**Nazi Looted Art Commissions After the 1998 Washington Conference: Comparing the European and American Experiences**

While the United States took a leading role in organizing the Washington and Prague conferences, the question recently came up at the Hague Symposium on Nazi Looted Art[1] as to whether the US is doing enough at home to facilitate the resolution of Nazi-Looted-Art cases.

In response to the Washington and Prague conferences, which call for signatory countries to implement the Washington conferences principles in order to reach fair and just resolutions in Nazi looted art cases, various countries in Europe have set up art commissions.

In Austria, the former Culture Minister Elisabeth Geyer introduced the "Federal Law regarding the return of artworks from Austrian Federal museums and collections" in 1998 which established a government commission to review and research Nazi-era art claims, as well as an advisory committee to issue recommendations concerning the return of Nazi-era artworks. The committee is composed of eight permanent members, one representative each from the Ministry for Economic Affairs, the Ministry for Justice, the Ministry for Culture, the Defense Ministry, the Finance Ministry, and a historian and an art historian.[2] The committee reviews the result of the investigation of the commission for provenance research and any material submitted by the families of the former owners. The material is reviewed during one session and the committee issues a written recommendation by majority vote at the end of each session. The recommendation is made on the basis of the Austrian Art Restitution law, which makes reference to the "Nullification Act" of 1946. The Nullification Act includes a presumption that all transactions made by persecuted Jews during the Nazi era are void. So far the commission has issued 290 recommendations. In 256 cases they ordered the return of the artworks and in 34 cases they recommended that the artworks should not be returned.[3]

France established the "Commission d'indemnisation des victimes de spoliations intervenues du fait des législations antisémites en vigueur pendant l'Occupation" or the "Commission for the Compensation of Victims of Spoliation resulting from the anti-Semitic legislation in force during the Occupation" (CIVS). In 1995, President Jacques Chirac was the first president of France to make a public statement recognizing the responsibility of the Vichy Government for the persecution and deportation of Jews in France.[4] Two years later, in 1997, the "Mattéoli Commission" was created to study the issue of the spoliation of Jewish property in France during the occupation.[5] This led to the establishment of the CIVS in 1999 with the goal of establishing a body which would analyze

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[1] The international symposium "Fair and just solutions? Alternatives to litigation in Nazi looted art disputes: status quo and new developments" took place on Tuesday, November 27, 2012 at The Peace Palace in The Hague.
[2] Full text of the "Kunstrückgabegesetz" the Federal Art Restitution Law available at http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10010094.
[3] See information on the website of the Dutch Restiution Committee at http://www.restitutiecommissie.nl/en/committees.html.
[4] See Marlise Simmons, *Chirac Affirms France's Guilt In Fate of Jews*, N.Y. Times, July 17, 1995.
[5] For the reports issued by the commission go to http://www.culture.gouv.fr/documentation/mnr/MnR-matteoli.htm.

individual cases and compensate Nazi persecution victims in France.[6] The CIVS consists of 60 members, 10 of whom decide on the recommendation to be issued. The CIVS acts upon the filing of a claim submitted by an individual claimant. Once the claim is received, the CIVS undertakes extensive research in order to assess the circumstances of the loss. An expert report is drafted by experts chosen by the commission and is submitted to the commission's members. Claimants have the chance to appear in person during the commission's session during which the case is discussed. Thereafter the commission issues a recommendation based on *"general principles of fairness"* which is then submitted to the Prime Minister who issues a binding decision based on the recommendation. The recommendations can be reconsidered on request of the claimants, and the decision of the Prime Minister may be appealed in the administrative courts. The CIVS deals mostly with compensation claims for damages due to Nazi persecution. Claims for the return of artworks are rarely submitted since they are often difficult to locate. According to a recent survey, the CIVS has dealt with 877 cases involving artworks, 115 of which were denied, and compensation was awarded in the remaining cases, except for 2 cases where the artworks were returned.[7]

In the United Kingdom the Spoliation Advisory Panel (SAP) was established by the Department for Culture, Media and Sport in 2000 as an advisory body to help resolve claims for cultural property looted during the Nazi era. The panel consists of 9 members appointed by the Secretary of State. The panel can be called upon either by individual claimants or the institution holding the artwork in question. Both sides are asked to submit all material supporting their claim. The panel then reviews the submitted material, and if necessary schedules an oral hearing. After review and consideration, it issues a written recommendation. In making its recommendations the SAP considers "*the moral strength of the claimant's case"* and the question as to "*whether any moral obligation rests on the institution concerned"*. Where the SAP decides in favor of a claim it can recommend either: (1) to return the object to the claimant, (2) to pay compensation to the claimant, (3) to make an ex gratia payment to the claimant, or (4) to display the object alongside an account of its history and provenance during and since the Nazi era. [8]

