

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

**ROSALIE SIMON, *et al.*,
Individually, for themselves and for all
others similarly situated,**

Plaintiffs,

v.

Case No. 1:10-cv-01770-BAH

THE REPUBLIC OF HUNGARY, *et al.*,

Defendants.

* * * * *

PLAINTIFFS' SUR-REPLY MEMORANDUM

Plaintiffs Rosalie Simon, *et al.*, through counsel, submit this Sur-reply Memorandum in response to the Reply Memorandum filed by the Republic of Hungary (“Hungary”) and Magyar Államvasutak Zrt. (“MÁV”) (collectively, “Defendants”) in further support of their Motion to Dismiss the First Amended Complaint.

I. SECTION 1605(a)(3) OF THE FSIA CONTAINS NO EXHAUSTION REQUIREMENT, AND DEFENDANTS’ LOOTING OF PLAINTIFFS’ POSSESSIONS AS PART OF AN INTERNATIONAL PLAN OF DISCRIMINATION AND EXTERMINATION CLEARLY VIOLATED INTERNATIONAL LAW.

A. The District of Columbia Circuit and This Court Have Recently Held That There Is No Exhaustion Requirement Under The FSIA.

In their Reply Memorandum (“Reply”), Defendants assert that they are entitled to sovereign immunity for a reason mentioned only briefly in a footnote (with no elaboration) in their Memorandum in Support of Motion to Dismiss, at 8, n.10. They claim that Plaintiffs cannot invoke FSIA’s § 1605(a)(3) exception without first showing that they have exhausted all possible remedies in Hungary. Defendants cite to one 1998 case from this Court that is

inapposite, *Millicom Int'l Cellular, S.A. v. Republic of Costa Rica*, 995 F. Supp. 14, 23 (D.D.C. 1998), yet ignore the controlling decision in this Circuit, *Agudas Chasidei Chabad v. Russian Fed'n*, 528 F.3d 934 (D.C. Cir. 2008). Decided *after Millicom*, *Chabad* held that FSIA contains no such requirement: “. . . [N]othing in Section 1605(a)(3) suggests that plaintiff must exhaust foreign remedies before bringing suit in the United States.” 528 F.3d at 948.

As this Court noted in its opinion affirmed on appeal, *Millicom* “only addresses takings that are based on a state’s failure to provide just compensation,” and the exhaustion “requirement” is generally limited to cases where a sovereign state espouses a claim on behalf of one of its nationals against another sovereign. *Agudas Chasidei Chabad v. Russian Fed'n*, 466 F. Supp. 2d 6, 21 (D.D.C. 2006) (Lamberth, J.).¹ Ultimately, this Court in 2006 expressly rejected any such exhaustion requirement: “Only a handful of district courts have referred to the exhaustion requirement in the context of the FSIA’s expropriation exception and this Court is not willing to make new law by relying on a misapplied, non-binding international legal concept, which the FSIA, the controlling statute for the jurisdictional question in this case, has not incorporated.” *Id.*, at 21. On appellate review, the D.C. Circuit approvingly noted, “We believe this is likely correct . . .,” but chose not to rely on that conclusion alone, because “in any event the remedy Russia identifies is plainly inadequate.” 528 F. 3d at 948. *See also, Cassirer v. Kingdom of Spain*, 616 F.3d 1014, 1034 (9th Cir. 2010) *pet. for cert. filed*, 79 U.S.L.W. 3377 (Dec. 10, 2010) (“It follows that exhaustion is not a statutory prerequisite . . .”).²

¹ *Millicom* concerned an allocation-of-spectrum dispute among commercial entities in Costa Rica. The suit was filed less than one year after the alleged “taking.” Indeed, whether or not there had been any formal “taking” in the government authority’s refusal to allow the commercial claimant there to use a particular portion of the spectrum remained an open issue: “It cannot be reasonably interpreted that the Republic of Costa Rica firmly denied any responsibility for injuries the plaintiffs may have suffered when the parties failed to reach a commercial solution.” 995 F. Supp. at 13.

