazi Era Cases Against German Defendants Litig.)*, No. 04-3934, 2006 U.S. App. LEXIS 19477, at \*12-13 (3d Cir. Aug. 2, 2006) (recognizing that litigation of World War II-era claims would “express a lack of respect for the Executive Branch because of the Executive Branch’s longstanding foreign policy interest that issues relating to World War II and Nazi-era claims be resolved through intergovernmental negotiation”).

Likewise, given the Executive and Legislative branches’ consistent “pronouncements” and efforts over the past sixty-five years in favor of non-litigated resolutions to World War II-era disputes, there is special need for this Court to adhere to prior political decisions and treaties so as not to: (i) completely unsettle a well-settled area of international relations; and/or (ii) treat Plaintiffs differently from prior Holocaust claim litigants.<sup>21</sup>

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<sup>21</sup> Even without direct reference to the six-prong *Baker* test, dismissal on the grounds of political question is compelled by the sheer volume of cases consistently holding that World War II-era claims are non-justiciable controversies conclusively committed to the Executive branch, and best resolved by the political branches of government through diplomatic activities, treaty obligations, and foreign policy. *See e.g., Whiteman v. Republic of Austria*, 431 F. 3d 57, 73-75 (2d Cir. 2005) (dismissing claims on political question grounds, noting that various “presidential administrations, notwithstanding their differences in political affiliation, have committed the United States to a policy of resolving Holocaust-era restitution claims through international agreements rather than litigation”); *Joo*, 413 F.3d at 51-52; *Kelberine*, 363 F.2d at 995; *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d 424, 483, 486, 489 (D.N.J. 1999); *Burger-Fischer*, 65 F. Supp. 2d at 272-85; *Zivkovich v. Vatican Bank*, 242 F. Supp. 2d 659, 665-670 (N.D. Cal. 2002); *Freund v. Republic of France*, 592 F. Supp. 2d 540, 573, 578-79 (S.D.N.Y. 1998); *Alperin*, 242 F. Supp. 2d at 689; *Rozenkier*, 2006 U.S. App. LEXIS 19477, at \*12-13; *accord Garamendi*, 539 U.S. at 420-21; *In re African American Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1054 (N.D. Ill. 2004).

In sum, this action must be dismissed as raising a non-justiciable political question because: (i) Plaintiffs' World War II and Communist-era compensation claims plainly meet numerous prongs of the *Baker* test (when only one prong would suffice); and (ii) there is extensive case law establishing a general U.S. policy to treat Holocaust-era compensation claims as non-justiciable disputes to be resolved by intergovernmental negotiation by the U.S. Executive.

#### **VI. Plaintiffs' Claims Are Barred By The Relevant Statute Of Limitations**

Hungary recognizes that motions to dismiss "based on a limitations defense are disfavored because resolution generally requires the development of a record and the adjudication of factual issues." *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322, 335 (D.D.C. 2007) (citation omitted). Where, as here, however, "the complaint establishes the defense on its face," *id.*, dismissal is appropriate. Thus, taking Plaintiffs' allegations as true, the Complaint should be dismissed.

Plaintiffs do not dispute that the statute of limitations at issue here is the District of Columbia's three-year statute for claims relating to "the recovery of personal property or damages for its unlawful detention." D.C. Code § 12-301(2). The District of Columbia applies the "discovery rule," which provides that the cause of action accrues "when the plaintiff knows or through the exercise of due diligence should have known of the injury." *District of Columbia v. Dunmore*, 662 A.2d 1356, 1359 (D.C. 1995) (quotation omitted); *see also Malewicz*, 517 F. Supp. 2d at 335 (recognizing that where a defendant did not acquire the property lawfully in the first instance, the claim accrues immediately and there is no need for a demand and refusal to trigger the statute of limitations) (citation omitted).

