

## **APPENDIX**

**APPENDIX**

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*Gregory Silbert* argued the cause for defendants-appellants/cross-appellees Republic of Hungary, et al. With him on the briefs was *Konrad L. Cailteux*.

*L. Marc Zell* and *David H. Weinstein* argued the causes for plaintiffs-appellees/cross-appellants Rosalie Simon, et al. and Steven Heller, et al. With them on the briefs were *Noam Schreiber*, *Charles S. Fax*, *Liesel J. Schopler*, and *Paul G. Gaston*.

*Andrew D. Freeman* and *Anthony J. May* were on the brief for *amicus curiae* Professor Vivian Grosswald Curran in support of plaintiffs-appellees/cross-appellants.

Before: PILLARD and CHILDS, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* PILLARD and *Circuit Judge* CHILDS.

Opinion concurring in part and dissenting in part filed by *Senior Circuit Judge* RANDOLPH.

PILLARD and CHILDS, *Circuit Judges*: These two consolidated cases arise out of the Hungarian government's confiscation of property owned by Jews during the Holocaust. "Nowhere was the Holocaust executed with such speed and ferocity as it was in Hungary." *Simon v. Republic of Hungary*, 812 F.3d 127, 133 (D.C. Cir. 2016) (quoting *Simon*, First Am. Compl. ¶ 1 (J.A. 44)). In 1944, as World War II neared its end, the Hungarian government implemented an accelerated campaign to exterminate its remaining Jewish population. Within a matter of months, the government systematically executed over half a million

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Jews—roughly two-thirds of the Jewish population in Hungary at the war’s outset. This state-perpetrated genocidal campaign ranks among the greatest crimes in human history.

The questions raised by these appeals bear on whether survivors of the Hungarian Holocaust may hale the Hungarian government and its instrumentalities into United States courts to answer for a subset of the wrongs they committed—namely, their confiscation of property from victims of the Holocaust. The plaintiffs invoke the Foreign Sovereign Immunities Act’s expropriation exception as a means to pierce the Hungarian state’s sovereign immunity and assert jurisdiction in federal district court. Defendants object that the exception is inapplicable.

In the first of the two cases consolidated before us, *Simon v. Republic of Hungary*, fourteen survivors of the Hungarian Holocaust sue the Republic of Hungary and one of its agencies, Magyar Államvasutak Zrt., seeking compensation for the seizure of their property during the Holocaust. The litigation in *Simon* is long running, and we have reviewed appeals in the case twice before. In the second case, *Heller v. Republic of Hungary*, two Holocaust survivors more recently sued for compensation from Hungary for property confiscated from their late parents and grandparents during the war.

Cognizant of the Supreme Court’s recent holding that “a country’s alleged taking of property from its own nationals” generally falls outside the scope of the Foreign Sovereign Immunities Act’s expropriation exception, *Fed. Republic of Germany v. Philipp*, 141

S. Ct. 703, 708 (2021); *see id.* at 715, the plaintiffs in these suits assert they were not Hungarian nationals at the time of the takings at issue. They instead claim that they were either stateless or Czechoslovakian nationals. The district court dismissed the claims of the plaintiffs asserting statelessness but concluded that most of the plaintiffs asserting Czechoslovakian nationality could proceed.

We largely affirm. Like the district court, we conclude that the plaintiffs claiming statelessness—Zehava Friedman, Vera Deutsch Danos, Steven Heller, and Charles Heller—have not made out a recognized claim within a Foreign Sovereign Immunities Act exception. Assuming without deciding that those plaintiffs were *de facto* stateless at the time of the alleged takings, as they claim, the plaintiffs have nevertheless failed to identify adequate affirmative support in sources of international law for their contention that a state’s taking of a stateless person’s property amounts to a taking “in violation of international law” within the meaning of the Foreign Sovereign Immunities Act. 28 U.S.C. § 1605(a)(3). We do not foreclose the possibility that such a takings claim might prevail if grounded in sources of international law not before us or based on arguments not raised here. But on this record, we affirm the district court’s dismissal of those four plaintiffs’ claims.

We likewise affirm the district court’s denial of the defendants’ motions to dismiss the claims of some of the plaintiffs asserting Czechoslovakian nationality, with a few exceptions. The district court correctly determined that four of those plaintiffs—Magda

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Kopolovich Bar-Or, Yitzhak Pressburger, Alexander Speiser, and Moshe Perel—had plausibly alleged they were Czechoslovakian nationals at the time of the takings. As for the five Lebovics sisters, the district court should have dismissed their claims, along with those of Tzvi Zelikovitch and Ella Feuerstein Schlanger, for failure to plausibly allege Czechoslovakian nationality. We direct that those dismissals, however, be without prejudice to the opportunity of any of those plaintiffs to amend in the event they can cure the identified defects in their nationality allegations.

In reaching this conclusion, we reject the Hungarian defendants' arguments that the plaintiffs are judicially estopped from asserting Czechoslovakian nationality and that, even assuming they were Czechoslovakian at the time of the takings, the Foreign Sovereign Immunities Act's treaty exception bars their claims. We also reject the plaintiffs' theory that Hungary's alleged treaty violations enable the plaintiffs to bypass the domestic takings rule.

Hungary and its instrumentality also assert that the plaintiffs' claims of expropriation in violation of international law lack the nexus to commercial activity in the United States that the Foreign Sovereign Immunities Act requires. We remand for the district court to make certain factual determinations regarding that nexus element of the remaining plaintiffs' claims.

All told, the claims of four *Simon* plaintiffs may proceed, and an additional eight *Simon* plaintiffs will have the opportunity to amend their pleadings. The

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district court, however, appropriately dismissed the *Heller* plaintiffs' claims.

### I.

#### A.

The historical events giving rise to these suits are recounted at length in our first two opinions in the *Simon* litigation, see *Simon v. Republic of Hungary* (*Simon I*), 812 F.3d 127, 132-34 (D.C. Cir. 2016), *abrogated in part by Fed. Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021); *Simon v. Republic of Hungary* (*Simon II*), 911 F.3d 1172, 1176-78 (D.C. Cir. 2018), *vacated*, 141 S. Ct. 691 (2021) (per curiam), as well as the district court's *Simon* and *Heller* opinions, see *Simon v. Republic of Hungary* (*Simon-2021*), 579 F. Supp. 3d 91, 97-99 (D.D.C. 2021); *Heller v. Republic of Hungary*, No. 21-cv-1739-BAH, 2022 WL 2802351, at \*1-2 (D.D.C. July 18, 2022). Further background is provided here as relevant to the disputes at issue.

We begin with a brief account of Hungary's evolving borders during the early twentieth century and their implications for the nationalities of persons living in affected territory. Prior to World War I, the Austro-Hungarian Empire controlled a significant share of European territory, including parts of modern-day Hungary, Slovakia, and the Czech Republic. At the war's end, however, the Austro-Hungarian Empire was dismembered into several smaller states organized primarily along ethno-linguistic lines. The Kingdom of Hungary, which had been part of the Austro-Hungarian Empire, ceded approximately two-thirds of its territory to newly created states. The territory



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Hungary retained is often referred to as “Trianon Hungary,” in recognition of the treaty that largely defined its borders: the 1920 Treaty of Trianon. Treaty of Peace Between the Allied and Associated Powers and Hungary arts. 27-35, June 4, 1920, S. Treaty Doc. No. 67-348 (1923) (Treaty of Trianon). In that treaty, Hungary also agreed to recognize the independence of a new nation state, Czechoslovakia, in an area that had comprised the northern region of the Austro-Hungarian Empire. *See id.* art. 48.

As relevant here, two post-war treaties governed the assignment of nationalities to persons in the territories ceded by Hungary to Czechoslovakia. First, the 1919 Treaty of St. Germain required the newly created state of Czechoslovakia to extend its citizenship to most Hungarian nationals who were habitually residing in the territory that became part of Czechoslovakia. Treaty Between the Principal Allied and Associated Powers and Czechoslovakia art. 3, Sept. 10, 1919, S. Treaty Doc. No. 67-348 (1923) (St. Germain Treaty). The St. Germain Treaty also established that “[a]ll persons born in Czecho-Slovak territory who are not born nationals of another State shall” acquire Czechoslovakian nationality. *Id.* art. 6. Second, the 1920 Treaty of Trianon included parallel provisions granting Czechoslovakian nationality to, and stripping Hungarian nationality from, those who had “rights of citizenship” in the territory that became part of Czechoslovakia, Treaty of Trianon art. 61, subject to certain conditions and exceptions, *id.* arts. 62-66.

The borders of this newly conceived Czechoslovakian state, however, did not last. In 1938

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and 1939, on the eve of World War II in Europe, Nazi Germany and Hungary illegally annexed parts of Czechoslovakia. Hungary thereafter sought to re-nationalize persons living in annexed regions who had lived there continuously from 1929 to 1939, and who had been Hungarian citizens as of 1921. In practice, however, “Hungarian officials imposed excessively stringent demands for proof of Hungarian citizenship upon Jews, making it virtually impossible for most Jewish residents of [annexed territory] to comply, with the result that they did not acquire Hungarian citizenship.” Bar-Shaked Decl. ¶ 62 (J.A. 1868); *see id.* ¶ 61 & n.31 (J.A. 1867). Hungarian laws also prohibited Jews from obtaining Hungarian citizenship by naturalization. *Id.* ¶ 31 (J.A. 1853).

After it became clear that they would lose the war, Nazi Germany and Hungary “raced to complete their eradication of the Jews before the Axis surrendered.” *Simon* Second Am. Compl. (*Simon* SAC) ¶ 3 (J.A. 238). Winston Churchill described Hungary’s genocidal campaign as “probably the greatest and most horrible crime ever committed in the history of the world.” *Simon I*, 812 F.3d at 132. The Axis powers wiped out more than two-thirds of Hungary’s pre-war Jewish population during the course of the war. *Id.* at 134. “The overwhelming majority of those deaths came from the roughly 430,000 Hungarian Jews deported to Auschwitz” or other concentration camps. *Id.* On November 3, 1944, the Hungarian government declared all valuable objects owned by Jews—except for their most personal items—part of the national wealth of Hungary. Hungary confiscated and liquidated much of that property.

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At the close of World War II, the Allied and Associated Powers entered into a peace treaty with Hungary. Treaty of Peace with Hungary, Feb. 10, 1947, 61 Stat. 2065, 41 U.N.T.S. 135 (1947 Treaty). The 1947 Treaty declared Hungary's annexation of Czechoslovakian territory null and void and returned to Czechoslovakia certain regions Hungary had illegally annexed. *Id.* art 1.

### B.

The Foreign Sovereign Immunities Act (FSIA) provides “the sole basis for obtaining jurisdiction over a foreign state in our courts.” *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989); *see* 28 U.S.C. § 1602 *et seq.* Absent a pre-existing agreement with the United States affecting the scope of sovereign immunity, a foreign sovereign is generally immune, unless one of the FSIA's enumerated exceptions applies. *See* 28 U.S.C. §§ 1604, 1605-1605B, 1607; *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 31 (2015).

This case concerns the FSIA's expropriation exception, codified at Title 28, Section 1605(a)(3). That exception waives foreign sovereign immunity in any case in which:

[1] rights in property taken in violation of international law are in issue and [2.A.] that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or [2.B.] 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.

28 U.S.C. § 1605(a)(3). Generally speaking, the exception has two requirements: (1) the claim must put in issue “rights in property taken in violation of international law,” and (2) there must be an adequate connection between the defendant and both the expropriated property and some form of commercial activity in the United States. *Id.* We refer to the latter as the commercial-activity nexus requirement.

With respect to the first requirement, the Supreme Court in *Philipp* held that “the phrase ‘rights in property taken in violation of international law,’ as used in the FSIA’s expropriation exception, refers to violations of the international law of expropriation, and thereby incorporates the domestic takings rule.” 141 S. Ct. at 715. Under the domestic takings rule, a foreign sovereign’s taking of its own nationals’ property is not a violation of the international law of expropriation. *Id.* at 709. *Philipp* thus generally bars plaintiffs who were nationals of the expropriating state at the time of the alleged taking from invoking the expropriation exception. *See id.* at 715.

The FSIA also contains a provision known as the “treaty exception.” *Simon I*, 812 F.3d at 135-36; *see* 28 U.S.C. § 1604. Per that provision, the FSIA’s baseline grant of immunity to foreign sovereigns is “[s]ubject to existing international agreements to which the United

States [was] a party at the time of enactment” of the FSIA. 28 U.S.C. § 1604. “[I]f there is a conflict between the FSIA and such an agreement regarding the availability of a judicial remedy against a contracting state, the agreement prevails.” *de Csepel v. Republic of Hungary (de Csepel II)*, 859 F.3d 1094, 1100 (D.C. Cir. 2017) (quoting *de Csepel v. Republic of Hungary (de Csepel I)*, 714 F.3d 591, 601 (D.C. Cir. 2013)).

C.

Two cases are consolidated before us on appeal: *Simon v. Republic of Hungary* and *Heller v. Republic of Hungary*. The plaintiffs in these cases—Rosalie Simon, Helen Herman, Charlotte Weiss, Helena Weksberg, Rose Miller, Tzvi Zelikovitch, Magda Kopolovich Bar-Or, Zehava (Olga) Friedman, Yitzhak Pressburger, Alexander Speiser, Tibi Ram, Moshe Perel, Vera Deutsch Danos, Ella Feuerstein Schlanger, Steven Heller, and Charles Heller—are survivors of the Hungarian Holocaust (collectively, Survivors).

Many were teenagers when Magyar Államvasutak Zrt (MÁV), the Hungarian national railway, delivered them to concentration camps in cattle cars. Two fled abroad and one remained in hiding and avoided deportation. The Survivors claim to have never received compensation for the personal property the Hungarian defendants allegedly stole from them, often while they were being transported to concentration camps or killing fields.

1.

The *Simon* litigation has been ongoing for more than a decade. The case was filed on October 20, 2010, as a putative class action by plaintiffs Simon, Herman, Weiss, Weksberg, Miller, Zelikovitch, Bar-Or, Friedman, Pressburger, Speiser, Danos, Schlanger, Tibi Ram, and soon thereafter was amended to add plaintiff Perel (collectively, the *Simon* Survivors or *Simon* plaintiffs). Simon, Herman, Weiss, Weksberg, and Miller are sisters, whose maiden name was Lebovics (collectively, Lebovics sisters). The *Simon* Survivors filed their complaint against the Republic of Hungary (Hungary) and MÁV (together, the Hungarian defendants). (One other defendant was dismissed on grounds not challenged here).

The Hungarian defendants moved to dismiss for lack of subject matter jurisdiction based on, *inter alia*, the FSIA's treaty exception, the *Simon* Survivors' failure to allege the elements necessary to invoke the expropriation exception, and the political question doctrine. The district court granted the Hungarian defendants' motion, holding that the FSIA's treaty exception immunized them from suit. *See Simon v. Republic of Hungary (Simon-2014)*, 37 F. Supp. 3d 381, 424 (D.D.C. 2014). Because the district court deemed the treaty exception dispositive, it declined to resolve the defendants' alternative grounds for dismissal. *See id.* at 407 n.21.

The *Simon* Survivors appealed, and we reversed. In *Simon I*, we held that the treaty exception did not divest the court of jurisdiction over the case because the *Simon* Survivors' action based on common-law

claims did not create an express conflict between the treaty provision on which the Hungarian defendants relied, Article 27 of the 1947 Treaty, and the FSIA immunity provisions. *Simon I*, 812 F.3d at 140. We further held that the expropriation exception applied to the *Simon* plaintiffs' claims that they had been deprived of property without compensation. *Id.* at 132, 140-49. We concluded that those claims put in issue property "taken in violation of international law" for purposes of the FSIA's expropriation exception, because the alleged takings of property amounted to the commission of genocide. *Id.* at 142 (quoting 28 U.S.C. § 1605(a)(3); *see id.* at 141-46. Additionally, we concluded that the *Simon* plaintiffs' allegations satisfied the commercial-activity nexus of the expropriation exception. *Id.* at 146-49. We remanded the matter for the district court to consider "whether, as a matter of international comity, it should refrain from exercising jurisdiction over th[e] [*Simon* plaintiffs'] claims until the plaintiffs exhaust domestic remedies in Hungary." *Id.* at 151.

On remand from *Simon I*, the *Simon* Survivors filed an amended complaint, and the Hungarian defendants moved to dismiss a second time. The defendants sought dismissal based on, *inter alia*, *forum non conveniens* and international comity grounds. The district court granted the Hungarian defendants' motion to dismiss on both grounds. *Simon v. Republic of Hungary (Simon-2017)*, 277 F. Supp. 3d 42, 47, 62, 67 (D.D.C. 2017).

The *Simon* Survivors appealed a second time. We again reversed, holding that the district court erred in

concluding that the doctrine of *forum non conveniens* barred the *Simon* plaintiffs' suit and in declining statutorily secured jurisdiction on international comity grounds. *Simon II*, 911 F.3d at 1176 (citing *Philipp v. Fed. Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018)).

The parties then litigated a third motion to dismiss that focused on whether the *Simon* plaintiffs' claims satisfied the expropriation exception's commercial-activity nexus requirement. *Simon v. Republic of Hungary (Simon-2020)*, 443 F. Supp. 3d 88, 116 (D.D.C. 2020). The district court denied the motion and another appeal was taken in this case—this time with the Hungarian defendants as the appellants. *Id.*

In the meantime, the Supreme Court granted the Hungarian defendants' petition for certiorari in *Simon II* on the international comity question. The Supreme Court decided this case simultaneously with *Philipp*, a related FSIA case. The *Philipp* Court held that “the expropriation exception is best read as referencing the international law of expropriation rather than of human rights.” 141 S. Ct. at 712. *Philipp* thus clarified that genocidal takings do not necessarily constitute takings “in violation of international law” for purposes of the FSIA's expropriation exception, *id.* at 715 (quoting 28 U.S.C. § 1605(a)(3)), thereby partially abrogating our opinion in *Simon I*. Without resolving the question of international comity on which the Court had granted certiorari in this case, the Supreme Court issued a judgment vacating our *Simon II* decision and remanded the matter for further proceedings consistent with *Philipp. Republic of Hungary v. Simon*, 141 S. Ct.



691 (2021) (per curiam). In light of the Supreme Court's ruling, we remanded the case to the district court for further proceedings consistent with *Philipp*.

With *Simon* back before the district court, the Hungarian defendants moved, for a fourth time, to dismiss the *Simon* Survivors' claims for lack of subject matter jurisdiction under the FSIA. The Hungarian defendants argued, *inter alia*, that the domestic takings rule barred the *Simon* plaintiffs from invoking the expropriation exception. They also argued that, even if any *Simon* plaintiffs had been foreign nationals, the treaty exception would divest the court of jurisdiction. In response to the defendants' domestic takings rule argument, the *Simon* Survivors asserted that they were not Hungarian nationals at the time of the alleged takings. They argued that, during the relevant time period, two of the *Simon* Survivors were *de facto* stateless and twelve were Czechoslovakian nationals. The district court partially granted the motion, with the outcome varying by Survivor. *Simon-2021*, 579 F. Supp. 3d at 140-41. The Hungarian defendants appeal and the *Simon* Survivors cross-appeal.

2.

That brings us to the second action in this consolidated appeal. More than a decade after the *Simon* litigation began, a separate group of survivors brought a similar lawsuit against Hungary. The named plaintiffs, Charles Heller and Steven Heller (together, *Heller* Survivors or *Heller* plaintiffs), are brothers. They were toddlers in 1939, when their parents and grandparents abandoned their businesses, personal

possessions, and homes in Hungary and fled with the brothers to the United States. After the war, the Heller family returned to Hungary to find other people living in their homes, operating their businesses, and using their possessions. The *Heller* Survivors do not claim to have been Czechoslovakian citizens, nor do they claim to have acquired any non-Hungarian nationality before the takings. Rather, they assert that they were *de facto* stateless at the time of the alleged takings. Just as it had in *Simon*, Hungary moved to dismiss the Hellers' claims for lack of jurisdiction under the FSIA. Hungary argued that the domestic takings rule barred application of the FSIA's expropriation exception because, according to Hungary, both *Heller* plaintiffs were Hungarian nationals at the time of the alleged takings. The district court granted Hungary's motion and dismissed the *Heller* Survivors' claims. The brothers appeal.

## II.

We begin with the Survivors' cross-appeal in *Simon* and direct appeal in *Heller* challenging the district court's dismissals of the claims of the Survivors asserting *de facto* statelessness. We refer to those plaintiffs as the Trianon Survivors. They argue that, because Hungary rendered them *de facto* stateless by the time of the alleged takings, the domestic takings rule poses no bar to their claims against Hungary. The district court rejected that argument. It granted the Hungarian defendants' motions to dismiss the Trianon Survivors' claims as incompatible with the Supreme Court's ruling in *Philipp*. See *Simon-2021*, 579 F. Supp. 3d at 115-19, 140; *Heller*, 2022 WL 2802351, at \*7-9.

The district court reasoned that, if the conduct alleged to have rendered the Trianon Survivors stateless also amounted to genocide, *Philipp* forecloses that statelessness from triggering the expropriation exception. *Simon-2021*, 579 F. Supp. 3d at 119; *Heller*, 2022 WL 2802351, at \*8. Thus, stopping short of deciding whether the domestic takings rule is generally inapplicable to stateless aliens, the district court read *Philipp* to bar FSIA expropriation claims by plaintiffs claiming *de facto* statelessness by virtue of experiencing genocide. *Simon-2021*, 579 F. Supp. 3d at 119; *Heller*, 2022 WL 2802351, at \*7 (“Whatever the merits of plaintiffs’ argument that the domestic takings rule does not, as a general matter, reach claims by stateless persons, . . . *Philipp* ‘precludes reliance on the egregiousness or genocidal nature of expropriative conduct as a means to escape the limitation of the domestic takings rule.’” (quoting *Simon-2021*, 579 F. Supp. 3d at 115)). We review the district court’s jurisdictional rulings on questions of law *de novo*, *Ivanenko v. Yanukovich*, 995 F.3d 232, 236 (D.C. Cir. 2021), and factual determinations for clear error, *Price v. Socialist People’s Libyan Arab Jamahiriya*, 389 F.3d 192, 197 (D.C. Cir. 2004).

We affirm the dismissal of the Trianon Survivors’ claims, albeit for reasons different from those of the district court. The Supreme Court’s ruling in *Philipp* does not foreclose the Trianon Survivors’ theory. That said, the Survivors have failed to identify affirmative support in sources of international law for their legal premise that a state’s taking of property from stateless persons amounts to a taking “in violation of international law” within the meaning of the FSIA, 28

U.S.C. § 1605(a)(3)—that is, in violation of “the international law of expropriation,” *Philipp*, 141 S. Ct. at 712, 715. The Trianon Survivors have thus failed to persuade us that their claims are cognizable under the expropriation exception.

A.

We first address the parties’ dispute over the implications of *Philipp*, 141 S. Ct. 703. The Hungarian defendants argue that the Survivors’ takings theory is “the same one that the Supreme Court already rejected” in *Philipp*: “[t]hat expropriations violate international law when they are accompanied by egregious human-rights violations.” Hungary Resp. & Reply Br. 27. In defendants’ view, *Philipp* precludes the Survivors from relying on “the egregiousness of the human rights abuses” inflicted by a foreign sovereign to claim statelessness and thereby escape the limitation of the domestic takings rule. *Id.* at 28; *see also Simon-2021*, 579 F. Supp. 3d at 115-19; *Heller*, 2022 WL 2802351, at \*7-9. Defendants miss the key distinction between the *Simon I* theory the Supreme Court rejected in *Philipp* and the Trianon Survivors’ position on remand that is now before us.

The Trianon Survivors’ theory does not conflict with *Philipp*, but heeds its guidance. *Philipp* holds that “the phrase ‘rights in property taken in violation of international law,’ as used in the FSIA’s expropriation exception, refers to violations of the international law of expropriation.” 141 S. Ct. at 715 (quoting 28 U.S.C. § 1605(a)(3)). Here is the relevant framework as we understand it post-*Philipp*: The international law of expropriation incorporates the domestic takings rule,

which treats a state's taking of its own national's property as a domestic legal matter not governed by international law. *See id.* at 709, 715. That rule is grounded in the traditional view that “international law customarily concerns relations among sovereign states, not relations between states and individuals.” *Id.* at 709-10. Because “[a] domestic taking . . . d[oes] not interfere with relations among states,” it does not “implicate[] the international legal system” under that traditional view. *Id.* at 710; *see also Mezerhane v. República Bolivariana de Venezuela*, 785 F.3d 545, 551 (11th Cir. 2015). In the wake of World War II, even as “international law increasingly came to be seen as constraining how states interacted not just with other states but also with individuals, including their own citizens,” the “domestic takings rule endured” within the sphere of the international law of expropriation. *Philipp*, 141 S. Ct. at 710. Accordingly, in determining whether the expropriation exception applies post-*Philipp*, courts generally must identify a plaintiff's nationality for purposes of the domestic takings rule. Absent any superseding principle or rule encompassed in the international law of expropriation, the threshold question is: Was the victim of the alleged taking a national of the foreign-state defendant at the time of the taking? If yes, the domestic takings rule bars application of the FSIA's expropriation exception; if no, that bar is inapplicable. *See id.* at 715.

The Trianon Survivors have attempted to advance a viable theory within the framework established by *Philipp*—that is, based on an argument about their nationality at the time of the alleged takings. They acknowledge that they were Hungarian nationals

before the war and do not claim that Hungary had formally denationalized its Jewish population *de jure* by the time of the alleged takings. They nonetheless contend the domestic takings rule is inapplicable because Hungary had rendered them *de facto* stateless for purposes of international law before it took their property.

To that end, the Survivors draw on a 1955 decision of the Permanent International Court of Justice that a nation may not, consistent with international law, *confer* nationality upon an individual (at least for purposes of exercising diplomatic protection in an international tribunal) where there is no “genuine connection” between that individual and the state. *Nottebohm Case (Liech. v. Guat.)*, Judgment, 1955 I.C.J. Rep. 4, 23, 26 (Apr. 6). The Survivors claim that the inverse principle must also be true: A state *deprives* an individual of their nationality when it severs the “genuine connection” between itself and the individual. And, according to the Survivors, Hungary severed that requisite connection by subjecting Hungarian Jews to systematic persecution during the Holocaust, thus rendering the Trianon Survivors *de facto* stateless for purposes of international law. *See* Survivors’ Reply Br. 8-12; Survivors’ Br. 18-25. Such *de facto* stateless persons, they claim, are properly treated as “aliens” for purposes of the domestic takings rule. Survivors’ Br. 18. That theory conforms to the analytic framework established by *Philipp*: It draws on international law governing nationality to argue that the Trianon Survivors were not Hungarian nationals at the time of the alleged takings. The Trianon Survivors’ argument

faces other obstacles, as discussed below, but it does not conflict with *Philipp* itself.

The Hungarian defendants' contrary reading of *Philipp*, while not without some logical appeal, breaks down on closer scrutiny. It is true, as the Hungarian defendants note, that the *Philipp* Court rejected the plaintiffs' attempt to rely on international human rights law to satisfy the expropriation exception's "violation of international law" requirement. 141 S. Ct. at 712, 715. It follows, they reason, that expropriations that violate international law "because of the 'egregiousness of the human rights abuses'" involved cannot give rise to a viable takings claim for purposes of the FSIA's expropriation exception. Hungary Resp. & Reply Br. 28 (quoting Survivors' Br. 23). Because the Trianon Survivors rely on Hungary's genocidal acts during the Holocaust (*i.e.*, violations of international human rights law) as the basis for their loss of nationality, the Hungarian defendants contend that *Philipp* forecloses their theory. *See id.* at 27-28; *see also Simon-2021*, 579 F. Supp. 3d at 118.

That reading of *Philipp* suffers from two principal flaws. First, it is irreconcilable with the remand in *Philipp*. The Supreme Court expressly reserved judgment on the plaintiffs' alternative theory that Germany's alleged taking was "not subject to the domestic takings rule because the [plaintiffs] were not German nationals at the time of the transaction," and remanded for the district court to consider that argument in the first instance. *Philipp*, 141 S. Ct. at 715-16. Critically, the *Philipp* plaintiffs' only theory as to why they were not German nationals at the time of

the alleged takings was materially identical to the Trianon Survivors' nationality argument here: They argued that "Jews may be deemed aliens of their respective countries during the Holocaust because they were not treated as citizens." Resp. Br. 15 n.5, *Philipp*, 141 S. Ct. 703 (No. 19-351); *see also id.* at 27-28. As counsel for the *Philipp* plaintiffs stated during oral argument, their theory was that "German governmental treatment of German Jews in the 1930s," *i.e.*, the same treatment that they argued amounted to genocide, "transgress[ed] th[e] nationality line." Oral Arg. Tr. 68:1-4, *Philipp*, 141 S. Ct. 703 (2021) (No. 19-351). When the Supreme Court chose to remand the *Philipp* plaintiffs' claims, it knew that the relevant conduct that could divest the plaintiffs of their nationality was part and parcel of the genocidal acts that they had claimed violated international human rights law. If the Court's reasoning in *Philipp* foreclosed that argument, there would have been no reason to remand.

Second, the Hungarian defendants' reasoning errs in treating the limits *Philipp* imposed on the legal basis of an expropriation actionable under the FSIA as also circumscribing the historical facts germane to a claim under the expropriation exception. *Philipp* clarified that "the expropriation exception is best read as referencing the international law of expropriation rather than of human rights." 141 S. Ct. at 712. Accordingly, "[w]e do not look to the law of genocide to determine if we have jurisdiction over [a plaintiff's] property claims. We look to the law of property." *Id.* That ruling barred the plaintiffs from relying on the law of genocide to avoid the domestic takings rule,



which the Court viewed as an integral principle of the international law of expropriation. *See id.* at 709-13, 715. What *Philipp* did not do, however, is limit the underlying facts a court may consider in identifying whether the expropriation exception applies or the domestic takings rule is a bar. *Philipp* did not opine on, let alone foreclose, the possibility that conduct that could give rise to a claim of genocide might also bear on the nationality inquiry for purposes of the expropriation exception or the domestic takings rule. Rather, *Philipp* left open for lower courts to resolve what conduct is relevant to the nationality inquiry. *See id.* at 716. We thus reject the view that *Philipp* preempts the Trianon Survivors' takings theory.

B.

The Trianon Survivors' invocation of the expropriation exception nevertheless fails for an independent reason: Even assuming the Trianon Survivors were *de facto* stateless at the time of the alleged takings, the Survivors have not mustered adequate support for their contention that a state's taking of a *de facto* stateless person's property violates the international law of expropriation.

Our inquiry regarding the rights of *de facto* stateless persons is governed by the customary international law of expropriation. That body of law determines whether an alleged taking violates "international law" within the meaning of the FSIA's expropriation exception where, as here, the plaintiffs do not rely on an express international agreement. *See, e.g., Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela (Helmerich II)*, 743 F. App'x 442,

449 (2018) (citing Restatement (Third) of Foreign Relations Law § 102(1) (Am. L. Inst. 1987) (Third Restatement)); *Beierwaltes v. L'Office Federale de la Culture de la Confederation Suisse*, 999 F.3d 808, 821 (2d Cir. 2021). Customary international law is the “general and consistent practice of states followed by them from a sense of legal obligation.” Third Restatement § 102(2). To demonstrate a taking in violation of international law for purposes of the FSIA’s expropriation exception, the Survivors must show that their legal theory “has in fact crystallized into an international norm that bears the heft of customary law.” *Helmerich II*, 743 F. App’x at 449.

To support their theory that a state’s taking of a *de facto* stateless person’s property violates the international law of expropriation, the Survivors principally rely on the Second Restatement of Foreign Relations Law. As the Restatement in effect when Congress enacted the FSIA, that source bears authoritative weight in interpreting the Act. *See Philipp*, 141 S. Ct. at 712 (recognizing “the [Court’s] consistent practice of interpreting the FSIA in keeping with ‘international law at the time of the FSIA’s enactment’ and looking to the contemporary Restatement for guidance” (quoting *Permanent Mission of India to United Nations v. City of New York*, 551 U.S. 193, 199- 200 (2007))). The Survivors point to Section 185 of the Second Restatement, which identifies a “taking by a state of property of an alien” as “wrongful under international law” when certain conditions are met. Restatement (Second) of Foreign Relations Law § 185 (Am. L. Inst. 1965) (Second Restatement). And they emphasize that Section 171 establishes that the

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term “alien” encompasses both foreign nationals and stateless persons “for purposes of the responsibility of a state for injury” to an individual. *Id.* § 171.

Notably, however, Section 175 of the Second Restatement makes clear that stateless persons are “without remedy” under international law for takings claims against an expropriating state, with certain exceptions. *See id.* § 175 & cmt. d. Section 175 provides:

The responsibility of [a] state under international law for an injury to an alien cannot be invoked directly by the alien against the state except as provided by

- (a) the law of the state,
- (b) international agreement, or
- (c) agreement between the state and the alien.

*Id.* § 175. And the lack of any remedy under customary international law for a stateless alien is spelled out in Comment (d) to that section:

*d. Stateless aliens.* Under traditional principles of international law, a state, being responsible only to other states, could not be responsible to anyone for an injury to a stateless alien. Under the rule stated in this Section, a stateless alien may himself assert the responsibility of a state in those situations where an alien who is a national of another state may do so. However, in those situations not covered by the rule stated in this Section or by an international agreement

providing some other remedy, a stateless alien is without remedy, since there is no state with standing to espouse his claim.

*Id.* § 175 cmt. d; *see also id.* § 174 cmt. b (“[P]rocedures allowing persons to proceed against states . . . are unavailable except under the limited conditions specified in § 175, and, espousal by the state of nationality continues to be generally necessary for the effective assertion of an international claim.”). In their briefing, the Survivors identify no Hungarian law, international agreement, or agreement between Hungary and the Trianon Survivors relevant to section 175 of the Second Restatement. Tellingly, after the Hungarian defendants pointed out the limits set forth in section 175 on when a stateless person has a remedy, *see* Hungary Resp. & Reply Br. 26-27, the Survivors abandoned reliance on that section in their reply and failed to explain why the defendants’ point was not fatal to their theory, *see* Survivors’ Reply Br. 2-12.

The secondary sources that the Survivors cite likewise fail to address that issue. To the extent those sources are helpful, they merely accord with the view that stateless persons are generally treated as aliens or non-nationals under state domestic laws. *See* Marc Vishniak, *The Legal Status of Stateless Persons, in 6 Jews and the Post-War World* 37 (Abraham G. Duker ed., 1945); Eric Fripp, *Nationality and Statelessness in the International Law of Refugee Status* § 5.105 (2016).

The Survivors have thus failed to persuade us that a state’s taking of a *de facto* stateless person’s property violates the customary international law of

expropriation. To be clear, we do not foreclose the possibility that such support exists in sources of international law not before us in this case or based on arguments not advanced here. We note that the Survivors nowhere argue in their briefing that a state's taking of a stateless person's property may *violate* the international law of expropriation even if stateless persons are "without remedy" under international law for such violation, Second Restatement § 175 cmt. d. At oral argument, the Survivors for the first time implied as much when, in response to probing from the bench on the point, they contended that the FSIA's expropriation exception itself provides the necessary remedy for expropriations from stateless persons in violation of international law. *See* Oral Arg. 37:30-38:50, 41:58-42:25, 42:40-43:40. Generally, however, "arguments raised for the first time at oral argument are forfeited." *Physicians for Soc. Resp. v. Wheeler*, 956 F.3d 634, 647 (D.C. Cir. 2020) (quoting *United States ex rel. Davis v. District of Columbia*, 793 F.3d 120, 127 (D.C. Cir. 2015)). We accordingly decline to reach that late-raised argument and take no position here on its potential merit.