² The Supreme Court invited the Acting Solicitor General to submit a brief in this case expressing the views of the United States. *See Spain v. Estate of Cassirer*, 131 S. Ct. 1717 (2011).

Accordingly there is no support in this Circuit for the notion that Plaintiffs would have to exhaust any putative remedies in Hungary in order to qualify for the § 1605(a)(3) exception to sovereign immunity.³

B. Mass Expropriation Directed At A National, Ethnic Or Religious Group, Incident To Crimes Against Humanity, Violates International Law.

In their Reply Memorandum, Defendants reiterate their argument that the takings exception to foreign sovereign immunity under § 1605(a)(3) does not apply as a matter of law where a “sovereign nation and one of its instrumentalities are alleged to have expropriated the property of its own nationals.” Reply at 5. This argument ignores the essence of Plaintiffs’ point – Defendants’ depredations were part of an international scheme of mass deportation, impoverishment, dehumanization and ultimately genocide of Hungarian Jewry, and constituted a crime against humanity so vast and evil as to offend universally held norms of civilized behavior. As such, the expropriations described in the Amended Complaint (encompassing the personal property of some half a million Jews in 1941 and 1944), and corroborated in the testimonial declarations accompanying Plaintiffs’ Opposition to the Motion to Dismiss, clearly contravene customary international law as it has been recognized for nearly a century.⁴

³ Moreover, even if Plaintiffs were required to make such a showing, they have properly pleaded that those who sought to obtain compensation through an administrative remedy were frustrated in their efforts to do so. Amended Complaint (ECF 21) at ¶¶ 127, 130 and 132. *See also* Plaintiffs’ Opposition (ECF 24) at 5, 7. Defendants themselves have conceded that in 1993 the Hungarian Constitutional court found that Hungary had failed to live up to its 1947 Treaty obligations to provide compensation. Memorandum in Support of Motion to Dismiss at 5.

⁴ None of the cases cited by Defendants in their Reply Memorandum stands for the proposition that a state’s expropriation of the property of its own citizens does not violate international law involved a massive, racially-motivated, genocide-related deportation of the sort described in the Amended Complaint. Rather, each of their cases dealt with ordinary commercial nationalizations of private assets of a discrete number of businesses or not-profit corporations. *See, e.g., Rong v. Liaoning Provincial Gov’t*, 362 F. Supp.2d 83 (D.D.C. 2005) (expropriation of corporate equity interests of Hong Kong corporation by local government); *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095 (9th Cir. 1990) (dishonor by government owned bank of letter of credit issued to private citizen); *F. Palicio y Compania S.A. v. Brush*, 256 F. Supp. 481 (S.D.N.Y. 1966) (flagrant expropriation of five cigar manufacturing businesses by Cuban government).

The applicable principles of customary international law were recognized and reaffirmed in Article 6(c) of the Charter of the International Military Tribunal (the so-called Nuremberg Tribunal) (“IMT Charter”)⁵, issued on August 8, 1945. *See* IMT Charter, § II, Article 6(c), available at <http://www.icrc.org/ihl.nsf/FULL/350?OpenDocument>. The IMT Charter defined “crimes against humanity” as:

murder, extermination, enslavement, *deportation*, and other inhumane acts committed against any civilian population, before or during the war; or *persecutions* on political, *racial or religious grounds* in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Id. (emphasis added). This section was adopted almost verbatim by the United Nations General Assembly on December 11, 1946, when it adopted Resolution 95(I), Principle VI.c.⁶ *See also* International Law Commission, *Report on Principles of the Nuremberg Tribunal*, in 2 YEARBOOK OF THE ILC 195 (1950);⁷ MALCOLM N. SHAW, INTERNATIONAL LAW 235 (5th ed. 2003) (the IMT Charter is regarded as part of international law). This fundamental principle of the law of nations was relied upon by the IMT when it issued its judgment against the individual war criminals on October 1, 1946, many of whom were sentenced to death and executed. The judgment makes clear that once World War II commenced in 1939, the inhumane acts committed by Defendants, including in particular those directed against the Jews, incontrovertibly

