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Elizabeth Sawyer, Justine Ferland, Marc-André Renold

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Case Herzog Collection – De Csepel et al. v. Republic of Hungary et al.

*De Csepel – Republic of Hungary – Herzog Heirs – Artwork/oeuvre d'art
– Nazi-looted art/spoliations nazies – Judicial claim/action en justice – Judicial
decision/décision judiciaire – Act of State – Breach of contract/violation du contrat
– Jurisdiction/conflit de juridiction – State immunity/immunité des Etats – State
responsibility/responsabilité internationale des Etats – Ongoing dispute/litige en
cours*

*The “Herzog Collection” was originally an assembly of over two thousand works
of art, collected by Baron Mór Lipót Herzog in the early 1900s. During World War
II, the collection was seized by the Hungarian government, under Nazi orders. For
the last seven decades, the Herzog Heirs have attempted to reclaim the Collection
from the Republic of Hungary, without success. Now, the Herzog Heirs are taking
their claim to the United States Supreme Court.*

*I. Chronology; II. Dispute Resolution Process; III. Legal Issues; IV. Adopted
Solution; V. Comment; VI. Sources.*

ART-LAW CENTER – UNIVERSITY OF GENEVA

PLATFORM ARTHEMIS

art-adr@unige.ch – <https://unige.ch/art-adr>

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I. Chronology

Nazi-looted Art

- **Early 1900s** : Baron Mór Lipót Herzog begins collecting thousands of famous paintings and sculptures. This collection is known as one of Europe’s greatest and largest art collections.¹
- **1940s** : During the Nazi occupation of Hungary, the collection is seized by the Hungarian government, despite the Herzog family’s best efforts to hide it. The collection is moved to the Museum of Fine Arts in Hungary.²
- **1950s** : The Herzog family is forced to flee Europe and settles in the United States, Italy and Argentina.³
- **1960s through 2011** : The Herzog Heirs send numerous requests to the Hungarian government and museums to reclaim several pieces of art (hereafter, the “Collection”), and attempt to pursue legal action in Hungary, without success.⁴
- **2010-2011**: The Herzog Heirs first file suit in the U.S. against the Republic of Hungary, three Hungarian art museums, and one Hungarian university (together “Hungary”), invoking the “expropriation exception” and the “commercial exception” of the Foreign Sovereign Immunities Act (FSIA)⁵ to justify the U.S. Courts’ jurisdiction. Hungary tries to have the motion dismissed at the preliminary stage on the grounds that U.S. Courts lack jurisdiction, but the court allows significant parts of the claim to go forward (except for eleven paintings that had already been the object of litigation in Hungary).⁶
- **2013**: Both parties appeal the District Court’s decision concerning the parts of their claims that were respectively denied. The D.C. Circuit rules in favour of the Herzog Heirs and allows the suit to proceed for all artworks, including the 11 previously excluded from the litigation by the District court in 2011.⁷
- **2016**: The case is sent back to the District Court, who confirms, after hearing the facts in discovery, that claims for 42 out of the 44 pieces of art can proceed under the FSIA’s expropriation exception.⁸
- **2017**: Hungary appeals this last decision. The D.C. Circuit upholds the District Court’s decision allowing the Herzog Heirs to litigate in the U.S. However, it dismisses the Herzog Heirs’ claim against the Republic of Hungary, holding that the expropriation exception does

¹ Balogh, Eva D, "Tag Archives: Mór Lipót Herzog".

² De Csepel et al. v. Republic of Hungary et al. (2011).

³ Ibid.

⁴ See generally De Csepel et al. v. Republic of Hungary et al. (2011), De Csepel et al. v. Republic of Hungary et al. (2013), De Csepel et al. v. Republic of Hungary et al. (2016), De Csepel et al. v. Republic of Hungary et al. (2017). See also O’Donnell, Nicholas, “DC Circuit Reinstates All Claims that Were Dismissed in Herzog Case Against Hungary – UPDATED”.

⁵ 28 U.S.C.S. § 1602 et seq.