Our holding is more limited: On this record, the Survivors have not demonstrated that their legal theory—that a state's taking of a *de facto* stateless person's property violates the international law of expropriation—has jelled into a binding rule of customary international law. Because the Survivors have therefore failed to show that the alleged seizure of the Trianon Survivors' property amounts to a "violation of international law" for purposes of the FSIA's

expropriation exception, 28 U.S.C. § 1605(a)(3), we affirm the district court's dismissal of their claims.

III.

Next, we address the parties' challenges to the district court's partial denial of the defendants' motion to dismiss the claims of the Survivors who assert that they were Czechoslovakian nationals at the time of the alleged takings. We refer to those plaintiffs as the Czechoslovakian Territory Survivors, as they each allege that they were either born or raised in Czechoslovakian territory. The district court denied the defendants' motion to dismiss the claims of nine of the Czechoslovakian Territory Survivors—namely, Magda Kopolovich Bar-Or, Yitzhak Pressburger, Alexander Speiser, Moshe Perel, and the five Lebovics sisters. *See Simon-2021*, 579 F. Supp. 3d at 131-35, 140-41. The court concluded that they had plausibly alleged Czechoslovakian nationality, thereby bringing their claims outside the scope of the domestic takings rule. *See id.* at 131-35. However, the court dismissed the claims of one of the Czechoslovakian Territory Survivors (Ze'ev Tibi Ram) without prejudice, and the claims of two (Tzvi Zelikovitch and Ella Feuerstein Schlanger) with prejudice. *See id.* at 140. Because those plaintiffs had failed to adequately allege non-Hungarian nationality at the time of the alleged takings, the court reasoned, the domestic takings rule barred application of the FSIA's expropriation exception to their claims. *See id.* at 120-21, 135-36, 140.

The Hungarian defendants appeal the district court's denial of their motion as to the nine non-dismissed plaintiffs' claims. They argue that judicial

estoppel precludes the Survivors from denying their Hungarian nationality at this stage in the litigation. The defendants further claim that the district court applied the wrong pleading standard in adjudicating their motion to dismiss the Czechoslovakian Territory Survivors' claims. And, in the alternative, they claim the Survivors' pleadings fall short even under the standard the district court applied.

The Survivors cross-appeal the district court's dismissal with prejudice of Zelikovitch and Schlanger's claims. They assert that the district court erroneously concluded that Zelikovitch and Schlanger had not plausibly alleged Czechoslovakian nationality at the time of the alleged takings. Neither party appeals the dismissal without prejudice of Ze'ev Tibi Ram's claim.

We largely affirm. We reject the Hungarian defendants' threshold arguments regarding judicial estoppel and the pleading standard for FSIA claims. Applying the same plausible-pleading standard that the district court applied, we affirm the court's disposition of the Czechoslovakian Territory Survivors' claims, except that we direct the district court to convert its allowance of the claims of the Lebovics sisters to proceed and its dismissal of the claims of Zelikovitch and Schlanger to dismissals without prejudice so those plaintiffs may seek to cure the defects in their nationality allegations.

A.

We first address the Hungarian defendants' argument that judicial estoppel bars the Czechoslovakian Territory Survivors from claiming

Czechoslovakian nationality. The Hungarian defendants contend that in *Simon I* the Survivors asserted they were Hungarian nationals to avoid application of the FSIA's treaty exception, and thus cannot now deny Hungarian nationality in relation to the expropriation exception. The district court determined that the "defendants' judicial estoppel argument fails because defendants [did] not clearly show that the *Simon I* court relied on plaintiffs' representations of nationality in an outcome-determinative fashion." *Simon-2021*, 579 F. Supp. 3d at 127. We review the district court's decision to not invoke judicial estoppel for abuse of discretion. See *Montgomery v. IRS*, 40 F.4th 702, 709 (D.C. Cir. 2022); *Temple Univ. Hosp., Inc. v. NLRB*, 929 F.3d 729, 734 (D.C. Cir. 2019).

Judicial estoppel prevents a party from obtaining an unfair advantage by "prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000)). Courts invoke judicial estoppel at their discretion to protect the integrity of the judicial process. *Id.* at 749-50. In evaluating whether to apply the doctrine of judicial estoppel, courts consider: "(1) whether the party's later position is 'clearly inconsistent' with its earlier position; (2) 'whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled'; and (3) 'whether the party seeking to assert an



inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *Temple Univ. Hosp.*, 929 F.3d at 733 (quoting *New Hampshire*, 532 U.S. at 750-51). The three factors are not a formulaic test. See *New Hampshire*, 532 U.S. at 751. Rather, they serve as guideposts to determining whether the “balance of equities” weighs in favor of invoking the doctrine in a given case. *Id.*

Applying those principles, we conclude the district court exercised its sound discretion in holding that the balance of equities tilts against applying judicial estoppel here. To start, the first factor—whether a party’s later position is “clearly inconsistent” with the earlier position on which it prevailed, *id.*—does not favor the Hungarian defendants. In *Simon I*, the parties did not litigate the question of those plaintiffs’ nationality in relation to the treaty exception—the relevant legal issue on which the plaintiffs prevailed. See 812 F.3d at 135-40. And, while one sentence of the plaintiffs’ reply brief in *Simon I* implied that they were Hungarian nationals, other portions of the plaintiffs’ *Simon I* briefing ran expressly counter to that view. For instance, in arguing that the domestic takings rule did not bar their suit, the plaintiffs emphasized that they were “Hungarian nationals or citizens *in name only, not substance*, as they were systematically deprived of the most fundamental rights to which a state’s nationals and citizens are entitled, including the right to exist.” Pls.’ Reply Br. 11, *Simon I*, 812 F.3d 127 (D.C. Cir. 2016) (No. 14-7082), 2014 WL 6603413, at \*11 (emphasis added). In other words, the plaintiffs affirmatively argued in their *Simon I* briefing that they

were substantively stripped of Hungarian nationality. That assertion accords, rather than conflicts, with the Survivors' current denial of their Hungarian nationality. Read in full, the plaintiffs' briefing in *Simon I* thus falls short of advancing a "clearly inconsistent" position. *New Hampshire*, 532 U.S. at 751; *see also id.* (explaining judicial estoppel targets "intentional self-contradiction" (quoting *Scarano v. Cent. R. Co. of N.J.*, 203 F.2d 510, 513 (3d Cir. 1953))).

The district court likewise permissibly weighed the second factor—whether the party "succeeded in persuading a court to accept that party's earlier position," *id.* at 750—against judicial estoppel here, *see Simon-2021*, 579 F. Supp. 3d at 127. As noted, the *Simon* plaintiffs made only an implicit reference to their nationality in relation to the treaty exception in their previous briefing. *See* Pls.' Br. at 11-26, *Simon I*, 812 F.3d 127 (D.C. Cir. 2016) (No. 14-7082), 2014 WL 5035235, at \*11-26; Pls.' Reply Br. 3, *Simon I*, 812 F.3d 127 (D.C. Cir. 2016) (No. 14-7082), 2014 WL 6603413, at \*3; *cf.* Oral Arg. Tr. 4:20-5:2, *Simon I*, 812 F.3d 127 (D.C. Cir. 2016)). And we had no occasion in *Simon I* to determine the plaintiffs' nationality, given our holding that the treaty provision the defendants invoked as the exclusive remedy for Hungarian nationals was not in any event exclusive. 812 F.3d at 140. On an issue neither contested nor decided in *Simon I*, our assumption then that the plaintiffs were Hungarian nationals and our references to them as such in analyzing the treaty exception are not particularly weighty. *See id.* at 136-40. The *Simon* plaintiffs thus did not in any meaningful sense "succeed[] in

persuading” us in *Simon I* that they were Hungarian nationals. *New Hampshire*, 532 U.S. at 750.

Finally, the third factor—the degree to which the party seeking to assert an inconsistent position will derive an unfair advantage if not estopped, *id.* at 751—fails to tip the scales in favor of estoppel for similar reasons. Given that in *Simon I* the plaintiffs did not affirmatively persuade us of their Hungarian nationality and, moreover, expressly denied legally effective Hungarian nationality in portions of their briefing, any unfairness caused by declining to invoke estoppel is, at most, slight. Additionally, while a party’s inconsistent position need not be a “but-for cause of the first tribunal’s decision” to warrant estoppel, *Temple Univ. Hosp.*, 929 F.3d at 735, a court may consider the degree to which the party’s representation influenced the prior ruling in determining what unfairness, if any, would result from declining to invoke estoppel. As discussed further in Part V, *infra*, our treaty-exception ruling in *Simon I* did not turn on the plaintiffs’ nationality. The district court permissibly weighed that consideration against the Hungarian defendants’ request. *See Simon-2021*, 579 F. Supp. 3d at 127.

We also conclude that the Czechoslovakian Territory Survivors adequately preserved their claim of Czechoslovakian nationality. *But see* Op. Dissenting in Part, at 5. This case is unlike *Philipp v. Stiftung Preussischer Kulturbesitz*, No. 22-7126, – F.4th –, 2023 WL 4536152 (D.C. Cir. July 14, 2023) (per curiam), in which we held the plaintiffs failed to preserve a claim of non-German nationality. *Id.* at \*2. The operative complaint in *Philipp* alleged that two of the individual

members of the plaintiff consortium fled Germany for the Netherlands, *see* Second Am. Compl. ¶ 170, *Philipp v. Stiftung Preussischer Kulturbesitz*, No. 1:15-cv-00266-CKK, (D.D.C. Sept. 10, 2021), ECF No. 62, but plaintiffs never intimated until their case reached the Supreme Court that they had thereby become nationals of the Netherlands or of any other state. We accordingly affirmed the district court’s holding that any such claim had not been preserved.

Here, in contrast, plaintiffs Bar-Or, Pressburger, Speiser, and Perel each plausibly alleged the minimum requirements for Czechoslovakian nationality in the first amended complaint in 2011, *see Simon* First Am. Compl. ¶¶ 21, 38, 40, 80 (J.A. 104, 108, 109, 118)—allegations they retained in the second amended (currently operative) complaint, and that the district court and we deem adequate to bring their claim within the FSIA expropriation exception. *See infra* pp. 38-39; *Simon-2021*, 579 F. Supp. 3d at 140. Consistent with those allegations, the Czechoslovakian Territory Survivors insisted in their earliest responsive filing in the district court that “not all of the plaintiffs were considered Hungarian citizens when they were deported by Defendants,” as many of the deported Jews were “citizens of Rumania, Poland and numerous other neighboring areas.” Pls.’ Opp’n 3, 17, *Simon v. Republic of Hungary*, No. 1:10-cv-01770-BAH (D.D.C. May 6, 2011), ECF No. 24. And, in their brief to us in *Simon I*, they described themselves as “Jewish Holocaust survivors who, on the threshold of World War II, lived within today’s Hungarian borders *or in territory annexed by Hungary in 1938 after Czechoslovakia’s dismemberment.*” Pls.’ Br. 2, *Simon I*, 812 F.3d 127

(D.C. Cir. 2016) (No. 14-7082), 2014 WL 5035235, at \*2 (emphasis added). To be sure, the point could have been more distinctly preserved throughout. But, like the district court, *see Simon-2021*, 579 F. Supp. 3d at 123-24, 127-29, we hold it adequately preserved.

With this full picture of the equities in view, we conclude the district court acted within its sound discretion to deny the Hungarian defendants' request to judicially estop the Czechoslovakian Territory Survivors from asserting Czechoslovakian nationality at this stage in the litigation.

B.

We turn next to the Hungarian defendants' assertion that the district court applied the wrong standard to their motion to dismiss the Czechoslovakian Territory Survivors' claims under the expropriation exception. According to the Hungarian defendants, the Supreme Court's decision in *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co. (Helmerich)*, 581 U.S. 170 (2017), "raised the bar to establish jurisdiction under the FSIA," because, they argue, it displaced for FSIA claims the ordinary plausible-pleading standard otherwise applicable on a motion to dismiss. Hungary Br. 20; *see also id.* at 20-21. The Survivors reject that argument as misconstruing *Helmerich*. They argue that, in view of sovereign nations' general immunity from suit, *Helmerich* held inapplicable under the FSIA only the low jurisdictional threshold of *Bell v. Hood*, 327 U.S. 678 (1946). In other words, *Helmerich* did not make an exception to the ordinary pleading requirements of Rule 8(a) as interpreted in *Bell Atlantic Corp. v.*

*Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). To establish federal question jurisdiction under 28 U.S.C. § 1331, *Bell v. Hood* merely requires a legally nonfrivolous claim, whereas *Helmerich* held that plaintiffs must state a legally valid claim as a basis for jurisdiction under the FSIA. We hold that the district court correctly applied the ordinary plausible-pleading standard we have consistently applied in FSIA cases, including *Simon I*, which the Supreme Court’s decision in *Helmerich* left undisturbed.

As a threshold matter, the Survivors claim the Hungarian defendants forfeited their *Helmerich* argument. Assuming that objections to subject matter jurisdiction under the FSIA are forfeitable, we exercise our discretion to reach the Hungarian defendants’ *Helmerich* argument. We typically review forfeited arguments “only in exceptional circumstances, as, for example, in cases involving uncertainty in the law [or] novel, important, and recurring questions of federal law.” *Flynn v. Comm’r*, 269 F.3d 1064, 1069 (D.C. Cir. 2001). This case presents such circumstances. *Helmerich* arguably has introduced “uncertainty in the law” governing motions to dismiss on foreign sovereign immunity grounds, and the Hungarian defendants’ novel heightened pleading theory is both important and likely to recur in future FSIA cases. *Id.* The question is squarely presented and amply briefed in this case, and we would be remiss if we did not resolve it.

We conclude *Helmerich* did not disturb the plausible-pleading standard that we employed in *Simon I*. Rather, *Helmerich* rejected the “nonfrivolous-

argument standard” that we had applied to the legal theory on which a plaintiff might depend to establish jurisdiction under the FSIA in *Helmerich I. Helmerich*, 581 U.S. at 187; *see id.* at 173-74, 177-83; *Helmerich & Payne Int’l Drilling Co. v. Bolivarian Republic of Venezuela (Helmerich I)*, 784 F.3d 804, 811-12 (D.C. Cir. 2015).

In our vacated *Helmerich* decision, we held that we would grant a motion “on the grounds that the plaintiff has failed to plead a ‘taking in violation of international law’ or has no ‘rights in property . . . in issue’ *only* if the claims are ‘wholly insubstantial or frivolous.’” 784 F.3d at 812 (quoting *Agudas Chasidei Chabad of U.S. v. Russian Fed’n*, 528 F.3d 934, 943 (D.C. Cir. 2008)); *see also id.* at 811 (quoting *Bell*, 327 U.S. at 682). The legal issue before us was whether a Venezuela-incorporated, wholly owned subsidiary of a U.S. company could invoke the FSIA’s expropriation exception to sue the Venezuelan government. *See id.* at 812. Venezuela argued that the suit was barred because the subsidiary should be treated as a Venezuelan national, bringing the alleged taking within the domestic takings rule’s scope. *Id.* The plaintiffs countered that international law recognizes an exception to that rule when a sovereign unreasonably discriminates based on a company *shareholder’s* nationality in expropriating that company’s property. *Id.* at 812-13. The parties also disputed whether the U.S. parent company had property rights in the subsidiary that were cognizable under international law. *Id.* at 814. We acknowledged that the plaintiffs had advanced novel legal theories to support their invocation of the FSIA’s expropriation

exception, but in denying defendants' motion to dismiss for lack of jurisdiction we did not decide whether those theories were valid. *See id.* at 812-16. Instead, we denied the motion because we thought it sufficed that the plaintiffs had "asserted a non-frivolous international expropriation claim" and had "put [their] rights in property in issue in a non-frivolous way." *Id.* at 812 (quoting *Chabad*, 528 F.3d at 941); *see id.* at 813, 816.

The Supreme Court vacated that ruling. It held that "a party's nonfrivolous, but ultimately incorrect, argument that property was taken in violation of international law is insufficient to confer jurisdiction" under the FSIA. *Helmerich*, 581 U.S. at 174. Rather, the complaint must make "a legally valid claim that a certain kind of right is at issue (property rights) and that the relevant property was taken in a certain way (in violation of international law)." *Id.* (emphasis omitted). The Supreme Court took issue with our decision to confirm the district court's jurisdiction because "the plaintiffs *might* have such a claim," requiring instead that courts decide at the jurisdictional threshold whether plaintiffs actually have a claim that is legally cognizable under the FSIA. *Id.* at 177. The Court found no support in the text, history, and purpose of the FSIA for permitting courts to exercise jurisdiction over a foreign sovereign "where there is a nonfrivolous but ultimately *incorrect* argument that the taking violates international law." *Id.* at 182; *see id.* at 176-83, 187.

In holding the nonfrivolous-argument standard inapplicable to the FSIA, *Helmerich* did not alter the



plausible-pleading standard. The Hungarian defendants conflate the distinct issues of the validity of a legal theory and the standard for assessing factual allegations in a complaint. As the Supreme Court has made clear in other contexts, the plausible-pleading standard clarified in *Twombly* and *Iqbal* “concern[s] the *factual* allegations a complaint must contain to survive a motion to dismiss,” *Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014) (per curiam), not the degree to which plaintiffs’ *legal* theories must be correct on their merits. *Helmerich* thus did not create a heightened pleading standard. Contrary to the Hungarian defendants’ argument, nothing in *Helmerich* affects the familiar standard we have consistently applied to review the plaintiffs’ factual allegations in FSIA cases like *Simon I*.

Indeed, prior to *Helmerich*, it was our longstanding practice to apply the plausible-pleading standard to resolve motions to dismiss on FSIA grounds where a defendant challenges only the legal sufficiency of a plaintiff’s allegations. *See, e.g., Price*, 389 F.3d at 194, 197; *Rong v. Liaoning Province Gov’t*, 452 F.3d 883, 885 n.2, 888 (D.C. Cir. 2006); *Simon I*, 812 F.3d at 147. And our rulings following *Helmerich* have, correctly, continued to apply the plausible-pleading standard in that context. *See, e.g., Ivanenko*, 995 F.3d at 236; *Valambhia v. United Republic of Tanzania*, 964 F.3d 1135, 1139 (D.C. Cir. 2020); *Schubarth v. Fed. Republic of Germany*, 891 F.3d 392, 398-99 (D.C. Cir. 2018); *EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro, S.A.*, 894 F.3d 339, 345 (D.C. Cir. 2018).

Finding no support in our precedent, the Hungarian defendants turn to *Rukoro v. Federal Republic of Germany*, 976 F.3d 218 (2d Cir. 2020). But *Rukoro* does not bind us, and to the extent it is inconsistent with our approach, we believe it is incorrect. *Rukoro* reads *Helmerich*'s requirement of "a legally valid claim" to have, *sub silentio*, adopted for purposes of FSIA claims a heightened standard of pleading, beyond the Rule 8(a) "plausibility standard" as clarified in *Twombly* and *Iqbal*. *Id.* at 224-25. In so doing, *Rukoro* erroneously implies that *Helmerich*'s requirement of a legally valid (not just nonfrivolous) legal theory equates to a more demanding standard of pleading. *See id.* at 225 ("Such allegations may satisfy a plausibility standard, but not a valid argument standard."). The Second Circuit in *Rukoro* acknowledged that it thereby departed from our approach in *Simon I*—a departure it viewed as required by the Supreme Court's ensuing decision in *Helmerich*. *Id.* (citing *Simon I*, 812 F.3d at 147). Because we conclude *Helmerich* left the generally applicable plausible-pleading standard undisturbed, we affirm the district court's adherence to it.

In short, we hold that the plausible-pleading standard that we applied in *Simon I* remains good law post-*Helmerich*. The Hungarian defendants challenge the adequacy of the Czechoslovakian Territory Survivors' factual allegations—and specifically, whether the pleadings plausibly allege facts that support their alleged Czechoslovakian nationality, and hence that their property was taken "in violation of international law." 28 U.S.C. § 1605(a)(3). The district court was correct to apply the plausible-pleading standard articulated in *Simon I*. We must adhere to

that same standard in our *de novo* review of the Survivors' nationality allegations, to which we now turn.

C.

Although the Survivors who claim statelessness cannot prevail, we conclude that a subset of the Survivors who assert Czechoslovakian nationality are entitled to proceed in the litigation.

Recall that the district court denied the defendants' motion to dismiss the claims of nine of the Czechoslovakian Territory Survivors: Magda Kopolovich Bar-Or, Yitzhak Pressburger, Alexander Speiser, Moshe Perel, and the five Lebovics sisters. *See Simon-2021*, 579 F. Supp. 3d at 131-35, 140-41. The court dismissed the claims of one of the Czechoslovakian Territory Survivors (Ze'ev Tibi Ram) without prejudice to his right to replead and dismissed the claims of the other two (Tzvi Zelikovitch and Ella Feuerstein Schlanger) with prejudice. *See id.* at 140.

The Hungarian defendants challenge the district court's decision not to dismiss nine of the Czechoslovakian Territory Survivors' claims. They argue that, even assuming the plausible-pleading standard applies, those Survivors failed to adequately allege that they were Czechoslovakian nationals at the time of the takings. Absent such allegations, they contend, the Survivors have not pleaded that their property was "taken in violation of international law" for purposes of the FSIA's expropriation exception. 28 U.S.C. § 1605(a)(3).

On cross-appeal, the Survivors challenge the district court's dismissal of Schlanger and Zelikovitch's claims for failing to plausibly allege Czechoslovakian nationality. They argue that the district court overlooked relevant allegations and filings in the record that demonstrate both were Czechoslovakian nationals at the time of the takings.

We review *de novo* the district court's jurisdictional rulings on the adequacy of the Czechoslovakian Territory Survivors' allegations under the plausible-pleading standard. *See Schubarth*, 891 F.3d at 398. We conclude that four of the Czechoslovakian Territory Survivors—Bar-Or, Pressburger, Speiser, and Perel—are entitled to proceed in the litigation. However, we direct the district court to dismiss the claims of the five Lebovics sisters, Zelikovitch, and Schlanger without prejudice.

1.

We begin by deciding which body of law governs the question: international or domestic law. “[W]hile it is for each state to determine under its own law who are its nationals, such law must be recognised by other states only ‘in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.’” 1 Oppenheim’s International Law § 378 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1996) (quoting Hague Convention of 1930 on Certain Questions Relating to the Conflict of Nationality Laws art. I, Apr. 12, 1930, 179 L.N.T.S. 89); *see also* Oliver Dörr, *Nationality*, Max Planck Encyclopedias of International Law ¶ 4 (recognizing that “international

law limits [the] discretion” of a state to “determine under its own law who are its nationals” for purposes of “acceptance on the international plane”); *Nottebohm Case*, 1955 I.C.J. Rep. at 23 (“[A] State cannot claim that the rules it has . . . laid down are entitled to recognition by another State unless it has acted in conformity with [international principles governing nationality].”).

As relevant here, treaties executed at the close of World War I established international obligations regarding the nationality of persons living in territory transferred from the Austro-Hungarian Empire to the newly created Czechoslovakian state. The 1919 Treaty of St. Germain, executed between the Allied and Associated Powers and Czechoslovakia, imposed international obligations on Czechoslovakia to confer nationality on certain persons within Czechoslovakia’s new borders. *See* St. Germain Treaty arts. 3-6. The 1920 Treaty of Trianon, which ended World War I hostilities between Hungary and the Allied and Associated Powers, also established rules to govern the nationalities of individuals living in the newly formed Czechoslovakian state. *See* Treaty of Trianon arts. 61-66, 213.

Accordingly, in this circumstance, we look first to international law to determine the Survivors’ nationality status. Czechoslovakian and Hungarian state law governing nationality remains relevant, but only “in so far as it is consistent with” the international legal obligations set forth in the Treaty of St. Germain and the Treaty of Trianon. 1 Oppenheim’s

International Law § 378 (quoting Hague Convention of 1930 art. I).

2.

Within that framework, we examine whether the Survivors have plausibly alleged Czechoslovakian nationality, thereby bringing their claims outside the scope of the domestic takings rule. Because the Hungarian defendants' position "amounts to a challenge to the legal sufficiency of the allegations . . . we must thus 'decide *de novo* whether the alleged jurisdictional facts are sufficient to divest the foreign sovereign of its immunity." *Mwani v. bin Laden*, 417 F.3d 1, 15-16 (D.C. Cir. 2005) (formatting modified) (quoting *Price*, 389 F.3d at 197). Dismissal is warranted only if no plausible inferences can be drawn from the facts alleged that, if proven, would bring plaintiffs' claims within an exception to sovereign immunity under the FSIA. *Schubarth*, 891 F.3d at 398. We must accept as true the allegations in the complaint and grant the survivors the benefit of all reasonable inferences that can be derived from the facts alleged. *See id.* at 400-01.

The district court observed that Bar-Or, Pressburger, Speiser, and Perel, each alleged that in the 1920s or 1930s they were born in Czechoslovakian territory to parents "not known to be of Hungarian nationality." *Simon-2021*, 579 F. Supp. 3d at 121 (citing Pls.' Opp'n 4). From that fact, the district court inferred that those Survivors' parents also lived for a sufficient period of time in territory that later became Czechoslovakia, so meet the requirements for citizenship under Czechoslovakian domestic law. *See*

*Simon-2021*, 579 F. Supp. 3d at 131, 133-35. The court therefore concluded that Bar-Or, Pressburger, Speiser, and Perel had each plausibly alleged Czechoslovakian nationality.

We agree with the district court's conclusion as to those four Survivors, though for different reasons. Bar-Or, Pressburger, Speiser, and Perel each allege the minimum requirements for Czechoslovakian citizenship under the 1919 St. Germain Treaty. Article 6 of that Treaty provides that "[a]ll persons born in Czecho-Slovak territory who are not born nationals of another State shall *ipso facto* become Czecho-Slovak nationals." St. Germain Treaty art. 6. That provision requires that the Survivors have been born in Czechoslovakia after its formation, which is precisely what those four plaintiffs allege. Bar-Or "was born in 1928 in Korosmezo (Jasina), in Hungarian-annexed Ruthenia (formerly Austria-Hungary, then Czechoslovakia and now Ukraine)." *Simon* SAC ¶ 22 (J.A. 242). Pressburger "was born in Prague in 1933." *Id.* ¶ 39 (J.A. 246). Speiser "was born on October 12, 1928, in Ersekujvar, Czechoslovakia." *Id.* ¶ 41 (J.A. 247). And Perel "was born in Ersekujvar [Czechoslovakia] . . . on February 7, 1927." *Id.* ¶ 81 (J.A. 256). Those Czechoslovakian Territory Survivors have thereby adequately alleged Czechoslovakian nationality. We accordingly affirm the district court's denial of the defendants' motion to dismiss their claims.

As for the Lebovics sisters, we reverse. The district court erroneously concluded that the sisters' plausible allegation that they were "raised in Tarackoz in

Hungarian-annexed Ruthenia,” *Id.* ¶ 10 (J.A. 239), supports an inference that they were Czechoslovakian nationals at the time of the alleged takings, *see Simon-2021*, 579 F. Supp. 3d at 131-32. Not so. Being “raised” in Czechoslovakian territory is insufficient, even under the St. Germain Treaty, to plausibly allege Czechoslovakian nationality because we cannot reasonably infer from that allegation that the sisters were born there; being “raised” in a place is distinct from being “born” there, as the district court itself noted. *See id.* at 132. Although the pleadings do not specify the Lebovics sisters’ place and date of birth, the Survivors’ counsel stated at oral argument that they were all “born in Czechoslovakia” after its formation. Oral Arg. 47:36-39; *see id.* at 47:06-36. Therefore, because it appears the five Lebovics sisters may be able to cure the jurisdictional defects in their complaint, we direct the district court to dismiss their claims without prejudice.

Finally, we reject the defendants’ argument that the Czechoslovakian Territory Survivors were required to obtain a permit to acquire Czechoslovakian nationality pursuant to Article 62 of the Trianon Treaty. The Survivors assert that the defendants forfeited this argument because they did not raise it before the district court. We nevertheless exercise our discretion to address this issue on appeal. The defendants’ reading of the Trianon Treaty does not withstand close scrutiny. First, the permit requirement in Article 62 covers a limited category of individuals that does not include the Czechoslovakian Territory Survivors. To understand Article 62’s scope, we begin with the provision it modifies: Article 61.



App. 47

Article 61 of the 1920 Trianon Treaty assigned new nationalities to citizens of the former Austro-Hungarian Empire. It provides:

Every person possessing rights of citizenship . . . in territory which formed part of the territories of the former Austro-Hungarian Monarchy shall obtain *ipso facto* to the exclusion of Hungarian nationality the nationality of the State exercising sovereignty over such territory.

Treaty of Trianon art. 61. Article 61 thus grants Czechoslovakian nationality to citizens of any territory of the Austro-Hungarian Monarchy that was transferred to the newly formed Czechoslovakian state. *See id.*

Article 62 then limits the scope of Article 61's reassignment of nationalities. It states:

Notwithstanding the provisions of Article 61, persons who acquired rights of citizenship after January 1, 1910, in territory transferred under the present Treaty to [Czechoslovakia], will not acquire [Czechoslovakian] nationality without a permit from the [Czechoslovakian] State . . . .

*Id.* art. 62. Read in context with Article 61, the phrase “persons who acquired rights of citizenship after January 1, 1910, in territory transferred under the present Treaty to [Czechoslovakia],” refers to persons who acquired citizenship in the *Austro-Hungarian* Empire after 1910 in the territories that were

“transferred” to Czechoslovakia in 1918; it does not refer more broadly to all persons who acquired *Czechoslovakian* citizenship after January 1, 1910. *Id.* Indeed, Czechoslovakia did not exist as an independent state until 1918 so it would have been impossible for an individual to acquire Czechoslovakian citizenship between 1910 and 1918.

Accordingly, we read Article 62’s permit requirement to cover those who acquired citizenship in the Austro-Hungarian Empire in the window after January 1910 and before the formation of Czechoslovakia in 1918—in other words, late-arriving Austro-Hungarian citizens without deep roots in the territory that became Czechoslovakia. *See* Treaty of Trianon art. 62. Because Bar-Or, Pressburger, Speiser, and Perel each allege that they were born after 1920, *see* *Simon* SAC ¶¶ 22, 39, 42, 81 (J.A. 242, 246-47, 256)—and because the Lebovics sisters may amend to allege as much, *see* Oral Arg. 47:06-38—they do not fall into the category of persons covered by the permit requirement in Article 62 of the Trianon Treaty.

Second, and in any event, even if the defendants’ reading of Article 62 were correct, Article 65 of the Trianon Treaty expressly preserves rights to choose any other nationality available under earlier treaties between the Allied and Associated Powers and Czechoslovakia. *See* Treaty of Trianon art. 65. Specifically, Article 65 provides that the Treaty of Trianon does not limit the ability of persons it covers to “choose any other nationality which may be open to them” pursuant to other treaties “concluded . . . between any of the Allied and Associated Powers

themselves,” including the St. Germain Treaty. *Id.* Therefore, even assuming the permit requirement in Article 62 of the Trianon Treaty applied to the Survivors, it would not have eliminated the option to accept Czechoslovakian nationality available to the Survivors under Article 6 of the St. Germain Treaty.

Before proceeding, we acknowledge that the Survivors did not draw on the St. Germain Treaty in support of their nationality claims before the district court. Nor did the district court consider it. *See Simon-2021*, 579 F. Supp. 3d at 129-35. Ordinarily, we refrain from “consider[ing] an issue not passed upon below.” *Liff v. Off. of the Inspector Gen. for the U.S. Dep’t of Lab.*, 881 F.3d 912, 919 (D.C. Cir. 2018) (quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)). However, we have discretion to do so “as may be justified by the [circumstances] of individual cases.” *Id.* We elect to exercise that discretion here. Interpreting Article 6 of the St. Germain Treaty and understanding how it operates in the context of the Czechoslovakian Territory Survivors’ nationality claims does not require any fact finding or “depend on any additional facts not considered by the district court,” *id.* (quoting *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 n.5 (D.C. Cir. 1992)), as demonstrated by the preceding analysis. Addressing the Survivors’ arguments under the St. Germain Treaty also “avoids unnecessary expenditure of judicial resources and expedites final resolution of the parties’ dispute.” *Id.*

3.

That brings us to the Survivors’ cross appeal. They contend that the district court erred in dismissing the

claims of Tzvi Zelikovitch and Ella Feuerstein Schlanger. We affirm the district court's dismissal of those two Survivors' claims. However, we conclude the district court should have dismissed their claims without prejudice.

As they stand, the allegations in the Second Amended Complaint fail to push Zelikovitch and Schlanger's nationality claims across the line from conceivable to plausible. Recall that Article 6 of the St. Germain Treaty provides "[a]ll persons born in Czecho-Slovak territory *who are not born nationals of another State* shall *ipso facto* become Czecho-Slovak nationals." St. Germain Treaty art. 6 (emphasis added). Accordingly, if Zelikovitch and Schlanger were born nationals of another state (*e.g.*, by descent), even proof that they were born in Czechoslovakian territory would not, per Article 6, have made them Czechoslovakian nationals. *See id.*

Although the Second Amended Complaint alleges that Zelikovitch and Schlanger were each born in Czechoslovakian territory, the pleadings also suggest that they may have been born nationals of another State—namely, Hungary. *See Simon* SAC ¶¶ 15, 73 (J.A. 240, 254). According to the Survivors, and as summarized by the district court, under Hungarian law at the time, "one acquired Hungarian citizenship . . . by descent from a citizen parent." *Simon-2021*, 579 F. Supp. 3d at 120 (quoting Pls.' Opp'n 25-26). And the pleadings provide reason to believe Zelikovitch and Schlanger's parents may have been Hungarian citizens at the time of Zelikovitch and Schlanger's births. As for Zelikovitch, the Second Amended Complaint alleges

that his parents were “both *Hungarian citizens*.” *Simon* SAC ¶ 15 (J.A. 240) (emphasis added). With respect to Schlanger, the pleadings allege she was “born in 1930 to a *Hungarian* family resident in Benedike, Czechoslovakia, approximately 10 km from Munkács.” *Id.* ¶ 73 (J.A. 254) (emphasis added). In light of those allegations, we cannot conclude that it is plausible, as opposed to merely possible, that Zelikovitch and Schlanger acquired Czechoslovakian nationality per Article 6 of the St. Germain Treaty upon birth. The district court therefore correctly granted the defendants’ motion to dismiss the claims of Zelikovitch and Schlanger.

That leaves the question whether the district court correctly dismissed their claims with prejudice. The “standard for dismissing a complaint with prejudice is high.” *Rudder v. Williams*, 666 F.3d 790, 794 (D.C. Cir. 2012) (quoting *Belizan v. Hershon*, 434 F.3d 579, 583 (D.C. Cir. 2006)). Dismissal with prejudice is warranted when “the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.” *Id.* (quoting *Belizan*, 434 F.3d at 583); accord *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328, 1340 (D.C. Cir. 2015).

