

THE HOLOCAUST (SHOAH) IMMOVABLE PROPERTY RESTITUTION STUDY

EXECUTIVE SUMMARY (as of 15 January 2017)

Introduction

The Nazis and their state-sponsored cohorts stole mercilessly from the Jews of Europe. Civilian and government bystanders became beneficiaries of this mass looting. As recently summarized in a best-selling study:

The plunder of Jewish property during the war had taken place in every country, and at every level of society. The comprehensive nature of this plundering was sometimes quite astounding. In the old Jewish quarter of Amsterdam, for example, the houses were stripped of everything right down to the wooden window and door frames. In Hungary, Slovakia and Romania, Jewish land and property was often divided up amongst the poor. Sometimes people did not even wait until the Jews had gone. There are examples in Poland of acquaintances approaching Jews during the war with the words, ‘Since you are going to die anyway, why should someone else get your boots? Why not give them to me so I will remember you?’

When handfuls of Jews began to come home after the war, their property was sometimes returned to them without any fuss – but this tended to be the exception rather than the rule. The historiography of this period in Europe is littered with stories of Jews trying, and failing, to get back what was rightfully theirs. Neighbors and friends who had promised to look after valuable items for Jews while they were away frequently refused to return them: in the intervening years they had come to regard them as their own. Villagers who had farmed Jewish land during the war saw no reason why returning Jews should benefit from the fruits of their labours. Christians who had been granted empty apartments by the wartime authorities considered those apartments rightfully theirs, and they had papers to prove it. All these people tended to regard Jews with varying degrees of resentment, and cursed their luck that, of all of the Jews that had ‘disappeared’ during the war, *theirs* had to be the ones who came back.¹

In the aftermath of the Holocaust, returning victims – not only surviving European Jews but also Roma, political dissidents, homosexuals, persons with disabilities, Jehovah’s Witnesses, and others – had to navigate a frequently unclear path to recover their property from governments and neighbors who had failed to protect them, and often, who had been complicit in their persecution. Many survivors embarked on their restitution journey not knowing whether they would ever be successful. Many others never knew recovering property was an option. Law was not the survivors’ ally; more often it was their enemy, providing impunity for thieves and those who held stolen property.

¹ Keith Lowe, *Savage Continent: Europe in the Aftermath of World War II* (2012), at 197-198 (emphasis in original).

While the return of Nazi-looted art has garnered the most media attention, and there have been well-publicized settlements involving bank deposits and insurance proceeds, there is a larger piece of restorative justice as applied to the largest theft in history that has not been adequately dealt with. A significant amount of immovable property confiscated from European Jews remains unrestituted.

The success of legal efforts to restitute stolen immovable property since World War II is mixed. Countries across the European continent have passed an array of legal and diplomatic restitution/compensation measures. Some were enacted even before the war ended (*e.g.*, the 1943 Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation and Control, the “London Declaration” endorsed by 18 governments). Others have come into force more than 70 years later (*e.g.*, Serbia’s 2016 Law on Elimination of Consequence of Property Confiscation of Heirless Holocaust Victims). Some measures were successful. Others existed in name only. In Eastern Europe, many restitution laws were in effect for only a few years, and were overturned as soon as the Communist authorities took power. Jews caught behind the Iron Curtain became double victims: first losing their assets to the Nazis, and then to the Communists. Much has still not been returned.

Against this backdrop of what U.S. Ambassador Stuart Eizenstat has termed “the unfinished business of World War II,”² 47 countries in June 2009 issued the Terezin Declaration on the site of the Terezin concentration camp in the Czech Republic. By endorsing the Terezin Declaration, these nations agreed to continue and enhance their efforts to right the economic wrongs that accompanied the genocide committed against European Jews and other groups persecuted during the Holocaust (Shoah, in Hebrew).

The Terezin Declaration (and its companion document, the 2010 Guidelines and Best Practices,³ endorsed by 43 countries⁴) focuses in substantial part on the treatment of immovable (real) property restitution: private, communal, and heirless property.⁵ Private property includes both pre-war Jewish private property currently in the hands of the state and private individuals or entities. It also includes large chunks of Jewish communal property (synagogues, clubs, social service organizations, and cemeteries) that has never been returned to the local Jewish community or the Jewish people at large. Finally, because six million European Jews were murdered between 1933-1945, including up to 90% of the Jewish population in some countries (*i.e.*, Poland and the Baltic countries of Lithuania, Latvia, and Estonia), much of this lost property remains heirless, with the state

² See, *e.g.*, Stuart Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II* (2003). Ambassador Eizenstat served as Special Representative of the President and Secretary of State on Holocaust Issues during the Clinton presidency and as Special Advisor on Holocaust issues during the Bush and Obama presidencies.

³ The complete title of the 2010 Guidelines and Best Practices is: 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 (Shoah) Era between 1933-145, Including the Period of World War II.

