

**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.

THE REPUBLIC OF HUNGARY, *et al.*,

Defendants.

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

* * * * *

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION
OF DEFENDANTS THE REPUBLIC OF HUNGARY AND MAGYAR
ÁLLAMVASUTAK ZRT. TO DISMISS THE FIRST AMENDED COMPLAINT**

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ÁLLAMVASUTAK ZRT. TO DISMISS THE FIRST AMENDED COMPLAINT**

Named Plaintiffs, Hungarian Holocaust survivors Rosalie Simon *et al.*, on behalf of themselves and all others similarly situated (“Plaintiffs”), submit this Memorandum of Law in opposition to the Motion to Dismiss the First Amended Complaint (ECF 22, hereinafter “Motion”) filed by Defendants The Republic of Hungary (“Hungary”) and its national railway, Magyar Államvasutak Zrt. (“MÁV”) (collectively, “Defendants”).¹ Defendants make three arguments: (a) The Court lacks subject matter jurisdiction due to Defendants’ claimed sovereign immunity under the Foreign Sovereign Immunities Act; (b) the claims are non-justiciable under the political question doctrine; and (c) the doctrine of *forum non conveniens* compels dismissal.

As demonstrated below, none of these arguments has merit, and the motion should be denied.

¹ Plaintiffs note that a default has been entered against Defendant Rail Cargo Hungaria Zrt. ECF 19.

I. INTRODUCTION: THE TRUE NATURE OF THE HUNGARIAN HOLOCAUST

As the mass deportation of Hungarian Jewry to the gas chambers of Auschwitz reached its apex in July 1944, Prime Minister Winston Churchill decried the slaughter as “probably the greatest and most horrible crime ever committed in the whole history of the world.”² This lawsuit seeks, for the first time in history, to bring Hungary to account for its actions.³

In their Motion, Defendants suggest that the Hungarian Holocaust was a German affair, and that Hungary was merely “integrated into the German war machine by the Nazi Regime that conceived and organized these crimes.” Defendants’ Memorandum in Support of Motion to Dismiss First Amended Complaint, ECF 22-1 (“Def. Mem.”) at 1. That is not true. To be sure, the destruction of Hungarian Jewry was masterminded by Adolph Eichmann and his staff, but they comprised only some 130 persons.⁴ The Germans could not have effectuated the isolation, concentration, impoverishment, expropriation, deportation and destruction of Hungarian Jewry without the wholehearted, wholesale cooperation of the Hungarian government, which marshaled and deployed the full complement of state authority, including Defendant MÁV, to destroy nearly half a million human beings within a few months in the spring and summer of 1944.⁵

² Note from Prime Minister W. Churchill to Foreign Secretary A. Eden (July 14, 1944) in Winston S. Churchill, *THE SECOND WORLD WAR: TRIUMPH & TRAGEDY*, Appendix at 693 (Houghton Mifflin 1953).

³ In a parallel suit pending in the Northern District of Illinois, MÁV is the sole defendant. *Victims of the Hungarian Holocaust v. Hungarian State Railways (MÁV)*, No. 1:10-cv-00868 (N.D. Ill.). The United States Judicial Panel on Multidistrict Litigation declined to consolidate the two cases in the District of Columbia pursuant to 28 U.S.C. §1407. ECF 10.

⁴ Gerald Fleming, *HITLER AND THE FINAL SOLUTION* at 160 (Univ. of Calif. Press 1984).

⁵ Randolph L. Braham, *The Holocaust in Hungary: A Retrospective Analysis*, in *THE HOLOCAUST AND HISTORY: THE KNOWN, THE UNKNOWN, THE DISPUTED AND THE RE-EXAMINED* at 434-435 (Michael Berenbaum & Abraham J. Peck eds., U.S. Holocaust Memorial Museum and Indiana Univ. Press 1998). 2 Randolph L. Braham, *THE POLITICS OF GENOCIDE: THE HOLOCAUST IN HUNGARY*, table 32.1, at 1298 (Rev. ed., Columbia Univ. Press 1994) (“2 Politics of Genocide”). These numbers do not take into account the murder of nearly 20,000 Hungarian Jews deported from the Transcarpathia and other territories annexed to Hungary after 1938 (Compl., ¶¶ 92-95); the death

II. STATEMENT OF FACTS

The facts in the First Amended Complaint, ECF 21 (“Complaint” or “Compl.”) are largely undisputed.⁶ The 14 Named Plaintiffs are Holocaust survivors who lived in the Hungarian State at the threshold of World War II. Contrary to Defendants’ assertion, Def. Mem. at 8, not all of the Plaintiffs were considered Hungarian citizens when they were deported by Defendants. Some, like Plaintiff Tzvi Zelikovich (who, alone in his family, survived the 1941 massacre), believed themselves to be Hungarian citizens, but were forcibly expelled from their homes and delivered to the Nazi extermination squads based on Hungary’s assertion that they were not Hungarian nationals.

Named Plaintiffs lived in disparate locales. Several lived in what is called Trianon Hungary, within the borders of Hungary today.⁷ Others lived in territory annexed by Hungary in 1938 after Czechoslovakia’s dismemberment.⁸ Certain members of the class alleged in this case (“Class”) reside in areas seized and then annexed by Hungary from Romania and former Yugoslavia (today Croatia).

Beginning in 1941, Hungary systematically excluded the Jews from public life. Compl., ¶ 96. Far worse, by 1944, Hungary and MÁV had already sent some 60,000 Jews to their

of 42,000 slave laborers in Hungarian and MÁV labor brigades; and 1,000 victims of Bacska massacres in 1942. With the exception of the Bacska murders, these deaths were the direct responsibility of Hungary and MÁV.

⁶ Defendants question only the sufficiency of Plaintiffs’ allegations concerning certain jurisdictional facts relevant to the exemptions under FSIA. These are discussed below at 17-19.

⁷ Zehava (Olga) Friedman, Satoraljaujhely (Compl. ¶ 27); Yitzhak Pressburger, Budapest (*id.*, ¶ 38); Vera Deutsch Danos, Miskolc (*id.*, ¶ 64). The term “Trianon” refers to the treaty between the Allied Powers and the Kingdom of Hungary that concluded World War I. In the Trianon Treaty, Hungary was shorn of approximately two-thirds of its territory, ceding it to Romania and the newly formed states of Czechoslovakia, Yugoslavia and Austria. 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).

⁸ Rosalie Simon, Helen Herman, Lenka Weksberg, Rose Miller and Charlotte Weiss, Tarackoz, Ruthenia (Compl. ¶ 10); Tzvi Zelikovitch, Uglya, Ruthenia (*id.*, ¶ 14); Magda Kopolovich Bar-Or, Korosmezo, Ruthenia (*id.*, ¶ 21); Alexander Speiser, Ersekujvar, Slovakia (*id.*, ¶ 40); Ze-ev Tibi Ram, Munkacs, Ruthenia (*id.*, ¶ 48); Ella Feuerstein Schlanger, Benedeke, Ruthenia (*id.*, ¶ 72); Moshe Perel, Ersekujvar, Slovakia (*id.*, ¶ 80).

intended deaths, *id.*, ¶ 95, including Plaintiff Tzvi Zelikovitch (then age 13), his parents and six siblings. *Id.*, ¶¶ 14-20; Declaration of Tzvi Zelikovitch (“Zelikovitch Decl.”), ¶ 17.

Soon after the Germans arrived in March 1944, Hungary passed a law requiring every Jew over six years old to wear a yellow Star of David on the left chest of the outer garment. Compl., ¶97. Hungary then undertook a well-coordinated program to drive the Jews from their homes in the provinces and large towns outside of Budapest into ghettos, abandoned factories and railroad sidings, where they were incarcerated for weeks. These actions were executed almost exclusively by Defendant Hungary with the assistance of MÁV and agencies of the Hungarian government. The Jews were stripped of their valuables and other personal property, much of which was confiscated by the Hungarian state with no compensation to the owners. The property was converted to cash through sales or other means, and the proceeds were transferred to the Hungarian treasury where they were commingled with other Hungarian revenues. *Id.*, ¶¶ 98-99. Hungarian officials prepared inventories of this property, which records still exist, but have never been shown to the public. *Id.*, ¶¶ 99, 218.

In many cases the Jews were transported from the villages to the regional ghettos by Defendant MÁV. Compl., ¶¶ 11, 23. Defendants did not provide housing for the Jewish deportees – they were simply dumped like trash in abandoned factories and railroad sidings, many of which were controlled and serviced by MÁV without food or basic sanitary facilities. *Id.*, ¶¶ 42, 67. Plaintiffs and Class members were incarcerated in these horrific conditions for weeks until the deportations by MÁV to Auschwitz. *Id.*, ¶¶ 67, 92, 98, 101, 106, 107. As a practical matter, by the spring of 1944 the Jews of Hungary had ceased to have the rights of Hungarian citizens, nationals, alien residents or even human beings.

The deportations to Auschwitz and other death camps began in earnest at the end of April 1944. Compl., ¶ 102. Virtually all of the Named Plaintiffs were among those deported, including Plaintiff Tzvi Zelikovitch, (then age 16) who, having miraculously survived the 1941 massacres near Kamenetz-Podolsk, was deported from Hungary for the second time. *Id.*, ¶ 19, Zelikovitch Decl., ¶ 20. As they boarded the MÁV trains, Plaintiffs and their families were stripped of most of their remaining possessions by employees and agents of Defendants MÁV and Hungary. Compl., ¶¶ 19, 43, 86, 100; Declaration of Yaffa Dascal (“Dascal Decl.”), ¶ 12. Not only did MÁV confiscate Plaintiffs’ personal property and convert it to cash or its equivalent, *MÁV charged the Jewish communities for the cost of transporting Plaintiffs and Class members to the death camps.* Compl., ¶ 105. MÁV pocketed substantial revenues from carrying the Jews to the death camps, which funds today amount to hundreds of millions of dollars or more, and were commingled with MÁV general revenues and used to fund MÁV’s capital and operating budget. *Id.*, ¶¶ 98-100. MÁV has never compensated Plaintiffs or the Class for the despoliation of their personal property and for the pain and suffering caused them during their deportation to the death camps of Poland and Austria. *Id.*, ¶¶ 16, 32, 54, 68.

MÁV created and maintained detailed records of its deportation of Plaintiffs and other Hungarian Jews to the death camps, including cargo manifests, bills of lading, invoices and inter-agency memoranda, which cumulatively specified the details of each “shipment,” and were cryptically demarcated by the letter “D.” Compl., ¶104. Despite repeated requests by victims and historians, Defendants Hungary and MÁV have concealed these documents in an effort to obscure their involvement in the destruction of Hungarian Jewry during the Holocaust. *Id.*

The Complaint describes the unspeakable conditions under which the Hungarian Jews were transported to the death camps. Compl., ¶¶ 105–108. Cruelly, MÁV charged the victims

for what little water they were given to last the two or three-day journey to Auschwitz, commingling those extorted funds with the company's other revenues. *Id.*; Dascal Decl., ¶ 13.

In 1941, before Hungary commenced its genocide, there were approximately 825,000 Jews in Greater Hungary, including approximately 100,000 converts. Compl., ¶ 120. Excluding those who managed to flee abroad, the loss of Hungarian Jewry in the Holocaust for which Defendants are directly responsible was 564,507. *Id.* Of these, 440,000 were deported to Auschwitz over a single rail line between May 15, 1944 and July 8, 1944. *Id.*, ¶ 121.⁹

As a result of Defendants' concerted actions, enormous quantities of Jewish-owned property of all types, totaling hundreds of millions of dollars (at World War II-era values) were seized by Hungary and MÁV. Much of this was converted into cash and cash equivalents and commingled with general revenues which financed the operations of the Hungarian government and MÁV through the end of World War II and beyond. Compl., ¶¶ 98, 100, 105. Thus, these comingled and fungible funds have been used to procure assets, good and services by Defendants Hungary and MÁV, including assets, goods and services in the United States. *Id.*, ¶ 83.

