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Framing the Issues

Malvina Halberstam

Benjamin N. Cardozo School of Law, halbrstm@yu.edu

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FRAMING THE ISSUES

*Malvina Halberstam**

Several months ago, it struck me that there is something in the news about the holocaust almost daily—a trial in France; documents shredded in Switzerland; a cache of what is believed to be looted Nazi gold found in Brazil; hearings held by a Congressional Committee; a report issued by the State Department—raising new issues and reviving old ones. I decided to organize this symposium in order to examine some of these issues from a historical, legal, and moral perspective.

In May 1997 the United States government issued a report on *U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II* (“Eizenstat Report”).¹ It was prepared by William Z. Slany, the Historian of the State Department, with the participation of the Central Intelligence Agency, the Department of Commerce, the Department of Defense, the Department of Justice, the Department of State, the Department of the Treasury, the Federal Bureau of Investigation, the Federal Reserve Board, the National Archives and Records Administration, the National Security Agency, and the U.S. Holocaust Memorial Museum. It is over 200 pages long. In the process of compiling the report, more than 800,000 pages of documents were declassified.

In his forward to the Report, Under Secretary of Commerce for International Trade Stuart Eizenstat, who coordinated it, states:

The report documents one of the greatest thefts by a government in history: the confiscation by Nazi Germany of an estimated \$580 million of central bank gold These goods were stolen from governments and civilians . . . , including Jews murdered in extermination camps, from whom everything was

* Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. These remarks were made at the opening of the symposium on *The Holocaust, Moral and Legal Issues Unresolved Fifty Years Later*, held at the Cardozo School of Law in New York on February 8-9, 1998.

¹ WILLIAM SLANY, U.S. DEP'T OF STATE, *U.S. AND ALLIED EFFORTS TO RECOVER AND RESTORE GOLD AND OTHER ASSETS STOLEN OR HIDDEN BY GERMANY DURING WORLD WAR II: PRELIMINARY STUDY* (1997).

taken, down to the gold fillings of their teeth.

....

This is a report by historians. It is a search for facts from the past.²

Its major conclusions are:

First, the massive and systematic plundering of gold and other assets... was essential to the financing of the German war machine. The Reichsbank—the central bank of the German state—was a knowing and integral participant.... It was the Reichsbank that assisted in converting victim gold coins, jewelry and gold fillings into assets for the SS “Melner” account....

... Between January 1939 and June 30, 1945, Germany transferred gold worth around... \$3.9 billion in today's values... to the Swiss National Bank in Bern....

Second, in the unique circumstances of World War II, neutrality collided with morality; too often being neutral provided a pretext for avoiding moral considerations.³

Mr. Eizenstat notes:

Of course, we must be cautious in making simplistic moral judgements about the conduct of neutral nations in wartime. None of these nations started World War II or caused the Holocaust; that responsibility rested squarely with Nazi Germany. No country, including the United States, did as much as it might have or should have to save innocent victims of Nazi persecution—Jews, Gypsies, political opponents, and others. America itself remained a non-belligerent for over two years following the outbreak of the War in Europe. Restrictive U.S. immigration policies kept hundreds of thousands of refugees from finding safety in the United States, most tragically exemplified by our refusal to allow the St. Louis to dock with its cargo of refugees—many of whom perished when the ship was forced to return to Europe. Nevertheless, the U.S. froze German assets in April 1940 (18 months before entering the War), conducted little trade and commerce with Nazi Germany, and generously assisted Britain, the Soviet Union and the anti-Nazi cause—despite fierce domestic opposition—through programs like Lend-Lease.

Many of the neutrals had a rational fear that their own independence was only a Panzer division away from extinction.

² *Id.* at iii.

³ *Id.* at iv-v.

