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"Wrestling the Dead Hand of History: Perspectives on a Proposed State Department Commission on Nazi Looted Art": The Interest Group on the International Law of Cultural Heritage & the Arts Hosts Its Inaugural Panel at the ASIL 2010 Annual Meeting

Jennifer Anglim Kreder

I recently moderated the Interest Group's inaugural panel on Nazi-looted art. I opened the panel by providing some background on the Nazi-looted art problem, which was followed by an introduction of the panelists, Ambassador Stuart Eizenstat, Ambassador J. Christian Kennedy, Charles A. Goldstein and Dr. Lucille Roussin (in opening round speaking order), and an impassioned debate about how to seek to resolve claims to Nazi-looted art in the United States.

**Background**

No one believes that restituting art will undo any of the horrors inflicted by the Nazis, but most believe that restituting valuable property to those from whom it was stolen because of their race is right. Most people don't realize that one core component of the Nazis' Final Solution was to steal Jews' art collections and eliminate from the Reich modern art, which they deemed a degenerate influence on Germanic culture. The Nazis stole more art than any regime in history – even Napoleon. It is widely accepted that over 100,000 significant art objects stolen in the Holocaust era remain unaccounted for. Some were destroyed, but the pre-War art market is infected with Nazi-looted art.

The western world tried to reach some agreement on how to deal with the issue in 1998 when forty-four nations signed onto the Washington Principles calling for increased provenance (ownership history) research, creation of alternative dispute mechanisms and reaching of "just and fair" solutions, recognizing that what is just and fair may differ from case to case. National laws differ significantly in terms of whether a modern claimant to such art may successfully sue. Historically, U.S. law has been regarded as the most favorable toward claimants, but a wave of cases since a landmark Supreme Court case in 2004 (which favored the claimant) has significantly shifted the legal landscape in U.S. courts, as you can see in the attached chart.

**The Panelists (and Some Additional Background)**

Ambassador Stuart Eizenstat, who organized and headed the U.S. delegation to the Washington Conference, was appointed to head the U.S. delegation to the Holocaust Era Assets Conference in Prague in June 2009, which resulted in the Terezin Declaration. The 2009 Terezin Declaration reaffirmed support for the 1998 Washington Principles, but the Terezin Declaration calls for the restitution of art transferred in "forced sales" as opposed to just "confiscated art", the term used in the Washington Principles. What exactly is a "forced sale" is a raging debate in the art world.

A current wave of claims attempts to expand the definition of "forced sale" to include all property sold as a consequence of the Nazis' rise to power in 1933 and immediate persecution of Jews. U.S. Military Government Law 59 implemented a presumption that all transfers from Jews to non-Jews after implementation of the Nuremberg laws in 1935 were made subject to duress. Also quite significant is the Flight Tax, a racially neutral law pre-dating the Nazis that required citizens leaving the Reich to forfeit 25% of their assets, which was turned to evil ends as Jewish refugees tried to flee the new regime. If courts accept as historical fact that immediately upon Hitler's rise to power in March 1933, Germany's entire Jewish population was stripped of all legal rights and remedies and forced to sell artworks as a matter of survival, U.S. museums may be compelled to acknowledge that many more works were acquired under problematic circumstances and may rightfully belong to persecuted Jews.

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Perhaps out of fear, U.S. museums, alone in the world, have begun filing declaratory judgment actions raising technical defenses, such as statutes of limitation and laches, to defeat such claims.

The Department of State's Special Envoy for Holocaust Issues, Ambassador J. Christian Kennedy, has hosted a series of Town Hall Meetings since 2009 to explore the idea of creating a national commission to issue non-binding opinions regarding claims to art displaced during the Holocaust. The State Department is going ahead with its plans to create a commission and is soliciting input into how the commission should be structured.

Charles Goldstein of Herrick, Feinstein LLP in New York, serves as Counsel to the Commission for Art Recovery and has been litigating Holocaust art claims for 15 years. The Herrick firm is deeply involved with Nazi-looted art litigation, including the Portrait of Wally case pending in New York since 1999 and set for trial later this year. Mr. Goldstein is critical of the commission proposal and has alternate proposals.

Dr. Lucille Roussin spoke at the Prague Conference. She is Founder and Director of the Cardozo Holocaust Restitution Claims Clinic and was the lawyer responsible for the first major restitution of a valuable piece of privately owned Judaica since the War. She brings both a practical and academic perspective to the Nazi-looted art problem and shares Mr. Goldstein's criticisms.

#### The Panelists' Discussion and Debate

First, Ambassador Eizenstat expanded on the background about the Washington Conference and Principles, the Prague Conference and the Terezin Declaration, and indicated that the current climate whereby U.S. museums are filing declaratory judgment actions against survivors and their heirs could be reformed by bringing the moral suasion of the Government of the United States to bear via the creation of a commission. He was passionate that we needed to return to the spirit expressed in Washington and Terezin that the Nazi-looted art problem must be viewed as a moral issue, not a legal one.

Second, Ambassador Kennedy discussed how the commission would be constructed. He stated that the commission would consist of five eminent persons who need not be drawn from the legal community but whose reputations and credibility would be beyond reproach. At this point, other firm details are not yet available as the commission is in its incipient stages. It is likely that the commission would have a staff to assist in provenance (ownership history) research and other matters. The current conception of the commission is that two tracks would be available, which would operate independently of one another to prevent potential adjudicators from acting as researchers: a finding track and an alternative dispute resolution track. Ambassador Kennedy stressed that the Washington Principles and Terezin Declaration favored use of alternative dispute resolution mechanisms and commissions over litigation to resolve claims to Nazi-looted art.

Both Mr. Goldstein and Dr. Roussin stressed that they do not oppose the commission; they support it in concept because they support the idea of reducing costs and maximizing access to research for claimants. Both were critical of the current formulation of the proposal, however, because they believe it does not address the heart of the problem – that museums are asserting statute of limitations and laches defenses in court, which prevents an airing of the merits and true provenance of the art in question. Mr. Goldstein stressed that the museums must be forced to the table and that they would not cooperate with a commission if all it offers are optional alternative dispute resolution mechanisms, which already exist. He stressed that this was true in light of the fact that five different museums had filed and won declaratory judgment actions on limitations grounds against claimants in contravention of Association of American Museum Directors (AAMD) and American Association of Museum (AAM) guidelines. Dr. Roussin was of the view that having "eminent persons" lead the commission was too vague, and that persons deeply knowledgeable about Nazi-looting and the subsequent infection of the market should lead the new commission.

In response, Ambassador Eizenstat was adamant that the status quo – a litigation model – could not remain the norm in the United States, and that legislative reform was not a possibility in the current congressional climate. Thus, creating a commission like the ones in place in the United Kingdom, the Netherlands, Germany and France is imperative to bring the United States into compliance with what it promised in the Washington Principles. He was passionate in his views that the commission would exert moral authority that would have an impact on litigation and in the end reduce the need to rely on courts to resolve the Nazi-looted art problem – even without mandatory jurisdiction over all Nazi-looted art claims or legislation barring the use of limitations and laches defenses. Finally, he felt it was time for the United States to once again lead the effort to reconstitute art stolen from Holocaust victims and restore faith in our public institutions. Ambassador Kennedy echoed Ambassador Eizenstat's statements.

In response to the final question posed to the panel about museums' fiduciary duties not to reconstitute artworks without compelling reason, Mr. Goldstein underscored that museums have

no fiduciary duty to hold on to stolen property and that receiving stolen property is a crime.

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