

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EMIL ALPERIN, et al.,

No. C-99-04941 MMC

Plaintiffs,

**ORDER GRANTING DEFENDANT IOR'S  
MOTION TO DISMISS FOURTH  
AMENDED COMPLAINT**

v.

VATICAN BANK, et al.,

(Docket No. 272)

Defendants.

Before the Court is the motion to dismiss plaintiffs' Fourth Amended Complaint filed March 20, 2006 by defendant Istituto per le Opere di Religione ("IOR"), seeking dismissal of the claims asserted against IOR for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act and for lack of standing. Plaintiffs have filed an opposition to the motion; IOR has filed a reply. Having considered the papers filed in support of and in opposition to the motion, the Court rules as follows.

**BACKGROUND**

Plaintiffs consist of both individual and organizational plaintiffs, as well as a purported class of all Serbs, Jews, Roma, and former Soviet Union citizens and their heirs and beneficiaries who suffered monetary and/or property losses assertedly caused by the Independent State of Croatia ("NDH") during the period from April 1941 through May 1945. (See Fourth Amended Complaint ("4AC") ¶¶ 1, 45-73.) The defendants are IOR and the

1 Order of Friars Minor (“OFM”). (See 4AC ¶¶ 74-85.)

2 According to plaintiffs, defendants “accepted, concealed, hypothecated, laundered,  
3 retained, converted and profited from assets looted by the Ustasha Regime during April  
4 1941 through May 1945 and deposited in, or converted, concealed, hypothecated,  
5 trafficked, credited, pledged, exchanged, laundered or liquidated through, the IOR, and  
6 OFM after the demise of the NDH in May 1945.” (See *id.* ¶ 8.) Specifically, plaintiffs  
7 allege that their property was taken by the Ustasha Regime and added to the Ustasha  
8 Treasury. (See *id.* ¶¶ 41-44.) Plaintiffs allege that “[m]ore than 200 million Swiss francs”  
9 from the Ustasha Treasury were “transferred to Vatican City and the College of San  
10 Girolamo Degli Illirici and then to the IOR for conversion.” (See *id.* ¶ 154.) Plaintiffs further  
11 allege that “[i]n 1948, 2,400 kilos of Ustasha Treasury gold was moved from the IOR to  
12 Swiss bank accounts.” (See *id.* ¶ 155.) Additionally, plaintiffs allege that jewels, gold  
13 coins, and gold jewelry from the Ustasha Treasury were converted after the end of World  
14 War II by IOR and OFM before being transferred to Swiss bank accounts. (See *id.* ¶ 159.)

15 Plaintiffs further allege that a portion of the Ustasha Treasury was “transferred,  
16 credited, and exchanged into the IOR’s gold trading program” in the United States. (See *id.*  
17 ¶ 39.) Plaintiffs allege that IOR deposited gold from the Ustasha Treasury in the Federal  
18 Reserve Bank in New York and the Republic Bank of New York through the 1960’s. (See  
19 *id.* ¶¶ 37, 166.) Plaintiffs also allege that “[f]unds from the Ustasha Treasury laundered by  
20 IOR were used to set up the publishing and commercial activities of the Croatian Publishing  
21 House Croatia and the Croatian Historical Institute . . . and to expand the existing  
22 operations of the Danica newspaper, the Croatian Franciscan Custody of the Holy Name,  
23 the Franciscan Printery, the Croatian Almanac, and the Croatian Catholic Messenger  
24 newspaper, all in Chicago under the direction of OFM.” (See *id.* ¶ 35.) Plaintiffs claim that  
25 IOR “profited from Ustasha Treasury transactions involving banks in various European and  
26 South American countries” and enhanced its position “as a post war gold trader on both  
27 public and private markets. (See *id.* ¶¶ 162, 165.)

28 By the instant complaint, plaintiffs assert causes of action against defendants for an

1 accounting, conversion, unjust enrichment, restitution, and violations of international law.  
2 (See id. ¶¶ 182-201.)

3 **LEGAL STANDARD**

4 A motion to dismiss for lack of subject matter jurisdiction is brought pursuant to Rule  
5 12(b)(1) of the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 12(b)(1). When ruling  
6 on a facial attack under Rule 12(b)(1), the Court “must accept as true all material  
7 allegations of the complaint, and must construe the complaint in favor of the complaining  
8 party.” See Warth v. Seldin, 422 U.S. 490, 501 (1975).<sup>1</sup>

9 **DISCUSSION**

10 IOR moves to dismiss the claims against it on the grounds it is immune from suit  
11 under the Foreign Sovereign Immunities Act (“FSIA”) and that plaintiffs lack standing.

