

International Comity's Threat to the Restitution of Stolen Holocaust Art: The Cautionary Tale of the Herzog Litigation

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“The Mór Herzog collection contains treasures the artistic value of which exceeds that of any similar collection in the country. . . . If the state now takes over these treasures, the Museum of Fine Arts will become a collection ranking just behind Madrid.” – Dénes Csánky, Director of the Hungarian Museum of Fine Arts, May 23, 1944¹

Baron Mór Lipót Herzog, a prominent Hungarian Jew, amassed a spectacular collection of artwork during his lifetime. It was looted by Nazi operatives during World War II, and kept in Hungarian state museums and institutions behind the Iron Curtain ever since. The Herzog family began trying to reclaim the artwork in 1989, when Hungary re-opened to the West. The family first sued for restitution in Hungary, then in the United States.

On September 1, 2011, Judge Ellen Segal Huvelle of the U.S. District Court for the District of Columbia ruled that the family's lawsuit could move forward with respect to the majority of the collection. However, she granted international comity to a prior Hungarian court decision that had ruled against the Herzog claim, thus holding that 11 pieces were forever inaccessible to the family. International comity doctrine honors the valid judgments of foreign courts, giving them preclusive effect in subsequent U.S. litigation. International comity is not justified if the process of the foreign court does not meet certain standards, or if the foreign court's holding contravenes U.S. public policy. In this case, Hungary's process was unsatisfactory and the Hungarian court's holding violates the United States' interest in proper

* Georgetown University Law Center J.D. Candidate 2013. Thanks to Charles Goldstein and Professor James Fitzpatrick for helpful feedback in the development of this paper. This paper received the CALI Award for best paper for Prof. Fitzpatrick's 2012 Art & Cultural Property Law Seminar.

¹ Complaint at 59, *de Csepel v. Republic of Hungary*, 808 F.Supp.2d 113 (D.D.C. 2011) (No. 1:10-CV-01261) [hereinafter *Complaint*] (quoting from *MAGYARSÁG*, an anti-Semitic, pro-Nazi newspaper).

interpretation of U.S. agreements and in the restitution of stolen art. Judge Huvelle's international comity ruling should be reversed on appeal.

Troublingly, the doctrine of international comity could be used to stifle the restitution of art stolen during the Holocaust. The Foreign Sovereign Immunities Act of 1976 (FSIA), which governs restitution cases, does not explicitly require exhaustion of remedies in the foreign country involved. Though it is not in the plain meaning of the statute, there has been some judicial indication that there may be an exhaustion requirement, although Judge Huvelle rejected that notion in this case. Yet there is grave danger in Judge Huvelle's cursory comity ruling. If exhaustion of foreign remedies is required under FSIA, as an appellate court may yet hold, and then comity is granted without full consideration of the foreign justice system and U.S. public policy, American courts are de facto ensuring that U.S. citizens' restitution cases will be decided by foreign courts. This outcome is undesirable. Foreign courts do not always rise to the level of integrity expected of the American justice system, foreign litigation is prohibitively expensive, and U.S. policy favors U.S. citizens being able to bring suit in American courts.

I. THE HISTORY OF THE HERZOG COLLECTION

a. The Herzog Family and Collection Through World War II

Baron Mór Lipót Herzog was a notable collector of artwork, focusing on Old Masters and Renaissance pieces.² At its peak, the Herzog collection contained nearly 2,500 pieces.³ The collection included masterpieces by El Greco, Lucas Cranach the Elder, Velázquez, Alonso Cano, Sir Anthony Van Dyck, Francisco du Zurbarán, Gustave Courbet, Corot, Renoir, Monet, and Hungarian painter Mihály Munkácsy.⁴ Baron Herzog died in 1934, and following the death

² *Id.* at 38.

³ *Id.*

⁴ *Id.* at 16–19 (listing the artworks claimed and where they are currently located); *see also* LIST OF HERZOG ART CLAIMED IN THE LAWSUIT, http://www.hungarylootedart.com/?page_id=38 (last visited April 27, 2012).

of his wife in 1940, the collection was divided between their three children: Erzsebét (Elizabeth) Weiss de Csepel, István (Stephen) Herzog, and András (Andrew) Herzog.⁵ Baron Herzog and the Herzog family were Jewish.⁶

In 1938, Hungary began enacting a series of anti-Semitic laws, restricting Hungarian Jews' economic freedoms and compelling forced-labor service.⁷ On November 20, 1940, Hungary joined the Axis Powers of Germany, Italy, and Japan, and agreed to adhere to the Tripartite Pact.⁸ Hungary began enacting a new series of laws, modeled on Germany's Nuremberg laws, defining Jews in racial terms and further restricting their rights.⁹ Hungary also embarked on a scheme of mass ghettos, deportation, forced labor, and murder.¹⁰ Over 27,000 Hungarian Jewish forced laborers perished by 1944,¹¹ including András Herzog.¹² In 1944, Adolf Hitler sent Adolf Eichmann and German troops into Hungary, to protect against an advancing Russian force and ensure Hungary's loyalty to the Nazi regime.¹³ More than half of Hungary's pre-war Jewish population was deported within three months.¹⁴ By the end of the war in 1945, over half a million Hungarian Jews were dead.¹⁵ Of a pre-war population of 825,000,¹⁶ less than one third survived.¹⁷

⁵ de Csepel v. Republic of Hungary, 808 F.Supp.2d 113, 120 (D.D.C. 2011).

⁶ *Id.*

⁷ See GÁBOR KÁDÁR & ZOLTÁN VÁGI, SELF-FINANCING GENOCIDE: THE GOLD TRAIN, THE BECHER CASE AND THE WEALTH OF THE HUNGARIAN JEWS 33–70 (Enikő Koncz, Jim Tucker & András Kádár, trans., Central European University Press 2004) (2001) (providing an overview of the Hungarian process of stripping Jews of their economic and social rights); see also *Complaint*, *supra* note 1 at 44–45.

⁸ WORLD WAR II HISTORY INFO, 1940 in WORLD WAR II TIMELINE (2003), available at <http://www.worldwar2history.info/1940.html>.

⁹ KÁDÁR & VÁGI, *supra* note 7 at 75–77.

¹⁰ Randolph L. Braham, *The Holocaust in Hungary: A Retrospective Analysis*, in THE NAZIS' LAST VICTIMS: THE HOLOCAUST IN HUNGARY 27, 33–36 (Randolph L. Braham & Scott Millder, eds., 1998).

¹¹ U.S. MEMORIAL HOLOCAUST MUSEUM, *Hungary Before the German Occupation*, in HOLOCAUST ENCYCLOPEDIA (2011), available at <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005457>.

¹² de Csepel v. Republic of Hungary, 808 F.Supp.2d 113, 121 (D.D.C. 2011).

¹³ Braham, *supra* note 10 at 36–37.

¹⁴ U.S. MEMORIAL HOLOCAUST MUSEUM, *Hungary After the German Occupation*, in HOLOCAUST ENCYCLOPEDIA (2011) [hereinafter *Hungary After the German Occupation*], available at <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005458>.

