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Cover image: Birds' Head Haggadah, dating from the fourteenth century. This illuminated Ashkenazi Passover Haggadah is the subject of a restitution claim brought by the Marum family, a family of Holocaust survivors, against the Israel Museum, where it is currently located.

Photo courtesy of Niv Goldberg/Hashava Foundation.

Nazi-Looted Art:

What Israel Can and Should Learn from Germany

Niv Goldberg*

Introduction

When the German Expressionist painting *Siblings* by Erich Heckel was restituted in early 2021 to the heirs of Max Fischer, it was done on the recommendation of Germany's independent Advisory Commission in Relation to the Return of Cultural Property Confiscated as a Result of Nazi Persecution, Especially Jewish Property (the so-called Limbach Commission). Those interested in a similar case in Israel duly took notice. Where formal rules of evidence and other technical rules may interfere with the restitution of Holocaust-looted artefacts to their rightful owners, it may be necessary to establish an independent commission authorised to do justice without the same constraints. An Israeli family, descendants of Ludwig Marum, are now among those leading calls for Israel to form its own independent advisory commission similar to the one in Germany. The cultural property in question in this case is the famous Birds' Head Haggadah, the oldest surviving illuminated Ashkenazi Passover Haggadah, currently on display in the Israel Museum.

The objects in the two cases are radically different: one is a twentieth-century *avant-garde* painting while the other is a fourteenth-century illuminated manuscript. And yet there are a number of similarities between the circumstances in which the objects changed hands that make the case of Heckel's *Siblings* an important precedent for the case of the Birds' Head Haggadah.

The German Case: Heckel's *Siblings*

Max Fischer had inherited *Siblings*, by Erich Heckel, when his widowed mother died in 1926.[1] Fischer was a journalist and foreign correspondent in Berlin who, after the Nazi Party took control in 1933, lost his job and was expelled from the Berlin Press

1 Recommendation of the Advisory Commission in the case of the heirs of *Max Fischer v. the Federal State of Baden-Württemberg*, 2 Feb. 2021, p. 2.

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Siblings
Erich Heckel

Association because of his Jewish identity.[2] There is evidence that Fischer tried but failed to sell the painting through a Berlin gallery in the early 1930s, and it was returned to him at that point.[3] He left for America in November 1935, able to take only very little luggage with him, and leaving his artworks and other property in the care of a friend in Berlin.[4] It is at this point that the story of the painting becomes contentious: at some point between Fischer's departure and 1944, the painting appeared back in the possession of Erich Heckel, the artist.[5] Heckel exhibited the work various times until 1967 when it was acquired, along with other works by Heckel, by the Kunsthalle Karlsruhe.[6]

The central question in the dispute between Fischer's heirs and the German state of Baden-Württemberg that owns the Kunsthalle Karlsruhe was this: was there a legal transfer of ownership between Fischer and Heckel at some point between 1934 and 1944? No relevant documents survived on either side; both Fischer and Heckel are long deceased, and furthermore, no letters or other records remain to suggest that either party ever mentioned the painting and the circumstances surrounding the transfer of its possession.

The Kunsthalle Karlsruhe argued that the most likely scenario is that Fischer sold the painting in a legally-valid transaction to Heckel, and that an appropriate purchase price was paid. They also argued that the fact that the painting was exhibited publicly, including internationally, in the years from 1944 to 1967 and was consistently listed as the property of Erich Heckel, and that the Fischer family made no claims to it during this period, was a tacit admission by the latter that the painting had been legally acquired by Heckel.

Germany's independent Advisory Commission, in its decision published in February 2021, strongly rejected these arguments and recommended that the painting be restituted to Fischer's heirs. They acknowledged that there was no evidence to establish how Heckel came into possession of the painting between 1934 and 1944 but held that that lack of evidence was a burden that should not be borne by the heirs. The Commission did not accept that a legal transfer of ownership was the most likely scenario. Rather, it determined that the burden of proof lay with the museum to positively demonstrate a legal sale rather than on the heirs to refute such a contended sale, and it was a burden that the museum failed to shift. In June 2021, following the Commission's recommendation, the Kunsthalle Karlsruhe restituted the work to Max Fischer's heirs.

