Restitution of Cultural Objects Taken During World War II (Part I)

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Although it may seem counter-intuitive, some of the most important developments in the restitution of cultural objects and other assets confiscated in the period surrounding World War II have occurred only within the last decade or so. Some restitution was done, of course, at the conclusion of the war. The cultural objects that the Allied forces recovered were returned to the countries from whose citizens or museums they had been taken (in a process known as "external restitution"), for those countries to then return to their owners ("internal restitution"). However, those actions were complicated by the loss of people, records, communities, and communal memory. They were also complicated, prevented, or delayed by the resistance of governments and legal systems to adequately address the question of restitution, as well as a variety of political complications, not least of which was the Cold War, which locked people, cultural objects, and information behind the Iron Curtain.

It took a combination of the end of Communism (with the unlocking of museums and archives in the former Soviet territories), the publication of pioneering studies of Nazi-era looting, and the persistent efforts of organizations like the Claims Conference and the World Jewish Congress to raise public awareness of the continuing problem of restitution. The statements of principles, statements of ethics, settlements, and court decisions have produced (and continue to produce) a profound change in the art trade and museum practice with respect to the understanding and treatment of confiscated and duress sale cultural objects. These efforts have produced an ongoing reassessment of the question of restitution, whose effects will be felt in many other restitution contexts as well.

With potentially more open relations between the U.S. and Cuba, some have proposed that we will see a wave of restitution claims arising from Cuba’s confiscation of cultural property. [See e.g., Alistair Bell, “Despite détente, search for art looted in Cuba could take years,” Reuters, Jan. 7, 2015; Celestine Bohlen, “Reclaiming Art Caught in the Cuban Revolution; In Cases Reminiscent of Looted Nazi Art, Émigrés Trace Fate of their Collections,” The New York Times, June 6, 2002; Patrick Symmes and Stephen Lewis, “Cuba’s Rising Art Scene,” Conde Nast Traveler, May 20, 2014. While the Act of State Doctrine could apply to bar restitution claims by Cuban citizens whose property was seized by the Cuban government, no such bar would apply to claims by non-Cuban citizens.]

In the 12 years between the Nazi Party’s rise to power in 1933 and the end of the war in 1945, the Third Reich’s policies and actions (as well as the policies and actions of others) wrought devastation and disruption on a massive scale. This included the systematic confiscation of art and cultural objects in public and private collections across continental Europe. [1] Scholars have noted that “as many works of art were displaced, transported, and stolen during the entire Thirty Years War or all the Napoleonic Wars.” [See Hector Feliciano, The Lost Museum, 23 (1997)] It has been estimated that “[o]ne-third of all of the art in private hands had been pillaged by the Nazis.” [id. at 4.] Ronald Lauder, former U.S. ambassador to Austria and former MoMA chairman, has noted that “more than 100,000 pieces of art, worth at least $10 billion in total, are still missing from the Nazi era.”[2]

The dislocation of cultural objects during this period took many forms – direct confiscation (seized by government officials and agents), “abandoned” objects (seized after being left behind as their owners fled persecution), [See, e.g., Menzel v. List, 267 N.Y.S.2d 804 (N.Y. 1966)(seeking to recover a painting by Marc Chagall that hung in the]
Menzel’s Brussels apartment when they fled Belgium before the Nazi occupation] forced sales, and what are sometimes called “fluchtgut” or “fluchtkunst” (“flight goods” or “flight art”, which are cultural objects sold, generally at a steep discount, by owners desperate to finance their escape from Nazi-occupied or threatened areas). In many instances, claims for the restitution of fluchtgut raise many of the same issues as more usual cases of forced sales, and can be viewed as an extension of those cases.

The Challenges of Nazi-Era Restitution

The challenges original owners (or their heirs) face in securing the return of objects taken from them in this manner are typically quite complex, since many decades have passed and the circumstances of the taking may be difficult to establish. As one scholar has noted, the Nazis not only plundered Europe’s art collections:

As part of a genocide of unparalleled scale, they also murdered (or forced into exile) many owners of that property. Thus, at the end of World War II, most of those best positioned to establish claims for restitution of their stolen property were unlikely to have survived. For those who did survive, or for their heirs, the practicalities of locating property and compiling evidence to support a claim for restitution were daunting. Indeed, relatively few claims for restitution of Holocaust art were filed in United States courts until more than fifty years following the close of World War II. [See Stephen K. Urice, “Elizabeth Taylor’s Van Gogh: An Alternative Route to Restitution of Holocaust Art?” 22 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1, 1-2 (2011).]