While the post-armistice Hungarian government and post-Communist regime have expressed sympathy for the plight of the Jewish victims of the Hungarian Holocaust through the enactment of laws and decrees purporting to address their injuries, the Jews have enjoyed no tangible results with respect to compensation or restitution.¹⁰ Hungary's most recent legislative attempts to deal with its participation in the genocide against Hungarian Jewry have been described by the world's leading authority on the Hungarian Holocaust as "too little too late." 2

⁹ This does not include the tens of thousands of remaining Jews slaughtered by the Arrow Cross/Nyilas government from October 1944 until the Soviet occupation in January 1945. Compl., ¶¶ 117-119; Declaration of Menachem Beck ("Beck. Decl."), ¶¶ 18-19.

¹⁰ 2 The Politics of Genocide at 1308.

The Politics of Genocide at 1310.¹¹ This assessment has been updated and buttressed by Hungarian law expert András Hanák, who, unlike Defendants’ chosen expert (who is a partner in the law firm that represents Defendants), is not affiliated with any party in this case. Hanák Decl., *passim*. Such compensation as was actually paid by Hungary to certain Holocaust victims was capped at an arbitrarily low sum of \$5,000 per person, hardly approaching “fair compensation” as that term is understood in international law and general human experience. *Id.*, ¶ 30; Beck Decl., ¶¶ 21-22. Moreover, the compensatory scheme adopted some fifty years after the fact by Hungary is illusory, as shown by the declarations of Class members Yaffa Dascal and Menachem Beck, who diligently sought indemnification from Hungary through administrative and judicial channels, to no avail. Dascal Decl., ¶¶ 20 – 23; Beck Decl., ¶¶ 21-25.

III. THE COURT HAS SUBJECT MATTER JURISDICTION OVER THIS CASE UNDER THE EXPROPRIATION EXCEPTION OF THE FOREIGN SOVEREIGN IMMUNITIES ACT, 28 U.S.C. § 1605 (a)(3).

As Defendants agree, Section 1605(a)(3) of the Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. § 1605(a)(3), expressly provides that a foreign state and its instrumentalities are not immune where:

rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

¹¹ “[I]t is fair to assume that the compensation and reparation that Hungary will eventually provide will not approximate a fraction of the staggering losses that were incurred by Hungarian Jewry.” *Id.*, at 1311. Although Professor Braham made his comment in 1994, there has been no material change in the situation in the last 17 years. Indeed, with the election of the ultra-rightist Fidesz government in 2010, matters have deteriorated significantly. Declaration of András Hanák (“Hanák Decl.”), ¶¶ 17, 19, 21-25.

Further, Defendants do not deny that MÁV and the Republic of Hungary are “engaged in . . . commercial activity . . . in the United States,” as alleged by Plaintiffs. Compl. ¶¶ 83, 85. Nor do they deny the taking of property from Plaintiffs in connection with Defendants’ collaboration in Hitler’s “Final solution,” the extermination of Europe’s Jewish population. Compl., *passim*. Nor do they disagree, as the plain language of § 1605(a)(3) provides, that Plaintiffs need not allege that any property taken or property exchanged for the property taken is present within the United States in order for the Court to have jurisdiction, at least over MÁV.¹² Instead, Defendants argue that (1) takings of property from Plaintiffs did not violate international law, because a taking of property from a state’s own citizens is generally not considered a violation of international law; and (2) Plaintiffs either have not alleged at all that property exchanged for the property taken is (i) in the possession or control of MÁV, or (ii) within the United States, or have not alleged those facts with sufficient specificity. Def. Mem. at 7-9. Both propositions are demonstrably wrong, as demonstrated below.

First, the takings at issue violate international law because they were discriminatory; based solely on the religious and ethnic identity of the victims; not for any legitimate public purpose; and uncompensated. Indeed, the takings from Hungarian Jewish citizens were recognized as a legitimate matter of international concern in the 1947 Treaty of Peace entered into among Hungary, the United States and other countries.¹³ As Defendants concede, Article 27 of that Treaty expressly required Hungary to recognize and compensate the claims of its own citizens and former citizens. *See* 1947 Treaty of Peace, T.I.A.S. No. 1651, 61 Stat. 2065, 1947

¹² In order to qualify for the § 1605(a)(3) exception with respect to MÁV, an instrumentality of Hungary, Plaintiffs need allege only that the property taken or property exchanged for the property taken “is owned or operated . . . [by MÁV] and that . . . [MÁV] is engaged in commercial activity within the United States,” not that the property itself is in the United States.

¹³ As observed below at 14-16, Hungary’s discriminatory treatment of its Jewish minority is also a flagrant violation of Hungary’s obligations under international law as expressed in the Treaty of Trianon.

WL 26320, Def. Mem., Exh. 1 (ECF 22-4).¹⁴ Second, Plaintiffs have properly and specifically alleged that property exchanged for the property taken, in the form of cash and credits derived from the illegal takings, is within the possession and control of MÁV, and is also present in the United States and used by Hungary in its United States commercial activities. Compl., ¶¶ 83, 85.

Before addressing that issue, however, Plaintiffs underscore – contrary to Defendants’ assertion – that the burden of persuasion as to jurisdictional facts relating to immunity rests solely on sovereign defendants who assert that immunity.

A. At The Pleadings Stage, Plaintiffs Need Make Only A “Substantial And Non-Frivolous Claim” To Support An Exception To Sovereign Immunity.

In the leading case in this circuit, *Chabad of United States v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008), the Court of Appeals determined the applicable standards when, as here, a plaintiff invokes the property-expropriation exception to sovereign immunity under FSIA, § 1605(a)(3).¹⁵ The Court held that the exception has two parts, each with a different standard of review.

One part of the exception considers “the character of a plaintiff’s claim,” asking whether it properly is a claim for the taking of property in violation of international law. *Chabad*, 528 F.3d at 940. On this issue, a plaintiff adequately invokes jurisdiction by alleging a claim that is substantial and non-frivolous. The *Chabad* court explained:

[T]o the extent that jurisdiction depends on the plaintiff’s asserting a particular type of claim, and it has made such a claim, there

¹⁴ In Article 27 of the 1947 Treaty, Hungary recognized its obligation under international law to restore or pay fair compensation for property in Hungary of “persons under Hungarian jurisdiction” where that property was confiscated “on account of the racial origin or religion of such persons.” Def. Mem. at 3-4.

¹⁵ In *Chabad*, a non-profit Jewish organization in the United States alleged that the predecessor government of Russia and certain Russian instrumentalities had taken without compensation religious texts and library collections in 1917 and 1925. *Chabad* asserted a claim within § 1605(a)(3) of FSIA, the same provision at issue here, and alleged that those takings were in violation of international law and otherwise met the requirements for that exception to sovereign immunity. The D.C. Circuit held those allegations sufficient to withstand Russia’s jurisdictional challenge.

typically is jurisdiction unless the claim is “immaterial and made solely for the purpose of obtaining jurisdiction or . . . wholly insubstantial and frivolous,” i.e. the general test for federal question jurisdiction under *Bell v. Hood*, 327 U.S. 678, 682-83 (1946) . . .

Id., citing *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 826 (9th Cir. 1987) (jurisdiction proper under § 1605(a)(3) when plaintiff’s claim of conversion was “substantial and non-frivolous”) and *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 712 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993) (“At the jurisdictional stage, we need not decide whether the taking actually violated international law; as long as a ‘claim is substantial and non-frivolous,’ it provides a sufficient basis for the exercise of our jurisdiction . . .”). In examining whether the plaintiff claims that property was taken in violation of international law, the court reiterated that “non-frivolous contentions suffice under *Bell*.” *Id.* at 941.

In fact, this Court so held even before the D.C. Circuit handed down its decision in *Chabad*, e.g., *Crist v. Republic of Turkey*, 995 F. Supp. 5, 10-11 (D.D.C. 1998) (“an expropriation is a violation of international law if the taking does . . . not provide for just compensation At the jurisdictional stage, a court is not required to determine whether a taking or expropriation actually violated international law. The claim must merely be substantial and non-frivolous to provide a sufficient basis for jurisdiction.”) (citations omitted); *accord*, *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 306-07 (D.D.C. 2005).

The other part of the § 1605(a)(3) exception considers whether “one or the other of two possible ‘commercial activity’ nexi between the United States and the defendants” exists. *Chabad*, 528 F.3d at 940. These alternative nexi are either that the subject property (or any property exchanged for the property) is present in the United States in connection with commercial activity carried on in the U.S. by the foreign state, or that the property (or any property exchanged for the property) is owned by an agency of the foreign state which is

engaged in commercial activity in the U.S. As to these “purely factual matters under the FSIA,” at least those independent of the merits, the *Chabad* Court held that plaintiffs have no more than “a burden of production” under the FSIA if their facts are challenged, but “the burden of persuasion rests with the foreign sovereign claiming immunity, which must establish the absence of the factual basis . . .” *Id.*, citing *Aquamar S.A. v. Del Monte Fresh Produce N.A.*, 179 F.3d 1279, 1290 (11th Cir. 1999); *Cargill Int’l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993); *Alberti v. Empresa Nicaraguense de la Carne*, 705 F. 2d 250, 255-56 (7th Cir. 1983).

Defendants have not challenged the basic factual underpinnings advanced by Plaintiffs – that property of Hungarian Jews was stolen, confiscated or otherwise taken by MÁV and the Hungarian government and that such property (or property exchanged for it) is present in the United States in connection with commercial activity carried on here by Hungary, or the property (or any property exchanged for it) is owned by MÁV, a Hungarian agency or instrumentality engaged in commercial activity in the United States.

Accordingly, under the governing precedent in this Circuit and Court, the sole question presented by Defendants’ jurisdictional challenge – whether the taking violated international law for purposes of § 1605(a)(3) of FSIA – is subject only to the requirement that plaintiffs have made a “substantial and non-frivolous claim.” Plaintiffs undoubtedly have done so here.

B. The Taking Of Personal And Other Property By MÁV And Hungary From Hungarian Jews Violated International Law.

Defendants argue that a taking by a state or its instrumentality of property from its own citizens, without more, does not rise to the level of a violation of international law. This ignores the unique and special circumstances here: (1) The takings were part of an international program of genocide, which is itself a violation of international law; (2) the takings were concomitant with and part of the international transportation of Hungarian Jews from their homeland to

destinations in Poland, Germany, and Austria on the death trains committed to this purpose by MÁV; (3) the takings were based solely on the religious and ethnic identity of the victims, in violation of international law; and (4) the takings were recognized as a fit subject of international agreement, and therefore of international law, in the 1947 Treaty of Peace entered into by Hungary and the United States as well as the 1920 Treaty of Trianon.

1. Courts Have Held That Discriminatory Takings Are Violations Of International Law.

Courts that have been presented with Holocaust-era claims have concluded that the taking of property in a discriminatory fashion from targeted ethnic and religious groups (such as the Hungarian Jews) violated international law. *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 134 (E.D.N.Y. 2000) (noting that “the confiscation of private property during the Holocaust was a violation of customary international law . . .”), citing *State of Netherlands v. Fed. Reserve Bank of New York*, 201 F.2d 455, 459 n.4 (2d Cir.1953). As *Bodner* stated, “[T]his Court finds that plaintiffs have stated a cognizable 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.” *Id.*

As in *Bodner*, the takings alleged here were part of a larger murderous international program in which Hungary and MÁV were willing and eager participants, designed to divest all European Jewry of their property, their freedom and their lives. The Hungarian Jews whose property was taken as they boarded the cattle cars that were used to transport them to their deaths or to slavery were already “in transit” to foreign destinations in Poland, Austria and Germany.

In a Second Circuit case involving the taking of property from Polish Jews by the Polish government after World War II, the Second Circuit quoted the opinion from the lower court on appeal to the effect that “no consensus existed on the issue whether the right to be free from

discriminatory and uncompensated taking of property was one of the ‘fundamental rights’ conferred by international law upon all people vis-a-vis their own governments . . .” *Garb v. Poland*, 440 F.3d 579, 589 (2d Cir. 2006). Noting that the lower court rested its decision to dismiss at least in part on what it perceived as a “substantial legal hurdle” that plaintiffs would have to overcome on that point, the Second Circuit refused to endorse the lower court’s view, expressly reserving judgment on that issue. *Id.*, at 589-90.

