

## THE HOLOCAUST AND MUSEUM ETHICS

by

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During November and December of 1998, forty-four nations met at the Washington Conference on Holocaust-Era Assets to consider the problem posed by property that had been looted by the Nazis but never returned to its rightful owner. At the Conference, and in the years that immediately followed, promises were made by governments and museums to undertake the difficult work of identifying Nazi-looted property and to resolve outstanding claims to property that had not been restituted during the post-War period. In this country, guidelines for dealing with the issue of Nazi-looted art were established by the American Association of Museums and the American Association of Museum Directors. A decade has passed since the Washington Conference, but we find ourselves at this conference today to discuss once more what needs to be done about this problem. This is a good time to reassess the position of the museum community as a whole.

There are some who would say that, given the scope of the problem, ten years is not a great deal of time to have been spent working to resolve it. But I think that position cannot stand when placed in the proper perspective. Since the Washington Conference, the renewed efforts to identify and retribute property, which are far from complete, have been underway for more than twice as long as the U.S. spent fighting the War itself. More importantly, as time passes, it takes from us many of the remaining survivors along with the opportunity to show them that, although they can never be compensated for all that they suffered, there is a strong commitment to see that they receive a measure of justice. Thus, it is imperative that the museum community do as much as it possibly can as quickly as it is able.

Over the course of the day, others will examine specific issues in more detail. I will provide a more general overview, discussing where we have come from and where we stand now and covering certain developments in museum guidelines and in the legal arena.

When the issue of Nazi-looted art came back into the public eye in the late 1990's, the initial response from the museum community was positive. In June 1998, the American Association of Museum Directors published the first set of guidelines for museums on the appropriate institutional approach to Nazi-looted artworks that had not been restituted. The guidelines urged museums to undertake provenance research to determine whether items in their collections had been looted by the Nazis. An addendum issued in 2001 stated that priority should be given to "European paintings and Judaica".

The AAMD's 1998 guidelines, in turn, became the foundation for the Washington Conference Principles on Nazi-Confiscated Art, which were issued in December 1998 and are now the international standard. I would like to focus on three of those principles:

3. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.

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7. Pre-War owners and their heirs should be encouraged to come forward and to make known their claims to art that was confiscated by the Nazis and not subsequently restituted.
8. If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.

As we shall see, the practical implementation of those principles in the United States has been problematic.

In 1999, following the Washington Conference and working in coordination with the AAMD and the Presidential Commission on Holocaust Assets, the American Association of Museums established its own set of guidelines (amended in 2001). With respect to research, those guidelines state that “museums should make serious efforts to allocate time and funding to conduct research” on objects that might have been the subject of unlawful transfer during the period from 1933 to 1945. They further state that “museums should seek methods other than litigation . . . to resolve claims” and that “in order to achieve an equitable and appropriate resolution of the claims, museums may elect to waive certain available defenses.” We shall shortly return to these last two points when we examine the current legal landscape in the United States.

As part of the effort to facilitate the dissemination of information that would lead to the identification of Nazi-looted artworks, the three organizations worked together to construct the Nazi-Era Provenance Internet Portal to serve as a central clearinghouse for information on objects in U.S. collections without complete provenance information that likely changed hands in Europe between 1933 and 1945. In theory, publishing information on the portal, financed in substantial amount by Ronald S. Lauder and the Commission for Art Recovery, would make it easier for individuals seeking objects stolen from them or their families to locate such artworks in the collections of museums. The portal went on line in 2003.

These were the guidelines established by the museum community. They may not be ideal, but they were indications of positive movement. The difficulty is that in practice, the guidelines have not been implemented in a straightforward manner and the results have not been what many hoped for. In testimony before a subcommittee in the U.S. House of Representatives in July 2006, Ambassador Stuart Eizenstat, whose work was so instrumental in the successes with other types of restitution during the 1990’s said, “At a time when almost all other Holocaust-related restitution and compensation matters have been completed, or are nearing completion, Holocaust-era art recovery remains a major unresolved challenge.” The examples of this problem in the U.S. are tangible. Although laudable, the Nazi-Era Provenance Portal was not opened until 2003, several years after the initiative was begun and approximately half a decade after the creation of such a database had first been urged by the AAMD’s guidelines and the Washington Conference Principles. Compliance with the AAM guidelines, despite the commitment of that organization to them also has not lived up to expectations. The AAM does not police compliance with the guidelines, so there is no one to see that the guidelines are properly implemented. In 2006 the Claims Conference (in cooperation with the World Jewish Restitution Organization) sent a survey to over 300 museums in the United States likely to have artworks that would fit into the AAM’s criteria. I am sure that Wesley Fisher will discuss this in

