

RESTITUTING LOOTED CUBAN ART

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The widespread plunder and nationalization of art that has occurred in Cuba since the Revolution is very much like the ransacking and looting of both publicly and privately owned art collections that took place in Eastern Europe and in the Soviet Union during the Communist era. However, the most notorious and well documented looting of art in the 20th century took place at the hands of the Nazis before and during World War II. An exploration of how the issue of Nazi looted art has been handled by different countries in the decades following the War provides an instructive backdrop for Cuba and its eventual handling of its legacy of expropriation and nationalization.

NAZI ART LOOTING

The sheer volume of artworks stolen by the Nazis during the War from both museums and private collections throughout Europe is staggering. This wholesale plunder was not a mere incident of war, but an official Nazi policy. Much of the looted art was destined to fill the Führermuseum that Hitler was planning to build in Linz, Austria. The Nazi art confiscation program has been called “the greatest displacement of art in human history.”² The United States Government has estimated that German forces and other Nazi agents be-

fore and during World War II seized or coerced the sale of one-fifth of all Western art then in existence.³ When one adds books, manuscripts and other cultural artifacts, the number of property items stolen runs into the millions. The value of the plundered art alone exceeded the total value of all artwork in the United States in 1945: it has been estimated at \$2.5 billion or approximately \$20.5 billion at today’s values.⁴ To this day, more than 100,000 artworks stolen by the Nazis have still not been located, and thousands more have been located, but have still not been restituted to their rightful owners.⁵

It took nearly half a century for European nations to fully recognize the issues involved in restituting Nazi- and Soviet-era assets, and only in the past decade or so have these countries widely accepted and addressed the ethical significance of returning objects of cultural and artistic value to their pre-War owners. Beginning with their participation in the Washington Conference on Holocaust Era Assets (1998),⁶ countries have focused on passing new laws and issued directives for state run museums on the identification and return of art works stolen during the Nazi era. Most recently, the progress generated by these measures was evaluated

1. The author wishes to thank Ethan Buchsbaum and Amalia Sax-Bolder for their invaluable assistance in the preparation of this paper.

2. Michael J. Bazylar, *Holocaust Justice: The Battle for Restitution in America’s Courts* (New York: N.Y. University Press, 2003), 202.

3. 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).

4. Bazylar, *Holocaust Justice*, 202.

5. The National Archives of the United States, *Documenting Nazi Plunder of European Art*, Greg Bradsher (November 1997).

6. Washington Conference on Holocaust Era Assets, Proceedings available at <http://www.state.gov/www/regions/eur/holocaust/heac.html>; see also <http://www.jewishvirtuallibrary.org/jsource/Holocaust/crs9.html>

at the Prague Conference on Holocaust Era Assets which took place in June 2009.⁷

In surveying the cultural property restitution programs enacted by European countries, a clear divide emerges between those nations that have taken concrete steps towards resolving claims and those that have intentionally delayed or outright refused to implement restitution schemes for Holocaust victims. In the former category fall countries such as Germany, Austria, the Czech Republic, France, the Netherlands, and Great Britain. Meanwhile, Hungary, Poland, the Baltic Republics, and Russia all fall into the latter. The countries in this second category hinder the restitution process in many ways, ranging from biased applications of EU and local laws restricting export of “cultural patrimony”; a general absence of a specific claims procedure; impossible burdens of proof and elaborate bureaucratic procedures; a lingering Communist mentality in the courts; closed, or limited access to archives; and other methods such as deliberate delay and inconsistent determinations, as well as the outright refusal to consider claims.⁸ To compound the problem, individual claimants face additional obstacles. Three generations after the war, it is often impossible to find documentary evidence to support claims, and families often do not have the resources to finance research or prolonged legal action.

Yet, despite these dilemmas, the restitution of art and cultural assets has also continued to undergo substantial improvements in many nations. Numerous commissions and foundations have been established to locate and further investigate lost and stolen artworks.