¹⁵ *Id.*

As Jews, the Herzog family was required by Hungarian law to register their artwork.¹⁸ Hungary was uniquely focused on artistic treasures, even forming a special commission to care for the looted art, the Government Commissioner's Office for the Registration and Preservation of the Confiscated Works of Art of the Jews.¹⁹ Rather than surrender their property, the Herzog family attempted to hide their artwork.²⁰ Dénes Csányi, Director of the Hungarian Museum of Fine Arts, aided the Herzogs in preparing the art for storage and secreting it away.²¹ Unfortunately, Hungarian authorities and Nazi representatives discovered the location of the majority of the artwork.²² In Dénes Csányi's presence, the Hungarians and the Nazis opened the boxes and seized the artwork.²³ The art was taken directly to Adolf Eichmann's headquarters.²⁴ Eichmann personally selected several masterpieces to display in his headquarters, and then sent them to Germany for further display.²⁵ The collection was broken up—many pieces were shipped to Germany, some were kept in Hungary in the custody of the Museum of Fine Arts, and others wound up in the possession of the liberating Russians.²⁶

The war scattered the members of the Herzog family as well. András Herzog's daughters, Andrea and Julia Herzog, fled to Argentina, then to Italy, where they remain.²⁷ Erzsebet Weiss de Csepel fled to Portugal in 1944, and then to the United States in 1946.²⁸ She and members of her family had left Hungary with a police escort, after buying their freedom with

¹⁶ Braham, *supra* note 10 at 34.

¹⁷ *Hungary After the German Occupation*, *supra* note 14.

¹⁸ *de Csepel v. Republic of Hungary*, 808 F.Supp.2d 113, 122 (D.D.C. 2011).

¹⁹ KÁDÁR & VÁGI, *supra* note 7 at 83.

²⁰ *de Csepel*, 808 F.Supp.2d at 122 (noting that the family hid most of their artwork in the basement of one of the family's factories).

²¹ *Complaint*, *supra* note 1 at 58.

²² *de Csepel*, 808 F.Supp.2d at 122.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*; *see also Complaint*, *supra* note 1 at 60.

²⁶ *de Csepel*, 808 F.Supp.2d at 122; *Complaint*, *supra* note 1 at 60–62, 66–68.

²⁷ *Complaint*, *supra* note 1 at 60–62, 66–68.

²⁸ *Id.* at 63.

a twenty-five year lease on a Weiss family factory.²⁹ Her husband, Alfonz Weiss de Csepel, had stayed behind as a hostage, but was later reunited with his family in the United States.³⁰ Weiss de Csepel became a U.S. citizen (as Elizabeth Weiss de Csepel) in 1952.³¹

In 1947, the Allied Powers (including the United States) and Hungary signed a Peace Treaty.³² Article 27 of the Peace Treaty mandated that Hungary undertake to restore the property, legal rights, and interests of those affected by racial discrimination after 1939.³³ If restoration was impossible, the Treaty demanded that Hungary pay fair compensation for the loss.³⁴ Disappointingly, “Hungary made little effort to fulfill its Peace Treaty obligations.”³⁵ Hungary made self-styled, “purported” returns of a few pieces of Herzog art.³⁶ However, these efforts were merely illusory, and were accompanied by threats and harassment to ensure that the art remained with Hungary and the Museum of Fine Arts.³⁷ The vast majority of the Herzog collection remains there to this day.

b. Post-World War II: The First American Restitution Effort

Soon after the end of World War II, communism swept over Hungary.³⁸ Hungary quickly moved to nationalize property, both Hungarian and foreign-owned.³⁹ The relationship between Hungary and the United States deteriorated dramatically during the onset of the Cold

²⁹ See Judith H. Dobrzynski, *Claims for Art Pose a Challenge for Hungary*, N.Y. TIMES, July 7, 1998, available at <http://www.nytimes.com/1998/07/07/arts/claims-for-art-collection-pose-a-challenge-to-hungary.html?src=pm>.

³⁰ *Complaint*, *supra* note 1 at 63.

³¹ *Id.*

³² Treaty of Peace with Hungary, Feb. 10, 1947, 61 Stat. 2065, TIAS No. 1651.

³³ *Id.*

³⁴ *Id.*

³⁵ Richard B. Lillich, *The United States—Hungarian Claims Agreement of 1973*, 69 AM. J. INT’L. L. 534, 535 (1975).

³⁶ See *Complaint*, *supra* note 1 at 70–73.

³⁷ *de Csepel v. Republic of Hungary*, 808 F.Supp.2d 113, 122 (D.D.C. 2011) (observing that items from the collection were displayed by the Museum of Fine Arts in 1948 with labels explicitly stating that the pieces were “on deposit”).

³⁸ See Braham, *supra* note 10 at 42–43.

³⁹ See Lillich, *supra* note 35 at 535 (noting that the value of U.S. property nationalized in Hungary was calculated to be \$263,000,000).

War.⁴⁰ In 1955, the United States amended the International Claims Settlement Act of 1949 to authorize the Foreign Claims Settlement Commission (“the Commission”) to use blocked Hungarian assets to pay claims for property seized as a result of both Hungarian actions during World War II and the recent nationalization program.⁴¹ Only current U.S. citizens who had been U.S. citizens at the time of their injury held cognizable claims.⁴² In total, the Commission processed 2,725 claims in four years, making 1,153 awards.⁴³ The Commission granted over \$80 million in awards.⁴⁴ The Commission only had \$2.2 million in funds, however, and limited claimants awarded over \$1,000 to receiving only 1.5 percent of their stated award amounts.⁴⁵ In 1973, the United States and Hungary signed an executive agreement (“1973 Agreement”).⁴⁶

⁴⁰ *See id.* at 535–36.

⁴¹ *Id.* at 536–37.

⁴² *See, e.g.,* Dayton v. Czechoslovak Socialist Republic, 834 F.2d 203, 206 (D.C.Cir.1987) (describing the doctrine of espousal: in general, a state may only settle its citizens’ claims against another state if the claimants were citizens at the time of injury); Letter from Ronald J. Bettauer, Deputy Legal Adviser, State Dept. Office of the Legal Adviser, to Andrew L. Jagoda (Sept. 20, 2002) (stating that the 1973 Agreement “settled and discharged certain claims against the Government of Hungary of U.S. nationals who were U.S. nationals at the time their claims arose. It did not settle or discharge claims of U.S. nationals who became U.S. nationals after their claims arose.”); Letter from Mashall Wright, Asst. Sec. for Congressional Relations, State Dept., to Sen. Alan Cranston (July 23, 1973) (stating that “it is a “universally accepted principle of international law that a state does not have the right to ask another state to pay compensation to it for losses sustained by persons who were not its citizens at the time of loss”); Letter from Fabian A. Kwiatek, Asst. Legal Manager, State Dept., to Alex Lowinger (March 27, 1973) (telling a potential claimant that “[u]nder customary international law, a state has standing to present a claim against another state only if the claim belongs to one of its nationals and it has been owned by the national from the date of its accrual to the date of settlement”); Karoly Reti and George Spangler, United States—Hungarian Negotiations: Sixteenth Meeting, 238 (June 8, 1966) (“Mr. Reti [Hungary]: ‘[A]s the claimant was at the point when they were deposited in the museum not a citizen of the United States, the United States cannot hold this claim.’ Mr. Spangler [United States]: ‘I accept that one hundred percent’”); *see also* Foreign Claims Settlement Commission: Working Draft Report of the House Committee on Foreign Affairs on H.R. 6382, 84th Cong., 1st Sess. (May 21, 1955) at 4 (stating that claimants “[m]ust now be a United States citizen and have been a citizen at the time of taking of property”); Transcript of Hearing Before the Subcommittee on Europe of the Committee on Foreign Affairs of the United States House of Representatives on H.R. 13261, 93rd Cong., 2d. Sess. at 9 (April 4, 1974) (confirming that the Commission “only considered those who were United States citizens on the date that the taking occurred.”); *see also* Remarks by J. Christian Kennedy, Special Envoy for Holocaust Issues at Potsdam, Germany, April 23, 2007, available at http://germany.usembassy.gov/kennedy_speech.html (“Under international practice, a country can formally present a case to a foreign state only if the property in question was held by its citizen at the time of the taking.”).