But if self-defense and fear were factors in that rationale for neutrality, so too were profit in all neutral countries and outright Nazi sympathy in some. The neutrals ignored repeated Allied entreaties to end their dealings with Nazi Germany. Whatever their motivation, the fact that they pursued vigorous trade with the Third Reich had the clear effect of supporting and prolonging Nazi Germany's capacity to wage war.

....

To varying degrees, each of the neutrals cooperated with Nazi Germany for their own economic benefit. Sweden was one of Nazi Germany's largest trading partners, supplying critically-needed iron ore and ball bearings, among other goods. Portugal supplied a variety of vital mineral resources for the Third Reich's war machine, including the ore for tungsten, a key additive used in the production of weapon-grade steel. Spain maintained an active trade in goods and raw materials. Turkey was Germany's source of very scarce chrome. Argentina's pro-Axis regime failed to control the transfer of German funds from Europe.⁴

The Report continues:

Third, of all the neutral nations, the one with the most complex roles in World War II, together with the deepest and most crucial economic relationship with Nazi Germany, was Switzerland. Switzerland's role was very mixed. It ended World War II as one of the wealthiest nations in Europe. It conducted trade with the Allied countries as well as with the Axis powers. . . . Switzerland persuaded the Nazis to establish the "J" stamp which prevented tens of thousands of Jews from entering Switzerland or other potential sanctuaries. Like Canada and the United States, Switzerland tightened its immigration policies, and during the War it virtually closed its borders to Jews fleeing deportation from France and Belgium. As many as about 50,000 Jewish refugees were admitted from 1933 until the end of the War, of whom some 30,000 remained and survived the War in Switzerland.⁵

Mr. Eizenstat also states: "As late as the end of 1944, Secretary of State Stettinius and his State Department colleagues concluded that, on balance, Switzerland's neutrality had been more a positive than a negative for the Allies during the War."⁶ However, he continues:

⁴ *Id.* at v-vi.

⁵ *Id.* at vi.

⁶ *Id.*

This relatively benign judgment was not shared by other agencies, from the War Department and Treasury Department to the Office of Strategic Services (OSS) and the Justice Department. These agencies noted that in addition to its critical banking role for the Nazis, Switzerland's industries engaged in direct production for the Axis and helped protect Axis investments; Swiss shipping lines also furnished Germany with a large number of boats for the transport of goods. Switzerland also allowed an unprecedented use of its railways to link Germany and Italy for the transport of coal and other goods. Switzerland provided Germany with arms, ammunition, aluminum, machinery and precision tools, as well as agricultural products. Swiss convoys carried products from Spain across France through Switzerland to Germany. Swiss banks serviced Nazi markets in Latin America. This conduct continued even as the Germans retreated and the threat of invasion evaporated. As late in the War as early 1945, Switzerland vitiated an agreement it had just reached with the United States to freeze German assets and to restrict purchases of gold from Germany.

....

Switzerland's "business as usual" attitude persisted in the postwar negotiations, and it is this period which is most inexplicable. The Swiss team were obdurate negotiators, using legalistic positions to defend their every interest, regardless of the moral issues also at stake. Initially, for instance, they opposed returning any Nazi gold to those from whom it was stolen, and they denied having received any looted gold. The Swiss contended they had purchased it in good faith, that it was part of war booty obtained in accordance with international legal principles by the Third Reich during its victorious campaigns, and that there was no International legal principle which would entitle the Allies to recover and redistribute Nazi assets. Finally, after long, contentious and difficult bargaining, agreement was reached in the form of the 1946 Allied-Swiss Washington Accord. The Accord obligated Switzerland to transfer 250 million Swiss francs (\$58.1 million) in gold to the Allies and to liquidate German assets—transferring 50 percent of the proceeds from the assets to the Allies for the reconstruction of war-torn Europe, of which a portion would be directed to assistance of stateless victims. At the same time, the Swiss made a commitment in a side letter to identify dormant accounts which were heirless and could be used for the benefit of Nazi victims.

