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INTRODUCTION

On June 30, 2009, the representatives of forty-six states met in Terezín, the infamous ghetto where thousands of European Jews and other victims of Nazi persecution perished during World War II ("WWII"). The meeting was the finale of the four-day Prague Holocaust Era Assets Conference during which political leaders, experts and non-governmental organization ("NGO") representatives had gathered to discuss Holocaust-related issues, among them the restitution of Nazi era[1] confiscated art, Judaica, and Jewish cultural property.[2] Thus was born the Terezín Declaration on Holocaust Era Assets and Related Issues, the latest link in a decade-long chain of the international community's response to the enduring injustices of Nazi spoliation.[3]

However, in spite of numerous international declarations proclaiming moral obligations for governments to effectuate the return of Nazi-looted art and cultural property to Holocaust victims and their heirs, United States courts have shown little difficulty dismissing these important international commitments by denying numerous claims for recovery.

On August 20, 2010, the Court of Appeals for the Fifth Circuit affirmed the judgment of the U.S. District Court for the Eastern District of Louisiana which awarded title of a Kokoschka painting, *Portrait of a*

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1. The term "Nazi era" refers to the period of the Nazi reign (1933–1945) and thus covers a wider time period than the mere war years, 1939–1945. Hence, "Nazi era looted art" refers to art objects that were stolen or otherwise seized from their owners between the moment of Hitler's rise to power in 1933 and the fall of the regime in 1945. *See* KATJA LUBINA, CONTESTED CULTURAL PROPERTY: THE RETURN OF NAZI SPOLIATED ART AND HUMAN REMAINS FROM PUBLIC COLLECTIONS 41–42 (2009). However, it is noteworthy that for works created prior to 1933, Sotheby's requires full provenance information from 1933 to 1948. *See generally* LUCIAN J. SIMMONS, *Provenance and Auction Houses*, *in* RESOLUTION OF CULTURAL PROPERTY DISPUTES 85 (Int'l Bureau of the Permanent Court of Arbitration ed., 2004) [hereinafter RESOLUTION OF CULTURAL PROPERTY DISPUTES]. By extension, the American Association of Museums ("AAM") considers 1951, with the closing of the Munich Central Collecting Point, as the final year. NANCY H. YEIDE ET AL., THE AAM GUIDE TO PROVENANCE RESEARCH 41 (2001).

2. For general information regarding the Prague Holocaust Era Assets Conference, the Terezín Declaration on Holocaust Era Assets and Related Issues, and all conference proceedings, see HOLOCAUST ERA ASSETS CONF., http://www.holocausteraassets.eu (last visited Sept. 16, 2011) (Czech).

3. The term "Nazi spoliation" refers to the program of systematic plunder of private and public property (often artwork) by agents acting on behalf of the Third Reich in territories that came under Nazi occupation. *See* LUBINA, *supra* note 1, at 42. However, the notion is not restricted to confiscations and plunder, but also includes other involuntary losses that are considered as being precipitated by the Nazi Regime, such as sales of artwork in exchange for export visa. *Id.*

Youth, to its current possessor.[4] The court found against the sole heir of a Holocaust victim who argued, to no avail, that the Terezín Declaration preempted Louisiana's law on prescriptive limitation.[5]

Similarly, on December 16, 2010, in spite of the Terezín Declaration's goal to resolve Nazi era title disputes on the merits, the Court of Appeals for the Second Circuit affirmed the decision of the U.S. District Court for the Southern District of New York that dismissed, on limitation grounds, a challenge to a New York museum's ownership of three prized works by George Grosz.[6] In that case, the late German artist's heirs filed suit against the Museum of Modern Art ("MoMA") seeking the return of artwork that fell prey to a network of unscrupulous dealers who took advantage of the Nazi regime's disfavor with the artist to divest him of his ownership.[7]

These examples render palpable the equivocality surrounding the administration of justice in the field of Nazi era art disputes. This Article exposes the tenuousness of public international law arguments in obtaining restitution of looted artwork from U.S. museum collections. Accordingly, the Article comments on the sharp divide between moral obligations and legal duties with regard to restitution matters. The Article's analysis of the impact of the Terezín Declaration and its predecessors on the settlement of Holocaust-related title disputes is not limited to the United States; it will likewise touch upon the situation on the European continent, the battleground of Nazi spoliation and home to numerous world-class museums. In many European countries, the overt disregard for international political consensus on the moral decency of restitution is equally alive. However, certain Western European countries—such as France, the United Kingdom, Germany, Austria, and the Netherlands—grant significantly better heed to fulfilling their commitments under the

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4. Dunbar v. Seger-Thomschitz, 615 F.3d 574, 575 (5th Cir. 2010), *aff'g* 638 F. Supp. 2d 659 (E.D. La. 2009).

5. *Id*. at 575–76; *see* Martha Lufkin, *Louisiana Court Affirms Rightful Owner in Kokoschka Claim*, ART NEWSPAPER (Aug. 27, 2010), http://theartnewspaper.com/articles/Louisiana-court-affirms-rightful-owner-in-Kokoschka-claim/21335.

6. Grosz v. Museum of Modern Art, 403 Fed. App'x 575 (2d Cir. 2010).

7. Grosz v. Museum of Modern Art, 772 F. Supp. 2d 473, 476, 477 (S.D.N.Y. 2010), *reconsideration denied by, motion denied by*, 2010 U.S. Dist. LEXIS 20248 (S.D.N.Y. 2010), *aff'd* 403 Fed. App'x. 575 (2d Cir. 2010); *see generally* Javier Pes, Grosz Heirs vs. MoMA *Case Dismissed: Three-Year Statute of Limitations Has Run Out,* ART NEWSPAPER (Feb. 3, 2010), http://www.theartnewspaper.com/articles/Grosz-heirs-vs-MoMA-case-dismissed/20127.

international art restitution agreements.[8] Accordingly, these countries' compliance with the international framework provides interesting insight to the contrasting approaches adopted in key jurisdictions on both sides of the Atlantic.

However, the main purpose of this Article does not lie at a merely comparative level. First, despite contrary claims in international fora, American inertia towards art restitution is increasingly evident from lack of domestic implementation of international commitments. Second, despite the widespread and readily invoked public international law arguments in Nazi era art litigation, this Article shows that, for most signatory countries, their added value to legal proceedings seeking restitution of looted art is virtually nonexistent. Consequently, there is—at least from a legal point of view—no need for additional declarations regarding Nazi era art looting. The only way for the international community to achieve the spirit of the principles established in the Washington Conference Principles on Nazi-Confiscated Art (the "Washington Principles")[9] is to broadly implement the existing framework, not to add another nonbinding recital of good intentions.

Part I of this Article briefly surveys the modern upsurge in Holocaust-related title disputes and interprets the prominence of Nazi-looted art disputes over the past fifteen years as a result of the post-Cold War revival of the general debate on wartime spoliations. Part II describes the international community's response to the worldwide explosion of Nazi-looted art claims that previously simmered under the surface of Cold War tensions. It also examines a chain of public law instruments that were adopted over the past thirteen years to come to terms with the enduring injustices of Nazi art spoliation. Part III, posits that, from a legal point of view, the ambiguous objectives of these various international agreements have been met only fragmentarily, if at all, by the United States. This may be attributed to the U.S. courts' reticence toward implementation of such initiatives in domestic law and the private status of the leading American art museums. Part IV enlarges the Article's geographical scope by calling attention to the heterogeneous implementation of the international agreements on the European continent. This analysis offers some comparative thoughts by contrasting the contemporary position of the United States with the noncompliance of Eastern and South-

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8. *See National Organizations Involved in Looted Cultural Property Restitution*, CLAIMS CONF., http://www.claimscon.org/index.asp?url=artworks/national (last visited Sept. 17, 2011).

9. Washington Conference Principles on Nazi-Confiscated Art, princ. I, Dec. 3, 1998 [hereinafter Washington Principles], *available at* http://fcit.usf.edu/holocaust/resource/assets/princ.htm.

ern European countries, and also with the establishment of alternative dispute resolution mechanisms for resolving ownership issues in certain Western European jurisdictions.

I. MODERN UPSURGE IN HOLOCAUST-RELATED TITLE DISPUTES

The international community's willingness to address the outstanding injustices of WWII resulted from a remarkable upsurge in Holocaust-related title disputes over the past fifteen years.[10] The recent prominence of Nazi-looted art claims is a manifestation of the post-Cold War revival of the general debate on wartime spoliation.[11] This may be attributed to a variety of causes, each of which enhanced the public's awareness of the Nazi regime's obsession with art looting and the availability of information allowing for retrieval and restitution.[12]

A. Revival of the General Debate on Wartime Spoliations

The primary reason for the explosion in Holocaust-related claims[13] in recent years is most likely the worldwide declassification of government records relating to WWII.[14] These records were locked away in restricted

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10. *See infra* notes 78–140 and accompanying text.

11. LUBINA, *supra* note 1, at 160–62.

12. *Id.* at 161–62.

13. Cases regarding Nazi era art lootings are only one type of Holocaust-related disputes recently brought before U.S. and European courts. For a thorough analysis of various types of Holocaust-related disputes, see MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS 1–58, 63–66, 172–78 (2003) [hereinafter BAZYLER, HOLOCAUST JUSTICE]; *see, e.g.*, Michael J. Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1 (2000) [hereinafter Bazyler, *Nuremberg in America*]; *see also* Burt Neuborne, *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 615 (2003); *see also* STUART EIZENSTAT, IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II (2003) [hereinafter EIZENSTAT, IMPERFECT JUSTICE]; Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003). For more on the issue of Holocaust-related dormant Swiss bank accounts, see *infra* notes 30–43 and accompanying text.

14. Nancy H. Yeide, *Provenance and Museums*, *in* RESOLUTION OF CULTURAL PROPERTY DISPUTES, *supra* note 1, at 99; Howard N. Spiegler, *Recovering Nazi-Looted Art: Report from the Front Lines*, 16 CONN. J. INT'L L. 297, 301 (2001); Stephanie Cuba, Note, *Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art*, 17 CARDOZO ARTS & ENT. L.J. 447, 448–49 (1999); *see also* MICHAEL J. KURTZ, AMERICA AND THE RETURN OF NAZI CONTRABAND 210–11 (2006) [hereinafter KURTZ, AMERICA & NAZI CONTRABAND]; LUBINA, *supra* note 1, at 160.

access archives for more than fifty years,[15] due to the lack of political support to confront the full extent of the Nazi era spoliations in the polarized postwar world.[16] Indeed, tensions during the Cold War years left little room for introspection into, or discussion about, Germany's wartime past.[17] The willingness to declassify Nazi era documents in both the East and West—and to actually restitute looted artwork[18]—was only possible after the fall of the Iron Curtain.[19] It is generally acknowledged that the collapse of communism and the disintegration of the Eastern Bloc played an important part in opening up the extensive Soviet archives on trophy art,[20] which provided key evidence for a great deal of the current

15. *See* Nancy H. Yeide, *Provenance and Museums*, *in* RESOLUTION OF CULTURAL PROPERTY DISPUTES, *supra* note 1, at 99; Paulina McCarter Collins, Comment, *Has "The Lost Museum" Been Found? Declassification of Government Documents and Report on Holocaust Assets Offer Real Opportunity to "Do Justice" for Holocaust Victims on the Issue of Nazi-Looted Art*, 54 ME. L. REV. 115, 119, 140–41 (2002) [hereinafter McCarter Collins]; Robert Schwartz, *The Limits of the Law: A Call for a New Attitude Towards Artwork Stolen During World War II*, 32 COLUM. J.L. & SOC. PROBS. 1, 28 (1998); Alexandra Minkovich, Note, *The Successful Use of Laches in World War II-Era Art Theft Disputes: It's Only a Matter of Time*, 27 COLUM. J.L. & ARTS 349, 351 (2004); Stephan J. Schlegelmilch, Note, *Ghosts of the Holocaust: Holocaust Victim Fine Arts Litigation and a Statutory Application of the Discovery Rule*, 50 CASE W. RES. L. REV. 87, 97 (1999); Leah Weiss, Note, *The Role of Museums in Sustaining the Illicit Trade in Cultural Property*, 25 CARDOZO ARTS & ENT. L.J. 837, 866–67 (2007).

16. Michele I. Turner, Note, *The Innocent Buyer of Art Looted During WWII*, 32 VAND. J. TRANSNAT'L L. 1511, 1520 (1999). For a thorough analysis of restitution politics in the Cold War, see KURTZ, AMERICA & NAZI CONTRABAND, *supra* note 14, at 177–200.

17. PETER NOVICK, THE HOLOCAUST IN AMERICAN LIFE 86–102, 127–28 (1999); *see* Mikka Gee Conway, *Dormant Foreign Affairs Preemption and* Von Saher v. Norton Simon Museum: *Complicating the "Just and Fair Solution" to Holocaust-Era Art Claims*, 28 LAW & INEQ. 373, 376 (2010).

18. Rebecca L. Garrett, *Time for a Change? Restoring Nazi-Looted Artworks to its Rightful Owners*, 12 PACE INT'L L. REV. 367, 371–72 (2000); s*ee also* Jessica Mullery, Note, *Fulfilling the Washington Principles: A Proposal for Arbitration Panels to Resolve Holocaust-Era Art Claims*, 11 CARDOZO J. CONFLICT RESOL. 643, 648 (2010).

19. Conway, *supra* note 17, at 376; Spiegler, *supra* note 14, at 301; Alexis Derrossett, Note, *The Final Solution: Making Title Insurance Mandatory for Art Sold in Auction Houses and Displayed in Museums That Is Likely to Be Holocaust Looted Art*, 9 T.M. COOLEY J. PRAC. & CLINICAL L. 223, 232–33 (2007); Kelly Ann Falconer, Comment, *When Honor Will Not Suffice: The Need for a Legally Binding International Agreement Regarding Ownership of Nazi-Looted Art*, 21 U. PA. J. INT'L ECON. L. 383, 386 n.16 (2000).

20. This Article does not address the international law debate of whether the Soviet/Russian notion of trophy art as compensation in kind for wartime losses is legal or morally justifiable. For materials discussing this issue in more detail, see generally Steven Costello, *Must Russia Return the Artwork Stolen from Germany During World War II?*, 4 ILSA J. INT'L & COMP. L. 141 (1997); S. Shawn Stephens, *The Hermitage and Pushkin Exhibits: An Analysis of the Ownership Rights to Cultural Properties Removed*

title disputes. Access to information regarding the fate and whereabouts of artwork traded during the Nazi era and the identities of wartime art dealers suddenly enabled many victims of Nazi spoliation to make claims.[21]

In the early 1990s, scholars and journalists played an important role in the revival of the stolen art debate, as their writings facilitated public access to declassified information.[22] Indeed, scholarly research and journalistic interest resulted in an abundance of publications, which in turn induced increasing popular awareness, about both the extent and the brutality of the Nazi art spoliation.[23] In most countries, the inadequacies of the postwar restitution initiatives were also exposed.[24] Soon, public awareness triggered some highly publicized claims[25] and motivated politicians

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from Occupied Germany, 18 HOUS. J. INT'L L. 59 (1995); Victoria A. Birov, Note, *Prize or Plunder?: The Pillage of Works of Art and the International Law of War*, 30 N.Y.U. J. INT'L L. & POL. 201 (1998); Margaret M. Mastroberardino, Comment, *The Last Prisoners of World War II*, 9 PACE INT'L L. REV. 315 (1997); Lina M. Montén, Note, *Soviet World War II Trophy Art in Present Day Russia: The Events, the Law, and the Current Controversies*, 15 DEPAUL-LCA J. ART & ENT. L. 37 (2004).

21. *See* Garrett, *supra* note 18, at 373; Turner, *supra* note 16, at 1539–41 (noting that lack of access to the archives prohibited victims of Nazi spoliation from accessing relief from the courts because the potential claimants could not meet the evidentiary burden of proving title).

22. Emily A. Graefe, Note, *The Conflicting Obligations of Museums Possessing Nazi-Looted Art*, 51 B.C. L. REV. 473, 476 (2010); Minkovich, *supra* note 15, at 354; s*ee also* Spiegler, *supra* note 14, at 300.

23. For some milestone publications on the theme of Nazi spoliation, see generally KONSTANTIN AKINSHA & GRIGORII KOZLOV, BEAUTIFUL LOOT: THE SOVIET PLUNDER OF EUROPE'S ART TREASURES (1995); HECTOR FELICIANO, THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART (Tim Bent & Hector Feliciano trans., 1997); LYNN H. NICHOLAS, THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR (1994); JONATHAN PETROPOULOS, ART AS POLITICS IN THE THIRD REICH (1996). In 1991, two former Soviet museum curators Konstantin Akinsha and Grigorii Kozlov had already set the art world ablaze with their ARTNEWS articles dealing with the touchy subject of Russian war treasures. *See* Konstantin Akinsha & Grigorii Kozlov, *Spoils of War: The Soviet Union's Hidden Art Treasures*, ARTNEWS, Apr. 1991, at 130; Konstantin Akinsha & Grigorii Kozlov, *The Soviets' War Treasures: A Growing Controversy*, ARTNEWS, Sept. 1991, at 112.

24. David Wissbroecker, *Six Klimts, A Picasso, & A Schiele: Recent Litigation Attempts to Recover Nazi Stolen Art*, 14 DEPAUL-LCA J. ART & ENT. L. 39, 43 (2004). For some authoritative publications on the postwar restitution initiatives, see generally NORMAN PALMER, MUSEUMS AND THE HOLOCAUST: LAW PRINCIPLES AND PRACTICE (2000); THE SPOILS OF WAR: WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY (Elizabeth Simpson ed., 1997) [hereinafter THE SPOILS OF WAR].

25. Crucial in building momentum for political action in the U.S. were the much debated restitution cases regarding the *Quedlinburg Treasure,* Willi Korte, *Search for the*

Treasures, *in* THE SPOILS OF WAR, *supra* note 24, at 150–51, and the Degas painting, entitled *Landscape with Smokestacks*. BAZYLER, HOLOCAUST JUSTICE, *supra* note 13, at 215–21.

In the case of the *Quedlinburg Treasure*, the authorities of the German church of Quedlinburg sued the heirs of a U.S. serviceman, Joe Meador. Thomas R. Kline, *Legal Issues Relating to the Recovery of the Quedlinburg Treasures*, *in* THE SPOILS OF WAR, *supra* note 24, at 156; *see, e.g.*, Stiftskirche-Domgemeinde of Quedlinburg v. Meador, No. CA3-90-1440-D (N.D. Tex. June 18, 1990). At the end of WWII, while stationed at Quedlinburg, Meador stole priceless medieval artifacts that the church had hidden for safekeeping in a cave on the outskirts of the town. William H. Honan, *Abrupt End to a Case of Looted Treasures*, N.Y. TIMES, Oct. 24, 1996, at C13 [hereinafter Honan, *Abrupt End*]. After the war, the church reported the objects missing. *See* Korte, *supra*, at 151. Unfortunately, they could not be found. *See id.* Upon Meador's death, the artifacts passed to his brother and sister. *Id.* at 150. It was not until Meador's heirs attempted to sell the artifacts in the late 1980s their theft came to light. *Id.* at 151; Kline, *supra*, at 156–57. A demand for restitution was not long in coming. Kline, *supra*, at 156–57. When negotiations broke down, the church filed an action in replevin against the Meador heirs. *Id.* The parties reached an out-of-court settlement in 1992. Honan, *Abrupt End*, *supra.* The heirs agreed to return all artifacts in exchange for $2.75 million. *Id.* However, in addition to the civil claim for restitution, the *Quedlinburg* dispute is equally interesting for its subsequent criminal and tax proceedings. *Id.* After the 1992 settlement, the U.S. Attorney's Office filed suit for conspiracy to sell stolen property. *Id.* The U.S. District Court for the Eastern District of Texas dismissed the case, as the action was time-barred. *Id.* The Court of Appeals for the Fifth Circuit affirmed the district court's decision. *See* United States v. Meador, No. 4:96cr1, 1996 U.S. Dist. LEXIS 22058, at *1 (E.D. Tex. Oct. 23, 1996), *aff'd*, 138 F.3d 986 (5th Cir. 1998). Following the dismissal of criminal charges, the Internal Revenue Service launched an inquiry against the Meador heirs for tax evasion. William H. Honan, *Quiet Conclusion for Case of Art Stolen During War*, N.Y. TIMES, Sept. 2, 2000, at B10. On April 20, 2000, the heirs reached a settlement to pay $135,000 in back taxes, penalties and interest. *Id.* The *Quedlinburg* case was broadly commentated on by legal scholars and covered in the media, see, for example, Hans Kennon, *Take a Picture, It May Last Longer if* Guggenheim *Becomes the Law of the Land: The Repatriation of Fine Art*, 8 ST. THOMAS L. REV. 373, 376–78 (1996); Ruth Redmond-Cooper, *Quedlinburg Indictment Comes Too Late*, 3 ART ANTIQUITY & L. 307 (1998) (U.K.); Kurt Siehr, *Manuscript of the Quedlinburg Cathedral back in Germany*, 1 INT. J. CULT. PROP. 215 (1992) (U.K.); Claudia Fox, Comment, *The Unidroit Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U. J. INT'L L. & POL'Y 225, 227–29 (1993); William H. Honan, *It's Finally Agreed: Germany to Regain A Stolen Trove*, N.Y. TIMES, Feb. 26, 1992, at C15; William H. Honan, *New Demand Delays Quedlinburg Treasures Case*, N.Y. TIMES, Nov. 8, 1990, at C24.

Goodman & Gutmann v. Searle was a high-profile dispute over the ownership of a Degas painting that, prior to the war, belonged to the German Gutmann family. BAZYLER, HOLOCAUST JUSTICE, *supra* note 13, at 216. In 1939, Friedrich and Louise Gutmann sent the Degas pastel, along with others paintings, to Paris for safekeeping. *Id.* However, during the occupation of France, the Nazis managed to confiscate the painting. *See id*. In 1996, the Gutmann heirs filed suit in a New York federal court, but soon the case was transferred to the District Court for the Northern District of Illinois. *See id.* at

and congressional endeavors worldwide.[26] The reemergence of the public debate on Nazi era spoliation resulted in a series of research commissions and international conferences. These gatherings delivered comprehensive reports and led to the proclamation of principles and resolutions.[27] Many of these initiatives did not exclusively address looted art, but took a more general approach by focusing on all kinds of wartime-plundered assets.[28]

In 1995, the World Jewish Congress broached the delicate subject of dormant Swiss bank accounts, to which victims of Nazi persecution during and prior to WWII had made deposits for safekeeping.[29] The heirs of Holocaust survivors encountered difficulties in accessing the accounts of their deceased relatives, often due to deliberate delaying tactics on the part of the Swiss financial institutions.[30] Assisted by extensive media coverage, the World Jewish Congress helped mobilize several senior

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217. Eventually, the dispute was settled in a Solomon-like manner. *Id.* at 221. Daniel Searle, the current owner and good faith purchaser, ceded a 50% ownership interest to the Art Institute of Chicago and a 50% ownership interest to the Gutmann heirs, who, in turn, agreed to sell their part to the Art Institute. *Id.* The case was broadly covered in the press and commented on in countless law review articles. *See, e.g.*, Hector Feliciano, *The Aftermath of Nazi Art Looting in the United States and Europe: The Quest to Recover Stolen Collections*, 10 DEPAUL J. ART & ENT. L. 1 (1999); Rebecca Keim, *Filling the Gap Between Morality and Jurisprudence: The Use of Binding Arbitration to Resolve Claims of Restitution Regarding Nazi-Stolen Art*, 3 PEPP. DISP. RESOL. L.J. 295, 304–05 (2003); Anne-Marie Rhodes, *On Art Theft, Tax, and Time: Triangulating Ownership Disputes Through the Tax Code*, 43 SAN DIEGO L. REV. 495, 504–06 (2006); Spiegler, *supra* note 14, at 302–03; Turner, *supra* note 16, at 1528; Barbara J. Tyler, *The Stolen Museum: Have United States Art Museums Become Inadvertent Fences for Stolen Art Works Looted By the Nazis in World War II?*, 30 RUTGERS L.J. 441, 453–55 (1999); Stephen E. Weil, *The American Legal Response to the Problem of Holocaust Art*, 4 ART ANTIQUITY & L. 285, 294–95 (1999) (U.K.); Geri J. Yonover, *The "Last Prisoners of War":Unrestituted Nazi-Looted Art*, 6 J.L. & SOC. CHALLENGES 81, 87–88 (2004); Judith H. Dobrzynski, *Settlement in Dispute over a Painting Looted by Nazis*, N.Y. TIMES, Aug. 14, 1998, at A17; *see also* HOWARD J. TRIENENS, LANDSCAPE WITH SMOKESTACKS: THE CASE OF THE ALLEGEDLY PLUNDERED DEGAS (2000).

