

Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes

CREATION OF AN INTERNATIONAL TRIBUNAL

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Nazi-looted art has been the subject of much recent litigation¹ and many news reports.² Given both the vast

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¹ See Stephen W. Clark, *World War II Restitution Cases*, SL077 A.L.L.-A.B.A. 541 (2006) (describing numerous Nazi-looted art claims faced by American institutions); see also *Austria v. Altmann*, 541 U.S. 677, 680-81 (2004); *Orkin v. Taylor*, 487 F.3d 734, 735-36 (9th Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3073 (Aug. 16, 2007) (No. 07-216); *Max Stern Estate v. Bissonnette*, No. 06-211 (D. R.I. filed May 8, 2006); *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 804-05 (N.D. Ohio 2006); *Schoeps v. Andrew Lloyd Webber Art Found.*, No. 06-12934 (S.D.N.Y. filed Nov. 6, 2006); *United States v. Painting Entitled "Femme en Blanc,"* 362 F. Supp. 2d 1175, 1178 (C.D. Cal. 2005); *Alsdorf v. Bennigson*, No. 04-5953, 2004 WL 2806301, at *2 (N.D. Ill. Dec. 3, 2004); *United States v. Portrait of Wally*, 105 F. Supp. 2d 288, 289 (S.D.N.Y. 2000); *Rosenberg v. Seattle Art Museum*, 42 F. Supp. 2d 1029, 1031 (W.D. Wash. 1999); *Bennigson v. Alsdorf*, No. B168200, 2004 WL 803616, at *1 (Cal. Ct. App. Apr. 15, 2004); *In re Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art*, 719 N.E.2d 897, 899 (N.Y. 1999); *Peters v. Sotheby's Inc. (In re Peters ex rel. Estate of Ash)*, 821 N.Y.S.2d 61, 63 (App. Div. 2006); *Warin v. Wildenstein & Co.*, 746 N.Y.S.2d 282 (App. Div. 2002); *Wertheimer v. Cirker's Hayes Storage Warehouse, Inc.*, No. 105575, 2001 WL 1657237, at *1 (N.Y. Sup. Ct. Sept. 28, 2001).

² The following are just a few articles from 2006: Martin Bailey, *Revealed: National Gallery's Cranach Is War Loot*, THE ART NEWSPAPER, Nov. 27, 2006, available at <http://www.theartnewspaper.com/article01.asp?id=520> (describing discovery in London museum concerning *Cupid Complaining to Venus*); Kelly Crow, *The Bounty*

magnitude of unrestituted Nazi-looted art³ and the revival of research into newly opened World War II-era governmental archives,⁴ the rise in interest in Nazi-looted art is not surprising even though sixty years have passed since the end of the war. Most legal academic literature on the subject focuses on statute of limitations issues, concludes that the statute of limitations would be an insurmountable hurdle in many cases, and either advocates in favor of tolling the limitations period⁵ or encourages voluntary submission to alternate dispute resolution for Solomonic decree.⁶ This Article proposes that the

Hunters, WALL ST. J., March 23, 2007 (describing soaring art prices creating a boom market in reclaiming stolen works); Anemona Hartocollis, *Judge Refuses to Halt Auction of Picasso*, N.Y. TIMES, Nov. 8, 2006, at B6 (describing dismissal of suit for *Portrait of Angel Fernandez de Soto* brought by family of Jewish banker persecuted by the Nazis and noting plaintiff's intent to re-file in state court); Robin Pogrebin, *Met Won't Show a Grosz at Center of a Dispute*, N.Y. TIMES, Nov. 15, 2006, at E1 (describing Met's refusal to display painting with Nazi-era provenance problem); Carol Vogel, *\$491 Million Sale at Christie's Shatters Art Auction Record*, N.Y. TIMES, Nov. 9, 2006, at B1 (reporting on Christie's withdrawal of painting from auction despite dismissal of lawsuit and Christie's consideration of suing the plaintiff); Brigitte Werneburg, *Raiders of the Lost Art*, DIE TAGESZEITUNG, Nov. 6, 2006, translated in SIGNANDSIGHT.COM, Nov. 7, 2006, <http://www.signandsight.com/features/1036.html> (reviewing the dispute surrounding the sale of Ernst Ludwig Kirchner's *Berlin Street Scene*).

³ See Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 631, 660 (2000) ("According to Ronald Lauder, a former U.S. ambassador to Austria and now chairman of the Museum of Modern Art in New York, 'more than 100,000 pieces of art, worth at least \$10 billion in total, are still missing from the Nazi era.' Mr. Lauder believes that 'because of these large numbers, every institution, art museum and private collection has some of these missing works.'" (citations omitted)); see also Julia Parker, *World War II & Heirless Art: Unleashing the Final Prisoners of War*, 13 CARDOZO J. INT'L & COMP. L. 661, 663 (2005) ("Some scholars purport that approximately fifty percent of the works displaced during the Nazi era remain unfound.").

⁴ See generally Paulina McCarter Collins, *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 (2002); Robert Schwartz, *The Limits of the Law: A Call for a New Attitude Toward Artwork Stolen During World War II*, 32 COLUM. J.L. & SOC. PROBS. 1 (1998) (discussing European governments' opening of archives and first-time admissions of possession of Nazi-looted art); see also Mark Landler, *Documents from Vast Nazi Archive to Be Made Available to Scholars*, N.Y. TIMES, May 16, 2007, at A3; Associated Press, *New Nazi Files on Holocaust to Be Opened*, N.Y. TIMES, May 17, 2006, at A5; David Stout, *After Resisting for Decades, Germany Agrees to Open Holocaust Archive*, N.Y. TIMES, Apr. 19, 2006, at A11.

⁵ E.g., 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, 450 (1999).

⁶ E.g., 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 (2003) (discussing how the judicial system is ill-equipped to handle Nazi-looted art claims and advocating for resolution via arbitration); Alan G. Artner, *Ethics and Art: Museums Struggle for Correct Response to Stolen Art Claims*, CHI. TRIB., Aug. 16, 1998, at 6 (quoting Constance Lowenthal, then Director of the Commission for Art Recovery of the World Jewish Congress in New

most just and effective solution would be to create an international tribunal with compulsory jurisdiction to resolve all such disputes and clear title to artwork. This Article proposes criteria to reconcile the tension between (1) the desire to reconstitute art to deserving claimants who likely could overcome traditional legal hurdles without forcing them to incur the agony and expense of U.S. litigation;⁷ (2) the desire to provide justice to those claimants who could not launch successful litigation but who seem to have valid claims nonetheless;⁸ and (3) the need of museums, galleries, auction houses, and individual bona fide purchasers of art for repose.⁹

From 1998 to 1999, the creation of a restitution commission to resolve Nazi-looted art disputes was discussed—at least peripherally—in art law circles.¹⁰ To date, no such

York, as stating that “[arbitration] certainly is a possibility, because these cases—which keep arriving with alarming regularity—and the laws that have been made with them, particularly those involving World War II, are not well-known by most judges.”).

⁷ Litigating even strong Nazi-looted art claims usually is very time consuming, aggravating, and expensive because of their complexity. Monica Dugot, *International Law Weekend Panel on Litigating the Holocaust in U.S. Courts*, 12 ILSA J. INT’L & COMP. L. 389, 390 (2006) (“The emotional and financial costs associated with litigation are high. The legal costs can easily end up being a sizable percentage of the actual value of the work. Indeed, the legal costs can easily exceed the value of the work.”); Ralph E. Lerner, *The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution to Disputes over Title*, 31 N.Y.U. J. INT’L L. & POL. 15, 36 (1998) (“[A] matter involving a claim for an artwork stolen during World War II will take between seven and twelve years to resolve.”); Carol Vogel, *Driven by International Bidders, Prices Soar at Sotheby’s Sale with No Blockbuster*, N.Y. TIMES, May 9, 2007, at B4 (describing the increasing value of the art market generally as new international wealth drives prices to new heights). See generally HOWARD J. TRIENENS, LANDSCAPE WITH SMOKESTACKS: THE CASE OF THE ALLEGEDLY PLUNDERED DEGAS (2000) (describing financial realities of bringing a successful claim). Thomas Kline, a successful plaintiffs’ attorney in the field, has reportedly stated: “I am almost at the point where I would say that if the art is worth less than \$3 million, give up.” Marilyn Henry, *Holocaust Victims’ Heirs Reach Compromise on Stolen Art*, JERUSALEM POST, Aug. 16, 1998, at 3.

⁸ This concept is akin to the idea of “rough justice” used by Ambassador Stuart Eizenstat as a guiding light in the slave and forced labor negotiations, which led to the signing of treaties and creation of tribunals in European nations to compensate Holocaust survivors. STUART EIZENSTAT, IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II 129-30, 353 (2003); see also Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Wrongs*, 103 COLUM. L. REV. 689 (2003) (analyzing ethical individualism versus group reparations theories).

⁹ See John G. Petrovich, *The Recovery of Stolen Art: Of Paintings, Statues, and Statutes of Limitations*, 27 UCLA L. REV. 1122, 1127-28 (1980); see also, e.g., Adam Zagorin, *Saving the Spoils of War*, TIME, Dec. 1, 1997, at 87 (reporting defense lawyer’s simple statement of the problem: “At what point is it safe for an honest man to buy a painting from a reputable dealer?”).

¹⁰ Owen Pell, *The Potential for a Mediation/Arbitration Commission to Resolve Disputes Relating to Artworks Stolen or Looted During World War II*, 10

commission exists.¹¹ The “professional art world leaves each defendant who unluckily ends up with Nazi-stolen artwork to fend for itself.”¹² The push in the late 1990s for Holocaust reparations also did not resolve the Nazi-looted art problem.¹³ It seems that the momentum was lost after the signing of the “French Agreement,” which established a new survivor fund in France, on President Clinton’s last day in office.¹⁴ U.S. Ambassador Stuart Eizenstat, who spearheaded the agreement’s negotiations, has lamented the “unfinished business” of the Holocaust reparations movement.¹⁵

Research over the past nine years exposing the quantity and value of art for which claims remain calls for reconsideration of the idea to create a commission.¹⁶ This commission would have compulsory, not voluntary, jurisdiction to resolve Nazi-looted art disputes. With the prospect of an

DEPAUL-LCA J. ART & ENT. L. 27, 46-47 (1999) [hereinafter Pell 1999]; Lerner, *supra* note 7, at 36.

¹¹ Pell’s proposal, which he later modified to contemplate utilizing the Permanent Court of Arbitration, was considered by the European Parliament, but never implemented. See Owen Pell, *Using Arbitral Tribunals to Resolve Disputes Relating to Holocaust-Looted Art*, in RESOLUTION OF CULTURAL PROPERTY DISPUTES 307, 325 (The Int’l Bureau of the Permanent Court of Arbitration ed., 2004) [hereinafter Pell 2004]; EUR. PARL. DOC. A5-0408/2003 (2003) (adopting COMM’N ON LEGAL AFFAIRS AND THE INTERNAL MARKET, REPORT ON A LEGAL FRAMEWORK FOR FREE MOVEMENT WITHIN THE INTERNAL MARKET OF GOODS WHOSE OWNERSHIP IS LIKELY TO BE CONTESTED (2002/2114(INI) (2003))). For additional information about the Permanent Court of Arbitration, see generally THE PERMANENT COURT OF ARBITRATION, PERMANENT COURT OF ARBITRATION: BASIC DOCUMENTS (2005), available at http://www.pca-cpa.org/showpage.asp?pag_id=1030; INT’L COUNCIL FOR COMMERCIAL ARBITRATION, NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND (Albert Jan Van Den Berg ed., 2005); H.M. HOTZMANN & B.E. SHIFMAN, DISPUTE SETTLEMENT: GENERAL TOPICS: 1.3 PERMANENT COURT OF ARBITRATION (U.N. Course on Dispute Settlement in Int’l Trade, Investment and Intellectual Property 2003), available at http://www.unctad.org/en/docs/edmmisc232add26_en.pdf; INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION: PAST, PRESENT AND FUTURE (The Int’l Bureau of the Permanent Court of Arbitration ed., 2000); THE PERMANENT COURT OF ARBITRATION: INTERNATIONAL ARBITRATION AND DISPUTE RESOLUTION (P. Hamilton et al. eds., 1999).

¹² Michael J. Bazylar & Amber L. Fitzgerald, *Trading with the Enemy: Holocaust Restitution, the United States Government and American Industry*, 28 BROOK. J. INT’L L. 683, 711 (2003).

¹³ See *infra* Part II.A.

¹⁴ See generally EIZENSTAT, *supra* note 8; see also *infra* Part II.A.

¹⁵ EIZENSTAT, *supra* note 8, at 359 (referring primarily, but not exclusively, to Central and Eastern European property claims).

¹⁶ E.g., Rachel Lasserson, *Art Restitution Cases to Rocket*, JEWISH CHRON., Jan. 18, 2007, available at <http://www.thejc.com>. A prospective administration change in the White House in 2008 could also lend support to the creation of a commission. See *id.* (quoting Ambassador Eizenstat, “Art restitution has not been a focus of the Bush administration.”).

explosion of claims,¹⁷ the art community of museums, collectors, dealers, and galleries needs an effective remedy—and Holocaust survivors and their families deserve the highest measure of justice achievable.¹⁸

This Article proposes the creation of a Nazi-Looted Art Tribunal (“Tribunal”). Section I demonstrates the need for the Tribunal. Section II outlines the basic blueprint for creating the Tribunal. Section III concludes that creating the Tribunal is superior to the current *ad hoc* manner of resolving claims through individually fueled litigation, mediation, arbitration, and negotiation. This Article does not lay out the dense factual background of Nazi looting, which has been discussed extensively in numerous books and articles, many of which are cited herein.¹⁹

I. A TRIBUNAL IS NEEDED

Before reaching the conclusion that an international tribunal should be created, one must conclude that disputes concerning artwork are worthy of such an extraordinary remedy.²⁰ It may seem a bit callous to be so concerned about lost art when so many people perished.²¹ Even within the Jewish community, creating a tribunal to resolve Nazi-looted art disputes would not be without controversy.²²

¹⁷ See generally GUNNAR SCHNABEL & MOIKA TATZKOW, NAZI LOOTED ART: HANDBUCH KUNSTRESTITUTION WELTWEIT (2007).

¹⁸ One recent proposal by European scholars mirrors the sentiment to create an international Nazi-Looted Art Tribunal. See Anne Niethammer & Maria O. Wantuch, *Compensation for Nazi Wrongdoing: The Case for an Integrated Approach* 12 ART, ANTIQUITY & LAW 29, 29-30 (2007).

¹⁹ E.g., THE SPOILS OF WAR: WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY (E. Simpson ed., 1997); JEANETTE GREENFIELD, THE RETURN OF CULTURAL TREASURES (2d ed. 1996); LYNN H. NICHOLAS, THE RAPE OF EUROPA: THE FATE OF EUROPE’S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR (1994).

²⁰ “The unprecedented scale of the tragedy of the Holocaust requires extraordinary methods to remedy its effects, and this also applies in the field of culture.” Wojciech W. Kowalski, *Claims for Works of Art and Their Legal Nature*, in RESOLUTION OF CULTURAL PROPERTY DISPUTES, *supra* note 11, at 31, 42.

²¹ See Pell 1999, *supra* note 10, at 27 (“It can be indelicate, perhaps even crass, to speak publicly about art looted during World War II because the loss of art, on its face, relates to money and property, losses that are insignificant when compared to the lives lost during the Holocaust.”).