12 **A. Foreign Sovereign Immunities Act**

13 The FSIA “provides the ‘sole basis’ for obtaining jurisdiction over a foreign sovereign  
14 in the United States.” See Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 611  
15 (1992). The district courts have “original jurisdiction . . . of any nonjury civil action against a  
16 foreign state . . . as to any claim for relief in personam with respect to which the foreign  
17 state is not entitled to immunity” under the FSIA or any applicable international agreement.

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19 <sup>1</sup> The moving party may make either a facial or a factual attack on the pleadings.  
20 See Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004). In a facial attack, the moving  
21 party “asserts that the allegations contained in a complaint are insufficient on their face to  
22 invoke federal jurisdiction.” Id. (quoting Safe Air for Everyone v. Meyer, 373 F.3d 1035,  
23 1039 (9th Cir. 2004)). In a factual attack, the moving party challenges the truth of the  
24 allegations with extrinsic evidence such as affidavits. Id. In a factual attack, the opposing  
25 party must respond with affidavits or other evidence to satisfy its burden of establishing  
26 subject matter jurisdiction. Id. Here, IOR has submitted declarations in support of its  
27 argument that it is a foreign sovereign, but it has not submitted extrinsic evidence with  
28 respect to whether it falls within any of the FSIA’s exceptions to sovereign immunity. Plaintiffs have not submitted any evidence in opposition, and have treated IOR’s motion as a facial attack, arguing that the allegations are sufficient on their face to establish jurisdiction under the FSIA’s exceptions. IOR likewise characterizes its motion as a facial attack, and makes no argument that plaintiffs are required to respond with evidence to satisfy their burden of establishing jurisdiction. (See Motion at 1:7-10.) Because IOR’s extrinsic evidence is limited to the issue of its status as a foreign sovereign, and because the parties have not argued the issue, the Court will assume plaintiffs are not required to respond with extrinsic evidence to survive the motion, and, accordingly, will analyze the sufficiency of the complaint on its face.

1 See 28 U.S.C. § 1330(a); see also 28 U.S.C. § 2604 (providing “a foreign state shall be  
2 immune from the jurisdiction of the courts of the United States and of the States except as  
3 provided in sections 1605 to 1607 of this chapter”). The FSIA applies retroactively to all  
4 conduct, including conduct occurring before its enactment. See Republic of Austria v.  
5 Altmann, 541 U.S. 677, 697 (2004).

6 The defendant “bears the burden of establishing its immunity, including the burden  
7 of proof that no exception applies.” See Phaneuf v. Republic of Indonesia, 106 F.3d 302,  
8 306 (9th Cir. 1997). The defendant must first establish a prima facie case of sovereign  
9 immunity, which gives rise to a presumption of immunity, by demonstrating that it is a  
10 foreign state within the meaning of the FSIA. See id. If the defendant establishes a prima  
11 facie case of immunity, the burden shifts to the plaintiff to establish that an exception  
12 applies. See id. at 307. If the plaintiff meets its burden, the defendant then bears the  
13 burden of showing that the exception does not apply. See id.

#### 14 **1. Agency or Instrumentality**

15 IOR argues that it is an agency or instrumentality of the Holy See, which plaintiffs  
16 concede is a foreign sovereign. (See Opp. at 1:23-24.) A foreign state “includes a political  
17 subdivision of a foreign state or an agency or instrumentality of a foreign state.” See 28  
18 U.S.C. § 1603(a). An agency or instrumentality of a foreign state is any entity that is (1) “a  
19 separate legal person, corporate or otherwise”; (2) “an organ of a foreign state or political  
20 subdivision thereof, or a majority of whose shares or other ownership interest is owned by a  
21 foreign state or political subdivision thereof”; and (3) “neither a citizen of a State of the  
22 United States . . . nor created under the laws of any third country.” See 28 U.S.C. §  
23 1603(b). As plaintiffs concede (see Opp. at 2:24-25), IOR is a separate legal person and is  
24 not a citizen of the United States or created under the laws of any third country, (see Caridi  
25 Decl. ¶¶ 35, 47). Consequently, the issue that remains is whether IOR is an organ of the  
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1 foreign state. See 28 U.S.C. § 1603(b)(2).<sup>2</sup>

2 To determine whether an entity is an organ, “courts consider whether the entity  
3 engages in a public activity on behalf of the foreign government.” See EIE Guam Corp. v.  
4 Long Term Credit Bank of Japan, 322 F.3d 635, 640 (9th Cir. 2003). In making this  
5 determination, courts examine the following factors: (1) “the circumstances surrounding the  
6 entity’s creation”; (2) “the purpose of its activities”; (3) “its independence from the  
7 government”; (4) “the level of government financial support”; (5) “its employment policies”;  
8 and (6) “its obligations and privileges under state law.” See EIE Guam Corp., 322 F.3d at  
9 640.