⁴ Of the 47 countries that endorsed the Terezin Declaration, only Belarus, Malta, Poland, and Russia did not endorse the Best Practices.

⁵ See also Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (2000), at 4 (describing the importance of restitution of all three types of property).

becoming the legal successor to such heirless property. In the Terezin Declaration, countries agreed that the heirless property instead should be used to benefit needy Holocaust survivors, and for commemoration of destroyed communities and Holocaust education.

ESLI and the Holocaust (Shoah) Immovable Property Restitution Study

Beginning with the so-called London Gold Conference in 1997, states have held numerous international conferences focusing specifically on the restitution of various forms of Jewish property stolen during the Shoah. At the conclusion of each of these multi-national conferences, the governments' delegates issued pronouncements on how they would implement measures to finally confront Holocaust era thievery. The grand pronouncements led to little action and actual implementation. The 2009 Prague Holocaust Era Assets Conference leading to the issuance of the Terezin Declaration aimed to change this pattern by creating the European Shoah Legacy Institute (ESLI).

ESLI was established in 2010 to monitor the signatory states' progress and advocate for the principles enshrined in the Terezin Declaration. In fulfillment of its mission, ESLI commissioned in 2014 the Holocaust (Shoah) Immovable Property Restitution Study (the "Study"). Completed in January 2017, the Study is the first-ever comprehensive compilation of all significant legislation passed by the 47 endorsing states since 1945, dealing with the return or compensation of land and businesses confiscated or otherwise misappropriated during the Holocaust era. This applies both to states where the Holocaust took place and states to which the proceeds of such misappropriated land and businesses had been moved.

The Study provides a much-needed and long-overdue resource for scholars of the Holocaust in particular and genocide scholars in general, as well as those researching and writing on the post-Holocaust era. ESLI hopes that the Study can also be used to drive the conversation forward toward both legal and policy solutions in the growing field of restorative justice.

The Study's main purpose, however, is practical. Jewish and non-Jewish claimants, heirs, governments, NGOs, and other stakeholders will now have a one-stop resource where all significant Holocaust restitution legislation and case law dealing with immovable property over the last 70 years has been compiled and analyzed.

No such resource, in print or online, in any language, is available elsewhere. The Study is composed of 47 individual country reports. The success of the restitution experience varies from country to country, depending largely on how each state has addressed some of the following challenges to devising a property restitution program:

- The timeframe for enacting restitution legislation – whether restitution was immediate or stalled until the 1990s or the present day;
- The nature and scope of nominal ownership for property to be restituted – whether the property in both public and private hands is subject to restitution;
- The effectiveness of the claims process – do existing judicial and/or administrative structures have the capacity to adequately, efficiently and

- transparently resolve property claims?
- The eligibility of claimants – is the claims process available to citizens only or open to persons of any nationality?;
 - Who is allowed to keep restituted property – does the state require foreign claimants to sell property back to a national?
 - The rate of compensation – are claimants symbolically, partially or fully compensated for property (in cash or bonds) when restitution *in rem* is not practicable?
 - Former owners versus subsequent good faith purchasers – do restitution laws fairly protect those whose property was stolen as well as subsequent good faith purchasers?
 - The treatment of heirless property – are the country’s usual inheritance rules overridden so that heirless property can be used for the benefit of Holocaust survivors (and their heirs) most in need?

In one form or another, these challenges represent the benchmarks set forth in the 2010 Guidelines and Best Practices. They present a pragmatic roadmap to carrying out restitution schemes in countries where there is still, in the words of Ambassador Eizenstat, “unfinished business.”

Methodology

Work on the Study began in the winter of 2014. The resulting reports are the product of multi-layer research and involved four stages.

In the first stage, *pro bono* attorneys from several top-tier international law firms conducted initial independent country research. The *pro bono* effort was contributed by five leading multinational law firms:

- Brownstein Hyatt Farber Schreck LLP;
- Fried, Frank, Harris, Shriver & Jacobson LLP;
- Morgan, Lewis & Bockius LLP;
- O’Melveny & Meyers LLP; and
- White & Case LLP.

A supervising partner in each firm coordinated the *pro bono* work of each firm. Many of the participating lawyers were physically located in the country they researched and/or were licensed to practice there. These *pro bono* attorneys contributed hundreds of hours gathering primary restitution legislation and case law.

The next stage involved contacting the Terezin Declaration governments directly. Government consultation is one of the unique features of the Study that sets its content apart from shorter, less comprehensive (yet still valuable) reports on immovable property prepared by other organizations. During summer 2015, all Terezin countries received questionnaires and preliminary research findings. Nearly half the governments responded, some with just a few sentences and others with comprehensive information and statistics (*e.g.*, Austria and Israel).

