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The Biggest (Stolen) House on the (Eastern) Bloc: Lessons from the Terezin Declaration to Poland for Enacting Holocaust Property Restitution Legislation

KRISTEN L. NELSON*

I. INTRODUCTION

Nearly seventy-five years after World War II, much of the property stolen or lost as a result of the war still remains in the hands of the undeserving. Immense looting of property during the war went hand in hand with the genocide of Jews and other targeted groups—the Roma people, political dissidents, and Jehovah’s witnesses, among others. These groups were deprived of their homes, businesses, and places of worship. While European governments issued declarations and other legal pronouncements both during and after the war condemning the acts of theft—and committing themselves to return what was stolen—justice for this large-scale thievery still has not been achieved.

Poland stands apart from its neighbors as the only country in the European Union not to have enacted a comprehensive legal regime for the restitution of immovable (real) property.¹ Most rightful owners or heirs of Jewish-owned homes and businesses from pre-war Poland have yet to receive restitution or compensation. This fact reflects the particular

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1. “Restitution” in this article encompasses both restitution and compensation of immovable property. The two terms are used interchangeably to describe both the return of actual property stolen and compensation. There are many other forms of reparations not covered by this article, including commemoration, education, establishing national mechanisms for monitoring, conflict resolution and preventative interventions, and combating impunity. “Immovable property” in this article is used interchangeably with the term “real property.” In the context of Holocaust era property restitution, immovable property most commonly refers to homes, apartments (to which tenants often had a perpetual usufruct (i.e., long-term lease)), businesses, schools, places of worship, and buildings owned by a religious community.

impunity of those who still inhabit the homes and benefit from the illicitly-procured businesses of the Jewish people and other targeted groups who were almost completely erased from Poland during the war.

Poland was home to 3.3 million Jews in 1939, the largest Jewish population in Europe. It is estimated that the occupying German forces killed at least 3 million Jewish and 1.9 million non-Jewish Poles. Close to ninety percent of Poland's Jewish population was murdered during the war. Surviving Polish Jews and other targeted groups had a ten-year window to reclaim their looted property before it escheated to the state. Whatever property was returned pursuant to 1940s legislation was soon subject to a second wave of widespread confiscations: nationalization laws passed by the Communist regime confiscated property from all Poles—regardless of race, religion or ethnicity.

Since the fall of Communism in Poland in 1989, multiple restitution bills have been proposed, but none were enacted. At the time of this writing in mid-2018,² a new bill has been proposed and remains under review by the Polish Ministry of Justice.³ However, the bill is rife with the missteps of previous draft legislation that limited both the amount of compensation and those that were entitled to it. More specifically, the proposed bill would limit restitution to only those current Polish citizens who were also Polish citizens on the date of the confiscation.⁴ It would also exclude all persons who were eligible to file claims—irrespective of whether they ever did—under the more than a dozen postwar bilateral settlement agreements Poland signed with a number of other countries.⁵

2. This article is based on the presentation the author gave at *The Confiscation of Property in Poland and Efforts at Restitution* conference in Warsaw Poland in June 2017. The author appeared on the panel titled “Can Poland Learn from its Neighbors?”

3. See Ustawa o zrekompensowaniu niektórych krzywd wyrządzonych osobom fizycznym wskutek przejęcia nieruchomości lub zabytków ruchomych przez władze komunistyczne po 1944 [Law to Compensate for Some of the Harm Done to Individuals as a Result of Taking Over Real Estate or Movable Monuments by the Communist Authorities after 1944] (*draft*, Oct. 20, 2017) (Pol.). The draft bill was introduced in October 2017 and could have gone into effect in early 2018. As of February 2018, the law is under further review by the Ministry of Justice. See Tamara Zieve, *Polish Government Revisiting Restitution Draft Legislation*, THE JERUSALEM POST (Feb. 14, 2018), <https://www.jpost.com/Diaspora/Polish-government-revisiting-restitution-draft-legislation-542633>. In the intervening months, Poland's efforts have been focused on the successful passage of legislation making it a crime to blame the Polish nation for the Holocaust. As observed in *The New York Times*, the “government says its goal is to defend the nation from slander, but scholars say the result is to stifle inquiry and reconciliation.” Isabel Kershner & Joanna Berendt, *Poland and Israel in Tense Talks Over Law Likened to Holocaust Denial*, N.Y. TIMES (Mar. 1, 2018), <https://www.nytimes.com/2018/03/01/world/europe/poland-israel-holocaust.html>.

4. See Ustawa o zrekompensowaniu niektórych krzywd wyrządzonych osobom fizycznym wskutek przejęcia nieruchomości lub zabytków ruchomych przez władze komunistyczne po 1944, *supra* note 3, at § 3.7.

5. *Id.* § 3.17.

Finally, it would reduce the circle of inheritance (i.e., those eligible to benefit under the law), utilize a short time-frame for making a formal claim, provide for compensation only (no *in rem* restitution), and cap compensation at twenty to twenty-five percent of the value of the property.⁶ Such carve-outs ensure that the law only obliges the state to make paltry payments to a small group of successful claimants.

Being the last in line to enact restitution legislation opens Poland up to criticism from the international community.⁷ However, it provides Poland with an opportunity to benefit from the experiences of other countries that have already enacted restitution legislation. It also presents Poland with an occasion to consider international commitments and best practices that have emerged since World War II for the proper return of property confiscated during the war and to apply these international law norms to its yet-to-be enacted law.⁸

This article will focus on two main sources of soft-law “rubrics” for restitution—to demonstrate how the current incarnation of proposed “compensation only” legislation in Poland, or any future iteration of such incomplete legislation, can be improved. The ultimate goal is to provide a measure of justice for those whose property has been lost in Poland for more than a generation, in the same way that the Holocaust restitution movement that began in the 1990s provided a measure of justice to some Jewish and non-Jewish victims and heirs for their property losses stemming from the war in Switzerland, Germany, Austria, France, Belgium, the Netherlands, the United States, and even Israel.⁹

6. See *World Jewish Restitution Organization ‘Profoundly Disappointed’ at Proposed Polish Property Legislation that would Exclude Vast Majority of Holocaust Survivors and Their Families*, WORLD JEWISH RESTITUTION ORG. (Oct. 23, 2017), <https://wjro.org.il/world-jewish-restitution-organization-profoundly-disappointed-proposed-polish-property-legislation-exclude-vast-majority-holocaust-survivors-families/>.

7. See, e.g., Stuart Ain, *Pushback on Proposed Polish Restitution Bill*, THE JEWISH WEEK (Oct. 24, 2017), <http://jewishweek.timesofisrael.com/pushback-on-proposed-polish-restitution-bill/>; Hagay Hacohen, *Polish Jews Protest Legislation Blocking Their Right to Claim Family Lands*, THE JERUSALEM POST (Oct. 21, 2017), <http://www.jpost.com/Diaspora/World-Jewish-Restitution-Organization-urges-Poland-to-change-tracks-508002>; *Boris Johnson Urged to Intervene Over Holocaust Restitution Law*, THE JEWISH CHRONICLE (Oct. 22, 2017), <https://www.thejc.com/news/uk-news/boris-johnson-urged-to-intervene-over-holocaust-restitution-law-1.446422>.