26. *See* Falconer, *supra* note 19, at 399–404; Kelly D. Walton, *Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen Art*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 549, 605–07 (1999); Mullery, *supra* note 18, at 649–50.

27. McCarter Collins, *supra* note 15, at 140–50.

28. *See* LUBINA, *supra* note 1, at 163.

29. BAZYLER, HOLOCAUST JUSTICE, *supra* note 13, at 2, 12–13.

30. *See generally* BAZYLER, HOLOCAUST JUSTICE, *supra* note 13, at 32; PHILIPPE BRAILLARD, SWITZERLAND AND THE CRISIS OF DORMANT ASSETS AND NAZI GOLD 13–14 (2000); Cuba, *supra* note 14, at 463; Jodi Berlin Ganz, Note, *Heirs without Assets and Assets without Heirs: Recovering and Reclaiming Dormant Swiss Bank Accounts*, 20 FORDHAM INT'L L.J. 1306 (1997).

U.S. government officials, including Under Secretary of Commerce for International Trade, Stuart E. Eizenstat,[31] and U.S. Senator Alfonse D'Amato.[32] Mr. D'Amato then chaired the 1996 hearings of the Senate Banking Committee on Holocaust victim deposits in Swiss banks.[33] These proceedings caused substantial friction between Switzerland and the United States.[34] In late 1996 and early 1997, a series of class action lawsuits against major Swiss banks were filed in New York.[35] In April 1997, these actions were consolidated and retitled *In re Holocaust Victim Assets Litigation*.[36] The class action eventually grew to include claims relat-

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31. In May 1997, Stuart E. Eizenstat, Under Secretary of Commerce for International Trade, Special Envoy of the Department of State on Property Restitution in Central and Eastern Europe, coordinated a study entitled *U.S. and Allied Efforts To Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II* (prepared by William Z. Slany), *available at* http://www.ushmm.org/assets/state/index.html (last visited Sept. 19, 2011).

32. BAZYLER, HOLOCAUST JUSTICE, *supra* note 13, at 13–14.

33. *Id.* at 21; *see also In re* Holocaust Victim Assets Litig. (*Holocaust Victims Assets Litig. III*), 270 F. Supp. 2d 313, 324 (E.D.N.Y. 2002) (citing Michael J. Bazyler, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKLEY J. INT'L L. 11, 15 (2002)).

34. BAZYLER, HOLOCAUST JUSTICE, *supra* note 13, at 22.

35. *See* Weisshaus v. Union Bank of Switzerland, No. CV-96-4849 (E.D.N.Y. filed Oct. 3, 1996); Friedman v. Union Bank of Switzerland, No. CV-96-5161 (E.D.N.Y. filed Oct. 21, 1996); World Council of Orthodox Jewish Communities, Inc., v. Union Bank of Switzerland, No. CV-97-0461 (E.D.N.Y. filed Jan. 29, 1997). For more details regarding these cases, see Burt Neuborne, *Litigation in a Free Society: Preliminary Reflections on Aspect of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L.Q. 795, 805 (2002) [hereinafter Neuborne, *Litigation in a Free Society*]; Bazyler, *Nuremberg in America*, *supra* note 13, at 31.

36. *See* Bazyler, *Nuremberg in America*, *supra* note 13, at 31; *see, e.g.*, Neuborne, *Litigation in a Free Society*, *supra* note 35, at 796 n.2. The 1995 Swiss governmental audits of unclaimed accounts showed a total of some tens of millions of dollars in dormant Nazi-era accounts. *See* Ganz, *supra* note 30, at 1349 n.285; *see also* Michael J. Bazyler & Amber L. Fitzgerald, *Trading with the Enemy: Holocaust Restitution, the United States Government, and American Industry*, 28 BROOK J. INT'L L. 683, 713 (2003). The plaintiffs, however, demanded payment of $1.5 billion. *See* BAZYLER, HOLOCAUST JUSTICE, *supra* note 13, at 28. On May 2, 1996, the Independent Committee of Eminent Persons, headed by ex-Federal Reserve chairman Paul Volcker, was charged with the additional audit. Paul A. Volcker, *Dormant Accounts in Swiss Banks: The Independent Committee of Eminent Persons*, 20 CARDOZO L. REV. 513, 514–15 (1998). The Volcker Committee consisted of representatives from Jewish groups and financial institutions. *Id*. According to the committee, the value of the accounts was approximately $643 million to $1.36 billion, including interest. *Overview*, HOLOCAUST VICTIMS ASSETS LITIG. (SWISS BANKS) (Aug. 4, 2011), http://www.swissbankclaims.com/Overview.aspx [hereinafter *Overview*, SWISS BANKS]. For more details on its constitution and work, see generally Volcker, *supra*. On December 13, 1996, the Swiss Parliament established a second committee, known as the Bergier Commission, to examine how money and assets had

ing to insurance policies issued by Swiss insurance carriers,[37] slave labor,[38] denial of entry into or expulsion from Switzerland,[39] and, most relevantly, looted assets disposed of or transacted through Switzerland.[40] The case, *In re Holocaust Victim Assets Litigation*,[41] was epoch-making as the first successful class action lawsuit stemming from WWII and, at $1.25 billion,[42] the largest settlement in American human rights litigation at that time.[43]

Beginning in 1998, several class action lawsuits were filed in the United States against German companies arising from their Aryanization of properties and use of forced labor during WWII.[44] In March 2000 the

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found their way into Switzerland in connection with Nazi politics in the period prior to, during, and directly after WWII. *Overview*, SWISS BANKS, *supra*. In its 1998 interim report the Bergier Commission dealt with the wartime gold transactions between Switzerland and Germany. *Id.* The 1999 interim report addressed Switzerland's questionable Holocaust-era refugee policy. *Id.* The Bergier Commission published its final conclusions on March 22, 2002. *Id.* For more details on the Bergier Commission, see Bazyler & Fitzgerald, *supra*, at 715–18; *see also* Lawrence Collins, *Reflections on Holocaust Claims in International Law*, 41 ISR. L. REV. 402, 406, 439–40 (2008).

37. *In re* Holocaust Victim Assets Litig. (*Holocaust Victim Assets Litig. I*), 105 F. Supp. 2d 139, 160 (E.D.N.Y 2000).

38. *In re* Holocaust Victim Assets Litig. (*Holocaust Victim Assets Litig. II*), 413 F.3d 183, 185 (2d Cir. 2001).

39. *Id.*

40. *Id.*

41. *Id.* The final settlement agreement created classes of claimants eligible under the settlement: the Deposited Assets Class; Slave Labor Class I; the Refugee Class; Slave Labor Class II; Looted Assets Class; and the Insurance Class. *Holocaust Victim Assets Litig. I*, 105 F. Supp. 2d at 154–63. In accordance with U.S. class action law, the court was provided notice of the proposed settlement and it affirmed its fairness. *Id.* at 160. For more details on the Swiss Banks Settlement and the class action procedure, with clear indication of all court decisions and issues still pending, see *Overview*, SWISS BANKS, *supra* note 36.

42. BAZYLER, HOLOCAUST JUSTICE, *supra* note 13, at 32.

43. LUBINA, *supra* note 1, at 162; Michael J. Reppas II, *Empty "International" Museums' Trophy Cases of Their Looted Treasures and Return Stolen Property to the Countries of Origin and the Rightful Heirs of Those Wrongfully Dispossessed*, 36 DENV. J. INT'L L. & POL'Y 93, 98 (2007); Benjamin E. Pollock, Comment, *Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-Looted Art Claims*, 43 HOUS. L. REV. 193, 199 (2006); Schlegelmilch, *supra* note 15, at 91. In exchange for the settlement amount, all existing and future claims relating to the Holocaust, WWII, its prelude, and its aftermath against Swiss banks, the Swiss government and other Swiss entities were discharged. *Holocaust Victim Assets Litig. I*, 105 F. Supp. 2d at 142. For the sake of completeness it should be observed that similar settlements would soon be agreed with other European banks, insurance companies, and industries that had taken advantage of wartime activities. *See* Bazyler & Fitzgerald, *supra* note 36, at 697–709.

44. Bazyler & Fitzgerald, *supra* note 36, at 691–92.

German *Bundestag* announced a global settlement of these claims.[45] On August 2, 2000, it adopted legislation establishing the foundation "Remembrance, Responsibility and Future" (*Stiftung "Erinnerung, Verantwortung und Zukunft"*), charged with recompensing former slave and forced laborers and other victims of National Socialism.[46] Payments were disbursed during 2001–2007[47] to citizens of over 100 countries, totaling over 1.66 million individuals, who collectively received €4.4 billion.[48]

In addition to the reemergence of the general debate on Nazi-looted assets, the issue of the restitution of cultural objects also capitalized upon developments regarding the 1953 London Agreement on German External Debts ("London Agreement").[49] The London Agreement was a debt relief treaty that, as a key element of stability in the Atlantic bloc, settled Germany's debts from the interwar period to reestablish the country in the international capital markets.[50] According to the London Agreement, Germany could postpone certain payments until the time of reunification.[51] As the 1990 Unification Treaty rendered due the debts under the

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45. *Overview*, SWISS BANKS, *supra* note 36.

46. Under National Socialism, around 8.4 million civilian forced laborers from outside Germany and 4.5 million prisoners of war were deployed as slave and forced laborers in concentration camps, work camps, and other places of detention, industry, agriculture, and public administrations from 1939 until the end of WWII. *Origins of the Foundation EVZ*, STIFTUNG EVZ, http://www.stiftung-evz.de/eng/about-us/origins (last visited Sept. 17, 2011) (Ger.). The official website of the *Stiftung "Erinnerung, Verantwortung und Zukunft"* [Foundation "Remembrance, Responsibility and Future"] offers more details on the German Forced Labor Settlement, see generally STIFTUNG EVZ, http://www.stiftung-evz.de (last visited Sept. 17, 2011) (Ger.).

47. *Origins of the Foundation EVZ*, *supra* note 46.

48. *Id.*; *see* Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung und Zukunft" [Act on the Creation of a Foundation "Remembrance, Responsibility and Future"], Aug. 2, 2000, BUNDESGESETZBLATT I [BGBL. I], at 1263 (Ger.). The Act entered into force on August 12, 2000, and was last amended on September 1, 2008. *See* Fünftes Gesetz zur Änderung des Gesetzes zur Errichtung einer Stiftung "Erinnerung, Verantwortung und Zukunft" [Fifth Act to amend the Act on the Creation of a Foundation "Remembrance, Responsibility and Future"], Sept. 1, 2008, BGBL. I, at 1797 (Ger.); Conway, *supra* note 17, at 381–82.

49. *See generally* Agreement on German External Debts, Feb. 27, 1953, 4 U.S.T. 443, 333 U.N.T.S. 3.

50. *Id.*; *see* Eric Toussaint, *The Marshall Plan and the Debt Agreement on German Debt*, COMM. FOR THE ABOLITION OF THIRD WORLD DEBT (Oct. 24, 2006), http://www.cadtm.org/The-Marshall-Plan-and-the-Debt; *see also* Neuborne, *Litigation in a Free Society*, *supra* note 35, at 813–14.

51. Agreement on German External Debts, *supra* note 49, art. 25; *see* Jennifer Anglim Kreder, *Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes: Creation of an International Tribunal*, 73 BROOK. L. REV. 155, 161 (2007) [hereinafter Kreder, *Resolving Nazi-Looted Art Disputes*].

1953 moratorium, the debate on the unsolved economic consequences of WWII revived.[52] Following the much publicized 1997 London Conference on Nazi Gold, which questioned the whereabouts of gold reserves seized during the war from the central banks of occupied nations,[53] the desire to come to terms with the past took hold in other countries.[54] The final years of the twentieth century saw the establishment of numerous national research commissions charged with scrutinizing various manifestations of Nazi era spoliation, covering all classes of assets from real

52. In the landmark case *Krakauer v. Federal Republic of Germany*, the court "abrogate[ed] the temporary immunity from suit for claims arising out of [WWII] that had been granted to German industry by the London Debt Agreement of 1953." Neuborne, *Litigation in a Free Society*, *supra* note 35, at 813; *see* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 13, 1996, 94 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 315 (Ger.); *see also* Landgericht [LG] [Trial Court] Bonn, Nov. 5, 1997, 1 * 134/92 (1997), *rev'd on other grounds*, Oberlandesgericht Köln [OLG Köln] [Court of Appeals Cologne] Dec. 3, 1998, 52 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1555 (1999) (Ger.); *see also* Anja Hense, *Entstehung und Konzeption der Stiftun, „Erinnerung, Verantwortung und Zukunft" für die Opfer von Zwangsarbeit und 'Arisierung'* [*Emergence and Conception of the Foundation "Memory, Responsibility and Future" for the Victims of Forced Labour and 'Aryanization'*], *in* ZWANGSARBEIT IM NATIONALSOZIALISMUS UND DIE ROLLE DER JUSTIZ [FORCED LABOR UNDER NATIONAL SOCIALISM AND THE ROLE OF THE LAW] 104 (Helmut Kramer et al. eds., 2007); Stuart M. Kreindler, Comment, *History's Accounting: Liability Issues Surrounding German Companies for the Use of Slave Labor by Their Corporate Forefathers*, 18 DICK. J. INT'L L. 343, 354–56 (2000); Graham O'Donoghue, Note, *Precatory Executive Statements and Permissible Judicial Responses in the Context of Holocaust-Claims Litigation*, 106 COLUM. L. REV. 1119, 1125–26 (2006).

53. The claimant countries are Albania, Austria, Belgium, the former Czechoslovakia, Greece, Italy, Luxembourg, the Netherlands, Poland, and former Yugoslavia. For more details on this topic, see generally WERNER RINGS, RAUBGOLD AUS DEUTSCHLAND: DIE «GOLDDREHSCHEIBE» SCHWEIZ IM ZWEITEN WELTKRIEG [ROBBED GOLD FROM GERMANY: THE SWISS "TURNTABLE FOR GOLD" DURING WORLD WAR II] (1985); Neal M. Sher et al., *The Search for Nazi Assets: A Historical Perspective*, 20 WHITTIER L. REV. 7, 15–18 (1998). Also refer to the website of the Tripartite Commission for the Restitution of Monetary Gold, which the United States, the United Kingdom, and France established in September 1946. Tripartite Gold Commission ("TGC"), BUREAU OF EUROPEAN AND CANADIAN AFFAIRS: U.S. DEP'T OF STATE (Feb. 24, 1997), http://www.state.gov/www/regions/eur/tripartite_gold_commission.html. The TGC was created by Part III of the Paris Agreement on Reparation, signed on January 14, 1946, concerning German war reparations. *Id.* In particular, the TGC was charged with recovering looted monetary gold. *Id.*

54. BRAILLARD, *supra* note 30, at 143–44; *see also* LUBINA, *supra* note 1, at 163. For more details on the 1997 London Nazi Gold Conference, see generally NAZI GOLD: THE LONDON CONFERENCE: 2–4 DECEMBER 1997 (Foreign & Commonwealth Office ed., 1998).

property,[55] gold,[56] bonds,[57] securities,[58] bank deposits,[59] and insurance monies[60] to movables and works of art.[61] In the United States, that role was assumed by the Presidential Advisory Commission on Holocaust Assets in the United States ("Presidential Commission"). The Presidential Commission conducted research into and advised the President on policies regarding assets taken from victims of the Holocaust that came into the possession of the United States' federal government.[62] In the final days of the Clinton presidency, the Commission presented its comprehensive final report, entitled, *Plunder and Restitution: The U.S. and Holocaust Victims' Assets*. The report commented on the insufficient implementation of restitution policies in the United States and Europe

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55. U.S. PRESIDENTIAL ADVISORY COMM'N ON HOLOCAUST ASSETS (PCHA), PLUNDER AND RESTITUTION: THE U.S. AND HOLOCAUST VICTIMS' ASSETS (2000) [hereinafter PLUNDER & RESTITUTION], *available at* http://pcha.ushmm.org/PlunderRestitution.html/html/Home_Contents.html.

56. *Id.*; McCarter Collins, *supra* note 15, at 144.

57. PLUNDER & RESTITUTION, *supra* note 55.

58. *Id.*; McCarter Collins, *supra* note 15, at 144.

59. *See* LUBINA, *supra* note 1, at 163.

60. *See* Bazyler, *Nuremberg in America*, *supra* note 13, at 149–59.

61. The website of the U.S. Holocaust Memorial Museum is an invaluable source of information concerning the principal governmental and private attempts of forty-seven countries to trace Holocaust assets. U.S. HOLOCAUST MEM'L MUSEUM, http://www.ushmm.org/assets/index.html (last visited Sept. 20, 2011). Even more comprehensive and dealing in particular with the issue of Nazi-era looted cultural property are the national reports, which are freely accessible on the website of the *Central Registry of Information on Looted Cultural Property 1933-1945*, an initiative of the *Commission for Looted Art in Europe.* LOOTEDART.COM, http://www.lootedart.com (last visited Sept. 7, 2011). Combined, these websites offer information on the following countries: Albania, Argentina, Armenia, Australia, Austria, Belarus, Belgium, Bosnia-Herzegovina, Brazil, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Holy See, Hungary, Ireland, Israel, Italy, Korea, Latvia, Lithuania, Liechtenstein, Luxembourg, Macedonia, Malta, the Netherlands, Norway, Paraguay, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, United States, Uruguay, and Serbia/Yugoslavia. U.S. HOLOCAUST MEM'L MUSEUM, *supra*; LOOTEDART.COM, *supra*.

62. *See* U.S. Holocaust Assets Commission Act of 1998, Pub. L. No. 105-186, 112 Stat. 611 (1998); *see also* Bazyler & Fitzgerald, *supra* note 36, at 748–59; Conway, *supra* note 17, at 385; McCarter Collins, *supra* note 15, at 143; Tyler, *supra* note 25, at 467–69; Walton, *supra* note 26, at 606; Emily J. Henson, Comment, *The Last Prisoners of War: Returning World War II Art to Its Rightful Owners—Can Moral Obligations Be Translated into Legal Duties?*, 51 DEPAUL L. REV. 1103, 1155–56 (2002); Predita C. Rostomian, Note, *Looted Art in the U.S. Market*, 55 RUTGERS L. REV. 271, 284 (2002). For more on the Holocaust Assets Commission Act, see *supra* notes 43, 151–55 and accompanying text.

and made a series of recommendations to promote further research and creative solutions to restitution policy issues.[63]

B. Nazi Era Looted Art at the Center of Attention

While most research bodies considered works of art as merely one type of spoliated assets, the restitution of looted cultural property only became the center of attention around 1998.[64] At that time, Jewish interest groups all over the globe called on national governments to properly address the enduring injustice of Nazi era art spoliation.[65] The emotional nature of their claims struck a sympathetic note, and soon the movement gained a firmer footing. Numerous special commissions to support recovery were established,[66] revised museum guidelines and codes of conduct widely

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63. PLUNDER & RESTITUTION, *supra* note 55.

64. Kreder, *Resolving Nazi-Looted Art Disputes*, *supra* note 51, at 167–70; *see* McCarter Collins, *supra* note 15, at 141; Owen C. Pell, *The Potential for a Mediation/Arbitration Commission to Resolve Disputes Relating to Artworks Stolen or Looted During World War II*, 10 DEPAUL-LCA J. ART & ENT. L. 27, 47 (1999); Walton, *supra* note 26, at 607; Cuba, *supra* note 14, at 463–64; Derrossett, *supra* note 12, at 234–35; Falconer, *supra* note 19, at 390; Schlegelmilch, *supra* note 15, at 101; *see also* Marilyn Henry, *Talking Looted Art*, JERUSALEM POST, Aug. 23, 2008, at 14; Thomas W. Lippman, *44 Nations Pledge to Act on Art Looted by the Nazis: Guidelines to Restore Ownership*, WASH. POST, Dec. 4, 1998, at A2.

65. Around the mid-1990s, the *Conference on Jewish Material Claims against Germany* was a long-established organization. *About Us*, CLAIMS CONF., http://www.claimscon.org (last visited Sept. 20, 2011). Since 1951, its mission had always been to secure justice for Jewish victims of Nazi persecution and to seek the return of Jewish property lost during the Holocaust. *Id.* Affiliated with the World Jewish Congress and the 1992 World Jewish Restitution Organization, the *Commission for Art Recovery* is a nonprofit organization, established in 1997, to stimulate restitution efforts by European governments. *About*, COMM'N FOR ART RECOVERY, http://www.commartrecovery.org/content/about (last visited Sept. 20, 2011). The commission encourages and assists governments, museums, and other public institutions to identify works of art in their collections that may have been stolen between 1933 and 1945, under the dominion of the Third Reich, to publicize these works on the Internet and adopt streamlined procedures that facilitate the return of these works to their rightful owners. *Mission*, COMM'N FOR ART RECOVERY, http://www.commartrecovery.org/content/mission (last visited Sept. 20, 2011).

66. The Holocaust Claims Processing Office of the New York State Banking Department was established in 1997 to provide institutional assistance to individuals seeking to recover Holocaust-looted assets. *See History and Mission,* HOLOCAUST CLAIMS PROCESSING OFF., http://www.claims.state.ny.us/hist.htm (last visited Sept. 20, 2011). From the outset, the recovery of looted artwork was one of the office's priorities. *See id.*; *see also* BAZYLER, HOLOCAUST JUSTICE, *supra* note 13, at 213. In September 1997, the Washington, D.C. National Jewish Museum established the Holocaust Art Restitution Project ("HARP"), to document and publish the Jewish cultural losses. *See* Judith H. Dobrzynski, *For What Nazis Stole, A Longtime Art Hound*, N.Y. TIMES, Nov. 29, 1997, at

adopted,[67] collections routinely vetted,[68] museum acquisition and deaccession policies questioned,[69] dealers and auctioneers criticized,[70] and

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B7; *see also* BAZYLER, HOLOCAUST JUSTICE, *supra* note 13, at 213; Schwartz, *supra* note 15, at 21. In 1999, the Commission for Looted Art in Europe ("CLAE") was founded. *About Us,* COMM'N FOR LOOTED ART IN EUR., http://www.lootedartcommission.com/Services (last visited Sept. 20, 2011) [hereinafter COMM'N FOR LOOTED ART]. It is an "international, expert and nonprofit representative body, which researches, identifies and recovers looted property on behalf of families, communities, institutions and governments worldwide . . . In 2001, the Commission [set up] the *Central Registry of Information on Looted Cultural Property 1933–1945*[,]" a central repository of information on Nazi looting. *Id.* The Central Registry is affiliated with the University of Oxford, as it operates under the auspices of the Oxford Centre for Hebrew and Jewish Studies. *Id.* For more information on the Central Registry, see LOOTEDART.COM, *supra* note 61. For the sake of completeness, the International Foundation for Art Research ("IFAR") and the Art Loss Register ("ALR") cannot go unrecorded. INT'L FOUND. FOR ART RESEARCH [IFAR], http://www.ifar.org/about.php (last visited Sept. 20, 2011); ART LOSS REGISTER, http://www.artloss.com (last visited Sept. 20, 2011).

Although these organizations have been founded long before the reemergence of the debate on Holocaust art, they clearly consider the looted art issue an integral part of their mission. *See* IFAR, *supra*; ART LOSS REGISTER, *supra*. As high-profile attempts to deter any type of illicit art trade, both IFAR and the ALR were predestined to take the lead in the Holocaust art restitution debate. *See* IFAR, *supra*; ART LOSS REGISTER, *supra*.

For an overview of national initiatives stimulating identification and restitution of Nazi era looted works of art at the end of the 1990s with regard to the Netherlands, Switzerland, Estonia, Latvia, Lithuania, Belarus, Croatia, Czech Republic, Hungary, Poland, Sweden, Norway, Greece, Italy, Spain, Portugal, and South Africa, see PALMER, *supra* note 24, at 129–49. The website of the U.S. Holocaust Memorial Museum offers a more elaborate discussion of the national initiatives (including special historical commissions) in the countries that participated in the Washington Conference. *See* U.S. HOLOCAUST MEM'L MUSEUM, *supra* note 61.

67. On June 4, 1998, the Association of Art Museum Directors ("AAMD") endorsed the *Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era (1933–1945)*, containing guidelines to "assist museums in resolving claims, reconciling the interests of individuals who were dispossessed of works of art or their heirs together with the fiduciary and legal obligations and responsibilities of art museums and their trustees to the public." *See* ASS'N OF ART MUSEUM DIR. [AAMD], REPORT OF THE AAMD TASK FORCE ON THE SPOLIATION OF ART DURING THE NAZI/WORLD WAR II ERA (1933–1945) (1998) [hereinafter AAMD TASK FORCE REPORT], *available at* http://www.aamd.org/papers/guideln.php.

