

Holocaust Restitution: The End Game?

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In the sixty-five years since the end of World War II, non-governmental organizations (NGOs) and a few interested national governments have achieved limited success in restituting Jewish property that was looted during the Nazi era 1933–45.¹ A brief summary of the history of Shoah restitution and the major events of the Prague Conference in June 2009 was published in a recent issue of this journal.² On that occasion, Julius Berman, chairman of the Conference on Jewish Material Claims Against Germany, diplomatically chronicled the stop-and-go nature of the pursuit of this issue—the restoration of assets plundered by Germans and Austrians and their henchmen in other countries. In the opening paragraph of his article, Berman warns “...of the danger that restitution and compensation issues may become dormant.”

When one takes into account the scope of Jewish losses, what has been restituted and compensated thus far sees like a less-than-generous downpayment.³ Following the latest international gathering held in Prague and the intensive NGO/governmental and expert meetings held in order to prepare the discussions that followed the international conference—and in preparation for the Terezin Declaration—it is clear that there is still much to be done to resolve this issue.

The quest to recover and retrieve Jewish property started immediately after the end of World War II. Jewish communities and communal organizations, spearheaded by the World Jewish Congress (WJC), acted to secure information on the scope of Jewish losses. These efforts played a crucial role in laying the groundwork for negotiations with the respective countries.⁴

Sadly, due to the situation brought about by the division of Europe by an Iron Curtain, the change in the mindset of the countries involved, and the change in the legal and constitutional perceptions of civil liberties in Central and Eastern Europe, it was impossible to pursue restitution vis-à-vis the so-called people's

democracies. Only the Federal Republic of Germany, driven by its desire to attain international legitimacy, was willing to introduce effective legal arrangements in order to retrieve plundered Jewish property and restitute it to its Jewish owners.⁵

For many years it has been clear that this issue can only be resolved with both the active involvement of the countries in which Jewish property was lost and of those countries in which the recipients or their heirs live, and especially through the intervention of the United States and the European Union. Owners or their heirs must be paid. Elementary justice dictates that the heirless property of those killed only because they were Jews belongs to the Jewish people, whose main address is the State of Israel. Picking up where Berman left off, we shall endeavor here to describe the steps to be taken to bring the issue of Shoah restitution to an equitable conclusion.

Starting in 1989, the collapse of the Soviet empire and the political void created following the decentralization of the political process in many Central and Eastern European countries (including East Germany) generated the first significant discussions and deliberations between property owners, NGOs, and a growing number of interested national governments.

In short order, the winds of political independence quickly swept through Central and Eastern Europe and the so-called “captive nations” were suddenly free to determine their own future. Many countries in the area swiftly undertook steps to reverse the Communist *Gleichschaltung* [bringing into line] and to adapt their laws to their newfound liberty and political sovereignty.⁶ This paved the way for Central and Eastern European countries to enter promising negotiations with Brussels to join the exclusive EU club and NATO.⁷

Regrettably, this process did not fully evolve with respect to the issue of the restitution of Holocaust-era assets, and though the scorecard was mixed, for the most part the results were unimpressive. The case of restitution of Jewish property from Poland⁸ (and the issue of the decades-long Polish parliamentary debate regarding the legislation process of the private restitution bill) is a good example. The need for new legislation addressing the issue of Jewish (and general) property has long been discussed with the Polish government but has borne meager results.⁹

In other countries, most notably Lithuania, members of the Israeli government and prominent members of Jewish NGOs, including the WJC and the Jerusalem-based World Jewish Restitution Organization (WJRO), have tried unsuccessfully for some twenty years to convince Vilnius to restitute Jewish communal and

private property. In November 2010, the Lithuanian parliament deliberated on the first reading of newly proposed legislation aimed at promoting the restitution of Jewish property, but the outcome of this remains to be seen. From what is known thus far, there is little cause for optimism.¹⁰ Both Poland and Lithuania are by no means the only problematic cases in Central and Eastern Europe. If for no other reason than to promote their international standing, some of the post-Communist countries felt compelled to act.¹¹ But the restitution of Jewish property, a struggle that has been going on for over twenty years, still awaits a final settlement.¹²

It was this unsatisfactory performance—the failure to achieve a comprehensive settlement—that ostensibly motivated the Czech government, with multinational and NGO support, to initiate the June 2009 international conference. European and non-European countries, together with active NGOs, discussed the current status of European restitution of Holocaust-era assets. It also provided participants the opportunity to agree on the steps to be taken to finally resolve this issue.¹³

The Terezin Declaration

The most important outcome of the Prague Conference was the Terezin Declaration. That document contains guidelines and best practices for a final resolution of the restitution issue. It laid the groundwork for the establishment of an institution to oversee the international process of implementing the complex agreements made at the conference. The European Shoah Legacy Institute (ESLI) is headquartered, with chilling symbolism, at Terezin—the site of the infamous German ghetto/concentration camp Theresienstadt. The agreement also contains a commitment to hold a follow-up conference on the matter under EU patronage in 2012.