10 **a. Circumstances surrounding IOR’s creation**

11 The first factor looks to whether the entity was created by public law. See, e.g., id.  
12 (finding organ status where entity created pursuant to laws enacted by Japanese Diet);  
13 Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect, 89 F.3d 650,  
14 655 (9th Cir. 1996) (finding organ status where entity created by Mexican Constitution,  
15 Federal Organic Law, and Presidential Proclamation). IOR is a “public juridic person”  
16 under canon law. (See Declaration of Professor Settimio Carmignani Caridi (“Caridi Decl.”)  
17 ¶¶ 25-26.)<sup>3</sup> IOR’s status as a public juridic person was established on March 1, 1990,  
18 pursuant to the Chirographum quo nova ordinatio datur Organismo Istituto per le Opere  
19 (“1990 Chirograph”)<sup>4</sup> and Adnexum Statuto, Istituto per le Opere di Religione (“1990  
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23 <sup>2</sup>The relevant inquiry is whether IOR is an agency or instrumentality “at the time the  
24 lawsuit is filed,” as opposed to “the time of the alleged wrongdoing.” See Patrickson v.  
Dole Food Co., 251 F.3d 795, 805 (9th Cir. 2001).

25 <sup>3</sup>A “juridic person” is a “fictitious” rather than a “natural” person. (See id. ¶ 25.) A  
26 “public juridic person” is an entity that “is created by the specific grant of the competent  
authority.” (See id. ¶ 27.)

27 <sup>4</sup>“A chirograph is a traditionally handwritten instrument through which the Pontiff  
28 expresses his will. In the Holy See’s legal system, the papal chirograph is law.” (See  
Caridi Decl. ¶ 32 n.1.)

1 Statuto”)<sup>5</sup> issued by Pope John Paul II, the governing authority of the Holy See.<sup>6</sup> (See  
 2 Caridi Decl. ¶ 32.) Accordingly, the circumstances surrounding IOR’s creation, and, in  
 3 particular, its creation as a juridic person by the Pope, support a finding of organ status.

4 **b. Purpose of IOR’s activities**

5 The second factor focuses on whether the entity serves a public purpose or whether  
 6 it acts as an independent commercial enterprise to maximize its own profits. See, e.g., EIE  
 7 Guam Corp., 322 F.3d at 640 (finding organ status where entity’s purpose was to carry out  
 8 national policy to revitalize Japanese financial system); Kelly v. Syria Shell Petroleum Dev  
 9 B.V., 213 F.3d 841, 848 (9th Cir. 2000) (finding organ status where entity’s purpose was to  
 10 develop and explore Syria’s mineral resources); but see, e.g., Patrickson v. Dole Food Co.,  
 11 251 F.3d 795, 808 (9th Cir. 2001) (finding no organ status where entity, created to exploit  
 12 resources owned by Israeli government, was “independent commercial enterprise[ ]” acting  
 13 to “maximize profits rather than pursue public objectives”).

14 According to the 1990 Statuto, IOR’s purpose is to “provide custody and  
 15 administration of movables and immovables transferred or entrusted to the same institute  
 16 for the purpose of works of religion and charity.” (See Caridi Decl. ¶ 37; see also  
 17 Declaration of Jeffrey S. Lena (“Lena Decl.”) ¶ 4 & Ex. A (Piccolo Decl., 1990 Bylaws  
 18 Translation (“Bylaws Translation”).) The 1990 Statuto authorizes IOR to act “as a fiduciary  
 19 of the deposited funds for designated pious purposes, and as an autonomous pious  
 20 foundation that directly carries out the charitable purposes of the Holy See and the State of  
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22 <sup>5</sup>Caridi states that the 1990 Statuto is the “internal governing regulations” of IOR.  
 23 (See Caridi Decl. ¶ 32.)

24 <sup>6</sup>Plaintiffs argue the Caridi Declaration should not be given any weight because IOR  
 25 has failed to provide translated copies of the documents relied upon by Caridi. IOR did,  
 26 however, provide copies and translations of the primary sources Caridi relied upon in his  
 27 declaration, in particular, the 1990 Chirograph and the 1990 Statuto. (See Lena Decl., filed  
 28 June 30, 2006, Ex. A.) Plaintiffs further argue that Caridi’s declaration “should be accorded  
 little if any weight” because “IOR is asking the Court to enforce religious law - canon and  
 ecclesiastical - in a secular property dispute with non-members of the Roman Catholic  
 religion.” (See Opp. at 3:9-11, 3:26-28.) IOR is not, however, asking the Court to enforce  
 religious law; rather, it is presenting its governing laws to establish it is an agency or  
 instrumentality of a foreign state as defined by the FSIA.

1 Vatican City.” (See Caridi Decl. ¶ 38; see also Lena Decl. Ex. A (Bylaws Translation).)  
2 IOR is not authorized to retain profits. (See Caridi Decl. ¶ 53.) Accordingly, IOR serves a  
3 public purpose of the Holy See and is not an “independent commercial enterprise”;  
4 consequently, this factor supports a finding of organ status.