Plaintiffs contend that the artworks were taken from their predecessors in 1944, when the works were discovered in a cellar. (Compl. ¶ 59.) Prior to July 31, 1959, Elizabeth Weiss de Csepel received an award from the FCSC for artworks taken by Hungary. (Mot. at 9.) In making the claim to the FCSC, Ms. Weiss de Csepel recognized (and claimed) that the Hungarian government had unlawfully taken her property.<sup>22</sup> Because Plaintiffs' predecessors had discovered and publically recognized by July 31, 1959, at the latest, that Hungary possessed the "taken" property, the statute of limitations begins to run on that date and expired on July 31, 1962. Applying the three-year statute of limitations, Plaintiffs' claims, brought on July 27, 2010, are untimely.

Plaintiffs contend that prior to the fall of the Communist regime in 1989, it was difficult to learn about the precise location of the artworks. However, in 1989, "the Herzog heirs started making inquiries and learned that many pieces of the Herzog collection were being openly exhibited, hanging on the walls of the Hungarian National Gallery and the Museum of Fine Arts." (Compl. ¶ 77.) Thus, Plaintiffs' predecessors knew the specific location of some (if not all) of the artworks in question in 1989. Plaintiffs' predecessors, however, did not file a claim in the United States, Italy, or anywhere else. Thus, the three-year statute of limitations began to run in 1989 and expired in 1992.

Ms. Weiss de Csepel attempted negotiations with the Hungarian government. (Compl. ¶ 78.) Plaintiffs' predecessors retained counsel in 1991. (Opp., Pasztory Decl. ¶ 5.) Ms. Weiss de

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<sup>22</sup> Plaintiffs now contend that Ms. Weiss de Csepel's FCSC claim was an "error." (Opp. at 21-22.) Whether the artworks were specifically "nationalized" or not is of no import for this analysis – the artworks, as the Complaint is pleaded, were "taken" by Hungary. In filing her claim with the FCSC, Ms. Weiss de Csepel made a claim for property that was taken by Hungary and not returned.

Csepel died in 1992 and Ms. Nierenberg took over her claim. (Compl. ¶¶ 78, 79.) Plaintiffs' predecessors did not file a claim in the United States, Italy or anywhere else.

Clearly, in 1992, at the time of Ms. Weiss de Csepel's death, Plaintiffs' predecessors knew the location of the artworks in question and that Hungary was the entity who had allegedly taken the property. Neither Plaintiffs' nor their predecessors had any communication with or took any action against Hungary between 1992 and 1996. This period also exceeds the three-year statute of limitations provided by D.C. Code § 12-301(2).

In 1996, attorneys retained by Martha Nierenberg, Ms. Weiss de Csepel's daughter, approached the Hungarian government to discuss artworks from the Herzog collection in Hungary's possession. (Opp., Pasztory Decl. ¶ 7.) The last of six meetings was held in May 1997. (Opp., Pasztory Decl. ¶ 7.) In October 1999, "after months of silence," Ms. Nierenberg filed a lawsuit against Hungary and its museums in Hungary. (Mot., Bánki Decl., Exh. L; Opp. at 19.) Plaintiffs Angela Maria Herzog and Julia Alice Herzog (as well as Stephen Gabriel Herzog and Peter Herzog, sons of István Herzog) were defendants in the action. (Mot., Bánki Decl., Exh. M; Opp., Lattmann Decl. ¶ 7). Thus, by 1999, predecessors of *all* of the Herzog children were aware of the lawsuit in Hungary which challenged Hungary's possession of artworks from the Herzog collection. Thus, the statute of limitations began to run in October 1999 and expired in October 2002.

