

Closing Remarks

Teresa Giovannini *

I would like to begin by thanking the Secretary-General and his colleagues at the International Bureau of the Permanent Court of Arbitration (“PCA”) for their efforts in putting together this Seminar and publication.

At the outset, I am grateful to Professor Lyndel Prott for having reminded us all of the Preamble to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (“1954 Hague Convention”)¹ which states that damage to cultural property means damage to the cultural heritage of all mankind. As a matter of fact, the Nuremberg Tribunal recognized that calculated economic devastation, including the systematic looting of property, could destroy the cultural heritage and continuity of a group and set the stage for the ultimate extermination of that group. Ultimately, the Nuremberg Tribunal ruled that the looting and destruction of public or private property constituted “war crimes” under international law.²

I can only strongly second Professor Prott’s proposal that all countries should now agree to bind themselves to international rules aimed at preventing such systematic looting.³ I would like to add that such rules should also be adopted to facilitate the return of looted objects to their legitimate owners. I will revert to the latter issue.

* Partner, Lalive & Partners, Geneva. E-mail: tgiovannini@lalive.ch.

1. Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, May 14, 1954, 249 U.N.T.S. p. 240, reproduced as Annex III in this volume. See Lyndel V. Prott, *The Prospects for the Recovery of Cultural Heritage Looted from Iraq*, in this volume at p. 23.

2. See Judgement of the International Military Tribunal, Sept. 30, 1946 in 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL pp. 411–414, 481–486 (1948); see also Queen C. Peel, *The Potential for a Mediation/Arbitration Commission to Resolve Disputes Relating to Artworks Stolen or Looted During World War II*, 13 ASA SPECIAL SERIES (Jan. 2000), p.1777.

3. See Prott, *supra* note 1.

RESOLUTION OF CULTURAL PROPERTY DISPUTES

Quite opportunely, Professor Wojciech Kowalski has explained that the restoration of cultural heritage to the place of its origin encompasses issues of a different legal nature.⁴ Thus, we have learnt that “restitution,” “repatriation” and “return” are subject to different legal regimes. We have been reminded that restitution implies that a certain prohibition has been violated (ordinary theft in peace time, qualified theft during hostilities or occupation). At present, the only existing internationally binding instrument covering this issue is the 1954 Hague Convention and its Protocol.⁵ Repatriation, however, relates to the return of property to a place or a country from which the cultural object originated. There is no internationally binding treaty on this subject at present.

Professor Kowalski has defined the concept of return by referring (i) to the Plea by the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) for the return of cultural heritage;⁶ (ii) to the International Institute for the Unification of Private Law (“Unidroit”) 1995 Convention on Stolen or Illegally Exported Cultural Objects (“1995 Unidroit Convention”);⁷ and (iii) to the Council of Europe Directive of 1993⁸ that covers the recovery of cultural property lost under colonial rule as well as the recovery of cultural objects of such significance that they represent an integral part of a public collection. Return as such has no legal status.

As we have seen throughout this volume, the common denominator with respect to the problem of looted art and restoration of cultural heritage consists of the absence of internationally binding legal instruments almost across the board.

The Seminar session “Insights and Provenance,” in which a number of high profile personalities in the art field participated, was a rich learning experience. I was pleased by Lucian Simmons’ renditions of the historical and current context of art looted during World War II.⁹ While it is true that the Nazis

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4. See Wojciech Kowalski, *General Observations: Claims for Works of Art and their Legal Nature*, in this volume at p. 31.
 5. The full text of the Protocol is reproduced as Annex IV in this volume.
 6. A Plea for the Return of an Irreplaceable Cultural Heritage to Those who Created It, UNESCO, June 7, 1978, reproduced as Annex VII in this volume.
 7. Unidroit Convention on Stolen or Illegally Exported Cultural Objects, Rome, June 24, 1995, 34 I.L.M. p. 1322, reproduced as Annex VIII in this volume.
 8. Council Directive 93/7/EEC of Mar. 15, 1993, O.J. (L 74) p. 74.
 9. See Lucian J. Simmons, *Provenance and Auction Houses*, in this volume at p. 85.

