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The U.S. Has No Special Panel for Nazi-Loot Claims. Could That Change?

Several European countries have restitution commissions that decide claims regarding art lost in the Holocaust. Some people think there should be a U.S. panel too.

By Milton Esterow
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The Washington Principles, adopted by the United States and 43 other countries in 1998, guide nations on how to handle claims for Nazi-looted art and recommend that countries create alternative dispute resolution processes, separate from their courts, to settle cases.

Why?

Because experts say the courts sometimes rely too much on narrow procedural grounds, like statutes of limitation, in deciding cases and do not consider the broader moral framework of a claim by families that lost art in the Holocaust.

So six countries — Britain, Germany, France, the Netherlands, Switzerland and Austria — created restitution panels that have become the tribunals in which many looted art claims are resolved. But the United States has yet to create one, even though it was a U.S. diplomat, Stuart Eizenstat, the secretary of state's special adviser on the Holocaust, who led the effort to establish the principles and, for decades, has been their tireless advocate.

This disparity was recently noted in an Art Newspaper essay by Olaf S. Ossmann, a lawyer who often represents claimants. He argued that the creation of such a panel in the United States was long overdue.

"It seems almost unbelievable," Ossmann argued, "when the U.S. State Department rightly makes exactly this demand to various European and non-European governments but does not take action in its own country after more than 25 years."

Eizenstat said in an interview that there are a number of reasons a restitution tribunal has never been created in the United States. One factor, he said, is that American institutions, unlike European museums, are almost exclusively private organizations that are not supervised by the government, or primarily financed by it.

European museums, on the other hand, are typically state-owned and operate under a culture ministry that can mandate compliance with a national policy.

“The basic point is that we don’t have a Ministry of Culture, right?” Eizenstat said. “There’s no governmental entity to oversee or set the rules for these commissions.”

In recent months, though, coinciding with the 25th anniversary of the Washington Principles, there has been an effort to explore whether a restitution panel along the lines established in other countries could work in the United States.

Several months ago, Eizenstat and a representative of the State Department met with lawyers from the Association of Art Museum Directors in Washington to begin thinking about how a restitution panel might possibly work for the United States. It would likely need to be run as a private organization, Eizenstat said, but one with the mission of mediating cases involving looted artwork found to be in the possession of museums.

Gideon Taylor, president of the World Jewish Restitution Organization and the Conference on Jewish Material Claims Against Germany, said that the momentum for creating a U.S. restitution panel stems largely from the sense that the legal system is not working well for claimants who find it expensive to pursue cases, especially when museums raise legal technicalities to thwart claims.

“The goal here is to look at the justice and the fairness of who owned it and what happened,” he said, “not to rely on a technical legal framework for an event that’s of unique historic proportions.”

The museum directors association said it does not comment on private discussions such as the meeting in Washington that Eizenstat described, but it suggested in a statement that a resolution panel “is not an active topic of discussion as far as AAMD is aware.”

As to the rationale for such a panel, the museum directors noted that the association’s guidelines urge members to be transparent and fair in resolving claims and that the vast majority of them have been resolved without litigation.

“In the rare circumstance that a museum — usually after extensive research — determines that a claim is not supported by the facts,” the association said in a statement, “litigation has occurred. Museums have an obligation to conduct that litigation in a responsible manner including raising affirmative defenses if they are merited. They are not ‘technical’, but are deeply rooted in our legal system to protect the rights of litigants.”

Ossmann, the lawyer who wrote the essay, often represents clients in restitution claims, including a case he pursued against the Museum of Fine Arts, Houston. In that case, the heirs of a department store owner who sold a painting by Bernardo Bellotto in 1938 said the sale came under duress at a time of economic hardship for German Jews. The heirs objected to the museum’s use of what they characterized as an overly legal defense rather than a decision on the merits of the heirs’ case.

The museum, which has had the painting since 1961, countered that the case was decided on the merits and that the store owner was fairly compensated at the time of the sale. Federal courts have sided with the museum. Thaddeus Stauber, a lawyer for the museum, said that the U.S. Supreme Court recently denied a petition by the heirs for a review of the case.

"The Marketplace at Pirna," by Bernardo Bellotto, painted in roughly 1764. It has been the subject of a long legal battle, but U.S. federal courts have upheld the ownership of the Museum of Fine Arts, Houston. The Museum of Fine Arts, Houston

One concern raised about a restitution panel that operates outside of the court system is the question of who would pick up the costs. Eizenstat said he thought there could be a number of funding mechanisms to consider and that panel members could be drawn from the ranks of retired judges, who may even agree to serve without pay.

