

**Washington Principles on Nazi-confiscated Art:
Ten Years and Promises of the Washington
Principles**

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I am pleased to be invited to this Holocaust Era Assets Conference and to comment briefly on the progress made in implementing the 1998 Washington Principles on Nazi-confiscated Art and to suggest new instruments to resolve issues of ownership and strengthen efforts to bring justice to the victims of the horrors of the Holocaust.

During the twentieth century, millions of human beings perished as a result of genocide, crimes against humanity, war crimes and other serious crimes under international law. The most horrific crime was the Holocaust perpetrated against the Jewish people, whose assets were seized in the process of the National Socialists' Final Solution.

It is indeed our responsibility, both legal and moral, to right wrongs and to fight for restitution of the plunder of Holocaust-era assets. The international community has long debated the principle that, in accordance with their domestic law and with international obligations, states should provide victims of violations of international human rights and law with restitution, compensation, rehabilitation, and guarantees of non-repetition.

The organizers of this Holocaust Era Assets Conference in Prague have recognized that art and cultural property of Holocaust confiscated by the Nazis and their collaborators through various means including theft, coercion, abandonment and forced sales and sales under duress must be addressed. Resolution of ownership issues, recognition of the suffering of victims and restitution includes the restoration of liberty, legal rights, social status, family life and the return of property remains unfinished. Remembrance, restitution and justice are the essence of the Washington Principles. Now is it for us to continue the quest to achieve them.

The Washington Principles

The international community gathered in Washington in 1998, and when it came to Nazi looted art, adopted the “Washington Principles on Nazi-confiscated Art”. Ten years ago participating nations pledged themselves to an organized international effort, voluntary in nature, but backed by strong moral commitment to research art provenance, to uncover stolen art, publicize its existence and encourage a just and fair solution to conflicting claims of ownership. Public international protection of cultural assets remains an important civilizing achievement.

The Washington Conference Principles on Art address the sale, purchase, possession, and exchange of Nazi-confiscated art. In his verdict on the Principles, the then-Director of the Metropolitan Museum of Art, described one of the key results of the Washington Conference on Holocaust-era Assets when he said: "The art world will never be the same."

Washington Principles on Nazi-confiscated Art

So, what are these Washington Conference Art Principles that have galvanized the art world? The history is illustrative. Working with the American Association of Museum Directors guidelines for dealing with questionable art provenance, the Washington

Principles were born. We engaged several key European museum directors. In effect, we showed them what their American counterparts were doing, challenged them to do likewise, and gave them an early draft of the Washington Principles.

Throughout this process, we were mindful of the serious issues American Museum Directors faced in expanding their guidelines along the lines we were proposing in the Washington Principles. We also kept up our dialogue with the American and European museum directors in a continuing effort to refine our Art Principles. Issues such as how international exchanges would be affected, and the cost of doing renewed research on art provenance, were very much in our minds.

At the Washington Conference -- and as a result of last-minute high level negotiations with the French, Russian, German and Swiss governments -- we fashioned 11 Art Principles and managed to get consensus from 44 governments to implement "non-binding" Principles that carry with them powerful incentives for nations to comply. Immediately following the conference, we saw more positive action by nations on this issue in the last six months than at any time since 1950.

Please let me quickly review what we hoped to accomplish through the Washington Principles:

-- Principles 1 through 3 envision a massive cooperative effort to trace this art. We call upon museums to search the provenance of their holdings; on governments to open up their World War II and related archives to private researchers; for commercial galleries and auction houses to seek information, document, and make available what information they have. It is important to locate what was confiscated. It is equally important to know what was not confiscated, or what was restituted to pre-war owners. The taint of "stolen art" should not be applied to works that do not deserve it.

-- Principle 4 deals with gaps and ambiguities in the provenance of artworks. The vast displacement of art, the destruction of many records, and the furtive nature of the international market during the Second World War mean there must be some leeway in establishing provenance. Where there is no bill of sale, a diary entry or an insurance listing might be acceptable evidence of pre-war ownership. If a work is not on a Nazi confiscation list, it may be in the archive records of the Monuments, Fine Arts and Archives or the secret inventories of the French Resistance, or in other archival collections. Conversely, there may be circumstantial evidence that works were not stolen but sold in the market, or restituted to families and subsequently sold.

-- Principles 5, 6 and 7 pertain to the publication of information related to works in question, as well as to the resolution of claims. They discuss circulating photos of the art and information about it everywhere in the world, through traditional media and on the Internet. Maximum publicity will tell survivors and their families if their art still exists. It will also tell the international art community if questions still exist about a given work.