The Welfenschatz

A suit recently filed in the United States District Court for the District of Columbia highlights a number of these challenges, as well as controversies concerning national and museum handling of claims brought by original owners or their heirs. In that case, Philipp et al. v. Federal Republic of Germany et al., the heirs of three Jewish art dealers are seeking return of the Welfenschatz (also known as the Guelph Treasure), a collection of medieval jeweled gold and silver objects (including reliquaries) originally in the collection of the Braunschweiger Dom (Brunswick Cathedral). The collection was held in private hands for several centuries, before being sold to the art dealers in the 1920s. In 1935, Hermann Goering, as Prime Minister of the State of Prussia, acquired the Welfenschatz from the dealers in a transaction that the heirs assert was coerced and for a fraction of the collection’s market value. Goering presented the Welfenschatz to Hitler as a birthday present. The State of Prussia approached the dealers through an intermediary, and, as pressures on Jewish businesses and property owners tightened, negotiated the acquisition of the Welfenschatz for a third or less of its value. The collection has been displayed at the Kunstgewerbe Museum in Berlin for decades. In 2008, the heirs filed a claim for restitution of the Welfenschatz. Germany’s Limbach Commission denied the claim in March 2014, finding that the sale did not meet the criteria for a forced sale.

Many recent Nazi-era restitution cases, like the Welfenschatz case, seek the return of objects held in public collections. It is important to acknowledge that, increasingly, the discourse surrounding restitution claims made against private individuals differs from that where restitution is sought against public collections (both in the U.S. and abroad). These public collections are seen as having a duty not only to the organization and its donors, but to the public at large and, sometimes, also to history.

The Washington Conference Principles: A Developing International Consensus

In 1998, the U.S. Department of State convened the Washington Conference on Holocaust Era Assets. Representatives of 44 countries gathered at the U.S. Holocaust Memorial Museum. In his opening remarks, Elie Wiesel asked “[w]hy is [the discussion of how to address restitution of assets] taking place at such a late date under the moral pressure of public opinion?” His answer is important. “In truth,” he explained,

the search for the missing monies, apartments and collections of art should have been initiated long ago and more elegantly, with a greater measure of grace – by banks and governments themselves. And I speak of neutral countries, as well as of countries which had been occupied by the Germans. Now we know that some did that, some were gracious – but for the wrong reasons. More precisely, for the benefit of the wrong people. Almost under duress, efforts were being made to ask for the restitution of what had been stolen. In some places, because Jews had asked for the restitution, a new wave of anti-Semitism swept the country. [Id.]

Wiesel’s statement encapsulates the problem that on-going efforts at restitution are meant to address – not only to see justice done, but also to ensure that history and the public record are not defaced.

What emerged from the Washington Conference was a set of non-binding principles (the Washington Conference Principles), which are guidelines for countries to incorporate into their national laws and legal and ethical approaches for the just handling of Nazi-era claims. The Washington Conference Principles are explicitly intended
to reflect the consensus reached among the 44 countries participating in the conference. The principles state, in part, that “if the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing that this may vary according to the facts and circumstances surrounding a specific case.”

National and international support for the Washington Conference Principles were reiterated and reinforced by the Declaration of the Vilnius International Forum on Holocaust-Era Looted Cultural Assets (2000), issued by 38 countries, and the Terezin Declaration on Holocaust Era Assets and Related Issues (2009), issued by 46 countries. Commentators have noted that the Washington Conference Principles and the Terezin Declaration “do not grant either party – the art’s possessor or its claimant – presumptions of correctness. Rather, they allow for the fact that while Holocaust victims (or heirs) and museums often face unique factual circumstances for each claim, not all claims are equal.” [Simon J. Frankel and Ethan Forrest, “Museums’ Initiation of Declaratory Judgment Actions and Assertion of Statutes of Limitations in Response to Nazi-Era Art Restitution Claims – A Defense,” 23 DEPAUL J. ART. TECH. & IP Law 279, 295-96 (2013).] The effect of the Washington Conference Principles on museum practice has been profound. The most important museum professional organizations have issued ethics guidelines concerning museums’ handling of potential Nazi-era looted objects in their collections. The International Council of Museums (ICOM) issued its Recommendations concerning the Return of Works of Art Belonging to Jewish Owners (1999), the American Alliance of Museums (AAM) issued its Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era, and the Association of Art Museum Directors (AAMD) issued its Resolution of Claims for Nazi-Era Cultural Assets. These professional ethics guidelines offer similar recommendations, drawn from the Washington Conference Principles – museums should (i) review their collections for potentially Nazi-looted objects, (ii) establish provenance research procedures, (iii) publish information concerning objects of doubtful provenance in their collections, and (iv) should resolve claims by original owners and their heirs to potentially looted objects in their collections in an equitable and appropriate manner. Many museums have assessed their collections for potentially Nazi-era confiscated objects and have publicized on their websites objects whose provenance contains gaps during the relevant period or otherwise raises questions. [These museums include The Metropolitan Museum of Art; The Art Institute of Chicago; Museum of Fine Arts Boston; The Museum of Modern Art; The Frick Collection; and The Smithsonian Institution.] In fact, some museums, notably the Museum of Fine Art, Boston, have established a curator of provenance to evaluate these and other issues. Notably, the Samuel H. Kress Foundation has established the Kress Provenance Research Project to support museum best practices in provenance research. The American Association of Museums has similarly focused resources on provenance research.