The \$58 million in German-looted gold to be returned to the Allies was far less than the range of \$185-\$289 million in looted gold . . . at the Swiss National Bank . . . This \$58 million

in monetary gold was promptly paid to the Tripartite Gold Commission (TGC) for redistribution to the claimant countries.

But the other part of the Accord, the liquidation of hundreds of millions of dollars in German assets, was neither promptly nor ever fully implemented. . . . U.S. negotiators concluded by 1950 that the Swiss had no intention of ever implementing the 1946 Washington Accord. . . .

. . . Finally, in 1952, after a lengthy and frustrating effort, Switzerland and the Allies agreed to a total payment of only \$28 million—far less than the agreed 50 percent of the value of German assets in their country.⁷

The summary of the report by Mr. Slany states:

Germany's war effort depended significantly upon its imports of raw materials and goods from the neutral nations. Switzerland was Nazi Germany's banker and financial facilitator, taking and transferring German gold—most of it looted—and providing Germany with Swiss francs to purchase needed products. Switzerland also supplied Germany with key war materials such as arms, ammunition, aluminum, machinery and locomotives. Moreover, Germany was able to mitigate slightly the effect of Allied bombing by moving some arms production to safety beyond the Swiss frontier. Sweden was a critical trading partner of Nazi Germany. Its wartime exports of ball bearings to Germany were vitally important, and for a time Sweden supplied Germany with 40 percent of its iron ore until other European sources reduced that dependency. Spain and particularly Portugal provided Germany with invaluable supplies of wolfram (tungsten) required in the steel-hardening process. Spain also supplied iron ore, mercury, and zinc. Turkey exported very scarce chrome ore to Germany, where the valuable mineral was in short supply.⁸

“[T]his generation's challenge,” Mr. Eizenstat says in the forward:

is to complete the unfinished business of the Second World War to do justice while its surviving victims are still alive. To do justice is in part a financial task. But it is also a moral and political task that should compel each nation involved in these tragic events to come to terms with its own history and responsibility.⁹

At this symposium, we will examine some of the issues raised by the *Eizenstat Report*. The speakers include leading scholars and

⁷ *Id.* at vi-vii.

⁸ *Id.* at xxi-xxii.

⁹ *Id.* at x.

key policy makers.

The first panel is entitled "The Role of Switzerland and Other 'Neutral' States During and Immediately Following World War II." The panelists include Bennett Freeman, the Senior Advisor to the Under Secretary. He was intimately involved in the preparation of the Report from which I just quoted and is concluding work on a second report.¹⁰ The panel also includes leading scholars from Switzerland and the United States: Professor Fleiner from the University of Fribourg, Professor Vagts from Harvard Law School, Professor Schachter from Columbia Law School, and Professor Kranzler from the City University of New York. Originally, the Panel was also to include Professor Bergier, chairman of the commission appointed by Switzerland to examine the entire historical relationship between Switzerland and Nazi Germany. Unfortunately, Professor Bergier was unable to come.

For the second panel, entitled "Looted Nazi Gold," we are very pleased to have Arthur L. Smith, Jr., the author of *Hitler's Gold: The Story of the Nazi War Loot*,¹¹ Ambassador Hedin and Rabbi Sobel, members of the Swedish and Brazilian Commissions, respectively, and Dr. António Louçã, author of *Deals with the Nazis: Gold and Other Lootings, 1933-45*,¹² who is an expert on Nazi gold in Portugal.