⁴³ Lillich, *supra* note 35 at 538–39.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *See* Lillich, *supra* note 35 (providing a detailed overview of the 1973 Agreement). The 1973 Agreement only covered claims made by U.S. citizens who were U.S. citizens at the time of their injury. *See* Letter from Ronald J. Bettauer, *supra* note 42.

Hungary paid the United States \$18.9 million to settle all claims arising from Holocaust-era looting and Communist-era nationalization.⁴⁷

Elizabeth Weiss de Csepel filed a claim with the Commission in 1959.⁴⁸ Though she had not been a U.S. citizen at the time of the Holocaust looting, Weiss de Csepel believed that her artwork had been nationalized by the Hungarian government and that she was thus entitled to make a claim to the Commission.⁴⁹ Weiss de Csepel claimed ownership of several parcels of real property and twelve paintings.⁵⁰ She was ultimately awarded \$486,235.22,⁵¹ but received only \$210,000.00.⁵² The Commission's decision explicitly preserved Weiss de Csepel's rights against Hungary.⁵³

II. RESORT TO THE COURTS: LITIGATION OVER THE HERZOG COLLECTION

a. Pursuing Restitution in Hungary: The Nierenberg Litigation

In 1989, Hungary re-opened to the West.⁵⁴ Elizabeth Weiss de Csepel made inquiries,⁵⁵ and learned that several Herzog artworks were being exhibited at Hungarian state museums, each

⁴⁷ *Id.* at 539–41. Additionally, Hungary passed Compensation Acts in 1991 and 1992, however, the Herzog family did not file claims under those acts. *See de Csepel*, 808 F.Supp.2d at 125.

⁴⁸ *See de Csepel v. Republic of Hungary*, 808 F.Supp.2d 113, 123–24 (D.D.C. 2011).

⁴⁹ Weiss de Csepel believed her property had been nationalized based on the 1954 Hungarian Museum Decree, which declared that all art in Hungarian museums whose owners were unknown or had left the country illegally was placed into state ownership. *See* Hungarian Museum Decree No. 13 of 1954. Weiss de Csepel thought the Hungarian government would hold that she had left illegally during the Holocaust. *See id.* Hungary had no impact on the Commission's process. *Id.* Weiss de Csepel was unable to obtain information otherwise from the Hungarian government about the legal status of the Herzog collection due to the communist regime in place at the time. *See Complaint*, *supra* note 1 at 75–76. However, later litigation in Hungary would hold that Weiss de Csepel had left legally and that the owners of the Herzog collection were known to Hungary and its museums. *See infra* Part III(a). Thus, Weiss de Csepel had ultimately been incorrect regarding her nationalization claim.

⁵⁰ *See de Csepel*, 808 F.Supp.2d at 123–24.

⁵¹ Decision No. HUNG-2079 of the Foreign Claims Settlement Commission of the United States (July 31, 1959) [hereinafter *Weiss de Csepel Award*].

⁵² *See de Csepel*, 808 F.Supp.2d at 124.

⁵³ *Weiss de Csepel Award*, *supra* note 51 at 2–3 (“Payment of any part of this award shall not be construed to have divested the claimant herein, or the Government of the United States on her behalf, of any rights against the Government of Hungary for the unpaid balance of the claim, if any”); *see also de Csepel*, 808 F.Supp.2d at 124.

⁵⁴ *See Braham*, *supra* note 10 at 42–43.

⁵⁵ *Complaint*, *supra* note 1 at 77.

one bearing the tag “From the Herzog Collection.”⁵⁶ She immediately sought to begin negotiations with the Hungarian government, though she was 89 years old.⁵⁷ Weiss de Csepel was only able to recover seven minor pieces (six paintings and a wooden sculpture) before her death in 1992.⁵⁸ Her daughter Martha Nierenberg, a U.S. citizen, inherited Weiss de Csepel’s share of the Herzog Collection, and continued the recovery efforts.⁵⁹ Nierenberg first met with representatives of the Hungarian government to discuss her claim in 1996.⁶⁰ Six more meetings took place in the next year, resulting in the creation of an Experts Committee to determine the ownership of the Herzog Collection, and with the last meeting indicating a possible settlement was within reach.⁶¹ In 1998, a new government took office in Hungary.⁶² The new regime was unfavorable to the Herzog restitution claim.⁶³ Following “months of silence,” Nierenberg took legal action.⁶⁴ She deliberately chose to sue in Hungary, instead of the United States, because she believed that she had to sue in Hungary first in order to preserve any legal claims under U.S. jurisdiction.⁶⁵

⁵⁶ *de Csepel*, 808 F.Supp.2d at 125.

⁵⁷ *Id.*

⁵⁸ *Id.* (“all of [the recovered items were] works attributed to little known artists. The identifiable masterworks remained in the Museum of Fine Arts and the Hungarian National Gallery”) (citations omitted).

⁵⁹ *Id.*

⁶⁰ See Declaration of Balas Gabor Andras Pasztory, *de Csepel v. Republic of Hungary*, 808 F.Supp.2d 113 (D.D.C. 2011) (No. 1:10-CV-01261) [hereinafter *Pasztory Declaration*].

⁶¹ *Id.*

⁶² *Id.*

⁶³ JENNIFER MOHR OTTERSON, ART RESTITUTION IN HUNGARY: A COMPARATIVE CASE STUDY OF THE SAROSPATAK BOOKS AND THE HERZOG COLLECTION, 25 (2011) available at <http://www.commartrecovery.org/content/resources> (quoting Martha Nierenberg, “The new government expressed no interest in negotiating on the basis of the proposal we had made.”); see also *Pasztory Declaration*, *supra* note 60.

⁶⁴ *Pasztory Declaration*, *supra* note 60.