On January 14, 1999, the International Council of Museums ("ICOM") issued the *ICOM Recommendations Concerning the Return of Works of Art Belonging to Jewish Owners*, calling upon its members to screen their collections for Nazi era spoliated items, to publish the result of these screenings and to actively address their return to their rightful owners. *See* Press Release, Int'l Council of Museums, ICOM Recommendations Concerning the Return of Works of Art Belonging to Jewish Owners (Jan. 14, 1999), *available at* http://archives.icom.museum/worldwar2.html.

Holocaust-related legislation passed.[71] Above all, however, the world witnessed a genuine explosion of Nazi era art disputes that shook the art

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In November of 1999, the American Association of Museums ("AAM") approved the *Guidelines Concerning the Unlawful Appropriation of Objects during the Nazi Era*, which also intended to assist museums in addressing issues relating to objects that may have been looted during the Nazi era. *See Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era*, AM. ASS'N OF MUSEUMS [AAM] (Apr. 2001), http://aam-us.org/museumresources/ethics/upload/ethicsguidelines_naziera.pdf [hereinafter *Unlawful Appropriation Guidelines*].

Pursuant to an agreement reached in October 2000 between the AAM, the AAMD, and the Presidential Advisory Commission on Holocaust Assets in the United States, the AAM formulated the *Recommended Procedures for Providing Information to the Public about Objects Transferred in Europe during the Nazi Era*. *See AAM Recommended Procedures for Providing Information to the Public About Objects Transferred in Europe During the Nazi Era,* AAM, http://www.aam-us.org/museumresources/prov/procedures.cfm (last visited Sept. 20, 2011).

68. *See, e.g.*, Stephen E. Weil, *U.S Museums to Provide Expanded Information about Objects Transferred in Europe during the Nazi Era*, 4 IFAR J., no. 2, 2001 at 10–11 [hereinafter Weil, *U.S. Museums' Information About Nazi Era Objects*]; John J. Goldman, *Museums Press Hunt for Art Nazis Stole*, L.A. TIMES, Apr. 13, 2000, at A18; Diane Haithman, *Getty Puts List of Paintings with Nazi-Era Gaps on Web*, L.A. TIMES, July 8, 2000, at F2. In 1997, the AAMD asked its members to "begin immediately to review the provenance of works in their collections to attempt to ascertain whether any were unlawfully confiscated during the Nazi/World War II era and never restituted." *See* AAMD TASK FORCE REPORT, *supra* note 67. Following an agreement between the AAMD, the AAM, and the Presidential Advisory Commission on Holocaust Assets in the United States, the AAM created a website entitled the *Nazi-Era Provenance Internet Portal* ("NEPIP"), which serves as a publicly accessible resource for information on objects in U.S. museum collections that changed hands in Continental Europe between 1933 and 1945. *See* NAZI-ERA PROVENANCE INTERNET PORTAL PROJECT, http://www.nepip.org (last visited Sept. 20, 2011) [hereinafter NEPIP]. Since September 2003, more than 28,000 objects have been posted by 165 U.S. art museums. *Id.* AAMD member museums also have posted information on their websites regarding works in their collections that changed hands under the Nazi reign. *See Who Should Participate?*, *in* NEPIP, *supra*.

69. *See, e.g.*, Daniel Range, Comment, *Deaccessioning and Its Costs in the Holocaust Art Context: The United States and Great Britain*, 39 TEX. INT'L L.J. 655, 665–73 (2004); Elaine L. Johnston, *Cultural Property and World War II: Implications for American Museums, Practical Considerations for the Museum Administrator*, SC40 A.L.I.-A.B.A. 29 (1998) (commenting on a list of steps that a museum should take in considering an acquisition); *see also* Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museum to the Public*, 11 CARDOZO J. INT'L & COMP. L. 409, 436–45 (2003).

70. *See, e.g.*, Louise Jury, *British Art Dealers Prop Up Market for Nazi Loot*, INDEP. (London), Mar. 5, 2000, at 5; *see generally* Kiesha Minyard, Comment, *Adding Tools to the Arsenal: Options for Restitution from the Intermediary Seller and Recovery for Good-Faith Possessors of Nazi-Looted Art*, 43 TEX. INT'L L.J. 115 (2007).

71. For example, on February 13, 1998, the Holocaust Victims Redress Act was signed into law. Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15

world to its foundations. Worldwide, dozens of heirs to Holocaust victims approached public and private collectors to lay claims to valuable paintings in their holdings.[72] By the change of the millennium, a multitude of restitution negotiations were initiated with many more in the offing.[73] The generation of original postwar purchasers began to shrink drastically, leaving behind heirs who unsuspectingly caught the public's attention by putting their heirlooms up for auction or making donations to museums and other public institutions.[74] Indeed, the current upsurge in claims would not have occurred were it not for the resurfacing of the

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(1998). It aims to provide "redress for inadequate restitution of assets seized by the United States Government during World War II which belonged to victims of the Holocaust and for other purposes," by authorizing the President to financially support organizations assisting Holocaust survivors and archival/translation services. *Id.* In October 1998, the Nazi War Crimes Disclosure Act was passed, in order to make public WWII criminal records. Nazi War Crimes Disclosure Act, Pub. L. No. 105-246, 112 Stat. 1859 (1998); *see also* U.S. Holocaust Assets Commission Act of 1998, Pub. L. No. 105-186, 112 Stat. 611 (1998) (establishing the Presidential Advisory Commission on Holocaust Assets in the United States). For more on the Holocaust-related legislation in the United States, see McCarter Collins, *supra* note 15, at 142–44. For some examples of legislation passed in European countries that suffered a lot under the German occupation, see, for example, Décret no 99-778 du 10 septembre 1999 instituant une commission pour l'indemnisation des victims de spoliations intervenues du fait des législations antisémites en vigueur pendant l'Occupation [Decree No. 99-778 of September 10, 1999 establishing a Commission for the Indemnification of the Victims of Spoliations which occurred as a result of Anti-Semitic Legislation in Force during the Occupation], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Sept. 11, 1999, p. 13633 (Fr.); BUNDESGESETZ ÜBER DIE RÜCKGABE VON KUNSTGEGENSTÄNDEN AUS DEN ÖSTERREICHISCHEN BUNDESMUSEEN UND SAMMLUNGEN [ACT ON THE RESTITUTION OF ARTWORKS FROM AUSTRIAN MUSEUMS AND COLLECTIONS] BUNDESGESETZBLATT I [BGBL I] No. 181/1998, § 1 (Austria), *available at* http://www.ris.bka.gv.at/Dokumente/BgblPdf/1998_181_1/1998_181_1.pdf; Arrêté royal portant création d'une Commission d'étude sur le sort des biens délaissés par les membres de la communauté juive de Belgique lors de leur déportation pendant la guerre 1940-1945 [Royal Decree Founding a Research Commission into the Fate of the Belgian Jewish Community's Assets after the Deportation during the War of 1940-1945] of July 6, 1997, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], July 12, 1997 (Belg.).

72. *See, e.g.*, LUBINA, *supra* note 1, at 32; THE SPOILS OF WAR, *supra* note 24, at 15–16, 241–43.

73. For a comprehensive overview of early Nazi era art restitution claims, see Stephen W. Clark, *World War II Restitution Cases*, SP035 A.L.I.-A.B.A. 371, 373–400 (2009).

74. Hector Feliciano et al., *Nazi Stolen Art*, 20 WHITTIER L. REV. 67, 73 (1998) ("Now, as the generation that lived through World War II shrinks, works of art that made their way out of Nazi-controlled Europe or the chaos of post-war Europe will begin to resurface through donations or dispositions by heirs."); McCarter Collins, *supra* note 15, at 120; Pell, *supra* note 64, at 46

spoliated works in the art market or in publicly exhibited collections.[75] Moreover, with the breakthrough of the Internet and online databases of stolen art, tracking down looted artwork took less patience, perseverance, and luck than ever. Resultantly, the international market and collections became much easier to monitor.[76] Finally, it seems reasonable to assume that the popular interest in spoliated art is partially due to the soaring prices in the booming art market of the recent decades. Whereas, in the past, the potential price tag of litigation had a deterrent effect, the expected value of the case—particularly given the high valuation of artwork in the early 2000s—is likely to exceed litigation costs, encouraging victims to come forward.[77]

II. INTERNATIONAL RESPONSES TO THE PROBLEM OF NAZI ART SPOLIATION

The international community soon realized that the worldwide explosion of Nazi era art disputes could only be adequately dealt with at the international level. Over the past thirteen years, several agreements have been adopted at the international level—evidence of the international community's renewed attention to the problem of Nazi era art spoliation, and societal commitment to come to terms with the enduring injustices of WWII. The following analysis examines these instruments of public international law in chronological order and comments on their legal purport, which, in spite of enthusiastic rhetoric, remains limited.

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75. Feliciano et al., *supra* note 74, at 73; McCarter Collins, *supra* note 15, at 120; Pell, *supra* note 64, at 46; Spiegler, *supra* note 14, at 299; Minkovich, *supra* note 15, at 354.

76. Elizabeth Neff, *Nazi-Era Art Probe Takes to the Internet*, CHI. TRIB., Apr. 12, 2000, at 1; *see* Elisabeth Olson, *Web Site Goes Online to Find Nazi-Looted Art*, N.Y. TIMES, Sept. 8, 2003, at E4; *see also* BAZYLER, HOLOCAUST JUSTICE, *supra* note 6, at 262–66; Joseph F. Sawka, *Reconciling Policy and Equity: The Ability of the Internal Revenue Code to Resolve Disputes Regarding Nazi-Looted Art*, 17 U. MIAMI INT'L & COMP. L. REV. 91, 98–99 (2009). For somewhat visionary comments on how the internet was seen, in 1998, as the ultimate solution for the title problems in the trade of art and antiquities, see Laura McFarland-Taylor, Comment, *Tracking Stolen Artworks on the Internet: A New Standard for Due Diligence*, 16 J. MARSHALL J. COMPUTER & INFO. L. 937, 939 (1998). On September 13, 2011, 173 American museums had uploaded the results of the provenance research of their collection to the *Nazi-Era Provenance Internet Portal*. *See* NEPIP, *supra* note 68. Other countries have similar internet databases. *See infra* note 290 and accompanying text.

77. Graefe, *supra* note 22, at 476; Steven A. Reiss & Jonathan Bloom, *The Good Faith Owner and the Tardy Heir*, 10 IFAR J., no. 2, 2008 at 13; Weiss, *supra* note 15, at 868. For some interesting comments with regard to the cost of art litigation, see Sawka, *supra* note 76, at 100–01.

A. The Washington Conference Principles on Nazi-Confiscated Art

To a large extent, the Washington Conference Principles on Nazi-Confiscated Art ("Washington Principles") had their origin in the events surrounding Egon Schiele's *Portrait of Wally*,[78] and in the resulting re-

78. In 1997, the Viennese Leopold Museum loaned Schiele's *Portrait of Wally* to MoMA for a grand retrospective on the artist. Derek Fincham, *Why U.S. Federal Criminal Penalties for Dealing in Illicit Cultural Property are Ineffective, and a Pragmatic Alternative*, 25 CARDOZO ARTS & ENT. L.J. 597, 625 (2007). Prior to the war, however, the painting belonged to Lea Bondi, a Jewish art dealer, who sold her collection under duress in order to flee Austria in 1938. *Id.* The portrait ended up in the private collection of Professor Rudolph Leopold, which became accessible to the public in 1994. *Id.* In January 1998, only moments before the painting was to be shipped back to its home country, the District Attorney's Office issued a grand jury subpoena at the request of the Bondi heirs. *Id.* at 625–26. The action was part of a criminal investigation into stolen property and the starting point of more than ten years of litigation. *See id.* at 626. At the time, the bold act of the District Attorney launched a world outcry over Nazi era art spoliation to all collectors and alerted many institutions of the need to examine their collections for objects with questionable provenance. *Id.*; *see In re* Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art, 677 N.Y.S.2d 872 (N.Y. Sup. Ct. 1998), *rev'd*, People v. Museum of Modern Art (*In re* Grand Jury Subpoena Duces Tecum), 688 N.Y.S.2d 3 (N.Y. App. Div.), *motion granted*, 719 N.E.2d 897 (N.Y.), *motion granted*, 1999 N.Y. LEXIS 2130 (N.Y.), *motion granted*, 1999 N.Y LEXIS 2131 (N.Y.), *motion granted*, 1999 N.Y LEXIS 2132 (N.Y.), *rev'd*, 719 N.E.2d 897 (N.Y. 1999), *related proceeding at*, United States v. Portrait of Wally, 105 F. Supp. 2d 288 (S.D.N.Y.), *reargument denied by, motion granted by*, 2000 U.S. Dist. LEXIS 18713 (S.D.N.Y. 2000), *summary judgment granted by, claim dismissed by, motion denied by*, 2002 U.S. Dist. LEXIS 6445 (S.D.N.Y. 2002), *summary judgment denied by*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009), *stipulation and order of settlement and discontinuance*, No. 99-CV-09940 (S.D.N.Y. July 29, 2010). The *Schiele* case was broadly covered in the press and commented on in countless law review articles, see, for example, Susan E. Brabenec, Casenote, *The Art of Determining "Stolen Property:"* United States v. Portrait of Wally*,* A Painting by Egon Schiele, 105 F. Supp. 2d 288 (S.D.N.Y. 2000), 69 U. CIN. L. REV. 1369, 1385–89 (2001); Lawrence M. Kaye, *A Quick Glance at the Schiele Paintings*, 10 DEPAUL-LCA J. ART & ENT. L. 11, 11–22, 26 (1999); Jennifer Anglim Kreder, *The Choice between Civil and Criminal Remedies in Stolen Art Litigation*, 38 VAND. J. TRANSNAT'L L. 1199, 1224–31 (2005); Martha Lufkin, *The Subpoena Heard Round the World*, 4 ART ANTIQUITY & L. 363, 363–73 (1999) (U.K.); Martha Lufkin, *Why Nazi Loot Ceased Being "Stolen" when US Forces Seized it in Austria: The Federal* Schiele *Case*, 5 ART ANTIQUITY & L. 305, 305–17 (2000) (U.K.); Martha Lufkin, *Whistling Past the Graveyard isn't Enough*, 7 ART ANTIQUITY & L. 207, 207–17 (2002) (U.K.); Spiegler, *supra* note 14, at 306–12; Wissbroecker, *supra* note 24, at 44–53; Daniel J. Bender, Case Commentary, In Re *Application to Quash Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*, 31 N.Y.U. J. INT'L L. & POL. 109, 109–16, 123 (1998); Alexander Kaplan, Note, *The Need for Statutory Protection from Seizure for Art Exhibitions: The Egon Schiele Seizures and Implications for Major Museum Exhibitions*, 7 J.L. & POL'Y 691, 691–99 (1999); Shira T. Shapiro, Case Note, *How* Republic of Austria v. Altmann *and* United States v. Portrait of Wally *Relay the Past and Forecast the Future of*

port of the American Association of Art Museum Directors ("AAMD") Task Force on the Spoliation of Art during the Nazi/World War II Era (1933–1945), stating principles and guidelines to deal with Nazi-looted art.[79] The 1998 Washington Conference on Holocaust-Era Assets served the United States' ambition to procure international endorsement of the earlier AAMD report.[80]

The Washington Conference was widely supported. From November 30 until December 3, 1998, the United States Holocaust Memorial Museum welcomed delegations from forty-four countries and thirteen non-governmental organizations.[81] The meeting's agenda was set on "forg[ing] an international consensus on how governments and other entities can cooperate to redress grave injustices that remain from the Holocaust era."[82] On December 3, 1998, the delegates reached a consensus on an eleven-point statement of principles, the Washington Principles, that aimed to 1) simplify the process of identifying Nazi-looted art objects; 2) track down prewar owners; and 3) settle conflicting claims to property.[83]

In relation to the identification process, Principle I lays down the generic obligation, according to which "[a]rt that had been confiscated by

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Nazi Looted-Art Restitution Litigation, 34 WM. MITCHELL L. REV. 1147, 1154–59 (2008); Judith H. Dobrzynski, *The Zealous Collector— A Special Report: A Singular Passion for Amassing Art, One Way or Another*, N.Y. TIMES, Dec. 24, 1997, at E1; Catherine Hickley & Zoe Schneeweiss, *Vienna's Leopold Pays $19 Million to Keep Schiele's 'Wally'*, BLOOMBERG (July 21, 2010), http://www.bloomberg.com/news/2010-07-21/vienna-s-leopold-pays-19-million-to-keep-schiele-s-wally-.html.

79. EIZENSTAT, IMPERFECT JUSTICE, *supra* note 13, at 193; Jennifer Anglim Kreder, *The Revolution in U.S. Museums Concerning the Ethics of Acquiring Antiquities*, 64 U. MIAMI L. REV. 997, 1022 (2010) [hereinafter Kreder, *Ethics Revolution in U.S. Museums*]. For the text of the AAMD Report on Nazi-era Art Spoliation, see REPORT OF THE AAMD TASK FORCE, *supra* note 67.

80. *See* EIZENSTAT, IMPERFECT JUSTICE, *supra* note 13, at 193–94; LUBINA, *supra* note 1, at 175; Kreder, *Resolving Nazi-Looted Art Disputes*, *supra* note 51, at 169; *see also* Graefe, *supra* note 22, at 503.

81. Bazyler & Fitzgerald, *supra* note 36, at 710; Kreder, *Resolving Nazi-Looted Art Disputes*, *supra* note 51, at 169–70; McCarter Collins, *supra* note 15, at 141; Pell, *supra* note 64, at 47; Walton, *supra* note 26, at 607; Cuba, *supra* note 14, at 463–64; Derrossett, *supra* note 19, at 234–35; Falconer, *supra* note 19, at 390; Schlegelmilch, *supra* note 15, at 101; *see also* Lippman, *supra* note 64, at A2.

82. Stuart E. Eizenstat, Under Sec'y of State for Econ., Bus., & Agric. Affairs, On-the-Record Briefing on Holocaust-Era Conference (Nov. 24, 1998), *available at* http://fcit.usf.edu/HOLOCAUST/resource/assets/holocaus.htm.

83. McCarter Collins, *supra* note 15, at 141.

the Nazis and not subsequently restituted should be identified."[84] Principles II to IV prescribe more specific measures to overcome the difficulties that victims of art looting typically experience.[85] Principle II instructs governments to make accessible to researchers all relevant records and archives.[86] Principle III directs the signatory countries to make available resources and personnel to facilitate the identification of all art confiscated by the Nazis and not subsequently restituted.[87] According to Principle IV, however, consideration should be given to "unavoidable gaps or ambiguities in the provenance of an object in light of the . . . [passage] of time and the circumstances of the 1933–1945 period,"[88] as in many cases it is likely that the entire truth of the events that happened more than fifty years ago will remain unknown forever. It is not surprising that, in numerous cases original owners will find it difficult to provide impervious and voluminous evidence of their title.[89]

Once an artwork is confirmed as having been looted during WWII, the search for its original owner is the next step. In that connection, Principle V requires complete openness, as "[e]very effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs."[90] Principle VI suggests establishing a central registry of such information, while Principle VII calls for measures to encourage prewar owners and their heirs to come forward and make known their claims to looted pieces of artwork.[91]

With regard to the settlement of conflicting claims to looted property, the Washington Principles' key objective is to achieve "a just and fair solution."[92] As to what "just and fair" solutions may be, the Washington Principles do not specify,[93] yet the text's cautious tone stands out, as per Principle VIII all signatories explicitly recognize that this may vary according to the facts and circumstances surrounding a specific case.[94] The

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84. Washington Principles, *supra* note 9, princ. I. This webpage offers the full text of the Washington Principles, along with all conference material (reports, testimonies, etc.). *Id.*

85. *See id.* princs. II–IV.

86. *Id.* princ. II.

87. *Id*. princ. III.

88. LUBINA, *supra* note 1, at 176.

89. *See id*.

90. Washington Principles, *supra* note 9, princ.V.

91. *Id.* princs.VI, VII.

92. *Id.* princs. VIII, IX.

93. Jennifer Anglim Kreder, *The Holocaust, Museum Ethics and Legalism*, 18 S. CAL. REV. L. & SOC. JUST. 1, 5 (2008).

94. Washington Principles, *supra* note 9, princ. VIII.

remainder of the text includes suggestions that may serve as a guide to achieve these "just and fair" solutions.[95] In this connection, Principle X calls for the establishment of bodies with a balanced membership to identify confiscated art and to assist in addressing ownership issues.[96] Finally, Principle XI encourages signatory nations to develop national processes to implement the Washington Principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.[97]

The Washington Conference was undoubtedly successful in facilitating identification of looted artwork and its wartime owners.[98] In response to the Washington Principles, numerous signatory countries have taken new efforts or expanded existing initiatives to enhance the degree of transparency and disclosure regarding the provenance of the artwork in national museums.[99] Although the Principles undeniably led to a number of voluntary restitutions by both public and private collectors all over the globe,[100] their net impact on the settlement of Holocaust-related title disputes is less obvious. After all, in contrast to the elaborate praise by political leaders pronouncing the Washington events as redefining the management of Nazi-looted art,[101] the international community's legal com-

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95. *See id.* princs. IX–XI.

96. *Id.* princ. X; LUBINA, *supra* note 1, at 177.

97. Washington Principles, *supra* note 9, princ. XI; LUBINA, *supra* note 1, at 177.

98. *See* McCarter Collins, *supra* note 15, at 142.

99. *See infra* notes 289–92 and accompanying text.

100. For some U.S. examples, see *infra* notes 357–63 and accompanying text.

101. The statement of Stuart Eizenstat, U.S. Under Secretary of Commerce for International Trade and Special Envoy of the Department of State on Property Restitution in Central and Eastern Europe, is exemplary of this attitude:

> The art world will never be the same in the way it deals with Nazi-confiscated art. From now on, the sale, purchase, exchange, and display of art from this period will be addressed with greater sensitivity and a higher international standard of responsibility. This is a major achievement which will reverberate through our museums, galleries, auction houses, and in the homes and hearts of those families who may now have the chance to have returned what is rightfully theirs. This will also lead to the removal of uncertainty in the world art market and facilitate commercial and cultural exchange.

Stuart E. Eizenstat, Under Sec'y of State for Econ., Bus., & Agric. Affairs, Concluding Statement at the Washington Conference on Holocaust-Era Assets (Dec. 3, 1998) *available at* http://fcit.usf.edu/HOLOCAUST/resource/assets/concl2.htm; *see also* Stuart E. Eizenstat, *Art, Gold and Slave Labor: The U.S. Government's Efforts on Behalf of Holocaust Victims*, 6 IFAR J., no. 3, 2007, at 27 [hereinafter Eizenstat, *Art, Gold and Slave Labor*] (quoting Philippe De Montebello, Director of the Metropolitan Museum) ("The art world has changed forever. The genie is out of the bottle. The secretive world of art will have to open up.").

mitment remains remarkably limited. The Washington Principles' opening lines immediately recall "that among participating nations there are differing legal systems and that countries act within the context of their own laws," thus adding to their vagueness and noncommittal nature.[102] Accordingly, the Washington Principles state mere moral obligations or guidelines, rather than binding legal duties.[103]

B. The Council of Europe Resolution 1205

Whereas the 1998 Washington Conference brought together an ad hoc group of delegations representing nations or interest groups, the restitution debate subsequently reached more established international fora.[104] In 1999, the Council of Europe, one of the oldest international organizations, buckled down to the issue of spoliation of Jewish cultural property. The Council's interest in the matter, however, was neither surprising nor completely new, in view of its stated aim to promote awareness and encourage the development of Europe's cultural identity and diversity. In that context, the Council of Europe had already adopted measures to en-

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102. Washington Principles, *supra* note 9; *see also* Kreder, *Resolving Nazi-Looted Art Disputes*, *supra* note 51, at 171.

103. BAZYLER, HOLOCAUST JUSTICE, *supra* note 13, at 259; McCarter Collins, *supra* note 15, at 142; Vanessa A. Wernicke, Comment, *The "Retroactive" Application of the Foreign Sovereign Immunities Act in Recovering Nazi Looted Art*, 72 U. CIN. L. REV. 1103, 1120–21 (2004); Derrossett, *supra* note 19, at 235; Falconer, *supra* note 19, at 391; Emily A. Maples, Comment, *Holocaust Art: It isn't Always "Finders Keepers, Losers Weepers": A Look at Art Stolen During the Third Reich*, 9 TULSA J. COMP. & INT'L L. 355, 382–83 (2001); Pollock, *supra* note 43, at 204–05; Mullery, *supra* note 18, at 651; Range, *supra* note 69, at 668.