For the third panel, entitled "Hidden Swiss Bank Accounts," we are honored to have Paul Volcker, chairman of the Independent Committee of Eminent Persons, established by Switzerland to examine the question of dormant bank accounts. We are also very pleased to have Roger Witten and Robert Swift, leading attorneys representing plaintiffs and defendants, respectively, in the pending cases involving Swiss bank accounts; Eric Wollman, from the New York City Comptroller's Office, who will speak on the role of local government; and Professor Anita Ramasastry, who has just completed an article on the subject¹³ and is continuing from here to

¹⁰ A second report was issued in June 1998. WILLIAM Z. SLANY, U.S. AND ALLIED WARTIME AND POSTWAR RELATIONS AND NEGOTIATIONS WITH ARGENTINA, PORTUGAL, SPAIN, SWEDEN, AND TURKEY ON LOOTED GOLD AND GERMAN EXTERNAL ASSETS AND U.S. CONCERNS ABOUT THE FATE OF THE WARTIME USTASHA TREASURY: SUPPLEMENT TO PRELIMINARY STUDY ON U.S. AND ALLIED EFFORTS TO RECOVER AND RESTORE GOLD AND OTHER ASSETS STOLEN OR HIDDEN BY GERMANY DURING WORLD WAR II (1998).

¹¹ ARTHUR L. SMITH, JR., *HITLER'S GOLD: THE STORY OF THE NAZI WAR LOOT* (1989).

¹² ANTÓNIO LOUÇÃ, *NEGÓCIOS COM OS NAZIS: OURO E OUTRAS PILHAGENS, 1933-1945 [DEALS WITH THE NAZIS: GOLD AND OTHER LOOTINGS, 1933-45]* (1997).

¹³ Anita Ramasastry, *Secrets and Lies? Swiss Banks and International Human Rights*,

Switzerland to work for the Volcker Commission.

The questions raised in the *Eizenstat Report* and the aforementioned panels are not the only ones that remain unresolved or are first coming to the fore. Although Germany has been making monetary restitution for a number of years, the rights of those in Eastern Europe, who until recently lived under Soviet domination, are still unresolved. These subjects and Jewish property in France and Norway will be discussed tomorrow on a Panel entitled "Confiscated Jewish Property," by Rabbi Israel Miller, president of the Conference on Material Claims Against Germany; Ambassador Naphtali Lavie, vice-chairman of the World Jewish Restitution Organization; Professor Richard Weisberg of the Benjamin N. Cardozo School of Law, author of *Vichy Law and the Holocaust in France*;¹⁴ and Professor Irwin Cotler of McGill University, a renowned advocate of human rights who has spent the past year researching in this area.

Another question very much in the news, most recently in the context of the Schiele paintings in the Museum of Modern Art exhibition, is that of "Looted Art." We are fortunate to have Hector Feliciano, author of *The Lost Museum*;¹⁵ Michael Kurtz, author of *Nazi Contraband: American Policy on the Return of European Cultural Treasures, 1945-1955*;¹⁶ Lawrence Kaye, a leading attorney in this field; and Constance Lowenthal, Director of Commission for Art Recovery, World Jewish Congress, to discuss it.

We will also focus on two subjects that do not involve tangible rights but raise profound moral and legal questions. Perhaps the most complex legal and moral question involves the responsibility of Britain after it broke the German Enigma Code. Although it has long been known that the British broke the German Code, the actual intercepts were only declassified in 1996. *The New York Times* reported:

One transcript, for instance, from the town of Slonim in Belarus, states, "In yesterday's cleansing action in Slonim by the police regiment Mitte, 1,153 Jewish looters were shot." The message on July 18, 1941—less than a month after the German invasion—was signed by General von dem Bach-Zelewsky, the German commander in Belarus, and transmitted to Heinrich

31 VAND. J. TRANSNAT'L L. 325 (1998).

¹⁴ RICHARD H. WEISBERG, *VICHY LAW AND THE HOLOCAUST IN FRANCE* (1996).

¹⁵ HECTOR FELICIANO, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART* (1997).

¹⁶ MICHAEL KURTZ, *NAZI CONTRABAND: AMERICAN POLICY ON THE RETURN OF EUROPEAN CULTURAL TREASURES, 1945-55* (1985).

Himmler, the head of the SS, and Commander Daluge of the Order Police.

....