⁶⁵ See Plaintiffs’ Reply Memorandum of Points and Authorities in Support of Their Alternate Cross-Motion for Certification Pursuant to 28 U.S.C. § 1292(b) at 2, *de Csepel v. Republic of Hungary*, 808 F.Supp.2d 113 (D.D.C. 2011) (No. 1:10-CV-01261) [hereinafter *Motion for Cross-Certification*] (“Martha Nierenberg brought a claim in Hungary only because she was under the misimpression, based on the prevailing state of the law on exhaustion (which has since been clarified), that she was required to do so before she could bring an action in the United States.”); see also *infra* Part IV (describing exhaustion requirements and the consequences of employing them in stolen art restoration lawsuits).

i. The First Judgment of the Budapest Municipal Court Finds for the Herzogs

In October 1999, Nierenberg filed a lawsuit in the Budapest Municipal Court for the restitution of 10 paintings.⁶⁶ Nierenberg named the Museum of Fine Arts, the National Gallery of Hungary, and the Republic of Hungary as defendants.⁶⁷ The lawsuit involved some of the most important artworks in the Herzog collection, including El Greco’s “Holy Family,” and Lucas Cranach the Elder’s “Annunciation to Joachim.”⁶⁸ Tamás Varga, Nierenberg’s attorney, noted that it was extremely difficult for Nierenberg to obtain discovery evidence.⁶⁹ Hungarian civil procedure requires very specific requests for documents in order to compel production, but Nierenberg had no knowledge of the documentation available in the state museums, which had “categorically refused” to make them available.⁷⁰ Varga noted that “[t]his circumstance left [her] entirely defenseless.”⁷¹ As additional difficulties, there were intra-familial disputes among the Herzog heirs, eventually resolved.⁷² Nierenberg also amended her complaint to include two additional paintings, and one painting was returned after the commencement of litigation without explanation.⁷³

On October 20, 2000, the Budapest Metropolitan Court ordered the defendants to return ten of the eleven artworks at issue to the Herzog heirs.⁷⁴ To begin, the court held that the

⁶⁶ *Id.*

⁶⁷ See Fővárosi Bíróság [Metropolitan Court] Oct. 20, 2000, 15.P.27.693/1999/44 [hereinafter *Oct. 20, 2000 Decision of the Budapest Metropolitan Court*].

⁶⁸ *Id.* at 14–15 (listing the artworks at issue).

⁶⁹ Declaration of Tamás Varga at 4–5, *de Csepel v. Republic of Hungary*, 808 F.Supp.2d 113 (D.D.C. 2011) (No. 1:10-CV-01261) [hereinafter *Varga Declaration*].

⁷⁰ *Id.*

⁷¹ *Id.* at 5.

⁷² See *de Csepel v. Republic of Hungary*, 808 F.Supp.2d 113, 125 (D.D.C. 2011).

⁷³ *Id.*

⁷⁴ *Oct. 20, 2000 Decision of the Budapest Metropolitan Court*, *supra* note 67 at 2.

artworks had never been nationalized by Hungary, contrary to Weiss de Csepel's earlier belief.⁷⁵ Additionally, the court held that the artworks were not abandoned, due to the defendants' inability to prove that there was no owner.⁷⁶ The court stated the fact that Weiss de Csepel "lodged a claim for indemnification [based on her belief that the art had been nationalized] is not fit for establishing that the right of ownership was waived."⁷⁷

Lastly, the court considered the defendants' claim of adverse possession.⁷⁸ The court found that the defendants had possession of eight of the paintings as a bailee, and could not determine how two of the paintings had come into the defendants' possession.⁷⁹ The court thus excluded these ten paintings from the adverse possession claim under Hungarian law, and ordered them returned to the Herzog heirs.⁸⁰ The court held that one painting should stay in Hungary, John Opie's "Portrait of a Lady."⁸¹ This painting was owned by Elizabeth Weiss de Csepel, and had been given to Dr. Pete Domony in 1948 for safekeeping.⁸² Dr. Domony had in turn passed it to Ilona Gyarmathy in 1949, and it eventually came into the possession of Endre Gyarmathy.⁸³ Endre Gyarmathy donated the painting to the Museum of Fine Arts in 1963, where it was duly registered as a gift.⁸⁴ Weiss de Csepel had requested information about the status of the painting in 1965, and informed the Museum that the donor had not been the owner

⁷⁵ Specifically, the court held that the 1954 Museum Decree was inapplicable because the Herzog family did not leave Hungary illegally and the defendants had the ownership information available if they had cared to look for it. *Id.* at 35–38.

⁷⁶ *Id.* at 42–43.

⁷⁷ *Id.* at 43.

⁷⁸ *Id.* at 49 (providing the following definition: "the person who has uninterrupted possession of moveable property for thirty-two years as his/her own, obtains title to that property by way of adverse possession, unless he/she acquired the property in bad faith.").

⁷⁹ *Id.* at 52–53

⁸⁰ *Id.* at 52–53, 58.

⁸¹ *Id.* at 54.

⁸² *Id.* at 10–11.

⁸³ *Id.* at 11.

⁸⁴ *Id.*

of the painting.⁸⁵ Nearly a year later, the Director of the Museum of Fine Arts rejected Weiss de Csepel's ownership claim.⁸⁶

The court upheld the adverse possession claim for this painting under the theory that it was a "gift of deed thought to be valid."⁸⁷ The court held that the Museum was under no obligation to investigate whether the donor was the valid owner without reason to believe he was not.⁸⁸ The court rejected Nierenberg's rebuttal that the painting was acquired "treacherously."⁸⁹ It did not discuss the relevance of Weiss de Csepel's inquiries about the painting, and dismissed Nierenberg's claims that she and Weiss de Csepel had been unable to state a claim earlier due to Hungary's political climate.⁹⁰ Curiously, the court held that the Museum had acquired ownership of the painting through adverse possession on April 1, 1976.⁹¹ Hungary requires thirty-two years of uninterrupted possession in order for a successful adverse possession claim.⁹² Thirty-two years prior to 1976 would be 1944, a date that contradicts the court's own statement of the history of the painting, which was apparently given to the Dr. Domy in 1948.⁹³ The court did not explain this discrepancy.

ii. The Supreme Court of Hungary Reverses

On November 29, 2002, the Supreme Court of Hungary remanded for reconsideration on the ten artworks the lower court had ordered returned to the Herzogs.⁹⁴ The court affirmed the Budapest Municipal Court's ruling as to the John Opie painting.⁹⁵ The court agreed that the

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 54.

⁸⁸ *Id.*

⁸⁹ *Id.* at 54–57.

⁹⁰ *Id.*

⁹¹ *Id.* at 57.

⁹² *Id.* at 49.

⁹³ *See id.* at 10–11.

⁹⁴ *See* Legfelsőbb Bíróság (LB) [Supreme Court] Nov. 29, 2002, Pf. IX.26.770/2000/21.

⁹⁵ *Id.*

Herzog collection had never been nationalized, and held that the Commission’s decision was irrelevant to its consideration on the nationalization issue.⁹⁶ The court then asked the lower court to consider whether the 1973 Agreement “should have been interpreted as actions of the owners disposing over the goods.”⁹⁷ The court wrote that “a new legal situation was created” after the execution of the 1973 Agreement.⁹⁸ Therefore, the court held, adverse possession might apply depending on “the political conditions at the time, the circumstances of the [U.S.] claim, and the legal actions of [Weiss de Csepel] in Hungary . . . [including] the fact that she failed to mention the valuable paintings in her will.”⁹⁹ Without explaining the math, the court finally held that the Herzog heirs would have to prove that adverse possession did not grant title to the defendants until after 1983 (thirty-two years following that date would be 2015, which has not yet occurred).¹⁰⁰

iii. The Second Judgment of the Budapest Municipal Court Finds for Hungary

Three years later, the Budapest Metropolitan Court flipped its former ruling, and held that nine of the ten paintings still at issue belonged to the defendants via adverse possession.¹⁰¹ The court held once more that the paintings had never been acquired by nationalization.¹⁰² The court held that the 1973 Agreement did not give the defendants ownership of the artwork.¹⁰³ The court held that Weiss de Csepel was not a party to the 1973 Agreement¹⁰⁴ (as she was not a U.S. citizen at the time of the Holocaust looting and the paintings had never been nationalized) and

⁹⁶ *Id.* at 15–16.

