NAZI-ERA ART CLAIMS IN THE UNITED STATES: 10 YEARS AFTER THE WASHINGTON CONFERENCE

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Introduction.

Nazi-era looted art in US museums is an important issue which continues to preoccupy the courts and catch headlines. Just this winter a case involving two Picasso paintings at the MoMA and the Guggenheim museums in New York settled on the courthouse steps just as it was about to go to trial. Why is it that more than 60 years after the Nazi regime came to an end we are still dealing with this issue?

The loss of property including art in the Nazi-era is an important moral issue. Jewish families were decimated by the Holocaust. Many families were scattered to the winds as was their property. Today these families want to reconnect with their past and obtain back property which was lost in confiscations and forced sales.

In 1998, 44 countries came together in Washington for a conference on Holocaust looted assets to address the issue of Nazi-era looted art in museums throughout the world.

As a result, the participants in the Washington Conference agreed upon 11 principles regarding Nazi looted art. Primary among these principles is that museums would research their collections and post the provenance of Nazi-era artworks on their websites for the public to see. Another encouraged claimants who lost Nazi-era artworks to come forward. And finally museums were to seek "fair and just solutions" to Nazi-era claims when claimants did come forward. Some have called these principles "softlaw" because they are morally based but are not enforceable in court.

Each country was encouraged to pass laws and set up art commissions in their own country to carry out the principles of the Washington Conference recognizing that each country is different and has its own unique legal system and administrative bodies.

With respect to how this should be carried out, Stuart Eizenstat the co-chair of the Washington Conference and then Under Secretary of State of the United States, stated the following:

> We can begin by recognizing that as a moral matter, we should not apply rules designed for commercial transactions of societies that operate under the rule of law to people whose property and very lives were taken by one of the most profoundly illegal regimes the world has ever known.

In other words, Nazi-era losses occurred under special circumstances which must be dealt with on a basis which takes into account the circumstances of the loss, the fact that these profoundly illegal acts took place over 60 years ago, and should not simply be dealt with by applying the common law, including statutes of limitation and laches defenses, as if the events in question happened only recently in a normal society.

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The reason why an event such as the Washington Conference was necessary was to highlight the fact that these losses occurred on an unprecedented scale and to a great extent have not yet been remedied.

The International Response

Different countries have responded to the Washington Conference in different ways. Some have called this "restitution roulette," since one countrys response could be very different from another, which would mean that the same loss might be treated differently, depending on where the artwork ended up.

For example a Nolde artwork looted from a Jewish family in Germany in 1939, which a Swedish museum bought at auction from an art dealer in Switzerland in the 1960's, was treated in the following manner: The claimants contacted the museum on several occasions to ask for the return of the painting. The museum responded by acknowledging that the artwork had been looted from the family in Germany in 1939, but refused to return it claiming that "there was no legal basis" to do so. Appeals to the Swedish Ministry of Justice and the Swedish Cultural Ministry were to no avail, until the family brought the matter to the press. Finally, after the press became involved, the Swedish government announced that it had assigned the task of resolving the matter to the museum under the principles of the Washington Conference.

Although finally acknowledging that it was a signatory of the Washington Conference and taking some limited action, the Swedish government failed to pass any restitution law or establish a national art commission to handle the claim in a neutral manner. Instead it acted only on an ad hoc basis and only after it had received considerable criticism in the press.

Contrary to the Swedish example, Germany responded to the Washington Conference by issuing guidelines to its museums based on German restitution principles. This included the presumption that sales of Jewish property in Germany between 1933 and 1945 were under duress unless it could be shown that the sales price was for the fair market value and that the seller had free control over the purchase proceeds. The presumption of a forced sale was even stronger following the enactment of the Nuremberg racial laws in 1935. After that date, the presumption of a forced sale could only be overturned if the sale was for a fair price and would have taken place anyway in the absence of the Nazi regime, and the buyer paid the purchase price in such a manner that the seller could have free access to it outside of Nazi controls.

Germany also set up an art commission called the "Limbach Commission" to decide cases where the claimant and museum could not agree on whether an artwork should be restituted. So far the Limbach Commission has issued 4 advisory opinions, 3 of which have recommended the return of or compensation for the loss of the artwork.