his presentation, so I will note here only that a large number of museums did not respond at all and many of those that did indicated that there was little or no provenance research being undertaken at their institutions. This is reflected in the numbers: based on the information it did receive, the Claims Conference was able to estimate that there are over 140,000 items in U.S. museums that fit the AAM criteria. A recent check of the Nazi-Era Provenance Portal, however, showed that only approximately 27,500 works had been listed and, thus far, U.S. museums had resolved just over twenty cases through restitution or some other form of settlement. To put it differently, only 19% of the works likely to fit within the AAM guidelines have been published on the Portal, and the cases where there has been restitution or other settlement represent far less than 1% of the objects that have been published.

But these results involve ethical guidelines, not laws, and it is important also to understand how legal claims are being treated in the U.S. courts and how the ethical guidelines have functioned in the cases that have been litigated. In this regard, it is critical to examine the evolving approach taken by U.S. museums in response to claims. Although the AAMD explicitly recommends that museums “consider . . . mediation” whenever possible, some museums in the United States have begun taking the opposite approach and have initiated their own actions in court merely in anticipation of a lawsuit. Just in the last three years, at least five different institutions have filed declaratory judgment actions asking the court to name them the rightful owners of artworks that have been the subject of claims or potential claims. This is an astonishing change. These museums have done more than merely defend themselves against claims. They have assumed the posture of aggressors, choosing to initiate, rather than respond to, legal actions. Moreover, the message to claimants is quite clear and in direct contradiction to the Washington Conference Principles. This approach effectively discourages claimants from coming forward by indicating that they must be prepared to be dragged into court as defendants - possibly without warning -- and forced to undertake expensive litigation that they might otherwise have sought to avoid.

A trial involving two of these cases was scheduled to begin in Federal Court here in New York this week, but a confidential settlement was reached at the last moment. The other three are instructive because of how they were argued and decided. As noted above, the AAM guidelines regarding claims of ownership state that “in order to achieve an equitable and appropriate resolution of claims, museums may elect to waive *certain available defenses.*” [Emphasis added.] Although those defenses are not enumerated within the guidelines, statutes of limitations are clearly the most significant of such defenses. It has been argued, by Ambassador Eizenstat, that “American museums who litigate cases [should be encouraged] to do so on the merits rather than on technical defenses like the statute of limitations.” This position is not merely academic, but is, rather, based on sound principles. First, statutes of limitations are broadly applicable and are not typically tailored to the specific difficulties and historical prejudices that may be faced by claimants seeking Nazi-looted art. Second, as Ambassador Eizenstat eloquently stated at the Washington Conference, “we [should] recognize that as a moral matter, we should not apply rules designed for commercial transactions of societies that operate under the rule of law, to people whose property and very lives were taken by one of the most profoundly illegal regimes the world has ever known.” Finally, waiving the defense of statutes of limitations is a common feature of extra-judicial resolutions of claims to Nazi loot. The Dutch and German governments have explicitly waived the defense in their restitution programs, which has resulted in the return of literally hundreds of artworks to their pre-War owners or their heirs. Great Britain and France have, in effect, done the same.

In contrast to the guidelines and recommendations that have been laid out for them and the examples set by others, American museums have shown themselves all too willing to assert limitations periods and other technical defenses. Indeed, in the three cases cited above all of the decisions were based on assertions by the museums that the time to bring a claim had expired. None was adjudicated on the merits.

One of these, which happens to be a case where the claimant is represented by my firm, is both particularly instructive and quite troubling when viewed against this background. In *Von Saher v. Norton Simon Museum of Art*, all parties agree that the two paintings at issue -- iconic, near life-size representations of Adam and Eve by Lucas Cranach the Elder -- were taken from the gallery of Jacques Goudstikker, a noted Dutch Jewish art dealer, by Hermann Goering. The Museum has asserted a number of defenses, but the most critical one for the case is that the limitations period for bringing the claim has expired. As we have seen, this is exactly the kind of approach that has been counseled against in matters like these, but in this case the use of the defense has taken on an even greater significance.