Here, it is possible that Zelikovitch and Schlanger could allege facts consistent with the Second Amended Complaint that would support their claims of Czechoslovakian nationality. Schlanger’s allegation that she was born to a “Hungarian family,” *Simon* SAC ¶ 73 (J.A. 254), does not necessarily mean that her parents were Hungarian citizens at the time of her birth. And, in their briefing, the Survivors state that

the complaint should have read “Hungarian-*speaking*” family. Survivors’ Br. 40 n.26 (emphasis added). If the Survivors were able to amend the complaint to clarify, for example, that Schlanger’s parents were not Hungarian citizens but only Hungarian speakers at the time of her birth, the pleadings would thereby plausibly allege that Schlanger acquired Czechoslovakian nationality at birth under Article 6 of the St. Germain Treaty. *See* St. Germain Treaty art. 6.

Similarly, the relevant allegations and filings in the record regarding Zelikovitch leave open the possibility that he did not inherit Hungarian nationality from his parents, and thus would have acquired Czechoslovakian nationality upon birth. Although Zelikovitch’s parents may have been “Hungarian citizens” prior to the creation of Czechoslovakia, *Simon* SAC ¶ 15 (J.A. 240), there is reason to believe his parents may have become Czechoslovakian nationals upon that country’s formation. Pursuant to Article 3 of the St. Germain Treaty, Czechoslovakia agreed to confer Czechoslovakian nationality on all “Hungarian nationals” who were, as of the Treaty’s effective date, “habitually resident or possessing the rights of citizenship . . . in territory which is or may be recognised as forming part of Czechoslovakia.” St. Germain Treaty art. 3. Zelikovitch’s father was born in 1895 in Uglya, an Austro-Hungarian region that became part of Czechoslovakia upon the country’s formation. *See* Zelikovitch Decl. ¶¶ 5-6 (J.A. 226); *Simon* SAC ¶ 15 (J.A. 240). And, as of 1928, Zelikovitch’s entire family was living in Uglya, where his father was a “prosperous blacksmith.” *Simon* SAC ¶ 15 (J.A. 240). Those allegations raise the possibility

that Zelikovitch's parents were residents of Uglya at the time of Czechoslovakia's formation in 1918. If that is the case, Zelikovitch's parents likely would have acquired Czechoslovakian citizenship in 1918 unless they affirmatively chose another citizenship. *See* St. Germain Treaty arts. 3, 5. Accordingly, it remains possible that Zelikovitch could cure the deficiency by alleging facts consistent with the Second Amended Complaint that would support the inference that his parents were not in fact Hungarian nationals at the time of his birth, even if they were Austro-Hungarian nationals before the creation of Czechoslovakia. Dismissal without prejudice was thus warranted as to both Zelikovitch and Schlanger.

\* \* \*

To sum up, four of the twelve Czechoslovakian Territory Survivors adequately alleged they were Czechoslovakian at the time of the takings and thus those claims survive dismissal. We reverse the decision to allow the claims of the five Lebovics sisters to proceed as alleged and affirm the dismissal of the claims of Zelikovitch and Schlanger. However, we hold that those seven plaintiffs should be permitted to amend their pleadings if they have evidentiary support enabling them, consistent with applicable requirements, to cure the identified shortcomings. *See* Fed. R. Civ. P. 11(b)(3).

#### IV.

As an alternative to their nationality-based arguments that the domestic takings rule does not bar their claims, the Survivors invoke the 1920 Treaty of

Trianon as an independent basis for demonstrating a “tak[ing] in violation of international law” for purposes of the expropriation exception. 28 U.S.C. § 1605(a)(3). Their argument proceeds in two steps. First, they contend that a “violation of the Trianon Treaty is a violation of international law within the scope of the expropriation exception.” Survivors’ Br. 27. Second, they claim Hungary violated the Trianon Treaty—and specifically, provisions guaranteeing religious free exercise and equal protection under the law without regard to race or religion—by “target[ing] for persecution, exploitation, and property expropriation its Jewish inhabitants, including Survivors[,] whether or not they were Hungarian nationals.” *Id.* at 29.

The Survivors’ argument fails at step one. Recall *Philipp* held that only violations of “the international law of expropriation” count for purposes of the FSIA’s expropriation exception. 141 S. Ct. at 715. The treaty provisions that the Survivors claim Hungary breached—Articles 55 and 58 of the Treaty of Trianon—do not fit that description.

As noted, the 1920 Treaty of Trianon is the peace treaty that formally concluded hostilities between Hungary and the Allied and Associated Powers in World War I. *See* Treaty of Trianon, preamble. The Treaty addresses a broad range of issues related to the end of hostilities, including Hungary’s post-war borders, *id.* arts. 27-35; Hungary’s recognition of the newly independent states of Yugoslavia and Czechoslovakia, *id.* arts. 41-44, 48-52; demobilization of Hungary’s military forces, *id.* arts. 102-43; and penalties and reparations Hungary owed to the Allied



and Associated Powers, *id.* arts. 157-74. While some provisions of the Treaty reference property, *see, e.g., id.* arts. 212, 232(1)(e), the Treaty as a whole is not focused on property rights or state takings. And the Survivors do not meaningfully contend that the Treaty of Trianon as a whole is part of the “international law of expropriation.” *Philipp*, 141 S. Ct. at 715. The Survivors must therefore advance a valid argument that the specific provisions they allege Hungary breached, Articles 55 and 58, are correctly characterized as international law of expropriation.

The Survivors have failed to do so. “The interpretation of a treaty . . . begins with its text.” *Medellín v. Texas*, 552 U.S. 491, 506 (2008). Here, the text of the Treaty belies the Survivors’ characterization of Articles 55 and 58 as “international law of expropriation.” *Philipp*, 141 S. Ct. at 715. Neither provision relied on by the Survivors even mentions property or takings. Rather, both provisions govern “protection of minorities” in post-war Hungary. Treaty of Trianon pt. III § IV (capitalization altered). Article 55 requires Hungary to “assure full and complete protection of life and liberty to all inhabitants of Hungary without distinction of birth, nationality, language, race or religion,” and establishes that “[a]ll inhabitants of Hungary shall be entitled to the free exercise, whether public or private, of any creed, religion or belief whose practices are not inconsistent with public order or public morals.” *Id.* art. 55. The provision of Article 58 on which the Survivors rely establishes similar protections for minorities. It mandates that “Hungarian nationals who belong to racial, religious or linguistic minorities shall enjoy the

same treatment and security in law and in fact as the other Hungarian nationals.” *Id.* art. 58.

The absence of any mention of property in Articles 55 and 58—which protect Hungarian inhabitants and nationals—is notable given that other provisions of the Trianon Treaty explicitly address property rights of foreign nationals. *See, e.g., id.* arts. 212, 232. Article 232, for instance, situated within the Treaty section titled “Property, Rights and Interests,” provides “[t]he nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests.” *Id.* art. 232(e). Article 212 similarly establishes that “[t]he nationals of the Allied and Associated Powers shall enjoy in Hungarian territory a constant protection for their persons and for their property, rights and interests.” *Id.* art. 212. These provisions show the drafters of the Trianon Treaty specifically considered property rights and state takings elsewhere in the Treaty, but chose not to address property rights in Articles 55 and 58. The text of the Treaty thus provides strong evidence that its drafters did not intend Articles 55 and 58 to impose on Hungary international-law obligations related to takings of its own nationals’ property—undercutting the Survivors’ claim that those provisions fall within the international law of expropriation or, as the *Philipp* Court also called it, the international “law of property.” 141 S. Ct. at 712.

The Survivors counter that the provisions in Articles 55 and 58 mandating equal treatment of Hungarian nationals regardless of race or religion necessarily encompass protections for property rights

and are therefore part of the international law of expropriation. That argument proves too much. The same could be said of many principles of human rights law—*i.e.*, that they encompass protections for property rights. Take, for instance, the prohibition on “systematic racial discrimination” recognized by customary international human rights law. Third Restatement § 702(f). That principle presumably protects against systematic property takings on the basis of race conducted “as a matter of state policy.” *Id.* § 702 cmt. i. But that does not make that rule of customary human rights law, any more than the law against genocide, a source of international law under *Philipp* that could support a claim under the FSIA’s expropriation exception. *See* 141 S. Ct. at 712. *Philipp* instructs that plaintiffs must show that the international legal obligation on which they rely falls within the “international law of expropriation *rather than* of human rights.” *Id.* (emphasis added). On that score, the Survivors come up short. Given the lack of any reference to property in Articles 55 and 58, in contrast to other provisions of the Trianon Treaty, we conclude that the Survivors have failed to advance a viable argument that those Articles constitute “international law of expropriation” for purposes of the FSIA’s expropriation exception. *Id.* at 715.

There is no question that Hungary’s persecution of its Jewish population during the Holocaust breached its obligations under Articles 55 and 58 of the Treaty of Trianon. But the Survivors have failed to demonstrate that Hungary’s alleged breach of the Trianon Treaty amounted to a “violation of international law” within

the meaning of the FSIA's expropriation exception. *See Philipp*, 141 S. Ct. at 715.

V.

We turn next to the Hungarian defendants' argument that, even assuming the Survivors were non-Hungarian nationals at the time of the alleged takings, their claims are barred by the FSIA's "treaty exception." That exception is codified in Title 28, Section 1604, which provides that the FSIA's baseline grant of immunity to foreign sovereigns is "[s]ubject to existing international agreements to which the United States [was] a party at the time of enactment of th[e] Act." 28 U.S.C. § 1604. The "exception applies when international agreements 'expressly conflict' with the immunity provisions of the FSIA." *Amerada Hess*, 488 U.S. at 442 (formatting modified) (quoting H.R. Rep. No. 94-1487, at 17 (1976); S. Rep. No. 94-1310, at 17 (1976)). Under the exception, "if there is a conflict between the FSIA and such an agreement regarding the availability of a judicial remedy against a contracting state, the agreement prevails." *de Csepel II*, 859 F.3d at 1100 (quoting *de Csepel I*, 714 F.3d at 601).

The Hungarian defendants' claim to immunity under the treaty exception rests on the 1947 Treaty of Peace, which formally established peaceful relations between Hungary and the Allied and Associated Powers following World War II. *See Simon I*, 812 F.3d at 136. According to the defendants, the 1947 Treaty provides "the exclusive means for non-Hungarian claimants to recover from Hungary for wartime property losses," thereby barring any non-Hungarian

Survivors from proceeding under the FSIA pursuant to the treaty exception. Hungary Br. 30.

Two provisions of the 1947 Treaty are relevant here: Articles 26 and 27. The former requires Hungary to “restore all legal rights and interests in Hungary of the United Nations and their nationals as they existed on September 1, 1939,” and to “return all property in Hungary of the United Nations and their nationals as it now exists.” 1947 Treaty art. 26(1). Article 26 further provides that, “[i]n cases where the property has not been returned within six months from the coming into force of the present Treaty, application shall be made to the Hungarian authorities not later than twelve months from the coming into force of the Treaty,” except in certain cases. *Id.* art. 26(2). Article 26 defines covered “United Nations nationals” as “individuals who [we]re nationals of any of the United Nations . . . at the coming into force of the present Treaty,” which included Czechoslovakia, and all persons who, “under the laws in force in Hungary during the war, ha[d] been treated as enemy.” *Id.* art. 26(9)(a). Article 27, for its part, requires Hungary to provide restoration of (or compensation for) property that the Hungarian government seized during the war from “persons under Hungarian jurisdiction” whom Hungary subjected to such seizures “on account of the[ir] racial origin or religion.” *Id.* art. 27(1).

The defendants acknowledge we already rejected their argument that Article 27 of the 1947 Treaty forecloses extra-treaty means of recovery. *See* Hungary Br. 28-29; *Simon I*, 812 F.3d at 140; *see also Simon-2021*, 579 F. Supp. 3d at 127 n.26 (D.D.C. 2021)

(declining to revisit the treaty exception). In *Simon I*, we held that “Article 27 secures one means by which Hungarian victims can seek recovery against Hungary for their wartime property losses, but not to the exclusion of other available remedies.” 812 F.3d at 140. We therefore concluded the defendants had failed to identify an “express conflict between an ‘existing international agreement[]’ and the FSIA’s other immunity exceptions for purposes of the FSIA’s treaty exception.” *Id.* (quoting 28 U.S.C. § 1604).

The Hungarian defendants claim our *Simon I* ruling poses no obstacle to their renewed treaty-exception argument. They argue that, if the Survivors were *non-Hungarian* nationals at the time of the alleged takings, then Article 26, rather than Article 27, of the 1947 Treaty would apply to their claims. And Article 26, the defendants argue, provides the exclusive means by which non-Hungarians may seek compensation for property taken from them by Hungary during World War II, thereby barring the Survivors from proceeding under the FSIA.

The Hungarian defendants’ argument falters at the outset. Their threshold claim—that Article 26 alone covers the Survivors’ property losses if they are indeed non-Hungarian nationals—is belied by the text of the 1947 Treaty. By its plain terms, Article 27 also applies. It establishes a restoration-or-compensation scheme for property seized by the Hungarian government during the war from “persons under Hungarian jurisdiction” who were targeted on account of their race or religion. 1947 Treaty art. 27(1). It nowhere limits its coverage to *Hungarian nationals* under Hungarian jurisdiction. *See*

*id.* Other provisions of the Treaty confirm that its drafters distinguished between “persons under Hungarian jurisdiction” and “Hungarian nationals.” Article 2, for instance, provides different protections in its first and second clauses for “persons under Hungarian jurisdiction” as compared to “persons of Hungarian nationality.” *Id.* art. 2(1)-(2); *see also, e.g., id.* arts. 26(4), 29(1), 29(3)-(5), 30(1)-(2), 30(4), 32(1), 32(3) (using the phrase “Hungarian nationals”). Because there is no dispute that the Survivors were in territory annexed by Hungary and thereby “under Hungarian jurisdiction,” nor is there any dispute the Survivors adequately allege that Hungary seized the Survivors’ property on account of their religion, Article 27 applies to their claims irrespective of their status as non-Hungarian nationals. *Id.* art. 27(1).

That raises the question, however, whether Article 27 as applied to *non*-Hungarian nationals provides the exclusive means for such persons to obtain recovery for Hungary’s seizure of their property during the war. As noted, our ruling in *Simon I* assumed that the plaintiffs were Hungarian nationals for purposes of the treaty-exception inquiry. *See* 812 F.3d at 136-40. We conclude, however, that our reading of the Treaty’s text in *Simon I* holds as applied to claims brought by non-Hungarian nationals.

As we explained in *Simon I*, “[t]he terms of Article 27 do not speak in the language of exclusivity.” *Id.* at 137. Although Article 27 provides certain rights to victims of the Holocaust regarding property the Hungarian government confiscated, “it says nothing about whether those rights are exclusive of other

claims” that covered individuals might bring. *Id.* Other World War II peace treaties, by contrast, contain express waivers of extra-treaty claims. *See id.* at 137-38 (citing Treaty of Peace with Japan art. 14(a)-(b), Sept. 8, 1951, 3 U.S.T. 3169). And, as we explained, “[t]he absence of any such waiver language in Article 27 is all the more notable given that the 1947 Treaty itself contains an express waiver of certain other claims.” *Id.* at 138. Indeed, Article 32 of the 1947 Treaty states that “Hungary waives all claims of any description against the Allied and Associated Powers on behalf of the Hungarian Government or Hungarian nationals arising directly out of the war,” 1947 Treaty art. 32(1), but includes no reciprocal waiver of all claims by Allied and Associated Powers or their nationals against Hungary, *see id.* arts. 27, 32. The text of the Treaty thus makes clear that Article 27 does not foreclose extra-treaty claims for covered individuals, including non-Hungarian nationals—and thus does not immunize Hungary from the Survivors’ suit under the FSIA’s treaty exception. *See Simon I*, 812 F.3d at 140; 28 U.S.C. § 1604.

The same goes for Article 26 of the 1947 Treaty. Like Article 27, Article 26 speaks only to Hungary’s obligations to compensate United Nations nationals, as defined by the Treaty. 1947 Treaty art. 26(1), (9). It does not address, let alone foreclose, extra-treaty claims that such nationals might seek to bring against Hungary. *See id.* art. 26(1). Moreover, Article 32’s one-way waiver provision—eliminating claims arising out of the war by Hungary on behalf of itself or its nationals against the Allied and Associated Powers but not vice versa, *id.* art. 32(1)—convinces us that



Article 26 lacks such exclusionary language by design. As further evidence of its non-exclusive nature, Article 26 overlaps in coverage with Article 27: A United Nations national who was “under Hungarian jurisdiction” during the war and whose property Hungary confiscated on account of their religion would fall within the scope of both Articles. *Id.* art. 27; *see id.* arts. 26-27. We therefore do not read Article 26 to provide an exclusive avenue for covered individuals to seek compensation for property losses during the war. And, accordingly, we see no “express conflict” between permitting the Survivors’ action to proceed under the FSIA and Article 26 of the 1947 Treaty. *Simon I*, 812 F.3d at 140; *accord Amerada Hess*, 488 U.S. at 441-43.

The Hungarian defendants counter that, because our reasoning in *Simon I* “relied on Plaintiffs’ *Hungarian* nationality to hold that the treaty exception did not bar” their claims, we must reach a “different result” now that the Survivors deny their Hungarian nationality. Hungary Br. 28-29. But our principal reasoning in *Simon I* was that the Treaty’s text did not support the defendant’s exclusive-remedy argument. Building from there, the analysis specific to Hungarian nationals provided “context” that we concluded “further weigh[ed] against construing [Article 27] to foreclose extra-treaty claims.” *Simon I*, 812 F.3d at 138. We found it informative, for instance, that the Allied powers “could, and did, impose an obligation on Hungary to provide a *minimum* means of recovery to Hungarian victims for Hungary’s wartime wrongs,” but we did not read Article 27 to implicitly “render that means of recovery an exclusive one because [the Allies] had no power to settle or waive the extra-treaty claims

of another country's (Hungary's) nationals." *Id.* In other words, the case for non-exclusivity was even stronger when considering Article 27 as applied to Hungarian nationals. *See id.* at 138-39. But, given the clear textual support detailed above, those additional points are not necessary to our conclusion here that neither Article 26 nor 27 bars extra-treaty claims by non-Hungarian nationals.

In short, we perceive no conflict between the provisions of the 1947 Treaty relied on by the defendants and permitting those Survivors who have plausibly alleged Czechoslovakian nationality to proceed under the FSIA's expropriation exception. We thus affirm the district court's denial of the Hungarian defendants' motion to dismiss the Survivors' claims on that ground.

## VI.

That brings us to the Hungarian defendants' final argument: that the expropriation exception's requirement of a nexus between the disputed property and a defendant's commercial activity in the United States remains unmet. The expropriation exception requires that the property at issue in the suit "or any property exchanged for such property" be either (1) "present in the United States in connection with a commercial activity carried on in the United States by the foreign state" or (2) "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." 28 U.S.C. § 1605(a)(3). Even as the FSIA defines "foreign state" to include subdivisions and agencies or instrumentalities of the

state, *id.* § 1603, the Act describes distinct routes to pierce the state’s immunity by reference to its own conduct and that of its agencies or instrumentalities, *id.* § 1605. The first clause of the commercial-activity nexus requirement addresses immunity of foreign states in terms of the states’ own conduct, while the second clause addresses it in terms of actions of foreign-state agencies or instrumentalities. *Id.* § 1605(a)(3); *see de Csepel II*, 859 F.3d at 1107. Generally speaking, each clause specifies a requisite connection between the defendant and both (i) “the expropriated property or proceeds thereof” and (ii) “some kind of commercial activity in the United States.” *Simon I*, 812 F.3d at 146. For ease of reference, we use “property element” and “commercial-activity element,” respectively, to refer to these two components of the commercial-activity nexus requirement.

The district court held that the *Simon* plaintiffs’ suit meets the relevant property and commercial-activity requirements as to Hungary and MÁV. *See Simon-2020*, 443 F. Supp. 3d at 116. It concluded that the *Simon* plaintiffs adequately alleged that both Hungary and MÁV continue to possess property obtained in exchange for the plaintiffs’ expropriated property, and that both engage in the requisite commercial activities in the United States. *Id.*<sup>1</sup>

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<sup>1</sup> In *Heller*, the district court did not reach this issue because it concluded that the “the domestic takings rule alone suffice[d] to grant the [Hungarian defendants’] motion [to dismiss].” *Heller*, 2022 WL 2802351, at \*9. Given that we affirm the district court’s dismissal of the *Heller* plaintiffs’ claims on domestic takings rule grounds, we do not address whether the *Heller* plaintiffs’ claims satisfy the commercial-activity nexus requirement.

The Hungarian defendants ask us to reverse that decision. We instead remand to the district court for factfinding as to two points relevant to the commercial-activity nexus requirement: first, whether the property at issue in the claims against both Hungary and MÁV derived from the *Simon* plaintiffs' expropriated property and, second, whether MÁV engages in commercial activity in the United States. As to those components of the commercial-activity requirement, the district court, proceeding in the wake of jurisdictional discovery, did not sufficiently respond to the Hungarian defendants' factual challenges to the court's jurisdiction. First, on the property element, the district court failed to "go beyond the pleadings and resolve [the] disputed issues of fact." *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000). Second, on MÁV's commercial activity in the United States, the district court erroneously relied on the pleading-stage ruling on the point in *Simon I* as law of the case, so did not make the findings of fact called for in response to the defendants' factual challenge. Finally, as for Hungary's commercial activity, we affirm the district court's conclusion—based on stipulated facts—that Hungary engaged in the requisite commercial activity through its issuance of bonds in the United States. We address each of these three components in turn.

A.

The district court did not make findings of fact regarding the disputed property and the defendants' commercial activity in the United States, as required in response to the Hungarian defendants' factual

challenges to the applicability of the FSIA's expropriation exception. The district court's task in assessing jurisdiction under the FSIA varies depending on whether the defendant presents a legal or a factual challenge. See *Phoenix Consulting*, 216 F.3d at 40. "If the defendant challenges only the legal sufficiency of the plaintiff's jurisdictional allegations, then the district court should take the plaintiff's factual allegations as true and determine whether they bring the case within any of the exceptions to immunity invoked by the plaintiff," *id.*, drawing "all reasonable inferences in [the plaintiff's] favor," *Schubarth*, 891 F.3d at 401. The Rule 12(b)(1) standard in this context "is similar to that of Rule 12(b)(6), under which dismissal is warranted if no plausible inferences can be drawn from the facts alleged that, if proven, would provide grounds for relief." *Valambhia*, 964 F.3d at 1139 (quoting *Schubarth*, 891 F.3d at 398).

By contrast, when a defendant moves beyond assuming the truth of well-pleaded facts and seeks at the jurisdictional threshold to challenge the factual basis of the court's jurisdiction—for instance, by factually disputing the *Simon* plaintiffs' jurisdictional allegations—"the court must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary" to resolve the Rule 12(b)(1) motion. *Phoenix Consulting*, 216 F.3d at 40. Put simply, if a decision about the existence of jurisdiction under the FSIA "requires resolution of factual disputes, the court will have to resolve those disputes." *Helmerich*, 581 U.S. at 187. In so doing, "[t]he district court retains 'considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction,'

but it must give the plaintiff ‘ample opportunity to secure and present evidence relevant to the existence of jurisdiction.’” *Phoenix Consulting*, 216 F.3d at 40 (quoting *Prakash v. Am. Univ.*, 727 F.2d 1174, 1179-80 (D.C. Cir. 1984)).

“Regardless of the procedures the court follows, however, the sovereign ‘defendant bears the burden of proving that the plaintiff’s allegations do not bring its case within a statutory exception to immunity.’” *Price*, 389 F.3d at 197 (quoting *Phoenix Consulting*, 216 F.3d at 40); *accord de Csepel v. Republic of Hungary*, 27 F.4th 736, 743 (D.C. Cir. 2022). That is because sovereign immunity is an “affirmative defense.” *EIG Energy*, 894 F.3d at 345. Accordingly, the “burden of proof in establishing the inapplicability of [the FSIA’s] exceptions is upon the party claiming immunity.” *Transam. S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1002 (D.C. Cir. 1985) (citing H.R. Rep. No. 94-1487, at 6-7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604); *see* H.R. Rep. No. 94-1487, at 17 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 6616.

Here, the Hungarian defendants raised a factual challenge to the Survivors’ allegations regarding the property element. Although their motion-to-dismiss briefing principally argued that the *Simon* plaintiffs’ pleadings had failed to satisfy the “heightened pleading standard” that they claimed *Helmerich* established, Hungary Mot. to Dismiss 22; *see id.* at 22-24; *see also* Part III.B, *supra*, they also filed fact declarations as attachments to their motion to dismiss, *see* Hungary Mot. to Dismiss, Exs. 1-6; Dkt. Sheet 29 (J.A. 29). The Hungarian defendants relied on those declarations to

factually question the *Simon* plaintiffs' allegations that property exchanged for their confiscated property is present in the United States in connection with Hungary's commercial activity or possessed by MÁV. *See* Hungary Mot. to Dismiss 23; Dkt. Sheet 29 (J.A. 29). Those declarations drew on Hungarian state archival records related to the Holocaust to conclude that it is impossible to trace the current location of the property Hungary allegedly seized or the proceeds thereof. *See* Botos Decl. ¶ 4 (J.A. 823); Csösz Decl. ¶ 5 (J.A. 834); Kovács Decl. ¶ 4 (J.A. 842).

The *Simon* Survivors countered by citing evidence in the record that "Hungary nationalized the expropriated property, sold it, and mixed the proceeds with the general state funds, which are used to fund various governmental commercial operations." Survivors' Br. 62 n.33; *see id.* at 62-63. They identified three sources of record support for those facts. First, they cited a declaration of a Hungarian attorney that describes, and attaches as an accompanying exhibit, a 1993 decision of the Hungarian Constitutional Court that includes the court's findings regarding Hungary's expropriation and use of property confiscated from Jews during the Holocaust. *See id.* at 62-63; Second Hanák Decl. ¶ 44 (J.A. 359); Second Hanák Decl., Ex. 8 (J.A. 414-40). The *Simon* plaintiffs' second declaration attaches and describes microfilm archives at the Holocaust Museum in Washington, D.C., that show "records of the confiscation, processing, and distribution of Jewish property in Hungary 1944." Fax Decl. ¶¶ 7-8 (J.A. 452); Fax Decl., Ex. 15 (*see* J.A. 750-61); Fax Decl., Ex. 16 (J.A. 762-71). Third, they submitted a study co-authored by one of the Hungarian

defendants' declarants, Dr. László Csösz, which, *inter alia*, identifies a Hungarian "Ministry of Finance's account" where proceeds from the liquidation of Jewish assets were deposited. Fax Decl., Ex. 17, at 23 (J.A. 794); *see id.* at 1-2 (J.A. 772-73). The *Simon* Survivors also submitted evidence of the presence of Hungarian funds used in connection with Hungary's commercial activity in the United States, as further discussed below.

In this posture, resolving the Hungarian defendants' motion to dismiss required resolving the "dispute over the factual basis of the court's subject matter jurisdiction under the FSIA." *Phoenix Consulting*, 216 F.3d at 40. The district court was, accordingly, required to "go beyond the pleadings" and make findings of fact germane to the expropriation exception's property element—namely, whether property defendants received in exchange for the *Simon* plaintiffs' confiscated property is present in the United States in connection with Hungary's commercial activity there or is possessed by MÁV. *Id.*; *see also Helmerich*, 581 U.S. at 187.

The district court did not do so here: It examined a mix of factual allegations and evidence submitted by the parties but does not appear to have undertaken the requisite factfinding to support its jurisdiction. *See Simon-2020*, 443 F. Supp. 3d at 103-05. The district court continued to view the central question as whether the *Simon* plaintiffs' "*allegations* suffice to raise a plausible inference that the defendants retain some portion of the expropriated property." *Id.* at 104 (emphasis added). It characterized the evidence



submitted by the *Simon* plaintiffs as “bolster[ing] the plausibility of [those] allegations,” and framed its conclusion as one that the “allegations suffice” to establish jurisdiction under the FSIA. *Id.* at 104, 116. Rather than find that the defendants had (or had not) established by a preponderance of the evidence that their property does not derive from the challenged expropriations, see *Simon I*, 812 F.3d at 147, the district court referred to the *Simon* plaintiffs’ allegations rather than evidence, concluding that the defendants’ “declarations do not affirmatively disprove the plausible inference drawn from the plaintiffs’ complaint,” *Simon-2020*, 443 F. Supp. 3d at 105. Remand is therefore warranted to enable the district court to make the necessary factual findings. See, e.g., *Phoenix Consulting*, 216 F.3d at 38, 41-40; see also *Helmerich*, 581 U.S. at 187.

The Hungarian defendants advance two primary counterarguments in support of their request for reversal, neither of which carries the day. They first argue that the district court erred by applying a legal standard that *Helmerich* displaced. See Hungary Br. 37. As discussed in Part III.B, *supra*, the defendants misread *Helmerich*. Next, the Hungarian defendants contend that, in any event, they are entitled to reversal because the *Simon* plaintiffs failed to “produce evidence tracing property in the United States or possessed by MÁV to property expropriated from them during World War II.” *Id.* at 44. That argument fails at the gate: The plaintiffs had no such burden here.

The FSIA’s expropriation exception requires that the property at issue, “or any property exchanged for

*such property,*” be present in the United States in connection with the foreign state’s commercial activity, or “owned or operated by an agency or instrumentality of the foreign state” that engages in commercial activity in the United States. 28 U.S.C. § 1605(a)(3) (emphasis added). Congress knew that an expropriating foreign state or instrumentality thereof might “exchange[]” or liquidate the stolen property—*i.e.* convert it to cash or cash equivalents. *Id.* It included language in the FSIA to enable plaintiffs to satisfy the expropriation exception’s jurisdictional nexus requirements in those circumstances. *Id.*

Requiring plaintiffs whose property was liquidated to allege and prove that they have traced funds in the foreign state’s or instrumentality’s possession to proceeds of the sale of their property would render the FSIA’s expropriation exception a nullity for virtually all claims involving liquidation. Given the fungibility of money, once a foreign sovereign sells stolen property and mixes the proceeds with other funds in its possession, those proceeds ordinarily become untraceable to any specific future property or transaction. The Hungarian defendants’ proposed rule could thus thwart most claims under the expropriation exception: A foreign sovereign would need only commingle the proceeds from illegally taken property with general accounts to insulate itself from suit under the expropriation exception. We decline to ascribe to Congress an intent to create a safe harbor for foreign sovereigns who choose to commingle rather than segregate or separately account for the proceeds from unlawful takings.

We came to a similar conclusion in *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123 (D.C. Cir. 2004), with respect to tracing foreign-state funds for purposes of material support under the FSIA's terrorism exception. *See id.* at 1130-33; 28 U.S.C. § 1605(a)(7) (2002).<sup>2</sup> That exception requires a link between a foreign state's material support and the act of terrorism that harmed the plaintiff. 28 U.S.C. § 1605(a)(7) (2002); *see Kilburn*, 376 F.3d at 1130. The defendants argued that, for the exception to apply, the plaintiff must allege and ultimately prove that a state's "material support" is "directly traceable to the particular terrorist act" that gives rise to the underlying claim. *See Kilburn*, 376 F.3d at 1130 (emphasis omitted). We rejected that argument. Because money is "fungible, and terrorist organizations can hardly be counted on to keep careful bookkeeping records," we explained, "[i]mposing a jurisdictional requirement that a state sponsor's financial assistance to a terrorist organization must be *directly* traceable to a particular terrorist act, would likely render § 1605(a)(7)'s material support provision ineffectual." *Id.* With regard to "property taken in violation of international law," 28 U.S.C. § 1605(a)(3), relying on foreign sovereigns and their agencies to segregate

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<sup>2</sup> In 2008, after our decision in *Kilburn*, Congress relocated the terrorism exception from 28 U.S.C. § 1605(a)(7) to 28 U.S.C. § 1605A, "but the relevant language remains substantially identical to that considered in *Kilburn*." *EIG Energy*, 894 F.3d at 346 n.4 (citing National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181 § 1083(a), (b)(1)(A)(iii), 122 Stat. 3, 338-41). In the interest of consistency with *Kilburn*'s references, we quote and cite the version included in the 2002 edition of the U.S. Code.

resulting proceeds and “keep careful bookkeeping records” poses similar hazards, *Kilburn*, 376 F.3d at 1130.

We hold that the *Simon* plaintiffs need not produce evidence directly tracing the liquidated proceeds of their stolen property to funds retained by the defendants in order to survive the defendants’ factual challenge to the court’s jurisdiction under the FSIA’s expropriation exception. Rather, because “the sovereign ‘defendant bears the burden of proving that the plaintiff’s allegations do not bring its case within a statutory exception to immunity,’” *Price*, 389 F.3d at 197 (quoting *Phoenix Consulting*, 216 F.3d at 40); accord *EIG Energy*, 894 F.3d at 344-45, defendants who wish to disclaim property they seized and liquidated must at least affirmatively establish by a preponderance of the evidence that their current resources do *not* trace back to the property originally expropriated. In keeping with the parties’ respective burdens, evidence that “merely confirm[s] the difficulty of tracing individual paths of exchange,” will—as the district court observed—“hurt[] rather than help[] the defendants” in that endeavor. *Simon-2020*, 443 F. Supp. 3d at 105.

It is the province of the district court to find facts, including the requisite jurisdictional facts regarding the property element. The district court has wide “latitude [to] devis[e] the procedures” necessary “to ferret out the facts pertinent to jurisdiction,” *Phoenix Consulting*, 216 F.3d at 40 (quoting *Prakash*, 727 F.2d at 1179), should it determine that any additional jurisdictional discovery or evidentiary submissions

would be appropriate. We therefore remand to the district court to make the factual findings necessary to a determination whether the property component of the commercial-activity nexus requirement is satisfied as to Hungary and MÁV.

B.

Next, we turn to the question whether MÁV engages in commercial activity in the United States. Here, too, we conclude the district court failed appropriately to respond to the Hungarian defendants' factual challenge by making findings of fact. Instead, the district court relied on law-of-the-case doctrine to treat *Simon Ts* pleading-stage ruling on the point as dispositive. *See Simon-2020*, 443 F. Supp. 3d at 111-12, 116.

Law-of-the-case doctrine applies only where a prior ruling in the case resolved the same question that a party asks the court to revisit. *See Wye Oak Tech., Inc. v. Republic of Iraq*, 24 F.4th 686, 698 (D.C. Cir. 2022); *Kimberlin v. Quinlan*, 199 F.3d 496, 500 (D.C. Cir. 1999). When the prior ruling occurred at a “distinct procedural” stage of the case, it may not provide the type of resolution required at a later stage. *Wye Oak*, 24 F.4th at 698. We deemed law-of-the-case doctrine inapplicable in *Wye Oak*, for instance, because the prior ruling at issue assessed only “the legal sufficiency of [the] complaint for the purpose of proceeding to discovery,” and we were then reviewing a post-trial judgment made on the basis of “a developed factual record” following a “full adversarial hearing.” *Id.* at 697-98.

Given those principles, the district court erred by deeming dispositive *Simon I*'s ruling on MÁV's commercial activity. In *Simon I*, we determined that the plaintiffs had adequately pleaded MÁV's commercial activity. See 812 F.3d at 147-48. We accordingly reversed the district court's grant of the Hungarian defendants' motion to dismiss. In so doing, we noted that questions of proof would await "any factual challenge by the Hungarian defendants." *Id.* at 147, 151.