In the third stage, the ESLI research team (the authors herein) then conducted its own independent research, to verify, synthesize, and analyze the information provided by the law firms and governments to create a comprehensive report for each of the 47 Terezin Declaration countries. The length of each country report varies, depending on that country's connection to the Holocaust. For the European countries occupied by Nazi Germany, and especially those with a large pre-war Jewish population (*e.g.*, Poland and the Baltic countries), the reports are more detailed than for those that remained neutral during the war (*e.g.*, Sweden, Spain, Turkey) – with the exception of neutral Switzerland which disproportionately benefited from Nazi theft of Jewish property – or those countries outside the European theater of war (North and South America, Australia) that nevertheless endorsed the Terezin Declaration.

In the last stage, independent scholars, legal experts and historians active in the Holocaust restitution field for that country reviewed each report for accuracy and provided valued input. The bibliography for each country report lists the outside experts who reviewed the reports prepared by the Study team.

Report Contents

Each country report is standardized. The reports present law and legislation for each country in the following order: (1) commitments made in post-war armistices and agreements following the immediate end of the Second World War; (2) private property restitution law and legislation, and restitution efforts undertaken from 1944 to the present time for such property; (3) communal property law and legislation, and restitution efforts undertaken from 1944 to the present time for such property; and (4) heirless property restitution law and legislation, and restitution efforts undertaken from 1944 to the present time for such property.⁶

For each country's restitution regime (historical and current), the report:

- Catalogues the historical scope of restitution *in rem* and/or compensation legislation and its associated regulations; identifies the time period covered by the legislation and what kind of property (private, communal, heirless) is covered;
- Ascertains whether eligibility is contingent upon citizenship in the legislating country; clearly lists claim filing deadlines; describes how the claims process works (including who decides the claims, standards of proof, necessary documentation, associated costs, appeals procedures);⁷ and
- Describes notable judicial decisions interpreting the legislation (including national court decisions and decisions of the European Court of Human Rights). Where available, statistical information concerning, for example, the status of claims, value of restituted property, and length of claims process, is included.

⁶ Some of the countries were liberated in 1944, and so began enacting restitution legislation immediately upon liberation.

⁷ The Study team did not conduct on-the-ground archival research, but did review digitized archival material available (or accessible) online.

The reports also place a country's legislation and restitution regime into its unique historical context. For example, the reports include information regarding the so-called double confiscations – the widespread nationalization efforts by emerging post-war Communist regimes (confiscations which this time impacted the entire population) – to help explain why restitution efforts faltered or failed to come to fruition for decades following the end of World War II. In addition, such context explains why restitution in these countries is often more than returning or compensating for property confiscated during the Holocaust but is also a matter of unwinding subsequent Communist nationalizations of that same property.

Summary of Findings

The Study examined private, communal, and heirless property as discrete components of each country's restitution efforts from 1944 to 2016.

While the historical experiences of each country make its country report and the laws described therein wholly unique, certain patterns emerged as to how, when, and why the various restitution regimes have been or are still being carried out.

Broadly, countries in Western Europe initiated restitution measures almost immediately after the end of World War II. The work of national commissions and subsequent legislation of the 1990s and 2000s was therefore mainly focused on restitution completion efforts – gap-filling the restitution measures of the 1940s and 1950s. By contrast, for Eastern Europe, there was little time to create successful restitution schemes before Communist regimes came to power in each country and collectivized and nationalized private property. As a consequence, for Eastern European countries, legislation of the 1990s and 2000s *necessitated* a more comprehensive approach – covering greater time periods and more property. Often, Holocaust era confiscated property is specifically excluded from post-Communist restitution legislation.

More than 70 years after the conclusion of World War II, the “unfinished business”⁸ of immovable property restitution remains unfinished. It remains to be seen whether there will be a future gap-filling period for restitution measures in Eastern Europe.

Findings and Conclusions

The Study examined restitution measures across the three main categories of immovable property: private, communal, and heirless. The findings are broken down into each category, and then grouped by region (Western Europe and Eastern Europe).

⁸ Stuart Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II* (2003). Much of the “unfinished business” identified by Ambassador Eizenstat concerned restitution or compensation of stolen property.

Private Property

Private immovable (real) property is described in the Terezin Declaration Guidelines and Best Practices for the purpose of restitution as:

property owned by private individuals or legal persons, who either themselves or through their families owned homes, buildings, apartments or land, or who had other legal property rights, recognized by national law as of the last date before the commencement of persecution by the Nazis, Fascists and their collaborators, in such properties.

(Terezin Best Practices, para. b.)

For most Western European countries – including Belgium, Denmark, France, Germany (the then, West Germany or Federal Republic of Germany), Greece, Italy, Luxembourg, the Netherlands, and Norway – private property restitution measures were established immediately after the end of World War II and applied equally to citizens and non-citizens.⁹ The measures were met with relative success. This is, however, not to suggest that it was uniformly *easy* to get back what had been taken, that there was an absence of resistance to restitution, or that *all* property was restituted after the war. And in contrast to West Germany, in the former East Germany (German Democratic Republic), with few exceptions, no property restitution regime was established after the war. It was not until the unification of Germany in 1990 that property restitution in East Germany took place.

