

Genocide by Expropriation - New Tendencies in US State Immunity Law for Art-Related Holocaust Litigations

On 10 July 2018, the United States Court of Appeals for the District of Columbia Circuit rendered its judgment in the matter of Alan Philipps et al. v. the Federal Republic of Germany and the Stiftung Preussischer Kulturbesitz.

This case involves a claim by heirs of Holocaust victims for restitution of the „*Welfenschatz*“ (Guelph Treasure), a collection of medieval relics and devotional art housed for generations in the Cathedral of *Braunschweig* (Brunswick), Germany. This treasure is now on display at the *Kunstgewerbemuseum Berlin* (Museum of Decorative Arts) which is run by the Stiftung Preussischer Kulturbesitz. The value of the treasure is estimated to amount to USD 250 million (according to the claim for damages raised in the proceedings).

The appeal judgment deals with, inter alia, the question whether there is state immunity for Germany and the Stiftung respectively. Under the US Federal Sovereign Immunities Act, foreign sovereigns and their agencies enjoy immunity from suit in US courts unless an expressly specified exception applies, 28 U.S.C. § 1604.

One particularly relevant exception in Holocaust litigations relating to works of art is the „expropriation exception“, § 1605(a)(3). This exception has two requirements. Firstly, rights in property taken in violation of international law must be in issue. Secondly, there must be an adequate commercial nexus between the United States and the defendant:

„A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or

operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.”

According to the Court’s recent judgment in Holocaust litigation against Hungary (*Simon v. Republic of Hungary*, 812 F.3d 127, D.C. Cir. 2016), intrastate expropriations in principle do not affect international law but are internal affairs of the acting state vis-à-vis its citizens. However, if the intrastate taking amounts to the commission of genocide, such a taking subjects a foreign sovereign and its instrumentalities to jurisdiction of US courts (*Simon v Hungary*, op.cit.).

This leads to the question of what exactly is „genocide“ in this sense. The Court in *Simon* adopted the definition of genocide set forth in Article II lit. c of the Convention on the Prevention of the Crime of Genocide of 9 December 1948, 78 U.N.T.S. 277, (signed by the USA on 11 December 1948, ratified on 25 November 1988), i.e. „[d]eliberately inflicting“ on “a national, ethnical, racial or religious group ... conditions of life calculated to bring about its physical destruction in whole or in part“. Thus, the Court in *Philipps*, as it observed, was „asked for the first time whether seizures of art may constitute ‘takings of property that are themselves genocide’ “. “The answer is yes“ (*Philipps v. Germany*, op.cit.).

The Court prepared this step in *Simon v. Hungary*:

„The Holocaust proceeded in a series of steps. The Nazis achieved [the “Final Solution“] by first isolating [the Jews], then expropriating the Jews’ property, then ghettoizing them, then deporting them to the camps, and finally, murdering the Jews and in many instances cremating their bodies“.

Therefore, actions taken on the level of first steps towards genocide are themselves genocide if later steps result in genocide even if these first measures as such, without later steps, would not amount to genocide. To put it differently, this definition of genocide includes expropriations that later were escalated into genocide if already these expropriations were „deliberately inflicted“ „to bring about ... physical destruction in whole or in part“ (see again Art. II lit. c Prevention of Genocide Convention).

It will be a crucial question what the measures and means of proof for such an intent should be. In this stage of the current proceedings, namely on the level of appeal against the decision of first instance not to grant immunity, the *Philipps* Court explained, in its very first sentence of the judgment, that the claimants’

submissions of facts have to be laid down as the basis for review:

„Because this appeal comes to us from the district court’s ruling on a motion to dismiss, we must accept as true all material allegations of the complaint, drawing all reasonable inferences from those allegations in plaintiffs’ favor.”

However, the position of the US Congress on the point is clear: As the Philipps Court explains,

“[i]n the Holocaust Expropriated Art Recovery Act (HEAR Act 2016), which extended statutes of limitation for Nazi art-looting claims, Congress ‘[found]’ that ‘the Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe as part of their genocidal campaign against the Jewish people and other persecuted groups’, see Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 2, 130 Stat. 1524, 1524.”

It will be another crucial question, what „expropriation“ exactly means in the context of the Holocaust. It is common ground that the unlawful taking of property from persecuted persons not only took place by direct taking but also and structurally through all sorts of transactions under duress. However, the exact understanding of what constitutes such “forced sales” – and thereby “expropriation” – seems to differ substantially. Some argue that even a sale of art works at an auction in a safe third state after emigrating to that state constitutes a forced sale due to the causal link between persecution, emigration and sale for making money in the exile. Under Art. 3 of the US Military Law No. 59 of 10 November 1947 on the Restitution of Identifiable Property in Germany, there was a „presumption of confiscation“ for all transfers of property by a person individually persecuted or by a person that belonged to class of persecuted persons such as in particular all Jews. This presumption could be rebutted by submission of evidence that the transferor received a fair purchase price and that the transferor could freely dispose of the price. It is not clear whether this standard or a comparable standard or another standard applies in the case at hand. Irrespective of this legal issue, the claimants submit on the level of facts that the purchase price was only 35% of the fair market value in 1935. This submission was made in the following context:

Three Jewish art dealers from Frankfurt am Main, ancestors to the claimants,

acquired the Guelph Treasure in October 1929 from the dynasty of Brunswick-Lüneburg shortly before the economic crisis of that year. The agreed price was 7.5 million Reichsmark (the German currency of the time). The estimations of the value prior to the acquisition seem to have ranged between 6 and 42 million Reichsmark. The sales contract was signed by the art dealers „J.S. Goldschmidt“, „I. Rosenbaum“ und „Z.M. Hackenbroch“. These dealers and others formed a “consortium” with further dealers to be able to raise the money (the whereabouts of the contract for this consortium and thus the precise structure of this joint-venture is unknown up to now).