-- The eighth principle calls upon involved parties to be flexible and just in the resolution of claims. Art claims do not have to be winner-take-all propositions, which produce prolonged struggles in the courts, and drain the resources of both parties. In an atmosphere of good will, a wide range of solutions is to be found.

-- If the original owner is found to have died without heirs, we suggest, in principle 9, that other just and fair solutions must be sought. For example, the art may be sold with proceeds benefiting victims of the Holocaust and Jewish communities around the world. The art could also be displayed in museums and identified in ways that educate the public about the cultural losses sustained by individuals during the Holocaust.

-- The tenth principle states that to ensure objectivity and to

enhance public confidence in their work, national commissions in this field should have members from outside the governments, such as art experts, historians and representatives of communities that were victims of the Holocaust, and, where appropriate, distinguished persons from other countries.

-- The final, eleventh principle calls upon nations to take specific measures to apply these principles so they can more quickly accomplish justice. Nations and organizations should strive to develop internal processes which allow for the timely restitution of looted property.

Unfulfilled Promises

The promises made in Washington to bring a measure of justice to the victims that the principles brought remain unfulfilled. The challenge the Principles still pose is to ensure, even if the Conference Principles were "non-binding," that they would nonetheless compel tangible, positive change in the way nations dealt with Holocaust asset issues.

It is the final, eleventh Washington Principle that speaks to the need to give other principles vitality. It calls upon nations to take specific measures to apply these principles so they can more quickly accomplish our mutual goals. That is: Nations and organizations should strive to develop internal processes which allow for the timely restitution of looted property.

It has become clear that disputes over Nazi-confiscated art are subject to international law, cross national borders, span decades of time and require international rules to adjudicate claims. Cases continue to arise and call for urgent action to address this continuing injustice.

Following the Washington Conference an international consensus for consistent and efficient resolution of claims developed. The

1999 Council of Europe Resolution 1205, the 2000 Vilnius Forum Declaration, the 2003 Hearings of the European Parliament and European Parliament Resolution 408 all called for action to resolve these claims. Although individual cases continue to arise, little has been done to establish a fair, international claims process.

Prague Conference participants again will reaffirm their support of the Washington Principles on Nazi-Confiscated Art and will encourage all parties including public and private institutions and individuals to apply them as well. “In particular, recognizing that restitution cannot be accomplished without knowledge of potentially looted art and cultural property, the Conference calls on all parties . . . to continue and support intensified systematic provenance research, and to make the results of this research, where relevant, including ongoing updates, available via the internet, with due regard to privacy rules and regulations, and, where it has not already been done, to promote the establishment of public and private mechanisms to assist claimants in their efforts.”

That reassurance is not sufficient to fulfill the promises that can be found in the Washington pledge for consistent and efficient resolution of claims of the Washington Principles on Nazi-Confiscated Art, and in the Council of Europe Resolution 1205 from 1999 as well as the 2000 Vilnius Forum Declaration.

Legal Affairs Committee of the European Parliament in April, 2003 held hearings that addressed the need for a more uniform, efficient and just approach to such claims under the theme of “A Legal Framework for the free movement of goods whose ownership is likely to be contested”. The committee’s assessment is as valid today as it was in 2003.

“The legal situation in this area is at present entirely unclear, so that museums, art dealers, victims and heirs

have been unable to recover looted goods or fill the gap in provenance of art ownership. Claimants face a bewildering array of legal problems, many driven by the sheer accident of where looted property happens to be found. Access to data varies from nation to nation, as do the legal standards regarding such fundamental issues as determining the applicable law, proving ownership, assessing when a claim must be brought and the effect of intervening transfers to allegedly innocent transferees. There is a need for a legal and institutional framework that will be fairer to claimants, current holders and state-owned and not-for-profit entities. Moreover, this is very much a European problem which requires a European solution, and the forthcoming enlargement of the European Union makes the issue still more important as it directly affects a number of candidate Member States.”

That hearing, demonstrated the need for an international solution and resulted in a European Parliament Resolution A5-0408/2003, adopted by a vote of 487-10 called on the European Commission to:

- *Undertake a study by the end of 2004 on:*
 - *- establishing a common cataloguing system, to be used by both public entities and private collections of art to gather together data on the situation of looted cultural goods and the exact status of existing claims; - developing common principles regarding access to public or private archives containing information on property identification and location and tying together existing databases of information about title to disputed properties; - identifying common principles on how ownership or title is established, prescription, standards of proof, rights to export or import property which has been*

recovered; - exploring possible dispute resolution mechanisms that avoid lengthy and uncertain judicial procedures and take into account principles of fairness and equity; - the value of creating a cross-border coordination administrative authority to deal with disputes on title of cultural goods;