⁶ De Csepel et al. v. Republic of Hungary et al. (2011); Nicholas O’Donnell, “Hungarian World War II Restitution Case Will Go Forward”.

⁷ De Csepel et al. v. Republic of Hungary et al. (2013); Nicholas O’Donnell, “DC Circuit Reinstates All Claims that Were Dismissed in Herzog Case Against Hungary – UPDATED”.

⁸ De Csepel et al. v. Republic of Hungary et al. (2016).

not apply to them in this case, thus allowing only the claim against the Hungarian cultural institutions.⁹

- **2018:** The Herzog Heirs file a writ of certiorari in the Supreme Court of the United States. Hungary files a brief in opposition, and the Herzog Heirs file a reply brief.

I. Dispute Resolution Process

Judicial claim – Judicial decision

- The Herzog Heirs initially attempted to regain their art through requests to the Hungarian government. One of the Baron’s daughters “negotiated the return of six less significant works before her death in 1992”¹⁰ but the other requests were unsuccessful.
- This dispute is now being decided through a judicial process. The Herzog Heirs first instituted judicial action in Hungary. “Initially, the Budapest Municipal Court recognized their claim and awarded ownership of eleven paintings, but in January 2008 an appellate court reversed the decision. The Herzog heirs have consistently characterized that reversal as politically motivated.”¹¹
- The Herzog Heirs then took action in the U.S. based on the “expropriation” and “commercial activity” exceptions of the FSIA. Arguably, going through the U.S. judicial process is a “last resort”, evidenced by the case being appealed to the Supreme Court.
- The case is still at a preliminary stage. Indeed, to date, the District Court and the D.C. Circuit (appellate court) have generally affirmed that U.S. Courts do have jurisdiction over the Herzog Heirs’ recovery claim – at least for most of the artworks at issue – albeit the arguments on which they base their decisions sometimes vary. The question is now pending before the Supreme Court. The merits of the claim – namely whether the Herzog Heirs are entitled to restitution of the artworks – have yet to be decided.

II. Legal Issues

Act of State – Breach of contract – Jurisdiction – State immunity – State responsibility

- In the U.S. suit, Hungary pleads sovereign immunity and argues that the district court lacks subject matter jurisdiction under FSIA, which states that “a foreign state is immune from the jurisdiction of the courts of the United States”.¹² In response, the Herzog Heirs argue that the facts of the case fall under the “expropriation” and “commercial activity” exceptions of the FSIA, which would allow them to sue Hungary before U.S. Courts.

⁹ De Csepel et al. v. Republic of Hungary et al. (2017).

¹⁰ Nicholas O’Donnell, “Herzog Heirs’ Claims Against Hungary Survive Dismissal Under FSIA”.

¹¹ Ibid.

¹² 28 U.S.C.S. § 97-1604.

- Regarding the **expropriation exception**, it can be invoked in any situation where the two following conditions are met: “rights in property taken in violation of international law are at issue” and “defendant engages in commercial activity in the United States”¹³, meaning that there is “a commercial nexus — some connection between the defendants or the property and a commercial activity in the United States”¹⁴.
- This is the provision that notably allowed Maria Altmann to sue Austria before the U.S. Courts in the *Six Klimt Paintings* case.¹⁵ In almost all decisions, except the 2013 D.C. Circuit decision, the judges found that the expropriation exception applied and allowed the Herzog Heirs to sue Hungary in the U.S based on this argument.
- Regarding the “international law violation” prong of the expropriation test, the 2017 D.C. Circuit decision held – based, notably, on the *Simon v. Republic of Hungary*¹⁶ decision rendered one year before – that the taking of property during the Holocaust is genocidal and that genocide is always a violation of international law, which means that such takings of property will always be considered as violating international law.¹⁷
- The second prong of the expropriation test, namely the “commercial nexus” prong, required a more difficult analysis. The FSIA states¹⁸ that a *foreign state* shall not be immune when the property is “present in the United States in connection with a commercial activity carried on in the United States by the *foreign state*,” or the relevant 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.” The Republic of Hungary pleaded that in light of this provision, only the Hungarian museums and cultural institutions who held the Collection – as agencies or instrumentalities of the state – should be subject to the U.S. Courts’ jurisdiction. The Herzog Heirs argued on their part that a foreign state could be subject to jurisdiction based on the actions of its agents and instrumentalities. Basing itself on the interpretation of this clause made in *Simon v. Republic of Hungary*, the D.C. Circuit sided with the Republic of Hungary and dismissed the claim against them for lack of jurisdiction, leaving only the Hungarian museums and cultural institutions as defendants.
- It should also be noted that the District Court, in its 2016 decision, indicated that the 1947 peace treaty entered into between the Republic of Hungary and the Victorious Allies, as well as the 1973 property settlement agreement between the U.S. and the Republic of Hungary, did not bar the expropriation claim because it only applied to people who were U.S. citizens at the time of the injury – which the Herzog Heirs were not (they moved there after the war). This reasoning is also based on the *Simon v. Republic of Hungary* precedent.