⁹⁷ *Id.* at 16.

⁹⁸ *Id.*

⁹⁹ *Id.* at 17.

¹⁰⁰ *Id.*

¹⁰¹ See Fővárosi Bíróság [Metropolitan Court] Nov. 16, 2005, 4.P.20.389/2003/35.

¹⁰² *Id.* at 21–23.

¹⁰³ *Id.* at 22.

¹⁰⁴ *Id.*

that her claim to the Commission did not result in her disposing of ownership of the paintings.¹⁰⁵ Furthermore, the court noted that “there is not even a reference in the [1973] Agreement to the change of the ownership title of the assets affected by the compensation.”¹⁰⁶ The court then found reasons to grant adverse possession for all but one painting.¹⁰⁷ The court mandated that El Greco’s “Holy Family” be returned to the Herzogs, as defendants should have known whose painting it was when they acquired it in 1944.¹⁰⁸ The other ten paintings were held to belong to Hungary.¹⁰⁹

iv. The Capital City Court of Appeals Dismisses the Suit

Nearly nine years after Martha Nierenberg first filed suit, the Capital City Court of Appeals dismissed the Herzogs’ claim in its entirety.¹¹⁰ The court held that all of the paintings had been purchased by Hungary via the 1973 Agreement, and if not, that they had all been acquired by adverse possession.¹¹¹ The court’s analysis of the 1973 Agreement is self-contradicting.¹¹² The court held that under the 1973 Agreement, Weiss de Csepel surrendered ownership of the artworks to Hungary by submitting a claim to the Commission and accepting payment in restitution.¹¹³ The court found it irrelevant that she had not personally participated in

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 25–27 (reversing its previous bailment ruling, the court did not discuss every painting at issue, but held that some were subject to adverse possession as they were acquired by the state after a criminal judgment against István Herzog’s wife, to whom he had donated the paintings. Mrs. István Herzog unsuccessfully attempted to smuggle the paintings out of Hungary, that there was a presumption of lawful acquisition, that the defendants had good reason to believe some paintings were state-owned, and that the defendants did not act treacherously).

¹⁰⁸ *Id.* at 26. Although it remained in the defendants’ possession consistently, this painting was also technically seized from Mrs. István Herzog following the criminal judgment against her and given to the defendants a second time. *Id.* at 14. This painting different from the others taken from Mrs. Herzog because it had not left the defendants’ possession since it was first acquired in 1944. *Id.* at 26.

¹⁰⁹ *Id.* at 25–27.

¹¹⁰ Fővárosi Ítéletábla [Capital City Court of Appeal] Jan. 10, 2008, 5.Pf.20.499/2006/33 [hereinafter *Decision of the Capital City Court of Appeal*].

¹¹¹ *Id.* at 14–15 (summarizing the court’s holding).

¹¹² *See id.* at 12.

¹¹³ *Id.*

the Agreement, because the U.S. had publicized how to file claims with the Commission.¹¹⁴ The court was aware that Weiss de Csepel only became a U.S. citizen in 1952,¹¹⁵ however, it ignored the critical fact that Weiss de Csepel was not an American citizen at the time of the Holocaust looting, and thus was not included within the 1973 Agreement,¹¹⁶ as well as the fact that the Commission award explicitly preserved future rights against Hungary and did not constitute a sale.¹¹⁷ The court also held later that Weiss de Csepel's claim to the Commission was irrelevant as no nationalization had occurred,¹¹⁸ despite having just relied upon the claim to find a transfer of ownership under the 1973 Agreement.¹¹⁹ Despite its significant mistakes and illogic, the court's judgment was final ("No appeal lies against the judgment").¹²⁰ The Herzogs had lost in Hungary.

b. Seeking Justice: The Current Litigation in the United States

On July 27, 2010, the Herzog heirs filed a complaint against the Republic of Hungary, the Hungarian National Gallery, the Museum of Fine Arts, the Museum of Applied Arts, and the Budapest University of Technology and Economics in U.S. District Court for the District of Columbia.¹²¹ The suit sought restitution of over forty works of art, worth over \$100 million, including the eleven pieces previously litigated in Hungary.¹²² In this suit, the Herzog family was represented by Martha Nierenberg's son, David de Csepel, a U.S. citizen, and Angela

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 13.

¹¹⁶ *See supra* notes 42 and 46.

¹¹⁷ *See supra* note 53.

¹¹⁸ *Decision of the Capital City Court of Appeal, supra* note 110 at 13.

¹¹⁹ *Id.* at 12.

¹²⁰ *Id.* at 2. *Cf. Varga Declaration, supra* note 69 at 5–6 (stating that in extremely rare cases, the Supreme Court of Hungary may hear an appeal, but that it would have been "extremely unlikely" that review would have been granted in this case).

¹²¹ *Complaint, supra* note 1.

¹²² *Id.* at 15–20.

Herzog and Julia Herzog, András Herzog's daughters and Italian citizens.¹²³ On February 15, 2011, the defendants filed a motion to dismiss.¹²⁴ On September 1, 2011, Judge Ellen Segal Huvelle denied the motion to dismiss, except for the eleven pieces of art previously involved in the Nierenberg litigation.¹²⁵

In denying the motion to dismiss with respect to the other thirty-something pieces of artwork, Judge Huvelle made several important holdings. She held that the court had subject matter jurisdiction under the expropriation exception to the Foreign Sovereign Immunities Act, as there was a substantial and non-frivolous claim of a taking in violation of international law with a sufficient commercial nexus to the United States.¹²⁶ Judge Huvelle also held that the 1973 Agreement only applied to Americans who were U.S. citizens at the time of their injury.¹²⁷ She held that the 1973 Agreement could only apply to claims arising between 1952 (the year of Weiss de Csepel's naturalization) and 1973.¹²⁸ Judge Huvelle held that the plaintiffs had a substantial and non-frivolous claim that no nationalization had taken place following Weiss de Csepel's U.S. citizenship.¹²⁹ Furthermore, she held that the Commission's claim award from 1959 "did not prevent Ms. Weiss de Csepel from seeking additional recovery from Hungary, including restitution of the property itself."¹³⁰ Judge Huvelle additionally denied the motion to dismiss' theories of failure to state a claim, forum non conveniens, statute of limitations, act of state doctrine, and political question doctrine.¹³¹

¹²³ *Id.* at 6–8.

¹²⁴ Motion to Dismiss, *de Csepel v. Republic of Hungary*, 808 F.Supp.2d 113 (D.D.C. 2011) (No. 1:10-CV-01261).

¹²⁵ *de Csepel v. Republic of Hungary*, 808 F.Supp.2d 113, 145 (D.D.C. 2011) (summarizing the disposition of the motion to dismiss).

¹²⁶ *Id.* at 127–33.

¹²⁷ *Id.* at 133–34 (relying upon several sources, detailed *supra* note 42).

¹²⁸ *Id.* at 134.

¹²⁹ *Id.* at 133–34 (basing the claim on the fact that the two conditions precedent in the 1954 Museum Decree were not met: ownership was known and the Herzogs did not flee the country illegally).

¹³⁰ *Id.* at 134–35.

¹³¹ *See id.* at 135–44.