8. This article primarily focuses on real property that was taken during World War II.

9. See MICHAEL R. MARRUS, *SOME MEASURE OF JUSTICE: THE HOLOCAUST ERA CAMPAIGN OF THE 1990S* (2009); see also STUART EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* (2003); MICHAEL J. BAZYLER, *HOLOCAUST, GENOCIDE, AND THE LAW: A QUEST FOR JUSTICE IN A POST-HOLOCAUST WORLD* (2016) [hereinafter *HOLOCAUST, GENOCIDE, AND THE LAW: A QUEST FOR JUSTICE IN A POST-HOLOCAUST WORLD*]; MICHAEL J. BAZYLER, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS* (2003); Michael J. Bazylar & Roger P. Alford, eds.,

Section II begins with an overview of how we arrived at the present day. This includes covering the immediate efforts of the post-war years (i.e., the 1940s and 1950s) as well as the international commitments and best practices that were developed concurrently with renewed interest in Holocaust-era property theft and restitution in the late 1990s and 2000s.

In Section III, particular attention will be paid to a second wave of restitution efforts that culminated in the soft-law Terezin Declaration in 2009¹⁰ and its companion Guidelines and Best Practices in 2010¹¹, which were endorsed by nearly four-dozen nations. Poland agreed to the former but declined to sign on to the latter. These two documents set out a pragmatic “to-do” list for restitution legislation with items that are both reasonably achievable and necessary to realize a desired “measure of justice.”

Section IV then examines restitution efforts—through the lens of the Terezin Declaration and Guidelines and Best Practices—from two of Poland’s geographic neighbors: Hungary and Serbia. While Hungary and Serbia each have their own unique historical narrative and their restitution laws are not perfect, Poland can still learn from their experiences. Hungary passed its restitution legislation shortly after regaining full independence in the early 1990s, while Serbia passed its restitution law in 2011. Serbia’s more recent passage of legislation addressing private and heirless property restitution is proof positive that it is never too late to do justice.

Section V of the article concludes with suggestions to improve upon Poland’s proposed restitution bill. Poland can do better—and with its endorsement of the Terezin Declaration, Poland committed to doing better.

HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY (2006). *See also* LEORA BILSKY, *THE HOLOCAUST, CORPORATIONS AND THE LAW: UNFINISHED BUSINESS* (2017), for a discussion of litigation against the Swiss banks and settlement distribution.

10. HOLOCAUST ERA ASSETS CONFERENCE, *TEREZIN DECLARATION* (2009) [hereinafter *TEREZIN DECLARATION*].

11. *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 SECOND WORLD WAR* (2010) [hereinafter *GUIDELINES AND BEST PRACTICES*].

II. OVERVIEW OF HOLOCAUST IMMOVABLE PROPERTY RESTITUTION

A. *Intra-War and Post-War Pronouncements*

Constantin Goschler and Philipp Ther vividly capture how the wave of Nazi property confiscation washed over Europe during World War II:

The Nazis extended their attack on Jewish property in a series of steps, initially to Austria following the so-called *Anschluss*, then to the border regions of Czechoslovakia, and finally to all those regions that directly or indirectly came under German sway during World War II. When the Jews of the occupied territories were expropriated, their possessions were either brought back to the German Reich or they fell into the possession of the local states and the non-Jewish population there. Whereas the radicalization of persecution from expropriation to destruction spanned a number of years within the Reich, in the occupied territories this development was compressed into a much shorter time. In many places the looting of Jewish property took place only in the wake of their murder, but was nonetheless closely linked to it.¹²

At the same time as the continent was being mercilessly looted, Europe and other Allies prepared a framework for property restitution in anticipation of German defeat. In 1943, seventeen governments—including Poland—endorsed the London Declaration,¹³ whereby each government reserved the right to declare invalid property transfers made during the war. Governments-in-exile in London during the war, including Belgium, France, Luxembourg, the Netherlands, Norway, and Poland, also issued decrees and other legal pronouncements annulling German laws that confiscated property.¹⁴

Armistice agreements ending the war, signed between the Allied powers and defeated Axis states such as Romania, included requirements that the defeated country would “repeal all discriminatory legislation and restrictions imposed thereunder,” which was particularly relevant for post-war restitution because the Antonescu regime had confiscated

12. Constantin Goschler and Philipp Ther, *A History without Boundaries: The Robbery and Restitution of Jewish Property in Europe*, in *ROBBERY AND RESTITUTION: THE CONFLICT OVER JEWISH PROPERTY IN EUROPE* (Martin Dean et al., eds. 2008) 3, 4; see also GÖTZ ALY, *HITLER’S BENEFICIARIES: PLUNDER, RACIAL WAR, AND THE NAZI WELFARE STATE* (2006).

13. Inter-Allied Declaration Against Acts of Dispossession Committed in Territories under Enemy Occupation and Control, issued Jan. 5, 1943, available at <http://www.lootedartcommission.com/inter-allied-declaration>.

14. See *id.* at 1.

Jewish urban and rural real estate in Romania through a series of racially discriminatory laws.¹⁵

The Paris Peace Treaties between the Allied powers and the other defeated Axis states, which followed the armistice agreements that had initially stopped the fighting between military forces—including Bulgaria, Finland, Hungary, and Italy—were also specific in terms of property restitution requirements. The Treaty of Peace with Hungary, for example, required property taken from the United Nations and their nationals,¹⁶ to be returned to the owner; if the property could not be returned, the Hungarian government would then be obliged to pay the owner two-thirds compensation. In addition, property confiscated “on account of the racial origin or religion of such persons” was to be restored or, when that was not possible, “fair compensation” was required.¹⁷

Jewish leaders in the United States and Mandate Palestine were also concerned with the return of property and “[i]n 1944, the World Jewish Congress called for ‘uniform laws’ [on restitution] to be enacted ‘in all territories formerly occupied, annexed, dominated, or influenced by Axis powers.’”¹⁸

A solid foundation was therefore laid for large-scale restitution in the post-war years. However, the effectiveness of the execution of these restitution regimes varied by region. Global and national Cold War politics were often the decisive factors in whether, and how, restitution would take place.

B. Laws and Remedies of the Immediate Post-War Period (1940s and 1950s)

The first of two main periods of property restitution took place in the immediate post-war years. Allied efforts to recover and return assets stolen by the Nazis and their cohorts drove this period of restitution.¹⁹ Throughout formerly Nazi-occupied Western Europe, a raft of restitution

15. Armistice Agreement with Rumania, art. 6, Sept. 12, 1944, E.A.S. No. 490, 145 B.S.P. 506; *see also* STEFAN IONESCU, JEWISH RESISTANCE TO ‘ROMANIZATION’, 1940-44 (2015) 34-65.

16. This was not the United Nations international organization as we know it today, but the nearly two-dozen countries that banded together to form the Allied forces during the war under the “United Nations” name.

17. Treaty of Peace with Hungary, arts. 26-27, Feb. 10, 1947, 61 Stat. 2065, 41 U.N.T.S. 135 (entered into force Sept. 15, 1947).

18. MICHAEL MENG, SHATTERED SPACES 29 (2011).

19. *See* HOLOCAUST, GENOCIDE, AND THE LAW: A QUEST FOR JUSTICE IN A POST-HOLOCAUST WORLD, *supra* note 9, at 155-59.

measures was enacted. Yet, the amount compensated or returned was rarely of equivalent value to what had been taken.²⁰

Most countries in Eastern Europe also passed their first restitution legislation in the immediate post-war years. In fact, as described above, many were compelled to do so by the terms of their respective armistice agreements or treaties of peace.²¹ However, the restitution process in Eastern Europe came to a grinding halt with the onset of Soviet-style Communism. The new Soviet-dominated people's republics nationalized property, this time targeting private property of *all* persons and not just particular groups. With few exceptions, private property owners were not compensated for property nationalized by the Communist authorities.