¹³ 28 U.S.C.S. § 97-1605(a)(3).

¹⁴ Harvard Law Review, “de Csepel v. Republic of Hungary – D.C. Circuit Interprets Expropriation Exception to Allow Genocide Victims to Sue Their Own Government”.

¹⁵ Caroline Renold, Alessandro Chechi, Anne Laure Bandle, Marc-André Renold, “Case 6 Klimt Paintings – Maria Altmann and Austria,” Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

¹⁶ *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016).

¹⁷ Harvard Law Review, “de Csepel v. Republic of Hungary – D.C. Circuit Interprets Expropriation Exception to Allow Genocide Victims to Sue Their Own Government”.

¹⁸ 28 U.S.C.S. § 97-1605(a)(3).

- The **commercial activity exception** is invoked where “the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States”.¹⁹
- The D.C. Circuit, in 2013, found that the commercial activity exception applied, thus allowing the Herzog Heirs to file suit in the U.S., and dismissed Hungary’s appeal for that reason. Indeed, the Herzog Heirs’ primary claim was that Hungary had breached its duty to return works of art to the family. They alleged that following World War II, the Republic of Hungary became the “custodian” of the artwork that had been looted and continued to display it in museums; this gave rise to a bailment agreement, whereby “Hungary assumed a duty of care to protect the property and return it to the [Herzog family] upon their demand”.²⁰ Therefore, the D.C. Circuit noted that the Herzog Heirs sought to recover “not for the original expropriation of the Collection, but for the subsequent breaches of bailment agreements they say they entered into with Hungary”. Concluding that bailment is inherently a commercial activity, and that the act created a directed effect in the U.S. because Hungary refused to return the Collection to the Herzog Heirs, whom it knew were U.S. residents, the D.C. Circuit applied the commercial activity exception.²¹

III. Adopted Solution

Ongoing Dispute

- The Herzog family has filed a writ of certiorari with the Supreme Court of the United States. Hungary has filed a brief in opposition, and the Herzog family has responded with a reply brief. As the reply brief has recently been filed, the approval or denial of the cert petition should become available within the coming months.

IV. Comment

- The declaration of the D.C. Circuit in its 2017 decision that the taking of property of the Holocaust are genocidal and thus always qualified as a violation of international law under the FSIA, offers insight on how federal courts may address international property claims in the future.²² Federal courts are well acquainted with the political question doctrine, which would normally bar controversial international issues, and the FSIA doesn’t explicitly list genocide as “a violation of international law”. Instead, it refers to non-citizens bringing claims

¹⁹ 28 U.S.C.S. § 97-1605(a)(2).

²⁰ De Csepel et al. v. Republic of Hungary et al. (2013).

²¹ Ibid.

²² Egkolfopoulou, Misyrlena. "Herzog Heirs Win Again in Fight Over Art Seized During Holocaust"; Nicholas O'Donnell, "Herzog Heirs' Claims Against Hungary Survive Dismissal Under FSIA".

against a foreign state. By allowing the Herzog Heirs to bring this claim, the 2017 decision is inviting a potential influx of cases that come dangerously close to deciding foreign relations issues outside of their branch responsibility.²³

- The importance of a Supreme Court decision on the Herzog case cannot be overstated. The 2011, 2013, and 2017 decisions bring up international policy arguments that may have a significant effect on the breadth of judicial power. For the Herzog Heirs, a Supreme Court decision would mean the end of almost a century-long battle to reclaim the famous paintings from their past.