- *Call[ed] on the Member States and applicant States to make all necessary efforts to adopt measures to ensure the creation of mechanisms which favour the return of the property referred to in this resolution and to be mindful that the return of art objects looted as part of crime against humanity to rightful claimants is a matter of general interest for the purposes of Article 1 of Protocol 1 to the European Convention of Human Rights;*
- *Call[ed] on the Presidency of the European Union to assign this issue to a working group of the Council;*
- *Instruct[ed] its President to forward this resolution to the Council, the Commission, the Member States, accession States and the Council of Europe.*

That unfulfilled European Parliamentary Resolution could help initiate a title clearing entity Study. Perhaps the European Parliament or the EU Commission within the next 24 months could draft a report to the Commission or the Council of Ministers on how a title clearing entity/arbitral chamber could be set up in Europe to adjudicate Holocaust-related claims? That could lead to the adoption of Military Law 59 as the basis for claims that should apply equally to litigation in the US and in Europe.

National legislation based on the experience in implementing those Principles, is needed for fair resolution for looted art to be recovered and returned. Although individual cases continue to

arise for settlement, little has been done to establish a fair, international claims process. It is not enough that parties are urged to ensure that their “governments consider all relevant issues when applying provisions of national laws that may impede the restitution of art and cultural property, in order to achieve just and fair solutions,” action must be taken.

Although nations agreed to follow the Washington principles, there are still countries and institutions that fail to execute the principles as effectively as promised. It is not too late for the European Commission to call for best practices, harmonize EU law effectively, provide access to data on art, and control export of restituted art. As cases have been adjudicated individually, efforts have been undertaken to create metrics for returning Nazi-confiscated art to its rightful owners. Now is the time for nations and institutions to assess those best practices and take action that is morally right and necessary to fulfill the promises made a decade ago. Sadly, justice is still waiting for the European Commission as well as other governments, museums, private collectors and others.

What Must Happen Next?

Now a decade later since the signatory countries agreed on the “Washington Conference Principles on Nazi-Confiscated Art” it is time to review progress and re-energize our efforts toward fulfilling the responsibility for the identification and return of cultural assets that were taken from their rightful owners during the Nazi era.

Today the need to understand and fulfill the promises of the Washington Principles remains. What has been done? What best practices have been achieved and how can they be evaluated to lead us to additions to the Principles? The Prague Conference addresses whether the value of the Washington Principles has been properly recognized and reviews how the principles have been applied. Has the international community learned lessons to help

fulfill the non-binding Washington Principles in 1998, pledging to seek a “just and fair” settlement for the prewar owners and heirs of art looted by the Nazis?

As outcomes for this Conference, I would hope we could address proposals such as the establishment of a specialized international arbitral tribunal to move the resolution of disputes beyond case-by-case adjudication of Holocaust-looted art claims. Such a tribunal could be established on the basis of international executive agreements or by EU Directive.

Nevertheless, worldwide there is still much to be done in the area of confiscated and looted art.

Although individual cases continue to arise for settlement, little has been done to establish a fair, international claims process. One place to begin is seeking consensus on best practices from lessons learned over the past decade.

Best Practices

In the meantime, I look to the Conference to consider ‘best practices’ from the lessons learned to overcome obstacles to settlement in the many cases that have been considered over the past decade.

One of the most difficult obstacles to resolution is the availability of Information. For example, after several years of conducting research the Minneapolis Institute of Arts in 2008 returned the painting “Smoke Over Rooftops” , by Fernand Léger, to the Kann Association to the to Alphonse Kann’s heirs. It was in 1997 that the Association En mémoire d’Alphonse Kann had contacted the museum with a claim that the painting had been looted by the Nazis and sold illegally.

The choice of law remains contentious and when in 2004 the U.S. Supreme Court ruled that an American woman can file suit in U.S.

courts against the Austrian government to seek the return of six Gustav Klimt paintings seized by Nazis during the World War II. That ruling could have profound implications for suits involving seized property and human rights violations committed by foreign governments.

For various reasons, including post-WWII settlements as bar to claims, U.S. museums have been suing potential claimants before the claimants have filed suit to recover looted art. Whether for statute of limitations or questions of forced sales or sales under duress, it seems that the US courts have become markedly less sympathetic to claimants.

Export restrictions remain troubling as well. In Hungary, the granddaughter of Baron Mor Lipot Herzog, whose art collection included works by Manet, Renoir, and Velazquez has yet to receive the art after winning a lawsuit against the state. As late as April 2008 the art collection was being held in Hungarian museums and has yet to be returned. At the same time the Scottish government is apparently willing to sign up to legislation which will allow Scotland's national collections to return any of their artifacts which turn out to have been stolen by the Nazis during the Third Reich. Many of these artworks were sold on the black market.