However, Judge Huvelle granted the motion to dismiss with respect to the eleven pieces previously litigated by Martha Nierenberg in Hungary.¹³² She correctly denied the defendants' international comity theory as to the non-Nierenberg Litigation artwork.¹³³ They are different pieces of art not previously litigated, and additional plaintiffs are involved in the U.S. suit.¹³⁴ For the pieces that were involved in the Nierenberg litigation, Judge Huvelle held that international comity gave preclusive effect to the Hungarian Capital Court of Appeals' decision.¹³⁵ If upheld on appeal, this decision means that those 11 pieces are forever lost to the Herzog family. In her analysis, Judge Huvelle held that the plaintiffs had not shown that they were denied a "full and fair" proceeding in Hungary, making only "mere assertions."¹³⁶ She did not provide further analysis of why the plaintiffs' claims were "mere assertions," but focused on the page length of the Hungarian court's decision and the fact that the Herzogs had been represented by attorneys.¹³⁷ Judge Huvelle concluded that the plaintiffs had not shown prejudice or lack of impartiality,¹³⁸ despite their description of Hungary's hostility to restitution efforts.¹³⁹ She did not consider the public policy implications of the comity decision.¹⁴⁰ Judge Huvelle's holding as to the artwork involved in the Nierenberg litigation should be reversed as it is not in accordance with the doctrine of international comity.

¹³² *Id.* at 144–45.

¹³³ *See Drake v. Fed. Aviation Admin.*, 291 F.3d 59, 66 (D.C. Cir. 2002) (holding that "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action").

¹³⁴ *de Csepel*, 808 F.Supp.2d at 144.

¹³⁵ *Id.* at 144–45.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 145.

¹³⁹ *See Varga Declaration*, *supra* note 69; *see also infra* Part III(b).

¹⁴⁰ *de Csepel*, 808 F.Supp.2d at 145.

III. INTERNATIONAL COMITY AND THE HERZOG LITIGATION

a. *Principles of International Comity*

International comity doctrine derives from the 1895 case of *Hilton v. Guyot*.¹⁴¹ International comity grants preclusive effect to foreign court judgments if certain predicate conditions are met.¹⁴² Justice Gray, writing for the Court, described comity as a practice that is in between an unequivocal mandate and unfettered judicial discretion.¹⁴³ Comity is designed to nurture international cooperation and promote the rule of law.¹⁴⁴ *Hilton* provided the formula that a foreign court's decision is entitled to full preclusive effect if: 1) there has been an opportunity for a full and fair trial based on regular proceedings; 2) under a judicial system that is likely to come to a fair and impartial decision in suits between the citizens of its country and foreigners; and 3) so long as there is nothing to show prejudice in the foreign court or in the country's laws.¹⁴⁵ A "mere assertion" that the foreign court's decision was wrong about laws or facts is not sufficient to decline comity.¹⁴⁶

An important limitation on international comity doctrine is that the foreign judgment cannot be given preclusive effect if it contravenes U.S. public policy.¹⁴⁷ Upholding an inconsistent foreign decision would encourage the aberration and incite reprisals, the very opposite of the goals of comity.¹⁴⁸ The public policy exception derives from *Hilton v. Guyot*

¹⁴¹ 159 U.S. 113 (1895); see Richard H.M. Maloy & Desamparados M. Nisi, *A Message to the Supreme Court: The Next Time You Get a Chance, Please Look at Hilton v. Guyot; We Think It Needs Repairing*, 5 J. INT'L LEGAL STUD. 1, 1 (1999) (describing *Hilton* as "the leading case in the country" on comity, and observing that the case's "definition of comity is quoted endlessly").

¹⁴² See generally Mark D. Rosen, *Should "Un-American" Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 792 (2004) (summarizing international comity doctrine).

¹⁴³ *Hilton*, 159 U.S. at 163–64.

¹⁴⁴ See, e.g., *Laker Airways Ltd. V. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984).

¹⁴⁵ *Id.* at 202.

¹⁴⁶ *Id.* at 203.

¹⁴⁷ See, e.g., *Laker Airways*, 731 F.2d at 937 (collecting cases). Yet courts rarely decline to grant international comity. See Jennifer M. Anglim, *Crossroads in the Great Race: Moving Beyond the International Race to Judgment in Disputes over Artwork and Other Chattels*, 45 HARV. INT'L L.J. 239, 250 (2004)..

¹⁴⁸ *Id.* at 937–38.

itself, in which Justice Gray wrote that the court granting comity must have “due regard . . . to the rights of its own [country’s] citizens.”¹⁴⁹ The exception is understood to protect the rights of citizens and the country’s laws, as well as public policy.¹⁵⁰ The public policy exception has been used, for example, to protect the U.S. interest in the independence of its courts,¹⁵¹ and its interest in the finality of arbitration agreements.¹⁵² The exception does not extend to protect uniquely American procedural rights, which are not strictly necessary for a full and fair trial in another legal system.¹⁵³ Though courts do not often decline to grant comity,¹⁵⁴ the public policy exception has been regularly applied in situations where strong U.S. interests were impacted by a foreign judgment.¹⁵⁵

b. The Hungarian Decision in the Nierenberg Litigation Should Not Have Been Granted Comity

The Hungarian Capital Court of Appeals’ decision should not have been granted comity under the third prong of the *Hilton* test, or under the public policy exception. The Nierenberg litigation was a regular proceeding in the Hungarian justice system, and Martha Nierenberg was ably represented by counsel.¹⁵⁶ There is also no evidence that the Hungarian courts are systematically unable to render a fair decision in a lawsuit between Hungarians and foreigners.¹⁵⁷

¹⁴⁹ 159 U.S. at 164.

¹⁵⁰ See, e.g., *In re Arbitration of Certain Controversies Between Chromalloy Aeroservices & the Arab Republic of Egypt*, 939 F. Supp. 907, 913 (D.D.C. 1996) (holding that comity “never” requires a court to ignore the rights of its own country’s citizens).

¹⁵¹ See, e.g., *Laker Airways*, 731 F.2d at 939.

¹⁵² See *Chromalloy*, 939 F. Supp. at 913.

¹⁵³ See *Tahan v. Hodgson*, 662 F.2d 862, 866 (D.C. Cir. 1981) (holding that the public policy exception did not extend to certain procedural rights as it would be “unrealistic for the United States to require all foreign judicial systems to adhere to the Federal Rules of Civil Procedure”).

¹⁵⁴ See *Anglim*, *supra* note 147 at 250.

¹⁵⁵ See, e.g., *Laker Airways*, 731 F.2d at 939 (declining comity to protect the independence of U.S. courts in construing American laws); *Chromalloy*, 939 F. Supp. at 913 (declining comity to protect U.S. interest in final arbitration agreements).

¹⁵⁶ See *Varga Declaration*, *supra* note 69.

¹⁵⁷ Liberia, Iran, and, frequently, Russia have been held to be incapable of rendering an impartial verdict when foreigners are involved. See *Anglim*, *supra* note 147 at 254 n.113.