Guidelines and Best Practices

A major point in the declaration is the non-binding mechanism adopted regarding the notion of restitution of Holocaust-era property. Based on the Washington Conference Principles on Nazi-Confiscated Art of 1998,¹⁴ this mechanism morally obliges states to hold provenance checks on suspected looted art, and calls upon individuals and institutions in the art world to conduct such checks. It is also a general declaration of morality and fair trade rules and a vital structure that will assist in regulating markets in which the looted art might be offered for sale.¹⁵

The signatory nations undertook a year of international negotiations held under the patronage of the “friends of the chair” of the Prague Conference. The goal was to agree on a set of non-binding regulations that would set forth a framework

to advance the process of restituting property for owners or allocating funds to compensate for heirless property.

In June 2010, forty-three signatory countries agreed on the “Guidelines and Best Practices for the Restitution and Compensation of Immovable (Real) Property Confiscated or Otherwise Wrongfully Seized by the Nazis, Fascists and Their Collaborators during the Holocaust-Era Between 1933–1945, Including the Period of World War II.” These are a set of non-binding guidelines that would be the basis of any international intergovernmental negotiations, a multi-governmental negotiation, or even an NGO–government negotiation.¹⁶

Several major goals are listed in the Guidelines. First, governments are requested to act swiftly to enact laws that will create new restitution rules and regulations to assist claimants in retrieving their property or to be compensated for it. This guideline promotes the resolution of legal and moral issues relating to titles and ownership of property.¹⁷

Second, with respect to heirless property, an intimidating issue for many Central and Eastern European countries, the Guidelines request that states create solutions for the restitution and compensation of heirless or unclaimed property. Furthermore, states are charged with creating special funds to promote the welfare of needy survivors and to create memorials and commemorations of the Holocaust.¹⁸

Third, the Guidelines promote the idea that resolving the issue of restitution of Holocaust-era assets and the clearing of titles of property is no longer the sole interest of any one signatory country. All signatory nations are called upon to swiftly create restitution procedures. Further, they are urged to consult with each other regarding existing mechanisms and restitution procedures. This understanding will assist the signatory states to accelerate the talks among themselves and to promote the issue. Ideally, it would induce them to include issues of Holocaust-era property in their ongoing diplomatic dialogues.

The preamble to the Guidelines and Best Practices accords special status to the State of Israel as the domicile of the greatest number of Shoah survivors.¹⁹ This status, which was already recognized by several states including the US,²⁰ incorporates a well-known legal position of many Western European countries. The goal behind this position allows the State of Israel to freely contact other nations party to the issue in regard to matters relating to survivors residing in Israel.²¹ Notwithstanding the special position given to the State of Israel as the state with the greatest number of survivors, the Guidelines also establish a valid international standing for the active NGOs in this field.

Recognizing the importance of the involvement of the main NGOs, and the important role of the WJRO in the above process, the Guidelines allow these organizations to take an active part in managing and assisting in the administration of the claims and their processing.²² Many partner states accept that governmental/NGO dialogue will assist and advance this process, as has happened in the past. Thus, the NGOs, most notably the WJRO, attained a new status that was not originally spelled out in the Terezin Declaration itself and were now officially invited to take part in the restitution process.

Clearly, there has been a monumental and most positive change among dozens of nations regarding the issue of restitution of Holocaust-era assets. The Prague Conference and the recently agreed-to Guidelines call for more dynamic activities and structures to bring restitution of Holocaust assets to a successful conclusion.

The European Shoah Legacy Institute—ESLI

In accordance with the Terezin Declaration, the Czech foreign office has created the new entity envisioned during the preliminary planning of the Prague Conference and the Terezin Declaration itself. The ESLI will coordinate and promote follow-up activities and will distribute general restitution procedures information.

The precise role the ESLI will take to promote the goals set forth by the declaring nations is as yet unclear. Nevertheless, it will enhance transparency between the nations and provide a neutral ground for states within which to exchange views and to discuss future steps to be taken separately or jointly to implement restitution.