The Hungarian defendants then raised a factual challenge with respect to MÁV's commercial activity. See Hungary Mot. to Dismiss 9-11; Dkt. Sheet 29 (J.A. 29); *Simon-2020*, 443 F. Supp. 3d at 112-14. They factually contested the *Simon* plaintiffs' allegations that MÁV-START, another Hungarian entity, is an agent of MÁV, and argued that MÁV cannot be subjected to the jurisdiction of a U.S. court based on the activities of MÁV-START. Hungary Mot. to Dismiss 9-11. The district court granted the parties' request for limited jurisdictional discovery "concerning the averments in the declarations [filed] in support of" the Hungarian defendants' motion to dismiss. Dkt. Sheet 29 (J.A. 29) (internal quotation marks omitted). And the *Simon* plaintiffs thereafter filed a declaration and accompanying exhibits regarding MÁV's relationship with MÁV-START in support of their opposition to the defendants' motion to dismiss. See Dkt. Sheet 31 (J.A. 31); Schopler Decl. ¶¶ 3-18 (J.A. 1632-34); Schopler Decl., Exs. 11-17 (J.A. 1678-99). This factual challenge regarding the existence of a principal-agent relationship between MÁV and MÁV-START obligated

the district court to go beyond the pleadings to resolve that dispute. *See Phoenix Consulting*, 216 F.3d at 40.

In taking up the factual challenge, however, the district court began its analysis by stating that it was “bound by the law of the case,” and by what it described as the *Simon I* court’s “finding about MÁV’s commercial nexus to the United States.” *Simon-2020*, 443 F. Supp. 3d at 111; *see also id.* at 111-12 (reasoning that the defendants’ factual challenge to MÁV’s commercial-activity nexus would succeed “only if one of the limited exceptions to the law of the case doctrine is met”). Even as the court went on to discuss the factual record developed by the parties following *Simon I*, it expressly invoked law of the case and grounded its conclusion regarding MÁV’s commercial activity in what it described as this court’s “prior finding” of MÁV’s commercial activity in the United States. *See id.* at 116.

We do not suggest that the district court was wrong to draw on the legal ruling in *Simon I*, but only that doing so was insufficient once defendants pressed their factual challenge. We are in no position to discern whether the district court would have reached the conclusion about MÁV’s commercial activity that it announced had it expressly made factual findings on the point. Accordingly, we remand for the district court to determine as a factual matter based on the evidence whether MÁV engages in commercial activity in the United States.

## C.

That leaves the Hungarian defendants' challenge regarding Hungary's commercial activity in the United States. We note, at the outset, that the procedural history on this issue differs from that of the previous two points in one respect: Whereas we deemed other allegations sufficient in *Simon I*, we held that the First Amended Complaint's "allegations about Hungary's commercial activity fail[ed] to demonstrate satisfaction of § 1605(a)(3)'s nexus requirement." 812 F.3d at 148. As we explained, "the plaintiffs put forward only the bare, conclusory assertion that 'property is present in the United States in connection with commercial activity carried on by Hungary within the United States.' There is nothing more." *Id.* (quoting *Simon First Am. Compl.* ¶ 83 (J.A. 119)). We "express[ed] no view," however, "on whether [the plaintiffs could] (or should be allowed to) amend the complaint in this regard." *Id.*

On remand, the district court permitted the *Simon* plaintiffs to amend. *See* Dkt. Sheet 25 (J.A. 25). The *Simon* plaintiffs did so, *see id.* at 26 (J.A. 26), and added, *inter alia*, allegations regarding Hungary's issuance of bonds and military purchases in the United States, *see Simon SAC* ¶¶ 98-101 (J.A. 260-62). The Hungarian defendants then renewed their motion to dismiss, again arguing, *inter alia*, that the *Simon* plaintiffs had failed as a legal matter to satisfy the commercial-activity element as to Hungary. *See* Dkt. Sheet 29 (J.A. 29); *Simon-2020*, 443 F. Supp. 3d at 106-11. Following jurisdictional discovery, *see* Dkt. Sheet 29 (J.A. 29), the parties submitted a Joint Stipulation of



Facts relevant to Hungary's commercial activity in the United States, *see* Joint Stip. (J.A. 1155-70). Relying principally on the facts set forth in the Joint Stipulation, the district court concluded Hungary engaged in the commercial activity required for purposes of the expropriation exception. *See Simon-2020*, 443 F. Supp. 3d at 106-11. In particular, the court held that "Hungary's bond offerings and military equipment purchases are sufficient to meet the commercial activity prong." *Id.* at 107.

On appeal, the Hungarian defendants argue that the district court erred in its analysis of both the bond offerings and military equipment purchases. They argue that the district court erroneously accepted Hungary's issuance of bonds and military equipment purchases as satisfying the commercial-activity component of the expropriation exception. In their view, the district court misstated the central question under the commercial-activity inquiry in analyzing Hungary's issuance of bonds and erred in concluding that a state's participation in the U.S. Foreign Military Sales Program could qualify as commercial activity under the FSIA.

We affirm the district court's conclusion that the commercial-activity prong is met based on Hungary's issuance of bonds. Because that is sufficient to resolve the appeal with respect to Hungary's commercial activity, we do not consider Hungary's military equipment purchases. The commercial-activity nexus requirement, as it relates to foreign states, requires that the expropriated "property or any property exchanged for such property is present in the United

States in connection with a commercial activity carried on in the United States by the foreign state.” 28 U.S.C. § 1605(a)(3). The FSIA defines commercial activity as “either a regular course of commercial conduct or a particular commercial transaction or act.” *Id.* § 1603(d). The Act further specifies that the purpose of an activity does not determine its commercial character. Rather, courts should look to “the nature of the course of conduct or particular transaction or act.” *Id.*

In *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), the Court interpreted the term “commercial” in the FSIA’s commercial activity exception. *See id.* at 612-14. It held that a foreign state’s actions are “commercial” under the FSIA when the state “acts, not as regulator of a market, but in the manner of a private player within it.” *Id.* at 614. Applying that standard, the Court held that Argentina’s issuance of government bonds was a “commercial activity” under the FSIA. *Id.* at 617. As the Court explained, the bonds at issue were “in almost all respects garden-variety debt instruments”; private parties could hold them, trade them on the international market, and use them to secure a future stream of income. *Id.* at 615. Because “private parties regularly issue [such] bonds,” Argentina’s issuance constituted commercial activity for purposes of the FSIA. *Id.* at 616.

Application of *Weltover* to the relevant facts as stipulated by the parties establishes that Hungary’s issuance of bonds in this case qualifies as “commercial activity” within the meaning of the FSIA. Two Hungarian bond issuances are illustrative. *See Simon-*

2020, 443 F. Supp. 3d at 107-08. First, in 2005, Hungary filed a prospectus supplement with the United States Securities and Exchange Commission (SEC) offering \$1.5 billion in notes for sale globally, of which approximately \$582 million was “directly sold in the United States,” with an additional \$92 million “estimated to flow back into the United States from sales outside the United States.” Joint Stip. ¶ 21 (J.A. 1158). “The notes issued under the 2005 Prospectus constituted direct, unconditional, unsecured and general obligations of Hungary,” *id.* ¶ 25 (J.A. 1159), and the “[d]ebt securities issued under the 2005 Prospectus were outstanding in the United States throughout 2009, 2010, and 2011,” *id.* ¶ 27 (J.A. 1159)—*i.e.*, both before and after the *Simon* plaintiffs filed their complaint. Second, in 2010, Hungary filed another prospectus supplement with the SEC. *Id.* ¶¶ 47-48, 51 (J.A. 1161-62). “The debt securities issued under the 2010 Prospectus” were notes due in January 2020, “bearing interest at the rate of 6.250% per year,” accruing from January 2010, and “payable on July 29 and January 29 of each year, beginning on July 29, 2010.” *Id.* ¶ 52 (J.A. 1162). In short, these two sets of bonds are materially indistinguishable from those at issue in *Weltover*: “They may be held by private parties; they are negotiable and may be traded on the international market . . . ; and they promise a future stream of cash income.” 504 U.S. at 615. Hungary’s issuance of these bonds constitutes commercial activity within the meaning of the FSIA.

The Hungarian defendants dispute none of this. *See* Hungary Br. 52-53. Instead, they contend that Hungary’s issuance of the bonds, although commercial

in nature, is not germane to the commercial-activity nexus required here. *See id.* The real issue, they argue, is “who engaged in ‘commercial activity in the United States’ in connection with property exchanged for expropriated property.” *Id.* at 53 (quoting 28 U.S.C. § 1605(a)(3)). According to the Hungarian defendants, “[t]he bonds themselves are not property exchanged for property expropriated from [p]laintiffs.” *Id.* Rather, “[t]he only conceivably relevant property in the United States would be interest paid on the bonds to U.S. holders, and the relevant commercial activity in the United States would be the payment of that interest.” *Id.* Because a separate entity, ÁKK Zrt. (ÁKK), made those interest payments, defendants argue, it is ÁKK that was engaged in the relevant commercial activity, if any. *See id.*; *see also* Joint Stip. ¶¶ 28, 55, 73-77 (J.A. 1159, 1162, 1165-66).

That argument misunderstands the link required between the relevant property and the foreign state’s commercial activity in the United States. As noted, the expropriation exception requires that the confiscated “property or any property exchanged for such property [must be] present in the United States in connection with a commercial activity carried on in the United States by the foreign state.” 28 U.S.C. § 1605(a)(3). If money derived from the proceeds of liquidating the *Simon* plaintiffs’ stolen property is present in the United States as a result of Hungary’s commercial activity in the United States (here, its issuance of bonds), the fact that another entity acting for Hungary is using those funds to make the interest payments for the bonds does not negate the fact that the funds are “present in the United States in connection with a

commercial activity carried on in the United States by” Hungary. *Id.*

Moreover, to the extent the Hungarian defendants suggest that Hungary’s issuance of bonds occurred “outside the United States,” Hungary Br. 52, any such argument is foreclosed by the record. The parties’ Joint Stipulation of Facts explicitly states, “Hungary issued debt securities in the United States under the 2010 Prospectus.” Joint Stip. ¶ 51 (J.A. 1162). Additionally, as the district court explained in detail, SEC filings produced by the *Simon* plaintiffs and uncontested by the Hungarian defendants identify Hungary as the issuer of (and entity responsible for) the debt securities offered in the United States. *See Simon-2020*, 443 F. Supp. 3d at 108; *see also, e.g.*, Fax Decl., Ex. 7, at 54 (J.A. 618) (SEC filing listing the “Republic of Hungary” as the “Issuer” of the 2010 bonds, and noting the securities being offered “constitute direct, unconditional, general and unsecured obligations of the Republic”); *id.* at 5 (J.A. 569) (SEC filing describing the 2010 bonds as “debt securities of the Republic, which are being offered globally for sale in the United States and elsewhere where such offer and sale is permitted”).

The Hungarian defendants’ challenge to the district court’s ruling on Hungary’s commercial activity is thus unavailing. We affirm the district court’s ruling that the commercial-activity element is satisfied as to Hungary.

## VII.

For the foregoing reasons, we affirm the district court’s dismissal of the Trianon Survivors’ claims in its

2021 decision in *Simon* and 2022 decision in *Heller*. We likewise affirm the district court's 2021 disposition of the Hungarian defendants' motion to dismiss the remaining plaintiffs' claims, with the exception of the Lebovics sisters, Zelikovitch, and Schlanger, whose claims we direct the district court to dismiss without prejudice. As for the district court's 2020 *Simon* decision on the commercial-activity nexus requirement, we affirm the district court's ruling as to Hungary's commercial activity. However, we vacate the court's ruling on the property component of the nexus in relation to both Hungary and MÁV, as well as on MÁV's commercial activity. We remand for the district court to make factual determinations on those points, as necessary to resolve the Hungarian defendants' challenge to the remaining plaintiffs' invocation of the expropriation exception.

We pause, at this juncture, to acknowledge the immense gravity of the claims at issue in this case and others like it. The atrocities committed by the Hungarian government during the Holocaust are unspeakable. And there is no denying that the survivors of Hungary's genocidal campaign deserve justice. The role of the courts of the United States in these cases depends on the factual record before it. Our legal authority is granted and limited by Congress. We are also checked by the reality that even the best remedies a court can provide for past harms are, by their nature, profoundly inadequate. That reality, always there in the background, is starkly evident in cases like these.

*So ordered.*

RANDOLPH, *Senior Circuit Judge*, concurring in part and dissenting in part: A basic judicial principle is that like cases must be treated alike. *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc). My dissent is confined to the majority's compliance with that principle in its otherwise admirable opinion. That is, I cannot agree that four of the fourteen original *Simon* plaintiffs may continue with their action, given the Supreme Court's unanimous decision in *Federal Republic of Germany v. Philipp (Philipp III)*, 141 S. Ct. 703 (2021), and our decision on remand in *Philipp v. Stiftung Preussischer Kulturbesitz (Philipp VI)*, No. 22-7126, – F.4th –, 2023 WL 4536152 (D.C. Cir. July 14, 2023) (per curiam).

The *Philipp* case, involving the Nazis taking the property of Jews in Germany, and *Simon*, involving the taking of property of Jews in Hungary, raised comparable issues under the Foreign Sovereign Immunities Act. Our court naturally treated a decision in one as impacting the other. *See, e.g., Simon v. Republic of Hungary (Simon II)*, 911 F.3d 1172, 1176 (D.C. Cir. 2018) (citing *Philipp v. Federal Republic of Germany (Philipp II)*, 894 F.3d 406 (D.C. Cir. 2018)). The Supreme Court did the same. The Court granted writs of certiorari in *Philipp* and *Simon* at the same time. *See* 141 S. Ct. 185 (July 2, 2020) (*Philipp*); 141 S. Ct. 187 (July 2, 2020) (*Simon*). And, as I next discuss, when the Court released its judgments in these two cases, it tied the cases together.

In *Philipp III*, the Supreme Court – disagreeing with our court – held unanimously that foreign states and their agencies are immune from suits in United

States courts based on “a foreign sovereign’s taking of its own nationals’ property.” *Id.* at 709–10. In rendering its opinion, the Court treated the plaintiffs in *Philipp* as German nationals when the Nazis confiscated their property. *See id.* The Court did so even though the *Philipp* plaintiffs, apparently anticipating an adverse decision, suggested to the Court (for the first time in the litigation) that they or their ancestors might not have been German nationals on the relevant date. *See Philipp VI*, 2023 WL 4536152, at \*1. In response to this belated claim, the Supreme Court not only vacated our judgment in *Philipp* but also remanded the case for a determination whether the *Philipp* plaintiffs had preserved their new contention that they were not German nationals at the time of the alleged takings. *Philipp III*, 141 S. Ct. at 715–16.

On the same day, the Supreme Court issued the following *per curiam* order in this, the *Simon* case: “The judgment of the United States Court of Appeals for the D. C. Circuit is vacated, and the case is remanded for further proceedings consistent with the decision in [*Philipp III*].” *Republic of Hungary v. Simon (Simon III)*, 141 S. Ct. 691 (2021). The Court’s mandate thus required, on remand, a decision whether the *Simon* plaintiffs, or any one of them, had preserved a claim that they were not Hungarian nationals when Hungary confiscated their property. In light of the mandate, the preservation question had to be determined because subject matter jurisdiction turned



on it, at least as a preliminary matter.<sup>1</sup> See *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006); *Capron v. Van Noorden*, 6 U.S. 126, 127 (1804) (“Here it was the duty of the Court to see that they had jurisdiction, for the consent of parties could not give it.”).

In the appeal in the remanded *Philipp* case, we determined – in agreement with the district court – that the plaintiffs had failed to preserve a not-German-nationals claim. *Philipp VI*, 2023 WL 4536152, at \*2. The *Simon* case, also on appeal after remand, presents an even stronger ground for reaching the same result with respect to the plaintiffs’ disclaimer of Hungarian nationality.<sup>2</sup>

As in *Philipp*, none of the plaintiffs in *Simon* alleged in their original complaint or in either of their amended complaints that they were nationals of a country other than Hungary at the time of the takings. See *Simon v. Republic of Hungary*, 579 F. Supp. 3d 91, 124 (D.D.C. 2021), *appeal dismissed*, 2022 WL 7205036 (D.C. Cir. Oct. 12, 2022). The majority attempts to fill

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<sup>1</sup> The plaintiffs’ burden to establish jurisdiction increases at later stages in litigation. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

<sup>2</sup> The majority tries to distinguish *Philipp*. See Maj. Op. 29–30. But as the majority suggests, the *Philipp* plaintiffs *did* plead facts that could meet the “minimum requirements” for a non-German nationality. See Maj. Op. 30; Second Amended Complaint at ¶¶ 55, 170, *Philipp v. Stiftung Preussischer Kulturbesitz* No. 1:15-cv-00266-CKK (D.D.C. September 9, 2021), ECF No. 62. And the *Philipp* plaintiffs *did* press their non-German-nationality argument before the Supreme Court (unlike the plaintiffs here). See *Philipp VI*, 2023 WL 4536152, at \*1.

this gap by quoting a sentence from one of the plaintiffs' district court memoranda from twelve years ago. Maj. Op. 30. There are two problems with the attempt. An obvious one is that the quotation does not alter the fact that the plaintiffs' pleadings – their complaint and amended complaints – never alleged that they were Czechoslovakian nationals at the time of the alleged takings. The second is that the plaintiffs were arguing the opposite of what the majority thinks. That is, in the quoted passage the plaintiffs were disputing the claim of the Hungarian state at the start of World War II that they were no longer “citizens” of Hungary despite the fact – as plaintiffs stated in their preceding sentence – that the “14 Named Plaintiffs are Holocaust survivors who lived in the Hungarian State at the threshold of World War II.” Pls.' Opp'n 3, 17, *Simon v. Republic of Hungary*, No. 1:10-cv-01770-BAH (D.D.C. May 6, 2011), ECF No. 24.

As in *Philipp*, the *Simon* plaintiffs had “every opportunity” – and indeed, every incentive – to allege in their original complaint or in their amended complaints that they were Czechoslovakian nationals.<sup>3</sup>

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<sup>3</sup> The *Simon* plaintiffs devoted a portion of their Supreme Court merits brief to the FSIA expropriation exception because Hungary had “contested this question of subject matter jurisdiction below” and “intend[ed] to reap the benefits if Germany prevail[ed]” in the *Philipp* case. Brief for Respondents at 42 n.5, *Simon III*, 141 S. Ct. 691 (2021) (No. 18-1447), 2020 WL 6292564 at \*42 n.5; see also Reply Brief for Appellants Rosalie Simon, et. al. at 9, *Simon v. Republic of Hungary (Simon I)*, 812 F.3d 127 (D.C. Cir. 2016) (No. 14-7082), 2014 WL 6603413 at \*9 (“Hungary alleges that international law is not implicated where the wrongful conduct is perpetrated against a state’s own citizens or nationals.”);

*Philipp VI*, 2023 WL 4536152, at \*2. But unlike the plaintiffs in *Philipp*, the *Simon* plaintiffs never informed the Supreme Court that they even contemplated asserting such an allegation. Instead, the *Simon* plaintiffs represented to the Supreme Court in the clearest possible terms that they were all Hungarian nationals when the takings occurred: “All 14 of the Survivors were Hungarian nationals during World War II but have adopted other nationalities since escaping the atrocities of the Hungarian government.” Brief in Opposition at 4–5, *Simon III*, 141 S. Ct. 691 (2021) (No. 18-1447), 2019 WL 3380416 at \*4–5. That too had been our court’s understanding when the case reached us on appeal: “The named plaintiffs in this case are fourteen Jewish survivors of the Hungarian Holocaust. All fourteen were Hungarian nationals during World War II but have since adopted other nationalities.” *Simon v. Republic of Hungary (Simon I)*, 812 F.3d 127, 134 (D.C. Cir. 2016).<sup>4</sup>

The short of the matter is that the *Simon* plaintiffs, like the plaintiffs in *Philipp*, did not preserve a claim that they were nationals of a country other than Hungary when the takings occurred. The longstanding

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Opposition Brief of Defendants-Appellees at 32, *Simon I*, 812 F.3d 127 (D.C. Cir. 2016) (No. 14-7082), 2014 WL 5795145 at \*32 (no violation of international law because “Plaintiffs were Hungarian nationals at the time of the events in question”).

<sup>4</sup> The plaintiffs argued that Article 27 of the 1947 Peace Treaty applied to them because they were Hungarian nationals when Hungary took their property. See Reply Brief for Appellants Rosalie Simon, et. al. at 3, *Simon I*, 812 F.3d 127 (D.C. Cir. 2016) (No. 14-7082), 2014 WL 6603413 at \*3.

rule of this circuit, and of the other circuits,<sup>5</sup> is as follows: “It is elementary that where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand.” *Northwestern Indiana Tel. Co. v. F.C.C.*, 872 F.2d 465, 470 (D.C. Cir. 1989) (quoted in *United States v. Henry*, 472 F.3d 910, 913 (D.C. Cir. 2007)). As we held in *Philipp*, in order to “preserve a claim, a party must raise it ‘squarely and distinctly.’” *Philipp*, 2023 WL 4536152, at \*2 (quoting *Bronner on Behalf of Am. Stud. Ass’n v. Duggan*, 962 F.3d 596, 611 (D.C. Cir. 2020)). The *Simon* plaintiffs did neither.

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<sup>5</sup> See, e.g., *Omni Outdoor Advert., Inc. v. Columbia Outdoor Advert., Inc.*, 974 F.2d 502, 505 (4th Cir. 1992); *United States v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001); *Christian Legal Soc’y Chapter of Univ. Of Cal. v. Wu*, 626 F.3d 483, 486–88 (9th Cir. 2010).

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**APPENDIX B**

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

**Civil Action No. 10-cv-1770 (BAH)**

**[Filed December 30, 2021]**

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ROSALIE SIMON, <i>et al.</i> ,	)
<i>individually, for themselves and</i>	)
<i>for all others similarly situated,</i>	)
	)
Plaintiffs,	)
	)
v.	)
	)
REPUBLIC OF HUNGARY, <i>et al.</i> ,	)
	)
Defendants.	)

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Chief Judge Beryl A. Howell

**ORDER**

Upon consideration of defendants Republic of Hungary and Magyar Államvasutak Zrt.'s Motion to Dismiss the Second Amended Class Action Complaint, ECF No. 165, the related legal memoranda in support and in opposition, the exhibits and declarations attached thereto, and the entire record herein, for the reasons set forth in the accompanying Memorandum Opinion, it is hereby

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**ORDERED** that the Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART**; it is further

**ORDERED** that the Motion to Dismiss is **GRANTED** to the extent that all claims by plaintiffs Zehava Friedman, Vera Deutsch Danos, Ella Feuerstein Schlanger, and the Heirs at Law to Tzvi Zelikovitch (his three children, Esther Zelikovitch, Asher Yogev, and Yosef Yogev) are dismissed with prejudice and that all claims by plaintiff Ze'ev Tibi Ram are dismissed without prejudice; it is further

**ORDERED** that the Motion to Dismiss is **DENIED** in all other respects; and it is further

**ORDERED** that the remaining parties are **DIRECTED** to confer and file, by January 21, 2022, a joint status report proposing a schedule for further proceedings in this case.

**SO ORDERED.**

Date: December 30, 2021

[SEAL] /s/ Beryl A. Howell  
BERYL A. HOWELL  
Chief Judge

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**APPENDIX C**

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

**Civil Action No. 10-cv-1770 (BAH)**

**[Filed December 30, 2021]**

---

ROSALIE SIMON, <i>et al.</i> ,	)
<i>individually, for themselves and</i>	)
<i>for all others similarly situated,</i>	)
	)
Plaintiffs,	)
	)
v.	)
	)
REPUBLIC OF HUNGARY, <i>et al.</i> ,	)
	)
Defendants.	)

---

Chief Judge Beryl A. Howell

**MEMORANDUM OPINION**

The fourteen named plaintiffs in this proposed class action—Rosalie Simon, Helen Herman, Charlotte Weiss, Helena Weksberg, Rose Miller, Tzvi Zelikovitch, Magda Kopolovich Bar-Or, Zehava (Olga) Friedman, Yitzhak Pressburger, Alexander Speiser, Ze’ev Tibi Ram, Vera Deutsch Danos, Ella Feuerstein Schlanger, and Moshe Perel (collectively, “plaintiffs”)—are but a

few survivors among the approximately 825,000 Hungarian Jews who were subjected to the atrocities and horrors of the Holocaust at the hands of the Hungarian government between 1941 and 1945. Second Am. Compl. (“SAC”) ¶¶ 5–9, 14, 22, 28, 39, 41, 49, 65, 73, 81, 131, ECF No. 118.<sup>1</sup> The plaintiffs maintain this suit against the Republic of Hungary (“Hungary”) and the Hungarian national railway, Magyar Államvasutak Zrt. (“MÁV”), (collectively, “defendants”), in search of long-overdue restitution for property that was seized from them as part of Hungary’s broader effort to eradicate the Jewish people. See SAC ¶¶ 173–215.

After a decade-long tour of the federal court system, bouncing up and down the tiers of appellate review, this case is back in this Court for consideration of defendants’ fourth motion to dismiss—like the three before it, for lack of subject matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1), on grounds of sovereign immunity not exempted under the Foreign Sovereign Immunity Act (“FSIA”), 28 U.S.C. § 1602 *et seq.*. The D.C. Circuit twice rejected several bases on which to grant dismissal (both with and without prejudice), but since that time, the Supreme Court has expressly rejected a central pillar of the Circuit’s first *Simon* opinion while vacating the judgment associated with the second *Simon* opinion.

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<sup>1</sup> Mr. Zelikovitch passed away in 2012, after this action was filed, and his three children—Esther Zelikovitch, Asher Yogev, and Yosef Yogev—were substituted in his place as “his sole Heirs at Law.” SAC at 3 n.1. He remains described and discussed as a “named plaintiff” for ease of reference.



Meanwhile, the paper trail in this case grew further still when this Court last year ruled on defendants' third motion to dismiss, appellate review of which opinion was cut short by the Supreme Court's direction to remand everything back here. The task before this Court is first to sort out what the state of the law in this case *is*, given its complex procedural history with intervening changes in case law. Only then can the parties' arguments be examined in the context of the already-crowded slate on which the Court now writes.

The motion to dismiss is granted in part and denied in part. For the reasons explained below, the outcome of this motion varies by plaintiff. Four plaintiffs must be dismissed with prejudice for an incurable lack of subject matter jurisdiction due to sovereign immunity, nine plaintiffs may proceed past this motion to dismiss but may still face jurisdictional hurdles down the line, and one remaining plaintiff is the subject of jurisdictional allegations so ambiguous as to warrant dismissal, though without prejudice to a new attempt.

## I. BACKGROUND

The grim factual background of this eleven-year-old case has been recounted in several prior decisions of this Court and the D.C. Circuit. *See generally Simon v. Republic of Hungary* (“*Simon-2014*”), 37 F. Supp. 3d 381, 385–95 (D.D.C. 2014), *aff'd in part, rev'd in part*, 812 F.3d 127 (D.C. Cir. 2016); *Simon v. Republic of Hungary* (“*Simon I*”), 812 F.3d 127, 132–34 (D.C. Cir. 2016), *abrogated in part by Federal Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021); *Simon v. Republic of Hungary* (“*Simon-2017*”), 277 F. Supp. 3d 42, 47–49 (D.D.C. 2017), *rev'd*, 911 F.3d 1172 (D.C. Cir.

2018); *Simon v. Republic of Hungary* (“*Simon II*”), 911 F.3d 1172, 1175–76 (D.C. Cir. 2018), *vacated per curiam*, 141 S. Ct. 691 (2021); *Simon v. Republic of Hungary* (“*Simon-2020*”), 443 F. Supp. 3d 88, 92–94 (D.D.C. 2020). That background is briefly summarized below, followed by review of the lengthy relevant procedural history.

### A. Factual Background

In 1944, “the Nazis and Hungary, knowing that they had lost [the war], raced to complete their eradication of the Jews before the Axis surrendered.” SAC ¶ 3. As part of their broader plan to eradicate the Jewish people, defendants stripped Hungarian Jews of their possessions, including cash, jewelry, heirlooms, art, valuable collectibles, and gold and silver, loaded them onto trains, and transported them in squalid conditions to concentration camps where they were either murdered or forced to work as slave laborers. *Id.* ¶¶ 12, 17, 20, 23–26, 32–34, 44–48, 52–58, 69–71, 75–76, 81. “In less than two months, . . . over 430,000 Hungarian Jews were deported, mostly to Auschwitz, in 147 trains.” *Id.* ¶ 120; *id.*, Ex. B, ECF No. 118-2 (listing deportation trains in 1944, along with “DATES, ORIGIN OF TRANSPORTS AND NUMBER OF DEPORTEES”). The “vast majority” of the Hungarian Jews sent “to the killing fields and death camps of Nazi Germany-occupied Poland and the Ukraine” died. SAC ¶ 3. “The overall loss of Hungarian Jewry during the Second World War, excluding those who fled abroad, was 564,507.” *Id.* ¶ 131. Hungary “does not dispute that the treatment of Hungarian Jews during the Holocaust was reprehensible.” Hungary’s & MÁV Magyar

Államvasutak Zrt.'s Mem. Supp. Mot. Dismiss Second Am. Class Action Compl. ("Defs.' Mem.") at 19, ECF No. 165-1.

After the armistice agreement ended the hostilities of World War II, SAC ¶ 137, Hungary signed the "Paris Peace Treaty of February 10, 1947" ("1947 Treaty") that incorporated "a number of provisions relating to the restoration of confiscated property," with promises to undertake the restoration of, and make fair compensation for, property, legal rights, or interests confiscated from persons "on account of the racial origin or religion of such persons," *id.* ¶ 138 (citation omitted) (quoting 1947 Treaty art. 27, ¶ 1, 61 Stat. 2065, 2124, 41 U.N.T.S. 135). Article 27 of the 1947 Treaty and related provisions "were not self-executing (they needed appropriate municipal legislation and enforcement to prevail); and they did not provide for sanction in case of non-compliance, other than the implied possible litigation before an international tribunal." *Id.* (quoting 2 RANDOLPH L. BRAHAM, *THE POLITICS OF GENOCIDE: THE HOLOCAUST IN HUNGARY* 1308–09 (rev. ed. 1994)).

Plaintiffs acknowledge that the Hungarian government "implement[ed] an array of legislative enactments and remedial statutes," but Hungarian Jews "saw no tangible results with respect to restitution and indemnification" for their seized property. SAC ¶ 138. Moreover, "[w]ith the Communist party in power in Hungary" after World War II, "the issue of compensation or restitution was squashed," and to the extent the Hungarian government had set aside funds for victims of the Holocaust, "the funds

were rarely used for their intended purpose and they were frequently raided by the Communists for financing their own political projects.” *Id.* ¶¶ 141–42 (quoting 2 BRAHAM, *supra*, at 1309). In 1992, “two years after the downfall of the Communist regime” in Hungary, the Hungarian government adopted at least two laws to provide remedies to Hungarian Jews victimized in the Holocaust: one of these laws “provid[ed] compensation for material losses incurred between May 1, 1939 and June 8, 1949,” and the other “provid[ed] compensation for those who, for political reasons, were illegally deprived of their lives or liberty between March 11, 1939 and October 23, 1989,” but, in plaintiffs’ view, the remedies provided under those programs were “paltry and wholly inadequate.” *Id.* ¶ 143.

In sum, plaintiffs claim never to have been properly compensated for the personal property seized from them by defendants as plaintiffs were being deported. SAC ¶¶ 83–84. Further, plaintiffs allege that defendants “liquidated [this] stolen property, mixed the resulting funds with their general revenues, and devoted the proceeds to funding various governmental and commercial operations.” *Id.* ¶ 97. Thus, plaintiffs claim that the “stolen property or property exchanged for such stolen property is owned and operated by Hungary and MÁV,” some of which property “is present in the United States in connection with commercial activity carried on in the United States by Hungary,” *id.* ¶ 98, including, for example, “fees and payments, offices, furniture, furnishings, bank accounts, artwork, stock and bond certificates, securities held in ‘street name’ and airplanes,” *id.* ¶ 101.

In 2010, sixty-five years after the end of World War II and twenty years after the fall of the Hungarian communist regime, plaintiffs filed the instant action against Hungary and MÁV, seeking, *inter alia*, restitution for the possessions seized from them and their families during the Holocaust, and to certify a class consisting of “all surviving Jewish victims of the Holocaust” and “the heirs . . . and open estates . . . of the deceased Jewish victims of the Holocaust,” where such victims were residents of Hungary at any point between September 1, 1939 and May 8, 1945 and “were stripped of personal property by” defendants. *Id.* ¶ 153; Class Action Compl. (“Compl.”) ¶ 132, ECF No. 1. According to plaintiffs, the putative class consists of at least “5,000 survivors” and “countless heirs and estates” of many of the “approximately 825,000 Jews in Hungary” who were victims of the atrocities committed by defendants. SAC ¶¶ 131, 154.<sup>2</sup>

Plaintiffs’ Second Amended Complaint asserts, in ten counts, common law claims for conversion (Count I), unjust enrichment (Count II), breach of fiduciary and special duties imposed on common carriers

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<sup>2</sup> The parties offer no estimates of potential total damages specific to this case, but as defendants point out, *see* Defs.’ Mem. at 40 n.24, cases of this type have the potential to yield awards so large as to be economically destabilizing. In a suit by Holocaust victims against a Hungarian national bank and MÁV—both instrumentalities of the state—the Seventh Circuit observed, in the course of contemplating dismissal on the grounds of international comity, that “[t]he sum of damages sought by plaintiffs would amount to nearly 40 percent of Hungary’s annual gross domestic product in 2011.” *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 665, 682, 697 (7th Cir. 2012).

(Count III), recklessness and negligence (Counts IV and V), civil conspiracy with Nazi Germany to commit tortious acts (Count VI), aiding and abetting (Count VII), restitution (Count VIII), accounting (Count IX), as well as a demand for a declaratory judgment that plaintiffs and class members are entitled to inspect and copy certain documents in Hungary, and for injunctive relief enjoining defendants from tampering with or destroying such documents (Count X; Prayer For Relief ¶¶ 5–6). *See* SAC ¶¶ 173–215. To satisfy their burden of establishing the requisite subject matter jurisdiction of this Court to hear these claims, plaintiffs contend that defendants are not immune from suit because of the FSIA’s expropriation exception, 28 U.S.C. § 1605(a)(3), SAC ¶¶ 86–92, which exception permits suit in United States courts against a foreign sovereign or its agencies or instrumentalities to vindicate “rights in property taken in violation of international law” when an adequate commercial nexus is present between the United States and a defendant, 28 U.S.C. § 1605(a)(3).

### **B. Procedural Background**

This is the fourth motion to dismiss presented by defendants over the last decade in this case, with the first two motions granted and the third motion denied by this Court, the latter under controlling precedent established in the D.C. Circuit’s reversal of this Court’s grants of the first two motions. As summarized below, the D.C. Circuit has effectively rebuffed every ground previously found to warrant dismissal of this lawsuit, but the Supreme Court’s recent vacatur of *Simon II*

and rejection of a central holding in *Simon I* appropriately prompt yet another examination.