In 1998 the Austrian government passed the Federal Law for the Return of Works of Art from Austrian Federal Museums and Collections and since then it has reviewed its national collections and resolved 92 restitution cases involving 2,659 works of art.⁹

In France, the Mattéoli Commission published its findings in April of 2000, which assessed that 45,000 of the 61,233 artworks recovered and returned to France after the war had been restituted to their original owners.¹⁰ Around 2,000 of the objects that could not be restituted due to a lack of clear ownership history are now in the custody of the French National Museums. Today they are stored or exhibited in museums throughout France, and the French government continues active provenance research and restitution efforts.¹¹ To help illuminate this ongoing process, the Mattéoli Commission recommended an exhibition of these works at the Israel Museum. This exhibition, entitled *Looking for Owners: Custody, Research, and Restitution of Art Stolen in France during World War II*, was organized in 2008 by the French Ministry of Culture and Communication, the French Ministry of Foreign Affairs, the Direction des Musées de France and the Reunion des Musées Nationaux, in collaboration with The Israel Museum.¹² In addition to these efforts, the French Government established a Commission for Compensation of Victims of Spoliation, which hears and provides recommendations on Holocaust claims.¹³

In the Netherlands, the Ekkart Committee and the Origins Unknown Agency were created in 1997 to research and publicize the origins of over 4,000 looted artworks in possession of the Dutch government.¹⁴ In 2002, the Dutch government created the Advisory

7. Prague Conference on Holocaust Era Assets, <http://www.holocausteraassets.eu/program/>

8. Charles A. Goldstein, “Restitution of Holocaust-Era Looted Art: The Washington Conference (1998), An Overview,” *The Commission for Art Recovery*, http://www.commartrecovery.org/docs/MALAGA_LECTUREfinalMAY2009.pdf (accessed July 8, 2009).

9. The Conference on Jewish Material Claims Against Germany (Claims Conference), “Artworks and Other Cultural Property Restitution and Compensation,” <http://www.claimscon.org/index.asp?url=artworks/national> (accessed July 7, 2009).

10. Matteoli Commission Final Report; see http://www.lootedart.com/MFEU4A93515_print;Y

11. Ibid.

12. The Israel Museum; see <http://www.imj.org.il/exhibitions/2008/MNR/index.html>

13. The Commission for the Compensation of Victims of Spoliation Resulting from the Anti-Semitic Legislation in Force during the Occupation (CIVS), <http://www.civs.gouv.fr/spip.php?rubrique8>

14. For more information regarding the Ekkart Committee and the Origins Unknown Agency, see <http://www.originsunknown.org/>

Committee on the Assessment for Items of Cultural Value and the Second World War. This committee, also known as the Restitutions Committee, provides independent recommendations to the Dutch Ministry of Culture regarding applications for the restitution of artworks looted during World War II that are presently part of the Dutch national collection.¹⁵ It was this commission which in 2006 restituted 200 artworks to Marei von Saher,¹⁶ the sole heir of Jacques Goudstikker, the Jewish art dealer from whom they had been looted in 1940.¹⁷

In Germany and Poland, government-sponsored committees were formed and legislation was passed to locate stolen artworks. In 1999, Germany signed the Mutual Statement and Agreement which strongly encouraged German institutions to identify Nazi-confiscated items in their collections. Soon after, in February of 2001, the German government issued the legally non-binding “Handreichung,” which offered guidelines outlining various ways to discover and retribute looted cultural property.¹⁸

In 1998, the government of the Czech Republic, formed the Rychetsky Commission to address the private property claims of Holocaust victims. In 2000, the Czech parliament enacted legislation (Law No. 212/2000) that authorized the government to retribute 200 properties and 70 artworks from the National Gallery to the Jewish Community, and also provided for the return of 7,500 artworks in Czech government museums and galleries.¹⁹ Notably, although the Czech government’s restitution commission requires that claimants of private property be citizens residing in the Czech Republic, that restriction does not apply to claimants of looted art.