5 **c. Independence from the Holy See**

6 The third factor focuses on the entity’s structure. The Courts of Appeals have held  
7 that an entity is an organ of the foreign state where the entity’s board is comprised of high-  
8 ranking government officials. See, e.g., Kelly, 213 F.3d at 848 (finding organ status where  
9 board members “have invariably been high-level Syrian government officials”); Patrickson,  
10 251 F.3d at 808 (finding no organ status where entity was “not run by government  
11 appointees”). Here, the Cardinals’ Commission, the highest administrative level of IOR, is  
12 comprised of five high-ranking government officials, all appointed by the Holy See. (See  
13 Caridi Decl. ¶¶ 41-42; see also Lena Decl. Ex. A (Bylaws Translation).) Plaintiffs argue,  
14 however, that the Holy See lacks control over IOR because the Cardinals’ Commission  
15 does not conduct the day-to-day activities of IOR. Although the Cardinals’ Commission  
16 does not itself oversee IOR’s day-to-day activities, the Commission appoints and removes  
17 members of the Oversight Council, including the IOR’s president (see Caridi Decl. ¶ 43;  
18 see also Lena Decl. Ex. A (Bylaws Translation)), who, as plaintiffs concede, is responsible  
19 for IOR’s day-to-day operations (see Opp. at 7:25-27). Furthermore, an entity “may be an  
20 organ of a foreign state even if it has some autonomy from the foreign government.” See  
21 EIE Guam Corp., 322 F.3d at 640. Simply “because ‘the [state] is not directly involved in  
22 the day-to-day activities of [the entity] does not mean that it is not exercising control over  
23 the entity.’” See id. (alteration in original) (quoting Gates v. Victor Fine Foods, 54 F.3d  
24 1457, 1461 (9th Cir. 1995)). Moreover, IOR “cannot change its rules of internal  
25 governance without permission of and final approval by the sovereign,” further indicating a  
26 lack of independence from the Holy See. (See Caridi Decl. ¶ 36; see also Lena Decl. ¶ 4 &  
27 Ex. A (Piccolo Decl., 1990 Chirograph Translation).) Accordingly, IOR’s lack of  
28 independence from the Holy See supports a finding of organ status.

1                   **d. Financial support from the Holy See**

2           The fourth factor focuses on whether the entity is funded by the government. See,  
3 e.g., EIE Guam Corp., 322 F.3d at 640 (finding organ status where entity funded by  
4 government and compensated by government for all losses); California v. NRG Energy,  
5 Inc., 391 F.3d 1011, 1026 (9th Cir. 2004) (finding no organ status where entity received no  
6 financial support from government). Although IOR's current source of funding is not  
7 apparent from the record, IOR was originally funded by the Holy See. (See Caridi Decl. ¶  
8 33.) Moreover, although IOR has not presented evidence that the Holy See compensates  
9 it for its losses, IOR, as previously noted, is not authorized to retain profits. (See id. ¶ 53.)  
10 Accordingly, the evidence with respect to IOR's receipt of financial support from the Holy  
11 See supports a finding of organ status.

12                   **e. IOR's employment policies**

13           The fifth factor looks to whether the entity employs civil servants. See, e.g.,  
14 Corporacion Mexicana, 89 F.3d at 656 (finding organ status where entity employed only  
15 public servants); Patrickson, 251 F.3d at 808 (finding no organ status where entity's  
16 employees "were not treated as" civil servants). IOR has not presented evidence to show  
17 that its employees are civil servants. An entity, however, "may be an organ of a foreign  
18 state for purposes of the FSIA even if its employees are not civil servants"). See EIE, 322  
19 F.3d at 641.

20                   **f. IOR's obligations and privileges under state law**

21           The final factor considers the entity's obligations and privileges under state law,  
22 including whether it performs any exclusive activities for the government, see, e.g.,  
23 Corporacion Mexicana, 89 F.3d at 655 (finding organ status where entity charged with  
24 exclusive responsibility of refining and distributing government property); Kelly, 213 F.3d at  
25 848 (finding organ status where entity had exclusive right to explore and develop Syria's  
26 petroleum reserves), and whether the entity enjoys immunity from suit, see, e.g., NRG, 391  
27 F.3d at 1026 (finding no organ status where entity not immune from suit).

28           Here, IOR performs activities exclusively for the foreign state, including routing

1 payments between Holy See agencies. (See Caridi Decl. ¶¶ 49, 51.) Moreover, although  
2 there is no evidence that IOR is immune from suit within the Holy See, IOR is immune from  
3 suit in Italy. (See id. ¶ 35.) Accordingly, IOR’s obligations and privileges under state law  
4 support a finding that IOR is an organ of the Holy See.