Yet there is substantial evidence of prejudice in the Hungarian courts against the Herzogs, and indeed, against restitution of Holocaust art in general.¹⁵⁸ Hungary ignores the evils committed during the Holocaust and the communist era;¹⁵⁹ the new Hungarian constitution claims that the country lost its “self-determination” between 1944 and 1990.¹⁶⁰ Hungary has been described as evidencing “outright hostility” to claims for the return of Holocaust art.¹⁶¹ Despite publicly embracing international agreements on returning looted art,¹⁶² Hungary has tried to keep stolen Holocaust art in state museums by destroying archives and delaying negotiations, responding to nationalist pressure applied by the media.¹⁶³

Hungary’s attitude towards restitution lawsuits is profoundly hypocritical.¹⁶⁴ While the country has devoted 3.7 million Euros to opposing the Herzogs’ claim in U.S. court,¹⁶⁵ it simultaneously vigorously pursues the restitution of looted Hungarian art from other countries.¹⁶⁶ It is also critical to note that the artworks involved in the Herzog litigation are valued at over

¹⁵⁸ Bert Demarsin, *Let’s Not Talk About Terezín: Restitution of Nazi Era Looted Art and the Tenuousness of Public International Law*, 37 *Brook. J. Int’l L.* 117 (2011).

¹⁵⁹ See Braham, *supra* note 10 at 42–43 (“During the post-Communist era, the treatment of the Holocaust has varied across the newly evolved political spectrum. . . . the extreme Right . . . [is] engaged in an obscene campaign to absolve the Nazis and their Hungarian accomplices of all crimes committed against the Jews. . . . Many highly respectable individuals acknowledge the mass murder of Jews, but place exclusive blame on Germans. . . . Still others, including top officials of the government, would like to close the book on World War II and ease their conscience . . . [the Hungarian government] has so far failed to make a national, collective commitment to honestly confront the Holocaust.”).

¹⁶⁰ Declaration of Tamás Lattmann at 7, *de Csepel v. Republic of Hungary*, 808 F.Supp.2d 113 (D.D.C. 2011) (No. 1:10-CV-01261). Notably, the Hungarian court decisions in the Nierenberg litigation do not mention the tragedy of the Holocaust, and only relate the bare minimum of facts about the history of the artwork.

¹⁶¹ Charles A. Goldstein, Counsel, Herrick Feinstein (N.Y.), Address at the Restitution of Holocaust-Era Looted Art-The Washington Conference (1998): An Overview 7 (May 8–9, 2009), available at http://www.commartrecovery.org/sites/default/files/docs/MALAGA_LECTUREfinalMAY2009.pdf.

¹⁶² See *Varga Declaration*, *supra* note 69 at 14–15.

¹⁶³ Demarsin, *supra* note 158 at 169 (quoting Agnes Peresztegi, *Recovery, Restitution or Re-nationalization: The Herzog and Hatvany Cases in Hungary*, Holocaust Era Assets Conf. Proc 3 (June 26–30, 2009)).

¹⁶⁴ See *Varga Declaration*, *supra* note 69 at 15–18 (discussing the futility of pursuing Holocaust restitution lawsuits in Hungary).

¹⁶⁵ OTTERSON, *supra* note 63 at 28 (citing MTI - Magyar Tavirati Iroda Zrt., *Hungary Earmarks a Billion Forints for Herzog Case*, MTI INTRADAY NEWS (Budapest), Nov. 20, 2010, <http://www.mti.hu> (accessed December 10, 2010)).

¹⁶⁶ See OTTERSON, *supra* note 63 at 25–28 (analyzing the discrepancy between Hungary’s hostile attitude towards the Herzog lawsuit and Hungary’s passionate reclamation of the Sarospatak books from Russia).

\$100 million,¹⁶⁷ include highlights of the Hungarian museums' collections,¹⁶⁸ and generate substantial funds for Hungary through tourism and use of the images of the artworks.¹⁶⁹

Together, these factors constitute far more than a “mere assertion” of prejudice, and comity should not have been granted.

Judge Huvelle did not explore the public policy exception in her decision to grant comity to the Hungarian decision.¹⁷⁰ The exception dictates that comity be declined in this case, where strong U.S. interests are at stake.¹⁷¹ For example, in *Laker Airways*, the D.C. Circuit declined to grant comity to a British injunction that was designed to halt an American antitrust lawsuit, because the United States has a very strong interest in autonomously administering its own laws.¹⁷² Here, the United States has a similar interest in having its executive agreements interpreted and executed properly, for to do otherwise would be “fundamentally prejudicial to . . . the domestic forum.”¹⁷³ The Hungarian Capital Court of Appeals deeply misconstrued the 1973 Agreement to 1) apply to someone whom the Hungarian court knew was not a U.S. citizen at the time of injury, and 2) constitute a relinquishment of ownership and rights.¹⁷⁴ The Hungarian court's interpretation contradicted fundamental U.S. principles,¹⁷⁵ and the U.S. interest in proper understanding of its agreements. Additionally, the United States has a strong interest in cultural property matters.¹⁷⁶ The United States also has a particular interest in the restitution of stolen

¹⁶⁷ See *Complaint*, *supra* note 1 at 20.

¹⁶⁸ *Id.* at 59 (quoting Dénes Csányi, Director of the Hungarian Museum of Fine Arts, on the value of the Herzog collection).

¹⁶⁹ *Id.* at 32; see also OTTERSON, *supra* note 63 at 27.

¹⁷⁰ See *de Csepel v. Republic of Hungary*, 808 F.Supp.2d 113, 145 (D.D.C. 2011).

¹⁷¹ See *supra*, Part III(b).

¹⁷² 731 F.2d at 939; see also *Chromalloy*, 939 F. Supp. at 913 (refusing to grant comity to a foreign decision vacating an arbitration award because of the U.S. interest in final arbitration agreements).

¹⁷³ See *Laker Airways*, 731 F.3d at 937.

¹⁷⁴ *Decision of the Capital City Court of Appeal*, *supra* note 110 at 12.

¹⁷⁵ See *supra* notes 42 and 53.

¹⁷⁶ See, e.g., H.R. REP. NO. 95-615, at 4, 8 (1977) (discussing the “moral leadership” role of the United States in the effort to end illegal looting of cultural property).

property,¹⁷⁷ especially to U.S. citizens.¹⁷⁸ The U.S. government is also “very much committed to the principle of returning property to its rightful owners in the field of art restitution.”¹⁷⁹ Due to the strong U.S. interests in proper interpretation of its agreements and the return of Holocaust looted art, comity should be declined in the Herzog case under the public policy exception.

IV. BINDING RIGHTFUL HEIRS: THE SPECTER OF AN EXHAUSTION REQUIREMENT

The comity issue in this case arose because Martha Nierenberg was under the impression that she had to exhaust her remedies in Hungary before filing suit in the United States.¹⁸⁰

Exhaustion requirements are very common in administrative law.¹⁸¹ An exhaustion requirement mandates that a plaintiff try to resolve their claim through all other available means before filing suit in U.S. court.¹⁸² In administrative law, the exhaustion requirement is used to protect the authority of agencies to resolve disputes before litigation and to promote judicial efficiency.¹⁸³

Exhaustion requirements have been read into many different types of statutes, including tort statutes, foreign tort statutes, and, controversially, the Prison Reform Act.¹⁸⁴

The Herzogs filed their U.S. litigation under the Foreign Sovereign Immunities Act (FSIA), which provides jurisdiction over foreign countries in U.S. courts in certain

¹⁷⁷ See *Agudas Chasidei Chabad of United States v. Russian Federation*, 466 F. Supp. 2d 6, 30 (D.D.C. 2006) (observing the “strong public interest in the United States” in the return of cultural property—a Jewish library—taken by Russia during the Russian Civil War).