²² Neal M. Sher et al., *The Search for Nazi Assets: A Historical Perspective*, 20 WHITTIER L. REV. 7, 11 (1998) (“There is concern that the final Holocaust issue will be about assets, which are merely tangible remnants of intangible, insufferable human loss.”); see generally Michael J. Kurtz, *Resolving a Dilemma: The Inheritance of Jewish Property*, 20 CARDOZO L. REV. 625 (1998) [hereinafter Kurtz 1998] (discussing

It must not be forgotten, however, that one core part of the Nazis' proposed Final Solution was the destruction of Jewish culture and the targeted pillaging of its art.²³ The Nazis maintained "that Jews had intentionally duped the German people into embracing nontraditional aesthetic styles" and "that they had promoted modern art as a ploy to reap huge profits."²⁴ Hitler sought to eliminate Jewish culture from the Third Reich, including modern art, which he deemed "degenerate."²⁵ The Nazi regime targeted such art initially to destroy it, and then after recognizing its value in the market, to trade it for other works or sell it to raise capital to fuel its racist regime.²⁶ Post-war governments in Germany, Austria, and France passed legislation to invalidate such racially motivated transactions entered into under the Nazi and Vichy regimes.²⁷ Post-war claims tribunals were created in European nations for victims to reclaim lost and stolen property, but did not always operate to effect justice.²⁸

controversies over distribution of heirless art after the war). Controversy generated immediately after the war by Israeli-German reparations negotiations is discussed in ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* 25 (2000) ("The right-wing opposition in Israel led the political fight against German reparation. Menachem Begin, still a young leader, led mass demonstrations against the Israeli government and called it an accomplice to German blood money, while supporters of the government characterized him and the violent street demonstrations as Fascist. Never has Israeli society been so fractured, or the government so close to succumbing to direct political action, as it was during this debate. But because it was taking place against the background of an urgent need for economic relief, the eventual outcome of the moral and ideological debate was determined by material necessities.").

²³ MICHAEL J. KURTZ, *AMERICA AND THE RETURN OF NAZI CONTRABAND: THE RECOVERY OF EUROPE'S CULTURAL TREASURES* 15 (2006) [hereinafter KURTZ 2006]; see generally HECTOR FELICIANO, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE GREATEST WORKS OF ART* 185 (1997).

²⁴ JONATHAN PETROPOULOS, *ART AS POLITICS IN THE THIRD REICH* 54 (1996).

²⁵ *Id.* at 9.

²⁶ See NORMAN PALMER, *MUSEUMS AND THE HOLOCAUST: LAW, PRINCIPLES AND PRACTICE* 7-8 (2000).

²⁷ See *id.* at 122-23 (Germany), 119-20 (Austria), 121-22 (France).

²⁸ See, e.g., Constance Lowenthal, *Edited Presentation*, 31 N.Y.U. J. INT'L L. & POL. 133, 135 (1998). One also must not overlook that soldiers engaged in some looting as well. E.g., KURTZ 2006, *supra* note 23, at 15; see also *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829, 830 (E.D.N.Y. 1981) (involving defendant's 1946 purchase of paintings from an American serviceman); Martin Bailey, *Revealed: Six Paintings in Maritime Museum Were Seized by British Troops from Nazi Germany*, THE ART NEWSPAPER, Feb. 1, 2007, available at <http://www.patrimoniosos.it/rsol.php?op=getarticle&id=27160>; Glenn Collins, *New Hopes of Finding Lost and Looted Art*, N.Y. TIMES, June 20, 1990, at C11 (quoting Ely Maurer, an assistant legal advisor on cultural property for the State Department: "After the war, the Army prosecuted 'dozens of soldiers for taking stolen property and trying to sell it . . .'" Maurer estimated that the State Department brought about restitution of 300 looted objects in the United States.); William H. Honan, *It's Finally Agreed: Germany to Regain a Stolen*

A. *Recent Litigation and Mass Settlements*

Although Germany in the 1950s paid out an estimated DM 100 billion in accordance with its post-war compensation laws and several bilateral treaties,²⁹ these agreements were interpreted by many as not having provided a final, comprehensive settlement—hence the recent litigation. For example, survivors east of the Iron Curtain could not assert valid claims pursuant to West Germany’s Federal Compensation Law of 1956.³⁰ Similar gaps existed in the post-war reparations mechanisms of other European nations,³¹ but the onset of the Cold War and implementation of the Marshall Plan seem to have allowed the need for Western European economic revival to overshadow the call for full post-war reckoning for survivors’ claims.³²

In 1997, the German Federal Constitutional Court decided a landmark case. *Krakauer v. Germany*³³ has been read by many to have “abrogate[d] the temporary immunity from suit for claims arising out of World War II that had been granted to German industry by the London Debt Agreement of 1953.”³⁴ As a consequence of the case, plaintiffs’ lawyers in the

Trove, N.Y. TIMES, Feb. 26, 1992, at C15 (“After a year and a half of wrangling, representatives of the German Government and the heirs of Joe T. Meador, an American Army officer who stole a nearly priceless collection of medieval treasures from a mineshaft outside of Quedlinburg in the final days of World War II, completed an agreement yesterday to return the artworks to Germany.”).

²⁹ Detlev Vagts & Peter Murray, *Litigating the Nazi Labor Claims: The Path Not Taken*, 43 HARV. INT’L L.J. 503, 507 (2002).

³⁰ See *id.* at 508. It must be noted that the post-war German government returned located property to those who asserted valid claims. See Kurtz 1998, *supra* note 22, at 652.

³¹ See, e.g., ROBBERY AND RESTITUTION: THE CONFLICT OVER JEWISH PROPERTY IN EUROPE 99-258 (Martin Dean et al. eds., 2007) (describing post-war property claims practices in multiple countries).

³² E.g., Kurtz 1998, *supra* note 22, at 626 (“Though the commitment to restore cultural property was supposedly absolute and unconditional, the political failure of the Allied Control Council (‘ACC’) in Germany and the onset of the Cold War in Eastern Europe raised significant barriers to a successful cultural restitution effort.”).

³³ Landgericht [LG] [trial court] 1*134/92 (1997), *rev’d on other grounds*, Oberlandesgericht [OLG] [Court of Appeals] 7 U. 222/97 (1998) (F.R.G.).

³⁴ E.g., Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L.Q. 795, 813 (2002) [hereinafter Neuborne 2002]. Neuborne further commented:

The London Debt Agreement of 1953 was, in effect, an international bankruptcy workout plan for postwar West German industry, deferring judicial consideration of liability for wartime behavior until the negotiation of a peace treaty at some indefinite time in the future. By 1953, the international community had realized that an economically viable West

U.S. felt that it was possible to assert a wide range of suits against German and other European companies.³⁵ Thus, lawsuits seeking compensation for slave and forced labor, dormant bank accounts, unpaid insurance policies, and other assets and obligations were filed.³⁶

The first of the modern-era Holocaust class actions were filed in the U.S. against Swiss banks in 1996 and 1997 and consolidated before Judge Edward R. Korman in the Eastern District of New York (in Brooklyn).³⁷ As part of the \$1.25 billion settlement of those suits,³⁸ more documents were released, which assisted the plaintiffs' lawyers in their lawsuits against German, Austrian, French, and Italian governments, industries, and banks.³⁹

The Swiss bank settlement has been lauded by some, but also criticized on many grounds—most recently because much of the \$800 million allocated for payment of dormant bank accounts was not distributed to account holders.⁴⁰ Instead,

Germany was a crucial link in Cold War efforts to contain Soviet expansion. The fear was that immediate imposition of liability for wartime actions would make it impossible for a strong postwar German economy to flourish. The London Debt Agreement was designed to defer liability until the signing of a formal peace treaty, at which time West German industry would be stronger and the precise details of reparations could be provided for in the treaty. Unfortunately for Holocaust victims, the Cold War made it impossible to complete a peace treaty with Germany, rendering the deferral of German industrial liability for wartime actions virtually permanent. The 1991 Two-Plus-Four Treaty . . . that paved the way for German reunification, was as close to a peace treaty as the Allies managed to achieve. The importance of the *Krakauer* opinion was its recognition that the deferral provisions of the London Debt Agreement had been lifted by the signing of the Two-Plus-Four Treaty, which was treated by the German Court as a *de facto* peace treaty.

Id. at 813 n.62.

³⁵ *Id.* at 814; Robert A. Swift, *Holocaust Litigation and Human Rights Jurisprudence*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 50, 53-60 (Michael Bazylar & Roger P. Alford eds., 2006).

³⁶ Neuborne 2002, *supra* note 34, at 814.

³⁷ Melvyn I. Weiss, *A Litigator's Postscript to the Swiss Banks and Holocaust Litigation Settlements: How Justice Was Served*, in HOLOCAUST RESTITUTION, *supra* note 35, at 103, 103-15; see also Edward R. Korman, *Rewriting the Holocaust History of Swiss Banks: A Growing Scandal*, in HOLOCAUST RESTITUTION, *supra* note 35, at 115, 115-32. The first Holocaust-era class action actually filed in the United States was *Handel v. Artukovic* in the Central District of California on behalf of survivors from Yugoslavia against a former pro-Nazi Croatian official. 601 F. Supp. 1421, 1424 (C.D. Cal. 1985). The suit was dismissed. *Id.* at 1437.

³⁸ See generally Roger P. Alford, *The Claims Resolution Tribunal and Holocaust Claims against Swiss Banks*, 20 BERKELEY J. INT'L L. 250 (2002).

³⁹ HOLOCAUST RESTITUTION, *supra* note 35, at 53-56.

⁴⁰ See Bazylar & Fitzgerald, *supra* note 12, at 712-14 (describing disappointments with the Swiss Bank settlement); Burt Neuborne, *A Tale of Two Cities: Administering the Holocaust Settlements in Brooklyn and Berlin*, in HOLOCAUST

pursuant to the *cy pres*⁴¹ doctrine, Judge Korman allowed the undistributed funds to be paid to Jewish nongovernmental organizations to benefit needy survivors worldwide.⁴²

In contrast to the Swiss bank settlement administered under the *aegis* of a U.S. court, other class actions ended in the creation of new institutions designed to compensate survivors. For example, in 1998 the International Commission for Holocaust-Era Insurance Claims (“ICHEIC”) was created to provide a “swift track” for resolving claims utilizing “relaxed levels of evidentiary proof.”⁴³ The ICHEIC and founding insurance companies have been criticized for failing to make account information public or subject to independent review, denying too many claims, processing claims too slowly, and incurring \$40 million in administrative costs, which diminish the funds available for survivors and their heirs.⁴⁴

National funds were created in Germany, Austria, and France to compensate survivors for forced and slave labor during the war, as well as for confiscated property and bank accounts.⁴⁵ The German foundation “Remembrance, Responsibility and the Future” (“German Foundation”) was

RESTITUTION, *supra* note 35, at 70 [hereinafter Neuborne 2006] (court-designated lead settlement counsel describing process of administering Swiss settlement as “Herculean”); Neuborne 2002, *supra* note 34, at 805-10 (providing a favorable view); Benjamin E. Pollock, Comment, *Out of Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-looted Art Claims*, 43 HOUS. L. REV. 193, 199 (2006) (providing an objective view).

⁴¹ “The equitable doctrine under which a court reforms a written instrument with a gift to charity as closely to the donor’s intention as possible, so that the gift does not fail.” BLACK’S LAW DICTIONARY 415 (8th ed. 2004).

⁴² *In re Holocaust Victim Assets Litig.*, 319 F. Supp. 2d 301, 303 (E.D.N.Y. 2004).

⁴³ Funding for the ICHEIC was provided by a handful of major European insurance agencies facing regulatory inquiries in the United States. Lawrence Kill & Linda Gerstel, *Holocaust-Era Insurance Claims: Legislative, Judicial, and Executive Remedies*, in HOLOCAUST RESTITUTION, *supra* note 35, at 239, 241. The insurers signed a Memorandum of Understanding (MOU) with Jewish nongovernmental organizations, the State of Israel, and U.S. state insurance regulators. *Id.* “The MOU was, in effect, a nonbinding ‘agreement to agree’ on a framework for resolving claims.” *Id.*

⁴⁴ See *In re Assicurazioni Generali, S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 357 (S.D.N.Y. 2002) (referring to ICHEIC as a “company store”); Sidney Zabudoff, *ICHEIC: Excellent Concept But Inept Implementation*, in HOLOCAUST RESTITUTION, *supra* note 35, at 260, 260 (referring to “inept governance and poor management”); *Too Late, Too Slow, Too Expensive*, THE ECONOMIST, Aug. 2, 2003, at 14; Editorial, *The Holocaust Endures*, BALT. SUN, July 14, 2002, at 4F (concluding, based on reports by an investigative journalist, that the “ICHEIC is in need of immediate and deep reform”); Richard Wolffe, *Belief Wanes in Holocaust Insurance Process*, FIN. TIMES, Jan. 25, 2002, at 8 (“Both [U.S. and German] governments admitted the system of settling claims was failing.”).

⁴⁵ See generally HOLOCAUST RESTITUTION, *supra* note 35.

established through agreements signed by various nations and organizations, including the United States, Germany, Israel, Jewish nongovernmental organizations, plaintiffs' lawyers in the U.S. litigation, and German industry and banking leaders.⁴⁶ Groundwork for the funds in Austria and France followed a similar diplomatic course.⁴⁷ Unlike the ICHEIC and Swiss bank settlement, these funds were created pursuant to national legislation passed in each individual nation, and each is a governmental institution run by national governmental agencies. Most commentary about the distribution of compensation through the funds has been positive⁴⁸—albeit not universally so.⁴⁹ Finally, it must be noted that a condition for collecting from any of the newly created funds, including the Swiss bank settlement and ICHEIC, is that the claimant forfeits the right to sue in any other forum.⁵⁰ The nations and institutions involved in establishing the funds and settlements would not have been willing to make such large monetary contributions—over \$8 billion in all—had they not been virtually guaranteed the end of all litigation against them stemming from the Holocaust.⁵¹

Meanwhile, on the U.S. legal front, not all lawsuits were stayed and not all plaintiffs voluntarily dismissed their cases. New Jersey Federal District Court Judges Dickenson R. Debevoise and Joseph A. Greenaway agreed with the defense view of the litigation, and on September 13, 1999, both judges dismissed the slave and forced labor suits pending before

⁴⁶ Neuborne 2006, *supra* note 40, at 65-66.

⁴⁷ Eric Freedman & Richard Weisberg, *The French Holocaust-Era Claims Process*, in HOLOCAUST RESTITUTION, *supra* note 35, at 135, 135 (creation of France's Matteoli Commission); Hannah Lessing & Fiorentina Azizi, *Austria Confronts Her Past*, in HOLOCAUST RESTITUTION, *supra* note 35, at 226, 230-31 (creation of Austria's General Settlement Fund).

⁴⁸ *E.g.*, Stuart Eizenstat, *The Unfinished Business of the Unfinished Business of World War II*, in HOLOCAUST RESTITUTION, *supra* note 35, at 297, 298-301.

⁴⁹ See NORMAN G. FINKELSTEIN, *THE HOLOCAUST INDUSTRY: REFLECTIONS ON THE EXPLOITATION OF JEWISH SUFFERING* 151-53 (2d ed. 2000) (a widely criticized, highly controversial book, *see, e.g.*, Andrew Ross, "The Holocaust Industry" by Norman G. Finkelstein, Salon.com, <http://archive.salon.com/books/review/2000/08/30/finkelstein/>; *see also* Patricia Cohen, *Outspoken Political Scientist Denied Tenure at DePaul*, N.Y. TIMES, June 11, 2007, at E2); Libby Adler & Peter Zumbansen, *The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich*, 39 HARV. J. ON LEGIS. 1, 1 (2002). For example, disputes arose concerning contribution obligations with respect to a currency swap and interest payments. *See* Gross v. German Found. Indus. Initiative, 456 F.3d 363, 371-74 (3d Cir. 2006); Neuborne 2006, *supra* note 40, at 72-73.

⁵⁰ Neuborne 2006, *supra* note 40, at 61-62.

⁵¹ *See, e.g., id.*; Bazzyler & Fitzgerald, *supra* note 12, at 82-91.

them.⁵² Plaintiffs appealed to the Third Circuit Court of Appeals, but the appeals were adjourned in deference to the imminent creation of the German Foundation.⁵³ The vast majority of the slave and forced labor plaintiffs across the country voluntarily dismissed their claims to receive compensation from the newly created funds.⁵⁴

B. Gap in Coverage as to Art

None of the recent agreements deals with the Nazi-looted art problem. The Swiss bank class action allocated money specifically for looted assets that were “stolen by the Nazis and knowingly fenced through a Swiss bank,” but never expressly addressed artwork or gave a definition of “fenced.”⁵⁵ The German Foundation set aside DM 1 billion (approximately \$500 million) for the payment of property claims, but the documents leading to the Foundation’s creation never mention artwork.⁵⁶ The French Agreement pertains exclusively to the settlement of dormant bank accounts and does not mention art.⁵⁷ The ICHEIC agreement pertains only to unpaid insurance policies and thus does not cover art, barring perhaps a suit concerning a policy on artwork.⁵⁸ Annex A to the international treaty relevant to the Austrian National Fund and General Settlement Fund expressly *excludes* actions as to “*in rem* claims for works of art.”⁵⁹ The result is a significant gap

⁵² *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 282 (D.N.J. 1999) (J. Debevoise); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 460-61 (D.N.J. 1999) (J. Greenaway).