C. Renewed Scrutiny of Restitution in the 1990s and Early 2000s

The second period of Holocaust era property restitution was ushered in during the 1990s. After the fall of the Berlin Wall and the Soviet Union, the new post-Communist regimes of Eastern Europe resumed the process that had been halted more than fifty years earlier. But the half-century delay meant that these countries had to play catch-up with their Western European neighbors who, for the most part, had completed restitution of immovable Nazi-confiscated property by the 1950s and 60s.

With Eastern Europe opening up for the first time in fifty years, the next twenty years became a period of renewed vigor for World War II property restitution efforts. Eastern European countries enacted large-scale restitution programs (often, but not always, addressing Holocaust and Communist-era takings together).²² Western European countries reflected on the achievements and failures of earlier restitution efforts in the immediate post-war era.

Conference after conference took place where lingering issues of unrestituted Nazi-looted movable property such as gold and art, unpaid insurance policies, and other looted property issues (uncompensated

20. SAUL FRIEDLANDER, *NAZI GERMANY AND THE JEWS 1939–1945: THE YEARS OF EXTERMINATION* 541 (2007).

21. *See, e.g.*, Armistice Agreement with Bulgaria, art. 5, Oct. 28, 1944, E.A.S. 437, 123 U.N.T.S. 223 (requiring Bulgaria to cancel all discriminatory legislation).

22. *See* EUROPEAN SHOAH LEGACY INST., EXECUTIVE SUMMARY: IMMOVABLE PROPERTY RESTITUTION STUDY, available at <http://shoahlegacy.org/property-issues/immovable-property/immovable-property-study-map> [hereinafter EXECUTIVE SUMMARY: IMMOVABLE PROPERTY RESTITUTION STUDY]. A full print version of the ESLI Immovable Property Restitution Study (with the exception of the full text of the government responses to questionnaires that were completed as part of the Study) will be published in the forthcoming book: MICHAEL J. BAZYLER, KATHRYN LEE BOYD, KRISTEN L. NELSON, RAJIKA L. SHAH, *SEARCHING FOR JUSTICE AFTER THE HOLOCAUST: FULFILLING THE TEREZIN DECLARATION AND IMMOVABLE PROPERTY RESTITUTION* (forthcoming December 2018) [hereinafter *SEARCHING FOR JUSTICE AFTER THE HOLOCAUST*].

slave labor) were discussed. But these international gatherings led to few enforceable and effective legal standards, and even fewer tools that victims and heirs could use to get back their property. As an example, the 1998 Washington Conference focused on looted art and cultural objects and resulted in the issuance of the so-called Washington Principles.²³ The principles, however, were soft-law and thus failed to create legally-binding norms.²⁴

III. BENCHMARK GUIDANCE FOR HOLOCAUST IMMOVABLE PROPERTY RESTITUTION

A. *The Terezin Declaration*

Despite the fervor and renewed interest that marked the late 1990s and early 2000s for Holocaust-era *movable* property, it was not until 2009 that the focus of the international community settled on Holocaust-era *immovable* (real) property restitution.

The leader was the Czech Republic. In June 2009, the Czech Republic held the rotating six-month Presidency of the Council of the European Union and decided to host the Prague Holocaust Era Assets conference (“Prague Conference”).²⁵ Delegates from nearly four-dozen countries attended, along with members from international and national non-profit organizations and other international observers. Delegates came from as far away as Australia and Uruguay. This showed that interest in the return of Holocaust era assets was a universal concern and did not stop at the doorstep of Europe. One of the main objectives of the Prague Conference was “[t]o assess the progress made since the 1998 Washington Conference on Holocaust-Era Assets in the areas of the recovery of looted art and objects of cultural, historical and religious value . . . and in the areas of real property restitution and financial compensation schemes.”²⁶

On the last day of the Prague Conference, the delegates traveled to the site of the former Theresienstadt concentration camp in Terezin,

23. The Washington Principles, The Washington Conference on Holocaust Era Assets, Washington, D.C., Dec. 3, 1998, *available at* <https://www.state.gov/p/eur/rt/hlcst/270431.htm>.

24. *See, e.g., Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 808 (N.D. Ohio 2006) (holding that the 1999 American Association of Museums’ Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era, which are consistent with the Washington Principles, “were not intended to create legal obligations or mandatory rules” (internal citations omitted)).

25. HOLOCAUST ERA ASSETS – CONFERENCE PROCEEDINGS (Jiří Schneider et al., eds., 2009) (emphasis added).

26. *Id.* at 13 (emphasis added).

Czech Republic. It was there that forty-six countries issued the Terezin Declaration.²⁷ In doing so, these countries agreed to continue and enhance their efforts to right the economic wrongs that accompanied the genocide of European Jews and other targeted groups during the Holocaust. By highlighting the importance of respecting property rights as an essential element of the rule of law, the Terezin Declaration articulated a number of concrete benchmarks for enacting restitution legislation for immovable property:

[The endorsing countries] [c]onsider it important, where it has not yet been effectively achieved, to address the private property claims of Holocaust (Shoah) victims concerning immovable (real) property of former owners, heirs or successors, by either *in rem* restitution or compensation, as may be appropriate, in a fair, comprehensive and nondiscriminatory manner consistent with relevant national law and regulations, as well as international agreements. The process of such restitution or compensation should be expeditious, simple, accessible, transparent, and neither burdensome nor costly to the individual claimant²⁸

At virtually the same time the Terezin Declaration was endorsed in June 2009, a Czech-European Union Joint Declaration was also issued addressing the importance of *some* issues being discussed at the Prague Conference. While the EU's backing of the Conference was unequivocally a net positive, the narrow scope of the support would, in years to come, leave immovable property restitution without a champion. The Joint Declaration proclaimed: "Taking the Terezin Declaration into consideration, the European Commission and the Czech EU–Presidency declare their readiness to make every effort and create a more effective European approach by supporting goals dealing primarily with education and social welfare . . . ,"²⁹ Noticeably absent was support for immovable (real) property restitution measures.³⁰

The Terezin Declaration also recommended the establishment of the European Shoah Legacy Institute, an NGO that would "facilitate an intergovernmental effort to develop non-binding guidelines and best practices for restitution and compensation of wrongfully seized immovable property"³¹ Within a year, this recommendation would be fulfilled.

27. Serbia attended the 2009 Prague Conference on Holocaust Era Assets as an observer, and later became the 47th country to endorse the Terezin Declaration.

28. TEREZIN DECLARATION, *supra* note 10.

29. HOLOCAUST ERA ASSETS CONFERENCE, CZECH-EU JOINT DECLARATION (2009).

30. *Id.*

31. TEREZIN DECLARATION, *supra* note 10.

B. The European Shoah Legacy Institute and the Guidelines and Best Practices

Consistent with the recommendations of the Terezin Declaration, the European Shoah Legacy Institute (“ESLI”) was established in Prague in 2010.³² Its mission was to follow up on the work of the Prague Conference³³ and “serve as a voluntary forum for countries, organizations representing Holocaust (Shoah) survivors and other Nazi victims, and NGOs to note and promote developments in the areas covered by the Conference and th[e] [Terezin] Declaration.”³⁴ ESLI was specifically tasked with developing non-binding guidelines and best practices for restitution and compensation of confiscated property, which would be prepared with “due regard for relevant national laws and regulations as well as international agreements, and noting other positive legislation in this area.”³⁵

In one of its first acts of business, ESLI in 2010 oversaw the issuance of the Guidelines and Best Practices for the Restitution and Compensation of Immovable (Real) Property. While the Terezin Declaration addressed multiple topics relating to post-Holocaust justice,³⁶ the Guidelines and Best Practices *exclusively* addressed the restitution and compensation of private, communal and heirless immovable property.³⁷ Of the now forty-seven Terezin Declaration countries, only four countries elected not to endorse the Guidelines and Best Practices, one of which was Poland.³⁸

The self-proclaimed aim of the Guidelines and Best Practices was to bring “a measure of justice” to victims of Nazi persecution.³⁹ Countries were encouraged to consider the Guidelines and Best Practices as they develop national property restitution regimes.⁴⁰ The Guidelines and Best Practices reaffirm the principles from the Terezin Declaration and articulate additional criteria for private property restitution, including:

32. EUROPEAN SHOAH LEGACY INSTITUTE (ESLI), <http://shoahlegacy.org/storage/app/media/1.2/1.2.1%20ESLI%20Summary%20of%20Activities.pdf> (last visited May 2, 2018).