After more than eight years of litigation, the Hungarian court concluded that Hungary was the legal owner of the artworks based on the 1973 Agreement and the legal theory of adverse possession, a legal theory on which World War II property restitution claims have been denied in the United States too. *See Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 579 (5th Cir. 2010) (affirming lower courts finding that claimant's claims were barred by acquisitive prescription

(Louisiana's theory of adverse possession)). Neither Plaintiffs' nor their predecessors filed a lawsuit against Hungary until July 27, 2010, more than ten years after Ms. Nierenberg's complaint was filed, more than thirteen years after Ms. Nierenberg's communications with the Hungarian government ended in May 1997, and more than twenty years after the fall of the Communist regime in 1989.<sup>23</sup> Consequently, Plaintiffs' claims are untimely.<sup>24</sup>

Plaintiffs contend that the Court should toll their claims. (Opp. at 59-61.) As recognized by Plaintiffs, "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 v. Banque Paribas*, 114 F. Supp. 2d 117, 135 (E.D.N.Y. 2000) (emphasis added). Here, the facts as alleged by Plaintiffs make it abundantly clear that they (or their predecessors) were sufficiently familiar with the facts of the alleged taking prior to July 26, 2007, the date three

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<sup>23</sup> The Court must be mindful that Ms. Nierenberg only had standing to assert claims for the one third portion of the estate that she inherited from her mother, Ms. Weiss de Csepel. (In her complaint, Ms. Nierenberg sought return of items inherited by her uncle, Mr. Istvan Herzog. The Hungarian courts found that she did not have standing to assert a claim for these pieces.) Consequently, claims for artworks inherited by Istvan or Andras Herzog have *never* been raised and adjudicated in Hungary, Italy, or anywhere else. Plaintiffs have not exhausted these claims in Hungary and cannot assert that the three-year statute of limitations should be tolled pending any lawsuit or negotiations as there were none.

<sup>24</sup> Plaintiffs contend that the Court should toll the statute of limitations because Ms. Nierenberg was pursuing claims in Hungary. The cases Plaintiffs cite for support, however, are not applicable as they provide that statutes of limitation may be tolled "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass," *Young v. United States*, 535 U.S. 43, 50 (2002), or where a plaintiff elected to first pursue administrative remedies, *see Owens v. Dist. of Columbia*, 631 F. Supp. 2d 48, 57 (D.D.C. 2009) (Huvelle, J.). None of these situations apply here. Rather, Plaintiffs filed the instant lawsuit in the District of Columbia because they were unhappy with the decision rendered by the Hungarian court system. As stated in the initial motion, the Hungarian lawsuit did not toll the District's statute of limitations. *See, e.g., Carter v. Washington Metro. Area Transit Auth.*, 764 F.2d 854, 857 (D.C. Cir. 1985).

years and one day before Plaintiffs file their lawsuit. Thus, Plaintiffs' tolling argument is unavailing.<sup>25</sup>

Casting Plaintiffs' claim as one for bailment does not save it. 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. *See In re McCagg*, 450 A.2d 414, 416 (D.C. 1982).

“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.”

*Malewicz*, 517 F. Supp. 2d at 335 (citation omitted); *see also Kerns v. Ameriprint, Inc.*, 621 A.2d 381, 384 (D.C. 1993) (citation omitted). Plaintiffs do not dispute that a bailment claim is subject to D.C. Code § 12-301(2)'s three year statute of limitation. *See Schupp v. Taendler*, 154 F.2d 849, 850 (D.C. Cir. 1946).

In 1999, Ms. Nierenberg filed a lawsuit against Hungary asserting ownership of certain artworks. According to Ms. Nierenberg's Hungarian attorney, the Hungarian lawsuit was filed after negotiations with Hungary ended in 1997. (Opp., Pasztory Decl. ¶ 10.) Hungary's refusal to hand over the artwork to Ms. Nierenberg in 1997 is the “demand and refusal” that led to the

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<sup>25</sup> Plaintiffs assert that the statute of limitations should be tolled because “Plaintiffs were unable to obtain accurate information as to what had become of their property during the Communist era, (Compl. ¶¶ 75, 93) and could not have pursued a claim in Hungary during that period, (Compl. ¶¶ 76, 93.) Even if the Court tolled the statute of limitation to 1989 when the Communist regime fell, Plaintiffs failed to file suit against Hungary for more than twenty years. To the extent that Ms. Weiss de Csepel and Ms. Nierenberg were in discussions with Hungary that could toll the statute of limitations, those discussions were limited (Ms. Weiss de Csepel 1989-1992; Ms. Nierenberg 1996-1997) and cannot toll the statute of limitations sufficient to make Plaintiffs' claims timely.