In a case with similarities to this one, *Freund v. Republic of France*, 592 F. Supp. 2d 540, 554-55 (S.D.N.Y. 2008), *aff’d on other grounds*, *Freund v. SNCF*, 391 Fed Appx. 939 (2d Cir. 2010), the district court assumed (without expressly deciding) that the taking of property from French Jews by the French National Railways in connection with their deportation during the Holocaust was a violation of international law. Significantly, the court relied on both the *Garb* and *Chabad* precedents as recognizing that the “violation of international law” allegation was one of the three under § 1605(a)(3) that were “jurisdictional” and sufficient so long as the allegations were not “wholly insubstantial and frivolous.” *Id.*, at 555.¹⁶ Another leading case has found “that the dictum in [a prior decision] to the effect that ‘violations of international law do not occur when the aggrieved parties are nationals of the acting state,’ is clearly out of tune with the current usage and practice of international law.” *Filartiga v. Pena-Irala*, 630 F. 2d 876, 884-85 (2d Cir. 1980) (holding that “international law confers fundamental rights upon all people vis-a-vis their own governments” and that torture “admits of no distinction between treatment of aliens and citizens”). *See also*, *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1036 (9th Cir.

¹⁶ *See also* a decision of the Iran-United States Claims Tribunal, which stated that “[d]iscrimination is widely held as prohibited by international law in the field of expropriation.” *Amoco Int’l Fin. Corp. v. Iran*, 27 I.L.M. 1320, 1350 (1988).

2010) (sustaining jurisdiction over defendant Spain where complaint alleged taking by Germany of property of a German Jewish national prior to World War II).

The legislative history of § 1605(a)(3) identifies a “tak[ing] in violation of international law” as one where the “prompt, adequate and effective compensation required by international law” is not forthcoming, and specifically includes “takings which are arbitrary or discriminatory in nature,” without other limitation. See *Zappia Construction v. Emirate of Abu Dhabi*, 215 F.3d 247, 251 (2d Cir. 1999) (citing to H.R. Rep. No. 94-1487 at 19-20 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6618).

None of the precedents cited by Defendants holds to the contrary. Most involve a state’s run-of-the-mill expropriation of its own citizen’s property, sometimes accompanied by some form of compensation, and usually for a public purpose. Plaintiffs have found no case where a court has held that an uncompensated taking of property, not for any public purpose, from a targeted religious or ethnic group singled out for persecution, where that taking was done in the context of an overall plan of genocide that traversed international borders, was not a violation of international law.

Accordingly, there is no question that the takings at issue here were in violation of international law as understood by the drafters of the FSIA and as interpreted by those courts which have addressed the issue in this and similar contexts.

2. Hungary’s Express Undertaking In The 1947 Treaty To Compensate Its Own Citizens For The Discriminatory Takings Acknowledges Those Takings To Have Been In Violation Of International Law.

Article 27(1) of the Treaty of Peace that Hungary entered into with the United States and other sovereign powers in 1947 provided that:

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.

Def. Mem., Exh. 1. Hungary undertook to fulfill this obligation “within twelve months from the coming into force of the Treaty.” *Id.*, Art. 27(2).

In general, treaty obligations entered into between two or more sovereign states are subject to international law. Historically referred to as “the law of nations,” international law incorporates both treaty law and customary international law. Restatement (Third) of Foreign Relations Law of the United States § 102 (2004); *see also, e.g.*, Article 38(1)(a) of the Statute of the International Court of Justice,¹⁷ which recognizes “international conventions, whether general or particular, establishing rules recognized by the contesting states,” as one of its sources of international law.

Indeed, it is a bedrock principle of international law that that the agreements and obligations that sovereign states undertake to each other are fundamental elements of international law. Thus, the Vienna Convention on the Law of Treaties (1969), in its preamble, expressly recognizes “the ever-increasing importance of treaties as a source of international law . . .” 1155 U.N.T.S. 331, TS No. 58 (1980), 8 I.L.M. 679 (1969). Here, the Treaty obligation that Hungary undertook in 1947 expressed Hungary’s understanding that its obligation to compensate even its own citizens for discriminatory and uncompensated takings was a matter of international concern, international recognition and international law. This recognition reinforced Hungary’s

¹⁷ Available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> (last visited May 6, 2011).

earlier international law undertakings to nearly the same effect first made in the Treaty of Trianon after World War I, *supra* at 3 n.7.¹⁸

As Defendants admit, “in 1993, the Hungarian Constitutional Court determined that Hungary had not fully complied with its obligations under the 1947 Peace treaty . . .” even after 46 years. Def. Mem. at 5. Although Defendants claim to have made some amends on that score since the Constitutional Court finding in 1993, *id.*, it is clear that any such efforts were wholly inadequate and insubstantial. Dascal Decl., ¶¶ 20–23; Zelikovitch Decl., ¶¶ 23-24; Beck Decl., ¶¶ 21-25; Hanák Decl., ¶¶ 26-30.¹⁹ However, issue need not be joined on that score with respect to the separate point being made here, that in the 1947 Treaty Hungary and the other signatory nations recognized that Hungary’s obligations under international law to pay compensation for discriminatory takings directed at its own citizens was a fit subject for an international treaty, and therefore, a fit subject of international law.

Finally, although many of the Plaintiffs were citizens of Hungary at the time of the takings in question, not all were. For example, Named Plaintiff Tzvi Zelikovitch was one of the 18,000 Jews expelled from Hungary in 1941 on the premise that they were not Hungarian nationals. Zelikovitch Decl., ¶¶ 5, 10. Further, many of the Jews deported in 1944 were not

¹⁸ In Article 55 of the 1921 Trianon Treaty, Hungary undertook to “assure complete protection of life and liberty to all inhabitants of Hungary without distinction of birth, nationality, language, race or religion.” Art. 58 provides that “[a]ll Hungarian nationals shall be equal before the law and shall enjoy the same civil and political rights without distinction as to race, language or religion. Difference of religion, creed or confession shall not prejudice any Hungarian national in matters relating to enjoyment of civil or political rights, as for instance admission to public employments, functions and honours, or the exercise of professions and industries.”

¹⁹ A court may consider material beyond the complaint in determining whether it has jurisdiction to hear the case, so long as the court accepts the factual allegations in the complaint as true. *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624-625 n.3 (D.C. Cir. 1997). In this regard, “the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts.” *Coalition for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003); *see Jerome Stevens Pharm., Inc. v. Food & Drug Admin.*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

Hungarian nationals, but rather, citizens of Rumania, Poland and numerous other neighboring areas. With respect to these groups, Defendants' jurisdictional arguments simply do not apply.

C. Plaintiffs Have Expressly, Specifically And Plausibly Alleged That Some Of The Property Exchanged For The Property Taken Is In The Control And Possession Of MÁV And That Some Is Used In Connection With Hungary's Commercial Activities Within The United States.

Defendants ignore or mischaracterize Plaintiffs' allegations on this issue. The Complaint specifically alleges that: (1) "Hungary engages in an ongoing course of commercial activity throughout, and maintains property in the United States, that has been exchanged for the property it stole from plaintiffs herein," Compl. ¶ 83; (2) "That property is owned and operated by MAV and/or other agencies and instrumentalities of Hungary that are engaged in commercial activity in the United States," *id.*; (3) "Alternatively, that property is present in the United States in connection with commercial activity carried on by Hungary within the United States," *id.*; and (4) "MAV owns and/or operates property and property exchanged for property that it stole from Jewish deportees," *id.*, ¶ 85.

Throughout the Complaint, Plaintiffs allege with specificity exactly what happened to the monies and possessions taken from them:

All expenses associated with ghettoization were taxed on the Jews, including the Plaintiffs herein. The monies thus confiscated were remitted to defendant Hungary's national treasury and commingled with general government revenues.

Compl. ¶ 98.

Hungarian officials . . . went from one Jewish home to the next making detailed inventories of property in the homes The property was then expropriated by defendant Hungary and converted to cash through sales and other means. The proceeds were transferred to the Hungarian government treasury and commingled with other Hungarian government revenues.

Id., ¶ 99.

The defendant railways sold, liquidated or otherwise converted some or all of the property they stole from Plaintiff deportees to cash and commingled those funds with other revenues. Defendant railways' funds and operations are in part derived from the funds they realized from liquidating the possessions they stole from Plaintiffs.

Id., ¶ 100.

MÁV charged the victims exorbitantly for the cost of the meager supply of water These extortionate charges were also commingled with MÁV's legitimate revenues.

Id., ¶ 105.

The Complaint thus describes the kinds of property taken, such as illegal "taxes" for ghettoization, personal property left in their homes by ghettoized and deported Jews and seized by Hungary, and personal property taken from them when they arrived at the ghettos from which they were later deported. It describes what happened to that property – it was generally liquidated and converted to cash, and commingled with other funds in the Hungarian Treasury or in MÁV's operating accounts. And it specifically and plausibly alleges that those funds, or funds derived from those funds, are (1) still in the possession and control of MÁV, which conducts commercial operations in the United States, Compl. ¶ 85; and (2) used by Defendant Hungary in its commercial operations in the United States, *id.*, ¶ 83. These are much more than just "barebone allegations" or "bald assertions," as claimed by Defendants, Def. Mem. at 9. They are specific, historically based and plausible. *Indeed, Defendants do not deny that they took the property as alleged, that in fact they liquidated and converted that property to cash as alleged and that they commingled those funds with their general operating funds as alleged.* Defendants have thus failed to sustain their burden of persuasion by a preponderance of the evidence on these factual underpinnings of the § 1605(a)(3) exception to sovereign immunity. *See Chabad*, 528 F.3d at 940.

Plaintiffs have stated all the necessary factual elements with specificity and plausibility: funds derived from the original takings are still in the possession and control of MÁV, which has commercial operations in the United States, and other such funds are in the possession and control of Hungary and used in its commercial operations in the United States.

Defendants also argue that Plaintiffs alleged in ¶ 136 of the Complaint that all of this property was initially “transferred” to the Nazi government in World War II. Def. Mem. at 9. Defendants fail to quote the rest of the paragraph, which states that such property was subsequently received back by the Hungarian government. In any event, Plaintiffs intended to refer in ¶ 136 only to those possessions that were looted and put on the infamous “Hungarian Gold Train.”²⁰ The specific allegations of ¶¶ 98-100 quoted above make clear that transfer to Germany of Jewish property was not the norm. The historical norm was the direct liquidation of the property of Hungarian Jews by Defendants here, and the commingling of those realized funds with Defendants’ ordinary operating funds.

IV. PLAINTIFFS’ CLAIMS ARE JUSTICIABLE.

Defendants paint Plaintiffs’ claims with a broad brush in arguing that the political question doctrine precludes the Court from considering these claims. In fact, “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.” *Japan Whaling Assoc. v. American Cetacean Soc’y*, 478 U.S. 221, 229-30 (1986) (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)); *Zivotofsky v. Sec’y of State*, 571 F.3d 1227, 1236 (D.C. Cir. 2009) (Edwards, J., concurring), *reh’d denied*, 610 F.3d 84 (D.C. Cir. 2010) (en banc) (Edwards, J., dissenting), *cert. granted sub nom., M.B.Z. v. Clinton*, No. 10-699, 2011 U.S.

²⁰ See generally Presidential Advisory Commission on Holocaust Assets in the United States, “Progress Report On: The Mystery of the Hungarian ‘Gold Train’”, <http://govinfo.library.unt.edu/pcha/goldtrainfinaltoconvert.html> (last visited May 5, 2011); *Rosner v. United States*, Cas. No. 01-1859-CIV-SEITZ, Final Order and Judgment (S.D. FL., Sept. 30, 2005) at Pacer.gov: <https://ecf.flsd.uscourts.gov/doc1/0511542114> (last visited, May 5, 2011).

LEXIS 3528 (May 2, 2011). Instead, as the Court instructed in *Baker*, the political question analysis requires a “discriminating inquiry into the precise facts and the posture of the particular case.” 369 U.S. at 217. See *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 841-42 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 997 (2011). Furthermore, in the area of foreign relations, this inquiry must be couched “in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.” *Baker*, 369 U.S. at 211-12. The precise facts of this case and its unique historical posture compel a finding that the political question doctrine is inapplicable.