A resurgence of interest in Holocaust-era confiscations in the 1990s led to the creation of numerous national commissions of inquiry in Western Europe that examined the extent of property confiscation in each country and the degree to which property was returned (*e.g.*, Austrian Historical Commission (Austria); The Study Mission on the Spoliation of Jews in France (France); Van Kemenade Commission (the Netherlands)).

In general, the reports identified gaps in restitution and/or unfair or unreasonable consequences that had resulted in less than comprehensive restitution. As a consequence of commission findings, new national restitution mechanisms were established or lump-sum settlements reached with the Jewish community in the country.

For example, in 1999, the French government established the Commission for the Compensation for Victims of Spoliation (CIVS), to provide compensation to individual victims or their heirs who had not been previously compensated for damages resulting from legislation passed either by the Vichy Government or by the occupying Germans.

In 1998, the government of Norway approved a comprehensive settlement with the Jewish community worth NOK 250 million (USD 33 million) that covered all claims – private, communal, and heirless – of the Jewish community. It has also been the case in

⁹ The exceptions were Denmark, whose restitution legislation applied only to Danish citizens, and France, where the immediate postwar restitution laws excluded both non-citizens and minors. This effectively excluded nearly half of the surviving Jews in France at the time. In addition, Luxembourg's 1950 Law for War Damages only applied to Luxembourg citizens.

some countries, such as Italy, that despite an historical commission's finding restitution gaps and making recommendations that further restitution be made, no additional measures have since been carried out.

Somewhat uniquely situated is private property restitution in the United Kingdom. While not occupied during World War II, the UK enacted legislation that confiscated property from "enemies" of the state. After the war, the UK set up a scheme to compensate victims of property confiscation. Around the time that other Western European national commissions were being set up in the late 1990s, the UK investigated the shortcomings of its initial restitution scheme and set up the Enemy Property Payment Scheme for victims of persecution under the confiscation law.

The restitution experience of countries in Eastern Europe also began at the end of the war, but in the end followed a far more delayed and complicated path than that in most Western European countries.

Bulgaria, the Czech Republic, Hungary, Romania, and Slovakia all passed some form of restitution legislation shortly after the end of World War II. Many of these states were compelled to do so by the terms of armistice agreements or a treaty of peace (*e.g.*, Article 5 of the 28 October 1944 Armistice Agreement with Bulgaria required that Bulgaria cancel all discriminatory legislation).

Shortly after early restitution measures were put into place, private industry, financial enterprises, and residential properties were nationalized by the newly-installed Communist regimes throughout Eastern Europe. The outcome was that whatever property had been restituted was subject to a second round of confiscations, this time by Communist authorities. In Estonia, Latvia, and Lithuania, Soviet authorities nationalized private property twice, first upon their initial occupation during World War II and then a second time after expulsion of the Nazi German occupiers.

After emerging as democratic states in the early 1990s, the post-Communist regimes passed private property restitution legislation. This legislation covered both Holocaust-era confiscations and Communist-era takings, when applicable. The amount of restitution *in rem*/compensation varied by country. Among them, the Czech Republic, Hungary, Lithuania, and Slovakia limited eligible claimants to those who were citizens of their respective countries.¹⁰

Yugoslavia, which broke into the constituent states of Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia after the fall of Communism, also enacted private property restitution legislation after World War II (*e.g.*, Law No. 36/45 (on Handling Property Abandoned by its Owner during the Occupation and Property Seized

¹⁰ A portion of a 2001 endowment fund set up by the Czech Republic later provided symbolic compensation for people unable to make restitution claims because of the citizenship requirement. In the case of Hungary, while the law did not strictly limit restitution to current citizens, it did limit eligible claimants to those persons who were Hungarian citizens, were Hungarian citizens at the time of suffering the damage, suffered damage in conjunction with being deprived of their Hungarian citizenship, or were non-Hungarian citizens but were permanent residents in Hungary on 31 December 1990.

by the Occupier and his Collaborators) (Yugoslavia)). However, like its Eastern European neighbors, restituted property was soon subject to Communist nationalization.

The new democratic states of Croatia, Slovenia, Macedonia, and Montenegro all passed denationalization legislation in the 1990s and 2000s, but the laws did *not* cover Holocaust-era takings (*e.g.*, Law No. 92/96 (on Restitution/Compensation of Property Taken under the Yugoslav Communist Rule (Croatia); Law No. 43/2000 (2000 Denationalization Law) (Macedonia)). Moreover, eligible claimants in Croatia, Slovenia, and Macedonia were limited to citizens of the respective countries.¹¹ Serbia passed private property restitution legislation in 2011 (Law on Property Restitution and Compensation). Unlike many of the other Balkan countries, Serbia's legislation applies to both citizens and non-citizens. However, the text of the law is not clear as to whether the law covers Holocaust-era property confiscations.