In another message, dated Aug. 7, 1941, General von dem Bach-Zelewsky wrote, with evident self-congratulation: "The action of the SS cavalry brigade proceeds. By noon today, a further 3,600 were executed, so that the total number by Calvary Regiment Eastern is 7,819. Thereby, the number of 30,000 in my area has been exceeded."¹⁷

In the view of Richard Breitman, one of the historians who got the cables declassified, the several hundred pages of radio intercepts, together with earlier research, establish that "the British knew that Jews were being targeted for atrocities as early as September 1941—more than a year before Britain or the United States publicly acknowledged the plight of the European Jews."¹⁸ Did Britain have a legal or moral obligation to inform anyone of that?

In the *Corfu Channel* case,¹⁹ Britain sued Albania for damages because it failed to warn British warships of mines in its territorial waters. The International Court of Justice agreed that Albania, indeed, had a duty to warn. The court said:

The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war . . .²⁰

Did these elementary principles of humanity also obligate Britain to attempt to warn the millions of Jews trapped in German occupied territory that the Nazis planned to exterminate them?

Britain claims that it could not do so because that would have revealed that it had broken the Code. Indeed, even though it had advance knowledge of a bombing, Britain permitted its own citizens to be killed as well in order to avoid possibly alerting Germany that it had the information. But the fact that Britain was

¹⁷ Alan Cowell, *British Knew Early of Nazi Atrocities Against Jews*, N.Y. TIMES, Nov. 19, 1996, at A5.

¹⁸ *Id.*

¹⁹ (U.K. v. Alb.), 1949 I.C.J. 4.

²⁰ *Id.* at 22.

willing to sacrifice its own citizens as well is not dispositive of the question. It demonstrates how very complex the question is.

This question will be discussed by leading historians, theologians, philosophers, and legal scholars. We are privileged to have on this panel, Professor Daniel Goldhagen of Harvard Law School, author of *Hitler's Willing Executioners: Ordinary Germans and the Holocaust*,²¹ Rabbi Shear-Yashuv Cohen, a renowned scholar of Jewish law and philosophy, and Professors Kent Greenawalt and David Sidorsky of Columbia Law School, Professor Ruth Wedgwood of Yale Law School, and Professor Anthony D'Amato of Northwestern—world renowned scholars in jurisprudence, philosophy, and international law, respectively.

Finally, we will discuss the "Future of Auschwitz," where some three million people, Jews and non-Jews, but predominantly Jews, lost their lives. The enormity of the horror that took place there is ungraspable. When I visited Auschwitz several years ago, I found it very difficult just to keep walking. Jews believe it should remain as it is, as a memorial to those who perished. Apparently, that still has not been fully settled. First, there was an attempt to establish a convent on the premises. When, after a great deal of controversy, the convent was removed, there were proposals to build a shopping mall. Those proposals have now been rejected. The Polish government has, apparently, also agreed to remove crosses from what is known as "the field of ashes." However, a former SS barrack has been transformed into a church, and a very large cross, which dominates the whole area, has been placed on top of it.

The future of Auschwitz will be discussed by Professor Jan Van Pelt, a professor of Architecture at the University of Waterloo and co-author of *Auschwitz, 1270 to the Present*,²² who will also show slides of Auschwitz that will clarify the problem; Rabbi Avi Weiss, who has been personally involved in the struggle to keep Auschwitz as it is; Alyza Lewin, an attorney who will discuss the international law that governs; and Dr. Frank J. Macchiarola, President of Saint Francis College and former dean of the Benjamin N. Cardozo School of Law. We had also invited a representative of the Polish government, which had planned to send a person but informed me that it is not able to do so because its staff is occupied with their foreign minister's visit to the United States.

²¹ DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1996).

²² DEBORAH DWORK ET AL., *AUSCHWITZ, 1270 TO THE PRESENT* (1997).

The next two days will not be easy, emotionally or intellectually, but given the array of speakers they will, without doubt, be worthwhile and will warrant your full attention.