The *Baker* Court identified the parameters of the requisite political question analysis in the following six “formulations”:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217. These formulations are “probably listed in descending order of both importance and certainty.” *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004).

Defendants suggest that the resolution of Plaintiffs’ claims has been constitutionally committed to the executive branch. However, “[r]eparation for stealing, even during wartime, is not a claim that finds textual commitment in the Constitution.” *Alperin v. Vatican Bank*, 410 F.3d 532, 551 (9th Cir. 2005), *cert. denied*, 546 U.S. 1137 (2006). See *Ungaro Benages v.*

Dresdner Bank AG, 379 F.3d 1227, 1236 (11th Cir. 2004) (similar claims “not constitutionally committed to a coordinate political branch”); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (with regard to international claims sounding in tort, “the department to whom this issue has been ‘constitutionally committed’ is none other than our own – the Judiciary.”) (citation omitted). As detailed herein, Plaintiffs’ claims implicate no issue that is constitutionally committed to a coordinate branch of government.

Defendants also argue that the Court’s adjudication would demonstrate a lack of respect due the executive and legislative branches of government, and that there is an unusual need for unquestioning adherence to political decisions already made. The last of the *Baker* factors “appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests.” *Kadic v. Karadzic*, 70 F.3d at 249-50. See *Ungaro-Benages*, 379 F.3d at 1237. As detailed below, however, Defendants have identified no such potential contradiction. Plaintiffs’ claims lie squarely within judicial cognizance.

A. Neither The 1947 Peace Treaty Nor The 1973 Executive Agreement Preempts Federal Judicial Power Over Plaintiffs’ Claims.

To prevent justiciability of Plaintiffs’ claims under the political question doctrine, one or both political branches of government must have occupied the subject matter field to such an extent that, applying the *Baker* standards, judicial power has been supplanted. Whether that has occurred is a narrow question. Since all branches of government may operate simultaneously in the sphere of foreign affairs, the question is whether the executive branch’s exercise of power in concluding the 1947 Peace Treaty (ECF 22-4) and the 1973 Executive Agreement (ECF 22-5) is such as to preclude judicial power in the circumstances. The constitutional, statutory, diplomatic

and administrative record shows that these two instruments are not intended to be an *exclusively* executive exercise of power precluding judicial determination of Plaintiffs' claims.

A treaty or executive agreement with a foreign country, by itself, does not reserve the subject matter exclusively in the executive branch. On the contrary, the Constitution contemplates that all branches of government may operate in the field of foreign affairs, expressly providing that “[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under . . . *Treaties* made, or which shall be made . . .” U.S. CONST. art. III, § 2 (italics supplied). Thus, the federal courts may constitutionally exercise judicial power even where the executive branch has concluded a treaty with a foreign state and the legislative branch, through the Senate, has advised and consented thereto. That judicial power extends as well to actions, like the present one, “between a State, or the Citizens thereof, and foreign States . . .” *Id.*

Recognizing this broad reach of the federal judicial power, Congress in 1789 authorized suits under the Alien Tort Claims Act, 28 U.S.C. § 1350. *See Arias v. Dynacorp*, 517 F. Supp. 2d 221, 227 (D.D.C. 2007) (“The ATCA confers upon the district court subject matter jurisdiction when an alien sues for a tort committed in violation of the law of nations or treaty of the United States.”). This statute is an example of legislative acknowledgement of the intermingling of legislative, executive and judicial powers in foreign relations.

Case law also demonstrates the overlap of the powers of the three departments of government in foreign affairs. In *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 311, 333 (1936), the Court authorized criminal proceedings – an exercise of judicial power – against a corporation that had been indicted for allegedly violating a joint resolution of Congress that imposed penalties for shipping arms to those countries where the President had determined, in accordance with authority granted in the joint resolution, there was domestic violence. More

recently, in *Boumediene v. Bush*, 553 U.S. 723, 798 (2008), the Court held that the writ of habeas corpus extends to aliens detained by the military as enemy combatants. The political question doctrine did not arise before the Court in either of these cases, because the exercise of foreign affairs and war-making powers was not, by itself, a sufficient basis to invoke the doctrine.

As *Baker v. Carr* counsels, the doctrine requires a discriminating case-by-case analysis of the precise facts. That analysis in this case demonstrates that neither the 1947 Peace Treaty nor the 1973 Executive Agreement is inconsistent with and hence preemptive of the judicial power of the Court over Plaintiffs' claims. Taken together these documents and related statutes demonstrate that the present claims are indeed justiciable.

Article 27 of the 1947 Peace Treaty cited by Defendants does not supplant Holocaust victims' rights to pursue individual claims for compensation in court. To the contrary, the Article declares a standard of international law, appropriate for such a multi-lateral treaty, that countries such as Hungary must compensate the victims of conduct now understood as crimes against humanity.²¹ Section 2 of Article 27 reflected Hungary's obligation to effectuate its terms "within twelve months from the coming into force of the Treaty."

Defendants admit that Hungary utterly failed to comply with Article 27. Indeed, their expert states that for 45 years Hungary enacted no relevant legislation, Declaration of László Nagy, ECF 22-2 ("Nagy Decl." ¶ 27) (no legislation at all until 1992), and that additional required legislation was not enacted for five more years. *Id.* ¶ 28 (legislation only in 1997).²²

²¹ While the Holocaust occurred at the same time as World War II, the Holocaust is distinct from the war. Extermination of the Jews did not further the war effort of the Axis but clearly detracted from it. Thus, crimes against humanity are distinct from war crimes, and war reparations are different from compensation for the human rights violations during the Holocaust.

²² While the many admissions in Mr. Nagy's Declaration are telling, the Court should reject any self-serving statements proffered because he is not independent – he is a partner in Defendants' law firm in this case. Nagy Decl., ¶ 3. The opinion of someone who regularly represents one of the parties and is not an "independent, objective expert" on the question of the adequacy of a foreign forum is perforce "unreliable" and "virtually useless." *In re*

Defendants have pointed to no efforts by the U.S. executive branch during those five decades (or thereafter) to pursue Hungary's obligations to Holocaust victims under Article 27 or otherwise. Thus, in the 64 years since the Treaty was concluded, the U.S. executive and legislative branches have been absent from this field.²³

This history of inactivity contrasts dramatically with the events in *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57 (2d Cir. 2005), cited by Defendants. There the Second Circuit dismissed Holocaust claims of Austrian Jews under FSIA. The United States Government had submitted a formal Statement of Interest to the court urging dismissal of the claims because

- (1) the Executive Branch has exercised its authority to enter into executive agreements respecting the resolution of those claims;
- (2) the United States Government (a) has established through an executive agreement an alternative international forum for considering the claims in question, and (b) has indicated that, as a matter of foreign policy, the alternative forum is superior to litigation; and
- (3) the United States foreign policy advanced by the executive agreement is substantially undermined by the continuing pendency of the claims.

Id. at 59-60.

Unlike in *Whiteman*, here there is no statement of foreign policy interest by the United States. Moreover, none of the specific actions identified in *Whiteman* is present here. Significantly, the agreement in that case extended "to Austrian victims of Nazi-era persecutions," *id.* at 62, not just to U.S. nationals. As discussed below, there is no comparable executive agreement with Hungary respecting the resolution of the claims in this case, since the Executive

Bridgestone/Firestone Inc., 190 F. Supp. 2d 1125, 1131 n.5 (S.D. Ind. 2002). *See also, HTC Corp. v. IPCom GmbH & Co., KG*, 2009 U.S. Dist. LEXIS 125791 (D.D.C. Dec. 18, 2009) (district court allowed the affidavit of a foreign lawyer who was patent counsel to the party on whose behalf his affidavit was being introduced, but expressed skepticism about accepting anything case-specific that he might say).

²³ Article 40 of the 1947 Treaty is not relevant to Plaintiffs' claims. Plaintiffs are not bringing a claim pursuant to the Treaty, and Article 40 is not intended to afford a remedy for Plaintiffs or other individuals. It is merely a provision to address diplomatic disputes among the various signatory nations.

Agreement here concerns only the claims of persons who were U.S. nationals when the claims arose. Thus, there is also no alternative forum, international or otherwise, established by agreement for adjudication of these claims. And consequently, there is no identified foreign policy that would be substantially undermined by judicial resolution of the present claims.

Indeed, the Eleventh Circuit has held that claims like those brought by Plaintiffs are justiciable even where there exist, as in *Whiteman*, indicia of substantial executive branch foreign relations engagement. See *Ungaro-Benages*, 379 F.3d at 1235-36. *Ungaro-Benages* involved a claim by a German against German corporate interests to recover property that had been nationalized in the Holocaust. In evaluating the justiciability of the plaintiff's claim, the court reviewed pertinent United States-German agreements, focusing on the Foundation Agreement, which "aimed at achieving a 'legal peace' with Germany through the creation of a foundation to hear claims brought by German Nazi victims and to provide compensation therefor." *Id.* at 1231 (quoting Agreement concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, U.S.-F.R.G., 39 I.L.M. 1298).

Nevertheless, the court concluded that "federal court consideration of the present case does not reflect a lack of respect for the executive nor does it interfere with American foreign relations." *Id.* at 1236. In support of its conclusion, the court emphasized the fact that the U.S. executive had elected not to settle claims or transfer them to the Foundation, "although it had the power to do so." *Ungaro-Benages*, 379 F.3d at 1235. Moreover, although the U.S. executive had delivered a statement of national interest regarding the *Ungaro-Benages* litigation, the court held that "a statement of national interest alone . . . does not take the present litigation outside of the competence of the judiciary." *Id.*

Here, Defendants offer nothing remotely comparable to the Foundation Agreement in support of their political question argument. The 1947 Treaty falls far short of demonstrating the U.S. executive branch's engagement evidenced by the Foundation Agreement, and similarly does not represent a settlement of Plaintiffs' claims. Furthermore, the *Ungaro-Benages* court's determination that a Statement of Interest was insufficient to establish a political question only further underscores the weakness of Defendants' position here, because the U.S. government has been silent, both as to the litigation and the historical resolution of Plaintiffs' claims. Thus, *Ungaro-Benages* counsels strongly in favor of a ruling that Plaintiffs' claims are justiciable.

The Executive Agreement also does not resolve and hence preclude justiciability of Plaintiffs' claims, because the agreement does not even address those claims. Rather, like numerous similar executive agreements involving other countries, the agreement resolves only the claims of persons who were United States nationals *at the time the claims arose*. Plaintiffs and the members of the Class (or their decedents), however, were not United States nationals when their claims arose.

That the Executive Agreement is so limited is clear from the Peace Treaty, related federal statutes and the decisions of the Foreign Claims Settlement Commission ("FCSC" or "Commission"), charged by Congress to adjudicate claims out of funds like those received from Hungary under the Executive Agreement. Congress has provided that funds received pursuant to the Executive Agreement are to be used to pay certain claims of United States nationals including those arising under the Peace Treaty. *See* 22 U.S.C. § 1641a(a) (creating Hungarian Claims Fund), § 1641a(c) (directing deposit of Hungarian payments under the Executive Agreement into Hungarian Claims Fund), and § 1641b(1), (2), and (5) (directing payments on claims of United States nationals, including under Articles 25 and 26 of the Peace Treaty).

Demonstrating this approach, the FCSC has previously ruled:

In the Claim of [Redacted], Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), the Commission held, *consistent with its past jurisprudence and generally accepted principles of international law*, that in order for a claim to be compensable, the claimant must have been a national of the United States, as that term is defined in the Commission's authorizing statute, *from the date the claim arose* until the date of the Claims Settlement Agreement.

In the Matter of Claim of [Personally Identifiable Information Redacted] against the Great Socialist People's Libyan Jamahiriya, Claim No. LIB-I-052, Decision No. LIB-I-023 (F.C.S.C. Oct. 16, 2009) slip opinion at 4 (italics supplied), attached hereto as **Exhibit 1**. In that case under a claims settlement agreement with Libya, the FCSC discussed when one generally must be a national of the United States to be encompassed in such an agreement. The Commission explained:

The Claims Settlement Agreement is silent, however, as to *when* a claimant must be a United States national in order to be eligible for compensation under the Claims Settlement Agreement. Therefore, the Commission must look to United States practice and the applicable principles of international law, justice and equity, including its own jurisprudence, to make this determination. It is a *well-established principle of the law of international claims*, which has been applied *without exception* by both this Commission and its predecessors, the War Claims Commission and the International Claims Commission, that a claim may be found compensable only if it was owned by a United States national *at the time the claim arose*.