According to the sales contract, the buyers were obliged to resell the Treasure and share profits with the seller if these profits go beyond a certain limit. The contract expressly excluded the possibility for the buyers to keep the Treasure or parts of it. Rather, the buyers were to take „every effort” to achieve a resale.

In the following years, the consortium undertook many steps to sell the Treasure in Germany and in the USA. However, according to the German Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property (i.e. the alternative dispute resolution body established by the German government in order to implement the non-binding Washington Principles on Nazi Confiscated Art of 3 December 1998, on which 44 states, including Germany and the USA agreed), it was common ground that the economic crisis reduced means and willingness of potential buyers significantly. In 1930/1931, the dealers managed to sell 40 pieces for around 2.7 million *Reichsmark* in total. After displaying for sale in the USA, the remaining 42 items were stored in Amsterdam. In 1934, the Dresdner Bank showed interest as a buyer, acting on behalf of the State of Prussia. The bank apparently did not disclose this fact. In April of 1935, the consortium made a binding offer for 5 million Reichsmark, the bank offered 3.7 million, the parties ultimately agreed upon 4.25 million, to be paid partly in cash (3.37 million), partly by swap with other works of art to be sold abroad in order to react to foreign currency exchange restrictions. The sales contract was signed on 14 June 1935 by the dealers and the bank, acting on behalf of the State of Prussia whose Prime Minister was Hermann Göring at the time. In July 1935, (almost) the full price was paid (100.000 Reichsmark were kept as commission). The 42 objects were transferred to Berlin. The consortium seemed to have been able to freely dispose of the money that they received at that time and pay it out to the members of the

consortium. Later, all but one of the dealers had to emigrate, the one remaining in Germany came to death later (apparently under dubious circumstances, as is submitted by the claimants).

On the merits, the courts will have to take a decision on the central point of this case whether these facts, as amended/modified in the further proceedings, amount to “expropriation” and, if so, whether this expropriation was intended to „deliberately inflict ... conditions of life calculated to bring about ... physical destruction in whole or in part” (see once more Article II lit. c of the Convention on the Prevention of the Crime of Genocide).

On a principal level, the Federal Republic of Germany argued that allowing this suit to go forward will “dramatically enlarge U.S. courts’ jurisdiction over foreign countries’ domestic affairs” by stripping sovereigns of their immunity for any litigation involving a “transaction from 1933-45 between” a Nazi-allied government and “an individual from a group that suffered Nazi persecution.” In addition to that, the principal line of argument would certainly apply to other cases of genocide and preparatory takings of property. The Court was not impressed:

“Our conclusion rests not on the simple proposition that this case involves a 1935 transaction between the German government and Jewish art dealers, but instead on the heirs’ specific—and unchallenged—allegations that the Nazis took the art in this case from these Jewish collectors as part of their effort to drive [Jewish people] out of their ability to make a living.”

Even then, the enlargement of jurisdiction over foreign states by widening the exceptions to state immunity under the concept of genocide by expropriation appears to be in contrast to the recent efforts by US courts to narrow down jurisdiction in foreign-cubed human rights litigations under the ATS and in general.

However, the Federal Republic of Germany does no longer need to worry: The Court held that the second requirement of the expropriation exception is not fulfilled because the Guelph Treasure is not present in the United States in connection with a commercial activity carried on by the foreign state in the United States. In fact, it is not present in the USA at all but still in Berlin.

Yet, in respect to the Stiftung Preussischer Kulturbesitz, the suit will continue:

For a state agency it seems sufficient that the property in question is owned or operated by that agency or instrumentality of the foreign state if that agency or instrumentality is engaged in a commercial activity (not necessarily in connection with the property in question) in the United States. The ratio of this rule is difficult to understand for outsiders and appears not to be in line with the overall developments of (personal) jurisdictional law in the USA, and if at the end of the day there is a judgment against the Stiftung to return the Treasure there will of course be the issue of recognition and enforcement of that judgment in Germany - including all political implications and considerations of public policy.

The parties may want to think about arbitration at some point. That was the way out from lengthy court proceedings and delicate questions on all sorts of conflicts of laws in the famous case of *Maria Altmann v. Republic of Austria* that likewise turned, inter alia, on issues of state immunity for foreign states and their agencies or instrumentalities. In general, it seems that arbitration could play a larger role in art-related disputes (see e.g. the German Institution for Arbitration's Autumn Conference on 26 September 2018 in Berlin).