The Israeli Case: The Birds' Head Haggadah

The Birds' Head Haggadah belonged to Ludwig Marum, a prominent lawyer and Jewish

2 *Ibid*., p. 1.
3 *Ibid*., p. 3.
4 *Ibid*., p. 2.
5 *Ibid*., p. 3.
6 *Ibid*.

Birds' Head Haggadah and the accompanying plaque in the Israel Museum

parliamentarian in the German Reichstag.[7] It had been a gift from his wife's family on the occasion of their wedding,[8] and was reportedly kept by Marum in his law office.[9] We know this because a lawyer colleague of Marum's, Shimon Jeselsohn, later described having seen it there.[10] Marum was arrested in March 1933, an early victim of Nazi persecution, and was murdered by the SS in Kislau concentration camp in March 1934.[11] His family left their home after his arrest and fled Germany shortly after his death.[12] As with the Heckel painting, the location of the Haggadah is unknown between the time of Marum's murder in 1934 and its reappearance in Jerusalem in 1946 in the possession of a German Jewish refugee, Herman Kahn. Kahn sold it to the Bezalel National Museum, the predecessor of the Israel Museum, for $600,[13] a sum which, even at that time, as the director of the Museum admitted, was far from reflecting its true value.[14] Later on, it was spotted and recognised by Marum's former colleague, Jeselsohn, who had survived the Holocaust and lived in Jerusalem. Jeselsohn reported his discovery to Marum's family who confirmed that they had no knowledge of Kahn or the whereabouts of the manuscript. Kahn himself was confronted by Jeselshon and gave an explanation of how he got the Haggadah, which was later proved to be untrue.[15] It is clear, however, that the museum did not clarify with Kahn the true origin of the Haggadah.

The museum, although never explicitly rejecting the Marum family's claim, has maintained that it is up to Marum's heirs to prove what happened with the Haggadah

7 'Ludwig Marum', German Resistance Memorial Center - Biographie (Gedenkstätte Deutscher Widerstand), accessed 17 April 2021, <https://www.gdw-berlin.de/en/recess/biographies/index_of_persons/biographie/view-bio/ludwig-marum/?no_cache=1>.

8 Bezalel Narkis, *Hebrew Illuminated Manuscripts* [Hebrew] (Keter: Jerusalem 1992), p. 123.

9 M. Spitzer, *The Bird's Head Haggada of the Bezalel National Art Museum in Jerusalem*, L.A. Mayer Library, 1965/1967, p. 10.

10 *Ibid*.

11 German Resistance Memorial Center, above, note 7.

12 David D'Arcy, 'Is the Israel Museum's Birds' Head Haggadah Nazi-Era Loot?', *Art Newspaper*, 6 April 2016.

13 *Ibid*.

14 Spitzer, above, note 9, at p. 10.

15 Daniel Estrin, 'Jewish Family Renews Fight for World's Oldest Illustrated Haggadah', *Times of Israel*, 10 April 2017.

during the years of Nazi persecution, and to show how it ended up with the seller, Kahn. Unsurprisingly, the family was unable to present evidence that the museum considered satisfactory. Unfortunately, in Israel there is currently no viable alternative to the court system in which to raise a claim such as this one in the expectation that a just and fair solution as per the Washington Principles and the Terezín Declaration might be provided.

Israeli Law Unequipped to Deal with Restitution Claims

The case of the Haggadah is of course complex and emotive, involving one of the most important pieces of Judaica extant today. Nevertheless, there is a public interest in ensuring that the victims of Nazi persecution and their heirs do not continue to bear an insurmountable legal burden. This particular case – and its comparison to that of Heckel's *Siblings* in Germany – serves paradigmatically to lay bare the problems in Israeli jurisprudence as it relates to restitution of looted art. Israel's existing legal structures have failed, and new methods must be adopted in order to ensure the provision of justice for survivors and heirs, especially in the Jewish State.