In Civil law countries, bonding fees prevent access to courts for many claimants. Randy Schoenberg commented that it was enormously time-consuming to pursue the art recovery cases. He received his first call from Maria Altman in the Klimt case in 1998 and found it enormously expensive, running into millions of dollars.

In addition to bonding issues the speed of claims litigation blocks restitution. For instance, the Museum of Modern Art is opposed and the U.S. government over an Egon Schiele painting seized by

the Nazis in 1939 that the MOMA wants returned to the Austrian foundation that lent it for a show. Under U.S. law, "Portrait of Wally" if stolen property should be returned to the family.

What is to be Done?

Let me outline several courses of action that this conference can initiate and the participants can pursue. They include:

1. Availability of Information: There was a European Community Directive within the last few years relating to transparency and openness in terms of government records and access to such information and/or the harmonization of law across the Community with regard to data access. Consistent with this Directive, it should be the presumptive goal of every nation to allow access to information relating to Holocaust-related property looting during the World War II period (i.e., property lost by a member of a persecuted group during the period January 1, 1933 - May 9, 1945). Specifically, there should be (i) harmonization of laws across the Community to mirror some standard either embodied in an existing Directive or regulation or some standard we can enunciate now; (ii) a presumption that in any proceeding to obtain access to data or information the interests of a person seeking the return of property looted during the World War II period take precedence over all other interests; and (iii) a presumption that state-owned museums and auction houses must make their records available for research by anyone seeking to locate Holocaust-looted property. We also want certain definitions designated as controlling or presumptively valid. For example, any "sale" by a Jew after January 1, 1933 should be presumptively viewed as suspect such that the person has the rights of potential claimant for purposes of having access to information.
2. Choice of Law: Rather than the law of the place where the claim is brought (typically where the art is found now) or the law of the place where the victim lived when the looting occurred, the applicable law should be either Allied Law No. 59 or the current German statute that codified this law as German law after WWII.

The key is that there is no presumption in favor of even good faith purchasers. This law creates a strong presumption of return to the victim.

3. Limitations: No statute of limitations should apply to claims or any limitations period should run for 6 or 10 years from the date complete access to archival/governmental information about the property in question is provided (i.e., if a victim can show access to data was not complete, no statute would apply or run).
4. Limitations on Defenses: No defenses premised on waiver, abandonment, laches, or estoppels should be recognized. In addition, no presumptions run in favor of state-owned museums, universities, agencies, etc.
5. Post-WWII Settlements: Any settlement reached with a victim relating to Holocaust-looted cultural property prior to 1960 should not bar claims if (i) the settlement involved the return of only non-cultural property in compromise on other claims; (ii) the settlement involved the return of only money in compromise for cultural object claims; (iii) the settlement was made with the victim not having received full disclosure of all information relating to looted property; and/or (iv) the settlement was for an amount severely out of proportion to the property looted.
6. Export Restrictions and Taxation: Recovered property shall NOT be subject to designation as "cultural or national treasure" or other designations that would restrict export by the victim or a buyer from the victim. Settlements of Holocaust-related looting claims should not be subject to tax as to plaintiff or defendant.
7. Bonding Fees: Any bonding fees or percentages required to be posted by civil litigation plaintiffs would not apply to claims seeking return of Holocaust-related looted property.
8. Standing to Sue: Restrictions on agents, unincorporated associations or NGOs suing on behalf of victims should be lifted.
9. Clouded Title Registry: Each nation shall establish (or shall recognize as definitive) a public registry of works claimed to have been looted set up by the EU (such registry to be internet accessible). The registry would keep confidential the identity of the party claiming, but would identify the work looted. Each nation would require buyers and anyone selling cultural

property above a certain value to conduct all transactions -- and condition all warranties of title and sale -- subject to such registries. Any sale after registry of a work would be deemed presumptively invalid as to buyer and seller. Any work on a pre-existing national looted property list (like those set up after WWII) would cloud any sale since the end of WWII. 10. Export Licenses: All nations would amend existing export license procedures to provide for a representation that any cultural property being exported had been checked with regard to WWII-related looting and/or against the Clouded Title Registry. (Other databases could be defined based on certain well-known ones that already exist as to WWII looting.) 11. Speed of Claims Litigation: States will endeavor to establish procedures necessary to fast track Holocaust related claims. Any such claims not resolved by final order within three years could be deemed denied by the claimant and immediately appealed to an ECHR/ECJ court of first instance as if national remedies had been exhausted. I hope that you share my conclusion that the Washington Conference Principles on Nazi-confiscated Art have proved to be an excellent basis for international cooperation in resolving claims and that we have made historic progress on advancing the cause of justice -- however belated -- to the victims and survivors of the Holocaust. Now we should fulfill the promise of the Washington Principles.

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