104. *See* LUBINA, *supra* note 1, at 178. For the sake of completeness, it should be observed that at the European Community level, the European Parliament had already adopted three resolutions that recognized the problem of Nazi era art looting prior to the Washington Conference. LUBINA, *supra* note 1, at 182–83. The first resolution was adopted on December 14, 1995. Resolution on the Return of Plundered Property to Jewish Communities, 1996 O.J. (C 17) 141; *see* LUBINA, *supra* note 1, at 183. The scope of the resolution, however, was not limited to cultural property and must be understood against the background of the transition of the countries of the former Eastern Block after the fall of communism. LUBINA, *supra* note 1, at 183. The Resolution applauded the actions that various Central and Eastern European States—which at that time were not yet admitted to the European Union—had undertaken to return stolen property to Jewish communities. *Id.* For an interesting overview of these restitution initiatives taken in Central and Eastern Europe, see Stephen A. Denburg, Note, *Reclaiming Their Past: A Survey of Jewish Efforts to Restitute European Property*, 18 B.C. THIRD WORLD L.J. 233, 235–59 (1998). A second resolution, dealing with the restitution of property to Holocaust victims, was adopted on July 16, 1998. Resolution of 16 July 1998 on the Restitution of Property Belonging to Holocaust Victims, 1998 O.J. (C 292) 112, 166; *see* LUBINA, *supra* note 1, at 183.

courage the restoration of Jewish culture in Europe prior to the upsurge in Nazi era title disputes.[105] On November 5, 1999, the Parliamentary Assembly of the Council of Europe, then representing forty-one nations, unanimously adopted Resolution 1205.[106] The Resolution calls for the restitution of looted Jewish cultural property in Europe, in continuation of the attempts that were made following the end of WWII and the conferences of Washington and London.[107]

The Resolution's scope differs from the Washington Principles, as it takes into consideration all possible causes of loss, such as forced sales or unofficial Aryanizations, rather than the straightforward confiscations the Washington Principles exclusively address.[108] However, Resolution 1205 is more limited with regard to the claimant group. Unlike the Washington Principles, its range is confined to "Jewish property," which is not surprising in view of the Council's ambition of restoring Jewish culture in Europe.[109]

Unlike the Washington Principles and their vague aim at a "just and fair solution," the resolution's primary emphasis is on actual restitution, i.e. physical return of looted property to its original owners, their heirs, or their countries of origin.[110] However, the Parliamentary Assembly of the Council of Europe is not entitled to adopt legally binding measures.[111] Therefore, in order to meet its objectives, the Assembly could only invite the Committee of Ministers or the national parliaments to give immediate consideration to ways in which they may be able to facilitate the return of looted Jewish cultural property.[112] In that regard, the remainder of Resolution 1205 contains a number of suggested ac-

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105. *See, e.g.*, Eur. Parl. Ass., *Resolution 885 on the Jewish Contribution to European Culture*, 13th Sess. (1987), *available at* http://assembly.coe.int/documents/adoptedtext/ta87/eres885.htm#1; Eur. Parl. Ass., *Recommendation 1291 on Yiddish Culture* (1996), *available at* http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta96/EREC1291.htm.

106. Eur. Parl. Ass., *Resolution 1205 of the Parliamentary Assembly of the Council of Europe*, Res. No. 1205 (1999) [hereinafter *Resolution 1205*]; Range, *supra* note 69, at 668.

107. *Resolution 1205*, *supra* note 106, paras. 4–5.

108. *See* LUBINA, *supra* note 1, at 178–79; Patrick J. O'Keefe, *The Draft Resolution on Looted Jewish Cultural Property Produced by the Parliamentary Assembly of the Council of Europe*, 4 ART ANTIQUITY & L. 313, 314 (1999) (U.K.) [hereinafter O'Keefe, *Draft Resolution on Looted Jewish Cultural Property*].

109. *See* LUBINA, *supra* note 1, at 178; *see* O'Keefe, *Draft Resolution on Looted Jewish Cultural Property*, *supra* note 108, at 314.

110. *Compare* Washington Principles, *supra* note 9, princs.VIII, IX, *with Resolution 1205*, *supra* note 106, para. 8.

111. LUBINA, *supra* note 1, at 180.

112. *Resolution 1205*, *supra* note 106, para. 10.

tions,[113] or recommended legislative changes, such as "the extension or removal of statutory limitation periods, the removal of restrictions on alienability . . . [and] the waiving of export controls,"[114] or even the annulment of later bona fide acquired titles.[115]

Unfortunately, the profoundness of the Resolution's intended changes—alterations of long established principles of civil law—ensured that the overambitious Resolution 1205 was never implemented. The Committee of Ministers did not act upon the suggestions of the Parliamentary Assembly, nor did the Resolution inspire the member states to significant reforms.[116]

C. The Vilnius Forum Declaration

Paragraph 19 of Resolution 1205 called for "the organisation of a European conference, further to that held in Washington on the Holocaust era assets, with special reference to the return of cultural property and the relevant legislative reform."[117] The Government of Lithuania offered to serve as a host for the follow-up conference on the implementation of the Washington Principles and Resolution 1205.[118] The International Forum on Holocaust-Era Looted Cultural Assets took place in Vilnius, under the auspices of the Council of Europe.[119]

Although the meeting could be seen as a sign of the international community's continued commitment to rectify outstanding injustices of

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113. Paragraph 11 calls for the removal of all impediments to identification, such as laws, regulations or policies that prevent access to relevant information in government or public archives; Paragraph 12 recommends "bodies in receipt of government funds," which find themselves holding looted Jewish cultural property to return it, and Paragraph 17 aims at establishing out-of-court forms of dispute resolution. *Resolution 1205*, *supra* note 106, paras. 11, 12, 17; *see* O'Keefe, *Draft Resolution on Looted Jewish Cultural Property*, *supra* note 108, at 314–15, 320–21.

114. The legislative changes to be considered by the national parliaments are treated in Paragraph 13. *Resolution 1205*, *supra* note 106, para. 13; LUBINA, *supra* note 1, at 180; O'Keefe, *Draft Resolution on Looted Jewish Cultural Property*, *supra* note 108, at 315–18.

115. *See Resolution 1205*, *supra* note 106, para. 15; *see also* O'Keefe, *supra* note 108, at 319; Sue Choi, Comment, *The Legal Landscape of the International Art Market After* Republic of Austria v. Altmann, 26 NW. J. INT'L L. & BUS., 167, 196 n.221 (2005).

116. *See* LUBINA, *supra* note 1, at 180.

117. *Resolution 1205*, *supra* note 106, para. 19.

118. *See* Kreder, *supra* note 31, at 172 n.18; Range, *supra* note 69, at 668.

119. Patrick J. O'Keefe, *Vilnius International Forum on Holocaust-Era Looted Cultural Assets, Vilnius, Lithuania (October 3–5, 2000)*, 10 INT'L J. CULT. PROP. 127, 127 (2001) [hereinafter, O'Keefe, *Vilnius International Forum*]; Kreder, *Resolving Nazi-Looted Art Disputes*, *supra* note 51, at 172; Range, *supra* note 69, at 668.

the Holocaust,[120] it undoubtedly was a failure, as the Vilnius Forum fell short of producing anything that "significantly refine[d] or expand[ed the Washington Principles.]"[121] Nor did the Vilnius Forum produce anything legally binding,[122] which was particularly disappointing given the conference's ambition to seek legal reforms and implement the Washington Principles as well as Resolution 1205.[123]

The final text, the Vilnius Forum Declaration, went no further than to "encourage[] all participating States to take all reasonable measures to implement the Washington Conference Principles on Nazi-Confiscated Art as well as Resolution 1205,"[124] or to "welcome[] the progress being made by countries to take the measures necessary, within the context of their own laws, to assist in the identification and restitution."[125] Once more, the reserved tone of the Vilnius Forum Declaration stood out.

At an early stage of the conference, it became clear that most participants to the Vilnius Forum did not want to amend their national legal systems. A comparison of the draft recommendations developed prior to the Vilnius Forum and the corresponding Vilnius Declaration that was eventually adopted gives a clear indication of what states were not prepared to countenance.[126] Some states rejected the draft's suggestion for "the establishment of a Task Force on Holocaust-Era Looted Assets to monitor the implementation throughout Europe of the Washington Principles, Council of Europe Resolution 1205 and the Vilnius Recommendations" as "too drastic a step."[127] Accordingly, the Vilnius Declaration did not retain any suggestion of a watchdog and instead adopted the proposal that "periodical international expert meetings [were to be held] to exchange views and experiences on the implementation" of the Washington Principles, Resolution 1205 of the Parliamentary Assembly of the

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120. *See* McCarter Collins, *supra* note 15, at 142–43; *see also* O'Keefe, *Vilnius International Forum*, *supra* note 119.

121. Graefe, *supra* note 22, at 504; Kreder, *Resolving Nazi-Looted Art Disputes*, *supra* note 51, at 172. For a profound analysis of the Vilnius Forum Declaration, see also O'Keefe, *Vilnius International Forum*, *supra* note 119, at 127–32.

122. Lauren F. Redman, *A Wakeup Call for a Uniform Statute of Limitations in Art Restitution Cases*, 15 UCLA ENT. L. REV. 203, 222 n.191 (2008); Derrossett, *supra* note 19, at 235–36; Pollock, *supra* note 43, at 205; Range, *supra* note 69, at 669.

123. *See* LUBINA, *supra* note 1, at 181.

124. *Vilnius Forum Declaration*, COMM'N. FOR LOOTED ART IN EUR. (Oct. 5, 2000), http://www.lootedartcommission.com/vilnius-forum.

125. *Id.* para. 6.

126. O'Keefe, *Vilnius International Forum*, *supra* note 119, at 130; *see* LUBINA, *supra* note 1, at 181–82.

127. O'Keefe, *Vilnius International Forum*, *supra* note 119, at 130 (internal quotations omitted).

Council of Europe, and the Vilnius Declaration.[128] In addition, contrary to the draft, the Vilnius Declaration did not mention a word about the creation of a future international convention on the legal aspects of restitution.[129] Accordingly, the Vilnius Forum was nothing more than tea and sympathy for those countries that, since the Washington Conference, had actually undertaken some effort to achieve the restitution of looted cultural assets to the original owners or their heirs. No changes to existing legal rules and norms were actually contemplated.[130]

D. The Terezín Declaration

Although the European Parliament had already passed a set of resolutions regarding the restitution of looted property in the late 1990s,[131] at the European Community level the restitution debate only took shape towards the end of 2003. On December 17, 2003, the European Parliament adopted a resolution endorsing a Parliamentary Committee report on a legal framework for free movement within the internal market of goods whose ownership is likely to be contested.[132] In the resolution, the European Parliament called on the European Commission to undertake a study on the development of common principles regarding prescription and the establishment of ownership or title and possible dispute resolution mechanisms.[133] In addition, the Presidency of the European Union was requested to assign the issue to a working group.[134] However, all of Parliament's suggestions were disregarded, as no further action was taken at the European Community level until 2009.[135]

On June 26, 2009, under the auspices of the European Union, the four-day Prague Holocaust Era Assets Conference set about its proceedings. On June 30, 2009, upon the invitation of the Czech government, the rep-

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128. *Vilnius Forum Declaration*, *supra* note 124, para. 5; *see also* LUBINA, *supra* note 1, at 182 (internal quotations omitted); O'Keefe, *Vilnius International Forum*, *supra* note 119, at 130.

129. *See* LUBINA, *supra* note 1, at 182; O'Keefe, *Vilnius International Forum*, *supra* note 119, at 131–32.

130. *See* O'Keefe, *Vilnius International Forum*, *supra* note 119, at 130–32.

131. Dunbar v. Seger-Thomschitz, 638 F. Supp. 2d 659, 664 (E.D. La. 2009).

132. Resolution on Freedom of Movement and Ownership of Goods, 2002/2114(INI), 2004 O.J. (C 91) E/500 (2003) (setting out a legal framework for free movement within the internal market of goods whose ownership is likely to be contested).

133. *See* LUBINA, *supra* note 1, at 183–84.

134. *Id.*

135. *Id.* at 184.

resentatives of forty-six states met in Terezín to adopt the conclusive declaration.[136]

However, with regard to the restitution of Nazi-confiscated cultural property,[137] the Terezín Declaration paraded old ideas as new ones. The document solemnly reaffirmed the signatories' support of the Washington Principles and encouraged all parties to apply them, yet did not actually further the cause of restitution.[138] On the contrary, if there might have been some doubt about the normative value of the Terezín Declaration and its predecessors, their precise purport is henceforth extremely clear. With regard to restitution of cultural heritage, the Terezín Declaration only speaks in terms of "voluntary commitments" and "moral principles."[139] In that connection it is noteworthy that the preamble to the Terezín Declaration even explicitly affirms the legally nonbinding nature of the declaration and the moral responsibilities expressed therein.[140]

III. THE TENUOUSNESS OF PUBLIC INTERNATIONAL LAW FOR THE RESOLUTION OF NAZI ERA ART DISPUTES IN THE UNITED STATES

The preceding discussion serves as an indication of the international community's affected preoccupation with the outstanding injustices of Nazi era spoliation. Chronological analysis reveals that none of the adopted instruments of public international law imposed any enforceable legal duty on the government of the signatory states, let alone any additional legal right for the victims of Nazi era spoliation. Accordingly,

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136. *Id.* at 484; *see also* Terezín Declaration on Holocaust Era Assets and Related Issues, Holocaust Era Assets Conference, June 30, 2009, *available at* http://www.holocausteraassets.eu/files/200000215-35d8ef1a36/TEREZIN_DECLARATION_FINAL.pdf.

137. Unlike the 1998 Washington Conference, the 2009 Prague Conference did not exclusively focus on looted art. Miloš Pojar, *Why We Have Convened the Conference?*, HOLOCAUST ASSETS CONF. (Feb. 9, 2009), http://www.holocausteraassets.eu. Other issues, such as the welfare of Holocaust survivors and other victims of Nazi persecution, immovable property, Jewish cemeteries, burial sites, and archives, as well as Holocaust-related education, remembrance, research and memorial sites, were also discussed. *See id.*; *Program*, HOLOCAUST ASSETS CONF., http://www.holocausteraassets.eu/program (last visited Sept. 21, 2011).

138. There are no provisions within the Terezín Declaration that provide victims an actual *right* to claim back their stolen belongings. Accordingly, the Terezín Declaration did not further the cause of restitution (i.e. actually obtaining the stolen artwork of financial compensation). *See, e.g.*, Terezín Declaration, *supra* note 136, at 1–4; *see also* LUBINA, *supra* note 1, at 484–85; Conway, *supra* note 17, at 400–01.

139. Terezín Declaration, *supra* note 136, at 5–8.

140. *Id.* at 1 ("Keeping in mind the legally non-binding nature of this Declaration and moral responsibilities thereof.").

none of these instruments of public international law are self-executing international treaties, as the signatories lacked will to be bound.[141]

However, this does not necessarily imply that these international principles, resolutions, and declarations are devoid of all meaning. They may still be important factors in achieving—albeit indirectly—the objectives set by the international community when adopting these instruments of public international law. Nonbinding international agreements often trigger pressure for compliance among the actors involved, give rise to expectations as to the outcome of legal proceedings, and accordingly give courts a push in a certain direction.[142] In addition, they may serve as an inspiration or even justification for governmental action, leading to the implementation of domestic legislation.[143]

Despite the potential for nonbinding international agreements to produce indirect legal effects, this Part argues that, as far as the actual settlement of Holocaust-related art disputes in the United States is concerned, the ambitious objectives of the various international agreements regarding Nazi-looted art have, for the greater part, not even been indirectly met. In particular, the following analysis shows that, in Nazi era art litigation, arguments of public international law and corresponding domestic laws will not be of much help to heirs of original owners when trying to regain possession of looted belongings through U.S. court procedures.

A. Failure to Implement the Core Elements of the International Framework

In response to the sudden upsurge in Holocaust-related title disputes, several members of the U.S. Congress passed a number of Holocaust-related bills.[144] A plethora of proposed legislation eventually resulted in three 1998 bills, which the 105th Congress passed even prior to the Washington Conference.[145]

On February 2, 1998, President Clinton signed the Holocaust Victims Redress Act into law.[146] The bill, which was sponsored by New York

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141. *See* LUBINA, *supra* note 1, at 218–20.

142. *See id.*

143. *See id.* at 219.

144. Office of Cong. Relations, *The 105th Congress and Holocaust-Related Litigation*, U.S. HOLOCAUST MEM'L MUSEUM (Dec. 23, 1998), http://www.ushmm.org/assets/legislation.htm.

145. *Id.*; *see* Falconer, *supra* note 19, at 400.

146. Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15 (1998); *see also* Falconer, *supra* note 19, at 400; Lawrence M. Kaye, *Looted Art: What Can and Should Be Done*, 20 CARDOZO L. REV. 657, 666–67 (1998); Kreder, *Resolving Nazi-*

Senator D'Amato, had multiple purposes and addressed both the issue of heirless assets and the problem of looted art in an attempt to "provide a measure of justice to survivors of the Holocaust all around the world while they are still alive."[147] Title I of the Holocaust Victims Redress Act authorized the President to appropriate up to twenty-five million dollars for distribution to charitable organizations that lend succor to Holocaust survivors and an additional five million dollars for archival research and translation services to assist in the restitution of assets looted or extorted from Holocaust victims.[148] Title II expressed:

> [T]he sense of the Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.[149]

On June 23, 1998, President Clinton signed the United States Holocaust Assets Commission Act into law,[150] which created the Presidential Advisory Commission on Holocaust Assets in the United States.[151] The Holocaust Assets Commission was established to conduct a thorough study and develop a historical record of the collection and disposition of Holocaust era assets in the United States before, during, and after WWII.[152] The commission focused on a broad panoply of assets, such as money, gems, jewels, precious metals, bank accounts, insurance policies, real estate, works of art, books, manuscripts, and religious objects that came into the possession or control of the Federal Government at any time after January 30, 1933.[153] On January 16, 2001, the commission submitted its final report to the President, making recommendations for

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Looted Art Disputes, *supra* note 51, at 174–75; McCarter Collins, *supra* note 15, at 143; Pell, *supra* note 64, at 46; Walton, *supra* note 26, at 605–06; Henson, *supra* note 62, at 1155; Maples, *supra* note 103, at 382; Pollock, *supra* note 43, at 205.

147. Holocaust Victims Redress Act, § 101.

148. *Id.* § 103.

149. *Id.* § 202.

150. U.S. Holocaust Assets Commission Act of 1998, Pub. L. No. 105-186, 112 Stat. 611 (1998).

151. *Id.* § 2.

152. *Id.* § 3.

153. *Id.* The independent commission was composed of twenty-one members. *Id.* Eight were private citizens, who had a record of demonstrated leadership on issues relating to the Holocaust or in the fields of commerce, culture, or education; four were representatives of the Department of State, the Department of Justice, the Department of the Army, and the Department of the Treasury; another eight were Congressional Members from both the House of Representatives and the Senate. *Id.*

legislative, administrative, and other action.[154] However, none of the commission's recommendations have actually been adopted.[155]

In October 1998, the Nazi War Crimes Disclosure Act was passed, establishing the Nazi War Criminal Records Interagency Working Group.[156] Its mission was to locate, identify, inventory, recommend for declassification, and make available to the public all classified Nazi war criminal records of the United States.[157] Through this operation, Congress aimed to acknowledge the atrocities of the Holocaust and bring justice to the survivors and their heirs.[158] The Interagency Working Group coordinated the declassification and release of around eight million pages of Holocaust-related records.[159]

Unlike its predecessor, the 106th Congress (January 3, 1999 through January 3, 2001) was less effective than the preceding Congress in actually passing Holocaust-related legislation than introducing it.[160] Of the numerous proposals, it only enacted a single one.[161] The considerable amount of proposed legislation, however, demonstrates the 106th Congress's continued commitment to the resolution of the outstanding Holocaust injustices. Congressman Slaughter sponsored the Justice for Holocaust Survivors Act, which tried to add an exception to the Foreign Sovereign Immunities Act[162] allowing U.S. citizens who had suffered per-

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154. *See* Bazyler & Fitzgerald, *supra* note 36, at 748–59; Falconer, *supra* note 19, at 400–01; McCarter Collins, *supra* note 15, at 143; Tyler, *supra* note 25, at 465; Walton, *supra* note 26, at 606; Henson, *supra* note 62, at 1155; Maples, *supra* note 103, at 382; Mullery, *supra* note 18, at 650; Pollock, *supra* note 43, at 205–06; Sawka, *supra* note 76, at 107.

155. Pollock, *supra* note 43, at 206; Jessica Grimes, Note, *Forgotten Prisoners of War: Returning Nazi-Looted Art by Relaxing the National Stolen Property Act*, 15 ROGER WILLIAMS U.L. REV. 521, 544 (2010).

156. Nazi War Crimes Disclosure Act, Pub. L. No. 105-246, § 2, 112 Stat. 1859 (1998).

157. *Id.* § 3; *see also* Falconer, *supra* note 19, at 401; McCarter Collins, *supra* note 15, at 144.

158. Falconer, *supra* note 19, at 401; McCarter Collins, *supra* note 15, at 144.

159. *Interagency Working Group (IWG)*, U.S. NAT'L ARCHIVES & RECORDS ADMIN., http://www.archives.gov/iwg (last visited Sept. 21, 2011); *see* Falconer, *supra* note 19, at 401; *see also* McCarter Collins, *supra* note 15, at 143–44.

160. *See* Falconer, *supra* note 19, at 401.

161. U.S. Holocaust Assets Commission Extension Act of 1999, Pub. L. No. 106-155, 113 Stat. 1740. Through this Act, Congress extended the term and funding of the Holocaust Assets Commission. *Id.* § 2.

162. The Foreign Sovereign Immunity Act of 1976 introduced limitations as to whether foreign countries may be sued in U.S. courts. Accordingly, the FSIA obstructed lawsuits in U.S. courts against Germany. *See* Lauren F. Redman, *The Foreign Sovereign Immunities Act: Using a "Schield" Statute as a "Sword" for Obtaining Federal Jurisdiction in Art and Antiquities Cases*, 31 FORDHAM INT'L L.J. 781, 788–90 (2008).

sonal injuries during WWII to sue Germany in federal court when they exhausted all remedies under German law. However, the proposal never made it through the legislature.[163] Several propositions attempted to make amendments to the Internal Revenue Code by exempting Holocaust reparations from individual Federal income tax,[164] by excluding from gross income "any amount received by an individual (or any heir of the individual) from any person as a result of any moral or legal injustice experienced by such individual as a Holocaust victim"[165] or by prohibiting deductions "for any payment under a foreign-based Holocaust victims' settlement if no deduction would be allowed under such Code for such payment were it made directly by the foreign bank or other entity entering into such settlement."[166] However, none of these proposed bills were signed into law either.[167]

B. The Imperviousness of U.S. Courts to Public International Law

On August 20, 2010, the United States Court of Appeals for the Fifth Circuit ruled that the Terezín Declaration, expressing the U.S. policy on behalf of victims of Nazi era spoliation, does not preempt state property law.[168]

The case arose out of an adverse ownership claim made by Dr. Claudia Seger-Thomschitz for a 1910 painting by Oskar Kokoschka, entitled *Portrait of Youth (Hans Reichel)*.[169] Dr. Seger-Thomschitz was the sole heir to the estate of Raimund Reichel, whose brother sat for the painting. It is maintained that Raimund's father, Oskar Reichel, lost the Kokoschka portrait of Hans to the Nazis in 1939 when the regime forced Reichel to sell his art collection in Vienna, Austria, as he faced increasing Nazi persecution. Reichel transferred ownership of the portrait, along with four

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163. *See* Falconer, *supra* note 19, at 403–04. For an overview of federal and state laws regarding holocaust restitution, see *Federal and State Laws Regarding Holocaust Restitution*, PCHA, http://govinfo.library.unt.edu/pcha/lawsinfo.htm (last visited Sept. 21, 2011).

164. Falconer, *supra* note 19, at 403–04.

165. Holocaust Survivor Tax Relief Act, H.R. 1292, 106th Cong. (1999) and Holocaust Survivor Tax Relief Act, S. 779, 106th Cong. (1999); *see* Off. of Cong. Rel., *The 106th Congress and Holocaust-Related Legislation* (Dec. 18, 2000), http://www.ushmm.org/assets/legi2.htm.

166. Prohibition on Deductions for Certain Settlement Payments to Holocaust Survivors, H.R. 3511, 106th Cong. (1999); *see* Off. of Cong. Rel., *supra* note 165.