One year into the process it is evident that the long-term success of the institute will require the support of strong interested parties, including the governments of the US, Great Britain, Germany, and Israel. Prominent signatories from Central and Eastern European countries can be counted on to assist the Czech Republic in its potentially historic role in restitution. Financial and political support will be essential.²³

Because the framework set forth by the Prague Conference is of a non-binding nature, it does not infringe upon existing legal frameworks on either the national or international levels.²⁴ Nonetheless, it does not pardon countries that elect to ignore their international obligations, such as scrupulously obeying general international law, the European Human right convention, and other internationally relevant legislation (such as the new developments under EU legislation).²⁵

The ESLI may find itself monitoring the internal European process of the integration of human rights into the European legal system. Many Central and Eastern European countries, now members of the EU, can and should adopt other compensation arrangements to enforce constitutional individual rights in keeping with their obligation within the EU. Consequently, the institute may supply relevant information regarding the status of civil rights, as well as issues of property rights within the EU.²⁶ The neutrality of the institute and its ability to increase the flow of information will assist states in learning about and understanding the current restitution situation in the various declaring nations.

2012 International Follow-Up Conference

The experience of nations involved in this issue has led the organizers of the Prague Conference to the conclusion that a relatively short time span would be needed to create the international structure. Accordingly, it was decided that a follow-up conference should take place to analyze, assess, and evaluate the outcomes of the Prague Conference of June 2009.

As of this writing, it appears near certain that a vital, functioning model to promote the restitution of Holocaust-era assets will soon be established. Such a model can be presented during the follow-up conference. An additional goal for a conference in 2012 would be to accelerate steps to be taken by Central and Eastern European countries. A learning process is underway in those countries, and also in Western European countries and international political organizations such as the European Commission and the Council of Europe.

The US State Department has a specially designated ambassador for Holocaust restitution. This idea has now been adopted by Great Britain. Parallel processes, such as creating special liaison delegates, have taken place in France and Germany. Since 2007, the State of Israel has had a special department in charge of restitution of Jewish property and rights. That department is charged with liaising with Israel's Ministry of Foreign Affairs and relevant NGOs.

The ultimate success of the Terezin Declaration will depend on the goodwill and fairness of states vis-à-vis the non-binding obligations undertaken in the Declaration and the subsequent non-binding Guidelines. The long legal battles waged by individual claimants failed to create consistent legal precedent,²⁷ nor did they promote consistent arrangements. The non-binding Guidelines promote solutions that narrow the gaps existing in Europe created by the different legal arrangements in each country.²⁸

Central and Eastern European countries have undergone a long, complex process to synchronize their constitutional and legal systems to facilitate their association agreements with the EU. This model might be considered in the case of the restitution of Holocaust-era assets and included in preparations for the 2012 follow-up conference.

The role of the NGOs will continue to be of great value. They have the ability to promote restitution of private and communal properties. They can lobby Western governments, especially those of the US, Great Britain, Germany, France, and Israel. They can support the individual claiming process and can lobby Central and Eastern European countries to strive for general settlement agreements and to promote just and fair restitution procedures.²⁹

The Terezin Declaration signed by forty-seven countries was an attempt to promote a rapid, successful close to the issue of restitution of Holocaust-era assets. Led by Ambassador Stuart Eizenstat, special envoy of the US secretary of state, a framework for non-binding guidelines was set, and a respected arena for the exchange of thoughts and ideas was created in the form of the ESLI.

The signatory states recognize that the attempts made over the past sixty-five years to create a general agreed-upon framework have failed. They finally understand and accept the fact that nations must finally fulfill their obligation to reach a just solution to the problem of the restitution of Holocaust-era assets.

The Guidelines and Best Practices demonstrate the primacy of nation-state leadership, with NGOs playing important roles. Conceivably, the follow-up conference in 2012 might prove to be the beginning of the “end game,” moving all participants to completion and to a full and satisfactory resolution to the issue of restitution of Holocaust-era assets.

Notes

¹ Jewish property in Europe was estimated at \$10–15 billion in 1938 prices, and only 18–20 percent was restituted. See J. Sidney Zabudoff, “Restitution of Holocaust-Era Assets: Promises and Reality,” *Jewish Political Studies Review* XIX (2007) 1-2. Another estimate is provided by Helen B. Junz in her *Where Did All the Money Go?* (Amsterdam, 2002).