33. See TEREZIN DECLARATION, *supra* note 10 at 7.

34. *Id.* at 7.

35. *Id.* at 3.

36. See *id.* Other areas addressed by the Terezin Declaration included Jewish Cemeteries and Burial Sites, Nazi-confiscated and Looted Art, Judaica and Cultural Property, Archival Materials, and Education, Remembrance, Research and Memorial Sites.

37. See GUIDELINES AND BEST PRACTICES, *supra* note 11.

38. The other three countries that failed to endorse the Guidelines and Best Practices were Belarus, Moldova, and Russia.

39. GUIDELINES AND BEST PRACTICES, *supra* note 11.

40. *Id.*

- restitution and compensation laws apply to immovable property that was owned by private individuals or legal persons, and then subject to confiscation or other wrongful takings during the Holocaust (Shoah) Era between 1933-1945 and its immediate consequence;⁴¹
- restitution and compensation processes should recognize the lawful owner or holder of other legal property right as listed in property files as of the last date before the commencement of persecution against them;⁴²
- develop solutions to overcome citizenship and residency requirements;⁴³
- free access to archives;⁴⁴
- “decisions [on restitution claims] should be prompt and include a clear explanation of the ruling”;⁴⁵
- restitution “should result in clear title”;⁴⁶
- restitution *in rem* is preferred, and, when not possible, substitute property of equal value must be given or payment made of “genuinely fair and adequate compensation”;⁴⁷ and,
- while privatization programs should not compromise the rights of claimants, they should provide protections for current good faith occupants of restituted property.⁴⁸

While the Guidelines and Best Practices of 2010 were more thorough and particular than the Terezin Declaration, they were still less rigorous than the Expert Conclusions on Immovable Property⁴⁹ that were issued at the time of the Prague Conference in 2009. The Working Group on Immovable Property prepared the Expert Conclusions. Their conclusions and recommendations covered more ground than the Guidelines and Best Practices ever would. From the outset, the Expert Conclusions operated from a point of recognition that property was not restored to owners in Central and Eastern Europe after the war.⁵⁰ Instead,

41. *Id.* ¶ a.

42. *Id.* ¶ c.

43. *Id.* ¶ d.

44. *Id.* ¶ e.

45. *Id.* ¶ f.

46. *Id.* ¶ g. Moreover, the Guidelines and Best Practices urged that where “genuinely fair” compensation was paid to the claimant in lieu of restitution *in rem*, the current property holders’ rights should be assured, *id.*

47. *Id.* ¶ h.

48. *Id.* ¶ i.

49. HOLOCAUST ERA ASSETS CONFERENCE, EXPERT CONCLUSIONS: IMMOVABLE PROPERTY 17-18 (2009).

50. *Id.* at 17.

it was typically nationalized while the countries were under Communist control, the effect of which is that more than seventy years have passed since the property was initially taken and sixty years since it was taken for a second time.

The Expert Conclusions focused on overcoming the obstacle of the passage of time. The following recommendations never made it into the Guidelines and Best Practices:

- that “applications should be processed by special tribunals” and not the courts;⁵¹
- that “relaxed standards of proof should apply”;⁵²
- that compensation should be paid promptly, “*especially for elderly claimants*”;⁵³
- that claimants should have a method of appeal to an independent authority;⁵⁴ and
- that, consistent with national legislation, “states should modify privacy protection laws” that interfere with access to vital statistic and property ownership records.⁵⁵

Many of the recommendations contained in the Expert Conclusions were not new concepts in the field of restitution and reparations, but were key features of landmark Holocaust-era restitution programs of the late 1990s. The most notable example is that of the Swiss Banks Settlement.⁵⁶ In 1998, in exchange for release from all future liability arising out of Nazi-era claims and deposits, the Swiss banks⁵⁷—who had been sued in a class action suit in the United States for non-return of movable assets such as cash deposits—paid out USD 1.25 billion. The settlement amount went into a fund distributed to hundreds of thousands of claimants. The

51. *Id.*

52. *Id.*

53. *Id.* at 18 (emphasis added).

54. *Id.*

55. *Id.*

56. For more information on the settlement relating to Swiss bank deposits see, for example, *In re Holocaust Victim Assets Litig.*, 424 F.3d 132 (2d Cir. 2005) and *Holocaust Victims Asset Litigation*, SWISS BANKS, <http://swissbankclaims.com> (last updated Jan. 12, 2018). For more information on the settlement relating to insurance proceeds, see *The ICHEIC Claims Process*, INT’L COMM’N ON HOLOCAUST ERA INS. CLAIMS, <https://icheic.ushmm.org> (last visited Apr. 2, 2018).

57. The lawsuit had been filed against Credit Suisse, United Bank of Switzerland (“UBS”), and the Swiss Bank Corporation (which later merged with UBS). However, the settlement released not only those particular named entities from future litigation, but also nearly all Swiss business and government entities. See *About Us – Swiss Banks Settlement*, THE CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GER., <http://www.claimscon.org/about/history/closed-programs/swiss-banks-settlement/> (last visited Apr. 2, 2018) for an overview of the lawsuit and the settlement.

manner and distribution of the fund closely tracked many of the recommendations that appeared in the Expert Conclusions, such as lowering the standards of proof and taking the claims process out of the court system. Yet these pragmatic, but perhaps more lofty recommendations, were not included in the 2010 Guidelines and Best Practices, demonstrating that while critically important to the restitution discussion, the contents of the Guidelines were far less rigorous than they could otherwise have been.

It is also important to remember that the principles in the Terezin Declaration and its Guidelines and Best Practices are not only applicable to the plight of European Jews or a particular group of people. These same bedrock principles of restitution *in rem* and a fair and transparent process are also enshrined in non-Holocaust related modern international law documents, such as the U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law,⁵⁸ the U.N. Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles),⁵⁹ and the Universal Declaration of Human Rights, in particular Article 8's right to an effective remedy.⁶⁰

Ultimately, the Terezin Declaration, the Guidelines and Best Practices, and these other basic principles merely provide a “restitution roadmap.” And, like any other roadmap, navigating successfully will depend on whether it is used, and if so, how effectively.

C. The Mission Outlives the Organization

The Terezin Declaration had in 2010 what no other set of Holocaust-era restitution principles had managed to secure—a monitoring and advocacy organization. ESLI spent from 2010 to 2017 promoting activities, reports, conferences and studies⁶¹ to further its mission in the

58. G.A. Res. 60/147, annex, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law by the Commission on Human Rights (Dec. 16, 2005). Restitution efforts made in the aftermath of World War II were prominently examined as part of the preparatory work on the Basic Principles.