CLOSING REMARKS: T. GIOVANNINI

played a crucial and sad role in this respect, it is also the case that the general chaos engendered by World War II all over the world opened up a variety of ways in which art was looted all over Europe and the United States. Mr. Simmons has pointed out that at the same time as the Nazis were seizing art, the Americans and the British also seized property belonging to citizens of Germany and its Allies, including property which had been sent to England for safe-keeping by Jewish families in occupied Europe. For example, French authorities seized Prince Matsukata's art collection "as enemy alien property." This rendition of facts (often ignored by the various authors on looted art during World War II) is genuinely important: it allows – from the human angle – for an understanding that one side was no better or worse in this regard than the others, and shows – from historical and legal perspectives – that the problem is not limited to the well-known characteristics of the German methods of looting.

However, I do not share Mr. Simmons' view that "a large proportion was restituted in the years immediately after the War"¹⁰: during the 1950s, 1960s, 1970s and 1980s the whole art trade undoubtedly profited from a regular supply of Hitler's spoils. It is also important to remember that the disintegration of the Communist bloc, and the subsequent opening of the Soviet Union's archives, occurred as recently as 1989. In the United States, it was only in 1998 that museums began to search through their collections for looted art. I believe that the problem of restitution is far from being resolved. As stated by Professor Prott, "large amounts of misappropriated cultural property remained at large" after the 1950s.¹¹

Furthermore, despite the extensive explanation provided by Mr. Simmons regarding the problem of provenance and the consequent inquiries made by auction houses, I wonder whether such research can be a substitute for the good faith of the purchaser. In other words, can an individual argue "but the auction house undertook the necessary search" in order to validly claim to be a good faith purchaser? I have serious doubts about that.

Nancy Yeide's excellent summing up and updating of her American Association of Museums' ("AAM") Guide to Provenance Research, published

10. *Id.* p. 91.

11. Lyndel V. Prott, *Responding to World War II Art Looting*, in this volume at p. 113, p. 121.

RESOLUTION OF CULTURAL PROPERTY DISPUTES

together with Konstantin Akinsha and Amy Walsh in 2001,¹² has given us invaluable fundamental indications regarding the methodology of tracing provenance.¹³ Firstly, it involves looking into art history documentation to create “as complete a chain of ownership as possible.” Secondly, “red-flag” names (names of collections known to have been looted or dealers known to have dealt in looted works) are researched. Finally, specific lists of missing objects are consulted. However, as illustrated by the example of Gustave Courbet’s painting *Paysage, or La Bretonnerie*, in the Department of Indre, these steps might prove to be insufficient to clearly establish the provenance of a work of art, in particular when taking into account the chaotic conditions prevailing during World War II.¹⁴ I would like to emphasize the incredible efforts made by the United States museum community, to which Ms. Yeide has contributed more than significantly, to “fulfil the moral and ethical mandate” of identification and restitution of looted art.

Laurie Stein¹⁵ introduced the Seminar session on “World War II Looted Art” by recalling that only twenty years ago, there were very few records on the issue. This statement confirms the current breadth of the problem and the necessity to solve it through appropriate legal instruments as soon as possible.

Professor Prott’s recollection of the important steps taken by the Allied Associated Powers and various governments immediately after World War II with respect to the recovery of looted assets in general, and looted art in particular, is indeed significant. What is of particular interest with respect to this period is that after the Declaration of London was issued in 1943,¹⁶ several countries (including France, the United Kingdom, the United States, Germany and the Soviet Union) enacted specific laws (and not mere guidelines) in a real attempt to solve the problem of the restitution of looted assets. Unfortunately, most of these laws or decrees were repealed quite soon after they were passed,

12. See NANCY H. YEIDE, KONSTANTIN AKINSHA & AMY L. WALSH, *THE AAM GUIDE TO PROVENANCE RESEARCH* p. 109 (2001).

13. See Nancy H. Yeide, *Provenance and Museums*, in this volume at p. 99.

14. On that note, I found Connie Lowenthal’s suggestion that the heirs scrutinize the municipal archives of the city where the family once lived very interesting. See Constance Lowenthal, *Recovering Looted Jewish Cultural Property*, in this volume at p. 139, Part III.

15. Vice President & Midwest Director, Christie’s, U.S.A.

16. Inter-Allied Declaration Against Acts of Dispossession Committed in Territories under Enemy Occupation or Control, London, Jan. 5, 1943, reproduced as Annex I in this volume.

with consequences illustrated in cases such as *Koerfer v. Goldschmidt*¹⁷ (where the claim was time-barred under Article 728 of the Swiss Civil Code). However, these laws – as emphasized – provide an interesting precedent for the possible resolution of some issues as to the return of looted objects. I will revert to that aspect later.