⁵ The IMT Charter was drafted in London, following the surrender of Germany, by Justice Robert H. Jackson on leave from the United States Supreme Court along with two other members of the European Advisory Commission. *See* NAT’L ARCHIVES & RECORDS ADMIN., NAT’L ARCHIVES COLLECTION OF WORLD WAR II CRIMES RECORDS, RECORD GROUP 238, at 1-2, available at: <http://www.archives.gov/research/captured-german-records/microfilm/m1291.pdf>.

⁶ http://www.peacebuttons.info/PDF/1211.1946_UN-Resolution-95.pdf (last viewed on June 8, 2011).

⁷ http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf (last viewed on June 8, 2011).

constituted “crimes against humanity.”⁸ As one commentator has noted, the prosecution of individuals responsible for atrocities of World War II firmly established the principle that international law limits a State’s treatment of its own nationals.” Beth Stephens, *Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime*, 60 ALBANY L. REV. 579, 588 (1997).⁹

It is in this context that the Defendants’ mass expropriations and impoverishment of Hungarian Jewry as an incident to deportation and ultimate genocide must be seen. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F.Supp.2d 289, 325 (S.D.N.Y. 2003) (“While expropriation or property destruction alone may not violate the law of nations, the Court finds that expropriation or property destruction, committed as part of a genocide or war crimes, may violate the law of nations.”) (Emphasis added)¹⁰. United States courts have held that civil liability for crimes against humanity is actionable under principles of customary

⁸ Professor and Former Dean of Yale Law School Harold Koh, currently Legal Advisor to the State Department, has noted that the Nuremberg trials “pierced the veil of state sovereignty and dispelled the myth that international law is for states only, re-declaring that individuals are subjects, not just objects, of international law.” Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L. J. 2347, 2358-2359 (1991).

⁹ *See Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (disavowing the dictum in *Dreyfus v. von Finck*, 534 F.2d 24 (2d Cir. 1976), “to the effect that violations of international law do not occur when the aggrieved parties are nationals of the acting state”). *See generally* Fiona McKay, *Civil Reparation in National Courts for Victims of Human Rights Abuse*, in JUSTICE FOR CRIMES AGAINST HUMANITY 283 (Mark Latimer and Philippe Sands eds., 2003). *See also* Stacy Humes-Schulz, *Limiting Sovereign Immunity in the Age of Human Rights*, 21 HARV. HUM. RTS. J. 105, 132 (2008) (“the state is no longer able to subject its citizens whatever treatment it deems fit.”); John Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1 (1999); Criddle, Evan J., *Proportionality in Counterinsurgency: A Relational Theory*, 87 NOTRE DAME L. REV. (forthcoming 2011), (manuscript at 18, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1850616 (last visited June 7, 2011) (“a state may not violate the human rights of their people without undercutting their own claim to act as a sovereign entity under international law”).

¹⁰ The Second Circuit has criticized the opinion on motion to dismiss in *Presbyterian Church* on other grounds. *See Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 138 (2d Cir. 2010), *reh. en banc denied*, 2011 U.S. App. LEXIS 2200 (2d Cir. Feb. 4, 2011) (over vigorous dissent), *pet. for cert. filed* on June 6, 2011. In a later opinion granting defendants summary judgment, the district court held nevertheless that “[k]nowing participation in a forcible transfer of population, when part of a widespread or systematic attack directed against a civilian population, is a crime against humanity and a violation of customary international law.” *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F.Supp.2d 633, 663 (S.D.N.Y. 2006), *aff’d*, 582 F.3d 244 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 79 (2010).