5 **g. Summary of IOR’s status as a foreign sovereign**

6 In sum, the circumstances surrounding IOR’s creation, the purpose of its activities,  
7 its level of independence from the Holy See, its level of financial support from the Holy See,  
8 and its obligations and privileges under state law all demonstrate that IOR is an organ of  
9 the Holy See. Although there is no evidence that IOR’s employees are civil servants, the  
10 other factors are sufficient to support a finding that IOR is an organ of the Holy See.  
11 Accordingly, IOR has established a prima facie case of sovereign immunity, and will be  
12 immune from suit unless an exception applies. See Phaneuf, 106 F.3d at 306-07.

13 **2. Exceptions**

14 Because IOR has established a prima facie case of sovereign immunity, the burden  
15 shifts to plaintiffs to show that an exception applies. See id. Plaintiffs contend IOR is not  
16 entitled to immunity under the commercial activity exception set forth in § 1605(a)(2), the  
17 international takings exception set forth in § 1605(a)(3), or the tort exception set forth in  
18 § 1605(a)(5).

19 **a. Commercial activity exception**

20 The commercial activity exception provides three situations in which a foreign state  
21 will not be immune from suit, specifically, where the action is based upon (1) “a commercial  
22 activity carried on in the United States by the foreign state”; (2) “an act performed in the  
23 United States in connection with a commercial activity of the foreign state elsewhere”; or (3)  
24 “an act outside the territory of the United States in connection with a commercial activity of  
25 the foreign state elsewhere and that act causes a direct effect in the United States.” See  
26 28 U.S.C. § 1605(a)(2). Plaintiffs contend the first and third clauses are applicable herein.  
27 (See 4AC ¶ 34; see also Opp. at 9-14.)

28 In order to establish jurisdiction under the first clause, the commercial activity on

1 which the plaintiff relies “must be the activity upon which the lawsuit is based.” See Sun v.  
2 Taiwan, 201 F.3d 1105, 1109 (9th Cir. 2000) (quoting America West Airlines, Inc. v. GPA  
3 Group, Ltd., 877 F.2d 793, 796 (9th Cir. 1989). The entire case need not rest on the  
4 commercial activity of the defendant, but the plaintiff must show that “an element of the . . .  
5 claim consists in conduct that occurred in commercial activity carried on in the United  
6 States.” Id. (quoting Sugimoto v. Exportadora De Sal, S.A. De C.V., 19 F.3d 1309, 1311  
7 (9th Cir. 1994)). Here, plaintiffs do not identify the commercial activity within the United  
8 States that would satisfy the requirements of the first clause. Rather, they argue only that  
9 IOR’s conversion and money laundering activities, which occurred outside the United  
10 States, had a direct effect inside the United States because IOR used funds from the  
11 Ustasha Treasury to set up a publishing house and gold accounts in the United States.  
12 (See 4AC ¶ 34-37, 152-160; see also Opp. at 9:18-20.) Assuming such activities qualify as  
13 “commercial activity” within the United States, the instant action is not based thereon, but  
14 rather is based on IOR’s alleged conversion and money laundering, which took place  
15 outside the United States. See Sun, 201 F.3d at 1110 (holding defendants’ promotional  
16 and administrative activities within United States not relevant with respect to jurisdiction  
17 under FSIA where underlying claim of negligence was failing to supervise student in  
18 Taiwan). Accordingly, the first clause, requiring that an action be “based upon a  
19 commercial activity carried on in the United States by the foreign state” is not applicable.  
20 See 28 U.S.C. § 1605(a)(2).

21 With respect to the third clause, plaintiffs allege that “[p]ursuant to 28 U.S.C. [§]  
22 1605(a)(2), there is an exception to sovereign immunity as the conversion, money  
23 laundering, and retention of the plunder of plaintiffs’ property by the IOR has had a direct  
24 commercial effect in the United States and California.” (See 4AC ¶ 34.) Plaintiffs allege  
25 that the “[f]unds from the Ustasha Treasury laundered by IOR were used to set up the  
26 publishing and commercial activities of the Croatian Publishing House Croatia and the  
27 Croatian Historical Institute” in Chicago and to expand various existing newspaper  
28 operations also in Chicago. (See id. ¶ 35.) Plaintiffs further allege that “IOR possessed

1 and/or possesses gold accounts in the United States and the private and public gold  
2 markets in the United States were directly effected [sic] by gold credits and transfers made  
3 possible by the additional gold supplied the IOR from the Ustasha Treasury.” (See id. ¶  
4 37.)