59. CTR. ON HOUS. RIGHTS & EVICTIONS, THE PINHEIRO PRINCIPLES: UNITED NATIONS PRINCIPLES ON HOUSING AND PROPERTY RESTITUTION FOR REFUGEES AND DISPLACED PERSONS (2006).

60. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

61. As part of its monitoring and advocacy mission, in 2014 ESLI commissioned an Immovable Property Restitution Study. See EXECUTIVE SUMMARY: IMMOVABLE PROPERTY RESTITUTION STUDY, *supra* note 22. Completed in January 2017, the Study was the first-ever comprehensive compilation of significant legislation passed by the forty-seven endorsing states since 1945, dealing with the return or compensation of land and businesses confiscated or otherwise

areas of art provenance research, social welfare, education, and restitution of immovable property. During its seven-year existence, ESLI looked for partners at the European, intergovernmental, transnational and local levels, but unfortunately never gained the needed financial support from stakeholders (from Terezin-endorsing countries or from the European Union) to become the champion for the resolution of lingering post-Holocaust issues it could have been.⁶² Despite there being forty-seven Terezin Declaration-endorsing nations, only three—the Czech Republic, the United States and Israel—provided continued financial support. When these countries declined to continue funding ESLI, and no other state or entity came in, ESLI ultimately closed its doors.⁶³

The organization's closing announcement in August 2017 stated that, while "ESLI may [have] exhausted its potential, the goals of the Terezin Declaration are still alive!"⁶⁴ However, the open question is, *who* will take up the cause? *Who* will provide the necessary non-governmental assistance "not[ing] and promot[ing] developments" in the area of restitution?⁶⁵ The narrow scope of the Czech-EU Joint Declaration from 2009 now looms as a dark specter over ESLI's legacy.

The natural champion of lingering pan-European restitution issues is the European Union. But the issue of restitution was excluded from the Czech-EU Joint Declaration, which was signed at virtually the same time as the Terezin Declaration. The European Union has yet to pick up where ESLI left off.

In a strange turn of events, the United States government will now be the country to retake the lead on the monitoring of European Holocaust era restitution efforts. In May 2018, President Donald Trump signed the JUST Act (Justice for Uncompensated Survivors Today) into law. The

misappropriated during the Holocaust era. This applied both to states where the Holocaust took place and states to which the proceeds of such misappropriated land and businesses had been moved. No such resource, in print or online, in any language, was available elsewhere. The Study was composed of forty-seven individual country reports, *id*. The success of a restitution process varied from country to country, depending largely on how each state addressed the considerations included in the Terezin Declaration and its Guidelines and Best Practices. In this way, the experiences of some countries documented in this Study are beneficial to others still considering the passage of restitution legislation, like Poland.

62. See *Handout on the Conclusion of Activities of ESLI and What May Come Further*, EUROPEAN SHOAH LEGACY INST. (Aug. 22, 2017), <http://shoahlegacy.org> [hereinafter *Handout on the Conclusion of Activities of ESLI and What May Come Further*].

63. SEARCHING FOR JUSTICE AFTER THE HOLOCAUST, *supra* note 22.

64. *Handout on the Conclusion of Activities of ESLI and What May Come Further*, *supra* note 62.

65. TEREZIN DECLARATION, *supra* note 10, at 7.

JUST Act will require the U.S. government to report on the progress of restitution of Holocaust era property in Europe.⁶⁶

With or without an umbrella organization, the mission continues. The Terezin Declaration and its Guidelines and Best Practices continue to exist and provide a detailed and workable roadmap for redress for an untold number of Holocaust survivors and their heirs whose restitution of immovable property has, to date, remained out of reach.

IV. POST-1990 HOLOCAUST PROPERTY RESTITUTION FOR POLAND'S NEIGHBORS

In the more than twenty-five years since the Iron Curtain came down, there have been dozens of immovable property restitution and denationalization measures enacted in Eastern European countries that are now part of the European Union. In some countries the measures happened almost immediately after the Communist regimes were ousted. For others, restitution measures were enacted only recently.⁶⁷ For some countries, restitution was limited to citizens,⁶⁸ while in other countries restitution of Holocaust-era property was excluded.⁶⁹ In some states, only compensation was paid (no restitution *in rem* was possible),⁷⁰ and for a few, a catch-all fund was created to provide some—if only symbolic—

66. Justice for Uncompensated Survivors Today (JUST) Act of 2017, Pub. L. No. 115-171 (2018). The text of the law requires the Secretary of State to issue one comprehensive report to Congress eighteen months after the law is enacted, which is to address restitution topics, including restitution or compensation of private, communal and heirless property in Terezin Declaration countries. Thereafter, the Secretary of State will only report to Congress on Holocaust era assets and related issues “in a manner that is consistent with the manner in which the Department of State reported on such matters before the date of the enactment of the Act.” *Id.*

67. *See, e.g.*, Law on Property Restitution and Compensation, No. 72/2011 (Serb.).

68. *See, e.g.*, Act No. 87/1991 (amended by Act. No. 116/1994) (Slovk.) (The law actually had both a citizenship and a residency requirement).

69. *See, e.g.*, Act on Restitution of Property Taken During Yugoslav Communist Rule, Law No. 92/96 (Croat.).

70. *See, e.g.*, 1991. évi XXV. a tulajdonviszonyok rendezése érdekében, az állam által az állampolgárok tulajdonában igazságtalanul okozott károk részleges kárpótlásáról (Act XXV of 1991 on the Partial Compensation Damages Wrongfully Caused by the State to the Property of Citizens, for the Purpose of the Settlement of Ownership Relations) (Hung.) [hereinafter Act XXV of 1991]; 1992. évi XXIV. a tulajdonviszonyok rendezése érdekében, az állam által az állampolgárok tulajdonában igazságtalanul okozott károk részleges kárpótlásáról (Act XXIV of 1992 on the Partial Compensation of Damages Wrongfully Caused by the State to the Property of Citizens by Application of Legal Regulations Adopted between May 1, 1939 and June 8, 1949, for the Purpose of the Settlement of Ownership Relations) (Hung.) [hereinafter Act XXV of 1992].

compensation for those persons who had been ineligible for restitution due to certain restrictions.⁷¹

From this restitution history, it is obvious that there is no one-size-fits-all restitution law. Each Eastern European country had a different formulation with different inclusions and exclusions for restitution or compensation. Unfortunately, what can be gleaned by looking at the broader picture, and the more detailed explanations of Hungarian and Serbian efforts that follow, is that Poland collected the weakest restitution practices from its Eastern European neighbors and combined them into its most recent draft restitution bill, issued in October 2017.

A. Hungary

1. Restitution Measures

Beginning in 1930, and for most of World War II, Hungary was Nazi Germany's ally. However, Hungary's discriminatory legislation against its Jewish population began a decade earlier in 1920.⁷² By the end of the war, death and murder had decreased Hungary's pre-war Jewish population of 800,000 by more than seventy-five percent.⁷³

Before the war had even formally ended, the Allied powers began to lay a path for restitution of looted property. A provision of the 1945 Armistice Agreement between Hungary and the Allied powers required that "[t]he Government of Hungary undertake[] to restore all legal rights and interests of the United Nations and their nationals on Hungarian territory as they existed before the war and also to return their property in complete good order."⁷⁴

The international community's mandate for property restitution continued two years later with the 1947 Treaty of Peace with Hungary, which required restoration of immovable property confiscated "on account of the racial origin or religion of such persons" and, where such "restoration" (restitution *in rem*) was impossible, payment of "fair compensation."⁷⁵

In the years immediately following the war, Hungary passed a number of laws to give effect to their agreements concerning the

71. ENDOWMENT FUND FOR HOLOCAUST VICTIMS: ANNUAL REPORT (2001), http://www.fondholocaust.cz/sites/default/files/vyrocní-zpravy/nfoh_vz_2001_web.pdf.