Since 2000, the SAP has issued 11 recommendations, in 4 cases it recommended the return, in 1 case it recommended an ex-gratia payment, in 1 case it recommended the display of a plaque alongside the artworks, and in 4 cases it rejected the claim.[9]

Until 2009 British museums could not return works which were found to be lost due to Nazi persecution to the former owners because a law prohibited the museums from deaccessioning any artworks in public ownership. With the introduction of the *Holocaust (Return of Cultural Objects)*

[6] See http://www.civs.gouv.fr/spip.php?rubrique4.
[7] See information on the website of the Dutch Restitution Committee at http://www.restitutiecommissie.nl/en/committees.html.
[8] See the SAP's Constitution and Terms of Reference, No. 16
[9] See information on the website of the Dutch Restitution Committee at http://www.restitutiecommissie.nl/en/committees.html.

*Restitution Act* in November 2009 a "long standing injustice was righted"[10].

In the Netherlands, the Restitution Committee was established by decree of the Secretary of State for Education, Culture and Science dated November 16, 2001.[11] According to the 2001 Decree outlining the committee's rules and procedures, the committee has two tasks. One task is to advise the Minister of Education, Culture, and Science regarding claims for the restitution of artworks in Dutch state owned collections. The second task is to issue a recommendation upon the request of two private parties, a claimant and a possessor who has received a restitution claim. The committee compiles a detailed research report and subsequently issues a public recommendation. The recommendation is made on *principles of fairness*, the rules explicitly refer to the Washington Conference principles. The committee has reviewed 130 cases, and issued 107 recommendations. Of these, 56 recommendations were for restitution, 17 were for partial restitution, and 34 recommendations denied the claim.[12]

On the initiative of the Federal Government, the Federal States, and the National Associations of Local Authorities, Germany established an art advisory commission in 2003.[13] The commission consists of eight members and is chaired by the former President of the Federal Constitutional Court, Jutta Limbach, and is often called the Limbach Commission. The Limbach Commission acts as a mediator between the current possessors and former owners of cultural property lost due to Nazi persecution. Its recommendations are based on the rules outlined in the "Joint Declaration of the Federal Government, the Federal States and the National Associations of Local Authorities on the tracing and return of Nazi-confiscated art, especially of Jewish property" from December 18, 1999[14], as well the "Handreichung"[15], the restitution guidelines issued in accordance with the Joint Declaration. The Joint Declaration is primarily focused on public bodies, but asks that private parties follow its aims as well. Once a case is submitted, it is reviewed by one member of the commission and is later submitted to the entire panel for a final recommendation. The commission does not issue written recommendations. However, brief press releases are issued outlining the main points of its recommendations. Since 2003, 12 cases have been submitted to the commission, 5 of which have been decided, and 7 of which are still pending. In four of the five decided cases the commission recommended the return of the artworks.

Unlike the five European countries just discussed, the United States does not have an art commission. Instead it relies on a museum self-policing system pursuant to the American Association of Museums (AAM) and American Association of Museum Directors (AAMD)

[10] Press conference statement by Labor MP Andrew Dismore who introduced the bill.
[11] For full text of the decree, see https://zoek.officielebekendmakingen.nl/stcrt-2001-248-p24-SC32398.html.
[12] See information on the website of the Dutch Restitution Committee at http://www.restitutiecommissie.nl/en/committees.html.
[13] http://www.lostart.de/Webs/DE/Kommission/Index.html
[14] http://www.lostart.de/Webs/DE/Koordinierungsstelle/GemeinsameErklaerung.html.
[15] http://www.lostart.de/Webs/DE/Koordinierungsstelle/Handreichung.html

guidelines. These guidelines call for US museums to review their collections for artworks with a Nazi Era Provenance between 1933 and 1945, and to list those artworks and their provenances on websites.