The AAMD spoliation report 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.” The AAM Standards, however, provide more particularized recommendations to museums in how they should address claims to potentially Nazi-looted objects in their collections, noting that “in order to achieve an equitable and appropriate resolution of claims, museums may elect to waive certain available defenses.”

15 years after the Washington Conference, serious questions continue to be raised as to whether countries, museums, and others are living up to Washington Conference Principles. In September 2014, the Conference on Jewish Material Claims Against Germany and the World Jewish Restitution Organization issued a report, Holocaust-Era Looted Art: A Current World-Wide Overview, which provides a 50-country survey of restitution efforts. Increasingly, restitution claims arise in connection with governments’ allegedly inadequate or unjust post-war internal restitution efforts and will be discussed in Part II of this article. [4]

[1] See, e.g., Bert Demarsin, “Let’s Not Talk About Terezin: Restitution of Nazi Era Looted Art and the Tenuousness of Public International Law,” 37 BROOK. J. INT’L L. 117, n.1 (2011) (“Nazi era looted art’ refers to art objects that were stolen or otherwise seized from their owners between the moment of Hitler’s rise in 1933 and the fall of the regime in 1945. . . . [F]or works created prior to 1933, Sotheby’s requires full provenance information from 1933 to 1948. . . . [A]nd the American Association of Museums (“AAM”) considers 1951, with the closing of the Munich Central Collecting Point, as the final year.”). See also National Gallery of Art website, Munich Central Collecting Point Archive (explaining that “The Munich Central Collecting Point was established to accommodate repositories of Nazi-confiscated works of art and other cultural objects, hidden throughout Germany and Austria, which were discovered by the Allies at the close of World War II. At the central collecting points of Marburg, Wiesbaden, Munich, and the Offenbach Archival Depot, objects were identified, photographed, and restituted to their countries of origin. The works of art that passed through the Munich Central Collecting Point originated from many European museums and from private collections, a large percentage of which were French and Dutch. The recovered objects comprised a wide variety of media, from painting and sculpture to textiles and metalwork. The Munich Central Collecting Point ceased its restitution activities in 1951.”).

[2] Jennifer Anglim Kreder, “Guarding the Historical Record from the Nazi-Era Art Litigation Tumbling Toward the Supreme Court,”
159 U. Pa. L. Rev. 253, 255 (2011). See also Kelly Ann Falconer, When Honor Will Not Suffice: The Need for a Legally Binding International Agreement Regarding Ownership of Nazi-Looted Art, 21 U. Pa. J. Int'l Econ. L. 383, 383-84 (2000) (stating that “It has been estimated that German forces and other Nazi agents before and during WWII seized or coerced the sale of one-fifth of all Western art then in existence.”); Michael J. Bazyler, Holocaust Justice: The Battle for Restitution in America’s Courts, 202 (2003) (stating that “The value of Nazi-era looted art has been estimated at $2.5 billion or approximated $20.5 billion at today’s values.”); The National Archives of the United States, Documenting Nazi Plunder of European Art, Greg Bradsher (Nov. 1997). (stating that “More than 100,000 Nazi-looted artworks have been located, but not restituted to their original owners or heirs. . . . Philip Saunders, editor of Trace, the stolen art register, stated that ‘there are at least 100,000 works of art still missing from the Nazi occupation’.”).

[3] See, e.g., Vineberg v. Bissonette, 529 F.Supp.2d 300, 307 (D.R.I. 2007) (noting that “the Nazi government forced Dr. Stern to liquidate inventory in his art gallery and controlled the manner of the forced sale,” and concluding that “Dr. Stern’s surrender of the painting to [the auction house] for auction was ordered by the Nazi authorities and therefore the equivalent of an official seizure or a theft.”). But see Orkin v. Swiss Confederation, 770 F.Supp.2d 612, 616 (S.D.N.Y. 2011) (dismissing the action for lack of jurisdiction, because “[p]laintiff does not allege that Reinhart acted in any capacity other than as a private individual.” The court noted that “[i]n 1933, [Plaintiff’s grandmother] sold the drawing to Swiss art collector Oskar Reinhart for 8,000 Reichsmarks to help fund her family’s escape from the Nazis’ persecution of German Jews.”).

[4] See, e.g., de Csepel v. Republic of Hungary, 714 F.3d 591, (D.C. Cir. 2013) (restitution claim against the Republic of Hungary, alleging breach of post-war bailment agreements with the original owner’s heirs); Agudas Chasidai Chabad of United States v. Russian Federation, 528 F.3d 934 (D.C. Cir. 2008) (restitution claim arising from Russian state library and archive’s retention of religious archives). Recently, the heirs of Erich Lederer filed a restitution claim against the Austrian government for the restitution of Gustav Klimt’s Beethoven Frieze, alleging that the post-war Austrian government had required Lederer to sell the frieze at a below-market price as a condition of the government granting export licenses for other objects in Lederer’s collection. See Julia Michalska, “Klimt’s Beethoven Frieze should not be returned, panel says,” The Art Newspaper, Mar. 6, 2015.

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