Some of the artworks which have been returned by German museums in cases in which the author's law firm was involved include: *The Watzmann* by Casper David Friedrich which was sold by the Brunn family to the National Galerie in Berlin in a 1937 forced sale. And Ernst Ludwig Kirchner's *Berlin Street Scene*, which was also sold in a forced sale in Cologne in 1937. Last year a case study called the "Story of Street Scene" was published regarding the return of this artwork.

Similar to Germany, Great Britain, France, Austria and the Netherlands each have either passed specific laws or have set up an art commission to issue advisory opinions in response to the responsibility they undertook under the Washington Conference to resolve

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Nazi-era claims in a fair and just manner. Although sometimes the decisions of the art commissions set up in each country have been questioned, in all of these countries claims are reviewed on their merits taking into account the circumstances of Nazi oppression under which they occurred. (In a recent case in Germany, a German Advisory Commission decision that recommended the museum reject claims for the return of a poster collection looted during the war was challenged in the State Court of Berlin. The court held that the posters were to be returned to the heirs, thus indicating that the advisory decision was wrong.) None of these countries applies a statute of limitations or laches defense, which would in effect blame the claimants for not coming forward earlier and deny them their day in court based on a technical defense. And each country has set up a system where a neutral decision maker issues the advisory decision rather than leaving the decision of whether to restitute solely to the discretion of the museum.

US Response to the Washington Conference

So far, the United States has not passed any legislation or set up a national art commission in response to the Washington Conference. The sole exception is a California statute which eliminated the statute of limitations defense until December 31, 2010. The California statute has been challenged on constitutional grounds and is being reviewed on appeal at the Ninth Circuit Court of Appeals.

Instead, the American Association of Museums (AAM) and the Association of American Museum Directors (AAMD) came up with guidelines as to how museums should deal with Nazi-era artworks in their collections. This includes reviewing the provenance of artworks in the museums collection and posting this information on the museum's website. In addition, a self-policing system was created whereby museums are supposed to resolve Nazi-era art claims "in an equitable, appropriate, and mutually agreeable manner." Under the AAM and AAMD guidelines, US museums are also supposed to "seek methods other than litigation", that they "consider using mediation" and that they "may elect to waive certain available defenses".

The AAM and AAMD guidelines also instruct US museums to seek out heirs who may have Nazi-era claims in order to enter into discussions with them and resolve such claims in an appropriate manner.

Nowhere however in the AAM and AAMD guidelines does it say that museums are supposed to bring suit against claimants who may come forward with their morally based claims under the Washington Conference. However, that is just what some US museums have done.

In January 2006 two museums, the Toledo Museum of Art and the Detroit Institute of Art, filed suit against the heirs of Martha Nathan, a Jewish woman from Frankfurt am Main, Germany, who was from a wealthy banking family and who owned an important art collection. After the Nazis came to power, Martha Nathan's family was persecuted by the Nazis who wanted to take over their bank, the Dreyfus Bank, one of the largest private banks in Germany at that time. Eventually the bank was aryanized and Martha Nathan was forced to flee Germany. After first selling all of her assets in Germany and paying exorbitant exit taxes, in November 1938, just after *Kristallnacht* (the night of the broken glass), Martha Nathan sold 4 works of art which she was keeping in Switzerland to a consortium of three art dealers, Justin Thannhauser, Georges Wildenstein and Alex Ball.

Following the sale, the artworks were shipped to New York by the art dealers who promptly

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sold them for a profit of about 300%. One of the artworks, a painting by Paul Gauguin *Street Scene in Tahiti*, was bought by the Toledo Museum of Art and another artwork, a Van Gogh painting, *The Diggers*, was sold to a private collector who later donated it to the Detroit Institute of Arts.

After seeing the artworks posted on the museums' Nazi-era websites, the heirs contacted the museums to discuss their Nazi-era provenance. Shortly thereafter, during a meeting between the heirs and the museum directors, both museums simultaneously filed suit to quiet title against the Martha Nathan heirs in the respective local federal district courts where the museums were located. The heirs responded with *replevin* claims for the return of the artworks. However, the museums refused to waive their statute of limitations and laches defenses, as provided for under the AAM and AAMD guidelines and instead asserted them as affirmative defenses. Eventually both federal courts ruled that the heirs' *replevin* claims were barred by the statute of limitations. The federal court in Toledo found that the statute of limitations expired no later than four years after the Washington Conference in 1998 (although the artworks were first posted on the museum's website and were first discovered there by the heirs at a later date), and the Federal Court in Detroit found that the statute of limitations expired four years after the 1938 sale of the artworks.