Among Eastern European countries, Bosnia-Herzegovina (BiH) and Poland stand alone as the only countries that have failed to establish a comprehensive private property restitution regime for property taken either during the Holocaust or Communist eras, or one that addresses both types of takings. Both countries established private property restitution legislation shortly after World War II (*e.g.*, 6 June 1945 Decree on the Binding Force of Judicial Decisions made during the German Occupation in the Territory of the Republic of Poland), but these measures were again short-lived due the nationalization principles of the Communist regime that took over each country.

Poland is the only member of the European Union (and a former Eastern European member of the Communist bloc) not to have passed comprehensive private property restitution legislation in the post-Communist era.

In the mid- to late 1990s, one of the two autonomous entities that comprise BiH – the Republic of Srpska – passed legislation on the denationalization of property (but not for Holocaust-era confiscations). The laws were later annulled and no new legislation has come into force at either the entity or national level.

In the case of Poland, with the exception of so-called Bug River properties (property located in pre-war Poland east of the Bug River that became part of the Soviet Union after the war), where legislation from 2005 has provided for a property compensation scheme that has withstood scrutiny from the European Court of Human Rights (ECHR), Poland has no comprehensive private property restitution scheme for either Holocaust-era confiscations or Communist-era takings. The only recourse for rightful owners and heirs is to rely on long-standing provisions of generally applicable Polish law in the Polish Civil Code and the Polish Administrative Procedure Code. Even then, however, successful claimants are only those who have demonstrated that their property was nationalized contrary to the letter of the Communist legislation. This means that for property “legally” nationalized under then-existing laws, there is no recourse. The

¹¹ Contrary to the provisions of the existing laws in Croatia, the Supreme Court of the Republic of Croatia held in 2010 that a foreign national claimant *did* have a right to compensation.

situation in Poland regarding restitution remains fluid, with proposals for a comprehensive restitution program still being hotly debated in the country.¹²

As a result, as the U.S. Department of State Special Envoy for Holocaust Issues explained in late 2015 that “Jewish and non-Jewish Americans of former Polish citizenship have long complained that Polish laws governing property and the Polish court system are especially cumbersome, challenging, time consuming and expensive for claimants outside of Poland. The United States has consistently advocated for legislation or reforms to the court system that are fair, comprehensive, and nondiscriminatory and that are neither burdensome nor costly to the individual claimant.”¹³

When asked about the situation in Poland during a visit to Israel (“The issue of Jewish property in Poland has shed a heavy shadow on the good relations between Poland and Israel. Is the current government ready to work for a Juarez solution of this matter?”), Polish Foreign Minister Witold Waszczykowski in a newspaper interview explained:

[P]roperty restitution has been underway in Poland for well over two decades now [...] Property restitution is a process in which claimants’ ethnic or religious background is irrelevant: the Polish law treats everyone in the same manner. As far as private property is concerned, the existing legal system in Poland makes it perfectly clear that any legal or natural person (or their heir) is entitled to recover prewar property unlawfully seized by either the Nazi German or the Soviet occupation authorities, or by the postwar communist regime.¹⁴

Finally, in Cyprus, Finland, Ireland, Malta, Portugal, Switzerland, Spain, and Sweden,¹⁵ private property of targeted groups was not confiscated as a cause or consequence of

¹² For example, a special restitution regime was established in 1945 just for Warsaw under the so-called Bierut Decree (named after the first Communist leader of postwar Poland). The Communist authorities, however, failed to implement the law. Reprivatization of Warsaw properties only began taking place after 1989, but the process has lacked transparency. In 2016, city officials involved with the reprivatization process of Warsaw properties were forced to resign and the Anti-Corruption Bureau began an investigation, which is still ongoing. A law passed by the national parliament that came into effect on 17 September 2016 created a six-month deadline for pre-World War II owners of property in Warsaw to reactivate previous claims made under the Bierut Decree, although there are a number of exceptions and limitations on who may apply and what property is covered. The process under the 2016 law has been put on hold, pending investigation of the entire restitution process in Warsaw since 1989.

¹³ Letter from U.S. Dept. of State Special Envoy for Holocaust Issues to *Nowy Dziennik (Polish Daily News)*, 22 December 2015, available at <http://wjro.org.il/cms/assets/uploads/2016/01/Nick-Dean-Response-to-Nowy-Dziennik-Letter-12.22.15.pdf>.

¹⁴ Eldad Beck, “Polish Foreign Minister: There’s more to us than the Holocaust”, ynetnews.com, 15 June 2016 (last accessed 1 August 2016). At present, the restitution of immovable property stolen during the Nazi and Communist eras, remains a volatile issue in Poland. See, e.g., Joanna Berendt, “Polish Court Limits World War II-Era Restitution Claims in Warsaw,” *N.Y. Times*, 27 July 27 2016 (last accessed 20 October 2016).

