

**Malaga, Spain**  
**May 8-9, 2009**

**Restitution of Holocaust-Era Looted Art**  
**The Washington Conference (1998)**

**An Overview**

**By**

**Charles A. Goldstein, Esq.**

**Counsel, Herrick Feinstein (New York) and**  
**Commission for Art Recovery (New York and Budapest)**

1. **MAJOR ACHIEVEMENT:** After 50 years in which little attention was given to the issue and Holocaust loot was frequently sold, bought, collected and displayed, the "art world" in most of Europe and the United States has become acutely aware of the moral and legal aspects of the problem, and many governments and their museums acknowledge the right of Holocaust victims and their heirs to reclaim this type of war loot.

A. **Western Nations:** Following the Washington Conference on Holocaust-Era Assets (1998), a Resolution of the Parliamentary Assembly of the Council of Europe (1999), ethical guidelines issued by the Association of Art Museum Directors (1998), Guidelines issued by the Art Dealers Association of America (1998), principles by International Council of Museums (1999), and guidelines issued by the American Association of Museums (2001), there has been a general recognition of the problem (with notable exceptions). The major international auction houses and many legitimate dealers in the principal art markets refuse to facilitate sale of Holocaust loot. Databases have been created and techniques and provenance research have been developed. As a result, there have been several dozen well-publicized instances of successful resolution of restitution claims and some governmental intervention favorable to restitution claims. The effect has been to encourage the development of emerging principles of

international law recognizing that theft of cultural objects in the course of "ethnic cleansing" and genocide is a crime against humanity.

B. **Central and Eastern Europe**: Except for Germany, these countries have evidenced substantially less concern with the issue. There is a general willingness to retain looted art in state collections and even outright governmental obstruction of restitution claims despite commitments made to the Washington Principles and supported by public indifference or outright hostility to the "rights" of Holocaust victims. Local art dealers, despite trade association guidelines, are often antagonistic to both the concept of, and claims for, restitution of looted art.

2. **THE WASHINGTON PRINCIPLES** were adopted by 44 nations at a conference convened in 1998 by the U.S. Department of State: The Principles have considerable vitality in some jurisdictions and little or none in others.

A. General Acceptance of Principles and Support by Governments or the Public of Claims as a Matter of Policy with the Pursuit by Claimants of Judicial or Administrative Remedies.

U.S.A., U.K., Netherlands, France and Germany

B. Qualified Acceptance and Support by Governments Through Special Law or Policy.

Austria, Switzerland, Czech Republic and Belgium

C. Hostility to / Disregard of Washington Principles and/or Use of Local Laws To Obstruct.

Spain, Italy, Poland, Hungary, Sweden, Russia and Slovakia

D. No Action.

Ukraine, Belorussia, Serbia, Greece, Bulgaria, Croatia

3. **EXPERIENCE**: Some representative examples:

A. **U.S.A.** - Expressions of support by museum and museum director associations, art dealer associations and some federal and state officials; reluctant policy of return by some major museums and institutions; no special national or state restitution laws; some state and federal courts afford sympathetic application of general laws for the recovery of stolen property but recognize defenses based on delay and prejudice or statutes of limitation; widespread media interest in disputes; resistance by private collectors to peer pressure; limited governmental intervention; availability of contingent fee arrangements for legal representation; application of German law to “forced sale” cases.

B. **Germany** - Increasing transparency and assistance by government at federal and some state levels; governmental disregard of laws limiting periods in which claims may be made against government museums; statutes of limitation (U.K. case - City of Gotha); willingness to reconstitute art despite earlier compensation awards; resistance by some museums (often in geographical area of former GDR); increased emphasis on research; difficult access to some museum archives; issue of recovery in courts (Hans Sachs case).

C. **France** - Disclosure of state holdings of looted art (MNR); government mediation of restitution claims (CIVS) which may result in compensation; occasional application of criminal law concepts; does not appear to recognize “forced sales” made in the Paris art market during 1930’s and during World War II.