### **1. Simon-2014**

Defendants' first motion to dismiss for lack of subject matter jurisdiction due to sovereign immunity was granted on the basis of the "treaty exception" to the FSIA, under which the FSIA's general grant of immunity and the limitations thereto—including the expropriation exception—are all "[s]ubject to existing international agreements to which the United States [was] a party at the time of enactment of" the FSIA, 28 U.S.C. § 1604. *See Simon-2014*, 37 F. Supp. 3d at 424. In other words, a pre-existing international agreement among sovereign countries supersedes the FSIA's default provisions to the extent the two are in conflict. *See id.* at 408–09. This Court found that the 1947 Treaty was such an agreement and "trigger[ed] the FSIA's treaty exception to deprive this Court of subject matter jurisdiction over the plaintiffs' claims." *Id.* at 407. In particular, the 1947 Treaty addressed Hungary's disposition of "all property" taken from Holocaust victims, *id.* at 415 (quoting 1947 Treaty art. 27(1)), directed how Hungary was to distribute all expropriated property at the end of the war, and provided that "any dispute concerning the interpretation or execution of the treaty" was subject to resolution exclusively through the mechanisms described in the Treaty. *Id.* at 415–16 (quoting 1947 Treaty art. 40(1)). Viewing those treaty provisions as delineating the exclusive legal regime set up to resolve plaintiffs' property claims against Hungary, and thus defining the contours of Hungary's waiver of its

sovereign immunity for claims for property seized during the Holocaust, this Court held that the 1947 Treaty precluded review of plaintiffs' property claims under any FSIA exception. *Id.* at 397, 424, 444.

Other arguments advanced by the parties concerning the parameters of the FSIA's "expropriation exception" or prudential reasons to dismiss the case, such as international comity considerations or the *forum non conveniens* doctrine, were not then necessary to address. See *Simon-2014*, 37 F. Supp. 3d at 407 n.21, 418 n.28.<sup>3</sup> Nevertheless, though not essential to its disposition in *Simon-2014*, this Court highlighted the "serious comity issue," also identified by the Seventh Circuit in *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012), "raised by

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<sup>3</sup> *Simon-2014* also dismissed all claims against a third defendant, Rail Cargo Hungaria Zrt. ("RCH"), for want of personal jurisdiction, finding that RCH, now an Austrian company, lacked sufficient alleged minimum contacts with the United States. 37 F. Supp. 3d at 385, 394, 425. Plaintiffs conceded that specific jurisdiction over RCH was unavailable, *id.* at 426, and this Court rejected plaintiffs' attempts to characterize RCH as sufficiently "at home" in the United States so as to confer general jurisdiction based on RCH's maintenance of a website and the possibility that RCH could have shareholders or affiliates in or with sufficient contacts to the United States, *id.* at 427–29. Separately, the United States had filed a Statement of Interest advocating dismissal of the claims against RCH because of the U.S. government's "strong support for international agreements with Austria involving Holocaust claims against Austrian companies," Statement of Interest of U.S. at 1, ECF No. 42, but expressing no position as to the claims against Hungary and MÁV. Plaintiffs did not challenge RCH's dismissal on appeal, *Simon I*, 812 F.3d at 134, and RCH is not named as a defendant in the currently operative complaint, SAC ¶¶ 83–85.



adjudicating the merits of whether Hungarian efforts to provide restitution to the victims of the Hungarian Holocaust were sufficient.” *Simon-2014*, 37 F. Supp. 3d at 404–05 n.20. Specifically, “[i]f U.S. courts are ready to exercise jurisdiction to right wrongs all over the world, including those of past generations, we should not complain if other countries’ courts decide to do the same.” *Id.* at 405 n.20 (quoting *Abelesz*, 692 F.3d at 682). This Court pointedly raised the specter of “plaintiffs suing in foreign courts to obtain redress for the horrors of slavery inflicted upon millions of African-Americans during the eighteenth and nineteenth centuries in the United States, or for the destruction of property resulting from overseas armed conflicts involving American soldiers since the dawn of the Republic.” *Id.*

## 2. *Simon I*

On appeal, the D.C. Circuit affirmed in part and reversed in part. First, though calling *Simon-2014* “a comprehensive and thoughtful decision,” *Simon I*, 812 F.3d at 137, the Circuit rejected application of the treaty exception, *id.* at 135, finding that the 1947 Treaty set out only a non-exclusive mechanism for plaintiffs and other Hungarian Holocaust victims to obtain compensation, *id.* at 137. Thus, “the FSIA’s treaty exception does not foreclose jurisdiction over the plaintiffs’ claims,” *id.* at 140 (“Article 27 secures one means by which Hungarian victims can seek recovery . . . , but not to the exclusion of other available remedies.”).

The Circuit then considered—in the first instance—whether the expropriation exception provides a basis

for waiver of the sovereign immunity otherwise enjoyed by defendants under “the FSIA’s default rule.” *Simon I*, 812 F.3d at 140.<sup>4</sup> In applying the expropriation exception for the benefit of plaintiffs’ then-operative First Amended Complaint, the D.C. Circuit affirmed dismissal of plaintiffs’ non-property claims, albeit without enumerating precisely which claims it so characterized, “because [such claims] do not come within the FSIA’s expropriation exception,” and no other FSIA exception provided jurisdiction over the claims. *Id.* at 151. By contrast, plaintiffs’ claims that “directly implicate[d]” their property rights were “claims ‘in which rights in property taken in violation of international law’” remained at issue. *Id.* at 140 (quoting 28 U.S.C. § 1605(a)(3)).

Despite recognizing that a sovereign’s expropriation of its own nationals’ property is ordinarily not a violation of international law under the “so-called ‘domestic takings rule,’” *Simon I*, 812 F.3d at 144, the Circuit construed plaintiffs’ claims as not asserting a “basic international-law expropriation claim” to which the domestic takings rule would apply, *id.* at 145. In novel reasoning not presented to this Court for consideration in *Simon-2014*, the Circuit found that “[e]xpropriations undertaken for the purpose of

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<sup>4</sup> The D.C. Circuit explained its interest in opining on issues not resolved by this Court as follows: “While we ordinarily do not decide an issue unaddressed by the district court, the parties have thoroughly briefed and presented the applicability of the expropriation exception and asked us to decide it. We think it appropriate in the circumstances to take up the parties’ invitation and resolve that issue in the first instance.” *Simon I*, 812 F.3d at 140.

bringing about a protected group's physical destruction qualify as genocide." *Id.* at 143.<sup>5</sup> In other words, the Circuit saw "the expropriations *as themselves genocide*," *id.* at 142 (emphasis in original), based on "[t]he legal definition of genocide" set out in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) art. 2, Dec. 9, 1948, 78 U.N.T.S. 277, and other international treaties, *Simon I*, 812 F.3d at 143. *See also id.* at 144 ("[T]he complaint describes takings of property that are *themselves* genocide within the legal definition of the term." (emphasis in original)).<sup>6</sup> The relevant international law violated by defendants' actions was therefore, in the Circuit's view, not that of

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<sup>5</sup> Plaintiffs' briefing before the D.C. Circuit scarcely addressed this reasoning either. While plaintiffs in their *Simon I* reply brief suggested that the domestic takings rule did not apply to the takings at issue here "because such policies were racially discriminatory," Reply Br. Appellants ("*Simon I* Pls.' Reply") at 9, *Simon I*, 812 F.3d 137 (No. 14-7082), and observed in a footnote that "[s]tarting with the Nuremberg Tribunal judgments after World War II, the nationality exception has been held to be unavailable where the subject conduct constitutes a crime against humanity, including genocide and discrimination against a group on racial, ethnic or religious grounds," *id.* at 9 n.6, they did not argue that the expropriations *themselves* amounted to genocide.

<sup>6</sup> Commentators have expressed concerns that the theory of genocidal expropriation articulated in *Simon I* represents a problematic expansion of the expropriation exception's scope. *See Simon-2020*, 443 F. Supp. 3d at 96 n.3 (collecting academic perspectives). Notably, even plaintiffs themselves described the takings at issue as "in furtherance of a comprehensive program of genocide" rather than as genocide in and of themselves. Br. Appellants ("*Simon I* Pls.' Br.") at 28, *Simon I*, 812 F.3d 127 (D.C. Cir. 2016) (No. 14-7082).

expropriations of property but rather that of *genocide*—where “[t]he domestic takings rule has no application.” *Id.* “Genocidal expropriations of the property of a sovereign’s own nationals thus are ‘tak[ings] in violation of international law’ for purposes of the FSIA’s expropriation exception.” *Id.* at 145 (alteration in original) (quoting 28 U.S.C. § 1605(a)(3)).

The Circuit then turned—again in the first instance—to the “commercial-activity nexus requirement[]” of the expropriation exception, which, on a “general level, . . . require[s]: (i) that the defendants possess the expropriated property or proceeds thereof; and (ii) that the defendants participate in some kind of commercial activity in the United States.” *Simon I*, 812 F.3d at 146. Plaintiffs’ allegations that Hungary and MÁV “liquidated the stolen property, mixed the resulting funds with their general revenues, and devoted the proceeds to funding various governmental and commercial operations” were found to “raise a ‘plausible inference[]’ that the defendants retain the [plaintiffs’] property or proceeds thereof” and were found to be sufficient, as a matter of law, to show the requisite commercial-activity nexus and defeat the motion to dismiss. *Id.* at 147 (first alteration in original). While cautioning that plaintiffs ultimately “may or may not be able to prove the point” outside the posture of a motion to dismiss, *id.* (citation omitted), at this procedural juncture, the Circuit held that “[b]ecause defendants make no attempt to argue that the rail company fails to ‘engage[] in a commercial activity in the United States,’ the nexus requirement is satisfied as to MÁV,” *id.* at 147–48 (second alteration in original) (quoting 28 U.S.C. § 1605(a)(3)). With

respect to *Hungary*, however, “the complaint’s allegations about Hungary’s commercial activity fail to demonstrate satisfaction of § 1605(a)(3)’s nexus requirement” because plaintiffs “put forward only [] bare, conclusory assertion[s]” to support their claim, causing the Circuit to affirm this Court’s judgment of dismissal of the claims against Hungary in *Simon-2014*, *id.* at 148, albeit on different grounds.

Although rejecting the use of the treaty exception and holding that plaintiffs’ “property-based claims” could be brought under the expropriation exception, the Circuit affirmed this Court’s dismissal in *Simon-2014* of “plaintiffs’ non-property claims” but for a different reason: “they do not come within the FSIA’s expropriation exception.” *Simon I*, 812 F.3d at 151.<sup>7</sup> Noting that courts “make FSIA immunity determinations on a claim-by-claim basis,” the Circuit stated that the exception “applies only to claims implicating ‘rights *in property*.’” *Id.* at 141 (emphasis in original) (quoting 28 U.S.C. § 1605(a)(3)). “The exception therefore affords no avenue by which to ‘bring claims for personal injury or death’—or any other non-property-based claims.” *Id.* (quoting *Abelesz*,

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<sup>7</sup> In *Simon-2014*, this Court had no occasion to address explicitly the “non-property claims” because of its decision that the treaty exception, as triggered by the 1947 Treaty, preserved sovereign immunity against Hungary and MÁV with respect to all claims. As such, *Simon I*’s partial affirmance is best read as concurring in the judgment of dismissal as to certain claims because, although the treaty exception did not foreclose them, the FSIA’s general grant of immunity as to those claims was not overcome by the expropriation exception, which does not cover “non-property claims.”

692 F.3d at 697). It thus “affirm[ed] the district court’s determination that it lacked jurisdiction over those claims,” *id.*, but left for this Court on remand to “determine precisely which of the plaintiffs’ claims” those were, *id.* at 142.<sup>8</sup>

Finally, despite reversing *Simon-2014*, the Circuit did not foreclose the possibility that dismissal of the property-based claims in the suit was the appropriate result and expressly “[le]ft it to the district court to consider on remand” such questions as “whether, as a matter of international comity, the court should decline to exercise jurisdiction unless and until the plaintiffs exhaust available Hungarian remedies,” *Simon I*, 812 F.3d at 149, and “any other arguments that [the district court] has yet to reach and that are unaddressed [by the Circuit], such as the defendants’ *forum non conveniens* arguments,” *id.* at 151. The question of an exhaustion requirement predicated on international comity was not before the Circuit in *Simon I*, but the Circuit *sua sponte* introduced this potential defense to plaintiffs’ claims as a hypothetical argument defendants “could”—but did not—assert. *Id.* at 149. In introducing that possible ground for dismissal for the district court to consider “should the defendants assert it,” the Circuit highlighted that the Seventh Circuit had found a comity-based “prudential

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<sup>8</sup> The question of which claims were property-related claims was next visited in *Simon-2020*. By that time, the Second Amended Complaint had winnowed down the set of claims somewhat, such that this Court could readily conclude that the then-pressed claims all unambiguously implicated property rights. *See Simon-2020*, 443 F. Supp. 3d at 100–01.

argument to be persuasive in closely similar circumstances.” *Id.* (citing *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847, 859–66 (7th Cir. 2015)).<sup>9</sup>

### 3. Simon-2017

On remand, plaintiffs addressed the Circuit’s critique of the complaint’s spare, if any, allegations of Hungary’s commercial activity nexus to the United States and, with defendants’ consent, *see* Joint Stipulation & Proposed Scheduling Order, ECF No. 117, “amended their complaint to allege specific facts regarding Hungary’s ongoing commercial activity in the United States, including, among other things, . . . ‘[t]he acquisition by Hungary of military equipment,’ Hungary’s use of the United States’ capital and debt markets to secure financing, and Hungary’s acceptance of federal grants and loans from the United States.” *Simon II*, 911 F.3d at 1179 (alteration in original) (quoting SAC ¶ 101). Defendants then moved to dismiss the Second Amended Complaint, which motion this Court granted as to both defendants, Hungary and MÁV. *See Simon-2017*, 277 F. Supp. 3d 42. As expressly invited by the Circuit in *Simon I*, 812 F.3d at 149, 151, this Court examined the motion through the lens of international comity considerations and the *forum non conveniens* doctrine, concluding that “the prudential exhaustion and *forum non conveniens* doctrines both provide a compelling basis for ‘declin[ing] to exercise jurisdiction.’” *Simon-2017*, 277

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<sup>9</sup> Neither the United States nor any other amici participated in *Simon I*.

F. Supp. 3d at 53 (alteration in original) (quoting *Simon I*, 812 F.3d at 149).<sup>10</sup>

With respect to prudential exhaustion, this Court endorsed the principle, articulated by the Seventh Circuit in *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012)—a case the D.C. Circuit had cited with approval in *Simon I* at various points in its analysis—and *Fischer v. Magyar Államvasutak Zrt*, 777 F.3d 847 (7th Cir. 2015), that when plaintiffs allege “a taking in violation of international law where international law favors giving a state accused of taking property in violation of international law an opportunity to redress it by its own means, within the framework of its own legal system,” *Simon-2017*, 277 F. Supp. 3d at 53 (quotation marks and citation omitted), “principles of international comity make clear that these plaintiffs must attempt to exhaust domestic remedies,’ except where those remedies are ‘futile or imaginary,’” *id.* at 54 (quoting *Fischer*, 777 F.3d at 852, 858). “The prudential exhaustion doctrine recognizes the risks of unnecessarily infringing on the sovereignty of a foreign nation while also guaranteeing that the plaintiffs are afforded an adequate forum for their claims,” this Court wrote, because dismissal on international comity grounds would be without prejudice and United States courts could revisit the matter “[i]f plaintiffs find that future attempts to pursue remedies in Hungary are frustrated

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<sup>10</sup> The grant of dismissal in *Simon-2017* was solely prudential in character and expressly was *not* predicated on sovereign immunity. 277 F. Supp. 3d at 52 n.6.



unreasonably or arbitrarily.” *Id.* at 56 (quoting *Fischer*, 777 F.3d at 852).

Applying the *Fischer* inquiry to this case, this Court found that international comity considerations here militated in favor of requiring plaintiffs to exhaust Hungarian remedies, Hungarian fora offered an adequate alternative, and plaintiffs’ pursuit of their claims in Hungary would not be futile. *Simon-2017*, 277 F. Supp. 3d at 53–62. Accordingly, following the same steps taken by the Seventh Circuit in *Fischer*, which also had Hungarian agency defendants, this Court concluded that “this lawsuit must be dismissed, without prejudice, on the ground of prudential exhaustion.” *Id.* at 62.

The related *forum non conveniens* analysis also provided an “alternative prudential basis for dismissal.” *Simon-2017*, 277 F. Supp. 3d at 62. As a threshold matter, the finding that pursuing claims in a Hungarian forum would not be futile “satisfie[d] the first prong of the test for application of the *forum non conveniens* doctrine,” namely “that Hungary is both an available and adequate alternative forum.” *Id.* at 63. The Court then proceeded through the analysis of the well-established factors governing *forum non conveniens* decisions.

First, while recognizing that plaintiffs’ choice of forum is due “substantial deference,” the Court reminded that the deference to be accorded that choice “is lessened when the plaintiff’s ties to the forum are attenuated.” *Simon-2017*, 277 F. Supp. 3d at 63 (citing *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602, 605 (D.C. Cir. 1983)). Observing

that only a minority of the named plaintiffs reside in, and are citizens of, the United States; that “none of the underlying facts in [the] case relate to the United States”; that international travel would be required for plaintiffs regardless of venue; and that it is disfavored to require sovereign defendants “to defend themselves in the courts of another sovereign against claims brought by plaintiffs from all over the globe,” the Court concluded that “[i]n these circumstances, the plaintiffs’ choice of forum is entitled to minimal deference.” *Id.* at 63-64 (citing other cases where similar circumstances had “overcome the presumption” attached to plaintiffs’ choice of forum: *Fischer*, 777 F.3d at 871, and *Moscovits v. Magyar Cukor Rt.*, 34 F. App’x 24, 26 (2d Cir. 2002)).

With respect to the private interest factors, the likely location of relevant records, the Hungarian language thereof, the location of witnesses, and the availability of jurisdiction over dismissed defendant RCH all “weigh strongly in favor of dismissing this lawsuit.” *Simon-2017*, 277 F. Supp. 3d at 64–65. As to the public interest factors, Hungary “has an interest in every part of the litigation, and has a moral interest, if not obligation, to hear the plaintiffs’ claims and provide them appropriate relief.” *Id.* at 66. Furthermore, Hungarian law would likely apply. *Id.* at 66–67. Finally, the Court recognized the substantial administrative burden that would be borne by any court hearing this case, which “is not a typical, garden variety lawsuit,” but observed that “[t]hose burdens would be somewhat lessened on the Hungarian courts, based on Hungary’s status as the location where all of the conduct giving rise to this litigation occurred, with familiarity with the language and proximity to

archived documents and available witnesses.” *Id.* at 67 (citation omitted). In sum, the public and private interest factors “weigh[ed] uniformly and heavily in favor of Hungary as the more appropriate forum for this lawsuit,” warranting dismissal under the *forum non conveniens* doctrine. *Id.*

#### 4. Simon II

Over a year later, a divided panel of the D.C. Circuit reversed and remanded *Simon-2017*. *Simon II*, 911 F.3d at 1190.<sup>11</sup>

Before issuing its decision and immediately after oral argument in *Simon II*, the Circuit invited the United States to opine on the prudential bases for dismissal implicated in the case. *See Order, Simon II*, No. 17-7146 (Apr. 20, 2018) (per curiam). In response, the government posited that both the international comity and *forum non conveniens* doctrines “can properly be applied in appropriate circumstances to dismiss claims brought under the expropriation exception to immunity in the [FSIA],” but declined to “take a position on the specific application of those doctrines to the facts of this case.” Br. Amicus Curiae U.S. (“*Simon II* U.S. Br.”) at 1, *Simon II*, 911 F.3d 1172 (No. 17-7146).<sup>12</sup> The government rejected the notion

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<sup>11</sup> The Circuit rejected, however, plaintiffs’ request to reassign the case on remand, noting that the standard for reassignment had “not remotely been met” and that there was “no evidence that” the undersigned “acted with anything but impartiality in this case.” *Simon II*, 911 F.3d at 1190.

<sup>12</sup> The government critiqued this Court’s invocation of prudential exhaustion grounds for dismissal in *Simon-2017* not because it

that federal courts have an obligation to hear cases “in circumstances where, for example, such litigation would be at odds with the foreign policy interests of the United States and the sovereign interests of a foreign government.” *Id.* at 12; *see also id.* at 18 (“[T]he fact a district court has jurisdiction under the FSIA’s expropriation exception does not foreclose dismissal on the grounds of international comity. . . . Nothing in the text or history of the FSIA suggests that it was intended to foreclose application of [that] doctrine[], or to require a court to exercise jurisdiction in every case.”).

Plainly not persuaded by the government’s position, the *Simon II* panel flatly rejected the prudential exhaustion approach adopted by the Seventh Circuit

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believed that analysis to be erroneous, but rather because in its view “significant questions as to the court’s subject matter jurisdiction” worthy of resolution were presented—even after *Simon I*—before turning to prudential bases for dismissal. *Simon II* U.S. Br. at 13–14. Echoing concerns from the academy, *see supra* note 6, the government took issue with *Simon I*’s holding that plaintiffs’ allegations “that the Hungarian defendants liquidated the stolen property, mixed the resulting funds with their general revenues, and devoted the proceeds to funding various governmental and commercial operations . . . suffice to raise a ‘plausible inference[]’ that the defendants retain the property or proceeds thereof,” 812 F.3d at 147 (alteration in original), and expressed reservations about satisfaction of the commercial nexus requirement for the expropriation exception, noting that “deeming allegations that the Republic of Hungary seized and liquidated property abroad and commingled it with general revenues in its treasury abroad many decades ago to be sufficient to treat any state-owned property in the United States as ‘exchanged’ for expropriated property would expand the expropriation exception far beyond its intended limits.” *Simon II* U.S. Br. at 23.

and highlighted positively by a different D.C. Circuit panel in *Simon I*. See *Simon I*, 812 F.3d at 149 (citing *Fischer*, 777 F.3d at 859–66).<sup>13</sup> *Simon II* held that principles of international comity, as contemplated by the “prudential exhaustion” analysis in *Simon-2017*, should not afford an “extra-textual, case-by-case judicial reinstatement of immunity that Congress expressly withdrew” through the FSIA’s “‘comprehensive’ standards governing ‘every civil action.’” *Simon II*, 911 F.3d at 1180–81 (quoting *Philipp v. Federal Republic of Germany*, 894 F.3d 406, 415 (D.C. Cir. 2018), *vacated*, 141 S. Ct. 703 (2021)). The Circuit observed that the “prudential exhaustion” theory differed from “exhaustion” in the traditional sense because “the Survivors’ right to subsequent judicial review here of the Hungarian forum’s decision” could be jeopardized “by operation of *res judicata*” and, as such, use of the theory “in actuality amount[s] to a judicial grant of immunity from jurisdiction in United States courts.” *Id.* at 1180. Leaning on its then-recent holding in *Philipp v. Federal Republic of Germany*—which post-dated this Court’s opinion in *Simon-2017* but has since been vacated by the Supreme Court—that “nothing in the FSIA or federal law empowers the courts to grant a foreign sovereign an immunity from suit that Congress, in the FSIA, has withheld,” *id.* at 1180 (citing *Philipp*, 894 F.3d at 414–15), the Circuit held, “courts are duty bound to enforce the standards outlined in the [FSIA]’s text” and may not decline to exercise jurisdiction on prudential

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<sup>13</sup> The composition of the D.C. Circuit panels deciding *Simon I* (Judges Henderson, Srinivasan, and Wilkins) and *Simon II* (Judges Millett, Pillard, and, dissenting, Katsas) did not overlap.

exhaustion or international comity grounds, *id.* at 1181.

The Circuit also held that while “the ancient doctrine of *forum non conveniens* is not displaced by the FSIA,” *Simon II*, 911 F.3d at 1181, the doctrine did not warrant dismissal here because defendants had failed to meet their “heavy burden of persuasion” in establishing Hungary as a preferred forum over the United States forum chosen by plaintiffs, *id.* at 1183. Citing “a number of legal errors” in *Simon-2017* that, in its view, “so materially distorted [*Simon-2017*’s] analysis as to amount to a clear abuse of discretion,” *Simon II*, 911 F.3d at 1182, the majority panel found that: (1) *Simon-2017* “set the scales wrong from the outset” by “affording the Survivors’ choice of forum only ‘minimal deference,’” *id.* at 1183 (quoting *Simon-2017*, 277 F. Supp. 3d at 63); (2) *Simon-2017*’s determination of the adequacy of the Hungarian forum, borrowed from the prudential exhaustion analysis, improperly shifted the burden of proof from defendants to plaintiffs and thus “never analyzed the critical question of the availability and adequacy of the Hungarian forum,” *id.* at 1184–85; and (3) “[t]he consequences of the district court’s burden-allocation errors snowballed” in the balancing of the public and private interests across the two forum options such that the factors did not “*strongly favor*[] dismissal,” *id.* at 1185 (emphasis and alteration in original) (quoting *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 950 (D.C. Cir. 2008)), “mak[ing] this among ‘the rare case[s]’ in which a district court’s balancing of factors amounts to an abuse of discretion,” *id.* (second

alteration in original) (quoting *Morley v. CIA*, 894 F.3d 389, 391 (D.C. Cir. 2018) (per curiam)).

Writing in a clear-eyed dissent, Judge Katsas dissected the “mistaken argument” by the panel majority underlying its finding of a purported “snowball” of errors, *Simon II*, 911 F.3d at 1193 (Katsas, J., dissenting), to conclude that *Simon-2017*’s *forum non conveniens* determination that this case “should be litigated in Hungary” was appropriate in “this foreign-cubed case—involving wrongs committed by Hungarians against Hungarians in Hungary,” *id.* at 1190. *Simon-2017*, according to Judge Katsas, “correctly stated the governing law and reasonably weighed the competing considerations in this case.” *Id.* at 1195. First, the *Simon-2017* description of plaintiff’s choice of an American forum as deserving “minimal deference” was best read as a “considered conclusion that the ‘defendants had overcome the presumption’” of such deference, *id.* at 1191 (quoting *Simon-2017*, 277 F. Supp. 3d at 63, 64), rather than as a “threshold legal error of ‘set[ting] the scales wrong from the outset,’” *id.* (quoting *Simon II*, 911 F.3d at 1183 (majority opinion) (alteration in original)). Second, *Simon-2017* did not improperly shift the burden of demonstrating adequacy of the Hungarian forum to plaintiffs because *Simon-2017* “assessed futility as a matter of law, based on undisputed assertions in both [parties’] affidavits.” *Simon II*, 911 F.3d at 1192 (Katsas, J., dissenting). Finally, Judge Katsas found this Court’s assessment of the private and public interest factors to be reasonable at every step. *See id.* at 1193–95. Notably, in discussing the interest of the United States in ensuring compensation to Holocaust victims, Judge Katsas

highlighted the government’s position that this interest is best advanced “by encouraging parties ‘to resolve matters of Holocaust-era restitution and compensation through dialogue, negotiation, and cooperation,’ not by sweeping foreign-centered cases into United States courts.” *Id.* at 1195 (quoting *Simon II* U.S. Br. at 10).

### **5. Simon-2020**

On remand again from the Circuit, defendants filed a third motion to dismiss, which this Court denied on March 11, 2020. *Simon-2020*, 443 F. Supp. 3d 88. With multiple overarching grounds for dismissal having been rejected by the Circuit in *Simon I* and *Simon II*, which also created binding law of the case, *Simon-2020* addressed two comparatively narrow questions relating to the requirements for invoking the expropriation exception to the FSIA: first, “which of the plaintiffs’ claims place rights in property in issue”; and second, whether “one of two commercial-activity nexuses with the United States [are] satisfied” as to each of the two defendants. 443 F. Supp. 3d at 99–100 (citation omitted). With respect to the first question, “no party addressed whether each claim directly implicates a property interest, which amounts to an obvious concession by the defendants,” *id.* at 100, and, in any event, each of the claims in the Second Amended Complaint expressly invoked references to property, *id.* at 100–01. As to the second question, *Simon-2020* noted that “the commercial-nexus analysis differs for Hungary and for MÁV,” *id.* at 101 (citing *de Csepel v. Republic of Hungary*, 859 F.3d 1094, 1106–07 (D.C. Cir.



2017)), and as such proceeded to evaluate each defendant separately, *id.* at 102.<sup>14</sup>

With respect to Hungary, the Court first found that the Second Amended Complaint presented allegations of Hungary's possession and use of commingled proceeds from the sale of expropriated property, sufficient to "raise a plausible inference that" Hungary possesses such property, and that Hungary failed to defeat that inference. *Simon-2020*, 443 F. Supp. 3d at 103–05.<sup>15</sup> The Court then credited the sufficiency of plaintiffs' allegations that Hungary engages in commercial activity in the United States by, *inter alia*, issuing certain SEC-regulated bonds and purchasing military equipment. *Id.* at 106–11.

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<sup>14</sup> The FSIA expropriation exception may apply to a foreign state defendant only when the property in issue "or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(3). In contrast, for an "agency or instrumentality of [a] foreign state," the exception requires that the property in issue "or any property exchanged for such property is owned or operated by [the] agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." *Id.*

<sup>15</sup> According to the D.C. Circuit in *Simon I*, to defeat the inference of possession by way of commingled proceeds of liquidation, a defendant bears the burden of "affirmatively showing that the property was otherwise disposed of and not retained," *Simon-2020*, 443 F. Supp. 3d at 105 (citing *Simon I*, 812 F.3d at 147), which as a practical matter becomes all the more onerous a burden given the passage of decades, compounded by regime and records management changes in Hungary.

As to MÁV, *Simon-2020* invoked the D.C. Circuit’s “firm finding” in *Simon I* that MÁV satisfied the commercial nexus requirement “based on the allegation that MÁV maintains an agency for selling tickets, booking reservations, and conducting similar business in the United States.” *Simon-2020*, 443 F. Supp. 3d at 111 (quoting *Simon I*, 812 F.3d at 147) (internal quotation marks omitted). Under the law of the case doctrine, in the D.C. Circuit, this prior holding “may be revisited only if there is an intervening change in the law or if the previous decision was ‘clearly erroneous and would work a manifest injustice.’” *Id.* (quoting *Kimberlin v. Quinlan*, 199 F.3d 496, 500 (D.C. Cir. 1999)). No relevant intervening change in law had taken place in the time between *Simon I* and *Simon-2020*. *Id.* at 112. In a detailed exposition examining the relationship between MÁV and its subsidiary MÁV-START, the latter of which engaged in commercial activity by selling passenger rail tickets in the United States, the Court concluded that no new facts or arguments were “persuasive, let alone sufficient to show that the Circuit’s prior finding as to MÁV’s commercial nexus should be set aside as clearly erroneous or manifestly unjust.” *Id.* at 112–16.

Finding that all elements of the FSIA’s expropriation exception were satisfied as to both Hungary and MÁV, this Court denied defendants’ motion to dismiss. *See Simon-2020*, 443 F. Supp. 3d at 116. Defendants appealed to the D.C. Circuit, but without appellate consideration of the merits of that appeal, the case was remanded to this Court, without further direction, in light of subsequent Supreme Court developments, discussed next. *See Order, Simon v.*

*Republic of Hungary*, No. 20-7025 (D.C. Cir. Apr. 28, 2021) (per curiam).

### ***6. Defendants' Petition for Certiorari***

With briefing underway on defendants' third motion to dismiss before this Court (ultimately resolving in *Simon-2020*), on May 16, 2019, defendants petitioned the Supreme Court for review of *Simon II* as to: (1) whether a district court may abstain from hearing an FSIA case for international comity reasons, and (2) the degree of deference due plaintiffs' choice of forum and comity considerations when a court performs a *forum non conveniens* analysis. Pet. Cert. at i, *Republic of Hungary v. Simon*, 141 S. Ct. 691 (2021) (No. 18-1447).<sup>16</sup>

In a separate but similar case involving the allegedly forced sale of a “collection of medieval reliquaries” by German Jews to a Nazi-controlled state entity, defendants including the Federal Republic of Germany (“Germany”) petitioned for review of a D.C. Circuit decision affirming the denial of the defendants' motion to dismiss under the FSIA. Germany presented two questions: (1) whether the domestic takings rule applies to the FSIA expropriation exception when plaintiffs allege that the foreign sovereign “violated

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<sup>16</sup> In response to an inquiry from this Court, see Min. Order (Jan. 6, 2020), the parties disagreed as to whether proceedings in the district court—specifically, the resolution of the third motion to dismiss—should be stayed on account of the pending petition for certiorari, see Joint Status Report, ECF No. 153; Suppl. Joint Status Report, ECF No. 154, and this Court therefore proceeded to issue *Simon-2020*. See *Simon-2020*, 443 F. Supp. 3d at 98 n

international human-rights law when taking property from its own national[s] within its own borders”; and (2) whether or not the doctrine of international comity applies in FSIA cases. *See* Pet. Cert. at i, 6–7, *Federal Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021) (No. 19-351).

Responding to calls by the Supreme Court for the views of the Solicitor General, the United States argued that the international comity question, presented in both cases, warranted review because, in its view, the D.C. Circuit’s erroneous opinions in *Simon II* and *Philipp* created a split between circuits and jeopardized the United States’ “important foreign-policy interests,” which “may be particularly sensitive where the claims allege serious human rights abuses on the part of a foreign state.” U.S. Cert. Br. at 19–22, *Philipp*, 141 S. Ct. 703 (No. 19-351). Further, the government urged review of the domestic takings rule question raised in *Philipp*, arguing that the rule created by the D.C. Circuit in *Simon I*—in which the government did not participate—was “flawed” and also has “significant foreign policy implications.” *See id.* at 7–8, 14.

On July 2, 2020, the Supreme Court granted certiorari to review *Simon II* with respect to only the first question presented—international comity-based abstention. *Republic of Hungary v. Simon*, 141 S. Ct. 187 (2020). On the same day, the Court granted certiorari without limitation in *Philipp*, 141 S. Ct. 185 (2020), as to both the international comity question and the domestic takings rule question. The latter question directly implicated the D.C. Circuit’s holding in

*Simon I*—on which defendants had not sought certiorari—that the domestic takings rule does not limit the reach of the FSIA’s expropriation exception when the takings at issue are “*themselves* genocide,” 812 F.3d at 144 (emphasis in original).

In merits briefing, the United States continued to argue against the D.C. Circuit’s decisions in *Simon II* and *Philipp*. See generally U.S. Br. (“*Philipp* Sup. Ct. U.S. Br.”), *Philipp*, 141 S. Ct. 703 (No. 19-351); U.S. Br. (“*Simon* Sup. Ct. U.S. Br.”), *Simon*, 141 S. Ct. 691 (No. 18-1447). In addition to pressing its doctrinal arguments, as relevant here, the government suggested two policy reasons militating in favor of allowing courts to abstain from hearing cases on the basis of international comity. First, “comity-based abstention aids in the United States’ efforts to persuade foreign partners to establish appropriate redress and compensation mechanisms for human-rights violations, including for the horrendous human-rights violations perpetrated during the Holocaust.” *Simon* Sup. Ct. U.S. Br. at 26. Second, the government argued that the D.C. Circuit’s expansive view of the expropriation exception (as articulated in *Simon I* and again in *Philipp*) endangers the government’s “reciprocal self-interest.” *Philipp* Sup. Ct. U.S. Br. at 29. “Because ‘some foreign states base their sovereign immunity decisions on reciprocity,’ it is generally in the United States’ interest to avoid adopting broad exceptions to foreign sovereign immunity that are inconsistent with the immunity protections that would be afforded under principles of international law generally accepted by other nations.” *Id.* (citations omitted).