1999 lawsuit that Hungary fought and triggered the statute of limitations under Plaintiffs' bailment theory.<sup>26</sup> In their opposition, Plaintiffs acknowledge that, "[i]n October 1999, after months of silence from the government and it being apparent that Hungary had no genuine intention of returning the art, Martha Nierenberg filed a lawsuit in Hungary to recover ten paintings that belonged to her mother, Elizabeth Weiss de Csepel." (Compl. ¶ 79.) Thus, a refusal was clearly recognized by Plaintiffs' predecessor in 1999. Because Plaintiffs filed their lawsuit more than thirteen years after the 1997 refusal and eleven years after the acknowledged 1999 refusal, the bailment claim is untimely.<sup>27</sup>

## VII. The Act Of State Doctrine Bars Plaintiffs' Claims

As Plaintiffs concede, "the act of state doctrine *prohibits* a United States court from 'examining the validity of a taking of property within its own territory by a foreign sovereign government . . . .'" (Opp. at 61 (quoting *Sabbatino*, 376 U.S. at 428) (emphasis added)). The doctrine applies whenever "the relief sought or the defense interposed would [require] a court in the United States to declare invalid the official act of a foreign sovereign," *Kirkpatrick & Co., Inc. v. Env'tl. Tectonics Corp.*, 493 U.S. 400, 405 (1990), and it prevents a court in this country "from deciding a case when the outcome turns upon the legality or illegality (whether as a matter

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<sup>26</sup> Further, even if Hungary had not explicitly refused to return items, Plaintiffs' lawsuit, filed more than sixty years after the creation of alleged bailment, is untimely. *See Hohri v. United States*, 586 F. Supp. 769, 792 (D.D.C. 1984) ("Where no time for demand is specified by contract, demand must be made within a reasonable time after the bailor is entitled to the return of the property. That period would have expired soon after the war.") (internal citation omitted).

<sup>27</sup> Plaintiffs attach to their Opposition a letter, dated June 14, 2007, from Congresswoman Nita M. Lowey to then-Hungarian President László Sólyom, in which the Congresswoman advocates on Ms. Nierenberg's behalf. (Opp., Exh. I.) In the letter, Congresswoman Lowey states that despite attempts by Ms. Nierenberg to gain possession of artworks from the Herzog collection, Hungary has, with one exception "refused to return" the paintings to her. (Opp., Exh. I.) Even if the Court ignored the prior demands and refusals listed above and recognize that this the properly acknowledged refusal, Plaintiffs' claims are still untimely because this lawsuit was filed on July 27, 2010, several weeks beyond the three-year period expiring on June 14, 2010.

of United States, foreign, or international law) of official action by a foreign sovereign performed within its own territory,” *Riggs Nat’l Corp. & Subsidiaries v. Comm’r of IRS*, 163 F.3d 1363, 1367 (D.C. Cir. 1999).

In this case, the alleged taking took place in May of 1944, when the artworks were taken from the cellars of Plaintiffs’ predecessors by Hungary. Because the property was taken by Hungary from Hungarian citizens during World War II, there cannot be violation of international law and this Court should apply the Act of State Doctrine. *See World Wide Minerals v. Republic of Kazakhstan*, 296 F.3d 1154, 1164 (D.C. Cir. 2002) (“The act of state doctrine ‘precludes the courts of this country from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory.’”) (quoting *Sabbatino*, 376 U.S. at 401); *see also Altmann*, 541 U.S. at 700.

Plaintiffs allege a bailment was created by the Peace Treaty. Entering into a treaty is a sovereign act – an act of state – not a commercial action or an activity for an individual. *See Garcia*, 109 F.3d at 168 (recognizing that “treaties are agreements between nations”); *Weltover, Inc.*, 941 F.2d at 149-50; *Rush-Presbyterian-St. Luke’s Med. Ctr.*, 877 F.2d at 578. Thus, the alleged bailment must be considered an act of state.

