The Particular Position of the Museum Director, Curator and Registrar in Holocaust-Related Claims

I. The Ethical Environment[1]

Museums exist in an ethical and legal environment. Not only do they have to be seen to be ethically and morally sound, but they really must be ethically and morally sound. Ethics cover every area of a museum's operation.

Museums must consider themselves as having an ethical duty to share the provenance information in their archives with any inquirer as museums are the custodians, not the owners, of cultural information.

Most museums have a published policy that states that they are 'due diligence organisations', operating in accordance with international museum codes of conduct. The policy is often published as an indication that they are ethical and moral organisations. Museums' acquisition policies make it clear that they are bound to research the history and provenance of proposed purchases and gifts and to satisfy themselves as far as possible that the objects being acquired have complete provenance histories with no suspicious gaps. They must not have been illegally excavated (if antiquities) or looted, stolen or taken under duress in Germany or any Nazi-occupied country between 1933 and 1945.

Museums borrowing cultural objects for exhibition do so in the context of a rapidly increasing awareness of the pitfalls of borrowing ethically tainted objects. Museums proceeding with borrowing such objects risk losing their good names as ethically responsible institutions.

Many of the national laws granting immunity from seizure to certain cultural objects provide cover only for those objects that have been thoroughly researched and found to have sound provenance. If a museum were found to have been negligent in its due diligence procedures, its reputation would be called into question and the immunity afforded to an object in the United Kingdom (for example) may be void.

Museums should publish information on the objects they intend to borrow as this can bring to light objects or help identify claimants who have remained hidden for long periods of time.

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1 Section I is a condensed version of a paper delivered by Freda Matassa, a museum consultant and art collections manager, at a symposium presented by the University of Manchester on 9 July 2010. Ms Matassa is an expert on museum policy and practice and on immunity from seizure (www.fredamatassa.com). The paper appears on <www.commartrecovery.org>.

II. Ethical Responsibilities of Museum Personnel (United Kingdom)

The national policy with respect to Holocaust-looted art is clear: the United Kingdom has made a commitment to the Washington Principles (1998) and the Terezin Declaration (2010) which call for examination of museum collections, publication of information on artworks with doubtful or unknown provenance during the Nazi Era, the entertainment of claims by Holocaust survivors and their heirs and the just and fair disposition of claims after examination on the merits (rather than on technical legal defences).

British museums are ethically bound to give effect to the national policy. The role of the Spoliation Advisory Panel is to make recommendations in relation to claims concerning Holocaust loot and to advise the Government as to their disposition.[2] to the Holocaust (Return of Cultural Objects) Act 2009[3] was enacted in order to enable national museums to restitute Holocaust-related objects if they so wish notwithstanding the restrictive terms of their governing statutes.

Museum personnel should honour the national policy and cause their institutions to comply with their institutions' ethical responsibilities. As professionals they have a duty to perform their duties in an ethical manner.

Facilitating the display in the United Kingdom by foreign museums of stolen art taken from victims of racial persecution during the commission of genocide – which was both a war crime and a crime against humanity as early as the Nuremberg Trials – is not ethical.

Many museums throughout Europe have discovered (or have been found to possess) Holocaust looted art in their collections.

Some countries have established procedures to identify such art and to deal fairly with claims for the art made by victims. The Netherlands, Germany, France and Austria, as well as the United Kingdom have such procedures.

However, museums in other countries, in defiance of international and often national law as well as the Washington Principles and the Terezin Declaration, fail or even refuse to reveal the history of their acquisitions or to deal fairly or even at all with claims for Holocaust-looted art. Hungary, Russia, Poland, Spain and Serbia are among those who fall into this category.

When there is no effective remedy available to claimants in countries whose museums possess Holocaust loot and are hostile to claims by Holocaust survivors

2 See <http://www.culture.gov.uk/what_we_do/cultural_property/3296.aspx> for the work of the Panel.

3 See the note by Norman Palmer on the 2009 Act in (2010) 15 *Art Antiquity and Law* 87.

or their heirs, attempts are made to seek judicial assistance elsewhere. The presence of looted art, however temporary, in countries generally gives jurisdiction to courts in those countries to determine the merits of claims. As there is very often no other way to assert claims against museums in hostile countries, access to courts in jurisdictions in which looted artwork is on temporary exhibition may be the only recourse for claimants.

UK national policy favours art loans but its laws do not authorise the importation, possession, display or revenue-generating activities involving stolen art, or the facilitation of such activities by others, including countries, particularly those who murdered their Jewish citizens in order to loot their art collections and other property (e.g., Hungary).

Knowing involvement with stolen or looted art is not ethical. Facilitation of such activities by others is not morally sound. 'Looking the other way' or deliberate 'failure to know' is culpable and constitutes a denial of the ethical and moral values of museums. Making agreements with foreign lenders to keep confidential information indicating doubtful provenance (whether or not the artwork is actually borrowed) cannot be justified as such agreements are voluntarily made by UK museums seeking to borrow artworks.