### **7. *Supreme Court's Decision in Federal Republic of Germany v. Philipp***

The Supreme Court issued its opinion in *Federal Republic of Germany v. Philipp* on February 3, 2021. 141 S. Ct. 703. The bulk of the Court's opinion was devoted to the first question presented in the *Philipp* petition, namely, "whether a country's alleged taking of property from its own nationals falls within" the FSIA expropriation exception. *Id.* at 707–08. In *Philipp*, plaintiffs asserted that Hitler deputy Hermann Goering "employed a combination of political persecution and physical threats to coerce" German Jewish art dealers to sell a collection of relics to Prussia, of which Goering was Prime Minister, well under their actual value. *Id.* at 708. Echoing the D.C. Circuit's novel conclusion in *Simon I*, the plaintiffs argued to the Supreme Court that this purchase was *itself* an act of genocide. *Id.* at 709. Indeed, citing *Simon I*, the Circuit panel in *Philipp* had determined that "the [expropriation] exception for property taken in violation of international law was satisfied because 'genocide perpetrated by a state even against its own nationals is a violation of international law.'" *Philipp*, 141 S. Ct. at 709 (quoting *Philipp*, 894 F.3d at 410–11 (quoting *Simon I*, 812 F.3d at 145)). In other words, plaintiffs contended that the domestic takings rule did not apply to such a genocidal taking of property.

A unanimous Supreme Court disagreed. The Court first traced the historical origins of the domestic takings rule, starting with the premise that "a sovereign's taking of a foreigner's property, like any injury of a foreign national, implicate[s] the

international legal system because it ‘constituted an injury to the state of the alien’s nationality.’” *Philipp*, 141 S. Ct. at 710 (citation omitted). “The domestic takings rule endured even as international law increasingly came to be seen as constraining how states interacted not just with other states but also with individuals, including their own citizens.” *Id.* The result was a judicial “consensus that the expropriation exception’s reference to ‘violation of international law’ does not cover expropriations of property belonging to a country’s own nationals.” *Id.* at 711 (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 713 (2004) (Breyer, J., concurring)) (quotation marks omitted).

While acknowledging plaintiffs’ argument that “the forced sale of their ancestors’ art constituted an act of genocide because the confiscation of property was one of the conditions the Third Reich inflicted on the Jewish population to bring about their destruction,” the Court found it unnecessary to “decide whether the sale of the [German Jews’] property was an act of genocide, because the expropriation exception is best read as referencing the international law of expropriation rather than of human rights.” *Philipp*, 141 S. Ct. at 711–12. The international law of expropriation at the time of the FSIA’s enactment in 1976, the Court continued, clearly “retained the domestic takings rule.” *Id.* at 712. Furthermore, the text of the expropriation exception “places repeated emphasis on property and property-related rights,” an odd drafting choice if the exception were meant to “provide relief for atrocities such as the Holocaust.” *Id.* Viewing the FSIA as a whole, the Court observed that plaintiffs’ position would upend the FSIA’s carefully cabined grants of

jurisdiction related to human rights violations by “transforming the expropriation exception into an all-purpose jurisdictional hook for adjudicating human rights violations.” *Id.* at 713–14.

While not addressing international comity per se, the Court observed the importance of construing the FSIA “to avoid, where possible, ‘producing friction in our relations with [other] nations and leading some to reciprocate by granting their courts permission to embroil the United States in expensive and difficult litigation.’” *Philipp*, 141 S. Ct. at 714 (alteration in original) (quoting *Bolivarian Republic of Venezuela v. Helmerich & Payne Int’l Drilling Co.*, 137 S. Ct. 1312, 1322 (2017)). Indeed, the Court raised the specter of reciprocal consequences of allowing U.S. courts to hear claims of this type, implying that a foreign state subjected to such jurisdiction may well open its own courts as a forum to “adjudicate[] claims by Americans” to large sums “because of human rights violations committed by the United States Government years ago.” *Id.*

By holding that the FSIA expropriation exception “incorporates the domestic takings rule” and vacating the Circuit’s opinion accordingly, the Court did not need to reach the issue of abstention based on international comity. *Philipp*, 141 S. Ct. at 715.<sup>17</sup> The

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<sup>17</sup> The *Philipp* Court also did not reach “an alternative argument” that the sale “is not subject to the domestic takings rule because the consortium members were not German nationals at the time of the transaction.” 141 S. Ct. at 715. On remand, the district court was to be directed to “consider this argument, including whether it was adequately preserved.” *Id.* at 716.



Supreme Court vacated the D.C. Circuit's judgment in *Philipp* and remanded for further proceedings. *Id.* at 716.

### **8. Vacatur of Simon II and Remand**

Concurrently with the opinion in *Philipp*, the Supreme Court issued a brief order vacating the judgment of the D.C. Circuit in *Simon II* and “remand[ing] for further proceedings consistent with the decision in [*Philipp*].” *Simon*, 141 S. Ct. 691.

Following the rulings in *Philipp* and *Simon*, both parties separately filed a Motion to Govern Further Proceedings in the D.C. Circuit docket for the appeal of *Simon-2020*. Defs.’ Mot. Govern Further Proceedings (“Defs.’ Post-*Philipp* Mot.”), *Simon v. Republic of Hungary*, No. 20-7025 (D.C. Cir. Mar. 4, 2021); Mot. Appellees Govern Further Proceedings (“Pls.’ Post-*Philipp* Mot.”), *Simon*, No. 20-7025 (Mar. 5, 2021). Defendants urged the Circuit to remand to this Court with instructions to dismiss for lack of subject matter jurisdiction, in light of *Philipp*, Defs.’ Post-*Philipp* Mot. at 1, and to vacate *Simon-2020* as moot, *id.* at 4. Plaintiffs, for their part, urged the Circuit to stay the *Simon-2020* appeal while the *Simon II* panel addressed the case on remand from the Supreme Court. Pls.’ Post-*Philipp* Mot. at 2. In plaintiffs’ view, the outstanding issue in *Simon II* was at that point whether some plaintiffs escape the umbrella of the domestic takings rule on account of not having been Hungarian nationals at the time of the takings. *See id.* at 4–5. Plaintiffs also responded to defendants’ proposal with a cross-motion for *affirmance* of *Simon II*, arguing that *Simon II*’s international comity and *forum non*

*conveniens* analyses were undisturbed by the Supreme Court. Pls.’ Cross-Mot. Affirmance at 3, *Simon*, No. 20-7025 (Mar. 15, 2021).

Apparently declining plaintiffs’ invitation to reconfirm its holdings on international comity and *forum non conveniens*—at least at this procedural juncture—the next day the Circuit remanded the appeal of *Simon-2017* to this Court without further comment or direction beyond “further proceedings consistent with [*Philipp*]” and without discussing the extent, if any, to which its holdings in now-vacated *Simon II* remained the law of the case or this Circuit. *Simon v. Republic of Hungary*, 839 F. App’x 570 (D.C. Cir. 2021). Later, the Circuit also remanded the appeal of *Simon-2020* to this Court, again without further instructions. Order, *Simon*, No. 20-7025 (Apr. 28, 2021) (per curiam).

In *Philipp*, the Supreme Court did not resolve the international comity question on which certiorari had been granted in both *Philipp* and *Simon II*. Since *Simon II* did not itself concern the domestic takings rule issue on which *Philipp* was decided, the end result is that while the *Simon II* judgment was vacated, the apparent reason for that vacatur was not express disapproval of any determination in the *Simon II* opinion but rather the Supreme Court’s holding effectively overturning *Simon I* with respect to the domestic takings rule. As such, neither the Supreme Court nor the Circuit have provided any guidance as to the current legal effect of the panel majority’s opinion in *Simon II*—and, as discussed *infra* in Part III.D, the parties disagree on whether this Court continues to be

bound by *Simon II* or holdings in *Simon I* not addressed in *Philipp*, such as the unavailability of the treaty exception.

### **9. Fourth Motion to Dismiss**

Upon receipt of the mandate from the D.C. Circuit, this Court directed the parties to propose a schedule for further proceedings. *See* Min. Order (Mar. 19, 2021). The parties responded with, and the Court adopted, a proposed briefing schedule for a renewed motion to dismiss. Joint Status Report, ECF No. 164; Min. Order (Apr. 1, 2021).

Defendants filed the pending motion to dismiss on April 23, 2021, *see* Hungary's & MÁV Magyar Államvasutak Zrt.'s Mot. Dismiss Second Am. Class Action Compl. ("Defs.' Mot."), ECF No. 165, for which the briefing was completed on June 21, 2021, when defendants filed a sur-sur-reply in support of their motion to dismiss, *see* Hungary's & MÁV Magyar Államvasutak Zrt.'s Sur-Sur-Reply Mem. Further Supp. Mot. Dismiss Second Am. Class Action Compl., ECF No. 172. Additionally, plaintiffs filed a notice of supplemental authority on July 28, 2021. Pls.' Notice Suppl. Authority ("Pls.' Notice"), ECF No. 173. This fourth motion to dismiss is now ripe for resolution.

## **II. LEGAL STANDARD**

"Federal courts are courts of limited jurisdiction," *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)), and "have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto,"

*Johnson v. Comm'n on Presidential Debates*, 869 F.3d 976, 980 (D.C. Cir. 2017) (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)). To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), the plaintiff thus generally “bears the burden of invoking the court’s subject matter jurisdiction.” *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)).

When a jurisdictional skirmish “present[s] a dispute over the factual basis of the court’s subject matter jurisdiction,” the court “must go beyond the pleadings and resolve” any dispute necessary to the disposition of the motion to dismiss. *Feldman v. FDIC*, 879 F.3d 347, 351 (D.C. Cir. 2018) (quoting *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000)). In such situations, the “court may properly consider allegations in the complaint and evidentiary material in the record,” affording the plaintiff “the benefit of all reasonable inferences.” *Id.*; see also *Am. Freedom L. Ctr. v. Obama*, 821 F.3d 44, 49 (D.C. Cir. 2016) (“In considering a motion to dismiss for lack of subject matter jurisdiction, . . . we ‘may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction.’” (quoting *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005))). Absent “evidentiary offering[s],” *Feldman*, 879 F.3d at 351, however, courts must seek jurisdictional assurance by accepting as true all undisputed “factual allegations in the complaint and constru[ing] the complaint liberally,” and again “granting plaintiff the benefit of all inferences that can be derived from the facts alleged.” *Am. Nat’l Ins. Co. v.*

*FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (internal quotation marks and citation omitted).

The FSIA is a “comprehensive statute containing a ‘set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.’” *Altmann*, 541 U.S. at 691 (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983)). The FSIA “provides, with specified exceptions, that a ‘foreign state shall be immune from the jurisdiction of the courts of the United States.’” *Helmerich & Payne*, 137 S. Ct. at 1316 (quoting 28 U.S.C. § 1604). Under the FSIA’s expropriation exception, 28 U.S.C. § 1605(a)(3), however, “United States courts may exercise jurisdiction over a foreign sovereign in any case ‘in which 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 a 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.’” *Philipp*, 141 S. Ct. at 712 (quoting 28 U.S.C. § 1605(a)(3)); *see also Helmerich & Payne*, 137 S. Ct. at 1316.

Notwithstanding the general burden borne by any plaintiff to establish the subject matter jurisdiction of the chosen court, when a plaintiff invokes the FSIA’s expropriation exception as the basis for jurisdiction, “the defendant state ‘bears the burden of proving that

the plaintiff's allegations do not bring its case within a statutory exception to immunity.” *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 794 F.3d 99, 102 (D.C. Cir. 2015) (quoting *Phoenix Consulting*, 216 F.3d at 40).

### III. DISCUSSION

In ruling on the instant motion to dismiss—the fourth in this eleven-year-old case—this Court is not writing on an empty slate. Quite to the contrary: the legal landscape of this case is littered with a partially reversed district court opinion (*Simon-2014*), a circuit court opinion squarely abrogated in part by the Supreme Court (*Simon I*), a reversed district court opinion the reversal of which was later vacated (*Simon-2017*), a circuit court opinion vacated by the Supreme Court for reasons outside the scope of that opinion (*Simon II*), a district court opinion, issued prior to a change in relevant governing law, appealed to but remanded by the Circuit with no ruling on the merits (*Simon-2020*), a Supreme Court opinion changing the law of the expropriation exception (*Philipp*), and a pair of terse remands of *Simon-2017* and *Simon-2020* from the Circuit providing little clarifying guidance. Suffice it to say that figuring out what the law of this case *is* presents a challenge but is a determination that affects which of the parties' myriad arguments raised in briefing has any purchase.

Defendants' motion presses as many as six reasons this case should be dismissed at this juncture: (1) the Supreme Court's opinion in *Philipp* forecloses the use of the FSIA's expropriation exception by plaintiffs who were Hungarian nationals at the time of the takings at issue, *see* Defs.' Mem. at 17–18, including any once-

Hungarian-national plaintiffs ostensibly rendered stateless by Hungary's concededly egregious conduct, *see id.* at 18–23; (2) plaintiffs are barred from arguing that any of the named plaintiffs were *never* Hungarian nationals at the time of the atrocities carried out by the Hungarian government, *see id.* at 23–30; (3) if this Court nevertheless did entertain an argument that named plaintiffs were not Hungarian nationals at that time, *Simon I's* analysis of the treaty exception must change, *see id.* at 26–28, 28 n.18; (4) this Court's holding in *Simon-2020* that the commercial nexus requirement has been satisfied as to both defendants must be revisited in light of *Philipp's* redefinition of property "taken in violation of international law," *see id.* at 30–38; (5) the Supreme Court's vacatur of *Simon II* revives this Court's decision in *Simon-2017* to dismiss the case on the prudential basis of international comity, *see id.* at 38–41; and (6) depending on the composition of the group of named plaintiffs, if any, whose claims survive *Philipp*, "it may also be appropriate for this Court to revisit the doctrine of *forum non conveniens*," *id.* at 41 n.25, as set out in *Simon-2017*, which decision was reversed in a now vacated *Simon II*.

In response, plaintiffs pose at least seven counter-arguments that: (7) at least some of the named plaintiffs were not Hungarian nationals at any point and are thus unaffected by *Philipp*, *see Pls.' Mem. Opp'n Fourth Mot. Defs. Dismiss ("Pls.' Opp'n")* at 25–28, ECF No. 167, and plaintiffs are not now barred from raising this argument, *see id.* at 8–20; (8) even if any plaintiffs were Hungarian nationals pre-Holocaust, they *de facto* ceased to be when Hungary's treatment

stripped them of any indicia of citizenship, *see id.* at 21–25, thereby penetrating the shield of the domestic takings rule, *see id.* at 28–34; (9) “Hungary’s collaboration with Nazi Germany precludes Hungary’s reliance upon the domestic takings rule,” *id.* at 34–36; (10) the 1920 Treaty of Trianon created international law imposing obligations on Hungary, and Hungary’s violation thereof provides an independent basis for *all* plaintiffs regardless of nationality to invoke the expropriation exception, *see id.* at 36–39; (11) the commercial nexus findings in *Simon-2020* need not and should not be revisited, *see id.* at 39–40; (12) the *Simon I* analysis on the inapplicability of the treaty exception as to the 1947 Treaty holds true for plaintiffs who were not Hungarian nationals, *see id.* at 40–42; and (13) *Simon II*’s holdings regarding international-comity-based abstention and *forum non conveniens* survive *Philipp*, *see id.* at 44–45.

This thicket of arguments and counter-arguments may be sorted into three broad questions: whether then-Hungarian national plaintiffs may assert claims notwithstanding the domestic takings rule after *Philipp* (in the lists above, defendants’ argument 1 and plaintiffs’ arguments 8, 9, and 10); whether any plaintiffs may maintain this action by being characterized as not having had Hungarian nationality at the time of the takings (defendants’ 2, 3, 4; plaintiffs’ 7, 11, 12); and whether prudential bases for dismissal remain available due to the Supreme Court’s vacatur of *Simon II* (defendants’ 5, 6; plaintiffs’ 13).

The analysis below addresses these three questions in turn. First, the Court finds that certain named



plaintiffs have not shown anything other than Hungarian nationality at the time of the takings, and thus their claims sit squarely within the domestic takings rule as fortified by *Philipp*, requiring dismissal of these plaintiffs from this action with prejudice. Second, all but one of the remaining named plaintiffs have adequately alleged facts supporting reasonable inferences of Czechoslovakian nationality and a lack of Hungarian nationality, and the history of this litigation does not preclude them from asserting as much at this juncture. These plaintiffs may trigger the FSIA's expropriation exception and survive this fourth motion to dismiss. Third, the jurisdictional allegations concerning one named plaintiff have a level of ambiguity such that no determination may be made as to his nationality. That last plaintiff must be dismissed, but without prejudice to bringing an action again with more fulsome allegations. Finally, under the D.C. Circuit's rules governing the precedential weight of its own vacated opinions, *Simon II's* holdings on international comity and *forum non conveniens* remain the law of the Circuit. This Court therefore cannot again entertain these prudential reasons to abstain from exercising jurisdiction.

**A. Claims by Plaintiffs of Hungarian Nationality at the Time of the Takings Must Be Dismissed**

Four named plaintiffs—Zehava Friedman (“Zehava”), Vera Deutsch Danos (“Vera”), Ella Feuerstein Schlanger (“Ella”), Tzvi Zelikovitch (“Tzvi”)—must be dismissed from this case because they have not alleged facts or adduced evidence

suggesting that they were not Hungarian nationals at the outset of the Holocaust. The Supreme Court's opinion in *Philipp*, partially overruling *Simon I*, precludes reliance on the egregiousness or genocidal nature of expropriative conduct as a means to escape the limitation of the domestic takings rule. *Philipp* is also irreconcilable with plaintiffs' argument that statelessness induced by genocidal conduct removes such conduct from the confines of the domestic takings rule.

**1. *After Philipp, the Domestic Takings Rule Bars Claims by Plaintiffs Then of Hungarian Nationality***

In *Philipp*, as discussed in Part I.B.7, *supra*, the Supreme Court held that “the phrase ‘rights in property taken in violation of international law,’ as used in the FSIA’s expropriation exception, refers to violations of the international law of expropriation and thereby incorporates the domestic takings rule.” 141 S. Ct. at 715. “This ‘domestic takings rule’ assumes that what a country does to property *belonging to its own citizens* within its own borders is not the subject of international law.” *Id.* at 709 (emphasis added). At the time the FSIA was enacted in 1976—the relevant context when interpreting the FSIA—“[a] ‘taking of property’ could be ‘wrongful under international law’ only where a state deprived ‘an alien’ of property.” *Id.* at 712 (quoting RESTATEMENT (SECOND) OF FOREIGN RELS. L. U.S. § 185 (Am. L. Inst. 1965)); *see also id.* (noting the Court’s “consistent practice of interpreting the FSIA in keeping with ‘international law at the time of the FSIA’s enactment’ and looking to the

contemporary Restatement for guidance” (quoting *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199–200 (2007))). This holding categorically rejected the D.C. Circuit’s rule in *Simon I*, mirrored in the Circuit’s *Philipp* opinion, “that the exception for property taken in violation of international law” is satisfied by genocidal takings “because ‘genocide perpetrated by a state even against its own nationals is a violation of international law.’” *Id.* at 709 (quoting *Philipp*, 894 F.3d at 410–11 (quoting *Simon I*, 812 F.3d at 145)).

The parties do not dispute that with respect to plaintiffs who were Hungarian nationals at the time their property was expropriated by defendants, *Philipp* precludes such plaintiffs from invoking the expropriation exception as a basis to abrogate the FSIA’s default grant of foreign sovereign immunity to Hungary and MÁV. *See* Defs.’ Mem. at 17–18; Pls.’ Opp’n at 7. As such, plaintiffs correctly identify “the cardinal issue now before this Court” is whether the named plaintiffs were Hungarian nationals at the relevant time. Pls.’ Opp’n at 8.

***2. Once-Hungarian National Plaintiffs Arguably Rendered Stateless Cannot Circumvent the Domestic Takings Rule***

Plaintiffs vigorously argue that Hungary’s conduct towards its Jewish population rendered the named plaintiffs and others *de facto* stateless. *See* Pls.’ Opp’n at 29. The summary plaintiffs offer of this campaign is wrenching and deserves reprinting in full:

[T]he “dejewification” process began as early as 1920, continuing through the enactment of the three Anti-Jewish Laws in 1938, 1939 and 1941, the issuance of confiscatory and denationalizing decrees from 1942 to 1943 and culminating in 1944 in the ultimate *de facto* abnegation of their citizenship/nationality. That is when Hungary threw its Jewish inhabitants out of their homes, expropriated all of their movable and immovable property, forced them into ghettos, forcibly packed them like animals into cattle cars and shipped—that is, deported—them outside the borders of Hungary into the custody and control of another sovereign (Nazi Germany), knowing that these persons, whom Hungary now dares to call its nationals, would be transported to Auschwitz and other concentration and death camps outside Hungary to be gassed and turned into smoke and ash.

*Id.* (citing Decl. of Gavriel Bar-Shaked, Ph.D. (“Bar-Shaked Decl.”) ¶ 28, ECF No. 167-2; and Paul Abel, *Denationalization*, 6 MODERN L. REV. 57, 64-65 (1942)). “As a matter of international law, a state that marks, despoils, expropriates, ghettoizes, deports, and murders its own nationals in violation of international law—in short, subjects them to genocide—breaks the genuine connection of reciprocal rights and duties on which nationality is premised.” *Id.* at 29–30 (citations and internal quotation marks omitted). The

egregiousness of the human rights abuses reflected in these events is obvious and cannot be overstated but, as a legal matter, the repercussions for the fact-specific inquiry of nationality, which after *Philipp* is now key for the exercise of jurisdiction under the FSIA expropriation exception, is disputed by the parties and not previously explicitly resolved in this case.

Defendants nominally dispute that Hungary's actions rendered plaintiffs stateless, but do not advance any substantive arguments for this position. *See* Defs.' Mem. at 20 (offering only the conclusory assertion that "Hungary disputes" the "contention that [plaintiffs] were rendered stateless"); *see also* Defs.' Reply Mem. Further Supp. Mot. Dismiss Second Am. Class Action Compl. ("Defs.' Reply") at 8–9, ECF No. 168 (indicating that "Plaintiffs' Claims of Statelessness Fail As a Matter of Law" but again only arguing that this induced *de facto* statelessness, even if true, does not provide a basis for invoking the expropriation exception). Plaintiffs, for their part, misleadingly suggest that Hungary conceded this possibility, claiming that "Hungary recognizes that those Survivors who may once have been Hungarian citizens . . . may have been denationalized *de facto*." Pls.' Opp'n at 28. As support, plaintiffs quote a remark in defendants' opening brief that in fact merely acknowledges that "Plaintiffs argued" before the Supreme Court that they should have a chance to present a denationalization theory on remand. *Id.* at 28–29 (purportedly quoting Defs.' Mem. at 29).<sup>18</sup> In any

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<sup>18</sup> Such an acknowledgment by defendants of the existence of plaintiffs' procedural argument cannot reasonably be viewed as an

event, this is a complicated question, requiring deep consideration of what it means to be a “citizen” or “national” of a sovereign state, and the parties’ cross-talk complicates matters further, particularly in the absence of any formal official actions by Hungary revoking the label of “citizen” from its Jewish residents. In contrast, plaintiffs point out that “Germany stripped all Jews of their citizenship in 1941,” Pls.’ Opp’n at 7 n.4, highlighting that Hungary’s conduct may differ from Germany’s for legal purposes—though as a practical matter for the numerous victims in both countries, this distinction may have meant little.

Fortunately, *Philipp* provides an answer that renders unnecessary fact-specific determinations of which instances of abhorrent historical conduct are *de facto* denationalizing and which are not. That fraught exercise is one that courts would do well to avoid, particularly in the context of a sovereign immunity determination where the jurisdictional analysis—assessing the gravity of potentially denationalizing conduct as part of a broad genocidal program—becomes outsized relative to the underlying property claims. As Judge Katsas put it, such an endeavor “oddly matches the jurisdictional equivalent of a thermonuclear

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endorsement of plaintiffs’ related substantive argument. On top of this mischaracterization, the citation is incorrect. The cited page (p. 29) of defendants’ memorandum contains no text matching plaintiffs’ “quotation,” which is instead on pages 18–19 of that brief. This discrepancy would not be especially noteworthy were it not the case that this is one of several citation inconsistencies that collectively undermine the Court’s ability to rely on representations made in the briefing. *See also infra* notes 29 and 31.

weapon (determining the scope of a genocide) to the merits equivalent of swatting a fly (determining whether there was a common-law conversion).” *Philipp v. Federal Republic of Germany*, 925 F.3d 1349, 1352 (D.C. Cir. 2019) (Katsas, J., dissenting from the denial of rehearing en banc).<sup>19</sup> Plaintiffs’ proposed denationalization-based bypass route around the domestic takings rule, however, demands that courts do exactly that—a result that would render *Philipp*’s central holding a rule in name only.

To be sure, the Supreme Court in *Philipp* did not categorically close the door on the argument: “Nor do we consider an alternative argument noted by the heirs: that the sale of the Welfenschatz is not subject to the domestic takings rule because the consortium members were not German nationals at the time of the transaction.” 141 S. Ct. at 715. The plaintiffs in *Philipp* made that argument only obliquely, however, *see* Br. Resp’ts at 27, *Philipp*, 141 S. Ct. 703 (No. 19-351), citing a Ninth Circuit opinion long predating *Philipp* that noted the domestic takings rule does not apply to non-nationals and relied on the district court’s determination that the plaintiff “was no longer regarded by Germany as a German citizen,” a matter “not challenged on appeal,” *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1023 n.2 (9th Cir. 2010) (en

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<sup>19</sup> Defendants make a similar point: “Plaintiffs’ approach would bring back one of the most vexing problems of the interpretation of the expropriation exception that the Supreme Court overturned in *Philipp*: It would require courts to determine at the outset of a case how badly a sovereign had mistreated its nationals, merely to assess whether there is jurisdiction over claims for property losses.” Defs.’ Mem. at 22.

banc). In oral argument, the clearest statement of what is meant by this residual argument on remand was whether “German governmental treatment of German Jews in the 1930s would transgress [the] nationality line,” Arg. Tr. at 67–68, *Philipp*, 141 S. Ct. 703 (No. 19-351), a question plaintiff’s counsel acknowledged would be a case-specific question of fact that “may require the submission of historical expertise,” *id.* at 68.

Despite the murkiness of presentation of this issue to the Supreme Court, *Philipp* provided sufficiently clear breadcrumbs of a path to conclude that expropriations conducted as an integral part of a broad genocidal program—which the Holocaust unquestionably was—simply cannot trigger the expropriation exception with respect to takings from individuals regarded as citizens of the expropriating state during or just prior to the genocidal events. Put another way, if a loss of nationality is part and parcel of a set of genocidal acts that happen to include expropriation, then the expropriation exception becomes the very type of “all-purpose jurisdictional hook for adjudicating human rights violations” rejected in *Philipp*, 141 S. Ct. at 713. Indeed, it is difficult to conceive of a hypothetical program of genocide that does *not* deprive “member[s] of a minority group” of “full civic and political rights,” Pls.’ Opp’n at 21, or treat its victims as something less than “full citizen[s],” *id.* The logical result of plaintiffs’ argument, then, is that any program of genocidal conduct of which expropriations are a part—because it inherently entails a loss of nationality—falls outside the domestic takings rule and can be prosecuted using the expropriation exception. That is precisely what *Philipp* forecloses,



only without articulating the intermediate “loss of nationality” step. As the defendant in *Philipp* articulates in a renewed motion to dismiss on remand, “claim[ing] some de facto statelessness exception to the domestic-takings rule . . . do[es] little more than ask[] this Court to reinstate the unanimously overruled *Simon [I]* decision in new words.” Def.’s Mem. Supp. Mot. Dismiss Second Am. Compl. at 41, *Philipp v. Stiftung Preussischer Kulturbesitz*, No. 15-cv-266 (CKK) (D.D.C. Oct. 29, 2021), ECF No. 63-1. This Court agrees.

To be clear, none of this discussion is meant to suggest that Hungary granted plaintiffs the rights and dignity afforded to persons Hungary unambiguously considered to be that country’s nationals. It plainly did not. Nor does the Court necessarily reject the proposition that plaintiffs were rendered *de facto* stateless. Nor is there any real question whether Hungary committed “serious violations of international human rights law.” *Philipp*, 141 S. Ct. at 713. The holding here is more technical in nature: genocidal expropriations, including those directly associated with the result of denaturalization, cannot under *Philipp* trigger the expropriation exception with respect to plaintiffs that would have been nationals of the offending state but for the genocidal conduct.<sup>20</sup>

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<sup>20</sup> Defendants also address this question through a different lens, arguing that even if Hungary’s treatment of plaintiffs rendered them stateless, plaintiffs did not thereby become nationals of any other state and as a result there was no injured foreign state (by way of injury to its nationals) and no violation of international law on account of the expropriations. *See* Defs.’ Mem. at 19–20. Plaintiffs counter that a stateless person is an “alien” in relation

**3. *Four Plaintiffs Have Not Shown a Lack of Hungarian Nationality Prior to Hungary's Wartime Conduct***

After *Philipp* and due to the analysis above, to prevail in a motion to dismiss, a plaintiff must show that he or she was *not* a Hungarian national immediately prior to defendants' expropriation of their property or the commencement of other genocidal conduct. Four named plaintiffs—Zehava Friedman (“Zehava”), Vera Deutsch Danos (“Vera”), Ella Feuerstein Schlanger (“Ella”), and Tzvi Zelikovitch (“Tzvi”)—are unable to do so and must therefore be dismissed from this case because nothing in the record suggests a lack of Hungarian nationality at the relevant time. If anything, the record contains modest affirmative indicia that each was reasonably *likely* to have been a Hungarian national.

Plaintiffs seeking to invoke the subject matter jurisdiction of this Court using an FSIA exception to

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to the expropriating state and therefore not covered by the domestic takings rule. *See* Pls.' Opp'n at 31-34. This is a question of first impression in this Circuit and appears to have been addressed by only one federal court. In *Mezerhane v. República Bolivariana de Venezuela*, 785 F.3d 545, 551 (11th Cir. 2015), the Eleventh Circuit held, with limited analysis, that an arguably stateless individual could not invoke the expropriation exception “because his claims do not implicate multiple states.” *Mezerhane* distinguished this holding from Holocaust-related cases on the grounds that the expropriations at issue in the latter cases were part of a genocidal plan, *id.* at 551, a distinction that *Philipp* later rejected with respect to the applicability of the expropriation exception. This Court need not decide this relatively novel issue at this juncture.

the general grant of sovereign immunity bear the initial burden of production to show that the exception is applicable. *See Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 204 (D.C. Cir. 2015). Once that burden of production is met, however, “the burden of persuasion rests with the foreign sovereign claiming immunity, which must establish the absence of the factual basis by a preponderance of the evidence.” *Id.* (quoting *Agudas Chasidei Chabad*, 528 F.3d at 940).

Plaintiffs allege that the Holocaust “began in 1933 when the Nazi Party rose to power in Germany,” SAC ¶ 102, and the record lacks evidence of potentially citizenship-stripping actions by Hungary before that date. Further, according to plaintiffs, under the Hungarian Citizenship Law of 1879, effective until 1948, “one acquired Hungarian citizenship only by descent from a citizen parent, legitimization, naturalization, or marriage,” Pls.’ Opp’n at 25–26. This suggests a general citizenship rule determined by parentage rather than by place of birth, although in the absence of information about the citizenship of any plaintiff’s parents, place of birth may be a useful proxy.

*a) Zehava*

Zehava was born May 31, 1932, in Satoraljaujhely, Hungary, to a large family living in a “large home” on a “large lot”—sufficiently expansive so as to contain outbuildings with tenants—owned by her grandfather, a “successful wine merchant.” SAC ¶ 28. She had brothers serving in the Hungarian army, and a father and brothers conducting business in Budapest (the capital of Hungary) much of the year. *Id.* Given that Zehava’s birth predated the Holocaust and none of

these facts alleges or supports an inference that Zehava's parents were not Hungarian citizens, Zehava has not met her burden of production to establish jurisdiction. If anything, her family's fairly extensive, multigenerational ties to Hungary, combined with her birthplace in Hungary, weigh in favor of the opposite conclusion.

*b) Vera*

Vera was born in 1926 in Verpelet, Hungary to "a wealthy wine merchant" who owned a wine business. SAC ¶¶ 65–66. This description says little about the nationality of Vera's parents, and, critically, does *not* provide a reason to infer they were other than Hungarian nationals. Vera, too, has not met her burden of production. As above, the fact that Vera was born in Hungary increases the likelihood that her parents were Hungarian nationals.

*c) Tzvi*

Tzvi was born in 1928 in "Uglya in Carpatorus, part of Hungarian-annexed Ruthenia (which was in the Kingdom of Austria-Hungary until formation of the Czechoslovak Republic after World War I)," and was raised there as well. SAC ¶ 15. Plaintiffs explicitly allege, without any caveats or qualifications, that Tzvi's parents were "both Hungarian citizens." *Id.* Under the general rule of acquiring citizenship through birth to Hungarian citizen parents, Tzvi, too, would have been a Hungarian citizen upon birth. Plaintiff offers unrefuted evidence that some special considerations applied, however, with respect to inhabitants of Czechoslovakian territory annexed by

Hungary in the late 1930s. *See infra* Part III.B.2.b. Even under those additional rules, on this record, if Tzvi were not a Hungarian citizen at birth, he became one upon annexation because (1) he and his parents lived in Ruthenia continuously for the entire window of March 15, 1929 to March 15, 1939; (2) plaintiffs have offered no facts suggesting that his parents were not yet Hungarian citizens as of July 26, 1921; (3) at the time of annexation Tzvi was ten or eleven years old—in any event, under 24 years of age; and (4) nothing in the record indicates either of his parents or any other ancestors “acquired Czechoslovak citizenship by option based on Article 64 of the Trianon Treaty,” Bar-Shaked Decl. ¶ 61; to the contrary, because of the general rule of citizenship transfer through parentage, the limited set of his ancestors living between the 1920 signing of the Treaty of Trianon and the annexation in 1939 were likely Hungarian nationals as well.

*d) Ella*

Ella “was born in 1930 to a Hungarian family resident in Benedike, Czechoslovakia.” SAC ¶ 73. That statement, without more facts, is sufficient to extinguish jurisdiction over Ella’s claims because without more facts, the most reasonable inference by far is that Ella had Hungarian nationality and thus her claims fall within the domestic takings rule. Without some allegation to the contrary, Ella’s family must be deemed to have had Hungarian nationality. In this instance, the allegation that the family lived in Czechoslovakia actually harms, not helps, Ella’s position because it is unclear what *else* besides nationality the adjective “Hungarian” could mean when

applied to a family resident in Czechoslovakia prior to annexation.<sup>21</sup> If Ella's parents were Hungarian nationals at the time of her birth in 1930, under plaintiffs' description of the respective states' citizenship laws, she would have likewise become a Hungarian national upon birth and would *not* have become a Czechoslovakian national. Additionally, 1930 predates the various anti-Jewish laws later enacted by Hungary, *see* Bar-Shaked Decl. ¶ 29, meaning that plaintiffs have not identified any obstacle in Hungarian law for Ella to have held that country's citizenship.