Plaintiffs assert that certain factors counsel against application of the Act of State Doctrine. First, Plaintiffs contend that Hungary has not made any credible showing that this case will have “negative ‘implications . . . for our foreign relations.’” (Opp. at 63 (quoting *Sabbatino*, 376 U.S. at 428)). This is a misstatement. Although the facts of the cases are dramatically

different, one need only look at the fall out from the *Chabad* cases to see that haling a foreign sovereign into court can have a negative impact of foreign relations.<sup>28</sup>

Plaintiffs also contend that the Second Hickenlooper Amendment renders the Act of State Doctrine inapplicable to this case. Specifically, Plaintiffs contend that “any repudiation by [Hungary] of its [World War II] bailments occurred long after 1959 – the date of the Second Hickenlooper Amendment – and the act of state doctrine therefore does not apply.” (Opp. at 62.) Plaintiffs fail to note that the Second Hickenlooper Amendment only limits the post-1959 application of the Act of State Doctrine where there has been *a violation of international law*.<sup>29</sup> The repudiation of a bailment is not a violation of international law – rather, it is a basic contract

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<sup>28</sup> On June 26, 2009, the Russian Federation informed the district court that it “decline[d] to participate further in this litigation” and “believe[d] this Court has no authority to enter Orders with respect to the property owned by the Russian Federation and in its possession, and the Russian Federation will not consider any such Orders to be binding on it.” *Agudas Chasidei Chabad of United States v. Russian Fed’n*, 729 F. Supp. 2d 141, 144 (D.D.C. 2010). On July 30, 2010, the district court entered a default judgment against the Russian Federation, ordering it to turn over historical and religious materials long-possessed by Russian archives and libraries. *See id. at 148*. In direct response, State-run Russian museums, including the Hermitage in St. Petersburg and the Pushkin Museum of Fine Arts in Moscow, cancelled long-scheduled loans to American institutions. *See* Carol Vogel and Clifford J. Levy, *Dispute Derails Art Loans From Russia*, N.Y. Times, Feb. 2. 2011, at C1.

<sup>29</sup> The Second Hickenlooper Amendment provides

Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state . . . based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: Provided, That this subparagraph *shall not be applicable* (1) *in any case in which an act of a foreign state is not contrary to international law* . . . .

22 U.S.C. § 2370(e)(2) (emphasis added).

claim.<sup>30</sup> There is no exception to the Act of State Doctrine for “commercial activities. *See Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938, 955 (5th Cir. 2011) (“Neither the Supreme Court nor any circuit have adopted a commercial activity exception to the act of state doctrine, and we decline to do so today.”); *World Wide Minerals, LTD.*, 296 F.3d at 1166.

Plaintiffs contend that this Court should find that the Peace Treaty precludes application of the Act of State Doctrine. (Opp. at 64.) Although not deciding the applicability of treaties, the *Sabbatino* court noted the possibility that courts *might* find that the Act of State Doctrine does not bar review of a taking claim where there is a “treaty or other unambiguous agreement regarding controlling legal principles.” *Sabbatino*, 376 U.S. at 428. In this case, however, there was no relevant treaty in place at the time of the taking in 1944 – the Peace Treaty was not signed until World War II ended in 1947.<sup>31</sup> The cases cited by Plaintiffs all recognize that the Act of State Doctrine may be inapplicable when the sovereign violates a provision of an *existing* treaty. *See Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1540 (D.C. Cir. 1984) (noting that the Act of State Doctrine was never intended to apply when an existing, applicable bilateral treaty governs the legal merits of the controversy); *American Int’l Group v. Islamic Republic of Iran*, 493 F. Supp. 522, 525 (D.C. Cir. 1980).<sup>32</sup> Thus, the Court should find that the Act of State

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<sup>30</sup> This marks but one example of Plaintiffs trying to conflate two premises: (1) the alleged *taking* by Hungary in 1944, and (2) the supposed *bailment* created by the Peace Treaty in 1947 and subsequent repudiation of the bailment in 1997 and/or 1999. These are two distinct legal theories – one, a taking in violation of international law, and the other, a contractual, commercial act – that must be analyzed separately.