¹⁵ In certain instances, German firms with Swedish subsidiaries used German Aryanization measures to their own advantage. However, Aryanization efforts in Sweden were largely unsuccessful. There is also evidence that some German Jewish property in Sweden was liquidated after the war.

World War II and the Holocaust (Shoah). As a result, these countries do not have specifically applicable private property restitution legislation.

The Study found that most Western European states have complied or substantially complied with the principles of the Terezin Declaration and accompanying Guidelines and Best Practices regarding private immovable property.

The Study found that many of the former Communist states of Eastern Europe have made significant efforts to comply with the Terezin Declaration and the Guidelines and Best Practices regarding restitution of Holocaust era immovable property. The remaining work in these countries is to fill gaps in their laws toward meeting the standards of the Terezin Declaration. However, there are also many other former Communist states of Eastern Europe (Poland, with the largest Jewish population in prewar Europe of which ninety percent did not survive the war, being the prime example) that have not yet fulfilled their Terezin Declaration obligations to enact immovable property legislation covering Holocaust era property.

Communal Property

Communal property is described in the Terezin Declaration Guidelines and Best Practices for the purpose of restitution as:

property owned by religious or communal organizations and includes buildings and land used for religious purposes, e.g. synagogues, churches[,] cemeteries, and other immovable religious sites which should be restituted in proper order and protected from desecration or misuse, as well as buildings and land used for communal purposes, e.g. schools, hospitals, social institutions and youth camps, or for income generating purposes.

(Terezin Best Practices, para. b.)

In Western Europe, Austria, Belgium, France, Germany, Greece, Italy, Luxembourg, the Netherlands, and Norway have all made provisions for communal property restitution. In many of the countries, communal property was restituted pursuant to the same laws as private property restitution. This contrasts with communal property legislation enacted in Eastern European countries, where communal property laws were often separate from private property laws.

For countries such as Austria, France, and Germany (West Germany), efforts were made shortly after World War II to return or pay compensation for communal property (e.g., First, Second, and Third Restitution Acts (Federal Law Gazette Nos. 156/1946, 53/1947 148/1947 (Austria)). Those initial measures have been supplemented by more recent legislation meant to gap-fill the return of communal property that was formerly missed or not included (e.g., Amendment to the General Social Security Law and the Victims' Welfare Act (setting up the General Settlement Fund) (Federal Law Gazette No. 12/2001) (Austria)).

Countries such as Greece and Italy relied upon laws passed immediately after the war for restitution and repair of communal property (*e.g.*, Law DLG 736/1948 (extended the provisions of DLG 35/1946 to non-Catholic buildings of worship, which were destroyed or damaged during the war) (Italy)).

For Belgium and Luxembourg, communal property confiscation and damage was more isolated and the Jewish communities were compensated directly for damages after the war. For Norway, as a result of its national commission of inquiry established in the late 1990s, a comprehensive settlement with the Jewish community was made to compensate for the economic and physical liquidation of the community, and for the local preservation of Jewish culture and the Jewish community.

In Eastern Europe, communal property restitution legislation of some type – be it applicable to both Holocaust-era confiscations and denationalization, or just denationalization – has been passed in Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Macedonia, Poland, Romania, Slovakia, Slovenia, and Serbia.

Bulgaria, Estonia, Hungary, Poland, and Slovakia all passed communal property restitution legislation in the early 1990s that covered property confiscated during the Holocaust era and during the Communist era (*e.g.*, Act No. 282/1993 (on the Mitigation of Certain Injustices Caused to Churches and Religious Communities) (Slovakia); 1997 Law on the Relationship Between the State and Jewish Communities (Poland)). In Slovakia, the communal property restitution law applied generally to property seized *after* 1945, but a special provision permitted Jewish communities to file claims dating back to 1938.

For Latvia, Lithuania, and Romania, limitations written into their communal property restitution laws from the early 1990s – which addressed restitution of communal property confiscated during both the Holocaust era and Communist era – made it difficult for Jewish communities to receive restitution or compensation for communal property (*e.g.*, 1992 Law of Restitution of Property to Religious Organizations (Latvia)). However, between 2011 and 2016 each of these countries passed specific legislation facilitating the return of or compensation for formerly Jewish communal property to the Jewish community (*e.g.*, 2011 Good Will Compensation Law (Lithuania); 2016 laws returning five pieces of property to Jewish community (Latvia); 2016 legislation addressing community successorship and forced “donation” issues (Romania)). For countries such as Latvia, the recent communal property legislation is a positive development, but ownership over many other formerly Jewish communal properties in Latvia remains in dispute and the properties are not subject to current restitution legislation.