Most of these efforts to locate artworks have led to the establishment of online databases and specific organizations designed for the cataloguing of lost property. Austria, France, and Germany all have databases of this kind, in which they publish an online record of likely looted objects in their museums and public collections.

However, while countries may take up the responsibilities of conducting proper investigations and publishing the results, the actual process of returning works of art and other property or providing alternative compensation still poses significant challenges to many governments. Countries often respond to restitution issues by indicating their moral support for “righting the wrongs of past injustices,” while simultaneously neglecting to follow through with concrete action.

CUBAN REVOLUTION ART LOOTING

So what does all this have to do with Cuba? Cuba faces expropriation claims by many hundreds of thousands of its nationals, both on the island and abroad, as well as claims by almost six thousand U.S. nationals whose assets in Cuba were expropriated without compensation during the early years of the Cuban Revolution. These assets’ combined worth today is estimated at more than \$50 billion.²⁰ The property seizures range from land, homes, industries, and businesses to the personal property and art collections of Cuban citizens that were seized before and after they left the island.

It is virtually impossible to calculate the number of artworks seized and nationalized by the Castro regime since 1959. They were taken from the homes of wealthy and well-known families such as the Gómez-Menas, the Fanjuls, the Bacardís, the Cintas, and the

15. For more information on the Advisory Committee on the Assessment for Items of Cultural Value and the Second World War, see <http://www.restitutiecommissie.nl>

16. The author’s law firm, Herrick, Feinstein LLP, represented Marei von Saher in this matter.

17. For more information on Jacques Goudstikker and the Dutch Government restitution, see <http://www.nytimes.com/2008/04/27/nyregion/nyregionspecial2/27brucect.html>; http://www.nytimes.com/slideshow/2006/03/22/arts/20060326_RIDI_SLIDESHOW_4.html

18. The Conference on Jewish Material Claims Against Germany, Artworks and Other Cultural Property Restitution and Compensation: Art Restitution Organizations, available at <http://www.claimscon.org/index.asp?url=artworks/national>

19. Ibid.

20. Tim Badgett, “Cuba After Castro: Can Exiles Reclaim their Stake?”, *TIME*, August 5, 2006, <http://www.time.com/time/nation/article/0,8599,1223316,00.html> (accessed July 2, 2009).

Lobos, but also from the homes of intellectuals and professionals who counted Cuba's vanguard artists such as Mariano Rodríguez, Cundo Bermúdez, and René Portocarrero as their friends.

After being quietly seized from private homes, these artworks were catalogued and disbursed. Some were placed in Cuba's museums, such as el Museo de Bellas Artes, others were sold at auctions abroad (primarily in Europe and Canada) and surreptitiously sold to galleries and private dealers, while still others ended up in the private homes of government officials.²¹ Jesús Rosado, the former registrar of the Museo de Bellas Artes, has said that of the 50,000 to 55,000 works of art in the museum, 60–70% were confiscated from their owners after the revolution.²² The Museo de Artes Decorativas de la Habana itself is housed in a neo-classical mansion that used to belong to the Gómez-Mena family, and its collection is largely made up of the Gómez-Mena's antique furniture, Chinese porcelains, artworks and art objects.²³

After the fall of the Soviet Union, an increase in the volume of sales of seized artworks occurred during the *período especial* since these sales were an easy way to raise much needed capital. In 1989, Cuba's museums began clandestinely selling paintings from their public holdings. Numerous masterpieces were sold — including a painting by Jean-Léon Gérôme, “Entry of the Bull,” which was part of the Museo de Bellas Artes' collection of European paintings. It sold at Christie's London for £330,000 in 1990.²⁴

Much like the formerly Nazi-occupied and formerly Communist countries, Cuba will have to face the issue of restitution head on before it can politically, economically, and culturally recover from its dictatorial regime and re-enter the global community of nations. In doing so it will have the benefit of a great number of examples of different restitution systems, including art

and cultural property restitution schemes to draw from—when and if there is regime change and a transition to a free market economy.