⁵³ *Neuborne 2002*, *supra* note 34, at 815.

⁵⁴ *See e.g., id.*; *see also In re Nazi Era Cases Against German Defendants Litig.*, 198 F.R.D. 429, 430-31 (D.N.J. 2000) (approving voluntary dismissals by class representatives).

⁵⁵ *See Neuborne 2002*, *supra* note 34, at 808. Additional information related to the Swiss bank settlement can be found at <http://www.state.gov/p/ert/hlcst/c11378.htm> (last visited Aug. 20, 2007).

⁵⁶ *See Neuborne 2002*, *supra* note 34, at 801.

⁵⁷ Agreement Concerning Payments for Certain Losses Suffered During World War II, U.S.-Fr., Jan. 18, 2001, State Dep’t No. 01-36, 2001 WL 416465, available at <http://www.ambafrance-us.org/news/statmnts/2001/civs2.asp> [hereinafter French Agreement].

⁵⁸ *See generally Kill & Gerstel*, *supra* note 43 and accompanying text.

⁵⁹ Exchange of Notes Constituting an Agreement, Annex A, ¶¶ 1, 2(a), 10, U.S.-Austria, Jan. 17, 2001, 40 I.L.M. 565, 570-71, 577; *see also* Agreement Concerning Austrian Fund “Reconciliation, Peace and Cooperation,” U.S.-Austria, Oct. 24, 2000, 40 I.L.M. 523 [hereinafter Austrian Agreement]. For additional documents related to the Austrian Agreement, see <http://www.usembassy.at/en/policy/restitution.htm>. This exclusion is related to the then-pending Altmann claims to the paintings by Gustav Klimt. *See infra* Part II.B.

in coverage under the new international agreements—and thus substantial litigation potential.

One could surmise a few of the reasons for the exclusion of art from the agreements. First, the value of the looted art was so extremely high that art claims could potentially outstrip the amount of funds allocated for *all* lost property.⁶⁰ For example, the value of two families' claims, those of the Bloch-Bauers (Altmann) and the Rothschilds, which were well-known by the time of the signing of the Austrian Agreement, exceeded half the *total* amount (approximately \$800 million) allocated for *all* claims within the Austrian Foundation.⁶¹ Second, the idea of dedicating significant resources to compensation of outstanding art claims would not be without controversy, with many people feeling that compensation for slave and forced labor is more important than compensation for “luxury” items.⁶² That is not to say, however, that the subject was forgotten or not considered at the time negotiations to create the tribunals were proceeding—the contrary is true, as explained in the next section.

C. *Revival of Looted Art Awareness*

In 1997, the Austrian Leopold Museum-Privatstiftung (the Leopold) lent Egon Schiele's *Portrait of Wally* to the New York Museum of Modern Art (“MOMA”) for exhibition. MOMA received letters from two individuals claiming to be heirs of the rightful owner.⁶³ Before the painting was to be returned to Austria in 1999, the U.S. government caused the painting to be seized because of its Nazi taint.⁶⁴ During or before 1938, *Portrait of Wally* was housed in the apartment of a Viennese

⁶⁰ See, e.g., *supra* note 56 and accompanying text; see also Hannah Lessing et al., *The Austrian General Settlement Fund: An Overview*, in REDRESSING INJUSTICES THROUGH MASS CLAIMS PROCESSES 95, 103-04 (Permanent Court of Arbitration ed., 2006) (explaining problems posed by moveable property).

⁶¹ See *infra* Part II.B (discussing Altmann arbitration and Rothschild claims).

⁶² E.g., Pell 1999, *supra* note 10, at 1 (“It can be indelicate, perhaps even crass, to speak publicly about art looted during World War II because the loss of art, on its face, relates to money and property, losses that are insignificant when compared to the lives lost during the Holocaust.”).

⁶³ See *United States v. Portrait of Wally*, No. 99 Civ. 9940, 2002 WL 553532, at *1 (S.D.N.Y. Apr. 12, 2002); *United States v. Portrait of Wally*, 105 F. Supp. 2d, 288, 288-90 (S.D.N.Y. 2000); see also *In re Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*, 719 N.E.2d 897, 897-99 (N.Y. 1999).

⁶⁴ *Portrait of Wally*, 105 F. Supp. 2d at 288-90.

gallery owner, Lea Bondi Jaray, an Austrian Jew.⁶⁵ After Germany annexed Austria in the Anschluss,⁶⁶ Friedrich Welz, an Austrian who later became a member of the Nazi party, aryanized⁶⁷ Ms. Bondi's gallery and coerced her to give him *Portrait of Wally* as well.⁶⁸ After the war, the painting was returned to the wrong family and subsequently sold to the Galerie Belvedere (the Belvedere).⁶⁹ The Belvedere essentially subsequently sold the painting to the Leopold.⁷⁰

Ms. Bondi took various steps short of a formal claim to recover *Portrait of Wally*, but to no avail.⁷¹ Ms. Bondi passed away in 1969.⁷² Efforts to recover *Portrait of Wally* seemingly remained dormant until her heirs had an opportunity to have the U.S. government seize the painting in late 1997.⁷³ The case is still pending. The seizure caused quite a stir in the art world.⁷⁴

In response to *Portrait of Wally*, the American Association of Museum Directors ("AAMD") attempted to address the Nazi-looted art problem.⁷⁵ In late 1997, the AAMD created the Task Force on the Spoliation of Art during the Nazi/World War II Era (1933-1945), which on June 4, 1998, published guidelines for museums to deal with the Nazi-looted

⁶⁵ All facts are taken as stated in the Third Amended Verified Complaint, *Portrait of Wally*, 2002 WL 553532.

⁶⁶ "Anschluss" can be defined generally as "the historical euphemism describing Nazi Germany's bloodless annexation of the post-World War I Austrian Republic." Brian F. Havel, *In Search of a Theory of Public Memory: The States, the Individual, and Marcel Proust*, 80 IND. L. J. 605, 621 n.28 (2005).

⁶⁷ "Aryanization" can be defined generally as the process "whereby Jews were forced to sell their property to 'Aryans' at artificially low prices." *Portrait of Wally*, 2002 WL 553532, at *1.

⁶⁸ *Id.*

⁶⁹ *Id.* at *2.

⁷⁰ *Id.* at *3.

⁷¹ *Id.* at *3-4.

⁷² *Id.* at *4.

⁷³ *Id.*

⁷⁴ See, e.g., Jennifer Anglim Kreder, *The Choice Between Civil and Criminal Remedies in Stolen Art Litigation*, 38 VAND. J. TRANSNAT'L L. 1199, 1226-31 (2005) (providing extensive analysis of *Portrait of Wally*).

⁷⁵ For background information about the American Association of Museums (AAM) and the American Association of Museum Directors (AAMD), see Predita C. Rostomian, Note, *Looted Art in the U.S. Market*, 55 RUTGERS L. REV. 271, 289-91 (2002). The "American Association of Museums (AAM) Board of Directors and the International Council of Museums (ICOM) formed a joint working group in 1999 to study issues of cultural property, particularly the Nazi looting of cultural property" and issued guidelines similar to those of the AAMD. Marilyn Phelan, *Cultural Property*, 34 INT'L LAW. 697, 701 (2000); see also American Association of Museums, Nazi Era Provenance, <http://www.aam-us.org/museumresources/prov/index.cfm> (last visited Sept. 10, 2007).

art issue.⁷⁶ The guidelines provide, in part, that museums should investigate their collections and “facilitate access” to information about any works that seem to have gaps in provenance related to World War II.⁷⁷ The guidelines call for

⁷⁶ See Phelan, *supra* note 75, at 701; see also Report of the AAMD Task Force on the Spoliation of Art During the Nazi/World War II Era (1933-1945) [hereinafter AAMD Report], <http://www.aamd.org/papers/guideln.php> (last visited Aug. 25, 2007).

⁷⁷ AAMD Report, *supra* note 76, ¶ II(C)(1). Other relevant provisions concerning provenance research and publication include the following:

II. Guidelines

....

A. Research Regarding Existing Collections

1. As part of the standard research on each work of art in their collections, members of the AAMD . . . should 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.

2. Member museums should search their own records thoroughly and, in addition, should take all reasonable steps to contact established archives, databases, art dealers, auction houses, donors, art historians and other scholars and researchers who may be able to provide Nazi/World-War-II-era provenance information.

3. AAMD recognizes that research regarding Nazi/World-War-II-era provenance may take years to complete, may be inconclusive and may require additional funding. The AAMD Art Issues Committee will address the matter of such research and how to facilitate it.

....

C. Access to Museum Records

1. Member museums should facilitate access to the Nazi/World War II-era provenance information of all works of art in their collections.

2. Although a linked database of all museum holdings throughout the United States does not exist at this time, individual museums are establishing web sites with collections information and others are making their holdings accessible through printed publications or archives. AAMD is exploring the linkage of existing sites which contain collection information so as to assist research.

....

III. Database Recommendations

A. [] AAMD encourages the creation of databases by third parties, essential to research in this area. AAMD recommends that the databases being formed include the following information (not necessarily all in a single database):

1. claims and claimants
2. works of art illegally confiscated during the Nazi/World War II era
3. works of art later restituted

B. AAMD suggests that the entity or entities creating databases establish professional advisory boards that could provide insight on the needs of

extensive investigation and publication, but bemoan the fact that there is limited funding for this work, particularly in light of the absence of a central database of looting data.⁷⁸ Under the AAMD guidelines, if a legitimate claimant to looted art comes forward, the museum “should offer to resolve the matter in an equitable, appropriate, and mutually agreeable manner.”⁷⁹ The guidelines also encourage the use of mediation⁸⁰ and “encourage[] the creation of databases by third parties.”⁸¹

The AAMD guidelines greatly influenced the Washington Conference on Holocaust-Era Assets (“Washington Conference”), which was hosted by the United States in 1988 and was attended by forty-four nations and thirteen

various users of the database. AAMD encourages member museums to participate in the work of such boards.

Id. ¶¶ II-III.

⁷⁸ *Id.* ¶¶ II-III.

⁷⁹ *Id.* ¶ II(D)(2), II(E)(2). The guidelines provide:

D. Discovery of Unlawfully Confiscated Works of Art

1. If a member museum should determine that a work of art in its collection was illegally confiscated during the Nazi/World War II era and not restituted, the museum should make such information public.
2. In the event that a legitimate claimant comes forward, the museum should offer to resolve the matter in an equitable, appropriate, and mutually agreeable manner.
3. In the event that no legitimate claimant comes forward, the museum should acknowledge the history of the work of art on labels and publications referring to such a work.

E. Response to Claims Against the Museum

1. If a member museum receives a claim against a work of art in its collection related to an illegal confiscation during the Nazi/World War II era, it should seek to review such a claim promptly and thoroughly. The museum should request evidence of ownership from the claimant in order to assist in determining the provenance of the work of art.
2. If after working with the claimant to determine the provenance, a member museum should determine that a work of art in its collection was illegally confiscated during the Nazi/World War II era and not restituted, the museum should offer to resolve the matter in an equitable, appropriate, and mutually agreeable manner.
3. AAMD recommends that member museums consider using mediation wherever reasonably practical to help resolve claims regarding art illegally confiscated during the Nazi/World War II era and not restituted.

Id.

⁸⁰ *Id.* ¶ II(E)(3).

⁸¹ *Id.* ¶ III(A).

nongovernmental organizations.⁸² The conference, which concerned Nazi-looted art, led to the formation of the Washington Principles.⁸³ The Washington Principles establish general goals and guidelines to generate research and publication of Nazi-era provenance data and “encourage[]”

⁸² See Bazyler & Fitzgerald, *supra* note 12, at 710; PROCEEDINGS OF THE WASHINGTON CONFERENCE ON HOLOCAUST-ERA ASSETS, app. F (J.D. Bindenagel, ed., 1999), available at <http://www.state.gov/www/regions/eur/holocaust/heac.html>.

⁸³ The complete Washington Principles read as follows:

In developing a consensus on non-binding principles to assist in resolving issues relating to Nazi-confiscated art, the Conference recognizes that among participating nations, there are differing legal systems and that countries act within the context of their own laws.

1. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.
2. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.
3. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.
4. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.
5. Every 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.
6. Efforts should be made to establish a central registry of such information.
7. Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.
8. If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.
9. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, can not be identified, steps should be taken expeditiously to achieve a just and fair solution.
10. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.
11. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.

Washington Conference Principles, http://www.lootedartcommission.com/lootedart_washingtonprinciples.htm (last visited Aug. 25, 2007).

claimants to “come forward.”⁸⁴ They also call for “just and fair” resolution of such claims.⁸⁵ The Washington Principles do not establish a uniform policy for the signatory nations. In fact, the preamble expressly notes that “among participating nations, there are differing legal systems and . . . countries act within the context of their own laws.”⁸⁶ Because of the wide-ranging differences between the forty-four nations’ legal systems—in particular concerning statutes of limitations and bona fide purchaser issues—it is not surprising that a uniform approach was not forthcoming.⁸⁷

Even within the United States, for example, there are disparate views as to what should happen to looted art found in museums. The most common opinion seems to be that restitution should be made if it is clear that the art was looted and a valid claim is asserted,⁸⁸ but that view is not universally held. In contrast, Ralph E. Lerner, who wrote an article in 1998 calling for the creation of a Nazi-looted art commission, maintained:

Works of art, even stolen works, should remain—under all circumstances—in the American museum where they are now located. This will eliminate the emotional issues involved in a dispute over possession and ownership, and will encourage museums’ cooperation in opening their records for the purpose of tracing provenance.⁸⁹

Although the AAMD guidelines and Washington Principles were a good start for dealing with the Nazi-looted art problem, they were only that. For example, rather than firmly agreeing to create a central registry, the Washington Principles provide: “Efforts should be made to establish a

⁸⁴ *Id.* ¶ 7.

⁸⁵ *Id.* ¶¶ 8-9.

⁸⁶ *Id.* at Preamble.

⁸⁷ *See infra* Part II.C.

⁸⁸ *See, e.g.,* Lawrence M. Kaye, *Looted Art: What Can and Should Be Done*, 20 CARDOZO L. REV. 657, 660-64 (1998).

⁸⁹ Lerner, *supra* note 7, at 36. Israeli experts suggested a similar solution: that all artworks remain in the museum in which they are found, but that the victimized family’s loss be noted along with the art. *Israeli Experts Propose Museums Keep Looted Art*, Mar. 8, 2000, available at <http://www.museum-security.org/00/042.html#6>. It was widely rejected as insufficient on the ground that it would allow a museum that may have actively engaged in profiteering, or turned a blind eye, to benefit at the expense of victims of the Nazis’ persecution and looting. *Id.*

central registry of such information.”⁹⁰ Additionally, the final two sentences refer to “[c]ommissions or other bodies established to identify art that was confiscated by the Nazis” and states that such bodies should have “balanced membership,” but does not call for the creation of such bodies in nations where they did not already exist and does not establish any other firm provisions for such bodies.⁹¹ Rather than establish any firm obligations, the final sentence states: “Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.”⁹²

There was one more significant international push to deal with the problem. Nations met again in 2000 to build upon the Washington Principles in Vilnius, Lithuania, under the auspices of the Parliamentary Assembly of the Council of Europe.⁹³ The Vilnius Forum generated a declaration expressing continued support of the Washington Principles without significantly refining them or expanding upon them.⁹⁴

⁹⁰ Washington Conference Principles, *supra* note 83, ¶ 6. To be fair, it should be noted that creating one worldwide registry does not appear to be feasible. See Lowenthal, *supra* note 28, at 137-38.