<sup>31</sup> There was no treaty violated when the 1947 bailment was alleged to have been created – it is the Peace Treaty that is alleged to have *created* the bailment.

<sup>32</sup> Plaintiffs do not deny that the alleged 1944 taking is a “classic act of state.” *World Wide Minerals*, 296 F.3d at 1166. In this action, the artwork at issue was taken by the Hungarian government pursuant to various laws, actions, and decrees. Whether anyone today agrees with the decisions of the Hungarian government or its actions prior to or after World War II, its actions were sovereign in nature and could not have been committed by a private actor.

(Footnote continued on next page)

Doctrine applies to both the 1944 taking and the alleged 1947 bailment, and this Court is “prohibited” from adjudicating Plaintiffs’ claims. *Sabbatino*, 376 U.S. at 428.

### **VIII. The Doctrine Of Forum Non Conveniens Warrants Dismissal**

Only one of the three plaintiffs in this action lives in the United States.<sup>33</sup> The alleged taking occurred in Hungary in 1944. The alleged bailment agreement took place in Hungary in 1947. With the exception of Martha Nierenberg, all witnesses to the relevant events – to the extent that they are still living – are most likely to be located in Hungary or elsewhere in Europe. Hungarian (and not English) is likely to be their first language. Documents relating to the 1944 taking are most likely to be in Hungary and written in Hungarian. Hungary is a democratic nation, a member of NATO, a recognized member of the European Union, is the current President of the European Union, and has an independent judiciary and freely elected government. Despite these undisputed facts, Plaintiffs maintain that the District of Columbia – which has no connection to the Plaintiffs – is the proper forum. “[G]eneral allegations of deficiency,” however, “do not alone warrant the conclusion that a foreign forum is inadequate.” *MBI Group, Inc. v Credit Foncier du Cameroun*, 616 F.3d 568, 575 (D.C. Cir. 2010) (dismissing

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*(Footnote continued from previous page)*

Consequently, this Court should refrain from analyzing the legality of Hungary’s sovereign acts and grant the motion to dismiss. *See id.* at 1164 (“The act of state doctrine precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.”) (internal quotation marks omitted).

<sup>33</sup> Plaintiff de Csepel states that he has the “authority to represent all of the Herzog Heirs in this action.” (Compl. at 6.) Plaintiffs offer no justification for why this Court should consider claims brought by foreign nationals against a foreign defendant – particular as the foreign claimants have failed to seek (much less exhaust) remedies in Hungary or their own country.

action on *forum non conveniens* grounds) (quoting *El-Fadl v. Centr. Bank of Jordon*, 75 F.3d 668, 678 (D.C. Cir. 1996)).<sup>34</sup>

As noted in the initial motion, courts analyze both “private interest factors” affecting the convenience of the litigants, and “public interest factors” affecting the convenience of the forum.<sup>35</sup> As stated above, the private interest factors counsel in favor of allowing this action to proceed in Hungary. The public interest factors also clearly identify Hungary as a superior forum – Hungarian courts are better able to interpret and apply both current and historical laws as they apply to Plaintiffs’ ownership claims. Article 27 of the Peace Treaty specifically assigns to Hungary the responsibility of restituting or providing compensation for taken property. Peace Treaty, art. 27.1. In addition, courts, like those in Hungary, have an interest in having local controversies decided at home. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). As evidenced by Ms. Nierenberg’s lawsuit, Hungary has jurisdiction to hear Plaintiffs’ claims. Moreover, unlike in the United States, Plaintiffs admit that their claims would not be barred in Hungary. (Compl. ¶ 95.) Finally, it is possible that Hungarian substantive law, and not law of the United States, would apply to Plaintiffs claims. *See, e.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 260 (1981) (recognizing that “the need to apply foreign law point[s] towards dismissal”); *YWCA v. Allstate Ins. Co.*, 275 F.3d 1145, 1150 (D.C. Cir. 2002); *Fowler v. A & A Co.*, 262 A.2d 344, 348 (D.C. 1970).