5 Under the third clause, IOR will not be immune from suit if the instant action is based  
6 upon an act that (1) was committed outside the United States; (2) was taken in connection  
7 with a commercial activity of IOR outside the United States; and (3) caused a direct effect  
8 in the United States. See Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 611  
9 (1992). Although plaintiffs have alleged the instant action is based on conduct —  
10 conversion and money laundering — committed outside the United States, (see 4AC ¶¶  
11 152-160), plaintiffs have not shown IOR’s alleged conduct was done in connection with a  
12 “commercial activity” outside the United States.

13 A “commercial activity” is “either a regular course of commercial conduct or a  
14 particular commercial transaction or act.” See 28 U.S.C. § 1603(d). “The commercial  
15 character of an activity shall be determined by reference to the nature of the course of  
16 conduct or particular transaction or act, rather than by reference to its purpose.” Id. When  
17 a foreign sovereign acts “not as regulator of a market, but in the manner of a private player  
18 within it, the foreign sovereign’s actions are ‘commercial’ within the meaning of the FSIA.”  
19 See Weltover, 504 U.S. at 614. Plaintiffs contend, without citation to authority, that “[t]he  
20 [c]rimes of IOR were [c]ommercial [a]ctivity.” (See Opp. at 12:3-16.) Plaintiffs do not  
21 explain how IOR’s alleged criminal acts are synonymous with that of a “private player” in  
22 the market.

23 Even if plaintiffs were to establish that IOR’s alleged conversion was done in  
24 connection with a commercial activity, however, plaintiffs have failed to show a direct effect  
25 in the United States. An effect is direct “if it follows as an immediate consequence of the  
26 defendant’s activity,” see Weltover, 504 U.S. at 618 (internal quotation and citation  
27 omitted), and is not a “secondary or incidental[ ] result[ ]” of the defendant’s actions, see  
28 Corzo v. Banco Cent. De Reserva Del Peru, 243 F.3d 519, 525 (9th Cir. 2001) (holding

1 effect on U.S. companies not direct where defendant's conduct caused "cutoff of cash-flow"  
2 that caused plaintiff to breach contracts with said companies). Courts "often look to the  
3 place where legally significant acts giving rise to the claim occurred" to determine the place  
4 where a direct effect is likely to be located. See Adler v. Fed. Republic of Nigeria, 107 F.3d  
5 720, 727 (9th Cir. 1997) (internal quotation and citation omitted).

6 Here, plaintiffs contend the "direct effect" in the United States was IOR's "publishing  
7 activities in Chicago" and IOR's "enhance[d] . . . position as a gold trader." (See Opp. at  
8 12:18-19, 13:8-9.) Any such effect, however, has no legal significance with respect to  
9 plaintiffs' claim that IOR converted their property in Vatican City in 1946. A mere receipt of  
10 a collateral financial benefit in the United States is not a direct effect. Cf. Adler, 107 F.3d at  
11 726-27 ("[M]ere financial loss . . . in the U.S. is not, in itself, sufficient to constitute a 'direct  
12 effect.'") Moreover, the asserted effects occurred years after IOR's alleged conversion,  
13 and thus were not an "immediate consequence," see Weltover, 504 U.S. at 618, of the  
14 claimed wrongful conduct. According to plaintiffs, at least six years passed after IOR's  
15 alleged conversion in 1946 until the establishment of the publishing company in Chicago.  
16 (See 4AC ¶¶ 39, 146-147.) Further, plaintiffs concede there is a lapse of approximately  
17 fifteen years between IOR's alleged conversion in 1946 and IOR's alleged gold dealings in  
18 the United States. (See Opp. at 13:16-18.) The only authority plaintiffs cite in support of  
19 their argument is Altmann v. Austria, 317 F.3d 954 (9th Cir. 2002). That case, however,  
20 addressed only the "international takings" exception and thus did not involve an analysis of  
21 the "direct effect" requirement under the commercial activity exception. Accordingly,  
22 plaintiffs have failed to show the instant action is based on an "act outside the territory of  
23 the United States in connection with a commercial activity of the foreign state elsewhere"  
24 that "causes a direct effect in the United States." See 28 U.S.C. § 1605(a)(2).<sup>7</sup>

25 **b. International takings exception**

26 \_\_\_\_\_  
27 <sup>7</sup>In light of the foregoing, the Court does not reach IOR's argument that the Court is  
28 precluded from analyzing plaintiffs' claim under the commercial activity exception because  
the claim is "in essence" one for an unjust taking of property, properly analyzed under the  
international takings exception. (See Motion at 10:9-12:10.)

1 Plaintiffs next argue that IOR is not entitled to immunity under § 1605(a)(3), the  
2 international takings exception. Section 1605(a)(3) provides:

3 A foreign state shall not be immune from the jurisdiction of courts of the  
4 United States or of the States in any case . . . in which rights in property taken  
5 in violation of international law are in issue and that property or any property  
6 exchanged for such property is present in the United States in connection  
7 with a commercial activity carried on in the United States by the foreign state;  
8 or that property or any property exchanged for such property is owned or  
9 operated by an agency or instrumentality of the foreign state and that agency  
10 or instrumentality is engaged in a commercial activity in the United States.