⁹¹ Washington Conference Principles, *supra* note 83, ¶¶ 10-11.

⁹² *Id.* ¶ 11.

⁹³ The Assembly’s web site states:

The Parliamentary Assembly of the Council of Europe (PACE), which held its first session on 10 August 1949, can be considered the oldest international parliamentary Assembly with a pluralistic composition of democratically elected members of parliament established on the basis of an intergovernmental treaty. The Assembly is one of the two statutory organs of the Council of Europe, which is composed of a Committee of Ministers (the Ministers of Foreign Affairs, meeting usually at the level of their deputies) and an Assembly representing the political forces in its member states.

Parliamentary Assembly of the Council of Europe, Historical Overview, http://assembly.coe.int/Main.asp?Link=/AboutUs/APCE_history.htm (last visited Aug. 26, 2007).

⁹⁴ The full declaration reads:

The Vilnius Forum,

Recognizing the massive and unprecedented looting and confiscations of art and other cultural property owned by Jewish individuals, communities and others, and the need to reach just and fair solutions to the return of such art and cultural property,

Referring to Resolution 1205 of the Parliamentary Assembly of the Council of Europe and the Washington Conference Principles of Nazi-Confiscated Art,

Noting in particular their emphasis on reaching just and fair solutions to issues involving restitution of cultural assets looted during the Holocaust era

In fact, the preamble reaffirms the deference to national differences because it calls for “just and fair solutions,” which “may vary according to the different legal systems among

and the fact that such solutions may vary according to the differing legal systems among countries and the circumstances surrounding a specific case,

Makes the following declaration:

1. The Vilnius Forum asks all governments to undertake every reasonable effort to achieve the restitution of cultural assets looted during the Holocaust era to the original owners or their heirs. To this end, it encourages all participating States to take all reasonable measures to implement the Washington Conference Principles on Nazi-Confiscated Art as well as Resolution 1205 of the Parliamentary Assembly of the Council of Europe.

2. In order to achieve this, the Vilnius Forum asks governments, museums, the art trade and other relevant agencies to provide all information necessary to such restitution. This will include the identification of looted assets; the identification and provision of access to archives, public and commercial; and the provision of all data on claims from the Holocaust era until today. Governments and other bodies as mentioned above are asked to make such information available on publicly accessible websites and further to co-operate in establishing hyperlinks to a centralized website in association with the Council of Europe. The Forum further encourages governments, museums, the art trade and other relevant agencies to co-operate and share information to ensure that archives remain open and accessible and operate in as transparent a manner as possible.

3. In order further to facilitate the just and fair resolution of the above mentioned issues, the Vilnius Forum asks each government to maintain or establish a central reference and point of inquiry to provide information and help on any query regarding looted cultural assets, archives and claims in each country.

4. Recognizing the Nazi effort to exterminate the Jewish people, including the effort to eradicate the Jewish cultural heritage, the Vilnius Forum recognizes the urgent need to work on ways to achieve a just and fair solution to the issue of Nazi-looted art and cultural property where owners, or heirs of former Jewish owners, individuals or legal persons, cannot be identified; recognizes that there is no universal model for this issue; and recognizes the previous Jewish ownership of such cultural assets,

5. The Vilnius Forum proposes to governments that periodical international expert meetings are held to exchange views and experiences on the implementation of the Washington Principles, the Resolution 1205 of the Parliamentary Assembly of the Council of Europe and the Vilnius Declaration. These meetings should also serve to address outstanding issues and problems and develop, for governments to consider, possible remedies within the framework of existing national and international structures and instruments.

6. The Vilnius Forum welcomes 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 of cultural assets looted during the Holocaust era and the resolution of outstanding issues.

Vilnius Forum Declaration, Commission for Looted Art in Europe, *available at* <http://www.lootedartcommission.com/viniusforum> (last visited Nov. 3, 2007).

countries and the circumstances surrounding a specific case.”⁹⁵ On the call for publishing searchable information, the Vilnius Principles are firmer than the Washington Principles in that they call on “governments, museums, the art trade and other relevant agencies” to make information concerning looted assets in their collections “available on publicly accessible websites and further to co-operate in establishing hyperlinks to a centralized website in association with the Council of Europe.”⁹⁶ Further, “the Vilnius Forum ask[ed] each government to maintain or establish a central reference and point of inquiry to provide information and help on any query regarding looted cultural assets, archives and claims in each country.”⁹⁷ Finally, Paragraph 5 called for periodic meetings to continue dialogue about the Nazi-looted art problem,⁹⁸ but since 2000 no new meetings appear to have been held or at least none that have resulted in public reports.

Various nations have taken some steps in the spirit of the Washington and Vilnius conferences. For example, the U.S. Congress passed the Holocaust Victims Redress Act in 1998, which recognizes that “[t]he Nazis’ policy of looting art was a critical element and incentive in their campaign of genocide against individuals of Jewish and other religious and cultural heritage.”⁹⁹ The Act further states that

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

⁹⁵ *Id.* at Preamble, ¶ 3.

⁹⁶ *Id.* ¶ 2.

⁹⁷ *Id.* ¶ 3.

⁹⁸ *Id.* ¶ 5.

⁹⁹ Holocaust Victims Redress Act, Pub. L. No. 105-158, § 201(4), 112 Stat. 15, 18 (1998). The full purposes of the Act are:

- (1) To provide a measure of justice to survivors of the Holocaust all around the world while they are still alive.
- (2) To authorize the appropriation of an amount which is at least equal to the present value of the difference between the amount which was authorized to be transferred to successor organizations to compensate for assets in the United States of heirless victims of the Holocaust and the amount actually paid in 1962 to the Jewish Restitution Successor Organization of New York for that purpose.
- (3) To facilitate efforts by the United States to seek an agreement whereby nations with claims against gold held by the Tripartite Commission for the Restitution of Monetary Gold would contribute all, or a substantial portion, of that gold to charitable organizations to assist survivors of the Holocaust.

Id. § 101(b).

claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.¹⁰⁰

The Act also allocated \$5 million for research into unresolved Holocaust-era property claims.¹⁰¹ The Parliamentary Assembly of the Council of Europe passed a resolution mirroring the Vilnius Principles.¹⁰² Germany's *Handreichung* reflects ideals similar to those in the Washington Principles, and in 2003 Germany established the Advisory Commission on the Return of Cultural Property Seized as a Result of Nazi Persecution, Especially Jewish Property, to mediate Nazi-looted art claims if both sides agree to submit the dispute to the commission.¹⁰³ Austria enacted a law that allows it to waive the statute of limitations defense in actions seeking recovery of looted or aryanized art now located in public museums and galleries.¹⁰⁴ The French Foreign Ministry in 1998 published the "MNR"¹⁰⁵ catalog identifying almost 61,000 artworks that were looted by the Nazis during World War II and never returned to their rightful owners.¹⁰⁶ Just over 2,000 of these works were

¹⁰⁰ *Id.* § 202.

¹⁰¹ *Id.* § 103(b). California also passed a law extending the statute of limitations in Holocaust-era art litigation against museums and galleries until 2010. CAL. CIV. PROC. CODE § 354.3 (West 2004).

¹⁰² Looted Jewish Cultural Property Resolution, Parliamentary Assembly of Europe Council Resolution No. 1205, November 4, 1999, *available at* <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta99/eres1205.htm>.

¹⁰³ Matthias Weller, *The Return of Ernst Ludwig Kirchner's Berliner Straßenszene—A Case Study*, KUNSTRSP 2007, Feb. 2007, at 51. The *Handreichung* seems to implement the rather rigid burden of proof rules from the Allied Forces Restitution Legislation enacted shortly after World War II. *See generally* Harald König, *Claims for the Restitution of Holocaust-Era Cultural Assets and Their Resolution in Germany*, 12 ART, ANTIQUITY & LAW 59 (2007).

¹⁰⁴ Rückgabe von Kunstgegenständen aus den Österreichischen Bundesmuseen [Federal Act on the Return of Cultural Objects from Austrian Federal Museums and Collections] Bundesgesetzblatt Teil I [BGB1] No. 181/1998, § 1 (Austria) (cited in PALMER, *supra* note 26, at 178-79), *available in English at* <http://www.lootedart.com/MFEU4438589> (last visited Nov. 3, 2007).

¹⁰⁵ MNR is an abbreviation of Musées Nationaux Récupération. The database, which is solely in French, contains approximately 2000 objects and can be found at Musées Nationaux Récupération, Catalogue des MNR, <http://www.culture.gouv.fr/documentation/mnr/pres.htm> (last visited Aug. 25, 2007).

¹⁰⁶ Musées Nationaux Récupération, *Oeuvres récupérées après la Seconde Guerre mondiale*, <http://www.cnac-gp.fr/musee/mnr/index.htm> (last visited Nov. 1, 2007); *see also* FELICIANO, *supra* note 23, at 185 (describing the discovery of looted art in French collections); Prime Minister's Decree, Decree Creating a Commission for the Compensation of Victims of Spoliation Resulting from the Anti-Semitic Legislation in Force During the Occupation, Decree 99-778 (1999) (Fr.), *available in English at* http://www.civs.gouv.fr/download/uk/decrees/10_09_99.pdf; Agreement Concerning Payments for Certain Losses Suffered During World War II, U.S.-Fr., Annex B, Jan. 18, 2001, State Dep't No. 01-36, 2001 WL 416465 (describing the functioning of The Commission for the Compensation of Victims of Spoliation Resulting from Anti-Semitic

identified as being in French museums at the time the report was published.¹⁰⁷

France also committed significant funding to the Matteoli Commission, a “historical commission”¹⁰⁸ established “to investigate various sectors of the French economy and determine the property confiscated during the German occupation.”¹⁰⁹ Other countries and companies have created similar historical commissions.¹¹⁰ Moreover, Germany,¹¹¹ the Netherlands,¹¹² Austria,¹¹³ Russia,¹¹⁴ the Czech Republic,¹¹⁵

Legislation in Force during the Occupation) available at <http://www.ambafrance-us.org/news/statmnts/2001/civs2.asp>. The resulting body is known as the Drai Commission. Eric Freedman & Richard Weisberg, *The French Holocaust-Era Claims Process*, in HOLOCAUST RESTITUTION, *supra* note 35, at 133, 138-40. Not all news reports about the Drai Commission have been positive. *E.g.*, Press Release, Regine Elkan, Holocaust Art Claimant Files Suit Against French Prime Minister over a Major Paris Museum Collection (Feb. 24, 2006), available at <http://pressreleaseforum.com/viewtopic.php?p=5089> (reporting on filing of law suit after denial of claim as to furniture collection at Carnavalet Museum by the Drai Commission).

¹⁰⁷ See Musées Nationaux Récupération, *supra* note 105.

¹⁰⁸ Bazylar & Fitzgerald, *supra* note 12, at 712 (“European governments and private companies have [as a consequence of the recent mass litigation] been forced to examine and expose the truth about their histories during the Nazi era.”).

¹⁰⁹ Pell 1999, *supra* note 10, at 47 (citing Samer Iskandar, *French Bankers to Support Government's Plans*, FINANCIAL TIMES UK, Dec. 2, 1998, at A12). It would be neglectful not to mention that the Commission was created in the wake of the pressure generated by U.S. litigation.

¹¹⁰ Bazylar & Fitzgerald, *supra* note 12, at 712-23; Michael Berenbaum, *Confronting History: Restitution and the Historians*, in HOLOCAUST RESTITUTION, *supra* note 35, at 43, 45.

¹¹¹ The Lost Art Database is maintained by the Koordinierungsstelle für Kulturgutverluste. Lost Art Internet Database, <http://www.lostart.de> (last visited Aug. 25, 2007).

¹¹² The Netherlands maintains the “Origins Unknown” database of un-repatriated objects, which contains approximately 4000 objects. Origins Unknown, <http://www.herkomstgezocht.nl/eng/index.html> (last visited Aug. 25, 2007).

¹¹³ The National Fund of the Republic of Austria maintains a database of an unknown number of objects that are likely to have been looted during World War II. Kunst-Datenbank des Nationalfonds [Art Database of the National Fund], www.kunstrestitution.at (last visited Mar. 2007); see also *infra* notes 191-201 and accompanying text (concerning creation of the Austrian fund).

¹¹⁴ Russia maintains a database searchable only in Russian. Fyedyeral'noye Agyentstvo po Kul'turye i Kinyematografii [Federal Agency on Culture and Cinema], *Kul'turye Tsyennosti: Zhyertvi Voyni* [Cultural Treasures: Victims of War], <http://www.lostart.ru/ru/> (last visited Aug. 25, 2007). The criteria for inclusion in the database is not clear, but presumably would exclude trophy art brought back by the Soviet military as compensation for destruction of Slavic cultural property by the Germans and still not returned. See generally KONSTANTIN AKINSHA & GRIGORII KOZLOV, *BEAUTIFUL LOOT: THE SOVIET PLUNDER OF EUROPE'S ART TREASURES* (1995).

¹¹⁵ The Czech Republic maintains a registry of works that may have been taken from Holocaust victims. Restitution-Art, <http://www.restitutionart.cz/english/main.html> (last visited Aug. 25, 2007). The English web site has not been updated since 2000. *Id.*

Hungary,¹¹⁶ and Poland¹¹⁷ established databases in addition to the databases established by the Art Loss Register,¹¹⁸ Commission for Looted Art in Europe,¹¹⁹ the American Association of Museums (“AAM”),¹²⁰ and most recently MyThings Inc.¹²¹ All told, however, governmental action to identify and return Nazi-looted art to families, many of whom may be unaware of their claims through no fault of their own, has not been uniformly progressive, as evidenced by recently asserted successful claims like the *Altmann* claim discussed in Section II.B, *infra*.¹²² It appears indisputable that

¹¹⁶ Hungary seems to have a database, but its web site is not functioning: <http://www.koi.hu/restitucio/index.html> (last visited Mar. 2007). See Konstantin Akinsha, *The Temptations of the ‘Total’ Database*, in RESOLUTION OF CULTURAL PROPERTY DISPUTES, *supra* note 11, at 162-63.

¹¹⁷ Poland maintains a database of over 400 oil paintings, pastels, and watercolors lost between 1939 and 1945 within post-1945 borders of Poland. Wartime Losses: Polish Painting, <http://www.polancon.org/lostart> (last visited Aug. 25, 2007).

¹¹⁸ The Art Loss Register (“ALR”) lists stolen art of all types, not just art looted during World War II, and is headquartered in London with offices in New York, Germany, the Netherlands and India. Steven Swanson, *Loss Database One Answer to Art Thievery*, CHI. TRIB., Oct. 4, 2006, at C12. As of October 2006, the ALR database contained over 175,000 listings and claims to be the largest database in the world. *Id.* The ALR has helped recover more than 1000 pieces of art worth upward of \$100 million. The Art Loss Register, History and Business, <http://www.artloss.com/content/history-and-business> (last visited Aug. 25, 2007).

¹¹⁹ The Central Registry of Information on Looted Cultural Property 1933-1945 was established by the Commission for Looted Art in Europe and is headquartered in London. It maintains a database of 20,000 seemingly looted objects and maintains links to information and web sites concerning forty of the countries that participated in the Washington Conference. Press Release, The Central Registry of Information on Looted Cultural Property 1933-45, <http://www.lootedart.com/PressRoom/PressRoom.asp> (last visited Aug. 25, 2007). See also Lasserson, *supra* note 16.

¹²⁰ The AAM has registered approximately 25,000 suspect objects identified by museums around the world on its Nazi-Era Provenance Research Portal. Nazi-Era Provenance Internet Portal, The Nazi-Era Provenance Internet Portal Project, <http://www.nepip.org> (last visited Aug. 25, 2007).

¹²¹ See Trace, Looted Art, <http://www.tracelootedart.com/index.asp?page=about> (last visited Oct. 31, 2007) (claiming to be “the most comprehensive database of Nazi Era looted art available”).