² Julius Berman, “The Holocaust-Era Assets Conference in Prague and Its Outcome,”

Israel Journal of Foreign Affairs, IV (2010) 2.

³ Ibid.

⁴ See Ernst Féaux de la Croix, *Die Weidergutmachung Nationalsozialistischen Unrecht durch die Bundesrepublik Deutschland* (Munich, 1985), p. 147.

⁵ See Detlev Kaulbach, *Das Bundesentschädigungsgesetz* (Munich, 1983), p. 127. For a recent examination of the background to German policy, see Stefan Engert, "A Case Study in 'Atonement': Adenauer's Holocaust Apology," *Israel Journal of Foreign Affairs*, IV (2010) 3.

⁶ Anneli Albi, *EU Enlargement and Constitutions of Central and Eastern Europe* (Cambridge, 2005), p. 61.

⁷ See the political analysis regarding Croatia at www.politicsince.eu/documents/file/2008_06.pdf#page=24.

⁸ Elazar Barkan, *The Guilt of the Nations* (Baltimore, 2001), p. 147.

⁹ Ibid.

¹⁰ See English version of the legislation proposal at: www.holocaustinthebaltics.com/wp-content/uploads/2010/11/RestitutionLawFirstReadingPassedBySeimas4Nov2010.pdf.

¹¹ See www.holocausteraassets.eu.

¹² See Herbert Block, "The Restitution of Holocaust Era Jewish Communal Property: An Unfinished Item on the Jewish Diplomatic Agenda," *Israel Journal of Foreign Affairs* III:1 (2009).

¹⁵ See note 11. This information is to be found in the "expert conclusions" appearing on that site.

¹⁴ For detailed coverage of the conference, see www.state.gov/www/regions/eur/holocaust/heac.html.

¹⁵ Daniel Range, "De-accessioning and Its costs in the Holocaust Art context: the United States and Great Britain," *Texas International Law Journal* XXXIX (Summer 2004), 655.

¹⁶ See article "K" of these guidelines in regard to possible future intergovernmental cooperation, and article "L," relevant both for states and NGOs.

¹⁷ Compare with footnote 15, and the regime created in respect to looted art.

¹⁸ See article "J" of the Guidelines.

¹⁹ See Preamble to the Guidelines, sub-article 6.

²⁰ 251 US App. D.C. 310, John Demjanjuk V. Edwin Meese, Attorney General USA, No. 86-5097, US Court of Appeals, District of Columbia Circuit, given on 27/2/1986.

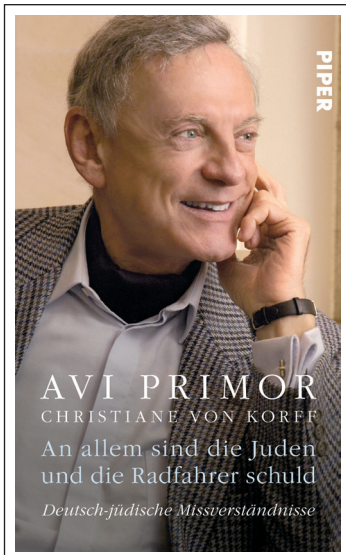
²¹ With regard to the right of states to approach other states regarding matters of survivors or nationals residing in the contacting state, please see article "K" within the Guidelines.

²² See Article "L" of the Guidelines.

²⁵ Many claim that had such an institution existed earlier; it might have contributed to the promotion of a fair and just restitution mechanism and the situation today would be very different.

²⁴ See Preamble.

- ²⁵ For a general overview of the current legal relevant structure under international law, see Rhodri C. Williams, “The contemporary right to property restitution in the context of transitional justice,” Occasional Paper series of the International Center for Transitional Justice, 2007.
- ²⁶ For more information on the ongoing process within the EU regarding constitutional, civil, and human rights, see www.europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/198&format=HTML&aged=0&language=DE&guiLanguage=en.
- ²⁷ *Ibid*, p. 13.
- ²⁸ See, for example, the complexity of the arrangement made in Austria, as they appear in Verena Pawlowsky and Harald Wendelin (eds.), *Die Republik und das NS Raub, Raub und Rueckgabe Österreich von 1938 bis heute* (Vienna, 2004).
- ²⁹ See, for example, the case of Romania and the legal obligation as a result of a decision of the European Court for Human Rights, as presented in a state report at: www.juristras.eliamep.gr/wp-content/uploads/2009/12/the-role-of-echr-in-the-consolidation-of-the-romanian-judiciary-policy.pdf.



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