There is nothing high-minded about dealing in any way with stolen and looted art, nor is it in the public interest. Museum personnel who knowingly engage in such unethical and immoral activities, whether or not condoned or even required by their institutions should be held responsible, prosecuted and dismissed for such violations of public policy and trust. The Adolph Eichmann defence ('just following orders') is not available; corporate personnel under the law are held to be responsible for their own misconduct. For example, if a senior officer at a museum connives at the museum's purchase of a stolen work, the officer would be liable in tort for conversion at the behest of the true owner.

Museum personnel ought to be held accountable for their ethical lapses and can, in principle, be held financially liable by dispossessed owners for the detention of looted property which they, on behalf of their institution, withhold from claimants after demand even if possession on the part of their own museum is merely temporary. This is true without regard to the claimants' inability to seize looted and stolen property while it is located in the UK on loan.

III. Ethical Responsibilities of Museum Personnel (United States)

In the United States, museum personnel who engage in such unethical and immoral activities, whether or not condoned or even required by their institutions, may be held personally liable for such violations of public policy and trust.

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In particular, New York case law establishes that personnel who are directly involved in arranging for a museum to acquire or borrow looted art or other cultural objects may be found personally liable for conversion, notwithstanding that the personnel may have been acting on behalf of the museum.[4] All that is required for the museum employee to be subject to personal liability is that the individual have "consummated the conversion through his personal action."[5] This is true even if the museum has possession of the looted art only temporarily. Additionally, under this standard, museum directors and board members who are personally involved in causing the conversion may also be held personally liable.

'Personal action' can take a number of forms, including arranging for an acquisition or loan or signing a document that facilitates bringing the museum into possession of the looted object.[6] Since wrongful intent is not required in order to bring a claim for conversion, museum personnel may be found liable in New York simply by failing to surrender property that has been demanded by the rightful owner.[7] New York is consistent with other US jurisdictions regarding the personal liability of corporate employees for claims of conversion.[8]

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4 See *American Exp. Travel Related Services Co., Inc. v. North Atlantic Resources, Inc.*, 261 A.D.2d 310, 311, (N.Y. App. Div. 1999) (stating that "a corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced..."); *Key Bank of New York v. Grossi*, 227 A.D.2d 841, 843 (N.Y. App. Div. 1996) (stating that personal liability is imposed on corporate officers who commit or participate in the commission of a tort, "even if the commission or participation is for the corporation's benefit"); *Fleming v. Sarva*, 2004 WL 2642247, 6 (N.Y.Sup. Ct. 2004) ("A corporate officer who participates in the commission of a tort may be held personally liable even if the tort was committed in the course of the corporate officer's official duties while acting on behalf of the corporation."); see also *Rajeev Sindhwani, M.D., PLLC v. Coe Business Service, Inc.*, 52 A.D.3d 674, 677-678 (N.Y. App. Div. 2008) (affirming a jury verdict holding a corporate officer personally liable for conversion because of his direct involvement in causing the conversion).

5 *Singapore Recycle Centre Pte Ltd. v. Kad Int'l Marketing, Inc.*, 2009 WL 2424333, 18 (E.D.N.Y. 2009) ("An individual, though acting for the corporation, may be held liable for the conversion, provided that the individual consummated the conversion through his personal action.").

6 *Aeroglide Corp. v. Zeh*, 301 F.2d 420, 422 (2d Cir. N.Y. 1962) (stating that a corporate director may be held personally liable for the torts of his corporation by having "personally voted for or otherwise participated" in the tort).

7 *Rajeev Sindhwani, M.D., PLLC v. Coe Business Service, Inc.*, 52 A.D.3d 674, 677-678 (N.Y. App. Div. 2008) (stating that "failure to surrender the wrongfully retained chattel either with knowledge of the conversion or upon demand from the rightful owner will give rise to liability"); *Aeroglide Corp. v. Zeh*, 301 F.2d 420, 422 (2d Cir. N.Y. 1962) ("[C]onversion requires no intent or fault. The determinative question then is whether these directors personally participated in the conversion...").