international law. *E.g., Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 257 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 79 (2010) (“crimes against humanity include murder, enslavement, deportation or forcible transfer, torture, rape, or other inhumane acts, committed as part of a widespread or systematic attack directed against a civilian population”). The crimes against humanity in *Talisman Energy* were perpetrated by the Sudanese government against its own citizens. *See also Bodner v. Banque Paribas*, 114 F.Supp.2d 117, 134 (E.D.N.Y. 2000) (denying motion to dismiss and finding that plaintiffs stated claim under international law for the confiscation and plunder of private property, for aiding and abetting genocide, and for conspiracy to plunder and transact in plundered property, all violations of international law).¹¹

For Defendants to dismiss as a “red herring” (Reply at 4) the racist, discriminatory, premeditated and all-encompassing monstrous mass expropriations, traversing international borders, that were committed in 1941 and 1944, is both intellectually dishonest and an affront to the memories of the myriad of victims whose last worldly possessions were cynically stolen from them by Defendants and their henchmen on the way from the ghettos of Hungary to the gas chambers of Poland.

Defendants also argue that the 1947 Treaty which Hungary entered (ECF-22-4), and which expressly required them to compensate their own citizens for the unlawful and racially motivated takings at issue, is irrelevant because treaties may sometimes create new obligations in international law rather than merely re-state international law. Reply at 6-7. This argument

¹¹ Defendants’ attempt to distinguish *Bodner* on the ground that it involved lawsuits between private litigants rather than a sovereign or its instrumentalities, Reply at 5, is baseless. *Bodner* held that the expropriation of Jewish assets in the context of the Holocaust constitutes a violation of the law of nations, sufficient to withstand a motion under Fed. R. Civ. 12(b)(6) for failure to state a claim. This was so even though the challenged expropriations were carried out by a state against its own citizens, *viz.*, France. To the same effect is *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, *supra*. The question whether the expropriation by a state of its citizens’ property in connection with the perpetration of a crime against humanity violates international law does not depend on whether the issue arises under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.*, the Hickenlooper Amendment, 22 U.S.C. § 2370 or the Alien Tort Claims Act, 28 U.S.C. § 1350. The result is the same.

founders on three independent grounds. First, it ignores the fact that the pre-existing Treaty of Trianon, entered into by Hungary in 1921, had already recognized an international-law obligation incumbent on Hungary not to treat any of its citizens in a discriminatory or targeted manner. *See* Treaty of Peace Between the Allies and Associated Powers and Hungary and Protocol and Declaration, Signed at Trianon, June 4, 1920, 1921 U.S.T. LEXIS 12; 6 L.N.T.S. 188 (In force Dec. 17, 1921), *available at* http://wwi.lib.byu.edu/index.php/Treaty_of_Trianon. Second, it ignores the fact that treaties are themselves a source of international law, and therefore the question whether the 1947 Treaty of Paris created new obligations or merely recognized pre-existing obligations and norms such as those already contained in the Treaty of Trianon is irrelevant to the issue whether international law was violated for purposes of application of section 1605(a)(3) of FSIA. Third, Hungary has by its own admission ignored and violated even the 1947 Treaty obligations themselves for at least 46 years after Hungary had agreed to them. (*See, e.g.*, note 2 above.) For all these reasons, it is clear that international law as embodied in Hungary's treaty obligations stemming from 1921 and reiterated in 1947 recognized that the targeted and discriminatory takings of property at issue here violated international law.

C. Hungary's Comprehensive Anti-Jewish Legislation Between 1938 and 1944 Effectively Stripped Hungarian Jews Of Their Citizenship, And Hungary Is Estopped To Hide Behind Plaintiffs' Putative Citizenship To Avoid The Application Of International Law.

Even accepting *arguendo* Defendants' erroneous statement of international law respecting mass expropriations on which the FSIA takings exception is predicated, the Court should not consider Plaintiffs and other members of the putative class as Hungarian citizens. Through a lengthy list of anti-Jewish legislation and other measures instituted by Hungary under various governments from 1938 to 1944, Hungary clearly did not consider its Jews to be Hungarian citizens. By first depriving them of their most fundamental human rights, then

removing them forcibly from their homes, herding them into ghettos and forcing them to wear yellow stars, and ultimately – while stripping them of their property and possessions – deporting them to a foreign territory to be massacred, the Hungarian state effectively nullified the citizenship status of those victims who may have possessed Hungarian nationality.