¹²² In addition, the lack of full restitution must be viewed in light of the recent trend to curtail jurisdiction over such claims, thereby reducing the number of possible *fora* to hear them. This development further demonstrates the need for a neutral, international tribunal so that valid claims may have a place to be heard. Rachel Lasserson, *The Scramble for Looted Art*, JEWISH CHRON., Jan. 18, 2007, available at <http://www.thejc.com/> (quoting Norman Palmer, member of the United Kingdom’s Spoliation Advisory Panel, as having stated: “If the UK adopts an anti-seizure statute, other countries are likely to follow. The result will be to disqualify more and more national courts as competent tribunals before which title claims can be brought.”); Marilyn Henry, *An Artful Dilemma*, JERUSALEM POST, Jan. 23, 2007, at 14 (reporting that the Israeli Knesset is considering adopting a controversial immunity from seizure law to encourage international art loans to Israel).

justice has not been done with regard to many families' claims to artworks.

D. *Financial Considerations*

Justification for the creation of a tribunal also is financial. Looking at the value of simply one looted painting restituted last year—\$135 million¹²³—demonstrates the importance of creating a tribunal to assist victims and help museums, galleries, auction houses, and private bona fide purchasers close this chapter on liability exposure. Although \$135 million is close to the highest reported price ever paid for a painting,¹²⁴ valuable looted art seems to be located more and more frequently and eventually awarded to claimants.¹²⁵ In fact, art historians are being hired by plaintiffs' lawyers to search archives and discover claims of which families are not presently aware.¹²⁶ One expert in the area has estimated that

¹²³ Carol Vogel, *Lauder Pays \$135 Million, a Record, for a Klimt Portrait*, N.Y. TIMES, June 19, 2006, at E1 (describing sale of Klimt restituted to Ms. Maria Altmann from the Belvedere Gallery in Austria). The total for all paintings restituted to Ms. Altmann from the Leopold Gallery was \$327 million. Anna Schumann, *Tech Museum Brings Study of Stolen Art and Law Together*, DAILY TOREADOR (Texas Tech. Univ. student newspaper), Nov. 20, 2006, available at <http://media.www.dailytoreador.com/media/storage/paper870/news/2006/11/20/News/TechMuseum.Brings.Study.Of.Stolen.Art.And.Law.Together469101.shtml?>

¹²⁴ See Ben Sisario, *Sale of Pollock Painting Becomes a Mystery*, N.Y. TIMES, Nov. 11, 2006, at B8 (reporting private sale of Jackson Pollock's *No. 5, 1948* for \$140 million as the highest price ever paid for a painting).

¹²⁵ MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS 205 (2003) (Austrian claims); PALMER, *supra* note 26, at 158 (same); Jeevan Vasagar, *Art Looted by Nazis Handed Back to Czech Family*, THE GUARDIAN, Jan. 25, 2007, at 4; *UK Gallery to Return Looted Art*, BBC NEWS, Jan. 24, 2007, available at <http://news.bbc.co.uk/2/hi/entertainment/6296007.stm>; Philip Smet, *WWII Art: Looted, But from Whom?*, RADIO NETHERLANDS, Nov. 30, 2006, available at <http://www.radionetherlands.nl/currentaffairs/ned061130mc>; Martin Bailey, *Revealed: National Gallery's Cranach Is War Loot*, THE ART NEWSPAPER, Nov. 26, 2006, available at <http://www.theartnewspaper.com/article01.asp?id=520>; Alan Riding, *After 60 Years, Austria Will Return a Munch Work to a Mahler Heir*, N.Y. TIMES, Nov. 9, 2006, at E8; Lawrence Van Gelder, *Canada to Return Looted Vuillard*, N.Y. TIMES, Aug. 21, 2006, at E2; Julie Mollins, *Gallery Returns Painting Looted by Nazis*, REUTERS, Aug. 19, 2006; *Germany Returns Painting to Jewish Heir*, JEWISH WORLD, Dec. 6, 2006, available at <http://www.ynetnews.com/articles/0,7340,L-3336763,00.html>; Etgar Lefkovits, *News in Brief*, JERUSALEM POST, Mar. 23, 2005, at 6 (Israeli Museum); see also *supra* note 2 (providing additional news reports).

¹²⁶ See, e.g., Carol Vogel, *Art Looted, Then Recovered, Put Up for Bid*, INT'L HERALD TRIB., Feb. 23, 2007, at 2 (quoting Lawrence Kaye as stating: "We have researchers working round-the-clock."); see also *Swiss Raid Bank Safe Belonging to Late Nazi Art Thief*, PR-INSIDE.COM, <http://www.pr-inside.com/swiss-raid-bank-safe-belonging-to-r141298.htm>, June 1, 2007 (describing Swiss blackmail investigation in connection with a request by a dealer and well-known art historian for finders fee to broker return of Pissarro's *Le Quai Malaquais Printemps*, which was looted by Bruno

\$700 million of art has been restituted in *the last five years*.¹²⁷ The trend is on the rise¹²⁸—to the point that the creation of an extraordinary international tribunal now is warranted.¹²⁹

Further, although the AAMD, the AAM, and the International Council of Museums have publicly advocated for extensive provenance research, these organizations predominantly represent the largest, most well-funded museums in the Western world.¹³⁰ Moreover, museum efforts

Lohse for Hermann Goering from Jewish publisher Samuel Fischer); accord Catherine Hickley, *Nazi-Looted Picasso in Zurich Bank Pits Heiress Against Dealer*, BLOOMBERG.COM, June 6, 2007.

¹²⁷ Schumann, *supra* note 123 (referring to Marc Masurovsky, co-founder of the Holocaust Art Restitution Project); see also Museum Security Network Mailing List, *Czechs Lift Deadline for Holocaust Claims*, Nov. 10, 2006, <http://msn-list.te.verweg.com/2006-November/006296.html> (noting the large amount of art to which claims may be asserted); Sabina Casagrande, *Germany Aims for Better Restitution Process for Nazi-Looted Art*, DEUTSCHE WELLE, Nov. 19, 2006, available at <http://www.dw-world.de/dw/article/0,2144,2242811,00.html> (same); Sue Choi, *The Legal Landscape of the International Art Market After Republic of Austria v. Altmann*, 26 NW. J. INT'L L. & BUS. 167, 191 (2005) (noting reports that over 2000 works have been restituted since the Holocaust reparations movement began in the mid-1990s) (quoting MICHAEL J. BAZYLER & KEARSON G. EVERITT, HOLOCAUST RESTITUTION LITIGATION IN THE UNITED STATES: AN UPDATE, INTERNATIONAL CIVIL LIBERTIES REPORT 11 (2004) (ACLU), available at <http://www.aclu.org/iclr/bazyl.pdf>).

¹²⁸ Dugot, *supra* note 7, at 391. Dugot states:

Not surprisingly, as additional information continues to become available . . . the number of Nazi-era claims is increasing. Moreover, these displaced works are likely to surface more frequently in the next few years as collections are passed on from one generation to the next. As children and grandchildren inherit these objects, some will end up selling them, in all likelihood . . . unaware of the complete provenance and therefore totally unaware of a possible restitution problem.

Id. (paragraph break omitted).

¹²⁹ Lasserson, *supra* note 16 (quoting Mark Stephens, an art lawyer at Finers Stephens Innocent in London, commenting on the recent restitution of Ernst Ludwig Kirchner's *Berlin Street Scene* to Anita Halpin: "Now claims are doubling year on year with concomitant levels of restitution. We are looking at large amounts of compensation. Every year we are going to see bigger cases as governments formalise their positions on this issue and put their national collections in order. It's much less clear what's going to happen to those paintings in private collections, as detection isn't as good at private sales and auction houses.").

The article also reported that the Albertina Museum in Vienna "is currently dealing with around 4,000 claims, and the Leopold Museum is 'rammed with stolen Schieles', according to sources. Switzerland, too, is vulnerable." *Id.* See also Riding, *supra* note 125 (Austria returning Munch work); Mollins, *supra* note 125 (Canada returning Vuillard painting); Vasagar, *supra* note 125 (British museum returning multiple works to Czech family); *Germany Returns Painting to Jewish Heir*, *supra* note 125; *UK Gallery to Return Looted Art*, *supra* note 125.

¹³⁰ See American Association of Museums, <http://www.aamus.org/aboutaam/index.cfm> (last visited Oct. 7, 2007); Association of Art Museum Directors, <http://www.aamd.org/about/> (last visited Oct. 7, 2007); International Council of Museums, <http://icom.museum> (last visited Oct. 7, 2007).

have not been universally thorough.¹³¹ According to Ambassador Eizenstat, as recently as January 2007, “German museums have performed and published disappointingly little provenance research,” and France, Italy, Spain, Switzerland, “and a host of other countries in Europe” have not undertaken any provenance research into their public collections.¹³² The international nature of the art market during the war and ever since has caused much of the missing art to be scattered throughout the world, and thus requires a global solution.¹³³ As stated by Owen Pell: “As a result of [the Nazi] looting program, art was dispersed across Europe and/or was fed into a market of dealers who bartered with the Nazis and then moved art out of Nazi-controlled territory to neutral nations and beyond.”¹³⁴

Finally, it also should be noted that smaller museums in the United States and abroad, as well as quite large museums in Australia, New Zealand, Asia, Latin America, the Middle East, South Africa, and the former Soviet bloc, have not committed in any significant way to Nazi-era provenance research.¹³⁵ Many would not have sufficient resources to

¹³¹ Randy Kennedy, *Museums' Research on Looting Seems to Lag*, N.Y. TIMES, July 25, 2006, at E1; Casagrande, *supra* note 127 (quoting Ute Haug, the only full-time provenance researcher hired by a German museum as stating: “For eight years, these difficulties have been known, for eight years there has been no money for provenance research, and for eight years there have been restitutions which could have gone better.”); *Czechs Lift Deadline for Holocaust Claims*, *supra* note 127 (“Last week, the government agreed to extend funding for the Czech center that researches the provenance of artworks and identifies Nazi-stolen art.”).

¹³² Lasserson, *supra* note 16.

¹³³ See BAZYLER, *supra* note 125, at 210. One commentator noted:

I speak from experience when I tell you that restituting a painting is not a simple task. Holocaust-era provenance research is time-consuming. Often this is due to the paucity of published and accessible provenance information. It is very labor-intensive. The information needed to resolve a case is usually in more than one place. Pre-war collections have not survived in their entirety—they have been dispersed and consequently items can surface anywhere—presenting considerable logistical challenges and making it a global issue.

Id. (quoting Monica Dugot).

¹³⁴ Pell 1999, *supra* note 10, at 27 (citing FELICIANO, *supra* note 23 and Georg von Segesser, *Switzerland and the Art Trade 1939-1945* (address given at the 1997 Annual Meeting of the International Academy of Estate & Trust Law in Paris)); *see also* Foreign Economic Administration: Enemy Branch: External Economic Staff, *Looted Art in Occupied Territories, Neutral Countries and Latin America: Preliminary Report* (May 5, 1945), available at <http://docproj.loyola.edu/laiot.html>.

¹³⁵ PALMER, *supra* note 26, at 129-49; *see also* Kurt G. Siehr, *Globalization and National Culture: Recent Trends Toward a Liberal Exchange of Cultural Objects*, 38 VAND. J. TRANSNAT'L L. 1067, 1077 (2005) (discussing a similar lack in the use of legislative approaches). Additionally, it is well known that Russia retains trophy art from World War II. *See generally* AKINSHA & KOZLOV, *supra* note 114.

undertake this research.¹³⁶ Recent news reports have indicated that valuable art in collections in Australia, Israel, and South Africa, for example, had been looted and never restituted.¹³⁷

E. Factual Complexity of Looted Art Cases

There is another dimension to understanding the Nazi-looted art problem that is difficult to broach. Often overlooked in the debate over Nazi-looted art is that each case is very different, with some being meritorious and others not. It is not the case that every piece of art that went missing during World War II was stolen by the Nazis from the hands of survivors and never restituted. It is undisputed that the art market continued to thrive throughout the war,¹³⁸ and although many sales were conducted in a criminal and unethical way, not all of them were.¹³⁹ Of course, some art was sold in forced sales for low prices,¹⁴⁰ and some was sold at the infamous “Jew auctions” now universally recognized as illegal,¹⁴¹ but quite a few sales were legitimate.¹⁴² In fact, some survivors were able to sell art on the open market at fair prices, which enabled them to obtain safe passage for themselves and their families to the United States and other countries.¹⁴³ The factual complexity of

¹³⁶ See AAMD Report, *supra* note 76, Addendum (“The Commission recognized that provenance research is difficult, expensive and time-consuming, often involving access to records that are hard or impossible to obtain, and that most museums lack the resources to accomplish this.”).

¹³⁷ See, e.g., reports cited in *supra* note 125. In fact, a recent report about a demand on the National Gallery of Victoria noted that if the “claim is successful, the painting would be the first looted work in Australia to be returned to its Jewish owners.” Rick Wallace, *Claim on Gallery’s “Nazi-loot” Art*, THE AUSTRALIAN, Feb. 13, 2007, available at <http://www.news.com.au/story/0,23599,21215397-2,00.html>. Additionally, it has recently been alleged that Finnish museums have a significant amount of non-restituted art. See *Researchers Believe Nazi-looted Art Could Be Found in Finland*, HELSINGIN SANOMAT, available in English at <http://www.hs.fi/english/print/1135225787506>.

¹³⁸ PETROPOULOS, *supra* note 24, at 5.

¹³⁹ PALMER, *supra* note 26, at 60.

¹⁴⁰ See, e.g., Douglas C. McGill, *Met Painting Traced to Nazis*, N.Y. TIMES, Nov. 24, 1987, at C19.

¹⁴¹ See, e.g., PALMER, *supra* note 26, at 17.

¹⁴² *Id.* at 59-60; JONATHAN PETROPOULOS, *THE FAUSTIAN BARGAIN: THE ART WORLD IN NAZI GERMANY* (2000).

¹⁴³ PALMER, *supra* note 26, at 59-60; see also Zagorin, *supra* note 9 (discussing opposition to compensating claimants for works sold in the 1930s at what seem to have been fair prices in that market and noting that the art market in New York “continued to function even as fighting raged in Europe”; also quoting Willi Korte, a consultant on Holocaust losses to the Senate Banking Committee, as having stated: “The paintings came to America because for more than 10 years during and after the war there was no place else to sell them.”).

a sixty-year-old claim should not be understated. One litigator has described the complexity of investigating allegations that particular paintings were looted as follows:

Art that was taken illegally during the War, for example in France, may have found its way back to the original owner after the War and may have been sold, unbeknownst to his own family, by that owner. That work may be in commerce today. Owners of art that was taken by the Germans and eventually sold to third parties may have been compensated by those third parties; there are several examples of that. In other words, someone who had bought looted art found out subsequently that it was looted and made amends with either the owner or the owner's heirs. So if we show a taking, we do not necessarily show an entitlement; it is much more complex than that.¹⁴⁴

The movement in the mid- to late 1990s for compensation of individual victims of the Nazi regime was groundbreaking and commendable. None of the funds created, however, deals with the issue of Nazi-looted art. Just as the post-war gaps in restitution programs justified the creation of national funds, the gaps in restitution of artwork justify this Article's call for the creation of a Nazi-Looted Art Tribunal. The Tribunal would achieve some measure of justice for those families that were targeted by the Nazis' attempt to rid Europe of Jewish culture. Similarly, the Tribunal would alleviate the uncertainty in the art market that looms because of potential liability, particularly in the United States.¹⁴⁵ Finally, creating the Nazi-Looted Art Tribunal would fulfill the commitments made at the Washington and Vilnius conferences. Now that the need for the Tribunal has been demonstrated, this Article will turn to how to structure the Tribunal.

II. STRUCTURING THE TRIBUNAL

Any dispute resolution tribunal that is created must be structured to promptly and fairly resolve most existing Nazi-looted art claims and reconcile the differences between common law and civil law traditions concerning property ownership. This Section provides new ideas for how to achieve these goals. Moreover, to engender participation by art market stakeholders, there must be a definite point in the future when

¹⁴⁴ Richard K. Bernstein, *Art Wars: International Art Disputes: Edited Presentation*, 31 N.Y.U. J. INT'L L. & POL. 127, 130 (1998).