167. *See* Falconer, *supra* note 19, at 404; Pollock, *supra* note 43, at 205; *see also Federal and State Laws Regarding Holocaust Restitution*, *supra* note 163.

168. *See Dunbar*, 615 F.3d at 579.

169. *See id.* at 575.

other paintings,[170] to Otto Kallir, an art dealer with a somewhat shady reputation for collaborating with the Nazis and taking advantage of the hardship inflicted on the Jewish art collectors in Austria.[171]

Dr. Seger-Thomschitz found the painting in the possession of Sarah Dunbar, a Louisiana citizen, who inherited the painting from her mother in 1973.[172] When Dunbar received a demand letter from Seger-Thomschitz, she filed suit to quiet title to the painting based on her ownership by acquisitive prescription under Louisiana law and the fact that

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170. For a related case regarding another Kokoschka that had once belonged to the Reichel family, *see* Museum of Fine Arts v. Seger-Thomschitz, No. 08-10097-RWZ, 2009 U.S. Dist. LEXIS 58826 (D. Mass. May 28, 2009), *aff'd* 623 F.3d 1 (1st Cir. 2010). In 1914 or 1915, the Viennese doctor and art collector Oskar Reichel acquired the painting, known as *Two Nudes (Lovers)* which is a self-portrait of the artist with his lover Alma Mahler. *Seger-Thomschitz*, 2009 U.S. Dist. LEXIS 58826, at *3. Kokoschka was a friend of the Jewish Reichel family, who owned several of his works. *See id.* In March 1938, Nazi Germany annexed Austria and soon the Nazi government issued regulations requiring Jews with property exceeding a certain value to file declarations listing all of their assets. *Id.* at *4. Reichel submitted such a property declaration in June 1938. *Id.* It included the *Two Nudes* and four other works by Kokoschka, one of which was the aforementioned *Portrait of Youth*. *Id.* On February 1, 1939, Reichel transferred the Kokoschka paintings to Kallir, who sold them in the United States in the late 1940s. *Id.* at *4–5. Accordingly, some time between December 1947 and April 1948, ownership of the painting passed to Sarah Reed-Platt, the same woman who had previously acquired *Portrait of Youth* from Kallir's New York gallery. *Id.* at *5. When she died in 1972, Sarah Reed-Platt bequeathed the painting to the Museum of Fine Art ("MFA"), which formally acquired the work in 1973. *Id.* at *6 n.5. The work remains in the MFA's possession ever since, where it has been on public display almost continuously since the museum's acquisition of the work. *See id.* at *6. In 2007, Claudia Seger-Thomschitz made demand for the painting, and the MFA brought an action for declaratory judgment to establish that it had valid title to the work. *Id.* at *2. In her counterclaim, Seger-Thomschitz sought a declaration that she was the rightful owner and asserted claims for replevin, conversion, constructive trust, disgorgement, restitution, unjust enrichment, and estoppel. *Id.* The MFA moved for summary judgment on the ground that Seger-Thomschitz's claims were time-barred. *Id.* On May 28, 2009, the Massachusetts District Court found for the museum, holding that Seger-Thomschitz's claims were time-barred. *Id.* at *35. On October 14, the Court of Appeals for the First Circuit affirmed that decision. *See Seger-Thomschitz*, 623 F.3d at 3. For more details on this interesting case, see Graefe, *supra* note 22, at 512–13; Jennifer Anglim Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice of Responsible Stewardship for the Public Trust?*, 88 OR. L. REV. 37, 72–75 (2009) [hereinafter Kreder, *New Battleground*]; Geoff Edgers, *MFA Sues to Bolster Claim to Disputed 1913 Painting*, BOS. GLOBE, Jan. 24, 2008, at 1B; Geoff Edgers, *Holocaust Historians Blast MFA Stance in Legal Dispute*, BOS. GLOBE, May 28, 2008, at 1; Geoff Edgers, *MFA Wins Legal Claim to Valuable Painting*, BOS. GLOBE, May 30, 2009, at 3.

171. *See Dunbar*, 615 F.3d at 575.

172. *See id*. at 575.

Louisiana's prescriptive laws barred Seger-Thomschitz's claims.[173] Seger-Thomschitz, however, counterclaimed, arguing that Dunbar's mother knew or should have known about the Reichel family's previous ownership when she purchased the painting from Kallir's New York gallery in 1946, but deliberately chose to turn a blind eye to the looting of Jewish property that had occurred in Austria under Nazi reign.[174]

The District Court for the Eastern District of Louisiana granted summary judgment in favor of Dunbar.[175] The court held that Dunbar obtained title by acquisitive prescription under Louisiana state law.[176] After all, there was no material factual dispute that Dunbar's possession of the painting was open and continuous for well over ten years, thus fulfilling the requirements to establish ownership by acquisitive prescription under Louisiana law.[177] In addition, the court found Seger-Thomschitz's counterclaims time-barred by the applicable Louisiana prescriptive periods.[178]

On appeal, Seger-Thomschitz did not "question that Louisiana prescriptive laws were correctly applied."[179] Seger-Thomas reasoned that Louisiana law did not apply at all, as they conflicted with and must be preempted by the foreign policy of the Executive Branch, as most recently articulated in the Terezín Declaration.[180] As discussed above, the Terezín Declaration urges all signatory countries to ensure that their legal systems facilitate just and fair solutions regarding Nazi-confiscated and looted art, and to make certain that restitution claims are resolved expeditiously based on their facts and merits.[181] Accordingly, Seger-Thomschitz argued that applying Louisiana's prescriptive laws would unconstitutionally intrude on the President's authority to conduct foreign affairs. Therefore, the policy represented by the Terezín Declaration should preempt Louisiana prescription periods because it expresses a preference to adjudicate claims for recovery of Nazi-confiscated artworks on their facts and merits.[182]

The Fifth Circuit, however, found Seger-Thomschitz's preemption theory untenable, holding that:

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173. *Id.* at 576.
174. *Id.* at 575–76.
175. *Id.* at 576.
176. *Id.*
177. *Id.*
178. *Id.*; *see generally* Martha Lufkin, *Second Kokoschka Nazi Loot Claim Rejected,* ART NEWSPAPER (Sept. 9, 2009), http://theartnewspaper.com/articles/Second-Kokoschka-Nazi-loot-claim-rejected/18722.
179. *Dunbar*, 615 F.3d at 576.
180. *Id.*
181. *See supra* notes 131–40 and accompanying text.
182. *See Dunbar*, 615 F.3d at 578–79.

> Louisiana has not pursued any policy specific to Holocaust victims or Nazi-confiscated artwork. The state's prescription periods apply generally to any challenge of ownership to movable property. Louisiana's laws are well within the realm of traditional state responsibilities. In exercising its strong interest in regulating the ownership of property within the state through these prescriptive laws, Louisiana has not infringed on any exclusive federal powers. Indeed, the Terezín Declaration itself contains language noting that "different legal traditions" should be taken into account. Appellant presents no proof that U.S. policy on behalf of Holocaust victims is committed to overriding generally applicable state property law. . . . Louisiana's prescriptive laws are not preempted by the Terezín Declaration, U.S. foreign policy, or the President's foreign affairs powers.[183]

Dunbar v. Seger-Thomschitz illustrates the unwillingness among U.S. courts to incorporate public international law arguments in Holocaust-related art decisions. The United States' policy on behalf of victims of Nazi era spoliation, as expressed in the Washington Principles or the Terezín and Vilnius Declarations, does not preempt the state rules on property law, the Louisiana court briefly held. In Nazi era art disputes, U.S. courts have indeed not yet set aside state rules on property law and statutory limitation, even if they were to conflict with the Executive Branch's preference, as expressed at the international level, to adjudicate claims for recovery of Nazi-confiscated artwork on their facts and merits. *Dunbar v. Seger-Thomschitz* is indicative of the ease with which the American courts turn down claims for restitution of Holocaust artwork that are grounded on the above instruments of public international law.

In addition to the denied direct effect of the aforementioned international framework on Holocaust-related art litigation, it should be recalled that these sources of public international law also fail to achieve their objectives indirectly, as the U.S. Congress did not implement the core elements of these international agreements.

C. The Ineffectiveness of Implemented Legislation for the Resolution of Title Disputes

The previous section demonstrates federal legislation's limited role in resolving restitution claims regarding Nazi-looted art. The little federal legislation that exists has a different focus: the Nazi War Crimes Disclosure Act that made WWII criminal records public; the U.S. Holocaust Assets Commission Act that merely established the Presidential Advisory Commission on Holocaust Assets in the United States, which was lim-

183. *Id.* at 579 (internal citations omitted).

ited to studying the issue and making recommendations which Congress failed to adopt; and the Holocaust Victims Redress Act that set up a sponsorship for archival and translation services in addition to the financial aid it procured to organizations assisting Holocaust survivors in bringing claims. Indeed, the Holocaust Victims Redress Act did no more than encourage victims of Nazi-spoliation to come forward and make known their claims to confiscated art, without providing any specific remedy.

In this connection, it is interesting to recall *Dunbar* and note the district court's considerations with regard to the Act. Whereas Seger-Thomschitz argued before the Fifth Circuit that Louisiana prescriptive laws should not be applied at all as they were preempted by the Executive Branch's foreign policy as articulated in the Terezín Declaration,[184] she maintained somewhat similar reasoning based on the Holocaust Victims Redress Act before the district court. She argued that "federal common law authority" should displace Louisiana law's prescriptive periods with the federal doctrines of laches and unclean hands to enable claims to recover Nazi-confiscated artworks to be decided on their substantive merit.[185] Accordingly, Seger-Thomschitz asserted that the Louisiana prescription laws should be supplanted with "federal common law" to ensure the goals of the federal Holocaust Victims Redress Act.[186] However, the district court found this assertion "problematic"[187] for a number of reasons.

First the district court held that the Holocaust Victims Redress Act did not create a "federal common law" cause of action.[188] In that connection, the court recalled that in *Erie Railroad Co. v. Tompkins*, when the U.S. Supreme Court decided that Congress lacked the power to declare substantive rules of common law applicable to a state whether they were general, commercial law, or part of the law of torts.[189] In addition, "no clause in the Constitution purports to confer such a power upon the federal courts."[190] On appeal, the Fifth Circuit also dedicated some thoughts to Seger-Thomschitz's theory of "federal common law":

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184. *See Dunbar*, 615 F.3d at 576–77.

185. *Id.* at 576.

186. *Id.*

187. *Dunbar*, 638 F. Supp. 2d at 664–65 ("Defendant's assertion that this court may supplant Louisiana prescription laws in order to ensure the goals of the Holocaust Victims Redress Act will not be compromised is problematic for a number of reasons.").

188. *Id.* at 664.

189. *Id.* (discussing Erie R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)).

190. Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

> [A]s this case is brought under federal diversity jurisdiction, the application of state statutory limitations periods is controlled by *Erie*. With regard to fashioning federal common law, the Supreme Court has held: ["]The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law, nor does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts. Rather, absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.["][191]

Second, the district court held that "the Holocaust Victim's Redress Act was not intended to give individuals a private cause of action."[192] On appeal, the Fifth Circuit affirmed this holding, finding that "no Act of Congress has articulated 'rights and obligations of the United States' in regard to these claims; even the [Holocaust Victims Redress Act] creates no individual cause of action."[193]

Similarly, the Ninth Circuit in *Orkin v. Taylor* held that "[t]he plain text of the Holocaust Victims Redress Act leaves little doubt that Congress did not intend to create a private right of action."[194] The case revolved around Elizabeth Taylor's complaint for declaratory relief to establish her title to a van Gogh painting, entitled *Vue de l'Asile et de la Chapelle de Saint-Remy*.[195] The District Court for the Central District of

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191. *Dunbar*, 615 F.3d at 577 (quoting Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640–41 (1981)) (internal citations omitted).

192. *Dunbar*, 638 F. Supp. 2d at 664.

193. *Dunbar*, 615 F.3d at 577 (quoting Orkin v. Taylor, 487 F.3d 734, 739 (9th Cir. 2007)).

194. Orkin v. Taylor, 487 F.3d 734, 739 (9th Cir. 2007), *aff'g sub nom.* Adler v. Taylor, No. 04-8472-RGK (FMOx), 2005 U.S. Dist. LEXIS 5862 (C.D. Cal. Feb. 2, 2005).

195. In the 1930s, the painting belonged to Margarete Mauthner, an early collector of van Gogh's works. *Orkin*, 487 F.3d at 736. Yet, Mauthner was Jewish and, as the Nazis' persecution accelerated, she fled Germany to South Africa in 1939, leaving her possessions behind. *Id.* at 737. What transpired with the painting during the 1930s in Berlin is clouded in uncertainty and disputed between the parties. *Id.* The descendants of Mauthner claim that their ancestor was wrongfully dispossessed of the painting, alleging economic coercion and contending that Mauthner sold the painting "under duress." *Id.* They note that Military Government Law No. 59, Restitution of Identifiable Property, MIL. GOV.

California found for Taylor, concluding that the state law actions were time-barred and that the federal statute did not create a private right of action.[196]

On appeal, the Ninth Circuit affirmed the decision of the district court.[197] Based on *Cort v. Ash*, in which the Supreme Court set out its four-factor test for discerning whether a statute creates a private right of action,[198] the court dismissed the claim the Orkins thought to derive from

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GAZ. (U.S. Zone) (Nov. 10, 1947), promulgated by the Allied Forces after the conclusion of WWII, established a presumption that any transfer or relinquishment of property by a persecuted person within the period January 30, 1933 to May 8, 1945 was an act of confiscation. *Id.* Taylor, on the other hand, contends that, at best, the record shows that through a number of consecutive sales the painting ended up in the possession of Alfred Wolf, with no evidence of any Nazi coercion or participation in the transactions. *Id*. Sometime in the early 1960s, the Estate of Alfred Wolf commissioned Sotheby's to sell by auction a number of Impressionist and Post-Impressionist paintings, including *Vue de l'Asile et de la Chapelle de Saint-Remy*. *Id.* With the help of her father, whom she authorized to bid for her, Elizabeth Taylor acquired the van Gogh at Sotheby's London for £92,000. *Id.* Taylor's acquisition was much discussed in the media at the time. *Id.* In addition, a 1970 *catalogue raisonné* referenced Taylor's ownership, and from November 1986 until March 1987, the painting was exhibited publicly in a blockbuster exhibition at the Metropolitan in New York. *Id.* In 1990, Taylor offered the painting for sale through Christie's, London, but the painting did not sell. *Id.* at 737–38. The Orkins contend not to have discovered the basis of their claim before 2001, when they retained a law firm to do investigations into the hardship that was inflicted on their ancestors as a result of Nazi persecution. *Id.* at 738. They also claim that they first learned of Taylor's ownership in 2002 through a rumor on the internet that Taylor was interested in selling the painting. *Id.* In December 2003, the Orkins wrote a letter to Taylor, demanding that she return the painting to them. *Id.* After some discussion of settlement, Taylor wrote a response letter declining settlement and asserting that the Orkins' claim to the painting was untimely. *Id.* Taylor then filed a complaint for declaratory relief to establish her title. *Id.* For more details on the factual background of the case, see Matthew Batters & Sharon Flescher, *Liz Taylor Seeks Court's Aid in Holocaust Claim*, 7 IFAR J., no. 1, 2004 at 6–7; Lauren Fielder Redman, Case Note, Orkin v. Taylor—*A Satisfying Solution to a Dispute over a Van Gogh or a Blow for Holocaust Art Restitution Claims in United States Federal Court?*, 12 ART ANTIQUITY & L. 389 (2007) (U.K.); Reiss & Bloom, *supra* note 77, at 14–18; *see also* Carla J. Shapreau, *Nazi-era Restitution Lawsuits – New Developments in the California Courts*, 10 IFAR J., no. 2, 2008 at 28–29; Linda Greenhouse, *Elizabeth Taylor to Keep Van Gogh*, N.Y. TIMES, Oct. 30, 2007, at E2.

196. Adler v. Taylor, No. 04-8472-RGK (FMOx), 2005 U.S. Dist. LEXIS 5862, at *13–16, (C.D. Cal. Feb. 2, 2005).

197. *Orkin*, 487 F.3d at 736.

198. In *Cort v. Ash*, the United States Supreme Court held:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or

the Holocaust Victims Redress Act.[199] The Orkins relied on §202 of the Act, which states that

> [i]t is the sense of the Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi-rule and there is reasonable proof that the claimant is the rightful owner.[200]

However, with regard to this provision the Ninth Circuit held:

> "Sense of the Congress" provisions are precatory provisions, which do not in themselves create individual rights or, for that matter, any enforceable law. Although "sense of the Congress" provisions are sometimes relevant to our determination of whether other mandatory provisions create private rights of action, the Orkins can point to no provision of the Act or of any of its companion legislation that can fairly be characterized as mandatory. There is simply no "right- or duty-creating language" anywhere in the statutory scheme and § 202's announcement of a "sense of the Congress" cannot, of its own force, imply a private right of action.[201]

In addition, the Ninth Circuit found that the Act's legislative history indicated that "even its most ardent supporter did not intend for the bill to create a private right of action. Rather, the legislative intent was to encourage state and foreign governments to enforce existing rights for the protection of Holocaust victims."[202] Indeed, the court observed that "[t]he sponsor and primary champion of the legislation, Representative Jim Leach believed that existing law would suffice to restitute Nazi-stolen artworks to their wartime owners."[203] At his hearing before the House Committee on Banking and Financial Services, Leach noted the possibility that new "domestic legislation" might assist in the restitution of stolen art, but he went on to conclude that "Congress may have gone

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> to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, 422 U.S. 66, 78 (1975) (internal citations and quotations omitted).

199. *Orkin*, 487 F.3d at 740–41.

200. Holocaust Victims Redress Act, Pub. L. No. 105-158, § 202, 112 Stat. 15, 17-18 (1998).

201. *Orkin*, 487 F.3d at 739 (internal citation omitted).

202. *Id.* at 739.

203. *Id.*

as far as it appropriately should on this subject in the Holocaust Victims Redress Act."[204]

Furthermore, the Ninth Circuit went on to hold that the motivating concern for the legislation was not access to courts, but rather, access to information.

> [T]he text and history of the legislation reveal that its overarching purpose was not to provide for private litigation. Rather, the general purpose of the statutory scheme was to fund research efforts and to declassify records, while simultaneously encouraging foreign governments, as well as public and private institutions, to do likewise.[205]

Finally, the Ninth Circuit found that there could be "no doubt . . . that state law provides causes of action for restitution of stolen artwork" and that "implication of a federal remedy" would therefore be improper.[206]

The decisions in *Dunbar* and *Orkin* perfectly illustrate that, despite federal legislation regarding Nazi confiscations, not even the Holocaust Victims Redress Act provides any specific remedy to reclaim stolen property. Indeed, actions in replevin are a quintessential area of state responsibility. In that connection, it is noteworthy that in *Alperin v. Vatican Bank*, the Ninth Circuit stated that for victims of Nazi era lootings to seek the return of their lost possessions, a private lawsuit is "the only game in town."[207] In these cases, the United States courts consistently apply state statutes of limitations, as the issue of restitution of stolen property is regulated by the states.[208]

In response to the upsurge in Holocaust-related claims and the adoption of the 1998 Washington Principles, no U.S. state, except California, has amended its limitation rules for actions in replevin regarding Nazi era confiscated cultural property. Consequently, as far as the actual resolution of Nazi era art claims is concerned, it was not only the United States Congress that failed to implement the core elements of the international agreements of Washington, Vilnius, and Terezín; the same is true

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204. *Id.* (quoting *Holocaust Victims' Claims, Hearing Before the House committee on Banking and Financial Services*, 105th Cong., 2d Sess. (1998)).

205. *Id.* at 740.

206. *Id.*

207. Alperin v. Vatican Bank, 410 F.3d 532, 558 (9th Cir. 2005).

208. For further discussion of cases in New York, see Bert Demarsin, *Has the Time (of Laches) Come? – Recent Nazi-Era Art Litigation in the New York Forum*, 59 BUFF. L. REV. 621, 665–71 (2011) [hereinafter Demarsin, *Has the Time (of Laches) Come?*], and in California, see Bert Demarsin, *The Third Time is Not Always a Charm: The Troublesome Legacy of a Dutch Art Dealer—The Limitation and Act of State Defenses in Looted Art Cases*, 28 CARDOZO ARTS & ENT. L.J. 255 (2010) [hereinafter Demarsin, *The Third Time is Not Always a Charm*].

for the state legislatures, which is particularly relevant in view of their traditional competence to regulate actions in replevin and conversion regarding stolen property.

However, in *Von Saher v. Norton Simon Museum of Art*,[209] the Ninth Circuit found California's amendment of the limitation rules in favor of Holocaust victims unconstitutional, as the provision infringed on the national government's exclusive foreign affairs powers.[210] It is surprising that the only statute that actually implemented the ideas of the 1998 Washington Principles was struck down for professed unconstitutionality.[211] As other states have passed upon the opportunity to implement legislation nationwide, it is unclear if all state statutes would be similarly stricken.[212]

D. The Private Law Status of Leading American Art Museums

At the 1998 Washington Conference, the United States set itself up as the great champion of ethical standards in the art and museum world and protective measures for the victims of Nazi era art looting.[213] The Wash-

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209. Von Saher v. Norton Simon Museum of Art, 592 F.3d 954 (9th Cir. 2010).

210. *Id.* at 967–68.

211. For some critical comments on the decision of the Ninth Circuit, see Case Comment, *Constitutional Law – Federal Preemption of State Law – Ninth Circuit Strikes Down California Law Extending Statute of Limitations for the Recovery of Holocaust-Era Artwork* – Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 07-56691, 2010 WL 114959 (9th. Cir. Jan 14, 2010)*, 123 HARV. L. REV. 1377 (2010); Conway, *supra* note 17, at 393–404; Demarsin, *The Third Time is Not Always a Charm*, *supra* note 208, at 287–93.

212. *See* Demarsin, *The Third Time is Not Always a Charm*, *supra* note 208, at 287–93.

213. The United States' self-proclaimed leadership on restitution matters is implicit in Ambassador Eizenstat's speeches at the Washington Conference. *See* Stuart E. Eizenstat, *Explanation of the Washington Conference Principles on Nazi-Confiscated Art*, *in* PROCEEDINGS OF THE WASHINGTON CONFERENCE ON HOLOCAUST-ERA ASSETS 415, 418 (Off. of the Coordinator for the Wash. Conf. on Holocaust-Era Assets ed., 1999) [hereinafter Eizenstat, *Explanation of the Washington Conference Principles*]. From Ambassador Eizenstat's words, the United States seemed to hold its efforts toward restitution in high regard:

> The U.S. National Archives and Records Administration has placed its finding aid to Holocaust-era art on the Internet. We encourage all governments, museums, art dealers and other institutions to join in this effort.

Id. The United States' self-established leadership on asset restitution issues is also clear from the report of the Presidential Advisory Commission on Holocaust Assets. *See* PLUNDER & RESTITUTION, *supra* note 55; *see also* EIZENSTAT, IMPERFECT JUSTICE, *supra* note 13, at 185–204 (outlining his central role as U.S. official in the art restitution process).

ington Conference was a U.S.-led initiative intended to procure international endorsement of the AAMD report.[214] It was U.S. Ambassador to the European Union, Stuart Eizenstat, who brought up the art restitution issue at the 1997 London Conference on Nazi Gold and later prepared and spearheaded the agreement's negotiations at the Washington Conference.[215] However, during the negotiations, it soon became clear that key countries in Europe displayed somewhat greater reticence to adopting the Washington Principles, as they worried that American principles, overriding their civil law judicial processes, were to be imposed upon their museums.[216] Europe's greater reluctance was understandable, as moral agreements of public international law such as the Washington Principles would still be seen as obliging all governmental branches, including the leading European art museums, which are all state-owned.

Compared to the European situation, the United States is undeniably in a more comfortable position, as the country's commitment per the Principles was significantly smaller than its European peers.[217] Indeed, leading museums in the United States are not federal governmental agencies; instead they are mainly private or state and municipal institutions.[218] As such, they are third parties to any commitment assumed by the Executive Branch. Consequently, while the federal government may be bound by the Washington Principles, the Metropolitan Museum is not.[219] Nor are other world-class institutions, such as the Art Institute of Chicago, the Museums of Fine Arts of Boston and Houston, the Guggenheim and Getty Museums, and the Museums of Modern Art of New York and San Francisco. In that connection, it is noteworthy that the State Department's Special Envoy for Holocaust Issues, Ambassador J. Christian Kennedy, emphasized the federal government's limited role in actually resolving restitution claims regarding Nazi-looted art.[220] In his Potsdam speech of April 23, 2007, Ambassador Kennedy observed:

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214. *See supra* note 67.