How can one not be thankful to Connie Lowenthal for having recalled that nobody and nothing will ever be able to compensate the Jews' and other victims' loss of home, unspeakable suffering and lives of family members who perished? We have all heard these famous words "never again." And still it continues – in the early 1990s in the former Yugoslavia, and in so many other parts of the world even today. Shall we ever learn from our mistakes?

Thanks also go to Ms. Lowenthal for having placed these terrible events in their historical context, namely the alleged "bleeding" of the German people and their economy by the Jews and the resulting rationale behind the "partial payment for the debt Jews owed to Germans."¹⁸ Ms. Lowenthal has also mentioned the difficulty in recovering looted art due to the variations in rules of law existing in the different places governing the permissibility of bringing forward a lawsuit. What case law has shown so far is that – except in isolated situations – the rules applied by the courts with respect to the statutes of limitation, for example, are clearly not suitable for the specific issue we are dealing with today.

Finally, with respect to the various attempts made by the Commission for Art Recovery in various countries, I would like to highlight the specific problem relating to Switzerland, where the most significant art collections belong to private museums or galleries. While apparently welcoming the Commission's initiative, no one concerned has agreed to the actual opening of their records in order to identify art possibly looted during World War II. The resistance is still very strong, as emphasized by Ms. Lowenthal.

Mr. Akinsha's bleak analysis of the existing gaps in museums' and governments' databases (that are sometimes not even workable) is,

17. *Koerfer v. Goldschmidt*, ATF 94 II p. 297 (Switz.). See Protts, *supra* note 11, n.27 and accompanying text.

18. Lowenthal, *supra* note 14, Part III.

RESOLUTION OF CULTURAL PROPERTY DISPUTES

unfortunately, accurate.¹⁹ It is true that the problem is incredibly complex: Ms. Yeide has explained to us how difficult it might be even to identify a painting that can have different titles. However I am sure that all of us support the proposals made by Mr. Akinsha: a complete database (together with infrastructure) is absolutely essential, and firm undertakings by the governments concerned must be made. The matter is urgent: generations are passing by, and in a few years, nobody will remember what happened fifty years ago.

During the Seminar session entitled “Legal Issues Associated with Restitution,” Michael Carl explained that as regards ownership, the applicable conflict rules are generally those applied by the court before which the action is pending (including, of course, international conventions or treaties), the standard rule being in this respect the *lex rei sitae* (the location where the relevant act occurred). With regard to the issue of statutes of limitation, Dr. Carl mentioned the common denominator in most legal systems, *viz.* that while the return of registered land or immovable property is not subject to a time-bar, the return of movables are subject to strict rules in this respect even though the rules of limitation vary from one country to another. Here, again, the *lex rei sitae* rules prevail. Listening to Dr. Carl, one could only conclude as he did: we urgently need universal rules for restitution of looted assets in general, and looted art in particular.²⁰

Likewise, as emphasized by Hans Das, the time has come for “concerted international action” with respect to evidence.²¹ Concrete steps towards an efficient and fair resolution of the Holocaust’s looted art problem need to be taken as a matter of urgency. I agree with him that not all Holocaust-looted art claims can effectively be resolved through mediation, and that a proper and binding dispute settlement mechanism must be set up by the international community. This approach implies the establishment of rules on both (i) substantive issues (amongst which I include the administration of evidence, as discussed by Mr. Das) and (ii) procedural rules aimed at organizing the settlement mechanism. It is clear that due to the specific aspects of looted art

19. See Konstantin Akinsha, *The Temptations of the “Total” Database*, in this volume at p. 159.

20. See Michael Carl, *Legal Issues Associated with Restitution – Conflict of Law Rules Concerning Ownership and Statutes of Limitation*, in this volume at p. 185.

21. Hans Das, *Claims for Looted Cultural Assets: Is There a Need for Specialized Rules of Evidence?*, in this volume at p. 193.

CLOSING REMARKS: T. GIOVANNINI

during World War II (which include, as mentioned by Mr. Das, war conditions, lapse of time and absence of comprehensive records), the bringing forward of evidence might become extremely difficult, if not impossible.