Croatia, Macedonia, and Slovenia passed restitution laws in the early 1990s which covered only Communist era property confiscations and excluded property that was taken during the Holocaust, and in the case of Croatia, its law also did not cover properties that were not directly owned by Jewish organizations (*e.g.*, Law No. 92/96 (on Restitution/Compensation of Property Taken under the Yugoslav Communist Rule)

(Croatia); 1991 Denationalization Act (Official Gazette RS, No. 27/91) (Slovenia)).¹⁶ The laws addressed both private and communal property that had been confiscated during the Communist era. Similarly, Serbia's 2006 Law on the Restitution of Property to Churches and Religious Communities only covers property confiscated *after* 1945.

Only Bosnia-Herzegovina and Montenegro have failed to enact communal property restitution legislation covering either Holocaust-era confiscations or Communist-era takings, or both.

For Cyprus, Denmark, Finland, Ireland, Malta, Portugal, Spain, Sweden, Switzerland, and the United Kingdom, no communal property was confiscated during the Holocaust era. As a result, there is no specific communal property restitution legislation.

The Study found that most Western European states have complied or substantially complied with the principles of the Terezin Declaration and accompanying Guidelines and Best Practices regarding communal immovable property. This is the area of immovable property that has had the highest level of compliance among Western European countries.

For the former Communist Eastern European states, with the onset of Communism, both Jewish and non-Jewish communal property was either nationalized or never returned to the various ethnic and religious groups in whose hands it was held prior to the war. The level of nationalization depended on the degree of anti-religious fervor in each country. In some states, there was widespread nationalization, while in others the Communist regime tolerated the practice of religion and ownership of property by religious institutions (e.g., Poland). After the fall of the Iron Curtain, all former Communist Eastern European countries passed laws to return communal property to the ethnic and religious communities from whom it had been taken.

The particular difficulty with Jewish communal property is that, in some of the countries (i.e., Poland and Lithuania) where once there had been a thriving Jewish community for nearly a thousand years, following the war there was no longer a Jewish community to speak of, with up to 90 percent having been murdered during the war and the remainder settling elsewhere. Additionally, for the miniscule Jewish community remaining, reconstituted Jewish organizations often were excluded from utilizing restitution laws because they came under different corporate ownership than the pre-war Jewish community, or sought to reclaim communal property that was not strictly "religious" (for example, Jewish schools, hospitals, or community centers operated by secular Jewish groups). These pose additional problems of restitution of communal property after the fall of Communism.

In sum, the Study found that some Eastern European states have substantially complied with the Terezin Declaration for communal property and some have partially complied.

¹⁶ Note, however, that in 2002, the government and the Jewish Community of Macedonia settled all remaining Jewish communal property claims.

Overall, the level of compliance in Eastern Europe is higher for communal property than for private property.

Heirless Property

Heirless property is described in the Terezin Declaration Guidelines and Best Practices for the purpose of restitution as:

property which was confiscated or otherwise taken from the original owners by the Nazis, Fascists and their collaborators and where the former owner died or dies intestate without leaving a spouse or relative entitled to his inheritances. . . . From these properties, special funds may be allocated for the benefit of needy Holocaust (Shoah) survivors from the local community, irrespective of their country of residence. From such funds, down payments should be allocated at once for needy Holocaust (Shoah) survivors. Such funds, among others, may also be allocated for purposes of commemoration of destroyed communities and Holocaust (Shoah) education.

(Terezin Best Practices, para. j.)

Heirless property routinely has received the least legislative attention, because it presents the most challenging problem in the context of the genocide of the Jews committed in Nazi-occupied Europe, where almost the entire Jewish community in certain countries of Europe was wiped out. In such instances, principles of equity make it inappropriate to apply the usual rule that heirless property simply escheats to the state. As Elazar Barkan explains, using the example of Jewish communal property in Czechoslovakia:

By law, since the Hapsburg premodern period, heirless property reverts to the state. Yet since the genocide created heirless property to an unprecedented extent, the community has a strong moral claim for the property of its members who were murdered in the Holocaust. The notion that the state, rather than the community, would be the beneficiary of this property may have been legally correct but was viewed by Jews outside the Czech Republic as morally offensive. The moral justification for restitution has collided with the new realities of privatization. Pragmatically, rapid privatization severely limited possible restitution because much of the potential property for restitution has been transferred to private ownership.¹⁷

There are more than a dozen European countries that have not enacted special heirless property laws. To comply with what the Terezin Declaration outlined, and certain provisions from the 1947 Peace Treaties demanded, for heirless property, would be to break with the established laws of most European countries: where there are no heirs to immovable property, the state becomes the owner of the property (known as escheat). In the special instance of property made heirless as a consequence of the Holocaust, the Terezin Declaration urged that the heirless property be used for the benefit of Holocaust

¹⁷ Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (2000), at 150-151.

survivors most in need. In countries where the overwhelming majority of Jews did not survive the Holocaust, the amount of heirless property is potentially tremendous.