In fact, with one exception that no longer exists in practice, Israel has not adopted any new or special legal mechanisms to deal with the question of Nazi-looted art. In 2006, the Knesset (the Israeli parliament), passed a law creating a government corporation, the Hashava Company,[16] to deal with restitution issues pertaining to property now in Israel that was displaced from its owners during the Nazi era ('hashava' is Hebrew for 'restitution').[17] However, this corporation was dismantled by law in 2017, after only ten years of operation, and before it managed to achieve all of its objectives.[18] During this decade, in which the Hashava Company dealt primarily with real estate and financial instruments, its mandate to deal with Nazi-looted art remained an unanswered question – for which it was criticised in several annual reports released by the State Comptroller.[19] Furthermore, according to information provided pursuant to a Freedom of Information request submitted by the Hashava Foundation,[20] it transpires that during its entire term of operation, the corporation handled only six cases relating to artworks looted during the Holocaust. Five of these were apparently a consequence of a pilot project between the Hashava Company and the Israel Museum in which at least 25 artworks were researched,[21] seemingly for the most part unsuccessfully. While the authority of the Hashava Company to accept and adjudicate claims regarding Nazi-looted property

16 The Company for the Location and Restitution of Holocaust Victims' Assets, Ltd.

17 Holocaust Victims Assets Law (Restitution to Heirs and Endowment for Assistance and Commemoration), 5766-2006 (hereinafter: Restitution Law).

18 The Restitution Law that was originally passed in 2006 stipulated that the corporation would operate for fifteen years, unless its dissolution was decided on at an earlier date. The law was amended in 2014 to change the dissolution date to 31 Dec. 2017.

19 See State Comptroller's Special Report 007-2010 (3 Jan. 2011); State Comptroller's Annual Report 67A (Nov. 2016).

20 The Hashava Foundation (<https://en.hashava.org>). is an Israeli non-profit organisation founded in 2020 to impact policy regarding cultural property in Israel, with a primary focus on systemising and regulating the restitution of cultural property looted by the Nazis. The authors are affiliated with the Hashava Foundation.

21 The Company for the Location and Restitution of Holocaust Victims' Assets' 2012 Annual Work Plan, as submitted to the Knesset Finance Committee on 14 Nov. 2011, at p. 15, available at: <www.knesset.gov.il/committees/heb/material/data/H14-12-2011_11-59-20_tochnit26122011.pdf> last accessed: 2 Sept. 2021.

was, with the corporation's dismantling, transferred to the Administrator General,[22] this merely transferred the existing problematic definitions of the governing law from one framework to another, as will be discussed in the next section.

Furthermore, Israeli courts are, despite expressions of regret by judges, unable or unwilling to incorporate the moral considerations surrounding a fair and just solution expounded on in the Washington Principles and the Terezín Declaration. While these instruments are non-binding, Israel has accepted them, including their provision that signatory nations should "develop national processes to implement these principles"[23] and:

> …ensure that their legal systems […] facilitate just and fair solutions […] based on the facts and merits of the claims….[24]

However, Israel's lack of movement in incorporating these principles is strikingly evident in a 2017 judgment against heirs of Holocaust survivors and victims in their lawsuit seeking restitution for real property that had been previously restituted by Germany to the Claims Conference. In her decision, Judge Avigail Cohen, in relation to the claimant's arguments based on moral justifications, unequivocally stated:

> I am emphasising this issue already at the beginning of this judgment and before I detail the sides' arguments in the pleadings in order to unambiguously illustrate, that in the State of Israel, and according to the laws of the State of Israel, even when the claimants are Holocaust survivors, the Supreme Court does not permit accepting their demands/claims that are not according to the law.[25]

Consequently, practically speaking, no mechanism is left for private claimants to raise their claims regarding Nazi-looted cultural property to be heard on the merits rather than risk being dismissed due to the statute of limitations or other procedural defences, and according to those rules of evidence which may make the rightful restitution of looted art more challenging.