8 See, e.g., *Saltiel v. GSI Consultants, Inc.*, 170 N.J. 297, 305 (N.J. 2002) ("It is well settled by the great weight of authority in this country that the officers of a corporation are personally liable to one whose money or property has been misappropriated or converted by them to the uses of the corporation, although they derived no personal benefit

Moreover, even where a claim is brought against the museum for conversion,[9] the museum employee is not relieved of his personal liability.[10] Rather, the employee becomes liable to the museum for damages it was compelled to pay as a result of the negligent and wrongful acts of the employee.[11]

Most of the national laws granting immunity from seizure to certain objects which are borrowed provide cover only for all objects that have been thoroughly researched and found to have sound provenance. In the case of objects imported into the United States, immunity from seizure under the Federal law must be applied for with the United States Department of State, and applicants must certify that they have engaged in professional, multi-source research into the provenance of the object proposed.[12] Applicants must also certify that they do not know of, or have reason to know of, any "potential for competing claims of ownership" in the object.[13]

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therefrom and acted merely as agents of the corporation.") (citations omitted); *Central Benefits Mut. Ins. Co. v. RIS Adm'rs Agency*, 93 Ohio App. 3d 397, 403 (Ohio Ct. App. 1994) (holding that a corporate officer could be personally liable for conversion where he "commits [the] tort while in the performance of his duties..."); *Francis J. Bernhardt, III, P.C. v. Needleman*, 705 A.2d 875, 878 (Pa. Super. Ct. 1997) (finding personal liability on a conversion claim, and holding that "liability attaches where the record establishes the individual's participation in the tortious activity" and not by piercing the corporate veil); *Johnson v. Harrigan-Peach Land Dev. Co.*, 489 P.2d 923, 927-928 (Wash. 1971) (finding corporate officers personally liable for conversion and holding that "an agent is not exonerated from the consequences of his torts by the fact that, in committing them, he acted for his principal"); *see also* 18 Am. Jur. 2d Conversion § 62 ("an officer or director of a corporation is not personally liable for a conversion committed by the corporation or one of its officers merely by virtue of the office or directorship that he or she holds; he or she must participate or have knowledge amounting to acquiescence or commit a breach of the duty he or she owes to the owner of the property before being held liable...").

9 See 23 N.Y. Jur. 2d § 40 (stating that a corporation "may be liable for the conversion of another's property by its officer or agent acting in its behalf"); 18B Am. Jr. 2d Corporations § 1832 (explaining that a corporation is liable under respondeat superior where the tort constitutes "the undirected act of the employee acting within the scope of his or her employment").

10 53 N.Y. Jur. 2d § 408; see also 18 Am. Jr. 2d Corporations § 1832 (stating that where the corporation is liable under the doctrine of respondeat superior, "it has a right to recover from its employees who are primarily liable"); *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 606 (3d Cir. Pa. 1978).

11 It should be noted that within the context of agency, at least one New York court has suggested that an auctioneer who sells an object on behalf of a principal may seek indemnification from the principal where the auctioneer has been sued for conversion. See *Parker v. P & N Recovery of New York, Inc.*, 697 N.Y.S.2d 462, 466-7 (N.Y.City Civ. Ct. 1999). This principle was also applied in *Deere & Co. v. Miller-Godley Auction Co.*, 249 Ga. App. 797, 801 (Ga. Ct. App. 2001) (stating that "if an auctioneer has not had the foresight to protect himself when the goods are offered to him for sale, he can seek indemnity from the principal").

12 See Check List for Applicants, *Statute Providing for Immunity from Judicial Seizure of Certain Cultural Objects (22 U.S.C. 2459)*, <http://www.state.gov/s/l/3196.htm>.

13 See Check List for Applicants, *Statute Providing for Immunity from Judicial Seizure of*

If any doubt as to the lender's title were to come to light after an object was imported into the United States, the museum would not be immune "from suit for a declaration of rights or for damages arising from an alleged conversion," even though the object would maintain its immunity from seizure.[14]

IV. Museum Personnel as Role Models

Museum personnel responsible for borrowing art must above all be role models for the rest of the museum community in identifying potentially problematic property in their exhibitions.

It is the moral responsibility of museum personnel to work with all possible speed and diligence to examine artworks proposed to be borrowed and exhibited and make information about objects with doubtful provenance available to the public, thereby affording potential claimants a better chance of finding Nazi-looted property. Failure to make information available to Holocaust victims when declining to borrow artworks from abroad is neither ethical nor moral because participation in a 'cover-up' amounts to a conspiracy of silence which is not honourable, and is prejudicial since time is not on the side of surviving victims who may be searching for property taken from them.

V. Conclusion

Museums and the professionals who manage them operate in an ethical and legal environment that has changed greatly in the last decade. There are considerations that outweigh the desirability of exhibitions of artworks.

Display of artwork looted by the Nazis and their allies from Jews who were terrorised and/or murdered during the Second World War raises ethical and moral issues that need to be addressed by museum personnel (ethical, legal and moral issues).

Certain Cultural Objects (22 U.S.C. 2459), <http://www.state.gov/s/l/3196.htm>.

14 *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 312 (D.D.C. 2005) ("Immunity from seizure is not immunity from suit for a declaration of rights or for damages arising from an alleged conversion if the other terms for FSIA jurisdiction exist.").