The AAM guidelines provide that "If a museum determines that an object in its collection was unlawfully appropriated without subsequent restitution, the museum should seek to resolve the matter with the claimant in an equitable, appropriate, and mutually agreeable manner"[16] and "When appropriate and reasonably practical, museums should seek methods other than litigation (such as mediation) to resolve claims that an object was unlawfully appropriated during the Nazi era without subsequent restitution."[17]

Similarly, the AAMD guidelines provide that "If after working with the claimant to determine the provenance, a member museum should determine that a work of art in its collection was illegally confiscated during the Nazi/World War II era and not restituted, the museum should offer to resolve the matter in an equitable, appropriate, and mutually agreeable manner"[18] and "AAMD recommends that member museums consider using mediation wherever reasonably practical to help resolve claims regarding art illegally confiscated during the Nazi/World War II era and not restituted."[19] In addition, the AAMD recommends waiving statutory defenses, where appropriate.

According to recent statistics, so far US museums have voluntarily returned approximately 21 artworks applying these guidelines.[20]

But what happens when claimants and museums do not agree? Since the US does not have an art commission, the only forum available for adjudication is the courts. However, US courts do not have any special rules to take into account the loss of artworks during the Nazi era. An exception to this has been California whose Code of Civil Procedure ' 354.3 extended the deadline to file suits for the return of Nazi looted art. But the California Federal Courts recently held that claims under this statute were preempted by the foreign affairs doctrine[21] and a petition for a Writ of Certiorari was denied by the U.S. Supreme Court on June 27, 2011[22]. As a result of the absence of any special rules to deal with these matters, US courts have dismissed 13 Nazi looted art cases on the technical grounds of statutes of limitations and laches and have issued only one decision returning a Nazi looted artwork to the heirs of the Nazi victim who lost it[23].

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[16] AMM guidelines 4(c)
[17] Id.
[18] AAMD guidelines E (2)
[19] Id. E(3)
[20] See Herrick Feinstein LLP, Resolved Stolen Art Claims, available at http://www.herrick.com/siteFiles/Publications/FF91C2215A892A5C71F64F0960B4F3FC.pdf (last visited, April 11, 2013)
[21] See Von Saher v. Norton Simon Museum of Art at Pasadena, 862 F. Supp. 2d 1044, 1045 (C.D. Cal. 2012)
[22] Von Saher v. Norton Simon Museum of Art, 131 S. Ct. 3055 (U.S. 2011).
[23] Herrick, *supra* note 20.

These figures raise the issue of whether the United States is doing enough at home to comply with the principles of the Washington Conference and the Terezin declaration, which call for Nazi looted art cases to be resolved on the merits.

While the art commissions in each of the above discussed European countries vary in the way they handle Nazi looted art cases, they uniformly decide these cases on the merits based either on submissions from the parties or their own historical research. Thus, their decisions, whether binding or non-binding, are not subject to preclusion based on technical defenses such as statutes of limitations or laches. The result is that a neutral decision maker, the national art commission, makes its decision based on the historical record and thus gives both the museum and the claimant the possibility of a fair hearing.

Contrary to the European approach, the United States has maintained that it is unique with respect to this issue, because unlike Europe, its museums are mostly private, although open to the public. Citing this difference the United States takes the position that claimants and museums should work out the issue of whether the art at stake is Nazi looted art and, if they cannot do so on their own, they should resolve the matter in the courts.

However the fatal flaw to the US approach is the historical fact that all Nazi looted art cases arose in the Nazi period in Europe between 1933 and 1945. Therefore, in litigation, the deck is stacked against the claimant from the start, because in most cases the statute of limitations will have already run, or the claim will be barred by the equitable doctrine of laches (undue delay and prejudice).

Although the AAM and AAMD guidelines call for museums to voluntarily waive technical defenses in appropriate cases, so far no US museum has done so.

A case in point is illustrative of the problem. In 2004, in response to the Washington Conference, the heirs of Martha Nathan, a German Jew who belonged to a wealthy Frankfurt banking family and whose property was almost entirely lost due to Nazi persecution, contacted the Toledo Museum of Art and the Detroit Institute of Art regarding two paintings which belonged to the Nathan collection.

One painting, a Van Gogh called "The Diggers" was located at the Detroit Institute of Arts and the other a Gauguin painting called, "Street in Tahiti" was located in the Toledo Museum of Art.