Specific Problems with Israeli Law

Israeli law provides for very limited special accommodations for claims regarding Nazi-looted property in general and Nazi-looted cultural property in particular. In fact, there are no special accommodations as regards such cultural property. Those accommodations, applied generally to all forms of Nazi-looted property, are to be found in the Administrator General Act,[26] the Restitution Law[27] and the Prescription Law.[28] However, while these accommodations do exist, the exceptions they carve out regarding Nazi-looted property are either too limited to be of any substantial value, or are expressed in such a way as to be extremely limiting, and even downright damaging, in their own right.

22 Holocaust Victims Assets Law (Restitution to Heirs and Endowment for Assistance and Commemoration) (Amendment No. 3), 5774-2014, §15, SH. No. 2449, p. 462.
23 Washington Conference Principles on Nazi-Confiscated Art, 3 Dec. 1998, §11.
24 Terezín Declaration, 30 June 2009, Section 'Nazi-Looted and Confiscated Art', §3.
25 C.C. (Tel Aviv-Yafo) 18277-07-13 *Linden Christina v. Conference on Jewish Material Claims Against Germany Inc*. (published *Nevo* 18 May 2017) [author's translation].
26 Administrator General Law, 5738-1978, SH No. 833, p. 61.
27 Restitution Law, above, note 17.
28 Prescription Law, 5718-1958, SH. No. 251 (as amended), p. 112.

Definition of Nazi-Looted Property

The Restitution Law was adopted in 2006 following public anger at having discovered that the management of Nazi-looted property held by the State in trust for heirs through the Administrator General Act and its legislative predecessors, did not afford its proper administration. However, the Restitution Law which was ultimately enacted as a consequence, unfortunately provided a very tight definition of 'Nazi-looted property'. This law, establishing the Hashava Company, defined Nazi-looted property as that property, found in Israel, which belonged to a person whose last known location was in (a defined list of) Nazi or Axis-held territory between 1 September 1939 and 31 December 1945, and who either perished in one of those territories during that period or whose fate is unknown as of that time period.[29] This is an extremely narrow definition of Nazi-looted property, certainly as compared to other countries engaged in restitution.

No country today involved in the restitution of Nazi-looted art, except Israel, requires the original owner to have died or for their whereabouts to be unknown (i.e., presumed to have died), and consequently they also certainly do not limit the eligible period during which time the original owner was required to have died or his whereabouts be unknown. These laws, again excepting Israel, when they refer to an eligible period, refer to such a period as being the time during which cultural property was looted (as opposed to when a victim was killed or his whereabouts disappeared), and these periods are invariably from the rise of the Nazi regime in 1933 in Germany, from the date of German occupation of other countries, and until the end of the war in 1945. This, again, stands in contrast to the eligible period in Israel, which is limited to the period of the Second World War, and does not take into account the seven preceding years of the persecution of Jews under the Nazi regime. In Austria the period during which cultural property was looted by the Nazis and is eligible for restitution is during the time of the German occupation of Austria for property looted in Austria itself, and between 30 January 1933 and 8 May 1945, for property looted in other territories of the former German Reich.[30] In France, no specific dates are mentioned in the restitution legislation, the defining parameter rather being "spoliations of property which have occurred as a result of anti-Semitic legislation taken during the Occupation, both by the occupier than by the Vichy authorities".[31] In Germany, the *Guidelines for implementing the Statement by the Federal Government, the Länder and the national associations of local authorities on the tracing and return of Nazi-confiscated art, especially Jewish property, of December 1999*, refer to "all

29 Restitution Law, above, note 17, at §2.

30 Bundesgesetz über die Rückgabe von Kunstgegenständen und sonstigem beweglichem Kulturgut aus den österreichischen Bundesmuseen und Sammlungen und aus dem sonstigen Bundeseigentum, as amended (Federal Law on the Restitution of Art Objects and Other Movable Cultural Assets from Austrian Federal Museums and Collections and from Other Federal Property, as amended), 2009, §1(1)(2) 1(1)(2a), GP XXIV RV 238 AB 349 p. 40. BR: AB 8187 p. 777. <https://www.provenienzforschung.gv.at/wp-content/uploads/2014/04/Kunstr%C3%BCckgabegesetz_2009.pdf> (English translation: <https://www.provenienzforschung.gv.at/wp-content/uploads/Art-Restitution-Act_2009-.pdf>). Accessed 3 Oct. 2021.