In the absence of a panel, the United States has tried to address some of the legal technicalities that hindered claims through legislation such as the HEAR Act of 2016. It was a response to complaints by claimants that restitutions were sometimes blocked by state statutes of limitations that prevent some older cases from being adjudicated. The legislation created a national six-year statute of limitations on claims that, importantly, did not begin until a claimant had reason to know of the Nazi theft of their family's art.

According to Ossmann, the HEAR Act "opened a new door, but is relevant in only 10 out of 100 cases."

And restitution panels are not without their critics. Some claimants have been frustrated by instances in which panels in different countries have taken opposite positions in similar cases. One example of such a case involves the claims made by the heirs of Curt Glaser, an art collector and former head of Berlin's State Library, who was of Jewish descent.

Glaser sold his collection at two auctions in Berlin in 1933 and fled Germany. In 2009, the British restitution tribunal, known as the Spoliation Panel, rejected a claim by the heirs for drawings held by a museum there. A year later in the Netherlands the restitution panel there recommended that a painting sold by Glaser under similar circumstances be returned.

"The criticism is repeatedly raised that allegedly similar cases have given rise to divergent decisions," said Benjamin Lahusen, professor of private law and modern legal history at European University, near Frankfurt. "The problem is said to apply at both the international and national level: The

recommendations put forward by the different commissions are said to differ in comparable cases, and even individual commissions are said to have issued contradictory recommendations at times."

Many disputed rulings arise because of questions of whether a claim was made in a timely fashion. The legal term is laches, and courts and panels often look unfavorably on claims that did not surface until, say, long after a painting was publicly on display in a museum. The HEAR Act did not take up the issue of laches, but those who believe it is too often wielded as a tool to block restitutions would like it addressed when Congress considers renewing the HEAR Act, now scheduled to sunset in 2026.

Panels have also often differed in their interpretations on the concept of a forced sale, which many Jews fleeing the Nazis made, using their art as a tool of escape. Panels will often review the timing of such a sale, whether it occurred before or after a Nazi invasion and whether the person received a fair market value in a sale, even if it came in haste.

The inconsistency in decisions has led some to call for a larger, umbrella-type organization, perhaps organized for the entire European Union, that could serve as a broader tribunal and bring more clarity, and coherence, to the rulings. The European Parliament recently decided to study restitution and commissioned Evelien Campfens, a lawyer and lecturer on cultural heritage law at the University of Amsterdam, to research the problems.

Her recommendations include, she said, mandatory due diligence standards for the trade to encourage provenance research and to discourage sales of cultural objects with tainted provenance.

"Also," she said, "setting up a knowledge center for provenance research, which would enhance coordination."

Lahusen said the appeal of coordination is evident in the cases of Jewish families whose relatives' extensive collections have been sold and resold, donated and lent to people and institutions in countries around the world.

"Some are to be found in Austrian institutions, some in Germany, others in the United States and France," he said. "Some institutions restitute, others pay a compensation. Others don't do anything."

He added: "By restituting cultural property we address the past, but even more the present. We are seeking to make a difference today."

Despite the efforts of the Monuments Men, shown here in 1945 rescuing works that had been looted by the Nazis, many works seized during World War II have not been returned to their owners. Keystone/Getty Images

Eizenstat said that, in one positive step, national restitution panels have begun sharing their decisions, which could lead to the development of a body of precedents.

Matthias Weller, professor of restitution law and chairman of the department of art and cultural property law at the University of Bonn, said he is hopeful about a recent measure in Germany that would allow claimants to submit their claims to a binding arbitration court.

“Until now, the parties had to agree on nonbinding mediation,” he said.

Some continue to be concerned about what impact proposed legislation there might have on the claims process.

Though national panel decisions have been inconsistent at times, Taylor, of the World Jewish Restitution Organization, said that he still feels there is momentum to create such a commission in the United States. In March, 28 countries signed an agreement to strengthen the Washington Principles and clarify ambiguities. The agreement, also negotiated by Eizenstat, is called “Best Practices for the Washington Principles on Nazi-Confiscated Art,” and one of its recommendations is a more explicit call for countries to create independent panels that can “adjudicate cases of art and cultural property.”

Taylor said that, while there is "clearly work to be done" if the United States is to create a restitution commission, the timing was right to pursue that effort.

"With the growing international consensus demonstrated by the Best Practices," he said in a statement, "an increasing number of claims in the U.S., and rising public interest, now is the moment for establishment of a commission or similar mechanism at the Federal or State level that will not simply apply restrictive law, but rather find historical justice for victims of Holocaust-era looting."