215. *See* KURTZ, AMERICA & NAZI CONTRABAND, *supra* note 14, at 217; Kreder, *Resolving Nazi-Looted Art Disputes*, *supra* note 51, at 158.

216. KURTZ, AMERICA & NAZI CONTRABAND, *supra* note 14, at 218; EIZENSTAT, IMPERFECT JUSTICE, *supra* note 13, at 193–94, 198.

217. Some criticized the Washington Principles for mainly serving U.S. interests by safeguarding the lucrative U.S. art market from troublesome litigation. *See* KURTZ, AMERICA & NAZI CONTRABAND, *supra* note 14, at 219.

218. Range, *supra* note 69, at 669; Sawka, *supra* note 76, at 106–07.

219. Range, *supra* note 69, at 669.

220. Mullery, *supra* note 18, at 654–55.

> [A]rt restitution in [the United States] has generally involved a private citizen who discovers that an artwork once held by his or her family is now hanging in a museum or private collection . . . . While the government can urge institutions to participate voluntarily in programs . . . the government does not have any leverage to force compliance, for one simple reason: With the exception of a few federally owned and operated institutions, museums in the United States tend to be owned and operated privately, or by state or municipal authorities. This leaves no specific role for the federal government in the art restitution process . . . . The point that I want to make with you today is the following. The role of the United States Government in art restitution matters is significantly different from the role of many European governments. Our government has not been involved in cases such as those adjudicated by the Dutch Art Restitution Commission, nor has it been involved in direct negotiations with other states as have some European countries.[221]

Although most American art museums are no different from private individuals as far as their obligation under the aforementioned international agreements is concerned, it might be argued that they still assume a somewhat special position. After all, unlike private citizens, these art museums have adopted the AAM and AAMD Guidelines to assist them in addressing issues raised by holding Nazi era looted artworks in their collections.[222] Similar to the Terezín Declaration or the Washington Principles, these guidelines aim at resolving title claims to Nazi era looted art "in an equitable, appropriate, and mutually agreeable manner."[223] In that connection, the AAM Guidelines even specify that "in order to achieve an equitable and appropriate resolution of claims, museums may elect to waive certain available defenses,"[224] most notably those based on statutory limitation and laches.

However, in practice, these Guidelines do not seem to prevent leading American art museums from raising technical defenses if such might allow museums to retain possession of Nazi era looted pieces. In recent years, art museums have become increasingly aggressive in filing declaratory judgment actions to quiet title, instead of relying on mediation procedures, which the AAM Guidelines, Washington Principles, and Te-

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221. J. Christian Kennedy, Special Envoy for Holocaust Issues, U.S. Diplomatic Mission to Ger., Remarks at University of Potsdam's Moses-Mendelssohn Center for European-Jewish Studies Conference: The Role of the United States Government in Art Restitution (Apr. 23, 2007), *available at* http://germany.usembassy.gov/kennedy_speech.html.

222. *See Unlawful Appropriation Guidelines*, s*upra* note 67.

223. *Id.*

224. *Id.*; *see also* Sawka, *supra* note 76, at 109.

rezín Declaration each state as the preferred way to resolve Holocaust-related art claims.[225]

In *Toledo Museum of Art v. Ullin*,[226] the museum was the first to file suit regarding a painting by Paul Gauguin, seeking declaratory relief based on Ohio's statute of limitations.[227] The museum argued that Martha Nathan, the Jewish prior owner of the Gauguin painting, sold the work voluntarily and at a fair price in 1938. However, the Nathan heirs contended that the paintings were sold under duress.[228] *Toledo Museum* is not only worthy of mention because of the museum's proactive approach of filing a declaratory judgment action and seeking a permanent injunction; it also illustrates that the museum did not feel in any way restricted or obliged under the aforementioned AAM guidelines. The heirs of Nathan, on the other hand, notably argued that, by endorsing the AAM Guidelines, the Toledo Museum voluntarily waived its statute of limitations defense.[229] The district court, however, found for the Toledo Museum, holding that according to Ohio law, the heirs' title claims were time-barred well before their filing in 2006.[230] With regard to the defendant's primary argument that the museum had voluntarily relinquished statute of limitations and laches defenses when it adopted the AAM Guidelines, the district court held:

> The Guidelines were not intended to create legal obligations or mandatory rules but rather were intended to "facilitate the ability of museums to act ethically and legally as stewards" through "serious efforts" on a "case by case basis." The Guidelines are "intended to assist museums in addressing issues relating to objects that may have been unlawfully appropriated during the Nazi era," but should not be interpreted to place an undue burden on the museums.[231]

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225. Kreder, *Ethics Revolution in U.S. Museums*, *supra* note 79, at 1023; Kreder, *New Battleground*, *supra* note 170, at 46, 61–75; Sawka, *supra* note 76, at 108–09.

226. Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802 (N.D. Ohio 2006).

227. *Id.* at 803; *see also* Robin Pogrebin, *Arts, Briefly; Museums Battle Heirs for Art*, N.Y. TIMES, Jan. 27, 2006, at E4.

228. Complaint for an Order Quieting Title to Property Pursuant to 28 U.S.C. § 1655, Declaratory Judgment & Injunctive Relief, paras. 56–58, *Toledo Museum of Art*, 477 F. Supp. 2d 802 (No. 3:06 Civ. 7031), 2006 WL 500068; Defendant's Answer, Affirmative Defenses, & Counterclaims, para. 1, *Toledo Museum of Art*, 477 F. Supp. 2d 802 (No. 3:06 Civ. 7031), 2006 WL 1468627.

229. *Toledo Museum of Art*, 477 F. Supp. 2d at 808.

230. *Id.* at 808.

231. *Id.* at 809 (internal citations omitted); *see also* Graefe, *supra* note 22, at 506.

In *Detroit Institute of Arts v. Ullin*,[232] the Michigan District Court found for the museum on similar grounds. The matter arose out of a dispute as to the ownership of a painting by Vincent van Gogh, entitled *Les Becheurs*. As in *Toledo Museum*, the van Gogh painting also belonged to Martha Nathan. In *Detroit Institute of Arts*, again the museum filed a declaratory judgment action first.[233] The district court held that the heirs' title claims were time-barred under Michigan law.[234] With regard to the heirs' argument that the museum had voluntarily waived its statute of limitations defense by adopting the AAM Guidelines, the court observed that, although the AAM Guidelines state that museums may elect to waive certain available defenses in order to achieve an equitable and appropriate resolution of claims, the Detroit Institute of Arts clearly expressed its choice not to do so by initiating the instant quiet title action.[235]

Museum of Modern Art v. Schoeps[236] concerns another recent action for declaratory judgment, brought by two leading New York museums.[237] The dispute revolved around two celebrated Picasso paintings, *Boy Leading a Horse*, part of the permanent MoMA collection, and *Le Moulin de la Galette*, a main attraction of the Guggenheim Foundation. At one time, the two paintings belonged to the private collection of Paul von Mendelssohn-Bartholdy, a prominent Jewish banker and art collector who lived in Berlin during the Nazis' rise to power.[238] Around the time of von Mendelssohn-Bartholdy's death in 1935, the paintings were sold to Thannhauser, a Berlin art dealer, who sold *Boy Leading a Horse* to William S. Paley in 1936.[239] Thannhauser himself donated *Moulin de la Galette* to the Guggenheim Foundation in 1963, and Paley donated *Boy Leading a Horse* to MoMA in 1964.[240] In 2007, Schoeps, the grandnephew of von Mendelssohn-Bartholdy, sent letters to both museums, stating that the paintings were sold under duress and accordingly demanded their return.[241] In response, the museums promptly initiated an action for declaratory relief in the U.S. District Court for the Southern District of New

232. Detroit Institute of Arts v. Ullin, No. 06-10333, 2007 U.S. Dist. LEXIS 28364, at *2 (E.D. Mich. Mar. 31, 2007).

233. *Id.* at *2.

234. *Id.* at *8–11.

235. *Id.* at *11–12.

236. Museum of Modern Art v. Schoeps, 549 F. Supp. 2d 543 (S.D.N.Y. 2008), *later proceeding at*, 594 F. Supp. 2d 461 (S.D.N.Y. 2009), *request denied by*, 599 F. Supp. 2d 532 (S.D.N.Y. 2009), *later proceeding at*, 603 F. Supp. 2d 673 (S.D.N.Y. 2009).

237. *Id.* at 543.

238. *Id.* at 544.

239. *Id.*

240. *Id.* at 544–45.

241. *Id.* at 545.

York seeking quiet title to the paintings and alleging an attempt to use the façade of Nazi-iniquities to extort monies from honorable institutions that were vulnerable to bad publicity.[242]

Along with the cases previously discussed—such as Dunbar v. Seger-Thomschitz,[243] Museum of Fine Arts v. Seger-Thomschitz,[244] Orkin v. Taylor,[245] Detroit Institute of Arts v. Ullin[246] and Toledo Museum of Art v. Ullin[247]—the Schoeps case illustrates the shift in mentality that occurred among individuals and institutions in possession of artwork that changed hands under Nazi dominion. In little more than a decade, U.S. museums had "turned away from the spirit of 1998."[248] The dismay, or perhaps even shame, and corollary obligingness of the late 1990s that propelled many of the first cases to settlement[249] quickly evolved into dogged defense of ownership among current possessors.

The Washington Principles and Terezín Declaration failed to lead to mutually negotiated and agreed solutions for Holocaust related title disputes.[250] Instead, in recent years, U.S. museums freely broke up ongoing negotiations and initiated court proceedings, despite possible agreement. The *MoMA* case is an unfortunate example of U.S. museums' stubbornness when confronted with possible claims for restitution.[251] This is especially harsh due to the fact that the parties announced that they reached a settlement on February 2, 2009, the morning that trial was to commence after a year of negotiations.[252] Solution seemed at hand, as for a sum "which was to remain confidential under the settlement agreement, there would be complete peace between the parties and the paintings would remain with the museums."[253] However, the Museums immediate-

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242. *Id.; see also* Schoeps v. Museum of Modern Art, 603 F. Supp. 2d 673, 674 (S.D.N.Y. 2009).

243. *See supra* notes 168–83 and accompanying text.

244. *See supra* note 170 and accompanying text.

245. *See supra* notes 194–206 and accompanying text.

246. *See supra* notes 234–35 and accompanying text.

247. *See supra* notes 227–31 and accompanying text.

248. Kreder, *Ethics Revolution in U.S. Museums*, *supra* note 79, at 1023.

249. *See infra* notes 357–63 and accompanying text.

250. *See* Kreder, *New Battleground*, *supra* note 170, at 46, 61–75; LUBINA, *supra* note 1, at 184–85; *see, e.g.*, *Dunbar*, 615 F.3d at 578–79.

251. *See* Kreder, *New Battleground*, *supra* note 170, at 46, 61–75.

252. *Schoeps*, 603 F. Supp. 2d at 674.

253. *Id.* at 674 (internal quotations omitted). Judge Rakoff severely criticized the confidentiality of the agreement, stating: "The Court finds the confidentiality provision of the settlement agreement and the plaintiffs' objection to disclosure to be against the public interest and a troubling reversal of the parties' previously stated positions on this issue." *Id.* at 675. The museums agreed to make the terms of the settlement public, but the heirs refused to waive the confidentiality provision. *Id.* at 674–75. Judge Rakoff called their

ly filed a declaratory judgment action, inflicting unnecessary litigation costs upon the heirs of Mendelssohn-Bartholdy.

Finally, the furtive position recently taken by MoMA in *Grosz v. Museum of Modern Art*[254] is perhaps even more startling. The case regarded an action brought by the son and daughter-in-law of the German artist George Grosz, who was forced to flee his country in the wake of Hitler's rise to power in 1933.[255] In March 1938, Grosz saw his remaining German assets confiscated and his citizenship revoked, as the Third Reich rendered him "stateless" by branding him an "enemy of the state."[256] The heirs' action in replevin related to three caricatural paintings: *Hermann-Neisse with Cognac*, *Self-Portrait with Model*, and *Republican Automatons*, "which [were] alleged to have fallen prey to [indirect] Nazi looting . . . in the years between Grosz's emigration from Germany in 1933 and the official confiscation of his assets in 1938."[257] Specifically, the Grosz heirs contended that MoMA wrongfully held all three paintings, which entered the museum collection either by donation or sale in the late 1940s or early 1950s.[258]

On December 16, 2010, the Court of Appeals for the Second Circuit affirmed the decision of the Southern District of New York that dismissed the challenge to the museum's ownership of the three prized works.[259] It was not so much the mere dismissal of the heirs' title claims[260]—after all, the painting's wartime provenance is not unequivocal as the Nazi-looting occurred indirectly[261]—but rather the grounds the court stated for this decision that were greeted with indignation.[262] In

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motives to be "no more compelling than concealing the amount of money going into their pockets." *Id.* at 675. However, the judge had no choice but to preserve the confidentiality of the settlement agreement, based on the Second Circuit's decision in *Glens Falls Newspapers*. *See* United States v. Glens Falls Newspapers, Inc., 160 F.3d 853, 857 (2d Cir. 1998).

254. Grosz v. Museum of Modern Art, 772 F. Supp. 2d 473, 476 (S.D.N.Y. 2010) (No. 10-257-cv), 2010 WL 2601991, at *1, *reconsideration denied by, motion denied by*, 2010 U.S. Dist. LEXIS 20248 (S.D.N.Y. 2010), *aff'd* 403 Fed. App'x 575 (2d Cir. 2010).

255. *Id.*

256. *Id.*

257. *Id.*

258. *See id.* 478–81 (describing in detail how the museum wrongfully obtained the paintings).

259. *Grosz*, 403 Fed. App'x at 578.

260. Brief for Am. Jewish Congress, et al. as Amici Curiae Supporting Plaintiff-Appellants, *Grosz*, 772 F. Supp. 2d at 476, 477 (No. 10-257-cv) [hereinafter Am. Jewish Congress Amici Curiae Brief].

261. *Grosz*, 772 F. Supp. 2d at 478–81.

262. One can tell the degree of indignation from the impressive list of Jewish community leaders and organizations, Holocaust educators, artists, art historians, and legal

spite of the policy goals embedded in the Washington, Vilnius, and Terezín agreements to effectively resolve Nazi era title disputes on the merits, rather than by reliance on technical or procedural legal defenses, both the Second Circuit and the Southern District of New York dismissed the claim on limitation grounds.[263]

The most troubling aspect of the *Grosz* case, however, was MoMA's conduct of engaging in extended negotiations with a hidden agenda of exploiting the additional passage of time for limitation purposes.[264] Accordingly, the museum's conduct "[made] a mockery of any serious negotiation over disputed title to an artwork."[265] To add to the heirs' misfortune, the district court did not object to this underhandedness, as it inferred an earlier—albeit implicit—demand and refusal from the parties' correspondence, so as to frustrate the action in replevin the Grosz heirs clearly regarded timely.[266] *Grosz* is yet another instance of institutional apathy within the United States to the very changes it zealously sought internationally.

IV. ART RESTITUTION: THE TALE OF A TWO-SPEED EUROPE

The progress of the body of international agreements concerning Nazi-looted art in the United States with regard to the actual settlement of Holocaust-related art disputes has been disappointedly paltry. The United States' policy on behalf of victims of Nazi era spoliation, as expressed in the Washington Principles or the Terezín and Vilnius Declarations, does not preempt state property law. In addition, the suggested international framework has not been implemented, and the predominantly private museums in the United States do not consider themselves bound by the political engagements of the Executive Branch. The above analysis contrasts sharply with the United States' proclaimed support of restitution efforts that continues to echo strongly through official speeches and addresses of state department officials.[267] Moreover, the United States re-

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scholars, all subscribing to the Amicus Brief filed in support of the Grosz heirs. *See* Am. Jewish Congress Amici Curiae Brief, *supra* note 260, at 11.

263. *Grosz*, 403 Fed. App'x at 577–789.

264. *See* Demarsin, *Has the Time (of Laches) Come?*, *supra* note 208, at 665–71.

265. *See* Am. Jewish Congress Amici Curiae Brief, *supra* note 260, at 11.

266. *Grosz*, 772 F. Supp. 2d at 483–88 (determining the time of the plaintiff's demand and the museum's refusal); *see* Demarsin, *Has the Time (of Laches) Come?*, *supra* note 208, at 665–71.

267. *See, e.g.*, Kennedy, *supra* note 221; Ambassador Edward O'Donnell, U.S. Special Envoy for Holocaust Issues, Remarks at the Annual Meeting of the Claims Conference Bd. of Directors (July 11, 2006), *available at* http://www.claimscon.org/index.asp?url=news/board_07-11-06; *see also* Mullery, *supra* note 18, at 650, 654.

peatedly denounces other countries' failure to follow the Washington Principles,[268] incite others to assume their responsibilities,[269] or pedantically calls on the European countries "to take a greater leadership role on Holocaust issues."[270]

As the majority of European countries participated in the Washington, Vilnius, and Terezín Declarations, it is interesting to compare the situation of the United States with Europe, particularly given the old continent's history as the battleground of Nazi-spoliation and home to world-class museums. Therefore, Part IV examines the response of European countries and compares the American lip service to the art spoliation debate with the often-denounced European reticence regarding the restitution of stolen artworks.[271] To a considerable extent, that criticism is justi-

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268. Mullery, *supra* note 18, at 655–56; *see also* Stuart E. Eizenstat, Head of U.S. Delegation to the Prague Holocaust Era Assets Conferences, Opening Plenary Session Remarks at Prague Holocaust Era Assets Conference (June 28, 2009) [hereinafter Eizenstat, Opening Remarks], *available at* http://www.state.gov/p/eur/rls/rm/2009/126158.htm ("For all that has been accomplished in some areas, like private and communal property and restitution and compensation, we have barely scratched the surface in Central and Eastern Europe.").

269. At the Washington conference, Eizenstat noticeably only emphasized the need for European governments to take "courageous decisions" to complete the restitution process. Eizenstat, *Explanation of the Washington Conference Principles*, *supra* note 213, at 418.

> In this regard, the U.S. Government applauds the courageous decision of the government of Austria to return art held in its federal museums and collections to surviving pre-War owners and their rightful heirs notwithstanding legal defenses. We hope other European governments will follow Austria's example in their own way, so they can complete the restitution process their predecessors left in abeyance after the war.

Id.

270. Stuart E. Eizenstat, Head of U.S. Delegation to the Prague Holocaust Era Assets Conference, Closing Plenary Session Remarks at Prague Holocaust Era Assets Conference (June 29, 2009), *available at* http://www.state.gov/p/eur/rls/rm/2009/126155.htm.

271. *See, e.g.*, Eizenstat, *Explanation of the Washington Conference Principles*, *supra* note 213, at 418; *see also* Lawrence M. Kaye, *Avoidance and Resolution of Cultural Heritage Disputes: Recovery of Art Looted during the Holocaust*, 14 WILLAMETTE J. INT'L L. & DIS. RES. 243, 260–61 (2006); Weiss, *supra* note 15, at 873. For a more general denunciation of the civil law protection of the bona fide purchaser in stolen art litigation, see, for example, Steven A. Bibas, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2452–53, 2460 (1994); Karen Theresa Burke, *International Transfers of Stolen Cultural Property: Should Thieves Continue to Benefit from Domestic Laws Favoring Bona Fide Purchasers?*, 13 LOY. L.A. INT'L & COMP. L.J. 427, 463 (1990); Steven F. Grover, Note, *The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study*, 70 TEX. L. REV. 1431, 1441–44 (1992); Lee Ann Houseman, Comment, *Current Practices and Problems in Combatting*

fied, as the following analysis shows that many European countries also failed to implement the aforementioned international framework and repeatedly deny restitution on technical/procedural grounds. However, the European situation requires further scrutiny, because—generally speaking—countries such as Austria, Germany, France, the United Kingdom, and the Netherlands have demonstrably put in more serious effort to carry out the international agenda. The analysis reveals that the United States' call upon the European politicians to take a leadership role on Holocaust issues is not only unsuitable given its own limited restitutional efforts, but also inaccurate taking into account the serious restitutional efforts displayed in a number of Western European countries.

A. Eastern and Southern European Obstruction or Noncompliance with International Agreements

In spite of apparently broad consensus regarding the restitution of spoliated artworks, the majority of European countries that participated in the intergovernmental conferences and resolutions failed to adopt any legislation organizing systematic provenance research, let alone actual restitution procedures. This is particularly true for Eastern and Southern European countries, but less so for those in Western Europe.

In Poland, for instance, the Washington Principles have only been used by the authorities to reclaim the country's own cultural losses,[272] despite

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Illegality in the Art Market, 12 SETON HALL L. REV. 506, 538 (1982); Michele Kunitz, Comment, *Switzerland & the International Trade in Art & Antiquities*, 21 NW. J. INT'L L. & BUS. 519, 541 (2001).

272. *See* Nawojka Cieślińska-Lobkowicz, *The Obligation of the State or a Hobby of the Few – The Implementation of the Washington Principles in Poland*, HOLOCAUST ERA ASSETS CONF. PROC. (June 26–30, 2009), http://www.holocausteraassets.eu/files/200000234-bbc68460b8/WG_LA_2_1_Cieslinska_Lobkowicz.pdf; *see also Poland Seizes Nazi-Looted Paintings From Christie's and Doyle Auction Houses*, ARTINFO (Dec. 22, 2010), http://www.artinfo.com/news/story/36653/poland-seizes-nazi-looted-paintings-from-christies-and-doyle-auction-houses; Charles A. Goldstein, Counsel, Herrick Feinstein (N.Y.), Address at the Restitution of Holocaust-Era Looted Art — The Washington Conference (1998): An Overview 2 (May 8–9, 2009), *available at* http://www.comartrecovery.org/sites/default/files/docs/MALAGA_LECTUREfinalMAY2009.pdf; Joe Milicia, *Poland Renews Claim to Looted Art*, SEATTLE TIMES (Jan. 31, 2005), http://community.seattletimes.nwsource.com/archive/?date=20050131&slug=lootedart31. For more on a potential Polish restitution claim regarding a painting by Alexander Gierymski that disappeared from the National Museum in Warsaw in 1944, see *Nazi Looted Painting Examined*, THENEWS.PL (July 12, 2010, 5:02 PM), http://thenews.pl/1/11/Artykul/8623,Nazi-looted-painting-examined.

the return of stolen artwork to Polish claimants.[273] However, there are clear indications that Polish institutions do hold Nazi-looted cultural assets, as during WWII the Nazis used closed Polish museum facilities and libraries as repositories for works of art from Jewish communities in occupied territories.[274] The lack of legislation establishing restitution procedures of spoliated personal property means there is not a single reported case of restitution from Polish institutions.[275] Consequently, at the Terezín Conference, Poland was criticized for not having made any headway in actually restituting looted objects to the heirs of wartime owners.[276] Other Eastern European countries ravaged by the Holocaust, such as Ukraine, Belarus, Romania, Estonia, Latvia, and Lithuania, are equally reported not to have made significant progress towards implementation of the Washington Principles.[277]

In Hungary, the situation is even worse, as the country is "outright[ly] hostil[e]" to restitution claims.[278] Instead of confronting its past as a Nazi ally, Hungary closed itself as it barricaded its renowned collections, disowning its international obligations.[279] However, the government's acquaintance with the international framework is remarkably profound, particularly when it makes aggressive claims of its own for art objects displaced from Hungary during WWII and its aftermath.[280] Hungary is stonewalling; it lacks any established restitution procedure, any specific

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273. For a list of recently returned works of art, dressed up by the Polish Ministry of Foreign Affairs, see *Returned Works of Art*, MINISTRY OF FOREIGN AFF. (POL.) (Sept. 28, 2011), http://www.msz.gov.pl/Returned,works,of,art,27632.html.

274. *See* Cieślińska-Lobkowicz, *supra* note 272.

275. *Id.*

276. *See Holocaust Era Looted Art: A World-Wide Preliminary Overview*, HOLOCAUST ERA ASSETS CONF. PROC. (June 26–30, 2009), http://www.holocausteraassets.eu/files/200000231-f4b090af39/WG_LA_1_2_Heuberger.pdf [hereinafter *Looted Art: World-Wide Overview*].

277. *See id.*

278. Goldstein, *supra* note 272, at 7; Agnes Peresztegi, *Recovery, Restitution or Renationalization: The Herzog and Hatvany Cases in Hungary*, HOLOCAUST ERA ASSETS CONF. PROC. 3 (June 26–30, 2009), http://www.holocausteraassets.eu/files/200000221-7c159490b0/WG_LA_7_Peresztegi.pdf; *see also* CONSTANCE LOWENTHAL, *Recovering Looted Jewish Cultural Property*, *in* RESOLUTION OF CULTURAL PROPERTY DISPUTES, *supra* note 2, at 155–56.