31 Decree n ° 99-778 of 10 Sept. 1999 establishing a commission for the compensation of victims of spoliations occurring as a result of anti-Semitic legislation in force during the Occupation, §1. <https://www.legifrance.gouv.fr/loda/id/LEGITEXT000005628500/>. Accessed 3 Oct. 2021.

cultural property that changed hands between 1933 and 1945",[32] and provides for greater specificity as follows: "Acquisitions or changes of ownership on the territory of the German Reich after 30 January 1933, in Austria after 12 March 1938, in the annexed areas of Czechoslovakia after 1 October 1938, and in countries occupied by German forces after the outbreak of World War II, on 1 September 1939."[33] The guidelines go further and note that consideration must also be given regarding cultural property looted outside of these dates and territories.[34] In the Netherlands, the criteria set out for the restitution commission state that "involuntary expropriation is presumed if it occurred in the Netherlands after 10 May 1940, in Germany after 30 January 1933 or in Austria after 13 March 1938, unless expressly stated otherwise."[35] This criterion is further clarified so that "irrespective of the original owner's status and of where and when expropriation occurred, as long as this was after 30 January 1933, it is presumed to be involuntarily if this is sufficiently plausible – for example, because the original owner needed the proceeds to finance his/her escape from the Nazi regime."[36] The relevant legislation in the United Kingdom refers to spoliation during the Nazi Era, which it defines as "(a) beginning with 1 January 1933 and; (b) ending with 31 December 1945."[37] Even the United States, which does not have a restitution commission, defines the applicable era for when the cultural property was looted by the Nazis as 1 January 1933 to 31 December 1945.[38]

The narrowness of this definition has been recognised by the courts. In a case decided in early 2021, in which survivors and heirs of survivors brought a class-action lawsuit to recover the real value of property that they claimed was restituted at below-market value, the court stated, as one of the rationales for denying the claim, that the Restitution Law was explicitly formulated to benefit the heirs of those murdered in the Holocaust, and explicitly not survivors or their heirs:

> In order for Holocaust survivors, or their heirs, to receive that requested in the motion for certification, specific legislation is required, just as was done for those who perished in the Holocaust, but the legislator has not done this.[39]

Applied to the example case of the Birds' Head Haggadah, the claimants would likely

32 *Guidelines for implementing the Statement by the Federal Government, the Länder and the national associations of local authorities on the tracing and return of Nazi-confiscated art, especially Jewish property, of December 1999*, p. 20 (hereinafter: 'German Guidelines'). <https://www.kulturgutverluste.de/Content/08_Downloads/EN/BasicPrinciples/Guidelines/Guidelines.pdf?__blob=publicationFile&v=8>.

33 *Ibid*., at p. 21.

34 *Ibid*., at pp. 20-21.

35 Decree issued by the Minister for Education, Culture and Science on 15 April 2021, no. WJZ/27740278, establishing an Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War and laying down the assessment framework to be used by that committee (Decree establishing a Restitutions Committee), Appendix: Assessment Framework for the Restitutions Committee, §3.1. <https://www.restitutiecommissie.nl/en/system/files/Decree-RC-per22April2021.pdf>. Accessed 3 Oct. 2021.

36 *Ibid*., §3.3.

37 Holocaust (Return of Cultural Objects) Act 2009, §3(3). <www.legislation.gov.uk/ukpga/2009/16/section/3>. Accessed 3 Oct. 2021.

38 Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Public Law 114-318, §4(3).