Id. at 5-6 (“when” in italics in original; other italics supplied). *See, also, Haas v. Humphrey*, 246 F.2d 682, 683 (D.C. Cir. 1957) (affirming denial of compensation because “the plaintiff was not a national of the United States at the time the property in question was taken”); 22 USC § 1645b (allowing compensation for “losses incurred as a result of the nationalization, expropriation, or other taking of (or special measures directed against) property [by Viet Nam] which, at the time of such nationalization, expropriation, or other taking, was owned wholly or partially, directly or

indirectly, by nationals of the United States”); Official Notice by FCSC of claims program for claims against the government of Czechoslovakia, 47 Fed. Reg. 8092 (February 24, 1982) (stating that compensable claims relate to “rights or interests in property owned . . . at the time of loss by nationals of the United States, where the claim arising therefrom, or an interest therein, was owned continuously by a United States national until the date of filing a claim with the Commission”); Department of State, Public Notice 749, “Registration of Claims Against Iran With the Department of State and Submission of Claims to the Iran-United States Claims Tribunal Department of State” ¶ 7, 46 Fed. Reg. 19893 (April 1, 1981) (specifying that “[f]or purposes of defining the jurisdiction of the Tribunal, the term ‘claims of national of the United States’ means claims owned continuously by U.S. nationals, from the date on which the claim arose to the date on which the claims agreement entered into force . . .”); Department of State, Office of the Legal Advisor, Public Notice 1837, “Claims for Property Located in Albania,” 58 Fed. Reg. 40461, 40462 (July 28, 1993) (advising that “[a]ny [claims settlement] agreement [the United States might conclude with Albania] would likely cover only claims for property which was owned by United States nationals at the time of expropriation by Albania”).²⁴

B. Plaintiffs’ Claims Do Not Require Evaluation Of Hungary’s Compliance With Article 27 Of The Peace Treaty, Its Compensation Schemes Or The Rulings Of The Hungarian Constitutional Court.

Defendants maintain that, notwithstanding the United States’ inactivity in pursuing Hungary’s obligations to Holocaust victims, the adjudication of Plaintiffs’ claims will require an

²⁴ The cases cited by Defendants, Def. Mem. at 17, n.18, likewise demonstrate that presidential settlement of foreign claims is focused upon claims of the United States and its nationals. See *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981) (“[T]he United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries. Though those settlements have sometimes been made by treaty, there has also been a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate.”) (citing at least 10 such agreements since 1952); *United States v. Pink*, 315 U.S. 203, 227 (1942) (“The United States is seeking to protect not only claims which it holds but also claims of its nationals.”); *Belk v. United States*, 858 F.2d 706, 707 (Fed. Cir. 1988) (“The relevant provision of the Algiers Accords prohibits United States nationals from prosecuting claims related to the seizure of the hostages, their detention, and injuries to them or their properties that arose out of events that occurred before the date of the Accords.”).

assessment of Hungary's compliance with its Article 27 obligations, a determination of the sufficiency of Hungary's "compensation schemes" for Holocaust victims, and a judgment as to the sufficiency of the Hungarian Constitutional Court's ruling regarding Hungarian compliance with Article 27. *See* Def. Mem. at 15, 17, 23. These determinations, according to Defendants, are constitutionally committed to the executive, and any claims that required their resolution would therefore amount to a nonjusticiable political question.

But Defendants are mistaken in their analysis of what rulings the Court might need to make in this case. Plaintiffs' claims are not founded upon Article 27 of the 1947 Treaty,²⁵ and thus there is no reason that the Court will need to assess Hungary's compliance with that provision. Indeed, Defendants' own expert has already established that Hungary failed to honor its responsibilities under Article 27. Further evaluation of Article 27 is therefore not relevant to the adjudication of Plaintiffs' claims. Similarly, there is no need for this Court to assess the sufficiency of the Hungarian Constitutional Court's ruling – and Defendants suggest no reason such need would arise. As discussed above, Defendants' expert has explained that the Hungarian court simply acknowledged Hungary's failures to comply with Article 27.

Further, although Defendants refer to subsequent Hungarian laws providing compensation for Holocaust victims, which Plaintiffs regard as an inadequate response to their claims in this action, either way the Court is clearly permitted to apply Hungarian law just as it would any other foreign law where necessary. American courts construe and apply foreign legal standards on a regular basis without implicating U.S. foreign affairs or the political question doctrine. *See, e.g., Ganem v. Heckler*, 746 F.2d 844, 853-54 (D.C. Cir 1984) (determination of foreign law "is one which courts make virtually every day as a matter of course. . . . [D]irect

²⁵ As explained above in Part III, the 1947 Treaty is strong evidence of what international law was at the time of the Holocaust.

governmental contact has not been deemed necessary to the task.”). *See, also, Watts, Watts & Co. v. Unione Austriaca di Navigazione*, 248 U.S. 9 (1918) (federal court has jurisdiction to hear claim by British corporation against Austro-Hungarian corporation under either French or English law).

Moreover, this case is distinguishable from the cases cited by Defendants. For example, in *Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005), *cert. denied*, 546 U.S. 1208 (2006), women from China, Taiwan, Korea and the Philippines asserted claims against Japan following World War II. Japan, at the insistence of the United States, had negotiated peace treaties with each of the plaintiffs’ nations following the war, and the court reasoned that an adjudication of their claims would require interpretation of the treaties. The Executive Branch, in a detailed Statement of Interest highlighting its history of management over the Japanese post-war recovery, explained that such a ruling would “undo” U.S.-Japan policy and could “disrupt” Japan’s relations with China and Korea, “thereby creating ‘serious implications for stability in the region.’” *Id.* at 52 (quoting Statement of Interest at 34-35). The court concluded, in light of the Executive’s judgment, that the plaintiffs’ claims were nonjusticiable because of the need to evaluate competing treaty interpretations.

Here, by contrast, the executive branch has offered no Statement of Interest, which is consistent with our nation’s history of asserting no management over the damages now sought by Plaintiffs. Moreover, unlike the treaties identified in *Joo*, the 1947 Hungary-U.S. Treaty did not reflect a settlement of Plaintiffs’ claims, but rather an acknowledgment that Plaintiffs were to be compensated. The instant case therefore lacks the two elements relied upon by the *Joo* court: the underlying dispute implicating foreign affairs, and the insistence by the Executive that the resolution of that dispute impinged upon a textually committed exclusive power.

Defendants also cite two cases from this Circuit to suggest there is a precedent for finding Holocaust-era claims against foreign defendants to be nonjusticiable political questions. Both cases, however, are inapposite, as neither involves a political question analysis or application of the Supreme Court's *Baker v. Carr* test.

The first case, *Kelberine v. Societe Internationale*, 363 F.2d 989 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 989 (1966), was dismissed over concerns for its manageability. Defendants fail to recognize that *Kelberine* preceded the 1966 revamping of Rule 23, the resulting new class action jurisprudence and practice and the advent of the *Manual for Complex Litigation*. See *Alperin v. Vatican Bank*, 410 F.3d at 554. In fact, the Ninth Circuit chided a district court for relying on *Kelberine* in a Holocaust case, describing *Kelberine* as “somewhat anachronistic.” *Id.*

The second case, *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), also omits any political question analysis. Instead, the D.C. Circuit ruled that the reparations claim there was barred under FSIA. *Id.*, at 1176. The footnote cited by Defendants, wherein the court considered the intended scope of FSIA, was written as a response to the dissent, and merely set forth the majority's rationale for not reading the statute more broadly. See *id.*, at 1174 n.1. That statement did not pertain to the *justiciability* of the *Princz* claim or any similar claims.

The other cases cited by Defendants fare no better. Despite the limited connection between Plaintiffs' claims and the foreign relations of the United States, Defendants over-generalize Plaintiffs' claims as “claims arising out of World War II” that have “routinely” been rejected. See Def. Mem. at 20. But Defendants' over-generalizations fly in the face of the Supreme Court's requirement of a “discriminating inquiry into the precise facts and the posture of the particular case.” *Baker*, 369 U.S. at 217. Indeed, Defendants ask the Court to rely on a series of cases concerning claims against Austrian and German interests where courts focused

their political question analyses on the numerous, far-reaching post-war agreements between the United States and those countries.²⁶ The contrast between the single 1947 Peace Treaty, which represents the only American involvement in Plaintiffs' claims, and the German and Austrian diplomatic histories, is striking. The political question analysis here is dramatically different from that in the German and Austrian cases, and thus it is inappropriate to sweep this case haphazardly into a "World War II reparations" category under the political question doctrine. That approach simply does not meet the demands of *Baker*.

Given the 64-year long history of non-involvement by the U.S. government in Plaintiffs' claims, there is no possibility that this Court's adjudication here will violate the "respect due coordinate branches of government." *Baker*, 369 U.S. at 217. And in light of the purely normative nature of Article 27, as well as the absence of any subsequent political activity by the United States with regard to Plaintiffs' claims against Hungary, there is no need, much less an "unusual need[,] for unquestioning adherence to a political decision already made." *Id.* Under the *Baker* standard, Plaintiffs' claims are fully justiciable.

V. THIS COURT IS THE PROPER FORUM FOR ADJUDICATION OF THIS CASE, AND IT SHOULD NOT BE DISMISSED ON THE GROUND OF *FORUM NON CONVENIENS*.

A. Standard For *Forum Non Conveniens*

It is axiomatic that where, as here, there are U.S. plaintiffs – including four Named Plaintiffs and untold others within the putative class – the federal courts will accord a "substantial presumption in favor of [their] choice of forum." *Chabad*, 528 F.3d at 950. "The doctrine of *forum non conveniens* is a drastic exercise of the court's 'inherent power' because,

²⁶ See, e.g., *Whiteman*, 431 F.3d at 74; *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 262-72 (D.N.J. 1999) (describing post-World War II treaties between U.S. and Germany, including establishment of reparations program and reparations court for dispute resolution); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 448-60 (D.N.J. 1999) (same); *Frumkin v. JA Jones, Inc.*, 129 F. Supp. 2d 370, 376078 (D.N.J. 2001) (same).

unlike a mere transfer of venue, it results in the dismissal of a plaintiff's case.” *Carijano v. Occidental Petroleum Corp.*, 626 F.3d 1137, 1144-45 (9th Cir. 2010) (citations omitted). It follows that *forum non conveniens* is “‘an exceptional tool to be employed sparingly,’ [and] . . . [t]he mere fact that a case involves conduct or plaintiffs from overseas is not enough for dismissal.” *Id.* “Instead of the rule being . . . that jurisdiction should be denied unless such denial would work an injustice, the rule is, rather, that jurisdiction should be taken unless to do so would work an injustice.” *Motor Distributors, Ltd. v. Olaf Pedersen’s Rederi A/S*, 239 F.2d 463, 465 (5th Cir. 1956). The heavy burden lies with the defendant to demonstrate its entitlement to this “exceptional” relief. *See Pain v. United Technologies Corp.*, 637 F.2d 775, 784 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

In examining the issue, the court should first ascertain whether there is an available and adequate alternative forum for the litigation. If not, the court has no discretion to dismiss the case, and the *forum non conveniens* motion must be denied. *Norex Petroleum Ltd. v. Access Industries, Inc.*, 416 F.3d 146, 157 (2d Cir. 2005), *cert. denied*, *Tyumen Oil Co. v. Norex Petroleum Ltd.*, 547 U.S. 1175 (2006); *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1225-26 (3d Cir. 1995). Only where an available and adequate alternative forum exists should the court then consider what degree of deference to give to the plaintiffs’ selection (“substantial” if they are U.S. citizens, and less deference if they are not, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981), *reh. denied*, 455 U.S. 928 (1982)). Then the court must balance the public and private factors enunciated in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-9 (1947), and make its determination accordingly. Applying this three-step analysis, it is manifest that Plaintiffs are properly before this Court, and that the case should not be dismissed for *forum non conveniens*.