72. AGNES PERESZTEGI, RESTITUTION OR RENATIONALIZATION: THE HERZOG AND HATVANY CASES IN HUNGARY 2 (2008).

73. See EUROPEAN SHOAH LEGACY INST., *Hungary Report*, in ESLI IMMOVABLE PROPERTY RESTITUTION STUDY (2017) [hereinafter *Hungary Report*].

74. Armistice Agreement with Hungary, art. 13, Jan 20, 1945, 456 E.A.S., 140 U.N.T.S. 397.

75. Treaty of Peace with Hungary, *supra* note 17, arts. 26, 27.

restitution of property under both the Armistice Agreement and the Treaty of Peace.⁷⁶ However, as with the rest of Eastern Europe, the early post-war restitution measures had a limited shelf life. The onset of Communism cast a long shadow over Eastern Europe, and property in the People's Republic of Hungary was soon subject to a new wave of confiscation under the Communist authorities. This time it was not just Jews whose property was stolen under Communist nationalization laws, it was everyone's property.⁷⁷

Following the end of Communist rule, and within a couple of years of Hungary holding its first free election, the country enacted restitution legislation. Unlike other Eastern European neighbors, where restitution was addressed through a bundle of legislation (such as Latvia or Bulgaria), Hungary's regime for private immovable property chiefly consisted of two laws. The first was Act XXV of 1991, which addressed compensation for the taking of private property after June 8, 1949 (i.e., Communist expropriations).⁷⁸ The second law, passed the next year, Act XXIV of 1992, expanded the temporal scope for compensation to property taken as far back as May 1, 1939 (i.e., Nazi and Holocaust-era takings).⁷⁹

While the restitution laws from 1991 and 1992 were broad in scope and applied to all types of private property,⁸⁰ whether taken lawfully or unlawfully, a litany of other limitations folded into the legislation resulted

76. See e.g., 300/1946. (Decree of Prime Minister No. 300/1946 on Settling Movable Property Lost by virtue of Regulations Containing Discriminatory Provisions against Jews) (Hung.); 12.530/1946. (Decree of Prime Minister No. 12.530/1946 on Deleting Proprietary Rights of Certain Immovable Properties Registered for the Benefit of the State Treasury) (Hung.); 6400/1947. (Decree of Prime Minister No. 6400/1947 on Farm Equipment Lost by Virtue of Regulations Containing Discriminatory Provisions against Jews) (Hung.); 5280/1947. (Decree of Prime Minister No. 5280/1947 on the Restrictions on Returning Cold Stores and Poultry Processing Plants Lost by Virtue of Regulations Containing Discriminatory Provisions against Jews or of Leftist Behavior) (Hung.) 13.160/1947. § 4(2) (Government Decree No. 13.160/1947. § 4(2) on Deleting Proprietary Rights of Certain Immovable Properties Registered for the Benefit of the State Treasury) (Hung.). This legislation was provided by the government of Hungary as part of the information gathered for ESLI's Immovable Property Restitution Study. See EUROPEAN SHOAH LEGACY INST., HUNGARY GOVERNMENT RESPONSE TO ESLI'S RESTITUTION DATABASE INITIATIVE QUESTIONNAIRE 7 (2017).

77. It is worth mentioning, however, that while property was nationalized in Hungary during the Communist period, it was on a scale perhaps smaller than what was experienced in other Eastern European countries. Many people in Hungary managed to keep their real estate, small businesses, and artwork. See *Hungary Report*, *supra* note 73, at 8 n.5.

78. See Act XXV of 1991, *supra* note 70.

79. See Act XXIV of 1992, *supra* note 70.

80. See *Hungary Report*, *supra* note 73, at 8.

in the efforts being little more than symbolic compensation.⁸¹ First, no *in rem* restitution was offered, only compensation. Second, the amount of compensation was limited to USD 21,000 (HUF 5,000,000) and was issued on a sliding scale depending on the value of property in issue.⁸² The scope of who was eligible was also limited and required some combination of Hungarian citizenship, deprivation of Hungarian citizenship, or permanent resident status as of December 31, 1990.⁸³

2. Evaluation of Efforts

Given the background and facts, there are a number of potential improvements on restitution measures in general that can be taken away from Hungary's experience. Criticism of the laws has focused on problems such as: narrow definitions of Hungarian *citizenship* and *heirship*, no *in rem* restitution, difficulty in obtaining necessary documentation, poor international notification, and lengthy claims processes, all of which compromised the efficacy of restitution.⁸⁴ The approved compensation scheme became, in practice, no more than a symbolic compensation measure.

However, it is crucial not to lose sight of the fact that Hungary's restitution measures were taken more than twenty-five years ago. Criticism with the benefit of hindsight is perhaps unfair. To its credit, Hungary was one of the very first Eastern European countries to establish a restitution regime just as it was emerging from the throes of Communist rule. Hungary should also be acknowledged for enacting legislation that explicitly covered both World War II and Communist-era takings, which was one of the benchmarks that would eventually be set out in the Terezin Declaration in 2009.⁸⁵ Many other countries' restitution laws of the time

81. The Constitutional Court of Hungary reviewed the two restitution laws in 1993 in connection with the country's commitments under Article 27(1) of the Treaty of Peace with Hungary. Under the Treaty, there was a duty to provide "fair compensation" when restoration (*in rem* restitution) was impossible. The Constitutional Court determined that light of the scope of restitution provided by the 1991 and 1992 laws, and the then-current economic situation of the country, the partial compensation provided was "fair" and in compliance with the Treaty. *See* Alkotmánybíróság (AB) [Constitutional Court], Mar. 9, 1993, 1543/B/1991 (Hung.); *see also* Alkotmánybíróság (AB) [Constitutional Court], Sep. 3, 1993, 1378/E/1990 (Hung.); *Hungary Report, supra* note 73, at 10.

82. *See Hungary Report, supra* note 73, at 8.

83. *See id.* (referring to Section 2(1) of Act XXIV of 1992).

84. WORLD JEWISH RESTITUTION ORG., IMMOVABLE PROPERTY REVIEW CONFERENCE OF THE EUROPEAN SHOAH LEGACY INSTITUTE: STATUS REPORT ON RESTITUTION AND COMPENSATION EFFORTS 10-12 (Nov. 2012).

85. TEREZIN DECLARATION, *supra* note 10.

excluded Holocaust-era takings.⁸⁶ If Hungary had the benefit of reviewing more than twenty-five years of restitution experiences of other countries and also had a rubric like the Terezin Declaration and the Guidelines and Best Practices, its restitution laws may have very looked different.

B. Serbia

1. Restitution Measures

During World War II, Serbia was part of Yugoslavia.⁸⁷ During the war, more than eighty-five percent of Serbia's 35,000 Jews were murdered by the Nazis or their Axis cohorts.⁸⁸ In contrast to the previous example of Hungary, which was an occupier during the war, Yugoslavia, like Poland, was occupied by Nazi Germany. Most of modern-day Serbia was under Nazi military occupation, while other portions were occupied by Hungary and Bulgaria.⁸⁹ During the military occupation in August 1943, the German occupier—through Decree No. 3313—authorized the seizure, without compensation, of all Jewish property.⁹⁰

After World War II and the liberation of Belgrade, Josip Broz Tito formed the Federal People's Republic of Yugoslavia ("FRPY") and Serbia became one of the FRPY's six constituent republics.⁹¹ In the years immediately following the war, Yugoslavia passed a property restitution bill and a number of amendments to it.⁹² The law promisingly provided for restitution *in rem*, and in certain cases when actual restitution would not be made, compensation was to be paid. However, the law only applied

86. See, e.g., Act on Restitution of Property Taken During Yugoslav Communist Rule, Law No. 92/96 (Croat.); Law on Denationalization, No. 43/2000 (Maced.).