Regime change is the key requirement for any future in the area of art and cultural patrimony restitution with regard to Cuba. And it is the main reason why a claim for a Nazi looted artwork is, at present, legally treated differently than a claim for an artwork nationalized by a Communist government.

The fundamental difference between a claim for a Nazi looted artwork and a claim for an artwork nationalized by a Communist government is the fact that the Nazi regime was never recognized as an official government by the United States and the Allies. The London Declaration of 1943 declared invalid any and all transfers of property made by the Nazi regime.²⁵ The purpose of this declaration was to revoke and disavow all looting, plunder, thefts or transfers of property, even if they were purportedly legally undertaken by the Nazi government. Therefore, there is a long standing policy that all acts taken by the Nazis were revoked, nullified and disavowed by subsequent German governments.

However, the situation in former Communist countries is not that black and white. After the fall of Communism, the former Eastern bloc countries have taken different approaches to dealing with the legacy of the Communist era. Some have created entirely new legal systems, and explicitly disavowed the prior politics, while others, such as Russia, have moved in a different political direction, but have not taken the position that the prior government's acts should be explicitly nullified or disavowed. By the same token, some of these countries such as the Czech Republic or the former Baltic states — Estonia, Latvia and Lithuania — have developed very expansive restitution and compensation regimes to deal with the Communist na-

21. David D'Arcy, “Cuba's Pillaged Patrimony,” *Art+Auction* (November 1995), 134.

22. D'Arcy, “The Fidel File,” *Art+Auction* 30, no. 9 (May 2007), 58.

23. Ibid.

24. D'Arcy, “Cuba's Pillaged Patrimony,” *Art+Auction* (November 1995), 133.

25. Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control, January 5, 1943 (the London Declaration), available at <http://www.lootedartcommission.com/inter-allied-declaration>.

tionalizations, while other countries have not. Once established, these types of Restitution and Compensation Commissions are usually the only source of redress that citizens of a particular country have to address nationalizations that took place as a result of a Communist regime.

Therefore, if nationalizations undertaken by the Communist governments of these countries have not been explicitly rejected and nullified by the current governments of those countries and there has not been a complete regime change which would make clear that those acts have been nullified, then those official acts of state may not be questioned by the courts of other countries.

So what can Cubans do if they find an artwork that had belonged to them in Cuba? Can they sue the present possessor for its return? Again, the key issue with Cuba is that there is currently no regime change, so the options are limited.

If that work of art were found in the United States, the chances of winning the lawsuit against the current possessor would be questionable because, as the situation currently stands, although there are no diplomatic relations, the U.S. government officially recognizes the Castro regime. As a result, any expropriations of property or nationalizations that were undertaken by that regime against its own citizens can be considered to be official “Acts of State,” which due to the concepts of individual sovereignty, foreign courts generally do not question or second guess.²⁶

The idea behind this “Act of State” doctrine is that under principles of international law, one country should not be standing in judgment of the official acts of another government (no matter how much they may disagree with them), if those acts were taken within the countries’ borders and affected its own citizens.²⁷ Therefore, if the Cuban government expropriated an artwork that belonged to an individual who was a Cuban citizen at the time of the expropriation, the Act of State doctrine would generally preclude an American

court from nullifying that expropriation and finding it to be an illegal theft. However, the Second Hickenlooper amendment, which provides an exception to the Act of State doctrine, would provide redress if the artwork was located in Cuba and expropriated from an American citizen.²⁸

RECOVERING LOOTED CUBAN ART TODAY

That is where we stand today, but as we all know, the political situation in Cuba is in flux and no one truly knows what the future of Cuba will hold. Hopefully Cuba will eventually follow the path of some of the former Eastern bloc countries and move towards developing a new legal regime that nullifies the Communist regime’s Constitution of 1976 and all of the nationalizations and related laws that came before it.