B. Hungary Affords An Inadequate Alternative Forum In Which To Adjudicate This Claim.

Plaintiffs' choice of Washington, D.C. as the forum for this suit is not random. In addition to the factors discussed below at Section V(C)(2) and (3), Congress has expressly provided that Washington, D.C., is a proper forum in which to bring suit against a foreign state.²⁷

Further, Hungary affords an inadequate alternative forum. An alternative forum is inadequate where, *inter alia*:

- “the proposed foreign forum. . . would deem Plaintiffs’ claims precluded,” *Norex Petroleum*, 416 F.3d at 162; or
- “the remedy provided by [it] is so clearly inadequate or unsatisfactory that it is no remedy at all,” *Piper Aircraft*, 454 U.S. at 254; or
- plaintiff demonstrates significant legal or political obstacles to conducting the litigation in the alternative forum, *Menendez Rodriguez v. Pan Am Life Ins. Co.*, 311 F.2d 429, 432-33 (5th Cir. 1962), *vacated on other grounds, Pan Am Life Ins. Co. v. Menendez Rodriguez*, 376 U.S. 779 (1964); or
- conditions there “plainly demonstrate that the plaintiffs are highly unlikely to obtain basic justice therein,” *Vaz Borralho v. Keydril Co.*, 696 F.2d 379, 393-94 (5th Cir. 1983), and will be “treated unfairly,” *MBI Group, Inc. v. Credit Foncier du Cameroun*, 616 F.3d 568, 574 (D.C. Cir. 2010); or
- there is a prevalence of bias, *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1179 (9th Cir. 2006); or
- only nominal damages, at most, are recoverable, *Carijano*, 626 F.3d at 1144-45; or
- unreasonable delays in adjudication effectively deny the plaintiffs justice, *Bhatnagar*, 52 F.3d at 1227-28; or
- plaintiffs cannot access evidence essential to prove their claims, *Eurofins Pharma US Holdings v. BioAlliance Pharma, S.A.*, 623 F.3d 147, 161 n.14 (3d Cir. 2010); or

²⁷ “A civil action against a foreign state . . . may be brought . . . in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.” 28 U.S.C. § 1391(f)(4).

- the plaintiffs suffered trauma there, causing undue prejudice or inconvenience to force them to return to litigate their claims, *Licea v. Curacao Drydock Co.*, 537 F. Supp. 2d 1270, 1275 (S.D. Fla. 2008) (citing *Guidi v. Intercontinental Hotels Corp.*, 224 F.3d 142 (2d Cir. 2000)).

Each of these conditions is present here, and the Defendants have not met the “heavy burden” of overcoming any, let alone all, of them. *Pain*, 637 F.2d at 784.²⁸

At the threshold, if the new Hungarian constitution, effective January 1, 2012 (called the “Basic Law”), is construed literally by the courts, this suit will be substantially barred. *See* Hanák Decl., ¶¶ 22-24. That is because the Preamble to the Basic Law states that on March 19, 1944 (the date the Germans occupied Hungary) Hungary lost its state sovereignty, which was restored only on May 2, 1990 (after the fall of the Communist regime). Thus, actions of Hungary and MÁV during the bracketed period, which embraces most of the violations alleged herein, would not be viewed as the acts of the sovereign and would not be attributable to it. *Id.* The likely inability to litigate this suit in Hungary *per se* disqualifies it as an available or adequate forum. *Norex Petroleum, supra*.

Apart from that, the manifest religious and ethnic prejudice to which these plaintiffs will undoubtedly be exposed if they subject themselves to the Hungarian judicial system to try to litigate these claims renders Hungary an inadequate forum. Defendants’ expert affiant, László

²⁸ Significantly, whether an alternative forum is adequate requires that the court conduct a case- and fact-specific inquiry and not simply adopt prior determinations that any specific proposed forum was adequate or inadequate. *See* *Martinez v. Dow Chem. Co.*, 219 F. Supp. 2d 719, 741 (E.D. La. 2002); *In re Bridgestone/Firestone, Inc.*, 190 F. Supp. 2d at 1132 n.6. *See also* *Bhatnagar*, 52 F.3d at 1229 (stating that prior case law finding the foreign forum adequate is “irrelevant to the issue of whether [the defendant] met its burden of proof on the issue here.”). Thus, it is irrelevant that the courts in *Moscovits v. Magyar Cukor Rt.*, 2001 U.S. Dist. LEXIS 9252 (S.D.N.Y. July 9, 2001) and *Dorfman v. Marriott Int’l Hotels, Inc.*, 2001 U.S. Dist. LEXIS 642, at *22-23 (S.D.N.Y. Jan. 29, 2001) (neither one a Holocaust case) found Hungary to be an adequate forum – although in *Dorfman*, the Court, applying the balancing factors discussed below at Section V(C)(2) and (3), denied defendants’ motion for dismissal for *forum non conveniens*. *Id.* at *28. Likewise, the court in *USH Ventures v. Global Telesystems Group, Inc.*, 1999 Del. Super. LEXIS 123, at *9-11 (Del. Super. June 9, 1999) rejected a *forum non conveniens* argument made by a Hungarian litigant. (Applying Delaware *forum non conveniens* law, comparable to federal law, the court in *USH Ventures* found that the defendant, a Hungarian telecommunications company, failed to demonstrate that continued litigation in the United States would be an overwhelming hardship, despite its arguments that it would be too difficult to take the depositions of witnesses in Hungary and that translation costs would be burdensome.)

Nagy, suggests that the Hungarian civil justice system is free of bias – because the Hungarian Constitution (the one still in effect) so mandates – and therefore the Plaintiffs could receive a fair trial there. Nagy Decl., ¶ 7. Of course, such aspirational language is not self-enforcing; what is more, it is belied by the facts. Mr. Hanák attests to his own experience in local litigation where Hungary is a party and the opposing party is foreign, noting that there is noticeable bias in favor of the State. Hanák Decl., ¶ 20.²⁹ Where the plaintiffs are Jewish Hungarian Holocaust victims, the prospect of overt anti-Semitism is palpable. Mr. Hanák cites articles in the media describing the ominous growth of virulent anti-Semitism in Hungary during the past several years. *Id.*, ¶ 21 and attachments thereto.³⁰ In these polluted conditions, the likelihood of a fair trial for these plaintiffs who are making horrific allegations against the Republic of Hungary that cut to the

²⁹ See *Sangeorzan v. Yangming Marine Transp. Corp.*, 951 F. supp. 650, 653-54 (S.D. Tex. 1997) (Where the defendant was 48% owned by the Taiwanese government, Taiwan was not an adequate alternative forum); *Canadian Overseas Ores Ltd. v. Compania De Acero del Pacifico, S.A.*, 528 F. Supp. 1337, 1342 (S.D.N.Y. 1982) (Where one party was a state owned corporation, “serious questions about the independence of the Chilean judiciary vis a vis the military junta currently in power” rendered Chile an inadequate forum).

³⁰ During a speech by the Budapest mayor last year, a mob chanted “Jewish pigs” and “To the concentration camps.” Hanák Decl., ¶ 21.

Election posters have been smeared with yellow Stars of David and anti-Semitic slogans.

Budapest rabbis describe racial epithets being shouted as they walk their children to school, slogans such as “Jews go to Israel” are daubed in the streets, accompanied by swastikas, while cars bear stickers with the slogan “Jew-free car.”

Id. (see excerpt from article in the *Sunday Times of London*, April 11, 2010, appended to Hanák Decl. as Attachment 1). An avowedly anti-Semitic political party has recently gained political prominence in Hungary “for the first time since the end of World War II.” *Id.* Perhaps most alarming, a news story dated March 11, 2011, reporting on a re-evaluation of a 2008 survey, found that ““Hungarians and Poles are those most likely [Europeans] to hold extreme anti-Semitic views.”” *Id.*

Asked whether they agree with the statement that “Jews have too much influence in my country,” 69.2 percent of Hungarians and 49.9 percent of Poles agreed. The lowest levels were in Holland, with 4.6 percent agreeing. Germany, with 19.6 percent, was in the middle, sociologist Beate Kuepper told JTA in a telephone interview.

Id. (quoting news report by the Jewish Telegraphic Agency on March 11, 2011).

core of its national consciousness, pride, guilt and fisc, is fanciful in the extreme.³¹ Accordingly, Hungary is inadequate as a forum. *Vaz Borralho v. Keydril Co., supra*; *MBI Group, supra*; *Tuazon v. R.J. Reynolds Tobacco Co., supra*.

Delays in the judicial system are another reason why Hungary is an inadequate forum. Mr. Hanák identifies two sources of delay. The first, a possible six-year time line for the litigation under the current judicial regime, Hanák Decl., ¶ 19, may not be dispositive on its own, but when coupled with the second source of delay, becomes prohibitive. Under the new Basic Law, 30% of the judges of the Supreme Court of Hungary and 10% of the lower court judges will be forced to retire in 2011-2012. *Id.*, ¶ 25. Mr. Hanák concurs with the statement of the Hungarian judiciary that this will drastically retard the performance and schedule of the judiciary, and could result in many years' delay for tens of thousands of litigants. *Id.*, ¶ 25, n.19 and Attachment 5 thereto. The greatest vice of these expected delays is that Plaintiffs here are in their eighties and nineties, and many are ill. *See, e.g., Zelikovitch Decl., ¶ 25; Dascal Decl., ¶ 23.* Even assuming that this suit were otherwise permissible in Hungary, many, if not most, Plaintiffs likely would not survive through judgment.

The trauma that Plaintiffs would endure is yet another reason why Hungary is an inadequate forum. *See Licea, supra.* As expressed by one victim, “the mere thought of appearing in a courtroom of the very people who murdered almost my entire family and refused to compensate me for the horrible losses that my family and I incurred financially, psychologically and physically, is beyond my capacity to bear . . .” *Dascal Decl., ¶ 23.* Plaintiff

³¹ That prospect is exacerbated by the new Constitution's blatant efforts to restrict the independence of the Hungarian judiciary and make it toe the legislature's line, as attested by Mr. Hanák, Hanák Decl., ¶ 25. This heavy-handed action flies in the face of Mr. Nagy's blandishment that the Constitution guarantees the “independence” of the judiciary, Nagy Decl., ¶ 8. *See Martinez*, 219 F. Supp. 2d at 737-38, 740-41 (describing problems with the Honduran and Philippine judicial systems, including the fact that they were poorly staffed and not truly independent, despite such claims in their constitutions, and finding that they were accordingly inadequate forums).

Zelikovitch writes: “[T]he emotional trauma of subjecting myself for a third time to the system and the culture that murdered my family and hundreds of thousands of Jews is far more than I could bear emotionally. I could not do it. My memories of that time and place are still with me, as are my memories of my family and friends who were killed there.” Zelikovitch Decl., ¶ 25.

In addition, substantial legal differences between the two systems, as applied to the facts of this case, independently render Hungary inadequate as an alternative forum. Hungary does not allow class actions. Hanák Decl., ¶ 9. While joinder of claims is possible on a discrete basis, that is vastly different from a class action as allowed by Fed.R.Civ.P. 23. *Id.* Mr. Hanák notes that in 2010 there was a legislative effort to allow for a form of class action in Hungary, as acknowledged by Mr. Nagy in his Declaration, but it failed. *Id.*, ¶ 10.

Civil damages are highly restrictive in Hungary. “In any given case, recovery for non-pecuniary damages, if available at all, is limited to a relatively modest amount in relation to the cognizable pecuniary damages in that case.” Hanák Decl., ¶ 11. There is no right to punitive damages under Hungarian law. *Id.* “Further, in terms of available remedies under Hungarian law, there is no right to a declaratory judgment to compel disclosure or inspection of documents, much less a right to an injunction enjoining the Defendants from destroying documents.” *Id.* Plaintiffs’ inability to obtain evidence essential to prove their claims as a result of being unable to compel the production of documents or enjoin Defendants from destroying documents, is an independent ground rendering Hungary inadequate as an alternative forum. *See Eurofins Pharma US Holdings*, 623 F.3d at 161 n.14 (“Where a plaintiff cannot access evidence essential to prove a claim in an alternative forum, that forum is inadequate.” (citing *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 191 (3d Cir. 1991))).