87. At that time Yugoslavia included present-day Serbia, Bosnia-Herzegovina, Croatia, Kosovo, Macedonia, Montenegro and Slovenia.

88. See EUROPEAN SHOAH LEGACY INST., *Serbia Report*, in ESLI IMMOVABLE PROPERTY RESTITUTION STUDY (2017) [hereinafter *Serbia Report*] at 1.

89. See *Axis Invasion of Yugoslavia*, U.S. HOLOCAUST MEM'L MUSEUM: HOLOCAUST ENCYCLOPEDIA, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005456> (last visited Apr. 2, 2018).

90. See ALEKSANDAR NEČAK & LUBICA DAIČ, *RESTITUTION IN SERBIA, A NEVER-ENDING STORY* 3 (2009).

91. See *Serbia Report*, *supra* note 88, at 3.

92. See Law on Handling Property Abandoned by its Owner during the Occupation and Property Seized by the Occupier and his Collaborators, No. 36/45 (Yugoslavia); see also Law on Confirmation and Changes to the Law on Handling Property Abandoned by its Owners during the Occupation and Property Seized by the Occupier and his Collaborators, No. 64/46 (amended by Nos. 105/46, 88/47 & 99/48) (Yugoslavia); see also *Serbia Report*, *supra* note 88, at 7.

to citizens of Yugoslavia and restitution was denied to those Yugoslavians living outside the country who refused to return.⁹³

As with Hungary, whatever property was returned as a result of these early post-war measures was subject to confiscation again between the 1940s and late 1960s by Yugoslavia's Communist regime. More than forty nationalization laws were enacted in the country, which for the most part applied to all citizens regardless of race or religion.⁹⁴ Moreover, a number of Jews were charged with collaboration after the war in order to facilitate seizure of their property by the state.⁹⁵

Serbia came into its current form following a referendum whereby Montenegro, which was previously part of Serbia (known then as Serbia and Montenegro), voted for independence in 2006.⁹⁶

While privatization of property began in the early 1990s in Serbia, it was not until the middle 2000s that denationalization legislation began to take shape. In 2005, Serbia passed a law whose sole purpose was not to return property, but merely to collect information about the value of nationalized property in Serbia.⁹⁷ Based upon the information collected, the value of nationalized property was estimated to be EUR 102-220 billion.⁹⁸

In 2011, Serbia passed Law No. 72/2011 on Property Restitution and Compensation.⁹⁹ Notwithstanding the actual text of the law, which states in Article 1 that the law only applies to property confiscated after March 9, 1945, the Serbian government has stated that "Article 1, Paragraph 2, of this Law, states that the law shall apply also on the restitution of the confiscated property as a consequence of the Holocaust on the territories forming an integral part of the territory of the Republic of Serbia today, *without stipulation of any date (year) limitation*

93. See Nehemiah Robinson, *War Damage Compensation and Restitution in Foreign Countries*, 16 LAW & CONTEMP. PROBS. 364, 347-376, (1951).

94. See *Serbia Report*, *supra* note 88, at 8.

95. See *id.* at 8 n.3.

96. This was subsequent to the conflicts in the Balkans during the 1990s and the fall of Serbia's controversial leader Slobodan Milošević in 2000.

97. See Law on Reporting and Recording of Nationalized Property, No. 45/2005 (Serb.); see also EUROPEAN PARLIAMENT DIRECTORATE-GENERAL FOR INTERNAL POLICIES, PRIVATE PROPERTIES ISSUES FOLLOWING THE CHANGE OF POLITICAL REGIME IN FORMER SOCIALIST OF COMMUNIST COUNTRIES 123 (2010).

98. EUROPEAN PARLIAMENT DIRECTORATE-GENERAL FOR INTERNAL POLICIES, *supra* note 97, at 119. This figure was based on the number of timely-submitted applications, *id.*

99. Law on Property Restitution and Compensation, No. 72/2011 (Serb.).

(*deadline*).¹⁰⁰ The law applies to both Serbian and foreign citizens.¹⁰¹ It also states that *in rem* restitution is prioritized over compensation (but there are nearly two dozen exceptions to this enumerated priority).¹⁰² When *in rem* restitution is not possible, successful claimants are to receive up to EUR 500,000 per property, an amount that ultimately may be reduced because the total amount of compensation paid out under the law cannot exceed EUR 2 billion.¹⁰³

The law established a specific Agency for Restitution, which was tasked with managing the claim and restitution/compensation processes.¹⁰⁴ The Agency was required to determine claims within a specific period of time and claimants had an opportunity to appeal the Agency's decision to a competent government ministry.¹⁰⁵ Claims were accepted for a two-year period that ended in 2014.¹⁰⁶ Roughly 76,000 claims were filed.¹⁰⁷

2. Evaluation of Efforts

Serbia is the only country to enact comprehensive immovable property restitution legislation¹⁰⁸ after endorsing the Terezin Declaration in 2009. While the law may have been long overdue (it was enacted more than twenty years after other restitution laws in Eastern European countries), there are numerous positive achievements in the legislation because it incorporated many of the restitution benchmarks set out in the Terezin Declaration and the Guidelines in Best Practices. The law did not discriminate between citizens and foreigner claimants.¹⁰⁹ The law (at least in theory) prioritized *in rem* restitution.¹¹⁰ Compensation was meant to be “genuinely fair”, since up to EUR 500,000 could be paid per property¹¹¹—significantly higher than Hungary's USD 21,000 cap and sliding scale. A

100. EUROPEAN SHOAH LEGACY INST., GREEN PAPER ON THE IMMOVABLE PROPERTY REVIEW CONFERENCE 2012 89 (2012) (emphasis added).

101. See No. 72/2011, art. 5 (Serb.). Foreign citizens are eligible claimants under the law so long as they are from a country that recognizes the right of Serbian citizens to inherit property in that country, *id.*

102. See *id.* arts. 8, 18.

103. See *id.* arts. 8, 31.

104. See *id.* arts. 51, 55; see also *Agency for Restitution*, REPUBLIC OF SERB., <http://www.restitucija.gov.rs/eng/index.php> (last visited Apr. 2, 2018).

105. See No. 72/2011, arts. 46, 48.

106. See *id.* art. 42.

107. EUROPEAN SHOAH LEGACY INST., GOVERNMENT OF THE REPUBLIC OF SERBIA RESPONSE TO ESLI IMMOVABLE PROPERTY QUESTIONNAIRE (2015).

108. See No. 72/2011.

109. GUIDELINES AND BEST PRACTICES, *supra* note 11, ¶ d.

110. *Id.* ¶ h.

111. *Id.* ¶ g.

reasonable two-year application period was provided, and the law established a separate agency to marshal the claims process.¹¹² As of 2017, according to the Agency, the restitution *in rem* process was nearing completion.