279. One rare exception is the return of four paintings from the Szépmûvészeti (Hungarian Fine Arts Museum) to the heirs of Jeno Vida. *See Resolved Stolen Art Claims*, HERRICK, FEINSTEIN LLP 12, http://www.herrick.com/siteFiles/Publications/FDF49CA8D3DFAD071169D8790DF80FC2.pdf (last visited Sept. 23, 2011) [hereinafter *Resolved Art Claims*].

280. Peresztegi, *supra* note 278, at 1.

legislation, and any effective judicial recourse.[281] Hence, at the Terezín Conference, the Hungarian experience was described as

> a total and concerted effort by successive governments to keep the looted art in their museums even if it requires that (i) the museums conceal or destroy archival evidence, (ii) government officials deliberately lengthen negotiations, effectively delaying legal actions that would be filed against the state, and (iii) pressure is brought to bear on the courts through the media to render judgments that effectively renationalize these artworks.[282]

Also in Southern Europe, little progress has been made towards implementing the Washington Principles. It was reported at the 2009 Terezín Conference that since 1998, neither the Balkan countries, nor Bulgaria, Greece, Italy, Portugal, or Spain engaged in systematic provenance research of their museum collections.[283] Most commonly, these countries equally lack specific legislation for the restitution of looted artwork.[284] Given the countries' reservations toward providing provenance information, their obstruction when faced with actual restitution claims is unsurprising.[285]

The above concise overview indicates that, contrary to their international political commitment under the Washington, Vilnius and Terezín agreements, a large majority of the European countries have not put in place any mechanism for systematic provenance research and restitution of Nazi-looted art.[286] As far as the above countries are concerned, the net effect of the body of international agreements concerning Nazi-looted art

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281. Goldstein, *supra* note 272, at 7–8. Taunted by the country's stonewalling and intransigence, the heirs to the great Hungarian art collector Herzog recently filed suit in district court in Washington, seeking the return of a series of masterpieces housed in various Hungarian state museums. *See* Gareth Harris, *Hungary Sued in $100m Restitution Claim—Heirs of Collector Herzog Seek Return of Works by Artists Such as El Greco and Velázquez*, ART NEWSPAPER (July 28, 2010), http://www.theartnewspaper.com/articles/Hungary-sued-in-$100m-restitution-claim/21284; Carol Vogel, *Hungary Sued in Holocaust Art Claim*, N.Y. TIMES (July 27, 2010), http://www.nytimes.com/2010/07/28/arts/design/28lawsuit.html. For more details regarding this case, see Peresztegi, *supra* note 278, at 1–4. For more criticism on the Polish and Hungarian noncompliance, see Judy Dempsey, *Roadblocks Remain in Case of Paintings Lost to Nazis*, N.Y. TIMES (Oct. 28, 2010), http://www.nytimes.com/2010/10/29/arts/29iht-loot.html?pagewanted=all.

282. Peresztegi, *supra* note 278, at 1.

283. *Looted Art: World-Wide Overview*, *supra* note 276.

284. *See id.*

285. *See, e.g.*, Cassirer v. Kingdom of Spain, 461 F. Supp. 2d 1157 (C.D. Cal. 2006), *dismissed in part, aff'd in part en banc*, 616 F.3d 1019 (9th Cir. 2010); *see also* Lowenthal, *supra* note 2, at 156–57.

286. *Looted Art: World-Wide Overview*, *supra* note 276.

seems almost inappreciable. It would appear, therefore, that the United States' criticism of the European non-compliance with the international framework is perfectly justified,[287] in view of the country's substantial realizations in the field of provenance research.[288] However, other European countries pay significantly better heed to implementing their commitments under the international art restitution agreements.

B. Alternative Dispute Resolution Mechanisms in Western Europe

Unlike Eastern and Southern Europe, nearly all the Western European countries implemented various policies and programs in an effort to aid restitution of Nazi era artworks. For example, countries such as Germany, Austria, Switzerland, Czech Republic, France, Belgium, the Netherlands, and the United Kingdom set up important provenance research programs to screen their national collections for Nazi loot.[289] Similar to the United States Nazi-Era Provenance Internet Portal ("NEPIP"), the results of the screening are often centralized in an online database.[290]

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287. Mullery, *supra* note 18, at 655–56; *see also* Eizenstat, Opening Remarks, *supra* note 268 ("For all that has been accomplished in some areas, like private and communal property and restitution and compensation, we have barely scratched the surface in Central and Eastern Europe.").

288. *See supra* note 68.

289. Jean-Pierre Bady, *Restitution and Compensation in Four Western European Countries: Belgium, France, Luxemburg and The Netherlands—Review and Outlook*, HOLOCAUST ERA ASSETS CONF. PROC. (June 26–30, 2009), http://www.holocausteraassets.eu/files/200000223-4feaf59f0d/WG_LA_9_Bady.pdf; *see also* Teresa Giovannini, *The Holocaust and Looted Art*, 7 ART ANTIQUITY & L. 263, 269–70 (2002) (U.K.); *Looted Art: World-Wide Overview*, *supra* note 276.

290. For example, "[t]he Lost Art Database is run by the *Koordinierungsstelle Magdeburg*, Germany's central office for the documentation of lost cultural property." *See* LOST ART INTERNET DATABASE, http://www.lostart.de (last visited Sept. 28, 2011) (Ger.). This Database "was set up jointly by the Government and the Länder of the Federal Republic of Germany and registers cultural objects which as a result of persecution under the Nazi dictatorship and the Second World War were relocated, moved or seized, especially from Jewish owners." *See id.* Origins Unknown is the database documenting unclaimed objects for the Netherlands. *See* ORIGINS UNKNOWN (May 2007), http://www.originsunknown.org. France runs the database of the *Musées Nationaux Récupération* ("MNR"), a searchable index of over 2,000 works stolen from victims of the Holocaust, and in the custodianship of the national museums of France since 1949. *See* MUSÉES NATIONAUX RÉCUPÉRATION [NAT'L MUSEUMS RECOVERY], http://www.culture.gouv.fr/documentation/mnr (last visited Sept. 28, 2011) (Fr.). *Cultural Property Advice* is a British website containing the results of a detailed research of the museum collections in the United Kingdom. *See* CULTURAL PROP. ADVICE, http://www.culturalpropertyadvice.gov.uk (last visited Sept. 28, 2011). The *Art Database of the National Fund* run by the National Fund of the Republic of Austria for Victims of National Socialism provides detailed information and images of "heirless" objects of art

However, in some countries, such as Switzerland, the provenance screening has not yet been finalized.[291] These provenance screenings should not be overvalued, as often the research initiative was already taken before the 1998 Washington Conference.[292] For most Western European coun-

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and objects of cultural value which are likely to have been expropriated in Austria during National Socialism and which then became public property. *See* ART DATABASE OF THE NAT'L FUND, http://www.artrestitution.at (last visited Sept. 28, 2011) (Austria). The *Commission for Provenance Research* is responsible for the screening of the national collections. *See* KOMMISSION FÜR PROVENIENZFORSCHUNG [COMM'N FOR PROVENANCE RESEARCH], http://www.provenienzforschung.gv.at (last visited Sept. 28, 2011) (Austria). For a similar initiative in Czech Republic, see RESTITUTION-ART, http://www.restitution-art.cz (last visited Sept. 28, 2011) (Czech). The access to the Belgian database, Jewish Cultural Assets-Belgium, is restricted to the members of the research commission on Nazi-spoliation in Belgium. However, the final report of the commission enunciates its findings. *See* La Commission d'étude des biens Juifs, Les Biens des Victimes des Persécutions Anti-Juives en Belgique: Rapport Final de la Commission d'étude sur le sort des biens des membres de la Communauté juive de Belgique spoliés ou délaissés pendant la guerre 1940-1945 [Assets of the Victims of Anti-Semitic Persecution in Belgium: The Final Report of the Study Commission into the Fate of the Belgian Jewish Community's assets, which where plundered or surrendered or abandoned during the war 1940-1945], at 425–27 (July 2011), http://www.combuysse.fgov.be/hoofdframemenufr.html (follow hyperlink "Partie 4") [hereinafter STUDY COMM'N FINAL REPORT].

291. On January 17, 2011, the Swiss Federal Office of Culture published the "FDHA/FDFA Report on the State of Work on looted Art during the National Socialist era, in particular, on the subject of provenance research." FED. OFFICE OF CULTURE, *Official Bodies and Reports*, http://www.lootedart.com/ON580E390361_print;Y (last visited Sept. 28, 2011) (Switz.). The document includes a summary of a survey of Swiss museums on the state of provenance research. *See* FED. DEP'T OF HOME AFFAIRS & FED. DEP'T OF FOREIGN AFFAIRS, REPORT ON THE STATE OF WORK ON NAZI-LOOTED ART, IN PARTICULAR, ON THE SUBJECT OF PROVENANCE RESEARCH, 12–13 (2010) (Switz.), *available at* http://www.lootedart.com/web_images/pdf/BerichtEDI-EDA_zum_Stand_der_Arbeiten_im_NS-Raubkunstbereich_e_140111.pdf. The report emphasized Switzerland's ongoing commitment to intensify provenance research and make its results available. *See id.*; Thomas Stephens, *Swiss Want Clearer Picture of Looted Nazi Art*, SWISSINFO.CH (Jan. 20, 2011, 8:28 AM), http://www.swissinfo.ch/eng/swiss_news/Swiss_want_clearer_picture_of_looted_Nazi_art_.html?cid=29271020 (Switz.).

292. In the Netherlands, the research initiative was taken in 1997, PALMER, *supra* note 24, at 130, 150, and in France, the research initiative was taken in 1995. *See* LUBINA, *supra* note 1, at 294, 370–71; STUDY COMM'N FINAL REPORT, *supra* note 290. In the U.K., the National Museum Directors' Conference launched its initiative in the summer of 1998, prior to the December Washington Conference. *See Spoliation of Works of Art during the Holocaust and World War II Period*, NAT'L MUSEUM DIRECTORS' CONF., http://www.nationalmuseums.org.uk/what-we-do/contributing-sector/spoliation (last visited Sept 28, 2011). Already in 1994, the German "Koordinierungsstelle für die Rückführung von Kulturgütern" (Coordination Office for the Return of Lost Cultural Property) had been established in Bremen to document and register Germany's cultural losses. *See* Basics, LOST ART INTERNET DATABASE,

tries, the Washington Principles only boosted then-existing projects of provenance research.

However, more important to this Article's thesis are the developments regarding the actual settlement of Holocaust-related claims. Considering the United States' paltry restitution achievements, the nation can no longer justifiably claim to be among the leaders in the restitution movement, as certain European countries—such as France, the United Kingdom, the Netherlands, Austria, and Germany—established various effective alternative dispute resolution mechanisms for resolving ownership issues.

In September 1999, France created the Commission pour l'indemnisation des victimes de spoliations intervenues du fait des législations antisémites en vigueur pendant l'Occupation ("CIVS"), a non-adversarial disputes resolution body to address all kinds of claims for financial or material spoliation, including artworks and collectibles.[293] CIVS operates outside the court system. Hence, its assessment is not limited to mere legal grounds and it may seek solutions where strictly speaking court actions are time-barred.[294] The authority to grant compensation by the state rests with the Prime Minister[295] as CIVS only makes nonbinding recommendations.[296] Nevertheless, in October 2006, all CIVS recommendations had been implemented in spite of their nonbinding nature.[297]

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http://www.lostart.de/Webs/EN/Koordinierungsstelle/Grundlagen.html (last visited Sept. 28, 2011) (Ger.).

293. Leila Anglade, *Art, Law and the Holocaust: The French Situation*, 4 ART ANTIQUITY & L. 301, 307 (1999) (U.K.); Giovannini, *supra* note 289, at 269, 272; Ruth Redmond-Cooper, *Limitation of Actions in Art and Antiquity Claims Part II*, 5 ART ANTIQUITY & L. 185, 203 (2000) (U.K.) [hereinafter Redmond-Cooper, *Limitation of Claims Part II*). It is interesting to see that, unlike the alternative dispute resolution mechanisms in Germany, Austria, the Netherlands, and the United Kingdom, CIVS does not exclusively deal with looted art claims. *See* LUBINA, *supra* note 1, at 375, 379.

294. LUBINA, *supra* note 1, at 375; Anglade, *supra* note 293, at 307–08; Redmond-Cooper, *Limitation of Claims Part II*, *supra* note 293, at 203.

295. LUBINA, *supra* note 1, at 378.

296. *Id.*

297. LUBINA, *supra* note 1, at 378 n.1776. It is however crucial to understand that CIVS is primarily geared towards financial indemnification for looted objects that no longer exist. *Id.* at 376. If a claim concerns the restitution of object from the national museums, the CIVS may still make recommendations, but the final decision-making power rests with the government political level. *Id.* For a recent governmental decision to restitute three paintings from the Louvre, see Didier Rykner, *Le Louvre accepte de dédommager la fille du donateur de trois tableaux* [*The Louvre Agrees to Compensate Donor's Daughter for Three Paintings*], LA TRIBUNE DE L'ART (Sept. 15, 2009),

The United Kingdom similarly instated means to facilitate restitution. Its Spoliation Advisory Panel was established in 2000[298] as an alternative to litigation. The panel resolves claims from victims of Nazi-looting, whose artwork is currently in the possession of a United Kingdom national collection or held in another United Kingdom museum or gallery established for public benefit.[299] The panel may also advise the claimant and the institution about claims for items in private collections at the joint request of the claimant and the owner.[300] Similar to its French counterpart, the panel considers both legal and non-legal obligations, such as the moral strength of the claimant's case and the moral obligation that may rest on the holding institution.[301] In addition, the Spoliation Advisory Panel's recommendations are also not legally binding on any party.[302] Nevertheless, if a claimant accepts the panel's recommendation, the claim is considered fully and finally settled as soon as the recommendation is implemented.[303]

In order to deal with claims for Nazi-looted art, the Dutch Ministry for Education, Culture, and Science took action on November 16, 2001, by calling into existence the "Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War" ("Restitutions Committee").[304] The Restitutions Committee's mission is twofold. First, it provides advice to the State Secretary for Culture regarding claims for restitution of Nazi-looted cultural assets from state controlled collections.[305] Although the Committee's recommendations are nonbinding, in practice the State Secretary has always

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http://www.latribunedelart.com/le-louvre-accepte-de-dedommager-la-fille-du-donateur-de-trois-tableaux-article002237.html (Fr.).

298. LUBINA, *supra* note 1, at 344; Range, *supra* note 69, at 669.

299. Redmond-Cooper, *Limitation of Claims Part II*, *supra* note 293, at 203.

300. DEP'T FOR CULTURE, MEDIA & SPORT, SPOLIATION ADVISORY PANEL, CONSTITUTION AND TERMS OF REFERENCE, para. 3 (Aug. 5, 2011), http://www.culture.gov.uk/images/publications/SAPConstitutionandTOR09.pdf (U.K.) [hereinafter SAP CONSTITUTION]; *see also* Redmond-Cooper, *Limitation of Claims Part II*, *supra* note 293, at 203.

301. SAP CONSTITUTION, *supra* note 300, paras. 5–6; *see also* Redmond-Cooper, *Limitation of Claims Part II*, *supra* note 293, at 203.

302. SAP CONSTITUTION, *supra* note 300, para. 7; Range, *supra* note 69, at 669.

303. SAP CONSTITUTION, *supra* note 300, para. 8; LUBINA, *supra* note 1, at 346; *see also Spoliation Advisory Panel*, DEP'T FOR CULTURE, MEDIA & SPORT, http://www.culture.gov.uk/what_we_do/cultural_property/3296.aspx (last visited Sept. 28, 2011) (U.K.).

304. *See* LUBINA, *supra* note 1, at 312.

305. *Id.* at 312.

acted upon them.[306] Second, it may also settle disputes concerning looted artwork that is not held by the Dutch state where the parties involved agree to bring the case before the Committee.[307] Up until December 31, 2010, a total of 122 claims for restitution were filed and 94 recommendations were made.[308]

The Dutch Restitutions Committee bears a strong resemblance to the Austrian dispute resolution mechanism. In Austria, the 1998 Art Restitution Act[309] and the 1999 Vienna Council Resolution on Art Restitution[310] regulate the conditions and procedure for the return of Nazi era looted artwork from public collections of the Republic of Austria and the City of Vienna to the original owners or their rightful heirs. The decision to restitute a certain object is made by the Federal Minister for Education, Arts and Culture,[311] acting upon the basis of the findings of the *Kommission für Provenienzforschung* (Commission for Provenance Research)[312] and the recommendation of the *Beirat* (Advisory Board).[313] Although they are nonbinding, historically all ministerial decisions concurred with the *Beitat*'s recommendations, which can be consulted online.[314] "In Vi-

306. This statement only concerns the period from January 2002 to October 2009. *See* LUBINA, *supra* note 1, at 313.

307. Article 2, Decree issued by the State Secretary for Education, Culture, and Science, F. van der Ploeg, establishing a committee to advise the government on the restitution of items of cultural value of which the original owners involuntarily lost possession due to circumstances directly related to the Nazi regime and which are currently in the possession of the State of the Netherlands, *see* F. van der Ploeg, State Sec. for Education, Culture & Science, DECREE ESTABLISHING THE ADVISORY COMMITTEE ON THE ASSESSMENT OF RESTITUTION APPLICATIONS, WJZ/2001/4537(8123), art. 2 (Nov. 16. 2001), http://www.restitutiecommissie.nl/en/instellingsbesluit.html (Neth.).

308. *See About the Restitutions Committee*, RESTITUTIECOMMISSIE, http://www.restitutiecommissie.nl/en/over_de_restitutiecommissie.html (last visited Sept. 28, 2011) (Neth.).

309. *See* BUNDESGESETZ ÜBER DIE RÜCKGABE VON KUNSTGEGENSTÄNDEN AUS DEN ÖSTERREICHISCHEN BUNDESMUSEEN UND SAMMLUNGEN [ACT ON THE RESTITUTION OF ARTWORKS FROM AUSTRIAN MUSEUMS AND COLLECTIONS] BUNDESGESETZBLATT I [BGBL I] No. 181/1998, § 1 (Austria).

310. *See* Fourth Rep. of the Fed. Minister for Educ., Sci. & Culture to the *Nationalrat* [Lower Chamber of the Austrian Parliament] on the Restitution of Art Objects from Austrian Federal Museums and Collections (2001/2002) (Austria), av*ailable at* http://www.kunstrestitution.at/docs/Restitutionsberichte/Restitutionreport_Federation_2001_02.pdf.

311. *Id.*

312. *Id.*

313. *Id.*

314. *See Recommendations*, COMM'N FOR PROVENANCE RESEARCH, http://www.provenienzforschung.gv.at/index.aspx?ID=24&LID=2 (last visited Sept. 28, 2011) (Austria).

enna, the functions of the Advisory Board and Commission for Provenance Research are performed by the *Wiener Rückstellungskommission* (Viennese Commission for Restitution), which can recommend to the executive city councilor that a specific object be returned."[315] Since the enactment of the Art Restitution Act, the Republic of Austria has restituted around 10,000 art objects.[316] According to the 2009 report, the City of Vienna itself restituted more than five-thousand objects.[317]

Finally, the German situation naturally differs from the above. In response to the Washington Conference, the German federal, regional, and local authorities adopted the *Gemeinsame Erklärung* (Common Declaration) regarding the restitution of Nazi-looted art on December 9, 1999.[318] According to Section I of the *Gemeinsame Erklärung*, the aforementioned authorities pledged to "bring their influence to bear in the" managing bodies of the public cultural institutions so as to enable the restitution of Nazi-confiscated artworks to the wartime owners or their heirs.[319] Section III embodies a crucial element of the *Gemeinsame Erklärung*, as it obliges the cultural institutions to fully disclose the results of the provenance research regarding their collection.[320] In order to implement Section III, the *Koordinierungsstelle für Kulturgutverluste* (Coordination

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315. More information regarding the Austrian restitution procedure, *see Art Restitution Proceedings After 1998*, ART DATABASE OF THE NAT'L FUND, http://www.artrestitution.at/Proceedings.html (last visited Sept. 28, 2011) (Austria).

316. Clemens Jabloner & Eva Blimlinger, *The Regulation of the Restitution of Artworks in Austria*, *in* VERANTWORTUNG WAHRNEHMEN [TAKING RESPONSIBILITY] 225, 233–34 (Koordinierungsstelle für Kulturgutverluste ed., 2009) (Ger.).

317. Gemeinderatsausschuss für Kultur und Wissens [Council Comm. for Culture & Science], Zehnter Bericht des Übereignung von Kunst- und Kulturgegenständen aus den Sammlungen der Museen der Stadt Wien sowie der Wienbibliothek im Rathaus [Tenth Report regarding the Transfer of Ownership of Art and Cultural Objects from the Collections of the Museums and Library in the City of Vienna] 5 (Feb. 1, 2010) (Austria), *available at* http://www.artrestitution.at/docs/Restitutionsberichte/Restitutionsbericht_2009_StadtWien.pdf.

318. Bundesregierung, der Länder und der kommunalen Spitzenverbände [Ger. Fed. Gov't, State & Nat'l Ass'ns of Local Authorities], Gemeinsame Erklärung der zur Auffindung und zur Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes, insbesondere aus jüdischem Besitz [Common Statement regarding the Tracing and Return of Nazi-Confiscated Art, Especially Jewish Property], Dec. 9, 1999 (Ger.) [hereinafter Common Statement], *available at* http://www.kmk.org/fileadmin/veroeffentlichungen_beschluesse/1999/1999_12_09-Auffindung-Rueckgabe-Kulturgutes.pdf.

319. Common Statement, *supra* note 318, § I.

320. Common Statement, *supra* note 318, § I; *see also* HAIMO SCHACK, KUNST UND RECHT [ART AND JUSTICE] 244–45 (2d ed. 2009) (Ger.).

Office for Lost Cultural Objects) was established and publishes provenance information on the Internet.[321]

Besides documenting and publicizing the problem of Nazi-looted art, the Koordinierungsstelle acts as the administrative office of the Beratende Kommission im Zusammenhang mit der Rückgabe NS-verfolgungsbedingt entzogener Kulturguts, insbesondere aus jüdischem Besitz (Advisory Commission in Connection with the Return of Cultural Property Seized, Primarily from Jewish Property, as a Result of Nazi Persecution, referred to as "the Advisory Commission").[322] The Advisory Commission was set up in 2003 and can be appealed to for disputes regarding the return of Nazi-looted art objects from the German museums, libraries, archives, or other public institutions.[323] The Advisory Commission serves as a mediator between representatives of the collections and former owners or their heirs.[324] Again, the Advisory Commission's recommendations are legally nonbinding.[325] In order to assist the cultural institutions in identifying Nazi-looted artworks in their collections and to provide guidance on dealing with claims, a set of implementary guidelines, the so-called Handreichung, was drawn up in February 2001 under the supervision of the Federal Government Commissioner for Culture and the Media.[326] As of this writing, the Advisory Commission issued four opinions, three of which recommended the return of, or compensa-

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321. SCHACK, *supra* note 320, at 245; Michael Franz, *Four Levels and a Database: The Work of the* Koordinierungsstelle für Kulturgutverluste *and www.lostart.de*, *in* RESOLUTION OF CULTURAL PROPERTY DISPUTES, *supra* note 1, at 169, 171.

322. Franz, *supra* note 321, at 171.

323. *See* Fed. Gov't Comm'r for Culture & the Media, 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, Feb. 2001, revised in Nov. 2007, at 34 (Ger.) [hereinafter Common Statement Guidelines], *available at* http://www.lostart.de/cae/servlet/contentblob/7312/publicationFile/63/Handreichung.pdf.

324. Franz, *supra* note 321, at 175.

325. *See* Common Statement Guidelines, *supra* note 323; *see generally* SCHACK, *supra* note 320, at 245.

326. The *Handreichung* is a 2001 policy document, containing guidelines that revised in the course of 2007 by a working group and adopted in conjunction with the establishment of a fund for provenance research. Representatives of the *Länder* (states) and of the national associations of local authorities, museum experts, and representatives of the Federation were involved in the drafting process. *See* Common Statement Guidelines, *supra* note 323, at 4. The aim was to draw on the experience of the past ten years with a view to making the existing guidelines more practicable, effective and conciliatory and to outline ways and means to arrive at "just and fair solutions" within the meaning of the 1998 Washington Principles. *Id.*

tion for the loss of, artwork.[327] However, this apparently limited number misrepresents Germany's actual restitutional efforts. Indeed, countless art objects have been restituted from German public collections without the involvement of the Advisory Commission.[328] After all, the Commission may only serve as a mediator at the joint request of both the museum and the claimant,[329] who often avoids submitting the request to the Commission,[330] or does not feel the need to do so, given the voluntary cooperation of the museum.