A much different result occurred in two very similar cases handled by art commissions in Europe. Only one year before the *Martha Nathan* suits were filed, the Advisory Commission in Germany issued a recommendation to return artworks to the heirs of Julius Freund. Similar to the *Martha Nathan* case, Julius Freund was forced to leave Germany with his family in 1939. After he died in 1941 his wife sold part of their collection at the Fischer auction house in Luzern because she was in serious financial difficulties due to her persecution by the Nazis. In the *Freund* case the advisory commission recommended that the museum return the paintings.

After the *Martha Nathan* cases were decided, another very similar case was decided by the Restitutions Committee in the Netherlands, involving the Flersheim family, who were forced to flee to the Netherlands from Frankfurt am Main, Germany in 1937. While in exile from Germany, because the Flersheims lacked funds to support themselves after being stripped of their property in Germany, they sold an artwork at under fair market value to an art dealer, who promptly sold it to a museum for a large profit. In the *Flersheim* case the museum also opposed the return of the artwork, however the Restitutions Committee determined that the artworks were sold due to Nazi persecution and had to be returned.

Although treated entirely differently in the US, there is essentially no material difference between the facts of the *Martha Nathan* case and the facts of the *Julius Freund* and *Flersheim* cases. All three cases dealt with Nazi victims who were persecuted in Germany, were then forced to flee to another country where they sold artworks under value in order have funds to sustain their existence.

Following the Martha Nathan decisions, US museums have continued to bring declaratory judgment actions against Nazi-era victims who have come forward with their morally based claims under the Washington Conference, although no other country which is a signatory of the Washington Conference has permitted its museums to initiate such suits.

Recently, the MoMA and Guggenheim museums filed suit in New York to quiet title

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against Professor Schoeps, an heir of the Jewish Berlin banker Paul Mendelssohn-Bartholdy. Professor Schoeps came forward to submit claims after those museums posted the provenance of two Picasso artworks which had been sold during the Nazi-era by the Mendelssohn-Bartholdy family in Switzerland in response to Nazi pressure. However, in the *Schoeps* case, the museums were not so lucky as in the *Martha Nathan* case. In *Schoeps*, the statute of limitations had not yet run, due to New York's three year demand and refusal rule. Judge Rakoff also refused to dismiss the claimant's *replevin* claims and denied the museum's motion for summary judgment based on the equitable doctrine of laches, finding that the elements of laches (unreasonable delay and prejudice) was a fact issue for trial. Professor Schoeps' claim for the return of the artworks therefore would have been decided on the merits, and rather than undergo this risk, the museums who instigated the lawsuit undoubtedly hoped that the *replevin* counter-claims would be dismissed based on laches, ended up settling the case on the courthouse steps just prior to trial.

Reforming the US Response to the Washington Conference

Although *Schoeps* showed that in some cases the technical defenses of statutes of limitations and laches can be overcome, the real issue is should such defenses be permitted at all in Nazi-era looted art cases. Since the Nazi-era occurred over 60 years ago, it goes without saying that the deck is stacked against Nazi victims who come forward with their morally based softlaw claims under the Washington Conference, especially if US museums are permitted to intimidate claimants (who the Washington Conference principles encourage to come forward) by using declaratory judgment actions as a sword, while at the same time asserting the statute of limitations and laches defenses as a shield against the claimant's *replevin* counter-claims.

A much more fair and responsible approach would be to eliminate the defenses of statute of limitations and laches for a policy of having all Nazi-era claims be decided on the merits rather than permitting *replevin* claims to be dismissed based upon technical defenses, which seek to establish blame on the part of the claimant for not coming forward earlier with the claim.

Another alternative to insure that Nazi-era art claims be decided on their merits, would be to establish a national art commission with exclusive jurisdiction over such claims to insure that they be decided by a neutral decision maker on the merits. Such a solution would bring the United States closer to the European model which involves a review by a commission of neutral experts, applying internationally recognized standards on the merits, without the possibility of denying the claims based on technical defenses.

In short, the United States needs to reform its response to the Washington Conference to insure that Nazi-era art claims be decided on their merits. The statute of limitations and laches defenses should be eliminated where Nazi-era art claims are litigated in US courts. Alternatively, a neutral national art commission should be established with exclusive jurisdiction to decide Nazi-era art claims on their merits.

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