Mr. Das has explained that the concept of “burden of proof” in international procedures also implies that on the one hand the parties must cooperate in providing the proof, and on the other hand that the tribunal itself must proceed to fact-finding on its own. Mr. Das has confirmed that despite the difficulties in the application of such rules in the framework of art looted during World War II, historical reparations commissions (such as the Italian Conciliation Commission) and arbitral tribunals have traditionally found it difficult in departing from them, with the exception of some isolated cases of the reversal of the burden of proof on the basis of a *probatio diabolica* (such as the *Grant-Smith* claim²²).

I agree with Mr. Das’ suggestion that certain contemporary bodies provide some guidance with respect to the rules of evidence to be applied in the circumstances discussed here. In this regard, I take the view that the sole example of the real softening of the general rules of evidence is demonstrated by the Commission for Real Property Claims of Refugees and Displaced Persons (“CRPC”), according to which “claimants are expected to present all evidence that is available to them” which, as emphasized by Mr. Das, is “substantially less than the traditional requirement of proving the facts relied on to support their claim.”

As to the standard of proof required, I wonder whether the solution proposed by Mr. Das – to apply stricter rules towards a *bona fide* purchaser – is well founded. I believe the real problem one has to cope with is the restitution of looted art: the issue of the *bona fide* purchaser is, in my view, a question of compensation, and more specifically, a question of who is going to pay for the restitution. Conversely, I tend towards the rule of “probability” (adopted by the Iran–US Tribunal in the *Daley* case²³ mentioned by Mr. Das); or the rule of “plausibility” applied by the Second Claims Resolution Process of Dormant Accounts (“CRT II”); or yet still of the rule of “presumption” used

22. *Grant-Smith Claim (the Gin and Angostura)*, Mar. 4, 1952, 22 I.L.R. p. 967 (Anglo–Italian Conciliation Commission).

23. *Leonard and Mavis Daley*, Case No. 10514, Chamber One, Award No. 360-10514-1, April 20, 1988 (Iran–U.S. Claims Tribunal), XIV Y.B. COMM. ARB. pp. 460–465 (1989), 1988 WL 637289.

RESOLUTION OF CULTURAL PROPERTY DISPUTES

by the Commission for Real Property Claims. Like Mr. Das, I think that these concepts could and should be applied to victims in the context of Holocaust-looted art claims. This standard should be accompanied by stricter rules with respect to the possessor.

The issue of good or bad faith, as discussed by Marc-André Renold,²⁴ is clearly one of the key problems with respect to looted art in general, and art looted during World War II in particular. The comparative approach has shown that under civil law legal systems, no one can transfer title on stolen property. The “high” standards of diligence required by the Swiss Supreme Court in the 1996 decision quoted by Mr. Renold,²⁵ or in France in the *Williams* case of 2001,²⁶ actually look more than reasonable, at least when the purchaser is an art collector or a gallery owner. One can even wonder whether such a criterion should not also apply to amateur collectors: everybody is now aware of the problem of looting, particularly that which occurred during World War II. In my view, it is reasonable to expect from someone who is spending significant amounts of money to acquire a work of art to seriously enquire into its provenance. According to Mr. Renold, this seems to be the approach taken by the 1995 Unidroit Convention,²⁷ which was actually fiercely fought, for exactly this reason, by art dealers in Switzerland (for example). The other interesting feature of the Unidroit Convention mentioned by Mr. Renold is that good faith does not give title, but merely entitles one to compensation. I am convinced that this is the correct approach to the problem in the field of looted art. The following question, however, arises: who should be condemned to make good the compensation? The victim of the looting? This might actually be unfair, and deserves in my view serious attention in the elaboration of future legal instruments.

Quite logically, the fourth and last session of the Seminar dealt with “Dispute Settlement Mechanisms Relating to Cultural Property.” Norman Palmer has given us a number of examples of decisions taken by English courts in the field of recovery of looted assets and looted art.²⁸ This shows beyond any

24. Marc-André Renold, *Stolen Art: The Ubiquitous Question of Good Faith*, in this volume at p. 251.

25. *Insurance X v. A.M.*, ATF 122 III p. 1, SJ 1996 p. 383 (Switz., Mar. 5, 1996).

26. *Demartini c. Williams*, *Tribunal de Grande Instance de Nanterre*, July 6, 2001 (unpublished decision).