Should Cuba follow this path, the best source of redress with regard to looted and confiscated artworks located in Cuba will be in Cuba itself, through the Cuban courts or hopefully a restitution commission, much like those I described earlier, that can address issues of restitution of or compensation for expropriated property.

In the meantime, there are a number of steps that people who lost artworks in Cuba can take to look for and recover their art. Although suing in a U.S. court for the return of the artwork can be fraught with difficulty at present, there are other routes that can be taken to attempt to find a remedy. The claimant must be able to specifically identify what he or she is looking for. General descriptions are not enough—the claimant must have a firm grasp of the artworks being sought. Of course, the more details the better. While insurance policies, bills of sale, or catalogue raisonné entries that list and describe the artwork and the individual as the owner are ideal, even family pictures of the painting on a wall in the house can be good evidence of what the artwork is and the fact that the claimant once owned it.

26. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

27. *Ibid.*

28. *See* 22 U.S.C. § 2370(e)(2).

One very good place to start is to register identifiable works with the Art Loss Register.²⁹ This is a service, that, for a fee, will register lost or stolen artworks in international, searchable databases of lost, stolen or seized art. Almost all auction houses, dealers or other buyers check the Art Loss Register before they take a consignment or purchase a work of art, in order to check the artwork out and make sure that its “clean.” If the works are listed and the Art Loss Register gets a “hit” on one of them, it will contact the claimant and attempt to find a resolution to the claim.

Another good option for those who know exactly what they are missing is to contact the restitution departments of major auction houses and inform them of your situation, advising them of the art collection or a particular painting that was stolen in Cuba. Many auction houses keep these lists and will check them before accepting for auction any paintings that could match the description you provided them with. Though the legal situation is such that at present it may be legal to sell an artwork that was once nationalized by the Cuban government, that does not mean that the auction houses or art dealers are not aware that this is an issue and are not interested in taking steps to address it. The fact that selling these types of artworks is ethically questionable, if not illegal, does carry a great deal of weight.

Sotheby’s in particular has received a lot of attention in this regard because of two nationalized Cuban

paintings that have created a controversy—a Mariano painting called *La Hamaca* which was owned by Manuel de la Torre, and a Sorolla painting called *Castillo de Málaga* which was owned by the Fanjul family. While each claimant took a different approach, Sotheby’s is now keenly aware of this as an issue and is interested in taking steps to amicably resolve these types of claims.

While the de La Torre family sued Sotheby’s for the return of the Mariano painting (and ultimately settled the case), the Fanjuls took a very innovative approach to their dispute with Sotheby’s.³⁰ They used Title IV of the Helms-Burton Act, which denies U.S. visas to executives of companies that are found to traffic in confiscated property that is claimed by a U.S. national, as the basis for filing a complaint against Sotheby’s with the State Department.³¹ The basis of the complaint was that Sotheby’s had a pattern and practice of “trading with the enemy” and in trafficking in confiscated and expropriated Cuban property.³² In response, Sotheby’s has committed itself to be sensitive to the issue of nationalized Cuban art and to take steps not to sell any nationalized artworks. Christie’s has also followed suit.

In sum, while regime change will eventually open the floodgates for Cuban art and cultural patrimony restitution claims, this does not mean that nothing can be done now. Each claimant’s case is factually different, and as facts change, so may the available options.

29. Art Loss Register <http://www.artloss.com/> (accessed July 18, 2009).

30. *De La Torre v. Sotheby’s*, complaint filed, N.Y. Sup. Ct., County of Nassau, Index No. 010910–03, (2003); 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, E2.

31. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, generally known as the Helms-Burton Act, Pub.L. 104–114, 110 Stat. 785, 22 U.S.C. § 6021–6091.

32. Mary Anastasia O’Grady, “Castro’s Art Theft Puts Sotheby’s on the Spot,” *The Wall Street Journal*, October 29, 2004, A15.