When a state treats its putative citizens in a manner that is utterly at odds with the status of citizenship, it cannot later escape liability under international law on the grounds that the victims of its gross misconduct were its own nationals. Even before World War II, the Hungarian government had adopted a host of anti-Jewish laws in emulation of the Nazi Nuremberg laws severely limiting the civil rights of Hungarian Jews. These anti-Jewish measures were multiplied many-fold in 1944 with the adoption of more than 100 anti-Jewish decrees, which variously removed Jews from the Hungarian economy en masse; confiscated Jewish businesses and other property; forced Jews to wear the six-pointed yellow star to set them apart physically from the rest of the population; prohibited travel by Jews; appropriated their residences and forced them into ghettos; restricted their right to acquire and have access to food supplies; prohibited fraternization with Christians; prohibited access to public baths, entertainment places, restaurants and other facilities; expelled Jews from public schools; prohibited employment of non-Jews; enslaved of the male Jewish population in so-called labor brigades; all culminating finally in the expulsion of the bulk of Hungarian Jewry from Hungarian territory to death camps in Poland, Germany and Austria. *See generally* 2 RANDOLPH L. BRAHAM, *THE POLITICS OF GENOCIDE: THE HOLOCAUST IN HUNGARY*, Appendix 3 at pp. 1371-1382 (1993) (listing 100 of the “major” anti-Jewish decrees issued by Hungary between March 29 and December 6, 1944). To speak of the Jews as having Hungarian citizenship under such circumstances is to mock the concept of citizenship. *See Cassirer v. Kingdom of Spain*, 461

F.Supp.2d 1157, 1165-1166 (C.D. Cal. 2006), *aff'd in part, rev'd in part*, 580 F.3d 1048 (9th Cir. 2009), *reh'g en banc granted*, 590 F.3d 981 (9th Cir. 2009), *aff'd on reh'g in part, appeal dismissed in part*, 616 F.3d 1019 (9th Cir. 2010), *pet. for cert. filed*, 79 U.S.L.W. 3377 (Dec. 10, 2010) (taking judicial notice of Nazi Nuremberg laws under which district court found that plaintiff was no longer considered a German citizen). Moreover, at a minimum, the principles of equitable estoppel should preclude Defendants from relying on Plaintiffs' putative Hungarian citizenship to deny them the protection of international law.¹² *See, e.g., Temple of Preah Vihear (Cambodia v. Thailand)*, Merits Judgment of June 15, 1962, 1962 ICJ Reports 6, 23, 31-32, 33 ILR 48, 62, 69-70; *Legal Status of Eastern Greenland (Norway v. Denmark)*, 1933 P.C.I.J., ser. A/B, No. 53, at 52; Report of the International Law Commission on the Work of its 52d Session, Chap. VI, Unilateral Acts of States (2000), *available at*: <http://untreaty.un.org/ilc/reports/2000/english/chp6.pdf> (all recognizing the estoppel principle in international law).

II. DEFENDANTS' REPLY MEMORANDUM ESTABLISHES THAT PLAINTIFFS' CLAIMS ARE JUSTICIABLE AT THIS STAGE OF THE LITIGATION.

In their Reply, Defendants rely upon statements of United States government policy by two former ambassadors who were serving as Special Envoys for Holocaust Issues in the U.S. Department of State. *See* Reply at 12, n.8. In one instance, Defendants materially misquote the statement, and in both instances the full statements actually support the justiciability of