¹⁷⁸ See *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 133 (E.D.N.Y. 2000) (stating that there is a U.S. interest in providing a forum where U.S. citizens “may seek to address an alleged wrong”).

¹⁷⁹ Kennedy, *supra* note 42 (stating additionally that the United States “continue[s] as a government to urge that foreign governments and institutions observe the Washington Principles and return artworks to their rightful owners.”); see also *Altmann v. Republic of Austria*, 327 F.3d 1246 (9th Cir. 2003) (holding that U.S. jurisdiction was proper for litigation over Klimt paintings looted during the Holocaust).

¹⁸⁰ *Motion for Cross-Certification*, *supra* note 65 at 2.

¹⁸¹ See Colin Miller, “*Manifest? Destiny?: How Some Courts Have Fallaciously Come to Require a Greater Showing of Congressional Intent for Jurisdictional Exhaustion than They Require for Preemption*,” 2008 B.Y.U. L. REV. 169 (2008).

¹⁸² See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938).

¹⁸³ *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992).

¹⁸⁴ See Eugene Novikov, *Stacking the Deck: Futility and the Exhaustion Provision of the Prison Litigation Reform Act*, 156 U. PA. L. REV. 817, 820 (2008) (arguing for robust judicial analysis of the futility of fulfilling exhaustion requirements under the Prison Litigation Reform Act); see also Miller, *supra* note 181 at 181 (describing examples of the use of exhaustion requirements).

circumstances.¹⁸⁵ The text of the statute does not contain an exhaustion requirement,¹⁸⁶ and no court currently reads one into the statute. Both the Ninth Circuit and the D.C. Circuit have recently declined to do so, and Judge Huvelle correctly followed their example.¹⁸⁷ In the Ninth Circuit, in *Cassirer v. Kingdom of Spain*, the court relied on the plain language of the FSIA and found that the statute did not *mandate* exhaustion, though it *may* be discretionally required in some situations.¹⁸⁸ In *Agudas Chasidei Chabad v. Russian Federation*, the D.C. Circuit held that it was “likely correct” that the FSIA did not include an exhaustion requirement.¹⁸⁹

Justice Breyer recently alluded to the possibility of requiring exhaustion under the FSIA.¹⁹⁰ He stated that “a plaintiff may have to show an absence of remedies in the foreign country sufficient to compensate for any taking,” which he followed with citations to the Restatement (Third) of Foreign Relations Law of the United States and two administrative law decisions requiring exhaustion, with no further commentary.¹⁹¹ The Restatement comments that “[u]nder international law, ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged.”¹⁹² Both *Cassirer* and *Chabad* declined to follow Justice Breyer and the Restatement.¹⁹³ *Cassirer* noted that Justice Breyer was only discussing a possible requirement, not a mandatory one.¹⁹⁴ *Chabad* held that the Restatement was inapplicable to the FSIA as it referred to the claims of one

¹⁸⁵ *See de Csepel v. Republic of Hungary*, 808 F.Supp.2d 113, 127 (D.D.C. 2011)..

¹⁸⁶ 28 U.S.C. §§ 1605(a)(3) (2012).

¹⁸⁷ *de Csepel*, 808 F.Supp.2d at 131 n.3.

¹⁸⁸ 616 F.3d 1019, 1034–37 (9th Cir. 2010).

¹⁸⁹ 528 F.3d 934, 948–50 (D.C. Cir. 2008).

¹⁹⁰ *Republic of Austria v. Altmann*, 541 U.S. 677, 714 (2004) (Breyer, J., concurring).

¹⁹¹ *Id.*

¹⁹² RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 713 cmt. f (1987).

¹⁹³ *Cassirer*, 616 F.3d at 1034–37; *Chabad*, 528 F.3d at 948–49.

¹⁹⁴ 616 F.3d at 1034–37.

state against another.¹⁹⁵ *Chabad* interpreted Justice Breyer’s remarks to be referring to a substantive constitutional law theory of taking (that there is no taking unless one’s state courts do not provide sufficient postdeprivation remedy), which the court held was questionable to extend to foreign courts that do not follow the U.S. Constitution.¹⁹⁶ The trend appears to be that there is no exhaustion requirement in the FSIA, however, Justice Breyer’s comment leaves lingering doubt.

Indeed, exhaustion should not be required under the FSIA. Foreign litigation is extremely expensive,¹⁹⁷ and may require time and resources for extensive travel to the foreign country. Foreign litigation can also be a very lengthy process,¹⁹⁸ as demonstrated in this case, where a final Hungarian decision was not reached for eight years.¹⁹⁹ More importantly, if exhaustion is required and comity is granted without a searching inquiry (as in this case²⁰⁰), U.S. citizens with art restitution claims are essentially bound to the judgments of foreign courts. The partiality of the Hungarian justice system in the Herzog case is illustrative of the dangers of outsourcing restitution claims.²⁰¹ This outcome also contravenes fundamental U.S. interests in providing a forum for its citizens to find redress, in the restitution of looted property to its citizens, and in interpreting its own laws.²⁰²

¹⁹⁵ 528 F.3d at 948–49.

¹⁹⁶ *Id.* at 949.

¹⁹⁷ See Anglim, *supra* note 147 At 241 (describing art litigation as being “particularly” expensive due to the need for experts in all of the complex legal doctrines that art law touches).

¹⁹⁸ See *id.* at 273 (describing an “extensive” debate among experts as part of a restitution suit where a U.S. soldier stole artifacts from the Weimar Museum); see also OTTERSON, *supra* note 63 at 25.

¹⁹⁹ See *supra* Part II(a).

²⁰⁰ See *supra* Part II(b).

²⁰¹ See *supra* Part III(b); see also Goldstein, *supra* note 161 (listing the problems of the justice systems of countries involved in the restitution of Holocaust looted art).

²⁰² See *supra* Part II(b).

V. CONCLUSION

The Herzog collection's masterpieces have now spawned over ten years of litigation. The case is unique in that it involves a large, valuable assortment of art, with plaintiffs who are dedicated to pursuing their claims. Judge Huvelle's decision to allow the majority of the suit to proceed correctly interpreted many points of law, however, she incorrectly granted international comity to the Hungarian court's decision denying restitution in the Nierenberg litigation. That decision blatantly misinterpreted a U.S.-Hungarian executive agreement on two separate grounds. Yet comity should not merely be denied because the Hungarian decision was wrong; comity should be denied because the Hungarian decision was based on prejudice in the Hungarian courts, and contravened important U.S. interests. The Hungarian court was influenced by strong cultural nationalism, economics, and a desire to ignore the darker parts of Hungarian history. Their ruling affronted the U.S. interests in proper interpretation of U.S. agreements and restitution of looted property, both in general and to U.S. citizens. The Herzog case illustrates the danger of using comity (particularly if there is held to be an exhaustion requirement) in art restitution suits without a full inquiry into the foreign country's justice system and U.S. public policy. On appeal, the Hungarian decision should not be granted comity, and the court should follow its precedent and decline to read an exhaustion requirement into the Foreign Sovereign Immunities Act. After all, the U.S. courts are now the only remedy for the Herzogs to reclaim their family's stolen treasures.