The Toledo Museum of Art had bought the Gaugin in 1939 from a consortium of art dealers

who had obtained it shortly after Kristall Nacht, the night of the broken glass, in late 1938 from Martha Nathan after she had fled Germany and was in dire need of funds since the Nazis had taken most of her property. Similarly, the Detroit Institute of Art obtained the Van Gogh as a gift from one of its patrons who had also purchased it in 1942 from the same consortium of art dealers who also obtained it from Martha Nathan after the night of the broken glass in late 1938.

After researching the matter and exchanging information, the parties had differing views as to whether the artworks were to be considered Nazi looted art. The Nathan heirs pointed out that the sales were caused by Nazi persecution. That it was without doubt that Martha Nathan had lost most of her property due to Nazi persecution and that the sale of the artworks to the art dealer consortium only took place because Martha Nathan had to flee Germany and was in desperate need of funds on which to survive. The Nathan heirs also pointed to the obscene profits made by the art dealers, who tripled their money on the ensuing sales to the Toledo museum and Detroit's patron.

The museums disagreed. They argued that although an undeniable Nazi victim, Martha Nathan had room to maneuver and was able to leave Germany and become a French citizen at the time of the sales. They saw her as a privileged banking heiress, who, although she was persecuted by Nazis, who forced her out of Germany and took most of her property, was merely inconvenienced by this course of events. They argued that the sale of the best parts of her art collection to the art dealer consortium was a fair market sale outside of Germany, and that such sales should not be considered as Nazi looted art. The museums took the narrow view that Martha Nathan's sale of the paintings should be considered as voluntary since she had escaped Germany. They failed to take into the account the totality of the circumstances under which the sales took place including the loss of most of her property due to Nazi persecution. The museum's response to the obscene profits made by the art dealer consortium was that such profits were perfectly normal in the art world.

Since the parties could not agree, the Nathan heirs called on the museums to either mediate or arbitrate the claims. They felt that this is what was called for under the Washington Conference and the AAM and AAMD guidelines which called for alternative dispute resolution and for museums to waive technical defenses so that Nazi era claims could be resolved on their merits.

In an attempt to resolve their differences the parties met to discuss the claims. During the meeting, which included both the Nathan heirs and the directors for the museums, the museums filed suit against the Nathan heirs in the federal courts of Michigan and Ohio respectively, seeking an adjudication of title.[24]

Several years later, the Director of the Detroit Institute of Art, in a talk he gave at the Prague

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[24] Detroit Inst. of Arts v. Ullin, 2007 U.S. Dist. LEXIS 28364 ( E.D. Mich. Mar. 31, 2007), Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802 (N.D. Ohio 2006)

Conference, asserted that the museums were justified in filing suit against the Martha Nathan heirs.[25] Apparently the museums had been given the legal advice that if they did not do so, the heirs might have filed suit in another jurisdiction with a more favorable statute of limitations. The museums hoped that by filing suit against the Nathan heirs in their own home states, they would obtain a ruling that the Nathan heirs' legal claims for the return of the artworks were barred by the local statutes of limitation. In other words, the museums engaged in forum shopping and gamesmanship, and decided that rather than risk a decision on the merits, they needed to strike first to insure that Nathan heirs claims would be barred by the local statute of limitations.

The tactics of the museums, although ethically questionable, and certainly not contemplated under the Washington Conference, worked. The Nathan heirs countersued for the return of the artworks, only to have their legal claims barred by the local statutes of limitations. Following the court rulings on the statutes of limitations issue, the museums withdrew their suit for a determination of title, not willing to risk a determination on the merits as to whether they had ever obtained lawful title to the artworks. The artworks remain in the museums to this day.

Was justice done? Did the museums fulfill their responsibilities under the Washington Conference and the AAM and AAMD guidelines? Did the Nathan heirs get a fair hearing on the issue of whether the artworks were lost due to Nazi persecution? Was there a fair process in place, as called for by the Washington and Prague conferences, so that a just and fair solution could be achieved?

I submit to you that the answer to all of these questions is No.

To this day, the Nathan heirs have continued to call on the Toledo and Detroit museums to arbitrate their claims on the merits, and the museums have steadfastly refused to do so. Their victory, if you can call it that, is simply one of gamesmanship and not one of a historical review on the merits and review by a neutral decision maker, as called for by the Washington and Prague conferences.

Were the actions of the Detroit and Toledo museums isolated, or were they more or less the norm with respect to the US museum response to the Washington Conference?