V. Sources

a. Bibliography

- Grimsted, Patricia Kennedy, and Konstantin Akinsha. "The Sarospatak Case; Rare Books Return to Hungary from Nizhnii Novgorod. A New Precedent for Russian Cultural Restitution?" in *Art Antiquity and Law* 11, no. 3 (September 2006): 215-49.
- Otterson, Jennifer Mohr. "Art Restitution in Hungary: A Comparative Case Study of the Sarospatak Books and the Herzog Collection." *University of Columbia*, June 3, 2011, 301-58.
https://www.researchgate.net/publication/265283406_Art_Restitution_in_Hungary_A_Comparative_Case_Study_of_the_Sarospatak_Books_and_the_Herzog_Collection
- O'Donnell, Nicholas. "DC Circuit Reinstates All Claims that Were Dismissed in Herzog Case Against Hungary – UPDATED", *The Art Law Report*, April 23, 2013.
<https://blog.sandw.com/artlawreport/2013/04/23/decision-in-herzog-case-against-hungary-focuses-on-bailment-theory-reinstates-all-claims-that-were-dismissed>
- O'Donnell, Nicholas. "Herzog Heirs' Claims Against Hungary Survive Dismissal Under FSIA", *The Art Law Report*, March 24, 2016. <https://blog.sandw.com/artlawreport/herzog-heirs-claims-against-hungary-survive-dismissal-under-fsia>
- O'Donnell, Nicholas. "Herzog Heirs Win Again in Appeals Court on Jurisdiction Over Hungarian Museums", *The Art Law Report*, June 26, 2017.
<https://blog.sandw.com/artlawreport/herzog-heirs-win-again-in-appeals-court-on-jurisdiction-over-hungarian-museums>
- "D.C. Circuit Interprets Expropriation Exception to Allow Genocide Victims to Sue Their Own Government." *Harvard Law Review* 131, no. 2 (December 2017): 650-57.
<https://harvardlawreview.org/2017/12/de-csepel-v-republic-of-hungary>

²³ Otterson, Jennifer Mohr. "Art Restitution in Hungary: A Comparative Case Study of the Sarospatak Books and the Herzog Collection"; Grimsted, Patricia Kennedy, and Konstantin Akinsha. "The Sarospatak Case; Rare Books Return to Hungary from Nizhnii Novgorod. A New Precedent for Russian Cultural Restitution?"

b. Court decisions

- *De Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113, 134–35 (D.D.C. 2011).
- *De Csepel v. Republic of Hungary*, 714 F.3d 591, 594–97 (D.C. Cir. 2013).
- *De Csepel v. Republic of Hungary*, 169 F.Supp.3d 143 (D.D.C. 2016)
- *De Csepel v. Republic of Hungary*, 859 F.3d 1094 (D.C. Cir. 2017).
- *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016).

c. Legislation

- 28 U.S.C. § 97-1604
- 28 U.S.C. § 97-1605

d. Documents

- Caroline Renold, Alessandro Chechi, Anne Laure Bandle, Marc-André Renold, “Case 6 Klimt Paintings – Maria Altmann and Austria,” Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

e. Media

- Egkolfopoulou, Misyrlena. "Herzog Heirs Win Again in Fight Over Art Seized During Holocaust." Bloomberg.com. June 21, 2017. Accessed June 06, 2018. <https://www.bloomberg.com/news/articles/2017-06-21/herzog-heirs-win-again-in-fight-over-art-seized-during-holocaust>.
- Balogh, Eva D. "Tag Archives: Mór Lipót Herzog." Hungarian Spectrum. June 7, 2016. Accessed June 06, 2018. <http://hungarianspectrum.org/tag/mor-lipot-herzog/>.