Austria, Belgium, France, Germany, Greece, Hungary, Italy, Macedonia, the Netherlands, Norway, Romania, Serbia, and Slovakia have all technically enacted heirless property legislation. Yet, a list of enacting countries fails to capture whether the country has fulfilled the letter and spirit of the Terezin Declaration. For example, while Romania technically has an heirless property law on its books (Law No. 113/1948 passed in connection with obligations under 1947 Paris Peace Treaty), the law was never meaningfully implemented. In the case of Hungary, the country has taken certain legislative measures with respect to heirless property since 1997, but the Jewish community views these measures as only a “down payment” by the government against the value of all heirless property in Hungary. Conversely, while the Czech Republic does not technically have a special heirless property law – all heirless property, even Jewish property, escheats to the state – the state has acknowledged and acted upon a moral duty to provide care for its survivors, the effect of which is similar to principles underpinning the use of heirless property funds for the benefit of Holocaust survivors (*e.g.*, through the 2001 Czech Endowment Fund for Holocaust Victims).

In general, countries in Western Europe enacted heirless property legislation in the immediate post-war years (*e.g.*, 1955 State Treaty (Austria); the 1947-1949 Allied Restitution Laws (West Germany); Law DLCPS 364/1947 (Italy)). For most Eastern European countries, which fell under Communist rule almost immediately after World War II, heirless property legislation (partial or comprehensive) is a much more recent construct (*e.g.*, Act X of 1997 (on the implementation of provisions included in Article 27, Item No. 2, of Act XVIII of 1947, related to the Peace Treaty of Paris (Hungary); 2016 Law on Elimination of Consequences of Property Confiscation of Heirless Holocaust Victims (Serbia); 2002 Partial Financial Compensation of Holocaust Victims in the SR (Slovakia)). It has also been the case that, following the work of historical commissions of inquiry, some Western European countries have made provisions for heirless property (*e.g.*, Belgium and Norway).

Bosnia-Herzegovina, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Latvia, Lithuania, Luxembourg, Montenegro, Poland, and Slovenia have not enacted heirless property legislation. The majority are Eastern European countries. Of particular note are the Baltic States and Poland, which had the highest percentage of deaths in its Jewish population in all of Europe, and correspondingly, likely the largest percentage of heirless property due to the number of deaths. Two of the countries can also be thought of as excepted from needing to enact heirless property legislation: Denmark (where the heroic efforts of ordinary Danes resulted in few Danish Jews dying during the war or property stolen), and Luxembourg (where its historical commission in 2009 found only a few isolated instances of heirless property).

Finally, Cyprus, Finland, Ireland, Malta, Portugal, Spain, Sweden, Switzerland, and the United Kingdom were not occupied during the war. As a result, no property was confiscated that might have eventually become heirless.

The Study found that, in general, the level of compliance has been lower for heirless property than for any other form of immovable property. A large obstacle is that, under the domestic law of most European countries, both Western and Eastern, heirless property reverts to the state.

Ordinary laws apply to ordinary events. But the Holocaust was an extraordinary event, and it makes little sense to apply ordinary laws to a situation in which so much heirless property suddenly came into existence as a result of the mass murder of millions of people. Principles of equity and justice grounded in ancient Roman law underscore that the application of ordinary heirless property legislation to the situation of Holocaust restitution creates a great injustice. The Terezin Declaration recognized this extraordinary situation by affirming that heirless property should be allocated for the benefit of needy Holocaust survivors, commemoration of destroyed Jewish communities, and Holocaust education rather than simply escheating to the state. Unfortunately, this has not been fully achieved.

Conclusion

The commitments in the Terezin Declaration, made by countries more than 60 years after the fall of Nazism, bring a measure of long-overdue justice to victims and their heirs.¹⁸ Though far from perfect, the widespread adoption of at least some form of restitutionary legal regime in virtually all European countries in the last 70 years, and especially beginning in the 1990s, has resulted in far more property returning to its rightful owner(s) than would have otherwise been the case.

The Study highlighted another, equally important development, that was a historical first in the international community. Countries took steps to provide “some measure of justice” through restitution to a group of victims because they were the specific targets of persecution and extermination. The Study chronicled in detail how these efforts contributed to the creation of a newly emerging norm of restorative justice in customary international law in the post-Holocaust era, which has been supported by more than two decades of substantial state practice. Countries’ acceptance and implementation of the Terezin Declaration principles underscores their willingness to amend existing legislation or pass new legislation specifically in light of Terezin commitments, which can act as a model for the future that states will be expected to commit to and engage in post-atrocity property restitution.

Under this emerging norm, as long as the proceeds of mass theft that accompany a mass atrocity remain in the hands of those not entitled to it, post-Holocaust restorative justice demands that the stolen assets be returned to their rightful owners or heirs. The answer provided by international practice today to the question asked of the Polish Jew in 1939-1943, “Since you are going to die anyway, why should someone else get your boots? Why not give them to me so I will remember you?” is: “The boots do not belong to you. They rightfully belong to me and my own.”

¹⁸ See Michael R. Marrus, *Some Measure of Justice: The Holocaust Era Campaign of the 1990s* (2009).