39 Cls. Act. (Tel Aviv-Yafo) 50936-04-15 *Wolpe v. Bank Leumi LeIsrael Ltd* (published *Nevo*, 11 Feb. 2021).

not be able to file a successful claim with the Hashava Company (or the Administrator General, in its stead), due to this very narrow definition. Ludwig Marum's murder by the Nazis was indisputably related to the fact that he was Jewish, but did not occur between September 1939 and November 1945, and his wife survived the war. The fact that the Haggadah was stolen from her home, probably around the time that she and her children were forced to flee for their lives shortly after Ludwig was murdered, is of no consequence to the hard text of the Israeli Restitution Law.

Statute of Limitations

While there are a number of legislated exceptions to the general civil statute of limitations that is found in Israel's Prescription Law (seven years for all non-land related issues, fifteen years for land),[40] none of these exceptions relates explicitly to Nazi-looted property, and they all provide shorter periods than would otherwise apply.[41] A proposed bill to replace the Prescription Law that was formulated in 2004,[42] primarily by substantially reducing the limitation period to four years, included a carve-out for all claims originating in circumstances related to the Holocaust, which would have retained the pre-existing seven-year term for such claims. While this would have given Holocaust-related claims an advantage over other non-Holocaust lawsuits, it would not have actually created better terms for plaintiffs bringing such claims, but rather would not have caused them further injury. Regardless, this proposed bill was never brought to vote, and has since been abandoned. A proposed Civil Codex, formulated to reform and standardise the whole of civil law in Israel, contains a similar provision. This draft bill, too, has languished since 2011, and it does not appear likely that it will be brought to a vote in the foreseeable future. The current law defines the period of limitation as beginning on the day that the cause of action accrued.[43] However, article 8 of the Prescription Law qualifies this, such that if the plaintiff can demonstrate that the facts constituting the cause of action were unknown to him and he could not have, even by exercising reasonable care, gained knowledge of them, then the beginning of the period will be the day on which such facts became known to him.

A particular difficulty with this, however, is that Israeli courts have applied the requirement for the plaintiff to exercise reasonable care quite strictly, and a claim that an heir was unaware that an artwork was to be found in a particular museum, for instance, is unlikely to gain much traction. Finally, while the statute of limitations in Israeli civil law is understood as a procedural rule, rather than a substantive one, thus affording the possibility that a defendant would choose to refrain from claiming it as a defence, this leaves the decision to the defendant's goodwill towards the claimant. Indeed, the Israel Museum, for instance, has in the past publicly stated that "there must not be a statute of limitations on the restitution of looted art",[44] thus implying that it would not resort to such a defence. However, this declaration of intent to allow a hearing on its substantive merits has not yet been tried in an actual claim in court.

40 Prescription Law, above, note 28, at §5.

41 Those exceptions include two years for privacy infractions, three years for defective products and two years for torts against the State or its agents for damages caused by the IDF in Judea, Samaria and Gaza. Each of these was legislated separately and explicitly carved out the exceptional limitation period.

42 Prescription Bill, 2004, Government Bill no. 611.

43 Prescription Law, above, note 28, at §6.

44 Protocol, Museums' Council Meeting No. 13/2014, §3.

Market Overt

Israeli law provides for a Market Overt defence against claims of ill-gotten property.[45] There is no explicit exception provided against this defence in cases of Nazi-looted property. It is possible to interpret clauses of both the Administrator General Law and the Restitution Law as taking precedence over the Sale Law's Market Overt clause. For instance, during the time that the Hashava Company was in existence, the Restitution Law required a person who held property that he knew or suspected to have been looted by the Nazis, to notify the Company.[46] Following such notification, if the Hashava Company found that the property had in fact been looted by the Nazis, it was to enact proceedings which would, within 60 days, transfer the property to the ownership of the Company.[47] However, if the current possessor contested the factual basis for this claim, he could appeal to the Company, as well as to the courts.[48]