D. **U.K.** - Laws restricting de-accession by public institutions and pending legislation; spoliation advisory committee; potential liability for the expense of litigation (and the prevailing party’s legal fees) as a deterrent to claims; complaints by art trade and art museum

community (confusion with antiquity claims); anti-seizure law applicable to temporary exhibitions from abroad.

E. **Spain** - Adamantly refuses to discuss restitution of Holocaust loot in government owned or controlled museums; complete failure to honor commitment made to Washington Principles in 1998; actively defending litigation in U.S. involving the Thyssen Bornemisza Museum [Cassirer case - pending appeal on issues of jurisdiction].

F. **Italy** - Country makes a broad-ranged effort to retrieve antiquities looted in the 20thC but refuses to consider a restitution law or the return of Holocaust loot or to allow export of artworks confiscated in Italy during the Fascist era even from Holocaust victims who were forced to leave the country [Gentili case]; purports to be a “victim”, like Austria.

G. **Netherlands** - Modern effort to redress refusal to allow claims made after World War II; effective; recognizes “forced sale” concept first applied by Allied Military Law 59 in Occupied Germany.

#### 4. **GENERAL PROBLEMS AND ISSUES:**

A. Biased application of EU and local laws restricting export of “national heritage” (e.g., Poland, Hungary, Czech Republic, Slovakia, Italy).

B. Governmental intervention and remedial statutes apply only to a few government-owned institutions and museums (e.g., Switzerland, Germany and Austria) --- and not to "private" museums (even those like TB, in Spain, which are created, owned, controlled and supported by the government).

C. General absence of specific claims procedure, and in Eastern Europe, unavailability of an independent and non-communist mentality in the courts.

- D. Deliberate delay, obstruction and inconsistent determinations (Poland, Russia, Sweden, Czech Republic and Hungary).
- E. Impossible burdens of proof and bureaucracy (Russia).
- F. Openly apparent political considerations (Russia, Poland, Hungary).
- G. Closed, or limited access to, archives (Italy, Hungary, Russia, Czech Republic).
- H. Outright refusal to consider claims (Spain and Italy).
- I. Hostility of museum curators who consider it their “duty” to collect, retain or exhibit stolen property.

5. **INDIVIDUAL CLAIMS AGAINST MUSEUMS ARE OFTEN**

**IMPRACTICABLE:**

- A. The process is expensive (lawyers, provenance research and investigators).
  - a. Difficult effort (unavailable or destroyed archives; unknown facts).
  - b. Family disputes (e.g., disagreements among heirs).
  - c. Uncertain law (conflict of law issues, statutes of limitations, issues of jurisdiction and delays in bringing claims) and procedures that limit access to courts (e.g., bonds for costs ), protection given to bona fide purchasers (rather than Holocaust victims).
  - d. Transfer of title by operation of law - the doctrine of prescription (often regardless of theft or bad faith).
  - e. Little assistance available from Jewish, governmental or non-profit organizations.

6. **THE FUTURE:**

- A. Political deliberations.
  - a. June 2009 Prague Conference.
  - b. European Union initiative.
- B. Alternative dispute resolution methods – mediation; arbitration; tribunal.
- C. Passage of time reduces likelihood of successful claims.
  - a. Death of victims and immediate heirs.
  - b. Application of local laws (e.g., prescription) and restricted jurisdiction of Court of Human Rights.

7. **DETAILS:**

- A. **Washington Principles (1998)**
  - a. Identify Nazi loot.
  - b. Open archives.
  - c. Publicize existence of Nazi loot.
  - d. Establish a central registry of displaced property.
  - e. Encourage claims by original owners and heirs.
  - f. Just and fair resolution of claims and potential claims.
  - g. Balanced membership of claims commissions.
  - h. Alternative dispute resolution mechanisms.
- B. **Vilnius International Forum (2000)** Convened by the Prime Minister of the Republic of Lithuania and the Secretary General of the Council of Europe:
  - a. Reaffirmation of Washington Principles.
  - b. Create databases for research of Nazi loot.