11 See 28 U.S.C. § 1605(a)(3).

12 IOR argues that plaintiffs fail to meet the exception for a number of reasons,  
13 including that plaintiffs have claimed only “intangible” property rights, that plaintiffs have not  
14 alleged facts showing the taking of their property was in violation of international law, and  
15 that plaintiffs have not satisfied the local remedies rule. The Court need not reach all of the  
16 issues raised by IOR, however, because plaintiffs have failed to establish an essential  
17 element under either clause of the exception. Under the first clause, plaintiffs have failed to  
18 allege that their property or property exchanged for it is in the United States in connection  
19 with a commercial activity in the United States. Under the second clause, although  
20 plaintiffs allege that IOR owns or operates their property, plaintiffs fail to allege that IOR is  
21 engaged in a commercial activity in the United States.

22 Plaintiffs argue that the jurisdictional nexus is satisfied under the first clause  
23 because parts of the Ustasha Treasury were exchanged for gold and then transferred to  
24 the United States through IOR’s gold trading program, which included trading with the  
25 Federal Reserve Bank and the Republic Bank of New York through the 1960’s. (See 4AC  
26 ¶¶ 37, 39, 166; Opp. 14:23-25, 18:21, 19:5-17.) Plaintiffs have not alleged, however, that  
27 their property was exchanged for gold and then transferred to the United States, only that  
28 an unidentified “portion” of the Ustasha Treasury was transferred. Further, plaintiffs  
concede that the gold involved in IOR’s alleged transfer may no longer be present in the  
United States. (See Opp. 18:21.) Plaintiffs’ argument thus rests on three levels of  
speculation: first, that their personal property might have been among the unidentified items

1 that IOR allegedly exchanged for gold; second, that the gold for which their property was  
2 exchanged might have been among the gold transferred to the United States as part of  
3 IOR's gold trading program; and third, that the transferred gold might still be present in the  
4 United States, forty years after IOR's last alleged gold transaction in the United States.  
5 Plaintiffs are correct that the Court is required to accept as true the factual allegations in  
6 the complaint. See Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir.  
7 2003). Plaintiffs, however, have not alleged, as required under the FSIA, that their property  
8 or property exchanged for it is within the United States, but only that the property might be  
9 within the United States. Such allegations are too speculative to support the requisite  
10 jurisdictional nexus. See Crist v. Republic of Turkey, 995 F. Supp. 5, 11 (D.D.C. 1998)  
11 ("Plaintiffs' mere allegation that the proceeds derived from their real property located in  
12 Cyprus are now somehow connected to some unidentified commercial activity . . . in the  
13 United States is simply not sufficient to satisfy the jurisdictional requirements under the  
14 FSIA.").

15 With respect to the second clause, plaintiffs allege that IOR "retained" some of their  
16 property after converting other property for the benefit of the exiled Ustasha. (See 4AC ¶¶  
17 42, 44, 191.)<sup>8</sup> Assuming, arguendo, such conclusory allegation suffices to plead current  
18 ownership by IOR, plaintiffs nonetheless fail to allege IOR is currently engaged in a  
19 commercial activity in the United States. See 28 U.S.C. § 1605(a)(3). Plaintiffs argue that  
20 IOR's gold trading program in the United States constitutes a commercial activity. (See  
21 Opp. at 19:6-17.) Plaintiffs acknowledge, however, that IOR's last gold transaction in the

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23 <sup>8</sup>Relying on Vencedora Oceanica Navigacion, S.A. v. Companie Nationale  
24 Algerienne de Navigation, 730 F.2d 195, 204 (5<sup>th</sup> Cir. 1984), IOR argues plaintiffs must  
25 allege not only possession or control but also that their property is being used by IOR for its  
26 own benefit. The legislative history on which Vencedora based its holding, specifically, a  
27 committee report, does not make reference to such a requirement, however. Although the  
28 report states that "a taking in violation of international law" includes "nationalization" or  
"expropriation" of property without compensation, see 1976 U.S. Code Cong. & Ad. News  
6604, 6618, the use of such terms does not imply a requirement that the foreign state use  
the property for its own benefit. See Black's Law Dictionary 1052 (8th ed. 2004) (defining  
"nationalize" as to "bring (an industry) under governmental control or ownership"); Id. at 621  
(defining "expropriation" as "[a] governmental taking or modification of an individual's  
property rights, esp. by eminent domain").

1 United States occurred, at the latest, in the 1960's. (See 4AC ¶ 166.)<sup>9</sup> Because plaintiffs  
2 fail to allege IOR is currently engaged in any commercial activity in the United States,  
3 plaintiffs have failed to establish the jurisdictional nexus under the second clause of §  
4 1605(a)(3).