\* \* \*

As discussed more fully in Part III.B.3, *infra*, plaintiffs have plausibly established non-Hungarian nationality for nine other named plaintiffs, each of whom is alleged to have been born "in the Ruthenia or Slovakian regions of Czechoslovakia" to parents not known to be of Hungarian nationality, making them "presumptively Czechoslovak nationals when Hungary wrongfully took their property in the Holocaust." Pls.' Opp'n at 4–5, 5 n.2. Their claims survive at the motion to dismiss stage, although further factual development may show that some of these named plaintiffs are Hungarian nationals as well, ultimately requiring further dismissals.

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<sup>21</sup> By contrast, when used to describe a resident of Hungary, the term "Hungarian" arguably could be used more colloquially without necessarily being a statement about nationality. *See infra* note 25 and accompanying text.

**4. *Plaintiffs' Alternative Bases for Showing a Violation of International Law By Hungary Against Jewish Hungarian Nationals Fail***

In a last gasp effort to preserve the right of then-Hungarian nationals to sue Hungary for Hungarian atrocities against them as Jews, plaintiffs also briefly advance two alternative arguments for why Hungarian national plaintiffs may bring expropriation claims, neither of which is convincing.

First, plaintiffs urge that because Hungary and Nazi Germany were “joint actors, joint tortfeasors, [and] partners in crime,” claims can be brought against Hungary for expropriations wrought by Germany. Pls.’ Opp’n at 34–35. In other words, the Hungarian nationals are not barred by the domestic takings rule because the takings were effectuated in part by Germany. In support, plaintiffs’ “leading case” is the decade-old case of *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010) (en banc), which held that the FSIA “does not require that the foreign state against whom the claim is made by the entity which took the property in violation of international law.” Pls.’ Opp’n at 35 (quoting *Cassirer*, 616 F.3d at 1028). *Cassirer* involved an art expropriation claim against Spain (the alleged current owner) for Nazi Germany’s expropriation from a German in Germany. 616 F.3d at 1022–23. The Ninth Circuit held that jurisdiction could lie against Spain, but relied on the statelessness argument, rejected as now incompatible with *Philipp* in Part III.A.2, *supra*, to prevent the German takings from being deemed “domestic.” *Id.* at 1023.

Furthermore, the D.C. Circuit did not endorse the reasoning quoted by plaintiffs from *de Csepel*, see Pls.’ Opp’n at 35, instead affirming the denial of dismissal by determining that the claims at issue were best construed as bailment claims and not expropriation claims at all, *de Csepel v. Republic of Hungary*, 714 F.3d 591, 598 (D.C. Cir. 2013). Finally, as defendants correctly point out, even if Hungary could be liable on a theory of complicity with Germany’s expropriations from Hungarians, not one of the complaint’s allegations identifies any takings of plaintiffs’ property by *German* officials. Defs.’ Reply at 12. The complaint alleges ample German involvement with human rights atrocities committed against the Hungarian Jews, but none that trigger the expropriation exception.

Second, plaintiffs attempt to invoke Hungary’s alleged violations of the 1920 Treaty of Trianon as an “independent and sufficient basis” for applying the expropriation exception on the premise that the Treaty created international law guaranteeing rights for “all inhabitants of Hungary,” the violation of which is sufficient predicate for invoking the expropriation exception without being limited by the domestic takings rule. See Pls. Opp’n at 36–39. Regardless of what obligations Hungary undertook under this Treaty related to World War I, the problem with this argument is that *Philipp* demands that the violation of international law used to invoke the expropriation exception be a violation of “the international law of expropriation” as understood in 1976 and not draw more broadly from “all of international law.” 141 S. Ct. at 712–13. Furthermore, the reliance on a pre-existing treaty to *abrogate* sovereign immunity, rather than to



expand it, strikes this Court as veering perilously close to the “generally disfavored” practice of “[o]ffensive use of a pre-existing agreement,” as articulated in *Simon-2014*, 37 F. Supp. 3d at 409.

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In short, *Philipp* closes the door on then-Hungarian national plaintiffs to pierce sovereign immunity using the expropriation exception, as the Supreme Court’s opinion revives and fortifies the domestic takings rule even for situations involving atrocities so grave that the expropriations could themselves be deemed genocidal in character. Furthermore, plaintiffs’ theory of statelessness caused by genocidal conduct as a means of bypassing the domestic takings rule is no longer viable for Hungarian plaintiffs as it is irreconcilable with the logic of *Philipp*. As applied to this case, the four named plaintiffs discussed above must therefore be dismissed with prejudice because they fail to offer allegations suggesting a lack of Hungarian nationality, and in some cases the facts even affirmatively militate in favor of such nationality.

#### **B. Foreign National Plaintiffs May Proceed**

Just as the parties agree that after *Philipp*, the domestic takings rule precludes the use of the expropriation exception by plaintiffs who were Hungarian nationals at the time of the takings, they also do not dispute that the FSIA does not confer sovereign immunity against claims brought by plaintiffs who were nationals of some *other* country (and not of Hungary) at the time of the takings, so long as those claims satisfy the other requirements of the

expropriation exception. *See* Pls.’ Opp’n at 7; Defs.’ Mem. at 1.<sup>22</sup> The task now before this Court, therefore, is to ascertain which, if any, of the named plaintiffs have adequately pleaded facts or proffered evidence supporting the position that they were foreign (*i.e.*,

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<sup>22</sup> Defendants invite this Court to revisit one of these “other requirements,” the commercial nexus requirement, in light of *Philipp*’s constriction of the scope of “property taken in violation of international law” to include only property taken from foreign nationals. Defs.’ Mem. at 30–38. As a result, defendants argue, this Court’s decision in *Simon-2020* that the nexus requirements had been satisfied as to both defendants “is no longer true” because after *Philipp*, “only takings from *foreign nationals* can deprive Hungary of sovereign immunity. Other expropriations cannot be considered when applying the nexus requirement. . . . The question now, which this Court has never considered, is whether the nexus requirement can be satisfied solely by property taken from foreigners.” Defs.’ Mem. at 30–31 (emphasis in original). As a technical matter, defendants are likely correct that *Philipp* can affect a commercial nexus analysis. Given that the scope of “property taken in violation of international law,” 28 U.S.C. § 1605(a)(3), was reduced by *Philipp*, the nexus requirement’s reference to “that property,” *id.*, must likewise be so constrained. The problem for defendants is that the commingling logic in *Simon-2020*, derived from a holding in *Simon I* not related to the domestic takings rule and thus not abrogated by *Philipp*, provided the bridge between the specific named plaintiffs’ property and the modern-day presence in the United States of commingled proceeds from liquidations of all victims’ property. *See Simon-2020*, 443 F. Supp. 3d at 103–04 (citing *Simon I*, 812 F.3d at 147). Nothing about that logic changes if one set of named plaintiffs—everyone listed on the face of the complaint—is displaced in favor of a different set of named plaintiffs—only those deemed to have been foreign nationals. Plaintiffs are correct that “[n]othing in the Court’s [*Simon-2020*] analysis depended on the Hungarian nationality *vel non* of those Jews who were deprived of their property.” Pls.’ Opp’n at 40. Accordingly, defendants’ invitation is declined.

other than Hungarian) nationals at the time of the takings at issue.<sup>23</sup>

***1. Nationality Arguments Are Properly Before the Court***

Defendants urge the Court to reject, on procedural grounds, plaintiffs' attempts to argue that at least some named plaintiffs were not Hungarian nationals at the time of the expropriations at issue. *See* Defs.' Mem.

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<sup>23</sup> This Court need not confront the question now—but could later be faced with it—whether plaintiffs who were stateless for some exogenous reason (*i.e.*, not through the denationalization theory discussed in Part III.A.2, *supra*) may bring claims using the expropriation exception without running afoul of the domestic takings rule. None of the named plaintiffs in the Second Amended Complaint alleges facts nor otherwise argues a condition of statelessness unrelated to the Holocaust. If any had, the types of arguments discussed in note 20, *supra*, would likely be central to that analysis. Likewise, the parties have not addressed whether the domestic takings rule would apply in the event of claims by plaintiffs who were nationals of *both* Hungary and another country (in this case, most likely Czechoslovakia) at the time of the expropriations. Only one appellate opinion has directly considered such a question. In *Comparelli v. Republica Bolivariana de Venezuela*, 891 F.3d 1311 (11th Cir.), a case involving expropriation claims against Venezuela by a dual Venezuelan-Italian national, the Eleventh Circuit declined to issue a per se rule in either direction, instead holding that “the inquiry is fact-based, considering matters such as the relationship between the national and the state which allegedly expropriated the property, how the national—through his words and conduct—characterized himself, and whether the state considered its national as one of its own or as a foreign national.” *Id.* at 1323.

at 23–30.<sup>24</sup> All three legal doctrines invoked for this basic point—judicial admission, judicial estoppel, and waiver—fail, and plaintiffs are not barred from pursuing these arguments.

*a) No Judicial Admission*

Defendants assert that because “[p]laintiffs have admitted numerous times that they *were* Hungarian nationals at the time of the takings,” those “statements constitute a judicial admission that Plaintiffs were Hungarian nationals at the time of the wrongdoing” and therefore bar plaintiffs from “now argu[ing] the opposite.” Defs.’ Mem. at 24 (emphasis in original). To

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<sup>24</sup> While defendants’ brief includes a heading titled “Any Claim By Plaintiffs That They Were Never Hungarian Nationals Has Been Forfeited *And Is Incorrect*,” Defs.’ Mem. at 23 (emphasis added), the associated text for this section deals exclusively with judicial admission, judicial estoppel, and waiver arguments. In other words, defendants do not articulate why it “Is Incorrect” as a factual matter for some plaintiffs to argue that they never had Hungarian nationality. Furthermore, to support a point that “Plaintiffs were not *actually* Czech nationals,” defendants point to “*infra* Point II.B,” Defs. Mem. at 26—a section that would have been interesting but does not exist in defendants’ brief, perhaps not surviving revisions. Furthermore, while asserting in another title that “Plaintiffs’ Claims As To Czechoslovakian Nationality Fail As A Matter Of Law,” defendants nearly concede that some named plaintiffs might in fact be able to show Czechoslovakian nationality. Defs.’ Reply at 9. The “Fail[ure]” asserted is not that plaintiffs cannot viably claim Czechoslovakian nationality, but rather that doing so would, defendants argue, cause “their claims [to] be extinguished under the treaty exception” by falling under Article 26 rather than Article 27 of the 1947 Treaty. *Id.* at 9–10. As discussed in Part III.B.1.b, *infra*, the Court rejects this attempt to revive the use of the treaty exception in the face of the Circuit’s clear holding in *Simon I*.

be sure, “[a] party’s assertion of fact in a pleading is a judicial admission by which it normally is bound throughout the course of the proceeding.” *El Paso Natural Gas Co. v. United States*, 750 F.3d 863, 876 (D.C. Cir. 2014) (quoting *Schott Motorcycle Supply, Inc. v. Am. Honda Motor Co., Inc.*, 976 F.2d 58, 61 (1st Cir. 1992)). Scrutiny of the record reveals that plaintiffs have not made such “admission[s]” to the extent defendants suggest. Defendants’ characterization of plaintiffs’ statements about their nationality over the course of this litigation is imprecise at best.

For example, early in their opening brief, defendants argue: “*As alleged* in the Complaint, all of the named Plaintiffs were Hungarian nationals at the time of the takings.” Defs.’ Mem. at 4 (emphasis added). This is imprecise because the types of ties to Hungary alleged in the complaint are not one and the same with Hungarian *nationality*. Nowhere in the complaint do plaintiffs expressly allege *any* nationality, Hungarian or otherwise, of any named plaintiff. As support for supposed implicit allegations of Hungarian nationality, defendants cite to examples of allegations of named plaintiffs who were “raised in Hungarian-annexed” territory, who were “raised in Hungary,” or who “lived in Hungary and worked in the Hungarian annexed regions.” *Id.* at 4–5 (citing SAC ¶¶ 10, 15, 22, 28, 39, 41, 49, 65, 73, 81). As apparent in the discussion below of Hungarian and Czechoslovakian nationality rules, these factual allegations are not dispositive as to Hungarian nationality for all the plaintiffs.

Elsewhere, defendants state: “Plaintiffs represented to the D.C. Circuit [in *Simon I*] that they were all

Hungarian citizens or nationals at the time Hungary took their property in both their opening and reply briefs.” Defs.’ Mem. at 8 n.7; *see also id.* at 24. On the cited page of plaintiffs’ opening appellate brief in *Simon I*, plaintiffs described themselves as having “lived within today’s Hungarian borders or in territory annexed by Hungary in 1938 after Czechoslovakia’s dismemberment,” *Simon I* Pls.’ Br. at 2, but such a description falls short of a “represent[ation]” of nationality. Defendants’ citation to plaintiffs’ appellate reply brief presents a closer question, given plaintiffs’ argument that “Survivors were Hungarian nationals or citizens in name only, not substance, as they were systematically deprived of the most fundamental rights to which a state’s nationals and citizens are entitled, including the right to exist.” *Simon I* Pls.’ Reply at 11. Taken in context, however, plaintiffs were making an argument that Hungary could not hide behind the domestic takings rule because Hungary’s expropriations “were racially discriminatory,” *id.* at 9, and regardless of any formal labels of nationality, Hungary’s relationship with plaintiffs did not entail substantive hallmarks of citizenship—hence the expression “nationals or citizens in name only,” *id.* at 10–11. Plaintiffs’ phrasing implied only that *if* Hungary applied formal labels of citizenship to plaintiffs, they were “citizens in name only.” In other words, the critical term is “in name only,” not “citizens.”

Similarly, defendants unconvincingly point to statements by plaintiffs that emphasize the relationship between a government and a country’s own nationals. *See* Defs.’ Mem. at 24. In briefing in

*Simon I*, plaintiffs noted judicial decisions that “concluded that [Holocaust expropriations] violate international law, notwithstanding the victims’ nationality” and continued that “[t]his comports with the modern view that international law confers fundamental rights upon all people vis-à-vis their own governments.” *Simon I* Pls.’ Reply at 9. This framing of their argument is altogether unsurprising to avoid reliance on non-Hungarian nationality to sidestep the domestic takings rule, since such arguments are critical for success for the handful of Hungarian nationals among the named plaintiffs. Nothing about that argument is inconsistent with some of the named plaintiffs having been foreign nationals at the relevant time; it is simply an argument that is not necessary for the entire group.

With more notable merit, defendants point out several times that plaintiffs describe themselves and putative class members as “Hungarian Jews,” Defs.’ Mem. at 5, 18, 34, but ultimately these litigation statements also fail to constitute an “admission.” Defendants are correct that plaintiffs frequently use this phrase as a descriptor. *See, e.g.*, SAC ¶ 84 (“MÁV . . . deport[ed] Hungarian Jews . . . .”); *id.* ¶ 101 (“property that Defendants stole from Hungarian Jews, including Plaintiffs”); *id.* ¶¶ 105, 107 (“First Deportations and Murder of Hungarian Jews” in 1941); *id.* ¶ 108 (expulsion of “Hungarian Jews from all public employment, academic and professional positions”); *id.* ¶ 110 (“ghettoization of the Hungarian Jews”); *id.* ¶¶ 120, 122 (deportation of “Hungarian Jews” to Auschwitz); *id.* ¶ 155(D) (posing the legal question “[w]hether Defendants, as a matter of course,

confiscated the property and possessions of Hungarian Jews”); *id.* ¶ 194 (alleging conspiracy between Germany and defendants to “steal Hungarian Jews’ property”). Even in the course of opposing this motion to dismiss, plaintiffs continue to use the phrase. *See, e.g.*, Pls.’ Opp’n at 6 (“Hungary expropriated all of the property of nearly 500,000 Hungarian Jews . . .”).

Plaintiffs offer, in a footnote, a construction of the phrase, to which defendants offer no rejoinder: “These references [to ‘Hungarian Jews’] merely describe the victims generically as Jews who were in Hungary and thus subject to Hungary’s genocidal actions; they do not purport to specify nationality.” Pls.’ Opp’n at 8 n.5. To be sure, the phrase “Hungarian Jews” may be understood to imply that the Jews at issue were more than merely present in Hungary when victimized by Hungary but had a closer connection of belonging to or coming from Hungary, as would a national or citizen of that country. Nevertheless, when considering a motion to dismiss for lack of subject matter jurisdiction, courts “construe the complaint ‘liberally.’” *Zukerman v. U.S. Postal Serv.*, 961 F.3d 431, 436 (D.C. Cir. 2020) (quoting *Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C. Cir. 2004)). In that vein, plaintiffs’ explanation of the intended meaning of their own allegations is credited as being a linguistically reasonable, useful shorthand rather than a blanket statement that all affected were “Hungarian nationals.”<sup>25</sup>

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<sup>25</sup> Dictionary definitions of the term “Hungarian” also show a range of interpretive possibilities. For example, a “Hungarian” may be “a native or inhabitant of Hungary” or “a person of Hungarian descent,” *Hungarian*, MERRIAM-WEBSTER ONLINE,



Further supporting the looser reading of the “Hungarian Jews” label, the D.C. Circuit’s opinion in *Simon I* likewise uses the term when referring to persons clearly lacking Hungarian citizenship. In its overview of the relevant history, the *Simon I* panel observed that starting around 1941, “Hungary stripped some Hungarian Jews of their Hungarian citizenship, forced others into internment camps or slave labor battalions, expelled others from public or professional employment, and pressed still others into exile.” 812 F.3d at 133. Continuing to describe this group in the aggregate, the court noted that despite this persecution, “Hungarian Jews” had until 1944 avoided “widespread extermination.” *Id.* That all changed in 1944, when in just three months “nearly half a million Hungarian Jews were murdered.” *Id.* In context, the *Simon I* panel seemingly applied the term “Hungarian Jews” at various points in time to describe groups that included members lacking Hungarian citizenship because that citizenship had been “stripped.” In short, “Hungarian Jews” is more a term of art than a statement of nationality and is not a judicial admission by plaintiffs of Hungarian citizenship or nationality.

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<https://www.merriam-webster.com/dictionary/Hungarian>, providing minimal insight into the extent, if any, to which the term “Hungarian” is associated with Hungarian nationality or citizenship, as opposed to birthplace, residency, or ancestry. Ambiguity of this sort is not unique to Hungarians. *See Démonym*, MERRIAM-WEBSTER ONLINE, <https://www.merriam-webster.com/dictionary/demonym> (“a word (such as *Nevadan* or *Sooner*) used to denote a person who inhabits or is native to a particular place”).

*b) No Judicial Estoppel*

Defendants next posit that plaintiffs are estopped from characterizing any named plaintiffs as having been foreign nationals because plaintiffs' argument and the D.C. Circuit's decision in *Simon I* based its analysis of the treaty exception on the expropriations at issue being covered by Article 27 of the 1947 Treaty. Defs.' Mem. at 25. According to defendants, because plaintiffs tried to invoke Article 27, "where Hungary 'undertook' to restore property of its own nationals," *id.* (quoting *Simon I* Pls.' Reply at 3), and the Circuit's determination that Article 27's remedies were non-exclusive was, itself, exclusive to Article 27, *id.* This reliance by the Circuit, defendants urge, estops plaintiffs from now arguing that they were not Hungarian nationals, as doing so would invoke Article 26 instead of Article 27. *See id.* at 25–28.

Defendants overstate the significance of the distinction between the two Articles as well as the extent of reliance by the Circuit on plaintiffs' framing on nationality. As an initial (and potentially dispositive) matter, Article 27 is *not* in fact constrained to claims by Hungarian nationals. Article 27 concerns property and interests "of persons *under Hungarian jurisdiction*" violated after September 1, 1939. 1947 Treaty art. 27, 61 Stat. at 2124 (emphasis added). It is difficult to see how persons residing in the annexed territories—regardless of their nationality—did not find themselves "under Hungarian jurisdiction" when they were ousted from their homes, divested of their belongings, and inhumanely shipped off to concentration camps. Furthermore, Article 27

encompasses offenses committed “on account of the racial origin or religion of such persons,” with no apparent nationality-related criterion. *Id.*

Even were Article 26 relevant to encompass claims by Czechoslovakian nationals for violations experienced while living within the jurisdiction of Hungary, defendants have still not clearly articulated why Article 26 remedies should be considered exclusive, allowing the treaty exception rejected in *Simon I* to come back into play for claims by foreign nationals. On the contrary, the Circuit’s first stated rationale for viewing Article 27 as providing non-exclusive remedies is that Article 27’s text “says nothing about whether those rights are exclusive of other claims Hungarian Holocaust victims might bring, such as the causes of action asserted by the plaintiffs here.” *Simon I*, 812 F.3d at 137. This contrasted with “[o]ther treaties concluding World War II hostilities,” which “contain language expressly establishing a final *and exclusive* resolution of war-related claims.” *Id.* (emphasis in original). Furthermore, “Article 27 of the 1947 Treaty contains no comparable waiver of extra-treaty claims against Hungary. The absence of any such waiver language in Article 27 is all the more notable given that the 1947 Treaty itself contains an express waiver of certain other claims . . . .” *Id.* at 138. Nothing about this analysis changes if “Article 26” is substituted for “Article 27” throughout. Article 26, too, contains no express waivers or suggestions of exclusivity of remedies. *See* 1947 Treaty, art. 26, 61 Stat. at 2121–24. Defendants mention none of this.

Defendants are correct that the *Simon I* court went on to bolster its conclusions about the non-exclusivity of Article 27 based on the context that remedies for Hungarian nationals needed to be non-exclusive because their own government (Hungary's) would not have negotiated on their behalf against itself. See *Simon I*, 812 F.3d at 138–40; Defs.' Mem. at 26–28. By failing to mention the Circuit's first reason—the text—for viewing Article 27 as non-exclusive, however, defendants misleadingly suggest that this “context” issue *alone* was dispositive in *Simon I*. A better reading of the *Simon I* opinion is that the Circuit found both of these reasons to be compelling.

In the end, defendants' judicial estoppel argument fails because defendants have not clearly shown that the *Simon I* court relied on plaintiffs' representations of nationality in an outcome-determinative fashion.<sup>26</sup> If anything, *defendants'* framing—as the party invoking the treaty exception—pushed Hungarian nationality and had more to do with the *Simon I* court's approach. See Pls.' Opp'n at 10–11 (showing the Circuit's reliance on defendant's characterizations). In any event, the outcome reached in *Simon I* would be no different if analyzed under Article 26.

*c) No Waiver*

Finally, defendants insist that plaintiffs' argument that at least some named plaintiffs were foreign (non-Hungarian) nationals at the time of the expropriations has been waived, principally because of plaintiffs'

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<sup>26</sup> For the same reason, revisiting the use of the treaty exception now is unnecessary.

failure to assert it on appeal in *Simon I*. Under the peculiar circumstances of this case, the waiver argument fails.

As an initial matter, plaintiffs raised the issue of the non-Hungarian nationality of some plaintiffs in their very first responsive filing in this case, stating: “Contrary to Defendants’ assertion, not all of the Plaintiffs were considered Hungarian citizens when they were deported by Defendants.” Pls.’ Opp’n [First] Mot. Dismiss at 3, ECF No. 24; *see also id.* at 16 (“Finally, although many of the Plaintiffs were citizens of Hungary at the time of the takings in question, not all were.”). As such, the suggestion that certain plaintiffs held other than Hungarian nationality is by no means a “new” argument. Furthermore, as noted above, the corpus of plaintiffs’ representations over the course of the case have not been inconsistent with this premise.

At the same time, however, plaintiffs did not argue the nationality point on appeal in *Simon I*, even though defendants asserted at the Circuit that “[a]ll of [the] Plaintiffs were Hungarian nationals at the time of the events in question,” Opp’n Br. Defs.-Appellees at 32, *Simon I*, 812 F.3d 127 (No. 14-7082), without any rebuttal by plaintiffs of that characterization. For its part, in its *Simon I* opinion the D.C. Circuit panel stated, without analysis, that “[a]ll fourteen [named plaintiffs] were Hungarian nationals during World War II, but have since adopted other nationalities.” 812 F.3d at 134.

To the extent the D.C. Circuit relied on this assumption about plaintiffs being Hungarian nationals,

as discussed in Part III.B.1.b, *supra*, the treaty exception analysis did not meaningfully turn on this issue. Indeed, Article 27 may have encompassed all plaintiffs' claims regardless of nationality given that they all found themselves under "Hungarian jurisdiction." Although the Circuit again mentions that "the plaintiffs were Hungarian nationals" on the way to determining that the "domestic takings rule has no application in the unique circumstances of this case," *Simon I*, 812 F.3d at 144, nothing about that conclusion is any less valid with respect to a foreign national named plaintiff. It is still the case that for a foreign plaintiff the domestic takings rule does not apply, but this time for two distinct reasons: (1) the takings in question were simply not "domestic" and (2) in any event, the domestic takings rule is null and void in this scenario. In short, while Hungarian nationality was surely assumed in the narrative in *Simon I*, this assumption did not in any way affect the logic and can hardly be deemed a "holding."<sup>27</sup>

Ordinarily, however, the "mandate rule" would indeed constrain plaintiffs because failing to raise all arguments on appeal triggers the general rule that unaddressed arguments are typically not available to be relitigated on remand. *See, e.g., Havlish v. 650 Fifth*

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<sup>27</sup> For the same reason, *Simon I*'s description of plaintiffs as having been Hungarian nationals is not "law of the case" as defendants contend. *See* Defs.' Mem. at 23 n.14. "The reach of the mandate is generally limited to matters actually decided. A mere recital of matters assumed for purposes of decision and dicta are not part of the mandate." 18B WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 4478.3 (2d ed. 2021) ("Law of the Case—Mandate Rule").

*Avenue Co.*, 934 F.3d 174, 181–82 (2d Cir. 2019) (“[W]here an issue was ripe for review at the time of an initial appeal but was nonetheless foregone, the mandate rule generally prohibits the district court from reopening the issue on remand unless the mandate can reasonably be understood as permitting it to do so.” (alteration in original) (quoting *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001))). As a mechanism for enforcing the decree of an appellate court, however, the mandate rule in its general formulation necessarily must yield to the explicit directives of the appellate court—themselves part of the mandate.

Here, the Circuit explicitly stated that on remand from *Simon I*, “the district court [may] consider on remand whether, as a matter of international comity, it should refrain from exercising jurisdiction over those claims until the plaintiffs exhaust domestic remedies in Hungary. The district court may also elect to consider any other arguments that it has yet to reach and that are unaddressed in our opinion today, such as the defendants’ *forum non conveniens* arguments.” *Simon I*, 812 F.3d at 151. The question whether plaintiffs were all Hungarian nationals was not reached by this Court in *Simon-2014* and *Simon I*’s references to plaintiffs as having been Hungarian nationals reflected an *assumption* that does not meet the bar for having been “addressed” by the Circuit. Accordingly, the Circuit’s directions spared this critical argument from being waived despite plaintiffs’ choice not to press it in *Simon I* as an additional basis on which to reverse the *Simon-2014* grant of dismissal.

The permissiveness of the *Simon I* mandate is underscored by the Circuit’s express invitation for defendants to argue, and this Court to consider on remand, the idea that international comity considerations provide reason for declining to exercise jurisdiction on prudential (not statutory) grounds pending exhaustion of domestic remedies. *See* 812 F.3d at 149, 151. Critically, defendants had not raised that argument at all in *Simon I*; rather, the Circuit identified it as an “argument that the Hungarian defendants *could* assert in this case.” *Id.* at 149 (emphasis added). Unsurprisingly, when defendants took the Circuit up on its invitation in *Simon-2017*, *see* Part I.B.3, *supra*, nobody argued there or in *Simon II* that defendants’ “new” prudential exhaustion argument had been waived by failure to press it in *Simon-2014* or *Simon I*. There is no reason to believe that the Circuit’s parallel blanket invitation to raise on remand any issue “unaddressed” in *Simon I* should be taken any less seriously.

## **2. Citizenship Rules**

Plaintiffs have provided a detailed and uncontroverted declaration by Dr. Gavriel Bar-Shaked, a historian “specializing in the Hungarian Holocaust.” Bar-Shaked Decl. ¶¶ 4–19. The Court has no reason to doubt the reliability of Dr. Bar-Shaked’s testimony, and in any event, defendants offer no rebuttal or objection. To the contrary, defendants cite to Dr. Bar-Shaked’s declaration in their own briefing in support of their own arguments regarding plaintiffs’ nationality. Defs.’ Reply at 1, 3–4, 4 n.4.



A number of named plaintiffs were living in the Ruthenia and Slovenia portions of Czechoslovakia that were annexed by Hungary in 1938 and 1939, Bar-Shaked Decl. ¶¶ 31 n.11, 58 & n.28, 60 & n.30, raising a question as to their nationality in the relevant period. The relevant citizenship laws of Czechoslovakia and Hungary at the time were, to put it mildly, complicated.

*a) Czechoslovakia*

Czechoslovakian citizenship law prior to the annexations by Hungary involved complicated criteria owing to Czechoslovakia's creation upon the 1918 collapse of the Austro-Hungarian Empire. According to plaintiffs, Czechoslovakian citizenship was conferred on October 28, 1918, to: (1) persons who had held a "domiciliary right" in the territory that became Czechoslovakia continuously since January 1, 1910; and (2) "[f]ormer Hungarian citizens who were born on the territory of Czechoslovakia as children of Hungarian citizens with domiciliary right on the Czechoslovakian territory." Pls.' Opp'n at 26. After that date, "Czechoslovakian citizenship was obtained by birth if a child was born into a marriage and the father was a Czechoslovakian citizen or[,] if born out of wedlock, if the mother was a Czechoslovakian citizen." *Id.*

As relevant to this case, plaintiffs argue that persons "born in the Ruthenia or Slovakia regions when [those regions] were part of Czechoslovakia," but then resided in Hungary at the time of the post-annexation takings, were "presumptively Czechoslovak nationals when Hungary wrongfully took their property

in the Holocaust.” Pls.’ Opp’n at 4–5. That conclusion, however, does not flow from plaintiffs’ explanation of Czechoslovakian citizenship law, without more. To the contrary, under the stated rule an individual’s Czechoslovakian citizenship status depended on some combination of when they were born, when they lived in the area corresponding to Czechoslovakia, and the citizenship status of one or both parents. Those are too many conditions to make someone “presumptively” a Czechoslovakian citizen based solely on the fact of birth in Ruthenia or Slovakia between 1918 and 1938. Furthermore, even if that “presumption” were valid, application required that the person must in fact have been born in those areas in that timeframe.

*b) Hungary*

Dr. Bar-Shaked describes a detailed set of qualifications for Hungarian citizenship for those living in annexed Ruthenia: “Hungarian citizenship was granted to inhabitants of Ruthenia who had lived there continuously from March 15, 1929 to March 15, 1939 and had been Hungarian citizens on July 26, 1921. Hungarian citizenship under these rules was granted also [to] wives and children under 24 years of age. However, any person whose ancestor acquired Czechoslovak citizenship by option based on Article 64 of the Trianon Treaty was not entitled to Hungarian citizenship.” *Id.* ¶ 61.<sup>28</sup> Dr. Bar-Shaked extrapolates

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<sup>28</sup> Defendants also cite Dr. Bar-Shaked on this point, misleadingly, to argue that any named plaintiffs “born in regions of Czechoslovakia that had been annexed by Hungary . . . became Hungarian nationals after the annexation in 1939.” Defs.’ Reply at 3–4. Even though defendants identify in a parenthetical that this

equivalent treatment for those in annexed Slovakia. *Id.* ¶ 61 n.31.

Finally, the Hungarian citizenship possibilities available to Jews in the annexed areas were restricted. Hungary's Second Jewish Law, enacted in 1939, "prohibited Jews from obtaining Hungarian citizenship either by naturalization or marriage." Bar-Shaked Decl. ¶ 31. As a result, Dr. Bar-Shaked contends, "many of the 324,000 Jews who lived in the territories acquired by Hungary from Czechoslovakia . . . between 1938 and 1941 were barred by the Second Jewish Law from becoming Hungarian citizens." *Id.* ¶ 31 & n.11.<sup>29</sup> "This law also established the 'legal' basis for the Hungarian government practice of imposing extra stringent requirements for the proof of Hungarian citizenship, which proved fatal to many Jews in occupied Ruthenia." *Id.* ¶ 31.

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citizenship-upon-annexation rule applied only to persons "who were originally Hungarian citizens," *id.* at 4 (citing Bar-Shaked Decl. ¶¶ 58, 60–61), they conveniently skip over that critical limitation and misattribute to Dr. Bar-Shaked the notion that birth in the annexed region plus residency therein at the time of annexation were, alone, enough to confer Hungarian citizenship, *see id.* at 3–4.

<sup>29</sup> The citation provided as support for this statement does state that 324,026 Jews lived in the annexed region, as a distinct minority—only 6.05% of the total population in the annexed region—*see* Yehuda Don & George Magos, *The Demographic Development of Hungarian Jewry*, 45 *JEWISH SOC. STUD.* 189, 206 n.75 (1983), but is silent on any citizenship implications from annexation or law as to those residents.

Without diminishing Dr. Bar-Shaked's expertise on this topic, for the purposes of subject matter jurisdiction in this litigation, this explanation raises more questions than provides answers. Was the conferral of Hungarian citizenship on a Czechoslovakian citizen (Jewish or otherwise) living in the *annexed* region a question of "naturalization" or some other annexation-related process? If the Second Jewish Law barred naturalization of Jews residing in the annexed areas without pre-existing Hungarian nationality, why were only "many of"—not "all"—such Jews "barred . . . from becoming Hungarian citizens"? If stringent documentation requirements of *Hungarian citizenship* "proved fatal to many Jews in occupied Ruthenia"—undoubtedly a very serious and real concern—does that mean that Hungarian citizenship *was* available to at least some Jewish residents of the annexed territory? If this prohibition was not universal, what determined who could obtain Hungarian citizenship and who could not? Ultimately, the Hungarian citizenship status, or not, of Jewish people—including nine of the named plaintiffs—residing in annexed regions at the time of annexation cannot be determined from the mere fact of residency in that place at that time. More plaintiff-specific information is required.

### ***3. Named Plaintiffs***

The jurisdictional analysis that follows for each named plaintiff necessarily focuses on facts and circumstances potentially relevant to nationality, omitting the many dreadful facts about atrocities to which plaintiffs were subjected during the Holocaust,

extending well beyond “mere” property confiscation. Without diminishing the gravity of the horrors experienced by each of these named plaintiffs and staggeringly many others, this technical analysis is intended, as it must be, to answer the legal question at issue.

Plaintiffs identify twelve named plaintiffs allegedly “born in the Ruthenia or Slovakian regions of Czechoslovakia.” Pls.’ Opp’n at 5 n.2. If this were sufficient to establish a rebuttable presumption of Czechoslovakian nationality at the relevant time, this entire discussion of nationality could end here, and those twelve plaintiffs deemed unaffected by the domestic takings rule. Two problems make that shortcut unavailable here. First, plaintiffs offer no explanation of *why* those meeting this description were “presumptively *Czechoslovak* nationals,” *id.* at 4 (emphasis added), as opposed to merely *not* being Hungarian nationals. That conclusion would require either that birthright citizenship be the rule (which, as a reference point, it was not in Hungary, *see* Pls.’ Opp’n at 25–26) or that those plaintiffs qualified for Czechoslovakian citizenship for some other reason *and* that the facts establish that the qualifications for that “other reason” are met. Plaintiffs offer neither the rule nor the facts to substantiate this “presumpti[on]” of Czechoslovakian nationality.