¹² Incredibly, Defendants also challenge Plaintiffs' contention that not all of the Plaintiffs were considered Hungarian citizens at the time of the deportations. Wholly apart from the "citizenship" status of Hungarian Jews addressed in the text, Defendants actually take issue with the contention that Tzvi Zelikovitch and his family were treated as aliens and not Hungarian nationals in 1941. Reply at 6. Defendants ignore the facts, as alleged in the Amended Complaint, that Tzvi Zelikovitch and his family, together with nearly 20,000 other Jews living in the Carpathian territories annexed by Hungary from Czechoslovakia, were deported to the Ukraine and slaughtered at Kamenets-Podolsk precisely because they were deemed "aliens" by the Hungarian authorities. This was so despite the fact that Tzvi Zelikovitch's father entreated the Hungarians to exempt him from deportation on the grounds that he was a Hungarian national and had even served in the Austro-Hungarian army during World War I. 1 RANDOLPH L. BRAHAM, *THE POLITICS OF GENOCIDE: THE HOLOCAUST IN HUNGARY*, at pp. 207 *et seq.* (1993).

Plaintiffs' claims. In his statement during the 2002 Hearings on H.R. 2693¹³ before the Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations of the House Committee on Government Reform, 107th Cong., 2d Sess., 24 (2002), Ambassador Bell stated,

With regard to claims for restitution or compensation by Holocaust survivors and other victims of the Nazi era, it is the policy of the U.S. Government that *concerned parties*, foreign governments, and *non-governmental organizations* should act to resolve matters of Holocaust-era restitution and compensation through dialogue, negotiation and cooperation. . . .

(Emphasis added) The import of this statement, contrary to the assertion of Defendants, is that the Executive Branch does not claim exclusive responsibility to resolve claims like those of Plaintiffs. On the contrary, this statement explicitly acknowledges that “concerned parties” such as Plaintiffs, as well as “non-governmental organizations,” have a rightful place in “act[ing] to resolve matters of Holocaust-era restitution and compensation.”

The earlier statement of Ambassador Bindenagel in 2001 cited by Defendants, Reply at 12, n.8, provides further insight and dimension into this policy. He stated, in pertinent part:

The policy of the United States Government with regard to claims for restitution or compensation by Holocaust survivors and other victims of the Nazi era is motivated by the twin concerns of *justice* and *urgency*. No price can be put on the suffering that the victims of Nazi-era atrocities endured, but the moral imperative remains to provide some measure of justice to these victims, and to do so in their remaining lifetimes. Today, more than half a century later, the survivors are elderly and dying at an accelerated rate. The United States believes, therefore, that concerned parties, foreign governments, and non-governmental organizations should act to resolve matters of Holocaust-era restitution and compensation through dialogue, negotiation and cooperation rather than subject victims and their families to the prolonged uncertainty and delay that accompany litigation.

¹³ Defendants mis-cited the bill as H.R. 293. See Reply at 12, n.8.

Hearing on the Status of Insurance Restitution for Holocaust Victims and Their Heirs before House Committee on Government Reform, 107th Cong., 1st Sess., 77 (2001) (emphasis added). In point of fact, another decade has passed with no Executive Branch engagement in pursuing this moral imperative. Thus, in the name of “provid[ing] some measure of justice to these victims . . . in their remaining lifetimes,” Defendants would have the Court perpetuate the denial of any measure of justice to them. That contradicts the express policy of the Executive Branch and all conscience. While litigation may involve uncertainty and delay, in the absence of a more certain and expeditious avenue to providing these victims justice, it is clear the Executive Branch does not oppose the pursuit of justice through litigation.

On May 18, 2011, the court in *Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank*, No. 10-C-1884, 2011 U.S. Dist. Lexis 54293 (N.D. Ill. May 18, 2011), denied dismissal of a similar case arising, like this one, in the circumstances of the Hungarian Holocaust. Among other arguments raised by the defendants there, the *Holocaust Victims* court rejected the assertion that the case should be dismissed under the political question doctrine. *See id.* at *14-16. The day after this decision, Plaintiffs in the instant matter brought the ruling to the Court’s and Defendants’ attention. *See* Notice of Supplemental Authority, filed May 19, 2011 (ECF 26).