Thus, it would appear, *prima facie*, that a factually-supported claim demonstrating that the property had been looted by the Nazis – with the proviso that it fell within the problematic definition of Nazi-looted art as discussed above – would take precedence over a claim of sale under Market Overt. It should be noted that the sunset provisions regarding the termination of the Hashava Company's existence do provide for the Administrator General to step into the Hashava Company's shoes as regards the activities described in this section;[49] however, the property in question would then be treated as 'abandoned property', which allows for a less intensive search for the property owners and for a much shorter waiting period for the property in question to devolve to the State. This is significant because there is (relatively speaking) a fairly large quantity of Nazi-looted cultural property held in public museums and other institutions in Israel,[50] and if the Administrator General were to apply the law as written to these cultural assets, it might have far-reaching consequences for their management and ultimate disposition. Regardless, no such cases have come before a court during the lifetime of the Hashava Corporation, or since its dissolution.

Lack of Case Law

As noted above, there is a dearth of case law in this field in Israel. Not a single case dealing with the restitution of Nazi-looted cultural property has found its way to the courts. Of the few cases of Nazi-looted property in general that have been tried, these have been either largely irrelevant to the questions that arise in the cases of cultural property, or have negatively impacted entire claimant populations, either by wholesale rejection of the idea that special circumstances require special rules, such as occurred in the class-

45 In the case of chattels: Sale Law, 5728-1968, §34, SH No. 529 (as amended), p. 98.
46 Restitution Law, above, note 17, at §9.
47 *Ibid.*, §10(a) §10(c) §10(d).
48 *Ibid.*, §10(b).
49 *Ibid.*, §67i(c).
50 Mostly, but certainly not exclusively, at the Israel Museum, which holds some 1,400 works of art and pieces of Judaica looted by the Nazis and received through the Jewish Restitution Successor Organization (JRSO). Other public institutions holding Nazi-looted art of currently unknown provenance are the Tel-Aviv Museum of Art, Ein Harod Museum of Art, Hechal Shlomo Museum of Jewish Art, Hecht Museum at the University of Haifa, Yad Vashem, Ghetto Fighter's House, Chamber of the Holocaust, and various synagogues that received items of Judaica from the Ministry of Religious Affairs as part of the dispersal of looted cultural property by JRSO.

action suit described above, and are likely to leave a devastating impact on the ability of an entire class of claimants to pursue claims for restitution of Nazi-looted property. Given this situation, claimants are likely to be seriously inhibited from pursuing their claims before the Israeli courts. Given the narrow definition of 'Nazi-looted property' in Israeli law, the lack of a tested reply to the Market Overt defence, and potential statute-of-limitations defences, this lack of case law creates both an environment of severe uncertainty and a chilling effect regarding such potential claims, and as for now, no alternative course outside of the courts.

An Independent Advisory Commission – A Solution?

The role that an independent advisory commission might have in such an environment, as brought to bear in the example of the Birds' Head Haggadah, is clear. In Germany, the independent Advisory Commission's work is informed by guidelines, as noted above, which establish a presumption that the loss of an object (within a specified timeframe and circumstances), particularly from Jewish owners, was the result of Nazi persecution.[51] It is a presumption that can be rebutted, but only with proof of a sale made willingly and at a reasonable purchase price. Thus, the burden of proof is reversed. Significantly, in the case of the Haggadah, a similar rule would presume that any change of hands of the Haggadah, by sale or otherwise, following on the heels of Ludwig Marum's persecution and then murder was the result of Nazi persecution (unless rebutted by proof of a willing sale at a reasonable price). While Germany's Advisory Commission has the power to issue a recommendation, rather than a legal ruling, it nevertheless provides a powerful moral imperative in cases like these. To date, its recommendations have not been rejected. It is useful to note in this regard that the parallel body in the Netherlands, the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War (in brief: the Restitutions Committee), can provide a binding opinion,[52] that becomes irreversible if not challenged in court within two months.[53]