5 **c. Tort exception**

6 Plaintiffs argue that the tort exception applies because “[s]ome of the Ustasha  
7 Treasury was converted in the United States through the IOR gold trading program.” (See  
8 Opp. at 19:20-21.) Under the tort exception, a foreign state is not immune from suit in any  
9 case “not otherwise encompassed in [the commercial activity exception], in which money  
10 damages are sought against a foreign state for personal injury or death, or damage to or  
11 loss of property, occurring in the United States and caused by the tortious act or omission  
12 of that foreign state or of any official or employee of that foreign state while acting within  
13 the scope of his office or employment.” See 28 U.S.C. § 1605(a)(5). Section 1605(a)(5)  
14 further provides: “[T]his paragraph shall not apply to”: (1) “any claim based upon the  
15 exercise or performance or the failure to exercise or perform a discretionary function  
16 regardless of whether the discretion be abused” or (2) “any claim arising out of malicious  
17 prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with  
18 contract rights.” See *id.*

19 The tort exception applies when both the injury complained of and the tortious act or  
20 omission occur in the United States. See *Olsen v. Gov’t of Mexico*, 729 F.2d 641, 645 (9th  
21 Cir. 1984). Although all of the tortious conduct need not occur in the United States, “at  
22 least one entire tort” must occur in the United States. See *id.* at 646.

23 Plaintiffs concede that the gold, after being looted, was “initially converted in 1946  
24 through the machinations of IOR in Vatican City,” (see Opp. at 19:24-25), but contend that,

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26 <sup>9</sup> Plaintiffs allege that an individual identified as Fr. Dominik Mandic, set up, under  
27 OFM’s direction, various publishing entities in Chicago that conduct ongoing business  
28 throughout the United States. (See 4AC ¶¶ 35, 36.) Plaintiffs do not allege, however, that  
IOR is in any way involved with these entities, other than to allege that the publishing  
businesses were originally established using funds from the Ustasha Treasury that had  
been laundered by IOR. (See *id.*)

1 by transferring the gold to the United States, "IOR reconverted the plaintiffs' property in the  
2 United States," (see id. at 19:25, 20:9-11). Plaintiffs argue that IOR's acts constitute a tort  
3 under California law, but provide no explanation as to why California law is applicable.  
4 Even under California law, however, plaintiffs have failed to show that "one entire tort" has  
5 occurred in the United States. See Olsen, 729 F.2d at 645. California Civil Code § 1712,  
6 which provides a cause of action for conversion, states in relevant part: "One who obtains a  
7 thing without the consent of its owner . . . must restore it to the person from whom it was  
8 thus obtained." As plaintiffs concede, IOR obtained the gold in the Vatican City. (See Opp.  
9 at 19:24-25.) Once IOR came into possession of the gold in the Vatican City, it did not  
10 "obtain" it again by transferring it to the United States. Plaintiffs provide no authority for  
11 their argument that IOR's "reconversion" is a tort under California law or the law of any  
12 other jurisdiction. Unlike the commercial activities exception, the tort exception does not  
13 confer jurisdiction where a tort committed outside the United States has a subsequent  
14 effect within the United States. See Argentine Republic v. Amerada Hess Shipping Corp.,  
15 488 U.S. 428, 441 (1989). Accordingly, plaintiffs have failed to show IOR's alleged tortious  
16 conduct occurred in the United States, and consequently, have failed to show the tort  
17 exception applies.<sup>10</sup>

### 18 3. Summary

19 Because IOR has established a prima facie case that it is an organ of a foreign  
20 sovereign, and because plaintiffs' allegations, even if taken as true, do not establish an  
21 exception to sovereign immunity applies, IOR's motion to dismiss plaintiffs' claims against  
22 IOR will be GRANTED. Consequently, the Court does not reach IOR's additional argument  
23 that plaintiffs lack standing.

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26 <sup>10</sup>In light of the above ruling, the Court does not reach IOR's argument that plaintiffs'  
27 claim is "based upon the exercise or performance or the failure to exercise or perform a  
28 discretionary function," see 28 U.S.C. § 1605(a)(5)(A), or whether the Court is precluded  
from analyzing plaintiffs' claim under the tort exception because it is "in essence" a claim  
for an unjust taking of property, properly analyzed under the international takings exception,  
(see Motion at 10:9-12:10).

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**CONCLUSION**

For the reasons set forth above, IOR's motion to dismiss the claims against IOR for lack of subject matter jurisdiction under the FSIA is hereby GRANTED, and plaintiffs' claims against IOR are hereby DISMISSED.

**IT IS SO ORDERED.**

Dated: December 27, 2007

  
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MAXINE M. CHESNEY  
United States District Judge