- c. Open archives to research.
- d. Issue of “heirless” cultural property.

C. **Frequent Conferences in 2008-2009**

- a. Israel Museum (Jerusalem)
- b. Jewish Museum (Paris)
- c. Dresden State Art Museum
- d. Potsdam Forum
- e. Berlin Symposium
- f. Foundation For Prussian Cultural Heritage Program
- g. Amsterdam Conference
- h. Jewish Museum (Berlin)
- i. IAL (London)
- j. Harvard Law School Symposium (Cambridge, Mass.)
- k. Council of Jewish Museums Meeting (New York)
- l. Provenance Symposium (Moscow)
- m. Zurich Symposium

8. **GOVERNMENTAL RESPONSE:**

A. **Hungary**

- a. Failure to honor treaty, Washington Principles and other commitments (1947 Peace Treaty; Washington Conference Statement; European Council Resolution 1205).
- b. Outright hostility to claims.
- c. No special law or procedure for restitution.

- d. No effective judicial recourse.
  - (i) formerly Communist judges.
  - (ii) lawless - Nierenberg case (Supreme and Appellate Courts; Hungary - U.S. Claims Settlement Agreement ); title by prescription despite bad faith of government.
  - (iii) Politically sensitive - Foreign Minister and Hungarian Ambassador's letters to Senator Hillary Clinton based on assertions of "ownership" without regard to the Washington Principles.
- e. Intimidation of claimants (costs, delay, technical defenses, adverse publicity).
- f. Double standard for claims by or against country.
- g. Deliberate obfuscation and misrepresentation of Government policy.

B. **Poland:**

- a. Refusal to restitute Holocaust loot despite return of artworks to Polish claimants.
- b. Failure to distinguish between confiscation of cultural works as a crime against humanity and Communist-era nationalization.
- c. Deliberate disregard of obligations undertaken when U.S. returned art after World War II - retention of mistaken shipment by the U.S. Army (Nierenberg) despite written agreement to correct mistakes and return artworks obtained by mistake.
- d. Double standard for claims by or against the country.
- e. Obfuscation and misrepresentation of Government policy.

C. **Germany:**

- a. Strong affirmative attitude towards restitution at federal level; Länder agreement; Federal Advisory Commission.
- b. Overall compliance with Washington Principles at federal level and in State of Brandenburg (Berlin) with resistance by museums in a few eastern states; recent judicial intervention.
- c. Limited research at museums; no effort to reconstitute art in private museums or collections (suspicion: much loot remains in private hands).
- d. Public controversy - return of Kirchner painting (Berlin Street Scene); renewed Government commitment to research.
- e. Government grants for research; Federal Government database of lost art.

D. **Russia:**

- a. Ambiguous 1998/2000 law effectively nationalizes cultural works but allows claims by countries on behalf of (1) victims of racial and religious persecution by Nazis, and (2) charitable and religious organizations.
- b. No administrative procedures; no effective judicial remedy; Ministry of Culture refuses to negotiate or settle claims; any restitution of significant art would require legislation by Duma.

- c. Outspoken opposition by prominent museum officials (e.g., BBC 4 radio program) and politicians; nationalist attitude of both Left and Right.
- d. Expiration of 5 years for title by prescription (statement by Minister of Culture – “there will be no restitution”).
- e. Symbolic diplomatic restitution (Germany --- stained glass windows returned to Frankfurt church; Hungary – 146 Rare Books to Sarospatak Library; 608 Dutch books to University of Amsterdam) but not to Holocaust victims.
- f. Insistence on anti-seizure statutes elsewhere as a predicate to museum loans.
  - (i) Adds insult to injury - there is no intention to lend Holocaust Loot.
- g. Challenges in U.S. Courts (Chabad case); injunction.