¹⁴⁵ See, e.g., Lasserson, *supra* note 16 (reporting foreign attorneys stating that the United States is the best place to file Nazi-looted art cases).

the uncertainty in the market created by gaps in provenance from the Nazi era will be definitively resolved.¹⁴⁶

Simply creating the Tribunal would be a step toward that goal, but more should be done. For example, any tribunal created should have a claims resolution mechanism, a prospective title clearing mechanism, and a theft registry to finally reach closure on the problem.¹⁴⁷ The case for creating a title clearinghouse and theft registry has been made quite effectively by other scholars since the mid-1990s, and thus extensive treatment is beyond the scope of this Article. This Article echoes the sentiment of those scholars that a clearinghouse and registry mechanism should be created, and calls for its establishment in conjunction with the Nazi-Looted Art Tribunal.

A. *Prompt and Fair Resolution of Most Remaining Claims*

Few would disagree that prompt and fair resolution of disputes is a laudable goal, but the issue of *how* to achieve that goal would certainly provoke disagreement. In any event, any proposal to deal with the problem of Nazi-looted art must “provide a substantial degree of certainty in result and simplicity in application, without unduly sacrificing fairness.”¹⁴⁸ Mass claims treatment is the only way to accomplish this goal.¹⁴⁹

¹⁴⁶ See, e.g., Phelan, *supra* note 3, at 660.

¹⁴⁷ See Ashton Hawkins et al., *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 *FORDHAM L. REV.* 49, 89-90 (1995); Lerner, *supra* note 7, at 35; Pell 2004, *supra* note 11, at 315-16; Pell 1999, *supra* note 10; Steven A. Bibas, Note, *The Case Against Statutes of Limitations for Stolen Art*, 103 *YALE L.J.* 2437, 2460-65 (1994).

¹⁴⁸ Hawkins et al., *supra* note 147, at 89-90.

¹⁴⁹ As stated by one scholar providing a comprehensive analysis of mass claims:

In a mass claims situation, all claims arise out of one basic set of facts, such as a war, a revolution or another event causing widespread harm. This implies that “practically all of the claims arise at around the same time and are very similar in terms of the legal and factual issues they raise.”

This does not mean that all questions of law or fact need to be common. In many cases, there will be a pattern of harmful conduct, consisting of separate though related incidents, rather than one particular harmful event. Such a pattern might have affected various claimants in different ways, leaving considerable scope for individual issues to arise in mass claims. This is illustrated by the claims dealt with by the CRPC [Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina] in Bosnia and the HPCC [Housing and Property Claims Commission] in Kosovo. The losses of property were all based on separate

As stated by Lawrence Kaye, a well-known litigator in the field: “One principle to be embraced should be that restitution and repatriation must be available to all claimants, not only to those who can afford private litigation.”¹⁵⁰ It would be impossible, however, to resolve *all* remaining individual claims to “works of art” broadly defined; there simply are too many claims and too many uncertainties. Nonetheless, the attempt to rectify the taking of property must be made on a broad scale.¹⁵¹ One way to achieve the correct balance of the desire to do widespread justice, on the one hand, and practicality in its administration, on the other, is to set a minimum jurisdictional threshold for the Tribunal. In 1999, Pell suggested a minimum of \$250,000 such that a commission would deal exclusively with very high-end artwork.¹⁵² This Article proposes that a \$100,000 present-day fair market value (“FMV”) minimum would bring most potential art disputes of which families are aware under the Tribunal’s jurisdiction without overwhelming it. In addition, claims at that value would not likely be asserted in a judicial forum because of the prohibitive cost of bringing such suits with a sixty-year

facts and attributable to different individuals. There was, however, a general pattern of taking of property, which means that the claims all raised very similar legal issues.

Hans Das, *The Concept of Mass Claims and the Specificity of Mass Claims Resolution*, in REDRESSING INJUSTICES THROUGH MASS CLAIMS PROCESSES, *supra* note 60, at 1, 7-8. For additional sources providing lessons from existing mass claims tribunals, see generally INTERNATIONAL MASS CLAIMS PROCESSES: LEGAL AND PRACTICAL PERSPECTIVES (Howard M. Holtzmann & Edda Kristjánsdóttir eds., 2007); REDRESSING INJUSTICES THROUGH MASS CLAIMS PROCESSES, *supra* note 60; INSTITUTIONAL AND PROCEDURAL ASPECTS OF MASS CLAIMS SETTLEMENT SYSTEMS (The Int’l Bureau of Permanent Court of Arbitration ed., 2000).

¹⁵⁰ Kaye, *supra* note 88, at 667.

¹⁵¹ *Id.* It must be remembered that the Nazis’ widespread theft of property constituted a war crime:

The strongest international condemnation of the destruction and plunder of cultural property during wartime appeared in the Charter of the International Military Tribunal at Nuremberg in 1945. Article VI(b) states that the “plunder of public or private property . . . not justified by military necessity” is a war crime. Several years after the war, the characterization of the plunder of public or private property as a war crime was confirmed in the 1949 Geneva Convention. Article 147 designates the wanton destruction and appropriation of property during war as a “grave breach” of the Convention. In addition, Protocols I and II to the Convention, adopted in 1977, specifically make it a “grave breach” of the Convention to destroy clearly recognized historic monuments, works of art, and places of worship.

Id. at 664-65; see also, e.g., Pollock, *supra* note 40, at 203-04 (outlining international law dating back to 1907 violated by the looting).

¹⁵² Pell 1999, *supra* note 10, at 60.

history.¹⁵³ Moreover, an artwork trading today at \$100,000 would justify a fair degree of due diligence by the buyer.¹⁵⁴ Because few works by 1945 were valued at \$100,000, the increase in value would allow room for compromise restitution awards to accommodate both the theft victim's entitlement to justice and the bona fide purchaser's investment-backed expectations.¹⁵⁵

Some might argue that an attempt to resolve disputes as to so many works of art could prejudice claims of survivors and their heirs because they may not receive notice of the existence of their claims until the Tribunal's limitations period expires.¹⁵⁶ The same type of argument has been raised in conjunction with statutes of limitations as applied to Nazi-looted art in general.¹⁵⁷ Worldwide notice, however, would not be as difficult for the Nazi-Looted Art Tribunal as it was for the Swiss bank settlement, German Foundation, or other recently created tribunals to compensate Holocaust victims and their heirs. This is because the Swiss bank litigation already engaged in a "massive, worldwide notice program designed to inform Holocaust victims of the contours of the settlement and of their right to opt out, followed by a fairness hearing under [Federal] Rule [of Civil Procedure] 23(e)."¹⁵⁸ Mailings were sent to more than one million persons, and questionnaires were returned by approximately 580,000 persons in the Swiss bank litigation alone.¹⁵⁹ A massive database of potential claimants, that is, Holocaust survivors and heirs, needed to be created to affect such notice.¹⁶⁰ Similarly, potential claimants of the German, Austrian, French, and ICHEIC funds also were notified.¹⁶¹ Notice about the funds was worldwide, with massive

¹⁵³ See, e.g., *supra* note 7. Another consideration is whether to allow a claimant to petition a national government to pursue lower value claims with particularly strong factual evidence. Alternatively, a screening mechanism in the Tribunal could serve the same function. See generally THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION (David D. Caron & John R. Crook eds., 2000) [hereinafter IRAN-U.S. CLAIMS TRIBUNAL].

¹⁵⁴ See generally Phelan, *supra* note 3.

¹⁵⁵ See *infra* Part II.C.

¹⁵⁶ See, e.g., Cuba, *supra* note 5 (arguing for suspension of statute of limitations in Nazi-looted art cases).

¹⁵⁷ *Id.*

¹⁵⁸ See Neuborne 2002, *supra* note 34, at 809.

¹⁵⁹ *Id.* at 810.

¹⁶⁰ Morris Ratner of Lieff Cabraser Heimann & Bernstein, LLP supervised the worldwide notice program. *Id.* at 810 n.44.

¹⁶¹ See generally Bazzyler & Fitzgerald, *supra* note 12; HOLOCAUST RESTITUTION, *supra* note 35.

mailings, newspaper and radio advertisements in many countries in varying languages, posting of useful information on the web, and establishing toll-free telephone numbers.¹⁶² Limited personal contact also was made available in offices of a few Jewish organizations.¹⁶³ Simply based on the numbers of claims received by the tribunals,¹⁶⁴ it can hardly be doubted that the notice was effective. Presumably, the Nazi-Looted Art Tribunal need only gain access to the previously generated databases, engage in an admittedly very large mailing, run newspaper and radio announcements, establish a toll-free number, create a web site, and work with a few Jewish organizations to achieve the same widespread notice. After an initial burst of advertising, the announcements should be run once per year for the duration of the Tribunal's existence.

Effective notice is essential because the Tribunal should allow claims to be registered by citizens of signatory nations for the next five years—more than three generations after the war. The registration process should be mandatory regardless of whether the work of art has yet been located. Such massive registration will develop the critical mass of information necessary to more efficiently match claims with tainted artworks.¹⁶⁵ Registering the claim should toll the applicable limitations periods, as discussed below.¹⁶⁶

The treaty establishing the Tribunal should provide that claims under its jurisdiction will be excluded from the jurisdiction of domestic courts or commissions in the signatory nations.¹⁶⁷ This policy mirrors that of the Iran-United States Claims Tribunal foundational documents¹⁶⁸ and is more

¹⁶² *E.g.*, French Agreement Exhibit 1, *supra* note 57.

¹⁶³ *See, e.g.*, Weiss, *supra* note 37, at 106.

¹⁶⁴ *See* Neuborne 2006, *supra* note 40, at 70. Additionally, various national commissions, such as the Drai Commission, have undertaken extensive notice campaigns. *See* Freedman & Weisberg, *supra* note 47, at 133, 138-40.

¹⁶⁵ The matching process would be greatly expanded via the title clearinghouse, which would generate registration by possessors of art, and thus data collection. *See infra* Part II.F.

¹⁶⁶ *See infra* Part II.C.

¹⁶⁷ Ralph E. Lerner's proposal contemplated voluntary submission to a commission: "Filing a claim with the restitution commission would bar any lawsuit against any museum for the return of artwork." Lerner, *supra* note 7, at 39.

¹⁶⁸ *See* THE HAGUE: LEGAL CAPITAL OF THE WORLD 245-46 (Peter J. Van Krieken & David McKay eds., 2005) [hereinafter THE HAGUE]. Establishing the Tribunal as the sole forum for resolution of Nazi-looted art claims would not constitute a taking by the U.S. government. *Cf.* RAHMATULLAH KHAN, THE IRAN-UNITED STATES CLAIMS TRIBUNAL, 7-23 (1990) (extensively discussing U.S. lawsuits challenging the

restrictive than the approaches utilized by any of the newly created Holocaust funds. For a survivor or heir to collect from any of the new funds, he or she must make a *voluntary* choice to dismiss any pending litigation and agree not to bring additional litigation.¹⁶⁹ In contrast, jurisdiction of the Tribunal should be *compulsory* for all plaintiffs and defendants, regardless of the nationality of either. Although compulsory jurisdiction no doubt would be highly controversial,¹⁷⁰ it would offer the most complete, cost effective, and fair resolution for the following reasons.¹⁷¹

First, art claims are different from slave and forced labor claims in that the claimants of art may not know the correct entity to sue until the art comes on the market, which tends not to happen regularly.¹⁷² Moreover, lawsuits over works of art tend to be very fact specific. Thus, unlike claimants of dormant bank accounts or unpaid insurance policies from the Nazi era, a class action settlement would be inappropriate for the Nazi-looted art problem. The class certification criteria of Federal Rule of Civil Procedure 23(a) could not be satisfied in light of the fact-sensitive nature of each claim.¹⁷³

Furthermore, the amount of a class action settlement, once finalized, is fixed save for rare conditions.¹⁷⁴ The settlement amount proved to be significantly mistaken in the Swiss bank settlement.¹⁷⁵ The Nazi-Looted Art Tribunal could avoid this problem by establishing a sizeable reserve payable by the signatory nations, but not establishing a fixed “settlement.”¹⁷⁶ Rather, the Tribunal’s foundational documents

establishment of the Iran-United States Claims Tribunal on takings grounds, all of which failed).

¹⁶⁹ See *supra* note 54 and accompanying text.

¹⁷⁰ See, e.g., Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT’L L. (forthcoming 2008) (discussing negative effects of limiting the number of tribunals that could resolve a dispute).

¹⁷¹ This approach also would avoid the “dual national” problem that plagued the Iran-United States Claims Tribunal. See, e.g., KHAN, *supra* note 168, at 120-53; see also WAYNE MAPP, THE IRAN-UNITED STATES CLAIMS TRIBUNAL, 61-81 (1983); JOHN A. WESTBERG, INTERNATIONAL TRANSACTIONS AND CLAIMS INVOLVING GOVERNMENT PARTIES: CASE LAW OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL 7 (1991); THE IRAN-UNITED STATES CLAIMS TRIBUNAL: 1981-1983, 59-81 (Richard B. Lillich ed., 1984).

¹⁷² See Collins, *supra* note 4, at 119.

¹⁷³ See Bazylar & Fitzgerald, *supra* note 12, at 711 (“Since each [art] lawsuit involves a specific work of art, all were individual lawsuits, rather than class action litigation.”).

¹⁷⁴ FED. R. CIV. P. 23(e) & 60(b).

¹⁷⁵ See *supra* notes 40-42 and accompanying text.

¹⁷⁶ This approach also would avoid underfunding problems like those experienced by the Iran-United States Claims Tribunal. See *generally* IRAN-U.S.

should establish that its judgments would be treated by all signatory nations as enforceable arbitral awards under the 1958 United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).¹⁷⁷ This is the same approach of the Iran-United States Claims Tribunal.¹⁷⁸ Thus, individual defendants would shoulder the impact of the final judgment when warranted, but a tribunal would allow both the claimant and the defendant to dramatically reduce litigation costs and risk, particularly with the allowance of compromise cash awards, commissions, and tribunal cost shifting.¹⁷⁹ The risk of an “all-or-nothing” verdict, the only option available in a court of law,¹⁸⁰ would be greatly reduced because it should be awarded in only the strongest of cases and where the possessor does not appear to qualify for bona fide purchaser status.¹⁸¹

Finally, unlike the documents at issue in the bank and insurance cases, it is fairly certain that many of the artworks will resurface in future years—often in the hands of innocent bona fide purchasers.¹⁸² Thus, to avoid perpetual disputes and uncertainty in the market, repose for the art community must be achieved—albeit in a manner that is fair to the theft victims. The Nazi-Looted Art Tribunal with a title clearinghouse would achieve that goal.

B. Independence from National Oversight

An identity distinct from any national body is essential for the Nazi-Looted Art Tribunal to maintain neutrality in deciding disputes against institutions or persons in any

CLAIMS TRIBUNAL, *supra* note 153, at 60 (“The gross inadequacy of the \$1 billion Security Fund was of universal concern, which was not much relieved by Iran’s paper obligation to replenish it as needed.” (citation omitted)); *accord* THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 15-16, § 1.3.3 (Richard B. Lillich & Daniel Barstow Magraw eds., 1998) [hereinafter Lillich & Barstow Magraw].

¹⁷⁷ U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York June 10, 1958), 21 U.S.T. 2517, 330 U.N.T.S. 38.

¹⁷⁸ THE HAGUE, *supra* note 168, at 264 (“[T]he Iran-United States Claims Tribunal is the only international multiclaims tribunal whose awards are covered by the New York Convention . . . and thus potentially subject to enforcement by national courts.” (citations omitted)).

¹⁷⁹ *See infra* Part II.C.

¹⁸⁰ Pollock, *supra* note 40, at 231.

¹⁸¹ *See infra* Part II.C.

¹⁸² *See* Petrovich, *supra* note 9, at 1124.

particular state.¹⁸³ One reason is that disputes concerning artwork, as opposed to those related to other types of property, tend to generate more emotion on both sides of the dispute.¹⁸⁴ This has been particularly true in relation to Nazi-looted art: “[B]ecause art often is viewed as a tangible connection to those who perished in the Holocaust or to the suffering they endured, victims and their families may feel more compelled to fight for it.”¹⁸⁵ The connection would be particularly strong with regard to portraits of family members who perished. There are a number of tales of children having promised their parents that they would do all they could to recover the family’s property, particularly art.¹⁸⁶ Perhaps the sentiment was best expressed by Neal M. Sher, President of the International Association of Jewish Lawyers and Jurists American Section, in speaking about the “quest” for restitution and money damages for Nazi-

¹⁸³ See Pell 1999, *supra* note 10, at 59 (stating that any commission should be a “non-governmental ‘person’ at international law (*i.e.*, by treaty and treatment the [tribunal] should have appropriate and useful immunities under international law).”).