It is crucial to realize that, if not for the above alternative mechanisms of dispute resolution, virtually all Holocaust-related art claims would be dismissed in court, given the strong protection European civil law awards to a bonafide purchaser's title. Indeed, unlike in the United States, actions in replevin or conversion regarding wartime stolen objects are long time-barred due to the lack of any mechanisms to postpone accrual in continental European property law, such as the widespread discovery rule or the New York demand and refusal rule.[331] Accordingly, in the above countries, restitution claims for works in the nations' leading museums are assessed on their merits, exclusively considering the circumstances under which the loss occurred, while disregarding technical de-

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327. The opinions of the Advisory Commission are published on the Internet. *See Advisory Commission*, LOST ART INTERNET DATABASE, *translated at* http://www.lostart.de/Webs/EN/Kommission/Index.html (last visited Sept. 28, 2011) (Ger.).

328. *See, e.g.*, Catherine Hickley, *Hanover Returns Lovis Corinth Painting to Nazi Victim's Heirs*, BLOOMBERG (Sept. 24, 2007), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aV4V.Vh1OSs8&refer=muse; Brian Parker, *German Lawmakers to Return Nazi-Looted Bismarck Canvas to Heirs*, BLOOMBERG (Nov. 11, 2009), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aLyjPhj2Scyc; Alan Riding, *Göring, Rembrandt and the Little Black Book*, N.Y. TIMES, Mar. 26, 2006, § 2, at 1, *available at* 2006 WLNR 4985931; John Varoli, *Restoring a Window's Glow, Healing a War's Wounds*, N.Y. TIMES, Dec. 27, 2000, at E2; *see also Resolved Art Claims*, *supra* note 279, at 7–12; Josephine von Perfall, *Museum Returns Baroque Painting Confiscated During Nazi Era*, ART NEWSPAPER (Aug. 27, 2010), http://www.theartnewspaper.com/articles/Museum%20returns%20Baroque%20painting%20confiscated%20during%20Nazi%20era%20/21333.

329. *See* Common Statement Guidelines, *supra* note 323; *see also* SCHACK, *supra* note 320, at 245; Franz, *supra* note 321, at 175.

330. In the much discussed Kirchner case, the claimant consciously avoided submitting the dispute to the German Advisory Commission. *See* SCHACK, *supra* note 320, at 245. For details regarding the Kirchner case, see generally, Friedrich Kiechle, *Hat Flierl rechtstreu gehandelt?* [*Did Flierl abide by the Law?*], FRANKFURTER ALLGEMEINE ZEITUNG (Ger.), Feb. 13, 2007, at 34; Alexander Pulte, *German Angst over Return of Kirchner Painting*, 9 IFAR J. no. 2, 2007, at 11.

331. *See also* Demarsin, *supra* note 211, at 264–72.

fenses that would deny the victims their day in court.[332] In addition, with respect to the responsibility they assumed under the Washington Conference to resolve Nazi era claims in a fair and just manner, Austria, Germany, France, the Netherlands, and the United Kingdom all established a permanent neutral advisory body to assist in addressing ownership issues.[333] This differs from the *ad hoc* advisory commission established in Belgium[334] and the absence of any such commission in the United States, where parties are obliged to resort to litigation.[335]

Finally, it is crucial to understand that the creation of these alternative dispute resolution mechanisms have not opened the feared "floodgates"[336] of litigation or instigated the closure of entire museums as a result of overindulgent, quasi-automatic restitutions.[337] In fact, even before these neutral advisory bodies, restitution claims are frequently dismissed, albeit on substantive grounds, as the following few examples will demonstrate.

Indeed, on June 12, 2008, the German Advisory Commission recommended against the return of Hans Sachs' looted poster collection, including valuable works by Mucha, Kandinsky, Toulouse-Lautrec, and Bernhard, from the *Deutsches Historisches Museum* (German Historical Museum).[338] The Commission took into account the fact that Sachs himself always considered his material claims to be settled in view of a 1961

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332. David J. Rowland, *Nazi-Era Art Claims in the United States: 10 Years after the Washington Conference*, 1 A.B.A. SEC. INT'L L. 30 (2009), *available at* http://www.rowlandlaw.com/NAZI-ERA%20ART%20CLAIMS.pdf.

333. *Id.*

334. Johan van de Wiele, *Externe commissie van advies in verband met eis tot teruggave van schilderij Kokoschka* [*External Advisory Commission to Assess the Restitution Claim regarding the Kokoschka Painting*], STAD GENT [CITY OF GENT] (Feb. 12, 2010), http://www.gent.be/eCache/THE/4/159.bGlzdHZpZXc9cGVyc2JlcmljaHRlbl9hcmNoaWVmJnJlYz0xNTg0OTYmeWVhcj0yMDEwJm1vbnRoPTI.html (Belg.). For more details on the recent dispute between the Ghent Museum and the heir of the wartime owner a Kokoschka painting, see Catherine Hickley, *Dresdner Banker's Heirs Claim Kokoschka Work in Belgian Museum*, BLOOMBERG (Jan. 26, 2009), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aBcmMgWbGVbE.

335. For some Nazi era art cases brought before the U.S. courts, *see supra* Part III.

336. *See* LUBINA, *supra* note 1, at 477; Bazyler, *Nuremberg in America*, *supra* note 13, at 5.

337. LUBINA, *supra* note 1, at 477.

338. Press Release, The Second Recommendation of the Advisory Commission for the Return of Cultural Property Seized as a Result of Nazi Persecution (Jan. 25, 2007) (Germ.), *available at* http://www.lostart.de/cae/servlet/contentblob/37954/publicationFile/764/07-01-25-The%20Second%20Recommendation%20of%20the%20Advisory%20Commission-DL.pdf.

compensation award of 225,000 DM, an amount several independent experts called "extremely respectable."[339] In addition, the commission observed that Sachs had always considered his activities as a collector to be a public service.[340] Displeased with the outcome, Sachs' heir refused to accept the Commission's decision and commenced legal proceedings. However, on February 18, 2010, the Berlin *Kammergericht* found that the posters were to stay on display at the museum, thereby overruling the decision of the Berlin Landgericht of February 10, 2009.[341]

The Spoliation Advisory Panel's decision in the *Glaser* case is a second interesting example. On June 24, 2009, only days before the United Kingdom signed the Terezín Declaration, the panel advised against restitution of eight drawings held by the Courtauld Institute of Art in London.[342] Nevertheless, it was generally accepted that the drawings had once belonged to Professor Glaser, the Jewish director of the Berlin State Art Library, who was forced to resign from his position and flee the country shortly after Hitler's ascension to Chancellor.[343] The panel, however, found "that Glaser's decision to sell the bulk of his collection and leave Germany stemmed from mixed motives."[344] In addition, according to the panel, the prices paid for "the drawings at second auction were reasonable market prices . . . and were not depressed by circumstances attributable to the Nazi regime."[345] Accordingly, the panel concluded that the Glaser heirs' claims to the drawings were "insufficiently strong to

339. *Id.* at 1.

340. *Id.*

341. Kammergericht Berlin [KG] [Superior Court of Justice], Jan. 28, 2010, 8 U 56/09, 2010, *rev'g* Landgerichts Berlin [LG] [Higher Regional Court], Feb. 10, 2009,19 OLGZ 116/08, 2009 (Ger.), *available at* http://www.lootedart.com/web_images/pdf/Kammergericht.Urteil.2-18-10.pdf; *see also* Patrick Bahners, *Eigentum ist nicht gleich Besitz* [*Ownership is Not Like Possession*], FRANKFURTER ALLGEMEINE ZEITUNG, Feb. 19, 2010, at 35; Catherine Hickley, *Nazi-Looted Posters Should Stay in Berlin Museum, Court Says*, BLOOMBERG (Jan. 28, 2010), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a5YeAD69s2B0. For more on the decision of the lower court, see Craig Whitlock, *Berlin Court Rules for Floridian Seeking Return of Art Posters Seized by Gestapo*, WASH. POST (Feb. 11, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/02/10/AR2009021003561.html.

342. *See also* SPOLIATION ADVISORY PANEL, REPORT IN RESPECT OF EIGHT DRAWINGS NOW IN THE POSSESSION OF THE SAMUEL COURTAULD TRUST, 2009, H.C. 757 (U.K.), *available at* http://www.official-documents.gov.uk/document/hc0809/hc07/0757/0757.pdf.

343. *Id.*

344. *Id.* ¶ 34.

345. *Id.* ¶ 41.

warrant a recommendation that the drawings should be transferred to them."[346]

Similarly, on December 15, 2010, the Spoliation Advisory Panel advised against the restitution of a Rubens oil sketch to the heirs of the Gutmann family. It concluded that, while there was some evidence that Gutmann suffered from "anti-semitic persecution under the Nazi regime, . . . [it] was only a subsidiary and causally insignificant factor in his decision to sell his [artwork]."[347] After all, the Panel found that Gutmann sold *The Coronation of the Virgin* at a price "consistent with the market value" and principally in order to pay debts resulting from investments incurred before the Nazis came to power.[348]

Finally, in its 2009 report, the Dutch Restitutions Committee pointed out that in 24 of 80 recommendations issued since 2002, the Committee recommended that the claim be rejected in full.[349] Similarly, with regard to the Austria situation, it was reported that in 26 out of 210 dossiers, the *Beirat* recommended not to return the objects at hand.[350]

Although the recommendations of the restitution commissions are sometimes controversial due to the uncertainty about the underlying facts, the above countries' claims are at least reviewed on the merits. This undeniably differs from the United States' approach, where legal actions in replevin or conversion are often dismissed based upon the technical defenses of statutes of limitations and laches, which are an inextricable part of day-to-day property litigation. As the Nazi-victims' claims stem from decades-old looting, it is evident that even under the more owner-friendly common law, the cards are easily stacked against those bringing a claim. By raising statute of limitations and laches defenses or even filing declaratory judgment actions, U.S. collectors often make the most of their chances to escape court ordered restitutions.

It is illogical that these institutions can deprive undisputed victims of wartime looting, who never received any compensation, from the stolen

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346. *Id.* ¶ 47.

347. SPOLIATION ADVISORY PANEL, REPORT IN RESPECT OF AN OIL SKETCH BY SIR PETER PAUL RUBENS, 'THE CORONATION OF THE VIRGIN', NOW IN THE POSSESSION OF THE SAMUEL COURTAULD TRUST, 2010, H.C. 655, ¶ 84 (U.K.), *available at* http://www.culture.gov.uk/images/publications/7349_HC_655_Accessible.pdf.

348. *Id.* ¶¶ 82–83; *see also* Jamie Doward, *Rubens Painting Once Owned by Victim of the Nazis is to Stay in Britain*, GUARDIAN (Dec. 19, 2010), http://www.guardian.co.uk/artanddesign/2010/dec/19/rubens-painting-kept-courtauld.

349. RESTITUTIONS COMM., REPORT 2009, at 17 (Nathalie Dufais ed., Advisory Comm. on the Assessment of Restitution Applications for Items of Cultural Value & the Second World War, 2010), *available at* http://www.restitutiecommissie.nl/images/stories/files/report2009-met%20wijz.b6.pdf.

350. Jabloner & Blimlinger, *supra* note 316, at 233–34.

possessions which they have at long last retraced, by raising technical defenses to blame them for not filing suit earlier. Although legally sound, is it not somewhat perverse reasoning that the leading U.S. museums think themselves not to be bound by the Washington Principles, Vilnius, and Terezín agreements the Executive Branch entered into, especially taking into consideration the museums' moral obligation under the self-imposed AAM guidelines? Is it not inconsistent for the United States to urge its museums to conduct provenance research, in the knowledge that it is beyond its power to procure actual restitution of looted objects? It is disconcerting that the United States demands restitution in other countries but is indulgent towards its own hesitations. After all, the purport of the United States' own commitment to effect restitution of looted art from U.S. collections is almost insignificant, particularly given the private status of the nation's leading museums. Above all, if the federal government's scope in resolving restitution claims is as inappreciable as Ambassador Kennedy observed in his 2007 Potsdam speech,[351] and the federal government truly lacks the power to impose a restitution policy on the nation's museums or to establish a neutral expert advisory body to settle Nazi era art claims on their merits, how can the public accept the federal court's decision that a state's elimination of the statutory limitation in favor of Holocaust victims infringes on the federal government's exclusive foreign affairs power to make and resolve war?[352] The United States must be honest about its restitution intentions on the international front. Either the federal level should change its response to the Terezín Declaration, or the states should take action to ensure that Holocaust-related restitution claims be decided on their merits.

CONCLUSION

This Article analyzes the impact of the 2009 Terezín Declaration on Holocaust Era Assets and Related Issues and its predecessors on the settlement of Holocaust-related title disputes. It also commented on the sharp divide between moral obligations and legal duties with regard to restitution matters. Taking into account the participation of both the United States and the majority of European countries in these international declarations on Nazi era art spoliation, the Article compares the United States' response to the international framework with the heterogeneous implementation on the European Continent.

As a manifestation of the post-Cold War revival of the general debate on wartime spoliations, the remarkable upsurge in Holocaust-related title

351. *See supra* note 221 and accompanying text.
352. *See Von Saher*, 592 F.3d at 964–71.

disputes over the past fifteen years caused the international community to acknowledge the outstanding injustices of WWII through concerted international action. Accordingly, since the 1998 Washington Conference Principles on Nazi-Confiscated Art, a chain of public law instruments has been adopted in order to come to terms with the enduring suffering of the victims of Nazi-art persecution. However, neither the Terezín Declaration nor its predecessors qualifies as an international treaty, as the signatories' will to be bound and compelled to them was nonexistent. Accordingly, in spite of the rhetoric that typically comes with Holocaust-related initiatives, these non-self-executing international agreements did not impose any enforceable legal duty on the government of the signatory states, let alone any additional legal right for the victims of Nazi era spoliation.

Despite nonbinding international agreements' potential invocation of social pressure spurring legal compliance, this Article demonstrates the tenuousness of arguments drawn upon public international law in actually obtaining restitution of looted artwork from U.S. museum collections. Indeed, as far as the actual settlement of Holocaust-related art disputes in the United States is concerned, the above international agreements' objectives have, for the greater part, not even been indirectly met due to their reticent implementation in domestic law and the private status of the leading American art museums.

However, the primary purpose of this Article is to expose the disparity of the American policy towards art restitution. After all, despite the United States' failure to implement the body of non-self-executing agreements concerning Nazi-looted art, the country continuously proclaims to support restitution efforts in compliance with its international obligations. Moreover, the United States repeatedly criticizes the European reticence regarding the restitution of stolen artworks in general, and its noncompliance with the spirit of the Washington Principles in particular. Through comparative analysis of the international agreements' heterogeneous implementation on the European Continent, the Article reveals that the United States' criticism of the European position is not only unfitting given its own legal imperfections with respect to Nazi-looted art, but also inaccurate taking into account the serious restitutional efforts displayed in a number of Western European countries. Indeed, unlike Southern and Eastern European countries, states—such as France, the United Kingdom, Germany, Austria, and the Netherlands—pay significantly better heed to the international agenda by establishing alternative dispute resolution mechanisms for resolving Nazi-looted art claims on the merits.

In that respect, it should be recalled that hundreds of objects were restituted from the Dutch national collections to the heirs of the original own-

ers, while Austria alone restituted around 10,000 art objects.[353] These figures contrast sharply with those in the United States. It is striking that, according to the May 2007 *AAMD Position Paper on Art Museums and Identification and the Restitution of Works Stolen by the Nazis*:

> [B]etween 1998 and July 2006 twenty-two works in American museum collections have been identified as having been stolen by the Nazis and not properly restituted after the war. In each of these cases, the works have been restituted to the heirs of Holocaust victims or settlements have been reached with the heirs to graciously allow the works to remain in museums for the public's benefit.[354]

Twenty-two works—out of more than eighteen million objects held by American art museums in public trust[355] and more than 25,000 works identified as having changed hands in Continental Europe during the Nazi era[356]—is a distressing number. The better part of these twenty-two voluntary restitutions occurred in the early days of the art spoliation debate's revival, when emotionality and perceived social pressure arguably motivated discomfited museum directors to concede, often acting simply to soothe public opinion. In 2000, for instance, the Philadelphia Museum agreed to return five looted pieces of armor to the Dresden Museum.[357] Later that year, the Denver Art Museum voluntarily returned a painting by a follower of Gerard ter Borch to the daughter of a Jewish banker, who was forced to sell his collection during WWII.[358] Around the same time, the National Gallery of Art in Washington, D.C., voluntarily restituted *Still Life with Fruit and Game* by the Flemish artist Frans Snyders to the heirs of a French Jewish collector, Edgar Stern.[359] A final example

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353. *See supra* notes 316–17 and accompanying text.

354. Press Release, Ass'n of Art Museum Dirs., Art Museums and the Identification and Restitution of Works Stolen by the Nazis (May 2007), *available at* http://www.aamd.org/papers/documents/Nazi-lootedart_clean_06_2007.pdf; *see also* Kreder, *Ethics Revolution in U.S. Museums*, *supra* note 79, at 1023.

355. Kreder, *Ethics Revolution in U.S. Museums*, *supra* note 79, at 1023.

356. *Id.*

357. Already in 1995, the museum requested the return of the artifacts, which had disappeared during WWII from the Dresden State Art Collections. *See* Carol Vogel, *Philadelphia Finds Gain in Returning Armor*, N.Y. TIMES, May 30, 2000, at E3, *available at* 2000 WLNR 3475713. The Philadelphia Museum negotiated to retain four pieces on loan throughout 2004. *Id.*

358. The painting was donated to the Denver Art Museum in 1961. *See* Weil, *U.S Museums' Information about Nazi Era Objects*, *supra* note 68, at 11; Mary Voelz Chandler, *Portrait of Plunder Museum to Ship Painting Stolen by Nazis to Owner's Oregon Heirs*, DENVER ROCKY MOUNTAIN NEWS, Nov. 8, 2000, at 15D.

359. The work was confiscated from Stern, and subsequently taken by Hermann Göring to the *Jeu de Paume* in Paris, where it was registered in 1941 as seized artwork. *See*

was the sensational dispute *Rosenberg v. Seattle Art Museum*.[360] In this case, the heirs of Paul Rosenberg, a French wartime art dealer, tried to recover *L'Odalisque*, a looted Matisse painting they came across in the collection of the Seattle Art Museum.[361] Until its private settlement, the case was fought before the Washington District Court.[362] Eventually, the museum agreed to return the painting, when its own research substantiated the claim of the Rosenberg heirs.[363]

The museums' respect, openness, and obligingness was, in the early days, often greeted with gratitude and resulted in favorable settlements. Often, in exchange for recognition and/or some minor financial compensation, the work could remain on display. In 2001, for example, a settlement agreement led to the gift of *Le Grand Pont*, a Gustave Courbet painting, to the Yale University Art Gallery and its temporary return to the Weinmann family on ten-year loan.[364] Another important resolved dispute concerned Lucas Cranach's *Madonna and Child in a Landscape*, which was donated to the Museum of Art in Raleigh, North Carolina, in

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Celestine Bohlen, *National Gallery to Return a Family's Painting Looted by the Nazis*, N.Y. TIMES, Nov. 21, 2001, at E1, *available at* 2000 WLNR 3225695. It ended up in the National Gallery in 1990, when a collector donated the work to the museum. *See id.*; Weil, *U.S Museums' Information about Nazi Era Objects*, *supra* note 68, at 10.

360. Rosenberg v. Seattle Art Museum, 42 F. Supp. 2d 1029 (W.D. Wash. 1999).

361. *See Rosenberg*, 42 F. Supp. 2d at 1031–33; BAZYLER, HOLOCAUST JUSTICE, *supra* note 13, at 222–24.

362. *See Rosenberg*, 42 F. Supp. 2d at 1031; BAZYLER, HOLOCAUST JUSTICE, *supra* note 13, at 224–25.

363. BAZYLER, HOLOCAUST JUSTICE, *supra* note 13, at 224–25. However, on behalf of the donors, the museum filed a third party complaint against Knoedler-Modarco, the gallery that had sold them the Matisse in 1954. *See* Shirley Foster, *Prudent Provenance—Looking Your Gift Horse in the Mouth*, 8 UCLA ENT. L. REV. 143, 152 (2001). Finally the Seattle Art Museum dropped all claims when Knoedler agreed to pay costs and legal fees, and provided the museum with some works from its holdings to compensate for the loss of the Matisse. *Id.* at 153–54. For an extensive analysis of this case, see Courtney S. Perkins, Comment, *The Seattle Art Museum: A Good Faith Donee Injured in the Restoration of Art Stolen During World War II*, 34 J. MARSHALL L. REV. 613, 619–20 (2001); *see also* Feliciano, *The Aftermath of Nazi Art Looting in the United States and Europe*, *supra* note 25, at 5–6; Keim, *supra* note 25, at 305–06; Turner, *supra* note 16, at 1528–29; Tyler, *supra* note 25, at 451; Cuba, *supra* note 14, at 447–49; Henson, *supra* note 62, at 1133–35; *see generally* Minyard, *supra* note 70, at 123–26.

364. Weinmann's assertions were based on a 1948 letter, in which his mother had submitted a claim to the work to the United States occupation forces in Germany. *See* Ron Grossman, *1948 Letter Backs Claim of Nazi Theft*, CHI. TRIB., Feb. 11, 2001, at C1, *available at* 2001 WLNR 10591195. In the letter, she alleged that she bought the painting in the 1930s. After she fled Germany, leaving the work behind, the Courbet disappeared. *See id.*; *see also* Walter V. Robinson, *Art from Collector with a Nazi Past Puts Yale on Spot*, BOS. GLOBE, Jan. 22, 2001, at A1, *available at* 2001 WLNR 2224105.

1984.[365] In return for a pledge to use the painting to instruct the public on the horrors of the Holocaust art looting, the museum could retain ownership upon payment of a much reduced price.[366] In yet another case, the Art Institute of Chicago reached a settlement with the heirs of Federico Gentili di Giuseppe, an Italian-Jewish collector living in France, whose entire collection had been auctioned off illicitly by the French government in 1941.[367] By recognizing the family's ownership over the sculpture, the Art Institute was able to retain the work through part-purchase and part-donation.[368]

Despite these favorable settlements, in less than a decade, U.S. museums shied from restitutional efforts, arguing statute of limitations defenses, and resorted to declaratory judgment actions. As such, the United States shifted away from the spirit of 1998 Washington Principles. Unfortunately, although international framework on the matter is widespread and readily invoked in Nazi era art disputes, most signatory countries—including the United States—ignore their international commitments. Nevertheless, it is beyond doubt that, the purport of the 1998 Washington Principles and its predecessors is sufficiently clear to all signatory countries. Accordingly, there is no need for additional elaborate, yet nonbinding, declarations regarding Nazi era art looting. After all, if the implementation of the existing international framework has not made significant headway in many jurisdictions, any future attempt to bring about an international restitution consensus, turning moral obligations into legal duties, will be stillborn. The only way for the international community to achieve the spirit of the Washington Principles is to broadly implement the existing framework, not to add yet another nonbinding recital of good intentions.[369] Therefore, let's not talk about the Terezín Declaration because, unlike what happened in the Nazi era ghetto, the 2009 Terezín events can be forgotten.

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365. Emily Yellin, *North Carolina Art Museum Says It Will Return Painting Tied to Nazi Theft*, N.Y. TIMES, Feb. 6, 2000, at A22, *available at* 2000 WLNR 3221430.

366. In this case, the Commission for Art Recovery set the ball rolling when it discovered that the painting had been stolen by Nazis during World War II. *See* BAZYLER, HOLOCAUST JUSTICE, *supra* note 13, at 249–50; *see also* Eizenstat, *supra* note 101, at 27; Spiegler, *supra* note 14, at 297; Weil, *U.S Museums' Information About Nazi Era Objects*, *supra* note 68, at 11; *see generally* Yellin, *supra* note 365.

367. Anglade, *supra* note 294, at 309.

368. In 1999, a French court ordered the return of a series of paintings from the Louvre Museum. *See* Anglade, *supra* note 293, at 309. The heirs equally managed to recover a painting from the *Gemäldegalerie* in Berlin. *See* Alan Artner & Ron Grossman, *Museum, Heirs Settle WWII-Era Art Dispute: Jewish Collector's Holdings Auctioned by Vichy France*, CHI. TRIB., June 13, 2000, at N1, *available at* 2000 WLNR 8300823.

369. *See* Henry, *supra* note 64.