Contrary to U.S. civil procedure, there is no right to inter-party pre-trial discovery under Hungarian procedure. Hanák Decl., ¶ 12. And unlike in the United States, there are no statutory protections afforded a party in Hungary as to documents controlled by the adverse party – no right to a motion to compel, no right to sanctions for destruction of documents. *Id.*

In Hungary, unlike in the U.S., “the losing party ordinarily must pay the attorneys’ fees and costs incurred by the other side pursuant to the prevailing party’s agreement with its counsel, or as set by the Court.” Hanák Decl., at ¶ 13.³² None of the Named Plaintiffs would have brought this suit were they at risk of liability for Defendants’ doubtless substantial legal fees and expenses paid to their New York counsel, much less would there be any likelihood of class participation. *Id.* In addition, were this case brought in Hungary, “upon Defendants’ motion U.S. Plaintiffs may be ordered to pay a prohibitively high amount of security deposit – the potential for an exemption from this requirement to which Mr. Nagy refers, Nagy Decl., ¶ 22, is very limited at best.” Hanák Decl., ¶ 13.

Further, while Mr. Nagy argues that Hungary would be bound to pay damages assessed against it by a Hungarian court whether or not budgeted funds were allocated for that purpose, Nagy Decl., ¶ 15, his statement is incomplete in two material respects. “First, if the money has not been allocated, enforcement would be difficult if not impossible as a practical matter.”

³² Mr. Nagy asserts that translation and interpretation costs may be borne by the Court, but he admits that this is subject to international convention or reciprocity, and he fails to disclose that even at that, any such limited benefit would apply only when a party or witness is testifying in court. [footnote omitted] *See* Nagy Decl. at ¶ 9. As, in fact, there is no pre-trial discovery allowed under Hungarian civil procedure . . . it follows that translation expense for pre-trial depositions, document translation and so forth are not subject to any cost-shifting. Here, where many of the Class members will require translation services during pre-trial discovery proceedings, and where a multitude of documents may require translation, it is clear that the possible, limited, availability of translation services for the trial itself affords little if any practical benefit.

Hanák Decl., ¶ 14.

Hanák Decl., ¶ 17. Second, the current law may well be revoked.³³ Finally, while it may be true that a foreign judgment against Hungary cannot be enforced in Hungarian courts absent certain restrictive conditions, Nagy Decl., ¶ 14, inhibitions on execution against Hungarian assets in the United States are much more limited under FSIA, *see* 28 U.S.C. § 1610; *Chabad*, 528 F.3d at 951, and there is no prohibition on execution of assets against Rail Cargo in Hungary (Hanák Decl., ¶ 18) or in the United States.³⁴

Some of these limitations alone render Hungary inadequate as an alternative forum (*e.g.*, the severe restriction on damages, *see Carijano, supra*, 626 F.3d at 1144-45, and the inability to access evidence essential to prove plaintiffs' claims, *see Eurofins Pharma US Holdings*, 623 F.3d at 161 n.14). Thus the effect of all of these limitations, *taken together*, is clear: Taking all of these restrictions into account, Plaintiffs could not obtain basic justice in Hungary.³⁵ Hungary is neither available nor adequate as a forum in which to adjudicate this case.

³³ . . . [T]he powers and jurisdiction of the Constitutional Court . . . have recently been limited by a new constitutional amendment, [footnote omitted] which has recently been re-codified in the new Hungarian Constitution called the Basic Law (“*Alaptörvény*”) [footnote omitted]. The effect of Act CXIX of 2010 and that of the new Basic Law is that the Constitutional Court will no longer have the power to review, much less invalidate, any legislation relating to taxes, public finance or budget. This would include legislative restrictions on payment of damages by the government. Stated differently, the current Civil Code provision could be quickly revoked by a legislative majority with no recourse to constitutional judicial review. This is a distinct possibility in part because, under Section (3) of Article N of the new Basic Law, both the Constitutional Court and ordinary courts need to adjudicate cases with a view to the balanced budget requirement set forth in Section (1) of Article N, which prescribes that Hungary must run a balanced, transparent and sustainable budget.

Hanák Decl., ¶ 17.

³⁴ *See, e.g.*, 2006 New York Code (“Actions or Special Proceedings by the Attorney General”), § 112(b)(4).

³⁵ *See Piper*, 454 U.S. at 254 (“[I]f the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice.”).

C. Alternatively, Defendants Have Not Met Their Heavy Burden Of Making A Clear Showing That The Balance Of Public And Private Interests Weighs So Heavily In Favor Of The Hungarian Forum That The Strong Presumption In Favor Of Plaintiffs' Choice Of Forum Is Overcome.

1. Contrary To Defendants' Assertion, The Court Must Afford Substantial Deference To Plaintiffs' Choice Of Forum.

A U. S. plaintiff's election to file suit in a United States court is entitled to great weight, and that deference is not diminished when the plaintiff sues in a representative capacity.³⁶

This presumption in favor of the plaintiffs' initial forum choice in balancing the private interests is at its strongest when the plaintiffs are citizens, residents, or corporations of this country. . . . [I]n this Circuit we have long mandated that district courts "require positive evidence of unusually extreme circumstances and should be thoroughly convinced that material injustice is manifest before exercising any such discretion as may exist to deny a United States citizen access to the courts of this country.

SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A., 382 F.3d 1097, 1101 (11th Cir. 2004) (internal citations omitted).³⁷ The defendant must make a "clear showing of facts which . . . establish such oppression and vexation of a defendant as to be out of proportion to plaintiff's

³⁶ Contrary to Defendants' assertion, Def. Mem. at 24, the U. S. plaintiffs' claims were not extinguished by the 1973 Agreement between the United States and Hungary. *See supra*, 26-28. Further, while the majority of Named Plaintiffs are non-U.S. citizens, this does not mean that the class will consist mainly of foreign citizens. *See, e.g., In Re: Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 352 (S.D.N.Y. 2002) (stating that "'outside of Israel, New York is home to the largest number of Holocaust survivors and their heirs in the world,' N.Y. Holocaust Victims Insurance Act of 1998 ('HVIA') § 2, N.Y. Ins. Law § 2701 notes (McKinney 2000), which suggests that whomever the unnamed plaintiff class or classes ultimately include, a substantial portion will consist of New York residents.").

³⁷ *See also, Bodner*, 114 F. Supp. 2d at 131-32 ("This Court should not dismiss a complaint brought by American plaintiffs in favor of a foreign jurisdiction on *forum non conveniens* grounds unless trial in the United States is demonstrably "unjust, vexatious, or oppressive." (citation omitted)); *In re Banco Santander Sec.-Optimal Litig.*, 732 F. Supp. 2d 1305, 1335-36 (S.D. Fla. July 30, 2010) ("When plaintiffs are United States citizens suing in United States courts, their choice of forum is entitled to substantial deference."); *Licea*, 537 F. Supp. 2d at 1273 ("plaintiffs' choice of forum is entitled to a strong presumption of suitability, and 'positive evidence of unusually extreme circumstances' must be present and . . . the court must be 'thoroughly convinced that material injustice is manifest before ousting a domestic plaintiff from this country's courts.'" (citations omitted)).

convenience, which may be shown to be slight or nonexistent. . . .” *Cheng v. Boeing Co.*, 708 F.2d 1406, 1410 (9th Cir. 1983).

Defendants have made no showing, much less a clear showing, that pursuit of this case in this district would be oppressive and materially unjust to them. Instead, Defendants shift the attention away from that inquiry and focus instead on Plaintiffs. Defendants argue that the District of Columbia is not the U.S. plaintiffs’ “home forum” and thus is not entitled to great weight, Def. Mem. at 27. The argument is weightless. “When the alternative forum is abroad, any domestic forum constitutes a ‘home’ forum for purposes of forum non conveniens analysis.” *Martin v. Vogler*, 1993 U.S. Dist. LEXIS 15878, at *8 n.4 (N.D. Ill. 1993) (citing *Interpane Coatings, Inc. v. Australia & New Zealand Banking Group Ltd.*, 732 F. Supp. 909, 915 (N.D. Ill. 1990)). Defendants also argue that less deference is afforded a foreigner’s choice of a U.S. forum, Def. Mem. at 27. But that is irrelevant, for as noted throughout this memorandum, four Named Plaintiffs and an untold number of class members are U.S. citizens.³⁸

Finally, Defendants improperly conflate the lower standard for consideration of transfer under 28 U.S.C. § 1404(a) with the higher standard for dismissal under *forum non conveniens*. The high bar for *dismissal* on the ground of *forum non conveniens* has been discussed above. A lesser standard for *transfer* to another district (*i.e.*, less deference to plaintiff’s choice of forum) obtains under 28 U.S.C. § 1404(a), which provides that “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” *See Norwood v. Kirkpatrick*, 349 U.S. 29,

³⁸ *See Carijano v. Occidental Petroleum Corp.*, 626 F.3d 1137, 1149-50 (9th Cir. 2010) (“*Piper* does not in any way stand for the proposition that when both domestic and foreign plaintiffs are present, the strong presumption in favor of the domestic plaintiff’s choice of forum is somehow lessened.”). At that, even if there were only foreign plaintiffs present, the Defendants would still be required to establish a “strong preponderance” in favor of dismissal. *See Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134, 1141 (C.D. Cal. 2005) (citations omitted). *See also Bhatnagar*, 52 F.3d at 1226 n.4.

32 (1955). Thus, the § 1404(a) cases upon which Defendants rely for the proposition that a plaintiff's choice of forum is entitled to less deference when the action is brought on behalf of a class are irrelevant to this suit.³⁹ *Id.* (noting that the district court has broader discretion to transfer a case under § 1404(a) than to dismiss under the doctrine of *forum non conveniens*); *Derensis, supra* at 1003, 1007.⁴⁰ Plaintiffs' choice of forum is entitled to substantial deference.

2. The Private Interest Factors Weigh In Favor Of Plaintiffs, And At A Minimum, Do Not Clearly Weigh In Favor Of Defendants.

Defendants fail to meet their burden to show clearly that private or public interest factors strongly weigh in their favor. *Deirmenjian v. Deutsche Bank, A.G.*, 2006 U.S. Dist. LEXIS 96772, at *68 (C.D. Cal. Sept. 25, 2006).⁴¹ The private interest factors include the relative ease of access to sources of proof; the availability of compulsory process for attendance of unwilling witnesses; the cost of attendance of witnesses; the enforceability of a judgment, if obtained; and other expenses or inefficiencies.⁴² *Am. Dredging Co. v. Miller*, 510 U.S. 443, 448 (1994) (quoting *Gulf Oil*, 330 U.S. at 508). Contrary to Defendants' assertion that the balance of private

³⁹ See Def. Mem. at 27 (citing *Gould v. Nat'l Life Ins. Co.*, 990 F. Supp. 1354, 1358 (M.D. Ala. 1998); *In re Nematron Corp. Sec. Litig.*, 30 F. Supp. 2d 397, 405-06 (S.D.N.Y. 1998); *Butcher v. Gerber Prods. Co.*, 1998 U.S. Dist. LEXIS 11869 (S.D.N.Y. Aug. 3, 1988). *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947), was technically a *forum non conveniens* case because 28 U.S.C. § 1404 was not yet enacted. However, the alternative forum at issue in *Koster* was a different U.S. forum, rather than a foreign forum. Accordingly, as explained in *Derensis v. Coopers & Lybrand Chartered Accountants*, 930 F. Supp. 1003, 1007 (D.N.J. 1996), that case is inapposite as well.

⁴⁰ Likewise misplaced, for the same reason, is Defendants' reliance on *Gould, supra*, for the proposition that a plaintiff's choice of forum is afforded less deference where the operative facts occurred abroad. Def. Mem. at 27.

⁴¹ "Even when an adequate alternative forum exists, [the court] will not disturb the plaintiff's original choice of forum 'unless the "private interest" and the "public interest" factors strongly favor' dismissal." *Deirmenjian, supra* (citations omitted).