¹⁸⁴ Lionel Trilling, one of the “New York Intellectuals,” reportedly once remarked that “a work of art is both a source of power and an object of knowledge.” Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 295 (1982). “Legal problems are further magnified by the passionate feelings aroused by attachment to a work of art, as well as by overwhelming revulsion at the horror of the Holocaust.” Lerner, *supra* note 7, at 15.

¹⁸⁵ FELICIANO, *supra* note 23, at 72 (quoting Pell 1999); see also Zagorin, *supra* note 9, at 87 (quoting Simon Goodman who is suing for recovery of the Degas monolithe, *Landscape with Smokestacks*: “My family was murdered, their possessions destroyed or stolen These works are all that is left of our heritage, so we want the painting back.”).

¹⁸⁶ See, e.g., Monica Dugot, *The Holocaust Claims Processing Office: New York State’s Approach to Resolving Holocaust-Era Art Claims*, in HOLOCAUST RESTITUTION, *supra* note 35, at 271, 271. Dugot quotes Jane Lerner:

Ismar Littmann was my grandfather. I never got to know him. Ismar Littmann committed suicide in 1934, when the world as he knew it was crashing down around him. Within five years of his death, his family home was abandoned, his children fled Germany for different continents, his wife escaped to England, and his life’s treasure, his art collection, had disappeared: lost, looted, confiscated, stolen. . . . What a tragedy that his collection was dispersed, and that his reputation as a great collector was never recognized or acknowledged. I am therefore so grateful . . . to the museums that have willingly come forward in Emden, Cologne and Berlin, to return pieces from our family collection and to connect Ismar Littmann’s name to the ownership. . . . We are only one family looking for our heritage; there are many others. And there’s still so much left to be done.

Id.; see also *Glittering Prize*, TELEGRAPH.CO.UK, Oct. 7, 2006, <http://www.telegraph.co.uk/arts/main.jhtml?xml=/arts/2006/07/10/baklimt.xml> (reporting that Ferdinand Bloch-Bauer wrote after the war to his friend, artist Oskar Kokoschka, that he hoped “with all [of his] heart to be able to recover the portraits of my darling Adele” and left his claims to the paintings to his heirs); Dugot, *supra*, at 271.

era property losses: “The quest for reparations is not only a matter of justice, but also a matter of morality.”¹⁸⁷ He continued:

As Holocaust issues are brought to the forefront, people must always remember there will never be perfect justice. Many Nazi war criminals will not stand accountable for their insidious crimes. Similarly, many stolen Jewish assets will never be reclaimed. Nevertheless, these criminals and stolen assets must be pursued to the ends of the earth.¹⁸⁸

Emotion has not only been felt on the part of victims’ families seeking full restitution of art. For example, one claimant who reached a settlement whereby a looted painting would remain in the British Museum stated:

This is in a way our thanks to the British people who enabled my parents; my then 2-year-old sister; and a couple of other members of our family to find refuge from the Nazis. If not for the British people, my younger sister and I wouldn’t be here today, let alone have found the drawings. So in a way, the circle is closed.¹⁸⁹

The proceedings in Austria prior to the final arbitration in the Altmann Klimt dispute drive the point home. It seems that emotion and politics infiltrated the Austrian process of deciding whether the Klimts should have been restituted.¹⁹⁰ A bit of history is necessary to understand what happened. The Austrian government established programs after the war in an effort to return aryanized property to its rightful owners pursuant to the Austrian State Treaty of 1955.¹⁹¹ Under Article 26 of the Treaty,

Austria was obligated to restore the legal rights and interests of the true owners of such property where possible . . . [and] if property remained unclaimed or heirless six months after the Treaty came into force, Austria “agreed to take under its control all [such] property” and “transfer such property to the appropriate agencies or

¹⁸⁷ Neal M. Sher et al., *The Search for Nazi Assets: A Historical Perspective*, 20 WHITTIER L. REV. 7, 9 (1998).

¹⁸⁸ *Id.* at 10.

¹⁸⁹ S.F., *British Museum Exhibits 5 Drawings Once Looted from Feldmann Collection*, 9 IFAR J. 13, 13 (2006).

¹⁹⁰ “It is widely believed that the Austrian government is reluctant to [lose] the Bloch-Bauer paintings as they are so important a part of the Austrian State collection.” Burriss & Schoenberg, LLP, *Nazi Loot Claim Goes to Court in US*, <http://www.bslaw.net/news/010701.html> (Jan. 7, 2001); *see also* E. Randol Schoenberg, *The Recovery from Austria of Five Paintings by Gustav Klimt*, 9 IFAR J. 28, 36-37 (2006) (providing background on the arbitration).

¹⁹¹ *See* United States v. Portrait of Wally, No. 99 Civ. 9940, 2002 WL 553532, at *7 (S.D.N.Y. Apr. 12, 2002) (discussing Austrian claims mechanisms).

organizations to be used for relief and rehabilitation of victims of persecution.¹⁹²

As a matter of context, it is important to realize that “in the eighteen months preceding the invasion of Poland, the Germans allowed more than eighty thousand Jews to leave Austria, but only by buying their way out through the surrender of all personal possessions to the Office of Emigration.”¹⁹³ The post-war statutory framework for claiming such property contemplated that survivors or their heirs would file claims with statutorily created Restitution Commissions that adjudicated claims.¹⁹⁴ In 1998, a series of articles by journalist Hubertus Czernin revealed post-war impropriety on the part of the Bundesdenkmalamt (“BDA”), the Austrian agency that collected property for processing by the Restitution Commissions.¹⁹⁵ Under the Austrian Ban on Export of Cultural Assets Code, the BDA would consult with museums to decide whether to exercise its shocking power to “impede the return of artwork to successful claimants residing abroad when it found that the ‘public interest’ required the preservation of such cultural assets in Austria.”¹⁹⁶ “Often the BDA would grant export approval for certain works of art on the condition that the owner would sell at a low price or make a gift of other works of art to Austrian museums.”¹⁹⁷ It should also be noted that Austria at the time still viewed itself as the first nation to have been invaded by Nazi Germany, a view that was endorsed by the Allies.¹⁹⁸

On December 4, 1998, the Austrian Parliament enacted legislation to provide for “restitution notwithstanding such legal obstacles as the statute of limitations.”¹⁹⁹ “Elisabeth

¹⁹² *Id.* (quoting the Austrian State Treaty art. 26, May 15, 1955, 6 U.S.T. 2369, 217 U.N.T.S. 223).

¹⁹³ Pell 1999, *supra* note 10, at 32 (citing Nicholas, *supra* note 19, at 39).

¹⁹⁴ *Portrait of Wally*, 2002 WL 553532, at *2. For a description of limitations in the post-war claims process in Austria, see Hannah Lessing et al., *The Austrian General Settlement Fund: An Overview*, in REDRESSING INJUSTICES THROUGH MASS CLAIMS PROCESSES, *supra* note 60, at 95, 98-99.

¹⁹⁵ See *Portrait of Wally*, 2002 WL 553532, at *1 (describing the BDA); Lowenthal, *supra* note 28, at 135.

¹⁹⁶ *Portrait of Wally*, 2002 WL 553532, at *2 n.2 (citing Friedrich Welz’s declaration).

¹⁹⁷ *Id.*

¹⁹⁸ See, e.g., Lessing & Azizi, *supra* note 47, at 226.

¹⁹⁹ PALMER, *supra* note 26, at 178-79; see also *supra* note 104; Landesverfassungsgesetz vom 14. März 2000 über die Rückgabe oder Verwertung von Kunstgegenständen und Kulturgütern, die während der nationalsozialistischen Gewaltherrschaft ihren Eigentümern entzogen worden sind [Styrian Provincial Law of

Gehrer, Austria's Minister of Culture, . . . set up a museum panel to identify works that [should] be returned."²⁰⁰ Based upon the number of recent valid claims asserted against Austrian institutions, it seems that post-war impropriety was widespread.²⁰¹

The Klimts dispute highlights the problem and its emotional aspects. In 1999, Ms. Maria Altmann, the heir of a Czech sugar magnate, Ferdinand Bloch, sought five Gustav Klimt paintings painted for Ferdinand's wife, Adele Bloch-Bauer.²⁰² Adele died in 1925 of natural causes, and her will, drafted long before the Nazis came to Austria, "kindly" requested that Ferdinand donate the paintings to the Austrian National Gallery upon his death.²⁰³ When the Nazis annexed Austria in the *Anschluss*, Ferdinand was forced to flee to Switzerland without his possessions.²⁰⁴ His possessions were aryanized by a Nazi official, and some of the paintings came to be housed in the Austrian Gallery Belvedere ("Belvedere").²⁰⁵ The Belvedere failed to return the paintings after the war, citing Adele's will.²⁰⁶ Moreover, in 1948, an agent of the Austrian Federal Monument Agency informed the family's lawyer that "it would grant export permits on some of the family's other recovered artworks in exchange for a 'donation' of the Klimt paintings."²⁰⁷

14 March 2000 on the Return or Taking to Account of Works of Art or Cultural Assets Confiscated from their Owners During the Nazi Regime] Landesgesetzblatt [LGBL] No. 46/2000 (Austria), available in English at <http://www.lootedart.com/MFEU4498720>; Beschluss des Gemeinderates der Bundeshauptstadt Wien vom 29. April 1999 über die Rückgabe von Kunst und Kulturgegenständen aus den Museen, Bibliotheken, Archiven, Sammlungen und sonstigen Beständen der Stadt Wien [Vienna City Council Resolution on the Return of Artistic and Cultural Property from the Museums, Libraries, Archives, Collections and other Holdings of the City of Vienna], available in English at <http://lootedart.com/MFEU4487209>. Additionally, the Austrian government enacted legislation in 1995, giving the Austrian Jewish community ownership of "heirless" art looted by Nazis, which had been simply sitting in storage since the war. Kelly Ann Falconer, Note, *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, 416 (2000).

²⁰⁰ Lowenthal, *supra* note 28, at 135.

²⁰¹ See *supra* note 61 and accompanying text (discussing the Rothschild and Altmann claims); Schoenberg, *supra* note 190, at 41; S.F., *Austria's Belvedere Loses Another Painting to Claimant*, 9 IFAR J. 10, 10 (2006).

²⁰² *Altmann v. Republic of Austria*, 317 F.3d 954, 958 (9th Cir. 2002), *aff'd on jurisdictional grounds*, *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

²⁰³ *Id.* at 959.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 959-61 (providing a detailed account of the paintings' fates).

²⁰⁶ *Id.* at 960.

²⁰⁷ *Id.*

The case was dormant until the aftermath of *Portrait of Wally* and Czernin's exposé of Austrian post-war practices. Nonetheless, the Belvedere decided not to return the paintings.²⁰⁸ Nor was restitution recommended by the new Austrian advisory committee set up pursuant to Austria's Federal Act on the Return of Cultural Objects from Austrian Federal Museums and Collections.²⁰⁹ The committee's purpose is to advise the Minister for Education and Culture as to which artworks in public collections with problematic provenance should be returned.²¹⁰ The committee seems to have completely precluded participation by Ms. Altmann or her attorney to the point that her evidence was ignored.²¹¹ Emotional attachment to the world-renowned Klimts, often referred to by Austrians as

²⁰⁸ *Id.* at 961.

²⁰⁹ Rückgabe von Kunstgegenständen aus den Österreichischen Bundesmuseen [Federal Act on the Return of Cultural Objects from Austrian Federal Museums and Collections] Bundesgesetzblatt Teil I [BGB1 I] No. 181/1998, § 3 (Austria).

²¹⁰ *Id.*

²¹¹ See Schoenberg, *supra* note 190, at 36 ("I had sent the commission several legal opinions that I had obtained from an Austrian lawyer, Dr. Andreas Lintl, about Adele Bloch-Bauer's will, which, I figured, would be the real issue. I later found out that the head of the commission did not share the opinions with all of the other members. I called one of the lawyers on the commission, Dr. Manfred Kremser, to offer to come to Vienna and meet with him to discuss whatever issues they may have. I was told that they decided not to have any external discussions. I said that sounded a little unfair; I was not just somebody, I was the lawyer for Maria Altmann and shouldn't she have a right to participate? He said, 'No, we are doing this all internally.' He added: 'Mr. Schoenberg, you can come and meet with me at any time, but we cannot talk about the case.'").

An Austrian art restitution board in November 2003 recommended the return to Ferdinand's heirs of another Klimt, *Portrait of a Woman*, from the Austrian Gallery. *Ein Weiterer Klimt Wird Restituiert* [Klimt Painting to Be Restituted to Heirs of Bernhard Altmann], DER STANDARD, Nov. 21, 2003, available at <http://www.bslaw.net/news/031121.html>. Other families have had success with the board. See Alexander Kaplan, Note, *The Need for Statutory Protection from Seizure for Art Exhibitions: The Egon Schiele Seizures and the Implications for Major Museum Exhibitions*, 7 J.L. & POL'Y 691, 740 n.227 (1999) (providing an outline of the commission and noting that the Austrian "government hoped to return 400-500 items whose provenance had been fully investigated by the end of 1998 to some 20 families") (citing Judith Dobrzynski, *Austria to Return Some Art Seized by Nazis, But Disputes Remain*, N.Y. TIMES, Nov. 23, 1998, at A6); S.F., *supra* note 201, at 10-11 (describing the Mahler family claim to Munch's *Summer Night on the Beach*). Ms. Altmann's claims to another Klimt, *Portrait of Amalie Zuckerandl*, were ruled against in arbitration, and the paintings were awarded to the Belvedere instead because of evidentiary issues. See Schoenberg, *supra* note 190, at 43. Another family, the Zuckerandls, also has claimed the painting. *Id.* Both families filed claims to set aside the arbitration ruling. The lower court denied the claims and the decision was affirmed by an intermediate appellate court in November 2007. One family already has expressed intent to appeal to the Austrian Supreme Court. E-mail from E. Randol Schoenberg, Partner, Burris & Schoenberg, L.A., Cal., to Jennifer Kreder, Associate Professor of Law, Salmon P. Chase College of Law (Nov. 7, 2007) (on file with author).

their *Mona Lisa*, seems to have influenced the Austrian position.²¹²

Ms. Altmann first attempted to sue the gallery in 1999 in Austria, where the paintings were located. The filing fee, however, based on the amount in controversy, was initially \$1.6 million but was later reduced to \$135,000.²¹³ Thus, Ms. Altmann, a U.S. citizen, filed suit in California, where she resides.²¹⁴ The case, *Altmann v. Republic of Austria*, wound its way through the U.S. District Court for the Central District of California²¹⁵ and the Ninth Circuit Court of Appeals²¹⁶ on jurisdictional issues. The U.S. Supreme Court granted certiorari to decide whether the Foreign Sovereign Immunities Act could be applied retroactively to allow suit against the Austrian Gallery for acts committed before the Act was adopted by Congress.²¹⁷ The U.S. Supreme Court ruled that the suit was not barred in U.S. courts by the Foreign Sovereign Immunities Act.²¹⁸

After the Supreme Court ruling, the parties in *Altmann* agreed to binding arbitration in Austria.²¹⁹ Typical appointments procedures were used with each side appointing one arbitrator and those two arbitrators selecting a third.²²⁰ Without jurisdictional and procedural issues in the case, the arbitration centered on the merits—Adele Bloch-Bauer's will.²²¹ The arbitration was conducted in September 2005, and in mid-January 2006, the arbitrators issued a unanimous opinion in favor of Ms. Altmann.²²² Ms. Altmann desired that the paintings would remain in Vienna, but the Republic of Austria

²¹² See Stevenson Swanson, *It's Our Mona Lisa*, CHI. TRIB., July 14, 2006, at 1; Josh Kun, *The Art of Memory*, L.A. MAGAZINE, Oct. 2006, at 1 (describing emotional and political attachment to the works in Austria); see also *Glittering Prize*, *supra* note 186 (describing Ms. Altmann's shock at learning of the restitution committee's denial of the claim and Ms. Gehrler's public denial of the looting when Ms. Gehrler had admitted the previous year that Adele's will was not binding).