The following plaintiff-specific recitations of facts and inferences establish that nine plaintiffs have met their burden of production to support a reasonable inference of Czechoslovakian rather than Hungarian citizenship. In these vignettes drawn from the

operative Second Amended Complaint, a common question emerges: if a named plaintiff was born in a yet-to-be-annexed portion of Czechoslovakia in the 1920s or 1930s, is the inference reasonable that the plaintiff's *parents* resided in that same area dating back to 1910? This matters because if that inference holds, the parents would qualify as having “held a continuous (1910-1918) domiciliary right” on eventual Czechoslovakian territory and thus would have been conferred Czechoslovakian citizenship on October 28, 1918. Pls.’ Opp’n at 26. A plaintiff born to such parents would similarly have been a Czechoslovakian citizen at birth. *Id.* The Court finds that, at the motion to dismiss stage, this inference may be reasonably drawn but any or all of these outcomes may change as the case progresses.

*a) The Lebovics Sisters*

Named plaintiffs Rosalie Simon, Helen Herman, Charlotte Weiss, Helena Weksberg, and Rose Miller (collectively, the “Lebovics sisters”) are five sisters with the original surname Lebovics, “raised in Tarackoz in Hungarian-annexed Ruthenia.” SAC ¶¶ 5–10.<sup>30</sup> Hungary and MÁV each confiscated some of their possessions in the course of deporting their family to Auschwitz. *Id.* ¶¶ 11–12. Plaintiffs have not alleged the nationality of the Lebovics sisters, when or where they were born, how long they had lived in Ruthenia prior to

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<sup>30</sup> The record is not consistent as to the spelling of “Lebovics.” Compare SAC ¶ 10 (“Lebovics”), with Pls.’ Opp’n at 5 n.2 (“Lebovic”). Accordingly, this opinion will refer to the Lebovics sisters using the spelling as alleged in the complaint.

its annexation, or the nationality of their parents. Although plaintiffs assert in briefing that the sisters were born in Ruthenia, Pls.' Opp'n at 5 n.2, the paragraph of the complaint cited in support does not so allege. See SAC ¶ 10 (“[The Lebovics sisters] were *raised* in Tarackoz in Hungarian-annexed Ruthenia.” (emphasis added)). “Born” and “raised” are distinct and need not be in the same place. Details matter, particularly given the complex nationality law at issue, the fact that plaintiffs have already been afforded two opportunities to amend, and plaintiffs’ ample opportunity to provide supplemental jurisdictional evidence.

Notwithstanding this dearth of facts, a plausible (perhaps even likely) chain of inferences can be drawn establishing the Lebovics sisters’ Czechoslovakian nationality and lack of Hungarian nationality. To be sure, on account of the spectacularly unhelpful pleading and briefing on this key issue, either ultimate inference requires a chain longer than the Court should be assembling on its own. For example, it is entirely plausible that the Lebovics sisters were not only raised in later-annexed Ruthenia but also born there, given that these two locations are very often one and the same. Furthermore, given that plaintiffs allege all five sisters were “raised” (an activity spanning some years) in Ruthenia, and the common-sense observation that the five sisters were most likely not all born on a single occasion, it stands to reason that at least some of the sisters were also born in Ruthenia. Then, plaintiffs’ description of the Lebovics family being collectively deported in 1944 supplies a plausible inference that the sisters were born after 1918 (which would have them at

26 years of age or younger at the time of deportation). If true, the sisters' Czechoslovakian citizenship status would mirror that of their parents.

Their parents, in turn, would have been Czechoslovakian citizens if they lived in Ruthenia for the period from 1910 to 1918, which would mean that they lived there for at least 34 years (1910 to 1944); again, entirely plausible. As for Hungarian nationality, nothing in the pleadings or briefing suggests that the Lebovics sisters were Hungarian citizens on July 26, 1921 (if they had even been born by then) nor that their parents had been. Plaintiffs alleged facts just barely sufficient to support the inference of Czechoslovakian nationality, and defendants, for their part, offered no useful persuasion to the contrary, leaning entirely on their failed procedural arguments of waiver and estoppel, *see* Part III.B.1, *supra*. The Lebovics sisters' claims survive insofar as they pierce defendants' asserted sovereign immunity.

*b) Magda*

Named plaintiff Magda Kopolovich Bar-Or ("Magda") "was born in 1928 in Korosmezo (Jasina), in Hungarian-annexed Ruthenia (formerly Austria-Hungary, then Czechoslovakia and now Ukraine)." SAC ¶ 22. Both defendants were involved with the expropriation of her family's property of substantial value in the course of the family's forced removal from their home. *Id.* ¶¶ 23–24. As with the Lebovics sisters, plaintiffs fail to allege the nationality of Magda or her parents nor where her parents lived prior to 1928. The complaint also does not explicitly state where Magda lived in the late 1930s at the time of Hungary's



annexation of Ruthenia. Accordingly, the complaint lacks sufficient facts to apply either the Czechoslovakian or Hungarian nationality laws as explained by plaintiffs. Nonetheless, a plausible inference of Magda's Czechoslovakian nationality and lack of Hungarian nationality may be teased from the sparse allegations available about Magda.

The complaint alleges that when Hungarian police expelled the family from their home in 1944, police left the family in an unspecified "town cemetery under heavy guard" and later moved them "to the *Krona* theater in Korosmezo." See SAC ¶ 23. These allegations—that Magda was born in Korosmezo in 1928 and her family was ultimately relocated in 1944 to a theater in the same town—support the plausible inference that the family lived in or near Korosmezo in 1944, and further that the family lived in Korosmezo in 1938 and 1939 at the time of the annexations. No facts alleged suggest that Magda's parents were Hungarian citizens on July 26, 1921, so although the family may have lived in Ruthenia for the ten-year period ending March 15, 1939, they would *not* have been eligible to obtain Hungarian citizenship at that time. As for Czechoslovakian nationality, given that they seemingly lived in Ruthenia from at least 1928 through 1944, they may plausibly have lived there since 1910 and therefore would have obtained Czechoslovakian citizenship in 1918. Magda would then have been conferred Czechoslovakian citizenship at birth.

Plaintiffs' allegations concerning Magda are sufficient—again, just barely—to meet their burden of production supporting an inference of Czechoslovakian

nationality, and defendants offer no evidence or specific argument to the contrary. Accordingly, her claim may proceed past this motion to dismiss.

*c) Yitzhak*

Named plaintiff Yitzhak Pressburger (“Yitzhak”) and his family went into hiding and managed to avoid being transported to a concentration camp, but still allege that MÁV confiscated a shipment of agricultural products without compensation. SAC ¶¶ 39–40.

Analysis of Yitzhak’s citizenship is confounded by inconsistent factual allegations. Plaintiffs’ complaint alleges that Yitzhak “was born in Prague in 1933,” SAC ¶ 39, but plaintiff’s opposition brief states that he “was born in Bratislava, Czechoslovakia (Slovakia),” Pls.’ Opp’n at 5 n.2 (misciting SAC ¶ 39 and failing to acknowledge the inconsistency). The complaint may be in error, stating, in fuller context: “He was born in Prague in 1933, the son of Jenó Pressburger, a trader in agricultural products. The family lived in Bratislava until 1934, when they moved to Prague.” SAC ¶ 39. Although the allegation as written—that is, that Yitzhak was born in Prague, away from the family’s residence in Bratislava, but returned to Bratislava for a year or so before the family relocated to Prague—could be true, the phrasing of these sentences combined with the recharacterization in plaintiffs’ briefing makes the more likely intended reading that Yitzhak was in fact born in Bratislava. Earlier iterations of this factual allegation provide little clarity. The original complaint stated that Yitzhak “was born in Slovakia in 1928,” Compl. ¶ 38, a different location and year. The First Amended Complaint changed this

to “born in Prague in 1933,” First. Am. Compl. ¶ 38, ECF No. 21, which carried through to the Second Amended Complaint.<sup>31</sup>

Despite the factual inconsistencies, because both Prague and Bratislava were in Czechoslovakia prior to the annexations and because no critical cutoff dates relative to nationality fall within the range of 1928 to 1933, plaintiffs adequately allege facts supporting a plausible inference of Yitzhak’s Czechoslovakian nationality and lack of Hungarian nationality. Every fact mentioned for Yitzhak and his family leading up to 1939 indicates that his birthplace was in Czechoslovakia and that the family resided there. SAC ¶ 39. From that, the inference is plausible that Yitzhak’s parents had resided in the territory that became Czechoslovakia since 1910. The family lived in Prague around the time of the annexations, *id.*, and therefore was *not* eligible for consideration for Hungarian nationality based on residency in an annexed area. Finally, although the family moved to Budapest, Hungary—not in an annexed territory, *see* Bar-Shaked Decl. ¶ 66 (depicting in a map that Budapest was well within pre-1938 Hungary)—there is no indication that they acquired Hungarian citizenship at any point, particularly in light of the Second Jewish

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<sup>31</sup> Practical difficulties may present a challenge in tracking down biographical facts in a case with numerous named plaintiffs and events 80 or more years ago. Nevertheless, when making a substantive legal argument in which a particular fact (here, birthplace) may be material to the legal conclusion, this Court finds troubling that counsel would submit a brief explicitly citing to the complaint allegation for “support” when the specific allegation cited provides different information entirely.

Law's prohibition on Jews from gaining Hungarian citizenship by naturalization, *see* Bar-Shaked Decl. ¶ 31. Yitzhak's claim is therefore not precluded by the domestic takings rule and may proceed.

*d) Alex*

Named plaintiff Alexander Speiser ("Alex") alleges that MÁV confiscated his family's possessions while in transit to Auschwitz. SAC ¶¶ 41, 44. Alex "was born on October 12, 1928, in Ersekujvar, Czechoslovakia," on territory later annexed by Hungary. *Id.* ¶ 41. Alex's family "lived in Ersekujvar until 1930, when they moved to Cesky Tesin, Czechoslovakia," returning to Ersekujvar in "1938, when the country was dismembered." *Id.* As with several other named plaintiffs, no information is provided as to Alex's parents' nationality, but from Alex's birth in Czechoslovakia in 1928 the inference is plausible that Alex's parents lived in territory that became Czechoslovakia from 1910 through 1918. If true, Alex's parents would have been conferred Czechoslovakian citizenship in 1918 and Alex would have obtained the same at birth.

As for Hungarian nationality, plaintiffs do not specify whether Cesky Tesin was in territory annexed by Hungary. Thus, it is unclear whether the Hungarian citizenship rule for those living in annexed territory would have been applicable, but in any event, no facts are alleged giving reason to believe Alex's parents were Hungarian citizens in 1921, thus making it unlikely that anyone in the family gained Hungarian citizenship in the late 1930s. Plaintiffs have adequately alleged

that Alex had Czechoslovakian and not Hungarian citizenship.

*e) Moshe*

Named plaintiff Moshe Perel (“Moshe”) alleges that defendants confiscated his family’s property in the process of transporting family members to multiple concentration camps. SAC ¶¶ 81–82. Moshe “was born in Ersekujvar (during the relevant time period an annexed part of Hungary, and today part of Slovakia) on February 7, 1927.” SAC ¶ 81. The citizenship analysis for Moshe is equivalent to that for Alex, the previous named plaintiff discussed. Here, again, the pleadings are silent as to Moshe’s parents’ nationality, but from Moshe’s birth in Czechoslovakia in 1927, the inference is plausible that his parents lived in territory that became Czechoslovakia from 1910 through 1918. If true, Moshe’s parents would have become citizens of Czechoslovakia in 1918 and Moshe would have followed suit upon his birth. Plaintiffs have adequately alleged that Moshe had Czechoslovakian and not Hungarian citizenship.

**C. One Plaintiff with Ambiguous Nationality Allegations Must Be Dismissed Without Prejudice**

For one named plaintiff, Ze’ev Tibi Ram (“Tibi”), the facts alleged can sustain reasonable inferences for *either* Czechoslovakian or Hungarian nationality for Tibi. The result is that the sovereign immunity analysis cannot be completed on this record.

Tibi alleges that some of his family’s belongings were seized from suitcases upon being pushed onto a

train to Auschwitz in 1944, and upon arrival, they were ordered to leave their other items in the train. SAC ¶¶ 49, 53–58. According to the complaint, Tibi “was born on December 3, 1930, in Munkács, Hungary,” *id.* ¶ 49, but plaintiffs’ briefing on this motion states that the “complaint erroneously says Hungary, but [Munkács] was [in] Czechoslovakia until at least 1938,” Pls.’ Opp’n at 5 n.2. Tibi’s father, Bernat Herman (“Bernat”), “was a Hungarian patriot who fought in the rebellion against Czech rule during the Czechoslovakia occupation.” SAC ¶ 50.

Even assuming for the sake of argument that Munkács was part of Czechoslovakia prior to annexation, the record describing Tibi is still too muddled to be able to reasonably infer from the alleged facts his citizenship status in 1944 with either country.<sup>32</sup> On the one hand, plaintiffs allege that Bernat was a “*Hungarian* patriot” who fought “*against*

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<sup>32</sup> The Munkács question is further muddled by other allegations in the complaint. On the one hand, when describing another named plaintiff, plaintiffs refer to “Benedike, Czechoslovakia, approximately 10 km from Munkács.” SAC ¶ 73. Munkács’ close proximity to a specific locality in Czechoslovakia favors, to some extent, it having been in Czechoslovakia. On the other hand, the allegation that Tibi “studied in Hungarian public schools for eight years,” SAC ¶ 49, points the other way. Presuming that Tibi’s Hungarian schooling extended no later than his deportation in 1944, *any* period of “eight years,” even if not contiguous, must have begun no later than 1936. The most straightforward conclusion from those facts is that for at least some amount of time before the annexation of Ruthenia, Tibi attended “Hungarian public schools” while living in Munkács. That result is not irreconcilable with Munkács having been in Czechoslovakia as opposed to in Hungary, but it is, at a minimum, counterintuitive.

*Czech* rule,” earning the family “exempt[ion] from racial laws that were imposed when *Hungary* annexed the area in 1938.” SAC ¶ 50 (emphases added). Under these facts, Bernat—and, by extension, Tibi—plausibly qualified for Hungarian citizenship in 1939 by way of having lived in Ruthenia continuously for ten years and having been a Hungarian citizen on July 26, 1921.<sup>33</sup> On the other hand, it is also plausible that Tibi’s parents lived in Munkács for the period from 1910 to 1918, which would mean—again, assuming that Munkács is appropriately labeled as having been part of Czechoslovakia notwithstanding the allegation—that his parents would have been granted Czechoslovakian citizenship in 1918.

All told, on this record, Tibi’s nationality at the time of defendants’ expropriations of his family’s property is ambiguous. While plaintiffs have not satisfied their burden of production in support of Czechoslovakian nationality, which would place his claims outside the reach of the domestic takings rule, insufficient evidence is provided to conclude he was a Hungarian national at the time, in which case sovereign immunity would bar his suit. Additional facts, presented with improved clarity, *might* still allow Tibi properly to allege Czechoslovakian nationality and thereby establish jurisdiction under the expropriation exception.

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<sup>33</sup> Presuming that “the Czechoslovakia occupation” refers to events subsequent to the fracturing of the Austro-Hungarian Empire at the end of World War I, *see* Bar-Shaked Decl. ¶ 54, a “Hungarian patriot” active in resisting Czech rule at that time could plausibly have had Hungarian nationality shortly after that, in 1921.

Accordingly, Ze'ev Tibi Ram must be dismissed from this action without prejudice.

**D. D.C. Circuit Precedent Still Bars Dismissal on Prudential Grounds**

In light of the vacatur of *Simon II*, defendants invite this Court to reassert its holdings from *Simon-2017* dismissing the case on the grounds of international comity and *forum non conveniens*. Defs.' Mem. at 38–41. The reasons articulated in *Simon-2017* regarding the appropriateness of dismissal on these prudential grounds as a matter of law and as a matter of policy may remain sound but, without garnering the support of a majority panel on the D.C. Circuit, are rendered irrelevant. *See Simon II*, 911 F.3d at 1194 (Katsas, J., dissenting) (“This case is ‘localized’ in Hungary; it involves the taking of Hungarians’ property by other Hungarians in Hungary. In addition, claims arising out of the Hungarian Holocaust are plainly a matter of historical and political significance to Hungary.”); *Philipp*, 141 S. Ct. at 714 (Roberts, C.J., writing for a unanimous Court) (“As a Nation, we would be surprised—and might even initiate reciprocal action—if a court in Germany adjudicated claims by Americans that they were entitled to hundreds of millions of dollars because of human rights violations committed by the United States Government years ago. There is no reason to anticipate that Germany’s reaction would be any different were American courts to exercise the jurisdiction claimed in this case.”). In *Simon II*, the panel majority pointedly disagreed, and



its holdings remain binding on this Court, as explained further below.<sup>34</sup>

The disposition of defendants' prudential arguments for dismissal in the instant motion turn entirely on the status of *Simon II*. In particular, this prompts the question whether, notwithstanding the Supreme Court's unqualified vacatur of the *Simon II judgment*, the Circuit's holdings in its accompanying *opinion*—rejecting across the board the idea that federal courts may abstain from hearing an FSIA-controlled case based on international comity, and rejecting *forum non*

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<sup>34</sup> Defendants offer an additional formulation of their argument for reasserting *Simon-2017*: “Because this Court has already held that international comity requires dismissal of the Complaint, and the D.C. Circuit’s decision reversing that holding has been vacated, this Court’s comity ruling remains the law of the case.” Defs.’ Mem. at 41. This fares no better. This argument is predicated on a misapprehension of how the D.C. Circuit treats its own holdings in decisions vacated by the Supreme Court, as discussed *infra*. Thus, assuming for the sake of argument that *Simon-2017* is “alive” because no still-effective Circuit action reversed or vacated this decision, any attempt to declare that decision the “law of the case” runs headlong into the existence of a later “intervening change in controlling law,” *DuBerry v. District of Columbia*, 924 F.3d 570, 579 (D.C. Cir. 2019). Such a change is a “primary example[]” of the types of “extraordinary circumstances” under which a court may reconsider an earlier decision that otherwise would indeed be law of the case. *See id.* Indeed, this Court’s *Simon-2020* opinion *itself* recognized this limitation on the force of the law of the case doctrine. *See* 443 F. Supp. 3d at 111–12. Yet, here, as discussed *infra*, no such change of law has occurred because the opinions in *Simon II* and *Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018), *vacated on other grounds*, 141 S. Ct. 703 (2021), are still binding on the pertinent prudential dismissal doctrines.

*conveniens* dismissal under the specific facts of this case—are still binding on this Court. If so, dismissal on prudential grounds may not be revisited. If not, on the other hand, the holdings in *Simon-2017* may be reasserted, though application of these prudential doctrines here would still face headwinds as disfavored in this Circuit on intermediate appellate review. Remarkably, this seemingly elemental question about the rules of decision subsequent to a Supreme Court order of vacatur yields a range of answers.

At first blush the answer to the question “Is *Simon II* binding?” would seem to be a resounding “no” because *Simon II* is null and void. Indeed, the Supreme Court has said in plain terms: “Of necessity our decision vacating the judgment of the Court of Appeals deprives that Court’s opinion of precedential effect, leaving this Court’s opinion and judgment as the sole law of the case.” *O’Connor v. Donaldson*, 422 U.S. 563, 577 n.12 (1975); accord *Los Angeles County v. Davis*, 440 U.S. 625, 634 n.6 (1979). Multiple circuits seem to agree. See, e.g., *United States v. Moore*, 916 F.3d 231, 241 (2d Cir. 2019) (“To the extent anything in our vacated . . . opinion may have supported [the party’s] position, it has no precedential value.”); *Balfour Beatty Constr., L.L.C. v. Liberty Mut. Fire Ins. Co.*, 968 F.3d 504, 516 n.20 (5th Cir. 2020) (“[T]his court has consistently held that vacated opinions are not precedent.” (alteration in original));<sup>35</sup> *Page v. King*,

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<sup>35</sup> The Fifth Circuit has elaborated on the distinction between the effects of vacatur and reversal on other grounds, observing—perhaps counterintuitively—that precedential weight may be preserved for an opinion associated with a reversed

No. 20-17073, 2021 WL 4690953, at \*2 n.3 (9th Cir. Oct. 7, 2021) (“Vacated opinions remain persuasive, although not binding authority.” (quoting *Spears v. Stewart*, 283 F.3d 992, 1017 n.16 (9th Cir. 2002))); *McKiver v. Sec’y, Fla. Dep’t of Corrs.*, 991 F.3d 1357, 1368 (11th Cir. 2021) (“[A] vacated opinion is ‘officially gone’ and has ‘no legal effect whatever,’ and ‘[n]one of the statements made [therein] has any remaining force.’” (second and third alterations in original) (quoting *United States v. Sigma Int’l, Inc.*, 300 F.3d 1278, 1280 (11th Cir. 2002))). This position has much intuitive appeal, and defendants reasonably argue that the very definition of the word “vacate” requires this result. *See* Defs.’ Reply at 15 n.15.<sup>36</sup>

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judgment, but not for one that has been vacated. *See Cent. Pines Land Co. v. United States*, 274 F.3d 881, 893 n.57 (5th Cir. 2001) (“This case illustrates the important difference between our treatment of a panel opinion after *vacatur* by the Supreme Court and our treatment when a judgment is reversed on other grounds. While our prior opinion in [an earlier case] did not bind the [later case] panel because it was *vacated*, the opinion in [the later case] binds us because only the *judgment* was reversed on other grounds.” (emphasis in original)).

<sup>36</sup> Defendants argue that all of this Court’s holdings preceding *Simon II* are fair game for revival, relying on *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950), for the proposition that “[w]hen the Supreme Court takes an appeal but does not consider one or more of the arguments at issue before the lower courts . . . , [it] vacates the entire decision on the merits, leaving the parties free to relitigate the issues on remand.” Defs.’ Reply at 14–15. *Munsingwear*, however, provides a narrower rule, that the proper Supreme Court response in a federal civil case that becomes moot with Supreme Court review still pending is “to reverse or vacate the judgment below and remand with a direction to dismiss.” *Munsingwear*, 340 U.S. at 39. That is simply not the situation

The D.C. Circuit, however, takes a different tack: “When the Supreme Court vacates a judgment of this court without addressing the merits of a particular holding in the panel opinion, that holding ‘continue[s] to have precedential weight, and in the absence of contrary authority, we do not disturb’ it.” *United States v. Adewani*, 467 F.3d 1340, 1342 (D.C. Cir. 2006) (quoting *Action All. of Senior Citizens of Greater Phila. v. Sullivan*, 930 F.2d 77, 83 (D.C. Cir 1991)); see also *Metro. Wash. Airports Auth. Pro. Fire Fighters Ass’n Local 3217 v. United States*, 959 F.2d 297, 304–05 (D.C. Cir. 1992) (describing the Circuit’s rule that “where circuit court decision is vacated for reconsideration, rulings on unrelated issues continue to have precedential effect”); *Edmond v. U.S. Postal Serv. Gen. Couns.*, 949 F.2d 415, 424 n.17 (D.C. Cir. 1991) (“Although vacated because of an intervening Supreme Court decision covering immunity, the *Briggs* opinion retains precedential weight on other issues.”).<sup>37</sup> To that end, citing this rule, another judge on this Court has recently found himself not just influenced but rather *bound* by a holding in a vacated Circuit opinion. See *Trump v. Mazars USA LLP*, No. 19-cv-1136 (APM), 2021 WL 3602683, at \*9 (D.D.C. Aug. 11, 2021) (“The

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here. Indeed, the parties present *no* case law invoking *Munsingwear* in the context of evaluating the precedential effect of a vacated opinion.

<sup>37</sup> None of these D.C. Circuit cases directly addresses the apparent contradiction with the Supreme Court’s rule that “[o]f necessity [its] decision vacating the judgment of [a] Court of Appeals deprives that Court’s opinion of precedential effect,” *O’Connor*, 422 U.S. at 577 n.12. This Court, however, must follow the Circuit’s consistent line of authority on this issue.

parties dispute whether—in light of the Supreme Court’s vacatur of the D.C. Circuit’s judgment—this court is bound by the holdings and reasoning in *Mazars II* that the Supreme Court left untouched. The court concludes that it is. . . . Because the Supreme Court declined to opine on the merits of the D.C. Circuit’s analysis of improper purpose, the Circuit’s holding on that issue—at least with respect to the evidence then in the record—is binding on this court.” (footnotes omitted).<sup>38</sup>

All told, under the D.C. Circuit’s rule regarding the continuing precedential effect of vacated opinions, *Simon II*’s central holdings—on which the Supreme Court did not opine<sup>39</sup>—remain the law of the Circuit,

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<sup>38</sup> A former Chief Judge of this Court suggested some difference in the effect of vacatur depending on the nature of the Supreme Court’s order, explaining that: “[A] general order of the Supreme Court vacating the judgment of the Court of Appeals deprives [the Court of Appeals’s] opinion of precedential effect. The Supreme Court’s GVR [“grant, vacate, and remand”] order in this case, however, was not a general vacation but rather a specific order vacating the Court of Appeals’ judgment and remanding for further consideration in light of the Supreme Court’s decision in [another case]. Such a GVR order that directs reconsideration in light of a new Supreme Court decision is of a much more limited nature than a general vacation.” *Boehner v. McDermott*, 332 F. Supp. 2d 149, 156 (D.D.C. 2004) (Hogan, C.J.) (second alteration in original), *aff’d*, 484 F.3d 573 (D.C. Cir. 2007). Under this dichotomy, the Supreme Court’s disposition with vacatur of *Simon II* more closely resembles its GVR practice, again leaving *Simon II*’s holdings binding on this Court in this case.

<sup>39</sup> The vacatur of *Simon II* in light of *Philipp* should not be read to imply a view by the Supreme Court on the merits of *Simon II*. See *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001).

bind this Court, and foreclose defendants' renewed prudential arguments for dismissal.<sup>40</sup>

First, abstention from exercising subject matter jurisdiction under the FSIA on the basis of international comity is prohibited in this Circuit. *See Simon II*, 911 F.3d at 1181; *see also Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018) (“[T]he FSIA, Congress’s comprehensive statement of foreign sovereign immunity, which is, and always has been, a matter of grace and comity, leaves no room for a common-law exhaustion doctrine based on the very same considerations of comity.” (citation and quotation marks omitted)), *vacated on other grounds*, 141 S. Ct.

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<sup>40</sup> Some authority suggests that *Simon II*'s holdings may be the “law of the Circuit” but *not* the “law of the case.” When confronted with a previous vacated appellate opinion *in the same case*, there *may* be a distinction between the concepts of “law of the circuit” and “law of the case.” *See Action All.*, 930 F.2d at 83 (“[A] decision vacating a judgment necessarily prevents the opinion of the lower court from being the law of the case . . . .” (quoting *Davis*, 440 U.S. at 646 n.10 (Powell, J., dissenting))); *Hopkins v. Price Waterhouse*, 920 F.2d 967, 975 n.5 (D.C. Cir. 1990) (same); *Coal. to End Permanent Congress v. Runyon*, 979 F.2d 219, 221 n.2 (D.C. Cir. 1992) (Silberman, J., dissenting from the *per curiam* disposition) (“And even a vacated opinion, while no longer the law of the case, still may carry ‘persuasive authority,’ and even some precedential value.” (citation omitted)). Perhaps the difference would be meaningful if this Court were now presented with a record on these issues that differed from that before the Circuit in *Simon II*. Absent such a change, however, whether *Simon II* is also “law of the case” matters little, since even if defendants were free to relitigate, and this Court free to reconsider, the prudential arguments, their disposition is preordained under the binding law of the *Circuit*.

703 (2021).<sup>41</sup> This Court therefore must decline defendants' invitation to reassert the prudential exhaustion logic of *Simon-2017*.

Lest there be any residual uncertainty as to whether the *Simon II* prohibition on international-comity-based abstention is still good law, writing after *Philipp*, a panel of the D.C. Circuit extinguished it by reaching a similar conclusion with respect to the FSIA's "tortious acts exception." See *Usoyan v. Republic of Turkey*, 6 F.4th 31, 38, 48–49 (D.C. Cir. 2021).<sup>42</sup> In *Usoyan*, plaintiffs brought suit against Turkey for personal injuries sustained when the security detail for Turkey's President Recep Tayyip Erdogan attacked a group of anti-Erdogan protestors assembled near the residence of the Turkish ambassador. *Id.* at 35–37. The Circuit upheld the district court's denial of Turkey's motion to dismiss on all three grounds asserted: foreign sovereign immunity, political question doctrine, and international comity. *Id.* at 36. As relevant here, the *Usoyan* panel characterized the comity-based argument as "ask[ing] [it] to 'abstain from hearing' the suit altogether" and "in effect asserting an alternative basis for sovereign immunity." *Id.* at 49. The FSIA's "comprehensive framework for resolving any claim of sovereign immunity," however, deprives courts of any "authority to override the FSIA's express exception for

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<sup>41</sup> The comity-based abstention holding in the D.C. Circuit's vacated *Philipp* opinion, which *Simon II* mirrored, continues to have precedential weight for the same reason as does *Simon II*.

<sup>42</sup> Coincidentally, the *Usoyan* panel was comprised entirely of judges who decided either *Simon I* (Judges Henderson and Wilkins) or *Simon II* (Judge Millett).

tortious conduct based on the sort of ‘ambiguous and politically charged standards that the FSIA replaced.’” *Id.* (quoting *Altmann*, 541 U.S. at 699). This argument, that the FSIA provides “the *sole* and *exclusive* standards to be used in resolving questions of sovereign immunity,” *id.* (emphasis in original) (quoting *MacArthur Area Citizens Ass’n v. Republic of Peru*, 809 F.2d 918, 919 (D.C. Cir. 1987)), is entirely consistent with both the logic and the outcome of *Simon II*.<sup>43</sup>

Finally, this case cannot be dismissed on the basis of *forum non conveniens*. Under *the same facts* as here, a divided panel of the Circuit has held—even while purportedly applying a deferential abuse of discretion standard—that while, unlike prudential exhaustion, “*forum non conveniens* is not displaced by the FSIA,” *Simon II*, 911 F.3d at 1181, the relevant factors “point strongly in favor of [plaintiffs’] forum choice” and

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<sup>43</sup> Although the *Usoyan* panel did not expressly cite the vacated *Simon II* or *Philipp* circuit opinions as authority supporting its analogous conclusion barring dismissal on the grounds of international comity, it conspicuously and pointedly cited *Simon II*—including identifying its subsequent history of vacatur in the citation—for the mundane proposition that its review of the district court’s holding was *de novo*. *Usoyan*, 6 F.4th at 48 (citing *Simon II*, 911 F.3d at 1180 (citing *Philipp*, 894 F.3d at 410)). While this citation stops short of proclaiming the continuing vitality of *Simon II*, the choice of citation is notable given the ample alternate—and more recent—authority available establishing this standard of review in the FSIA context. *See, e.g., Khochinsky v. Republic of Poland*, 1 F.4th 1, 8 (D.C. Cir. 2021); *Ivanenko v. Yanukovich*, 995 F.3d 232, 236 (D.C. Cir. 2021); *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 877 (D.C. Cir. 2021); *Valambhia v. United Republic of Tanzania*, 964 F.3d 1135, 1139 (D.C. Cir. 2020).



“certainly do not tilt decisively in favor of the Hungarian forum,” *id.* at 1190.

#### IV. CONCLUSION

Defendants’ fourth Motion to Dismiss is GRANTED IN PART and DENIED IN PART. Each named plaintiff in this action falls into one of three groups for the purpose of this disposition.

On the current record, four plaintiffs—Zehava Friedman, Vera Deutsch Danos, Ella Feuerstein Schlanger, and Tzvi Zelikovitch (through his heirs)—were Hungarian nationals at the time property was expropriated from them by defendants between 1941 and 1945. Those expropriations fall within the domestic takings rule and therefore are not within the scope of the FSIA’s expropriation exception. The default grant of sovereign immunity to defendants is therefore preserved with respect to these plaintiffs’ claims. Accordingly, defendants’ fourth Motion to Dismiss is GRANTED as to plaintiffs Friedman, Danos, Schlanger, and Zelikovitch, who are dismissed with prejudice.

The allegations and evidence proffered concerning one plaintiff, Ze’ev Tibi Ram, are sufficiently ambiguous as to leave the Court unsure as to whether he can be reasonably inferred to have been a national of Hungary or of Czechoslovakia at the time of the expropriations at issue. Accordingly, defendants’ motion is GRANTED as to Mr. Ram, who is dismissed without prejudice.

Finally, based on the allegations in the Second Amended Complaint and other unrefuted evidence

adduced, nine plaintiffs—Rosalie Simon, Helen Herman, Charlotte Weiss, Helena Weksberg, Rose Miller, Magda Kopolovich Bar-Or, Yitzhak Pressburger, Alexander Speiser, and Moshe Perel—each allege plausible facts giving rise to a reasonable inference that he or she was not a Hungarian national at the time property was expropriated from them by defendants between 1941 and 1945. Accordingly, they may invoke the FSIA’s expropriation exception unencumbered by the domestic takings rule and thereby overcome the default grant of sovereign immunity to defendants. Defendants’ fourth Motion to Dismiss is therefore DENIED as to plaintiffs Simon, Herman, Weiss, Weksberg, Miller, Bar-Or, Pressburger, Speiser, and Perel.

An Order consistent with this Memorandum Opinion will be entered contemporaneously.

Date: December 30, 2021

[SEAL] /s/ Baryl A. Howell  
BERYL A. HOWELL  
Chief Judge

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**APPENDIX D**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**No. 22-7010**

**1:10-cv-01770-BAH**

**[Filed October 12, 2023]**

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Rosalie Simon, et al.,	)
	)
Appellees	)
	)
v.	)
	)
Republic of Hungary and Magyar	)
Allamvasutak Zrt., (MAV ZRT.),	)
	)
Appellants	)

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**September Term, 2023**

Consolidated with 22-7013, 22-7112

**BEFORE:** Pillard and Childs, Circuit Judges;  
and Randolph, Senior Circuit Judge

App. 194

**ORDER**

Upon consideration of the petition for panel rehearing filed by appellees Trianon Survivors on September 6, 2023, and the response thereto, it is

**ORDERED** that the petition be denied.

**Per Curiam**

**FOR THE COURT:**

Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy

Deputy Clerk

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**APPENDIX E**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**No. 22-7010**

**1:10-cv-01770-BAH**

**[Filed October 12, 2023]**

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Rosalie Simon, et al.,	)
	)
Appellees	)
	)
v.	)
	)
Republic of Hungary and Magyar	)
Allamvasutak Zrt., (MAV ZRT.),	)
	)
Appellants	)
	)

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**September Term, 2023**

Consolidated with 22-7013, 22-7112

**BEFORE:** Srinivasan, Chief Judge; Henderson,  
Millett, Pillard, Wilkins, Katsas, Rao,  
Walker, Childs, Pan, and Garcia,  
Circuit Judges; and Randolph, Senior  
Circuit Judge

App. 196

**ORDER**

Upon consideration of the petition for rehearing en banc filed by appellees Trianon Survivors, the response thereto, the amicus brief filed by Professor Vivian Grosswald Curran, and the absence of a request by any member of the court for a vote, it is

**ORDERED** that the petition be denied.

**Per Curiam**

**FOR THE COURT:**

Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy

Deputy Clerk