Following the Toledo and Detroit decisions, several other US museums followed their example and filed suit against other claimants who had come forward with their Nazi era claims. In one such case, Museum of Fine Arts Boston v. Dr. Claudia Seger-Thomschitz[26], brought by the

[25] Graham Beal, *Four Cases from one Museum, Four Different Results*, in *Holocaust Era Assets: Conference Proceedings Prague, June 26—30, 2009*, pp. 802-807, available at http://www.holocausteraassets.eu/files/200000405-d114b29439/Holocaust_Era_Assets_Conference_Proceedings_2009.pdf

[26] The Museum of Fine Arts v. Claudia Seger-Thomschitz, 2009 U.S. Dist. LEXIS 58826 (D. Mass. May 28, 2009)

Boston Fine Arts Museum, the museum also prevailed on statutes of limitation grounds.

However in a case brought by MoMA and the Guggenheim museums against the heirs of Paul Mendelsohn-Bartholdy[27], the museums were not so lucky due to the unique New York statute of limitations which for replevin claims begins to run three years from demand and refusal. Eventually that case settled on the courthouse steps prior to a possible adjudication on the merits.

Sadly the Detroit and Toledo model of "race to the courthouse" gamesmanship in order to avoid a decision on the merits is more the norm than the exception in the United Sates. It is therefore, disappointing that the United States which played such a key role in the bringing about the Washington and Prague conferences has done so little to see that their principles are carried out at home.

As discussed above, contrary to the US approach, which relies on the parties to resolve these cases on their own, and if they cannot do so, lets them seek what justice they can find in the courts, the European approach was to set up art commissions to review Nazi looted art claims on their merits.

Although each European country's art commission is structured differently and has different methodologies for deciding cases, all of them review Nazi looted art claims on their merits. Thus, the European commissions do not permit their decisions to be shortcut by the technical defenses of statutes of limitations and laches, and their decisions are made on the merits by a neutral decision maker. In doing so, the European approach avoids the natural conflict of the US system where the museum is both a party and the arbiter of the dispute, a conflict which most US museums cannot overcome due to their self-interest as a party.

Contrasting the European approach to the US approach, a decision by the German art commission is instructive.[28] As was the case with Martha Nathan, Julius and Clara Freund were Jewish art collectors who lived in Berlin, Germany. After losing most of their property due to Nazi persecution, Julius and Clara Freund fled to Switzerland in 1933. Similarly to what happened in the Martha Nathan case, after Julius Freund died in 1941, his wife sold artworks they had brought with them to Switzerland in order to survive.

Unlike the Nathan heirs who had to face expensive lawsuits to quiet title filed by the US museums, the heirs of Julius and Clara Freund filed a claim with the German art commission. The German art commission reviewed submissions from both parties regarding the historical facts of the

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[27] The Museum of Modern Art, and the Solomon R Guggenheim Museum v. Julius H. Schoeps, 549 F. Supp. 2d 543 (S.D.N.Y. 2008),

[28] See Press Release of the German Advisory Commission, *available at* http://www.lootedart.com/web_images/news/Press%20Release%2012.01.2005.doc

claim. It then deliberated as to whether the artworks were lost due to Nazi persecution and should be returned to the Freund family.

Contrary to the result in the US Nathan case, where the claimants had to endure the aggressive gamesmanship of the US museums, the German art commission found that Julius and Clara Freund had been persecuted by the Nazis and were forced to sell the artworks, which they had brought with them to Switzerland when they fled Germany, in order to survive. Based on this conclusion, that the sale was caused by Nazi persecution and was thus involuntary, they recommended the return of the artworks.

So what should we conclude from this?

Unfortunately, although well intentioned in initiating the Washington Conference, the US response in claiming that the United States is unique and does not need a neutral art commission which will decide cases on their merits, is seriously flawed. The notion that US claimants will be able to have their claims fairly decided in US courts is without merit, since US courts must treat Nazi era claims like any other civil law claims and apply the technical defenses of statutes of limitations and laches.

If we are to have a fair system in the United States for the adjudication of Nazi era art claims on their merits, then we must either have federal legislation which eliminates technical defenses in Nazi era cases, or we must have a European style art commission which can decide Nazi era art claims on their merits.

To simply say that the status quo is fine and that Nazi era art claims can be resolved in the courts without empowering the courts to hear these cases is a seriously flawed policy and is an abdication of the leading role which the United States took when it initiated the Washington Conference.

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