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<sup>34</sup> Although Plaintiffs assert that the Hungarian Courts are an inadequate forum, (Opp. at 50-52), they cite frequently in their opposition to determinations made by those courts when aspects of those decisions are favorable to them, (Opp. at 20-21, 47).

<sup>35</sup> Although courts usually determine whether they have jurisdiction before evaluating of the merits of a claim, courts do have discretion to decide motions on *forum non conveniens* grounds before determining whether subject matter jurisdiction exists. *See Sinochem Int’l Co., Ltd. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 431 (2007); *In re Papandreou*, 139 F. 3d 247, 255 (D.C. Cir. 1998) (“[A]lthough subject-matter jurisdiction is special for many purposes . . . a court [may instead] dismiss [ ] on other non-merits grounds such as *forum non conveniens*.”).

Hungary recognizes that there is a presumption in favor of a plaintiff's choice of forum. *See Gulf Oil Corp.*, 330 U.S. at 508. However, where, as here, the only connection to the United States is one (of three) Plaintiffs, and that Plaintiff has been assigned the rights of non-U.S. citizens, it is clear that Hungary's superior forum warrants dismissal on *forum non conveniens* grounds. *See Piper*, 454 U.S. at 256 n.23; *Alcoa S.S. Co., Inc. v. M/V Nordic Regent*, 654 F.2d 147, 156 (2d Cir. 1980) (recognizing that an "American citizen does not have an absolute right . . . to sue in an American court") (internal citations omitted)).

#### **IX. Principles Of International Comity Warrant Dismissal**

Acknowledging that Ms. Nierenberg's litigation involved eleven of the artworks at issue in this action, Plaintiffs contend that this Court should not recognize comity principles because the current action includes two new plaintiffs (in addition to Ms. Nierenberg's heir) and the scope has been expanded to include thirty-three additional artworks. (Opp. at 68.) Thus, while this action includes additional plaintiffs and artworks, numerous artworks and certain ownership rights (Ms. Nierenberg's rights, as claimed by David de Csepel) are *identical* to those in the Hungarian lawsuit. Moreover, all claims relate to the "same nucleus of facts" as gave rise to the Hungarian lawsuit. *Apotex, Inc. v. FDA*, 393 F.3d 210, 217 (D.C. Cir. 2004). To the extent that Plaintiffs attempt to circumvent legal principles of comity by simply adding two additional plaintiffs who never brought a claim in Italy (or elsewhere) for sixty years, this Court should recognize the judgment of the Hungarian court system with regard to the eleven artworks already litigated. *See Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) ("The central precept of comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts").

**X. Conclusion**

For the above-stated reasons, defendants 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 respectfully request that this Court grant the Motion to Dismiss.<sup>36</sup>

Dated: June 15, 2011

Respectfully submitted,

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<sup>36</sup> Plaintiffs filed a Notice of Supplemental Authority (Docket No. 25) attaching a recent decision from the Northern District of Illinois in *Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank, et al.*, No. 10 C 1884 (N.D. Ill). That decision, which involved a class action lawsuit, has no impact on this action. In denying to consolidate the cases, the Judicial Panel on Multidistrict Litigation (JPML) noted that the *Magyar Nemzeti Bank* case “is brought against different defendants (including various European banks) and involves essentially different factual issues.” *In re: Hungarian Holocaust Litig.*, --- F. Supp. 2d ---, 2011 WL 346940, at \*1 (J.P.M.L. Feb. 3, 2011). In reaching this decision, the panel considered Plaintiffs’ representation that this action “is entirely different from the two class actions that are currently under consideration for consolidation.” (Mot., Ramirez Decl., Exh. F.)