⁴² This list is not exhaustive. See *Van Cauwenberghe v. Biard*, 486 U.S. 517, 528 (1988) ("This list of considerations to be balanced is by no means exhaustive, and some factors may not be relevant in the context of a particular case."). The factors provide for flexibility, with no one factor being dispositive. See *Piper*, 454 U.S. at 249-50 (the United States Supreme Court refused to "lay down a rigid rule to govern discretion" and "[e]ach case turns on its facts").

interest factors favors Hungary, they weigh decisively in favor of Plaintiffs. Certainly, and at a minimum, they do not strongly weigh in favor of the Defendants.

First, even if the majority of documents are in Hungary, given modern technology and the fact that any documents utilized by Defendants in the case will still have to be provided to U.S. Plaintiffs and their counsel, the factor of “relative ease of access to sources of proof” does not weigh strongly in favor of Defendants. *See Chabad*, 466 F. Supp. 2d 6, 28-29 (D.D.C. 2006), *aff’d in part and rev’d in part*, 528 F.3d 934 (D.C. Cir. 2008); *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d at 360-61; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 340 (S.D.N.Y. 2003).

Second, even assuming the majority of witnesses are not in the U. S., the proper inquiry is not the number of witnesses in various locations, but the evaluation of “the materiality and importance of the anticipated . . . witnesses’ testimony and then [the] determin[ation] [of] their accessibility and convenience to the forum.” *Carijano*, 626 F.3d at 1152.⁴³ The cost of attendance of witnesses weighs in favor of Plaintiffs because in the U. S., unlike in Hungary, inter-party deposition testimony is allowed. *See Hanák Decl.*, ¶¶ 9, 12; *Bodner*, 114 F. Supp. 2d at 131-32 (observing that the use of deposition testimony for witnesses who cannot travel from abroad is typical in international cases); *Licea*, 537 F. Supp. 2d at 1275-76 (stating that if foreign witnesses are necessary, “depositions could be used at trial, reducing the expense and inconvenience to witnesses”); *DiRienzo v. Philip Servs. Corp.*, 249 F.3d 21, 30 (2d Cir. 2002)

⁴³ In any event, the Defendants merely assert that “most of witnesses . . . are located outside the United States,” Def. Mem. at 28, and not that the majority of witnesses are located in Hungary, so it is not clear why Hungary would be the more convenient forum. In fact, as for the Named Plaintiffs, while not all are U.S. residents, *not one* resides in Hungary. Clearly, the United States would be a more convenient forum for the Plaintiffs.

(“Despite the preference for live testimony, we have recognized the availability of letters rogatory as relevant in deciding whether plaintiffs’ chosen forum is inconvenient.”).⁴⁴

Additional grounds tilting the balance of private interest factors in favor of Plaintiffs’ choice of forum, unmentioned in the Motion to Dismiss, include:

- **The substantial legal differences between the American and Hungarian forums that show why Hungary is not an adequate alternative forum.**

See Deirmenjian, 2006 U.S. Dist. LEXIS 96772, at *37-40; *id.* at *52-53 (finding that the lack of a class action devise, more stringent discovery, and the uncertainty of the availability of contingency fee-arrangements in Germany, “are practical problems that make Germany a less attractive forum than California” (citations omitted)); *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d at 366 (stating that the unavailability of contingency fees and the absence of a class action procedure weigh against dismissal, and also noting that “[m]any of the skills of plaintiffs’ current lawyers would be wasted in European civil-law systems which do not provide for pretrial discovery”); *Lehman v. Humphrey, Ltd.*, 713 F.2d 339, 346 (8th Cir. 1983) (prospective application of an extremely low cap on damages in the alternative forum served as a factor against forum non conveniens dismissal); *Derensis*, 930 F. Supp. at 1007-09 (finding alternative forum inadequate due to the undeveloped state of class action procedure);⁴⁵

⁴⁴ In addition, Defendants do not meet the heavy burden of showing that the cost of attendance of witnesses or the availability of hostile witnesses weighs heavily in their favor here since they failed to furnish any list of witnesses. While Defendants are “not required to identify potentially unavailable witnesses in exact detail,” *see Carijano*, 626 F.3d at 1152, they fail to allege any issues as to any specific witness. *See id.*; *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 340-41; *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 47 (2d Cir. 1996); *Weltover, Inc. v. Republic of Argentina*, 753 F. Supp. 1201, 1209 (S.D.N.Y. 1991) (“In the absence of such information, the Court cannot assess how defendant will be prejudiced by litigation in New York.”); *Duha v. Agrium, Inc.*, 448 F.3d 867, 877 (6th Cir. 2006) (“When no witness’ unwillingness has been alleged or shown, a district court should not attach much weight to the compulsory process factor.”); *Van Cauwenberghe*, 486 U.S. at 528 (“To examine ‘the relative ease of access to sources of proof,’ and the availability of witnesses, the district court must scrutinize the substance of the dispute between the parties to evaluate what proof is required, and determine whether the pieces of evidence cited by the parties are critical, or even relevant, to the plaintiff’s cause of action and to any potential defenses to the action.”).

⁴⁵ Of great significance in this case is substantial prejudice due to the fact that Hungary requires in person testimony and makes no provision for depositions. Not only is a hindrance due to the age and health of many of the Plaintiffs,

- **The financial disparity in relative means between Plaintiffs and Defendants.**

See In re Nematron Corp. Sec. Litig., 30 F. Supp. at 405 (“Where disparity exists between the parties, such as an individual plaintiff suing a large corporation, the relative means of the parties may be considered.”); *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 341 (“A countervailing factor is the relative means of the parties. . . . In this case, defendants clearly have the upper hand when it comes to resources.”); *Wiwa v. Dutch Petroleum*, 226 F.3d 88, 107 (2d Cir. 2000) (“The additional cost and inconvenience to the defendants of litigating in New York is fully counterbalanced by the costs and inconvenience to the plaintiffs of requiring them to reinstitute the litigation in [the foreign forum]--especially given the plaintiffs’ minimal resources in comparison to the vast resources of the defendants.”); and,

- **The undue burden that would be placed on Plaintiffs if trial were held in Hungary due to the fact that they cannot, if at all, travel easily due to their age and health, and also due to the undue emotional burden that would be placed on them if forced to return to Hungary, where they suffered horrendous trauma, to litigate their claims.**

See In Re: Assicurazioni Generali S.p.A. Holocaust Ins. Litig., 228 F. Supp. 2d at 366; *Altmann v. Republic of Austria*, 317 F.3d 954, 973-74 (9th Cir. 2002); *Dorfman*, 2001 U.S. Dist. LEXIS 642, at *25-26; *Bodner*, 114 F. Supp. 2d at 132.⁴⁶

Balancing the private interest factors, it is clear that this is not one of the rare *forum non conveniens* cases wherein Plaintiffs’ choice of forum should be disturbed.⁴⁷

but, as discussed, it would be an undue hardship to require many individuals to travel to Hungary in light of the horrific trauma they suffered there.

⁴⁶ While providing no names, Defendants assert that their witnesses are elderly and/or ill and, therefore, this factor weighs in their favor. But Named Plaintiffs and the class members are also of advanced age and ill. Foreign parties and witnesses who are aged and ill can testify by deposition in the U.S. if necessary, but Hungarian procedure does not make that allowance. Hanák Decl., ¶ 12.

⁴⁷ The Defendants’ argument that the United States is an inconvenient forum for them should also not carry much weight in light of the fact that Hungary is currently a plaintiff in a lawsuit that was filed in the United States. *See*

3. The Public Interest Factors Weigh In Favor Of Plaintiffs, And At A Minimum, Do Not Clearly Weigh In Favor Of Defendants.

The balancing of public interest factors – which include the administrative difficulties flowing from court congestion; local interest; avoidance of unnecessary problems in conflict of laws or application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty, *see Piper Aircraft*, 454 U.S. at 241 n.6 – likewise fail to support Defendants’ *forum non conveniens* motion.

The administrative difficulties do not weigh in favor of Defendants. There is no evidence that Hungarian courts are less congested than this Court;⁴⁸ there would be no undue burden placed on local jurors given the U.S.’s and the District of Columbia’s interest in the subject matter, discussed below; and the cases cited by Defendants that discourage U.S. courts from taking “upon themselves . . . to resolve the disputes of the world,” Def. Mem., at 34 (citing *Zinsler v. Marriott Corp.*, 605 F. Supp. 1499, 1506 (D. Md. 1985); *Cruz v. Maritime Co. of Philippines*, 549 F. Supp. 285, 290 (S.D.N.Y. 1982), *aff’d*, 702 F.2d 47 (2d Cir. 1983) are inapposite because those cases concerned foreign plaintiffs only, whereas U.S. citizens are plaintiffs here.

Hungary’s interest is outweighed by the interest of the United States and the District of Columbia in providing relief to their residents who were harmed in the Holocaust, and because public policy favors providing a forum in which United States citizens may seek to redress the alleged wrongs. *See In Re: Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d at 367; *Bodner*, 114 F. Supp. 2d at 133. *See also Presbyterian Church of Sudan*, 244 F. Supp. 2d

European Cmty. V. RJR Nabisco, Inc., 2011 U.S. Dist. LEXIS 41219 (E.D.N.Y. Apr. 14, 2011). *See Licea*, 537 F. Supp. 2d at 1276 (noting that the defendant is a large corporation which has brought federal lawsuits in U.S. courts).

⁴⁸ To the contrary, the evidence of delay tilts this factor decidedly in favor of Plaintiffs. *See Hanák Decl.*, ¶¶ 19, 25; *Deirmenjian*, 2006 U.S. Dist. LEXIS 96772, at *55 (“The real issue, however, is ‘whether a *trial* may be speedier in another court because of its less crowded docket.’”) (emphasis in original) (citation omitted)).

at 339 (“A second factor militating against dismissal on *forum non conveniens* grounds is the strong United States interest in vindicating international human rights violations. In this case, plaintiffs seek redress for *jus cogens* violations of international law.”).

Further, the local general public interest in this case is evidenced by the demonstrated interest and involvement of the United States in violations of international human rights norms and in Holocaust reparation matters. See *Chabad*, 466 F. Supp. 2d at 29-30; *Bodner*, 114 F. Supp. 2d at 133; *Deirmenjian*, 2006 U.S. Dist. LEXIS 96722, at *55; *Licea*, 537 F. Supp. 2d at 1276 (finding that “any interest that a forum in Curacao may have is countered by the public interest factors this jurisdiction has in the matter. This case concerns alleged violations of international human rights norms of concern to all nations and that the Alien Tort Statute empowered this Court to address.” The court cautioned, “Courts should be careful not to dismiss as inconvenient such cases.” *Id.*, at 1274).

Additional factors that illuminate the District of Columbia’s interest in this case include Congress’s designation of this Court as the proper forum for virtually all actions brought under FSIA and its status as the seat of the United States government and the preferred location for foreign embassies, including that of Hungary.⁴⁹ See *Chabad*, 466 F. Supp. 2d at 29-30; *Deirmenjian*, 2006 U.S. Dist. LEXIS 96722, at *58.

Finally, Defendants assert that the Court should dismiss this action on grounds of *forum non conveniens* because Hungarian law will apply. Even assuming *arguendo* that were true, it would not warrant dismissal for *forum non conveniens*. See *Piper*, 454 U.S. at 245; *McDonald’s Corp. v. Bukele*, 960 F. Supp. 1311, 1320 (N.D. Ill. 1997); *Moscovits*, 2001 U.S. Dist. LEXIS 9252, at *21-22; *In Re: Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d at

⁴⁹ By contrast, Hungary’s interest, defending itself against the allegations of its massive wrongdoing, should not be seen as a local interest factor that militates towards Hungary. See *Licea*, 537 F. Supp. 2d at 1276.

368-69 (finding that the forum's interest in the litigation of plaintiffs' claim was "only somewhat diminished by the probable need to apply foreign law," and holding the application of foreign law was not a persuasive basis for dismissal.).

VI. CONCLUSION

Accordingly, for the reasons set forth hereinabove and in the accompanying Declarations, the Motion to Dismiss should be denied.⁵⁰

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⁵⁰ Alternatively, the Court is respectfully requested to allow Plaintiffs to conduct limited discovery to elucidate further the jurisdictional facts giving rise to exemptions under FSIA.

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