All this is not to say the law was without critics. As noted above, a vast array of property was specifically excluded from return, including: property used by every level of government or by foreign government officials; property used for health care, educational, cultural or scientific purposes; and property already sold in the privatization process or held by state-owned enterprises; as well as “other cases determined by the law.”¹¹³

The next phase will be to determine compensation amounts for those whose properties cannot be returned, and this requires adopting a coefficient by which to divide the earmarked EUR 2 billion among successful claimants.¹¹⁴ There will almost assuredly be debate over whether the EUR 2 billion is actually enough to provide “genuinely fair” compensation to successful claimants whose properties could not be restituted *in rem*.

As described above, what makes Serbia particularly significant for the purposes of this article is that the country enacted a law that included many Terezin Declaration and Guidelines and Best Practices benchmarks.

Moreover, Serbia’s honoring of its Terezin Declaration commitments has garnered a wealth of goodwill from the international community, whose support and assistance in restitution efforts should not be discounted. A reflection of this support is contained in a statement from 2015, endorsed by six countries’ special envoys for Holocaust Issues and Anti-Semitism, congratulating Serbia on “tak[ing] important initial steps towards meeting its commitments under the Terezin Declaration and Guidelines and Best Practices through the passage of . . . the Law on Property Restitution and Compensation (2011).”¹¹⁵

Of course, the proverbial book has not yet been closed on Serbia’s restitution regime. The language of the law is only one ingredient in the success of the overall restitution process. How the law is applied in

112. See No. 72/2011, art. 31; see also GUIDELINES AND BEST PRACTICES, *supra* note 11, ¶ d.

113. See No. 72/2011, art. 18.

114. See, e.g., Filip Rudic, *Serbia’s Plan for Post-WWII Restitution ‘Flawed’*, BALKAN INVESTIGATIVE REPORTING NETWORK (BIRN) (Aug. 15, 2017), <http://www.balkaninsight.com/en/article/serbia-s-plans-for-post-ww2-restitution-wrong-ngo-says-08-14-2017>.

115. EUROPEAN SHOAH LEGACY INST., STATEMENT OF THE SPECIAL ENVOYS FOR HOLOCAUST ISSUES AND ANTI-SEMITISM ON HOLOCAUST RESTITUTION IN THE REPUBLIC OF SERBIA (May 11, 2015).

practice to all of the restitution claims will, in the future, provide the final assessment of the overall restitution picture for Serbia. Yet the message to Poland is, “*Pay attention.*” Serbia’s example shows that there is no such thing as being too late for a measure of justice in the context of restitution.

V. WHERE DOES POLAND GO FROM HERE?

The foregoing sections on the Terezin Declaration and restitution efforts of Poland’s two neighbors Hungary and Serbia contain dozens of examples of measures that should, and in some cases should not, be a part of a country’s Holocaust restitution regime. Whether intentionally or not, Poland’s draft restitution law (described in the Introduction of this article) collapses the weakest elements of the restitution regimes of its neighbors into a single law, all while taking no notice of its Terezin Declaration commitments, to say nothing about its side-stepping of any guidance from the Guidelines and Best Practices or the Expert Conclusions.

If future Polish restitution legislation could incorporate even just the following five pieces of advice from the Terezin Declaration and the experiences of its neighbors, the resulting law would provide significantly more meaningful redress for Poland’s Holocaust victims, survivors and heirs:

1. *Specifically address—and do not exclude—claims by Holocaust victims and their families.*¹¹⁶ To address claims of Holocaust victims, the law must not exclude Holocaust-era property claims. Exclusion occurs when, for example, the temporal scope of the law begins *after* World War II. This was the case in Hungary with its 1991 Restitution Law, but it was rectified by its 1992 Restitution Law, which included Holocaust-era looted property. To avoid future confusion, debate and litigation, Poland’s restitution legislation should be explicit in its coverage of both Holocaust-era and Communist-era takings.
2. *Address private property claims in a non-discriminatory manner.*¹¹⁷ This provision of the Terezin Declaration speaks to restitution measures applying fairly to all claimants. The current proposal of the restitution law in Poland limits the circle of inheritance to spouses, children and grandchildren. While the

116. See TEREZIN DECLARATION, *supra* note 10.

117. See *id.*

limitation would apply to both families of Holocaust victims and families who did not experience losses during the Holocaust, it will have the effect of disproportionately limiting the restitution/compensation for property belonging to Holocaust victims since ninety percent of the Jewish community in Poland died during the Holocaust. Non-linear relatives (e.g., aunts, uncles, etc.) may thus be the only surviving relatives to owners of Jewish property. Poland's restitution legislation should reflect this historical fact and expand the circle of inheritance.

3. *Do not exclude claimants based on citizenship.*¹¹⁸ By following the Guidelines and Best Practices to develop solutions to overcome citizenship and residency requirements in connection with restitution, Serbia's restitution law applied to citizens and non-citizens alike. For many, if not most, Polish survivors of the Holocaust, Poland is not where they currently live, which means that they may not have citizenship and certainly would not be able to meet any residency requirement. Poland's restitution law should apply to Poles in both Poland and the diaspora.
4. *Prefer restitution in rem to compensation.*¹¹⁹ Serbia's restitution law prioritizes restitution *in rem* over compensation. This is in line with the Guidelines and Best Practices, which describe restitution *in rem* as the "preferred outcome."¹²⁰ Poland's proposed restitution law does not provide for any restitution *in rem*, and caps compensation at twenty to twenty-five percent of the value of the property. This fractional compensation also brings into question whether it would meet the Guidelines and Best Practices criteria that when restitution *in rem* cannot be made, an "acceptable solution[] may include . . . paying genuinely fair and adequate compensation."¹²¹ Poland's law should include restitution *in rem*—where feasible—and ensure that any compensation paid is fair and adequate.

118. See GUIDELINES AND BEST PRACTICES, *supra* note 11, ¶ d.

119. See *id.* ¶ h.

120. *Id.*

121. *Id.*

5. *Provide a reasonable filing deadline.*¹²² Serbia's restitution law provided a two-year window in which to file property claims. This gave international organizations and foreign embassies whose countries have large Serbian constituent populations time to provide international notices about the claims process, as well as time for claimants to complete applications.¹²³ The shorter one-year filing window contained in Poland's proposed restitution bill would not offer sufficient time for international notification prior to the deadline. This would realistically bar would-be claimants living abroad (to the extent they were not already excluded based upon any citizenship requirement). Poland's restitution law should include, at a minimum, a two-year filing deadline so as to give individuals living abroad fair opportunity to file a claim.

VI. CONCLUSION

No comprehensive restitution law has been enacted in Poland, which means there is still opportunity for improvement of the current draft legislation. In the end, any remedy for property confiscation—however limited it may be—is better than no remedy at all. However, we are not yet at that end point for Poland, where we are left to rationalize the virtues of an imperfect law.

More unrestituted Jewish real property is located in Poland today than in any other country after World War II. By heeding its restitution commitments from the Terezin Declaration and the lessons learned from neighbors, Poland can still provide a measure of justice for those who have watched others benefit from their Polish property for more than a generation.

122. Though not explicitly contained within the Terezin Declaration or its Guidelines or Best Practices, this recommendation would likely fit within the “non-discriminatory” language contained in both. A short filing window would certainly work to discriminate against foreign applicants who might not receive timely knowledge about the claims process.

123. However, the World Jewish Restitution Organization has stated that for Serbia even a two-year claim-filing period was insufficient “for elderly Holocaust victims or their descendants . . . to become aware of the claims deadline, obtain all required documents, and secure needed assistance for submitting claims.” See *WJRO Serbia Operations*, WORLD JEWISH RESTITUTION ORG., <https://wjro.org.il/our-work/restitution-by-country/serbia/>.