27. *Supra* note 7.

28. See Norman Palmer, *Litigation, the Best Remedy?*, in this volume at p. 265.

CLOSING REMARKS: T. GIOVANNINI

reasonable doubt that ordinary courts are clearly not the appropriate fora for such disputes. Furthermore, Mr. Palmer has demonstrated that national substantive and procedural laws are clearly not adequate to deal with the issue at stake. Mediation, in his view, can resolve actual problems of recognition (“never forgetting what happened”). Advisory commissions (as in the case in France or Switzerland, for example) only issue recommendations, which are neither final nor binding.

Owen Pell, logically, has exposed the potential for arbitration in settling disputes related to looted art.²⁹ I strongly support Mr. Pell’s suggestion in this regard. However, as he has pointed out, substantive issues must first be resolved, which include the definition of the good faith purchaser, the regime of compensation, the statute of limitation and the adequate treatment of the problem of evidence, including the burden of proof. Unfortunately, this is not yet the case at the international level.

However, I do not share Mr. Pell’s view that the application of the principles adopted at the Washington Conference on Holocaust-Era Assets of 1998 (“Washington Principles”)³⁰ by a special arbitral tribunal would be sufficient. The Washington Principles leave a lot of room for interpretation, and this issue requires very clear rules. Nonetheless, I can only applaud the very concrete proposals made by Mr. Pell with respect to the functioning of the proposed arbitral tribunal, which would include a register or a general database. However for decisions made by such an arbitral tribunal to be actually enforced by states, rules of law must be adopted at an international level.

To conclude on this important debate, I believe that specific substantive and procedural rules should be adopted at the international level to deal with the issue of looted art.

The Seminar and this volume have highlighted three issues of particular relevance. The first is the issue of proof. I am of the view that the burden of proof should be shifted from the victim to the possessor. The criterion adopted by the CRT II, of mere presumption in favor of the victim, should be sufficient. Conversely, high standards should be applied with respect to the possessor.

29. See Owen C. Pell, *The Potential for Arbitration*, in this volume at p. 307.

30. Principles on Nazi-Confiscated Art, Washington Conference on Holocaust-Era Assets, reproduced as Annex IX in this volume.

RESOLUTION OF CULTURAL PROPERTY DISPUTES

Second, with respect to statutes of limitation, there should, in this specific context, be no time limitation regarding the restitution of looted art, as in the case of land or for war crimes (as characterized by the Nuremberg Tribunal).

Third, the issue of *bona fides* should in my view be dealt with along the lines of the principles set out in the 1995 Unidroit Convention, namely that good faith does not give title, but merely a right to compensation. Moreover, I adhere to the solution put forward by the 1996 decision of the Swiss Supreme Court,³¹ as well as by the Swiss International Transfer of Cultural Goods Act,³² that *bona fides* must be examined on the basis of diligence in the process of acquisition (in particular as regards provenance).

I do feel that governments should deal with the issue of compensation directly (as in Switzerland through the Decree of December 1945³³). I see no justification whatsoever in imposing compensation on the victim. Notwithstanding this, clear and specific rules should be established as to the moment in time from when the compensation must be calculated. In this respect, common rules can clearly find no application.

Finally, with respect to the mechanism of settlement for these disputes, I strongly suggest, as others have done today, that specific institutional rules of arbitration be developed. These rules should in particular provide for special inquiry powers as well as direct enforcement of the arbitral awards (as provided for in the 1965 Washington Convention on Private Investment in Foreign States³⁴). Indeed, the enforcement of such awards might trigger considerable difficulties when confronted with the requirements of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,³⁵ but that is a matter that can be dealt with in due course.

31. *Supra* note 24.

32. Federal Act on the International Transfer of Cultural Goods, June 20, 2003.

33. Federal Council Decree on the Restitution Claims of Assets Despoiled in the Occupied Territories During the War, Dec. 10, 1945.

34. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Washington, Mar. 18, 1965, 17 U.S.T. p. 1270, 575 U.N.T.S. p.159.

35. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958, 21 U.S.T. p. 2517, 330 U.N.T.S. p. 38.

The Permanent Court of Arbitration/Peace Palace Papers

RESOLUTION OF CULTURAL
PROPERTY DISPUTES

Edited by

The International Bureau of the
Permanent Court of Arbitration

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