E. **Netherlands**

- a. Press exposé forced government to revisit issue after one-half century of refusal; original claims procedure biased against claimants; independent commission to advise government.
- b. Applies “forced-sale” concept of Allied Military Law 59 liberally to void transfers by Jews after 1933 (in Germany) and 1941 (in Netherlands).
- c. Has recently returned many valuable paintings.
- d. Intelligent, honest, effective and independent effort.

- F. **France:**
  - a. Matteoli Commission Research and Report.
  - b. Draï (CIVS) Commission.
  - c. Apparent Conflict MNR and CIVS Practices.
  - d. Judicial Recourse?
  - e. “Looking for Owners” - France required Israel to adopt an anti-seizure law to hold an exhibit of admittedly looted artworks.
  
- G. **Switzerland:**
  - a. Bergier Commission - restitution law inapplicable to Canton and private museums.
  - b. Country believed to be the location of a large number of looted paintings (Swiss art galleries often have sold Holocaust loot).
  
- H. **Austria:**
  - a. Law - applies to national collections and Vienna.
  - b. Mauerbach auction.
  - c. Klimt Experience - initial Austrian decision clearly contrary to law; 4 years of litigation in U.S.; Austrian arbitration.
  
- I. **Spain:**
  - a. Outright refusal to discuss restitution or entertain claims.
  - b. Challenge in U.S. Federal Court (Cassirer case).
  
- J. **Czech Republic:**
  - a. Some returns pursuant to statute.
  - b. Recent returns - export permits refused for “Cultural Treasures”

c. “Right of prior purchase” reserved to government.

K. **Italy:**

a. Closed archives.

b. Refusal to permit claim from abroad.

(i) Heirs of Federico Gentili di Giuseppe for Madonna col Bambino (Zenale) and Christo Portacroce (Romanino) in Pinacoteca di Brera.

(ii) Letter to Berlusconi, June 12, 2002 and bureaucratic responses (no response) (cf. di Giuseppe decision of appeal Paris Court of Appeal, June 2, 1999).

(iii) Commission for Looted Art in Europe approach to Prodi government --- commitment to principle of restitution (Council of the State, Culture Minister and Justice Minister) and agreement to propose restitution legislation.

(iv) Berlusconi government - no progress.

(v) Beyeler v. Italy - Italy had a duty to act in good time, in an appropriate manner and with utmost consistency regarding application for transfer of painting of artistic interest; awarded damages.

9. **PUBLIC OPINION:**

A. **Hungary:**

a. Widespread press coverage of some claims by expatriates

b. Government manipulation of press (e.g., false assertion regarding Hungary - U.S. Settlement of Claims Agreement).

- c. Popular acceptance of government efforts to avoid claims (e.g., “taking” by prescription despite bad faith), particularly those made by foreigners (i.e., Jews).
- d. No affirmative interest in restitution

B. **Poland:**

- a. Public (media) fails to distinguish genocide looting and Communist government nationalization, immovable property and cultural property.
- b. Anti-semitism; xenophobia - public not interested in claims by foreigners.
- c. Cf. general acceptance of concept of restitution of property to religious communities.

C. **Germany:**

- a. General acceptance of policies of restitution following years of experience with claims legislation.
- b. Recent controversy in Berlin - Kirchner “Street Scene”; noisy efforts by art trade interests and Berlin CDU.

D. **Russia:**

- a. Widespread and perhaps universal opposition to return of trophy art taken by Soviet Army as “compensation” for World War II cultural losses (most of which occurred outside of modern day Russia).
- b. Failure to distinguish between Holocaust victims’ property and property owned by World War II enemies despite amendment to 1998 Law required by Constitutional Court.

10. **NEXT PHASE OF RESTITUTION ACTIVITY:**

1. U.S. litigation.
2. Prague “Protocol”.
3. E.U. Legislation/Directive; Council of Europe - Court of Human Rights.

**ANNEX**

The U.S. Foreign Sovereign Immunity Act and Its Application to Nazi-Expropriated Works of Art, *Claude Cassirer vs. Kingdom of Spain*, Kevin Chamberlain.