In 2002, the state of California, recognizing the difficulties faced by Holocaust victims and their families, passed a law extending the statute of limitations applicable to claims for Nazi-looted art in museums and galleries until 2010. To put it differently, the state of California enacted legislation specifically designed to remove the statute of limitations as a defense in these cases. Nevertheless, instead of proceeding to litigate the case on the merits, the Museum not only asserted a statute of limitations defense but also argued that that the law itself was unconstitutional and should be struck down. The district court agreed and granted the Museum's motion to dismiss. The case has been appealed to the Ninth Circuit, and a decision is pending.

In defending itself by arguing that the California law extending the statute of limitations is unconstitutional, the Museum -- which was, notably, created by and bears the name of a man from a Jewish family -- is not merely defending this single case on grounds that the limitations period has expired (although that argument, too, was made). Instead, it is effectively taking the position that every individual who might make a claim to Holocaust-era art during the extended period provided by the statute should be denied the opportunity that the legislature intended for them to have. It is, in other words, an argument not just against a single claim but against all other potential claimants as well. In this regard, it differs markedly from the other recent cases in which the statute of limitations has been asserted as a defense and is a broad affront to the position that these cases should be adjudicated on the merits.

These lawsuits are all, in their own way, typical of the kinds of suits involving museums and Holocaust claims that have been brought in U.S. courts in recent years.<sup>1</sup> It may be that the attitude taken by the museums, and perhaps even the courts, is the product of what has been termed "art restitution fatigue". The problem seems to be most acute in Europe, where museums have lost some important pieces because they were restituted. The return of the Klimts to the Altmann family is an example of a restitution that was a particularly painful moment for the country returning the artworks; the return of Kirchner's *Street Scene* in Germany shortly thereafter is another. The basic notion is that people are tired of watching significant artworks leave museum collections and particularly tired of watching as these things are sold after they are returned to the heirs.

But this attitude should be seen in its proper historical context. Around the time of the restitution of 200 paintings to the heirs of Jacques Goudstikker by the Dutch Government, a

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<sup>1</sup> Note: *Altmann v. Austria* is deliberately omitted because it did not involve a U.S. museum and was decided by arbitration in Austria.

letter to the editor from a Holocaust survivor appeared in one of the Dutch newspapers. Many had taken positions both for and against the restitution, but hers was particularly eloquent and poignant. She told of returning from a concentration camp to her home in the Netherlands only to find that many of her family's belongings had been appropriated by their neighbors during the war years. She recalled that, when her family requested their property back, the neighbors refused to return it, saying that since so many years had passed it was really theirs to keep. That treatment was clearly wrong, but in her mind, it also exactly paralleled the logic of those who would now deny the return of artworks to people with legitimate claims.

In this environment, where many museums are not undertaking the provenance research that is required and some museums are resorting to aggressive litigation strategies and using technical defenses against claimants, what is the role of Jewish museums? This is an important question that will be addressed in different ways by the panelists today, but I would like to make some preliminary proposals:

- 1) Jewish museums must above all be role models for the rest of the museum community in identifying potentially problematic property in their collections and in responding to claims that may be made. In the context of the Holocaust, Jewish museums must bear a heavier burden in setting an example for other institutions. If Jewish institutions ignore the moral issue then other museums can be expected to do so as well.
- 2) It is the moral responsibility of all Jewish museums to work with all possible speed and diligence to examine their collections and make information about objects with unanswered questions in their provenance available to the public, thereby affording potential claimants a better chance of finding Nazi-looted property. Time is not on the side of the surviving victims, and their needs and their potential claims deserve swift action. Equally importantly, Jewish museums must show that their institutional brethren that there is no excuse for delay. A typical complaint about provenance research is that it is both time consuming and expensive. This may often be the case, but it cannot be an excuse. Sadly, what the Claims Conference survey has shown us is that many institutions have made provenance research a low priority. That must change: priorities must be reevaluated and funds must be reallocated. It may be difficult for many institutions, but it must be done. An important step was taken in 2007 when the CAJM adopted a resolution supporting the efforts of the AAM and others, but this was only a step.
- 3) Jewish museums must be conspicuous in taking a different approach to dealing with claims if and when they are made. The aggressive, litigious approach on the part of museums that has been seen in the U.S. in the last few years must be rejected.
- 4) Jewish museums must reach out to the broader museum community and continue to make the case for restitution. "Art restitution fatigue," inasmuch as it exists, like "Holocaust fatigue", can be countered and perhaps defeated by thoughtful responses by museums and by forceful reassurances that they intend to comply by the AAM's guidelines as they were originally established. And let us not forget the special moral force that Jewish museums may have in urging other institutions to act.