Thus, frameworks to deal with the lacunae found in hard law have already been constituted in other countries. These are not perfect, and each has its own disadvantages, such as the issuance of non-binding opinions (UK and Germany), the necessity that both parties, in case of a non-State defendant, agree to the forum (UK, the Netherlands, Germany), or jurisdiction only over State cultural institutions (Austria). Nevertheless, these commission models provide a significant step forward in dealing with and providing just and fair solutions to claims of Nazi-looted cultural property, which would otherwise often be dismissed on procedural grounds rather than being adjudicated based on the substantive merits of each case. Given the unfortunate state of the law in Israel today, and the historical legal developments which it has been able to view from aside, it would seem that the most expedient way for Israel today to properly deal with claims of Nazi-looted cultural property would be to establish its own Restitution Commission. Furthermore, this would be in line with the principles adopted in Washington and Prague,

51 German Guidelines, above, note 32, pp. 33-34. The presumption in the guidelines is derived directly from Art. 3 of Berlin Allied Kommandatura Order No. BK/0 (49) 180 of 26 July 1949.

52 Regulations for opinion procedure under Art. 2(2) and Art. 4(2) of the Decree Establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War, §2(2).

53 *Ibid*., §18(2).

which encourage "particularly… alternative dispute resolution mechanisms for resolving ownership disputes",[54] and that:

> governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property, in order to achieve just and fair solutions, as well as alternative dispute resolution, where appropriate under law.[55]

Learning from the successes and failures of its fellow States in Europe, it would seem that pursuing such a solution of binding soft-law decisions made by specially trained experts in Nazi-looted provenance and the law, on a Commission with broad representation from a variety of representative stakeholders, might finally put Israel in a position to equitably deal with its own Nazi-looted art problem.

Israel's Ministry of Justice, in conjunction with the Ministry for Social Equality, has recently convened an inter-office working group, under the primary direction of the Administrator General, to investigate and start to deal with the question of the provenance of Nazi-looted cultural property in Israel. It is to be hoped that this working group will understand the need for a Restitution Commission that will on the one hand take the decision-making regarding looted art claims out of the hands of the institutions that currently hold the said artworks and Judaica, and on the other hand will provide a framework consistent with the Washington Principles and the Terezín Declaration, which is not today the case in Israeli jurisprudence.

Conclusion

Following the closure of the Hashava Company, a group of attorneys practising in the field of restitution and cultural property law and with personal family histories relating to the Holocaust, decided that the lacunae in Israeli law pertaining to the restitution of Nazi-looted cultural property cannot stand. Thus, they established the Hashava Foundation, with the goal of promoting a comprehensive framework of legislation and regulation for the administration of cultural property in Israel. Among other measures, the Foundation aims to ensure that Israel's laws are in accord with international treaties and declarations, including those to which Israel is a party, with an emphasis on those that promote the transparent, regulated and supervised administration of museums and other institutions, auction houses and other actors in the field. Within this context, the Hashava Foundation's primary focus is on regulating the mechanisms for identifying and locating artwork and Judaica looted from their owners during the Nazi period, and promoting restitution to their heirs – without taking direct involvement in specific restitution claims. It is in this framework that the Hashava Foundation believes that an independent Restitution Commission will serve as an important mechanism to provide those just and fair solutions to restitution claims for Nazi-looted art in Israel, much of which has found its way into the country's public collections.

A commission empowered to advise – or even give binding decisions – on claims involving cultural objects confiscated as a result of Nazi persecution could introduce a new and fairer approach to resolving these types of disputes. This is all the more

54 Washington Principles, above, note 23, §11.
55 Terezín Declaration, above, note 24, Section 'Nazi-Looted and Confiscated Art', §3.

important when one considers that formal judicial rules of evidence and procedure often prevent the restitution of looted artefacts to their rightful owners. A just and fair solution – as asserted by the Washington Principles of 1998 and the Terezín Declaration of 2009, both accepted but as yet not applied by Israel – may require reliance on moral guidelines that are outside of the legal scope that a court may consider. Ultimately, public interest can be served only if justice can be done.