In *Holocaust Victims*, the court held that it could not, at the motion to dismiss stage, rely upon the 1947 Treaty and 1973 Executive Agreement (ECF 22-5) to find the Holocaust Era claims non-justiciable. As the court explained, “it is premature to address at this juncture whether the Executive Agreements and Treaties cited by Defendants may limit certain Plaintiffs’ claims, since their applicability raises factual issues not properly adjudicated at the motion to dismiss stage of the proceedings. At the summary judgment stage of the proceedings, if

warranted, Defendants may re-raise the issue relating to the applicability of existing Executive Agreements or Treaties to Plaintiffs' claims." *Id.* at *15-16.

Defendants attempt to deflect the import of this decision in the final footnote in their Reply, at 27, n.27, by observing first that the decision is not binding on this Court. Of course, that truism has not prevented them, in their Memorandum in Support of Motion to Dismiss and in their Reply, from relying on innumerable district court decisions from other jurisdictions, equally non-binding, when they thought that those opinions favored their argument. The point, of course, is not that a decision from a sister jurisdiction is binding, but rather, that its analysis may be persuasive, or at least helpful, in the adjudication of a different action. That is certainly the case here, where the *Holocaust Victims* court's careful analysis of several issues expressly raised in this case, including *forum non conveniens* and the justiciability issue discussed above, might have a direct bearing on this Court's consideration of the self-same issues.¹⁴

Defendants' further efforts to dismiss the obvious significance of the *Holocaust Victims* decision – namely, that it is “erroneous” because it traverses local precedent, and that it must be irrelevant because the JPML declined to consolidate the two cases – are equally specious. First, contrary to Defendants' blandishments, *Holocaust Victims* does not traverse local precedent, as demonstrated throughout Plaintiffs' Opposition Memorandum and this Sur-reply. Second, the

¹⁴ *Holocaust Victims*' analysis of *forum non conveniens* is particularly apt, as it adopts *in toto* several arguments made by Plaintiffs here to the effect that a number of the named Plaintiffs and a substantial number of class members are in the United States; Plaintiffs' choice of forum should be “accorded deference”; it would be grossly inconvenient for Plaintiffs to litigate this case in Hungary; the evidence, parties and witnesses are disbursed; and there is a strong local interest in litigating this case here. See Notice of Supplemental Authority (ECF 26), Attachment thereto (ECF 26-1) at 5-6. Further, Defendants' misbegotten effort to impeach the credibility of Plaintiffs' expert, András Hanák, on the suitability of this forum (Reply at 19, n.19) – apart from its implication that there are facts at issue that beggar a motion to dismiss – is wholly inapt. As stated by Mr. Hanák in his Supplemental Declaration appended hereto, the purported quotation in English from his article is misleading because (a) the article was written in Hungarian, and no translated copy has been provided; and (b) it was taken out of context. Specifically, Mr. Hanák, elsewhere in his article, states that in his view “the clear facts of the Chicago ‘railroad case’ are persuasive for a lawyer and [] the Chicago plaintiffs' legal arguments may prevail on the merits.” See Hanák Suppl. Aff., attached hereto, at ¶ 3. While acknowledging that he would not choose to be a plaintiff in this type of lawsuit for “personal reasons” (having “lived and worked in Hungary for the past 20 years”), “that has nothing to do with [his] balanced legal opinion that [he] expressed in [his] first Declaration in this case.” *Id.*

JPML's declination is hardly reflective, let alone dispositive, of the similarity, *vel non*, between two discrete issues raised in *Holocaust Victims* and in this case among a myriad of issues argued by disparate parties in the four lawsuits considered by the JMPL for partial or full consolidation.

III. CONCLUSION

For the reasons set forth hereinabove and in Plaintiffs' Opposition (ECF 24), the Motion to Dismiss should be denied.

Respectfully submitted,

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