²¹³ *Altmann*, 317 F.3d at 961.

²¹⁴ *Id.*

²¹⁵ *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187 (C.D. Cal. 2001).

²¹⁶ *Altmann*, 317 F.3d at 954.

²¹⁷ *Republic of Austria v. Altmann*, 541 U.S. 677, 677 (2004).

²¹⁸ *Id.*

²¹⁹ Howard Reich, *Austrian Panel, Not U.S. Courts, Will Decide Who Owns Looted Art*, CHI. TRIB., May 18, 2005, available at <http://www.adele.at>.

²²⁰ See Schoenberg, *supra* note 190, at 40. See also, e.g., UNCITRAL Rules § II, art. 7, in *IRAN-U.S. CLAIMS TRIBUNAL*, *supra* note 153, at 442-43.

²²¹ Schoenberg, *supra* note 190, at 39.

²²² *Id.* The full arbitral opinion is available at <http://www.adele.at> (last visited Aug. 25, 2007).

did not raise the funds to make a reasonable offer.²²³ Thus, the paintings were shipped to the United States and auctioned.²²⁴ The most famous, *Adele Bloch-Bauer I*, was purchased by Ronald Lauder of the cosmetics family for the newly created Neue Gallerie museum in New York.²²⁵ The remaining works were sold to as-of-yet anonymous telephone bidders.²²⁶ In all, the paintings sold for approximately \$327 million.²²⁷

Shockingly, just before completing the sale, Ms. Altmann was criticized in the *New York Times* for selling the artwork, which rightfully belonged to her, instead of donating it to a museum.²²⁸ The Rothschilds' auction of \$90 million of artwork restituted by Austria in 1999 met with similar criticism.²²⁹ The Goudstikker family also has begun to auction a large art collection restituted to it by the Dutch.²³⁰ As was well-stated by E. Randol Schoenberg, Ms. Altmann's attorney:

Rich Austrians hawk their property all the time, but Jews can't? What do you do when you've inherited ten suits of armor and a collection of old Roman coins and you're living in a small apartment? One of the possibilities is that you call Christie's and have the biggest single collection sale that there's been, and then we put the money in more valuable things than suits of armor. It's always a matter of putting yourself in the person's shoes. You can't understand the Rothschild's [sic] position if you're an Austrian who thinks they're rich, greedy Jews.²³¹

²²³ Schoenberg, *supra* note 190, at 40; Christopher Reynolds, *Austria Bows Out of Klimts' Future*, L.A. TIMES, Apr. 9, 2006, at 33.

²²⁴ Christopher Michaud, *NY Fall Auctions Feature Prizes and Altruism*, REUTERS, Nov. 3, 2006.

²²⁵ See Carol Vogel, *\$491 Million Sale Shatters Art Auction Record*, N.Y. TIMES, Nov. 9, 2006, at B1.

²²⁶ *Id.*

²²⁷ Schumann, *supra* note 123.

²²⁸ Michael Kimmelman, *Critics Notebook; Klimts Go to Market; Museums Hold Their Breath*, N.Y. TIMES, Sept. 19, 2006, at E1. Just as the paintings' fame and beauty were reasons for Austrian resistance to a valid reading of Adele's will, the fame and beauty of the paintings were an excuse for the criticism of Ms. Altmann.

²²⁹ Kun, *supra* note 212, at 8 ("A similar moment occurred in 1999 when the new restitution law returned property to the heirs of the Rothschild fortune. When they turned around and put it all up for auction, the Austrians went wild with criticism.").

²³⁰ Carol Vogel, *Recovered Artwork Heading to Auction*, N.Y. TIMES, Feb. 22, 2007, at E1.

²³¹ Kun, *supra* note 212, at 8; see also CultureGrrl, http://www.artsjournal.com/culturegrrl/2006/09/cashing_in_on_restituted_nazi.html (Sept. 28, 2006) ("[R]ushing to auction rather than cherishing objects that were once important to lost loved ones reinforces the pernicious stereotype that we Jews are always up against—that we are enamored of money."); Casagrande, *supra* note 127 (quoting German Museums Association President, Michael Eissenhauer, as referring to

One objection that often is raised against art restitution from a museum is that it necessarily means that the public will not have the opportunity to enjoy the work.²³² It is often stated that the “restitution movement” will lead to “bare walls.”²³³ This objection, however, seems to be based more on emotion than reality. First, very few private collectors can purchase paintings of extremely high values.²³⁴ Second, most prized collections eventually will be found in public collections—either by donation, loan, or sale.²³⁵ Finally, when it comes to art looted by the Nazis, it can hardly be fairly said that the public has a right to the enjoyment of the work.²³⁶ If anything, the public has been unjustly enriched by being able to enjoy the art for sixty years without compensating the true owner.²³⁷

the restitution movement as “big business”: “It’s worth it to go out and look for prey, to see which works can bring new blood to the art market.”).

²³² See generally Daniel Range, Note, *Deaccessioning and Its Costs in the Holocaust Art Context: The United States and Britain*, 39 TEX. INT’L L.J. 655 (2004).

²³³ See Tony Paterson & David Cox, *German Crisis Meeting Called on Nazi Art Sales*, TELEGRAPH.CO.UK, Nov. 15, 2006, <http://www.telegraph.co.uk/> (describing German museum community’s publicly stated fears that its heritage is being “spirited away from public view and sold off for millions to private collectors” at the expense of the public’s right to view the work).

²³⁴ See Modern Art Notes, <http://www.artsjournal.com/man/2006/09/> (Sept. 19, 2006) (“[I]f you want to be angry at someone for not ensuring that the Klimts ended up in private collections, what about the wealthy trustees at major museums?”).

²³⁵ See, e.g., John Follain, *Trader of Lost Art*, SUNDAY TIMES, Sept. 24, 2006, available at <http://stolenvermeer.blogspot.com/2006/09/sunday-times-september-24-2006-feature.html> (quoting Clemens Touissant, Nazi-looted art “bounty hunter,” as stating that repatriated “works go back on show sooner or later—the Klimt never went into a bank vault, it’s already on show in New York”); AAMD Newsletter, *Art Museums and Private Collectors, and the Public Benefit*, Jan. 2007 (“More than 90% of the art collections held in public trust by America’s art museums were donated by private individuals.”). Recent tax code amendments enacted as part of the 2006 Pension Protection Act may have the potential of discouraging donations to museums. See, e.g., Anne Tergesen, *These Gifts Don’t Keep on Giving*, BUSINESS WEEK, Nov. 27, 2006, at 18.

²³⁶ See Eric Gibson, *With Klimt Comes Condemnation*, WALL ST. J., Sept. 29, 2006, at W13 (“Long-denied heirs like Ms. Altmann should be allowed to do as they please with their property once they have recovered it. Isn’t that, so to speak, the whole point?”); accord Steven E. Thomas, *Due Diligence and How to Avoid Acquiring Holocaust Looted Art, and What to Do If You Own Art with Uncertain Provenance for WWII Years*, in ENTERTAINMENT, ARTS, AND SPORTS LAW, at 481, 484 (A.L.I.-A.B.A. Course of Study No. SK035, 2005) (“Title is ownership—the right to possess, control, use, transfer and/or dispose of an object.”).

²³⁷ See Paterson & Cox, *supra* note 233 (quoting Ronald Lauder: “Remember how [the art] got [in the museums] in the first place . . . The owners were either killed or sent to Auschwitz. German museums were only too ready to buy this stuff. These were people who died because they were Jewish.”). See generally KARL E. MEYER, *THE PLUNDERED PAST* (1973) (discussing public and private benefits of an increasingly high-priced art market).

In conclusion, the Nazi-Looted Art Tribunal must remain independent from national oversight to prevent emotional attachment to art from infiltrating the decision-making process. Accordingly, straightforward arbitration procedures for appointing arbitrators should be used, as under the UNCITRAL Rules.²³⁸ The UNCITRAL Rules were designed for commercial arbitration, but were modified for use in the Iran-United States Claims Tribunal.²³⁹ Similarly, the Rules would need to be modified for the Nazi-Looted Art Tribunal to render them appropriate “for claims by private parties against sovereign states.”²⁴⁰

Finally, it should be noted that creating the Nazi-Looted Art Tribunal would vitiate the need for parallel domestic restitution commissions and panels.²⁴¹ Thus, money saved on

²³⁸ The UNCITRAL Rules can be modified as necessary, as was done in the Iran-United States Claims Tribunal. *See, e.g.*, THE HAGUE, *supra* note 168, § 8.1.4. Moreover, The Permanent Court of Arbitration likely could be relied upon at least for early assistance in operating the Tribunal. *See id.* § 6.1.6.5. The typical arbitration appointment process should be utilized. *See, e.g., id.* § 8.1.2. One issue that will need to be considered is to what extent arbitral awards are published. The art world is notoriously secretive. *E.g.*, Hawkins et al., *supra* note 147, at 92 (“To encourage use of [a looted art] registry, it is crucial that the information provided be kept confidential, with [limited] exceptions . . .”). But secrecy in the context of World War II profiteering is no longer accepted by the survivor community or historians—although some commissions’ reports, such as those of the Drai Commission are confidential. *See supra* Part II.B (discussing creation of historical commissions); BARKAN, *supra* note 22, at xvi (“The demand that nations act morally and acknowledge their own gross historical injustices is a novel phenomenon.”); French Agreement, *supra* note 57, at Annex B ¶ J. Moreover, the art community’s sense of entitlement to secrecy also has been questioned specifically in the context of Nazi-looted art. *See, e.g.*, *Menzel v. List*, 24 N.Y.2d 91, 96 (1969). Compromise positions are possible that would allow for the creation of Tribunal precedent, but whether they are desirable constitutes a serious policy decision. *Compare* Hawkins et al., *supra* note 147, at 92 (calling for strict confidentiality of proceedings) *with* Pell 1999, *supra* note 10, at 61 (calling for publication of precedent with parties’ names redacted) *and* THE HAGUE, *supra* note 170, § 8.1.4 (“[T]he fact that all of the Tribunal’s awards and decisions and many of its more significant procedural orders have been published has contributed to a wider appreciation of the Tribunal’s role in acting as a primary source of interpretive rulings on the UNCITRAL Rules.”). *See generally* Sarah Williams, *Confidentiality in Mediation: Is It Encouraging Good Mediation or Bad Conduct?*, 2005 DISP. RESOL. 209 (discussing pros and cons of confidential ADR); Vilnius Forum Declaration, *supra* note 94, ¶ 2 (“The Forum further encourages governments, museums, the art trade and other relevant agencies to cooperate and share information to ensure that archives remain open and accessible and operate in as transparent a manner as possible.”).

²³⁹ Paul D. Friedland & Lucy Martinez, *The UNCITRAL Arbitration Rules: A Commentary*, *By David D. Caron, Lee M. Caplan, and Matti Pellonpää*, 101 AM. J. INT’L L. 519, 519 (2007) (book review).

²⁴⁰ *Id.*

²⁴¹ One example is the United Kingdom’s Spoliation Advisory Panel, established in April of 2000. *See, e.g.*, Range, *supra* note 232, at 669. This panel seems to be handling claims very well. At first blush, this might seem to indicate that the United Kingdom should opt out of any treaty creating the Nazi-Looted Art Tribunal,

domestic commissions and judicial resources could be used to help continue archival research and fund the Nazi-Looted Art Tribunal.

C. *Rectifying the Differences Between Common Law and Civil Law*

Now that almost sixty years have passed since the war ended, most of the litigation is brought by heirs of survivors, not survivors themselves.²⁴² Understandably, those heirs do not always have complete information about what happened to the art during or immediately after the war.²⁴³ In some cases, those proclaiming to be heirs are not actually entitled to the art,²⁴⁴ and in other cases, the survivors have already reached a settlement with people or entities holding the art.²⁴⁵

but to do so would deny its museums and collectors the multi-jurisdictional repose offered by the title clearinghouse aspect of the Tribunal.

²⁴² Pell 1999, *supra* note 10, at 53. One commentator addressed the effect of the passage of time on Nazi-looted art litigation, particularly with regard to a laches defense:

In addition to evidentiary issues and concern about the harm caused to the defendant, the policy arguments that favor plaintiffs also weaken over the course of time. Currently, the plaintiffs in these cases are Holocaust survivors, their children, or their grandchildren. The defendants are frequently the initial good-faith purchasers who purchased the artworks shortly after the war. As both parties become more remotely connected to the original parties to the dispute (both the actual theft victim and the Nazis or the thief), the policy of reuniting Holocaust victims with their stolen property becomes weaker and the interest in quieting title becomes stronger. . . . It is unclear why, under equitable principles, the original owner's distant descendants would be any more entitled to the stolen works than the equally blameless good-faith purchasers who currently possess stolen works. Courts may find the policy of returning property stolen by the Nazis to its original owners less compelling when the plaintiff is several generations removed from the original owner, never knew the original owner, and has no connection with the stolen property.

Alexandra Minkovich, *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, 380-81 (2004).

²⁴³ PALMER, *supra* note 26, at 53.

²⁴⁴ Bernstein, *supra* note 144, at 128-29; see also *Holocaust Assets Hearings Before the H. Comm'n on Banking and Fin. Servs.*, 106th Cong. 177 (2000) (testimony of Glenn D. Lowry, Director of Museum of Modern Art, New York, with regard to the *Portrait of Wally* litigation: "Although we had assumed from the start the good faith of the people claiming the pictures, it now appears likely that neither family has a *bona fide* claim. In the case of one of these two claims, the painting was claimed by a former reporter for the *New York Times*. As it turned out, her claim was based upon her being the widow of a son of the pre-War owner's cousin, who, in turn, was not an heir to the painting.").

²⁴⁵ PALMER, *supra* note 26, at 55; Bernstein, *supra* note 144, at 128-29; see also 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.

Statutes of limitation exist, in part, to protect current possessors of art against fading memories and lost evidence.²⁴⁶ As stated by Ralph E. Lerner:

The public policy objectives for having a statute of limitations include: (1) the prompt filing of suit by a party, on the premise that those with valid claims will not delay in asserting them; (2) the protection of a defendant from having to defend a claim after a substantial period of repose, where evidence may have been lost or destroyed; and (3) the promotion of the free trade of goods, by making sure that those who have dealt with property in good faith can enjoy secure and peaceful possession after a certain, specified time period.²⁴⁷

That does not, however, tell the whole story, especially in the context of art theft. Fairness to a plaintiff is a consideration in how U.S. courts determine when the limitations period begins to run. This principle bears out slightly differently from state to state within the United States. Most states follow the “discovery rule,” whereby the limitations period begins to run when the true owner knew or reasonably should have known the correct person or institution to sue.²⁴⁸ New York follows the “demand and refusal” rule, which dictates that the limitations period begins to run only when the true owner demands the artwork’s return from the current possessor and is refused.²⁴⁹ This rule may sound extreme, but it is greatly tempered by the applicability of the laches defense, whereby a plaintiff’s claim will be barred if the plaintiff unreasonably delayed bringing the claim and such delay caused the defendant to suffer “prejudice.”²⁵⁰ Finally, regardless

REV. 87, 117 (1999) (“The publicity of such high profile cases, such as the Seattle [Art Museum] case, will encourage plaintiffs with tangential and weak cases to sue museums, realizing that public sentiment is likely to push the museum toward settlement.”).

²⁴⁶ PALMER, *supra* note 26, at 54-55; see also Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 76 (2005).

²⁴⁷ Lerner, *supra* note 7, at 17 (citing John G. Petrovich, *The Recovery of Stolen Art: Of Paintings, Statues and Statutes of Limitations*, 27 UCLA L. REV. 1122, 1127-28 (1980)).

²⁴⁸ *E.g.*, *O’Keefe v. Snyder*, 416 A.2d 862, 870 (N.J. 1980).

²⁴⁹ *E.g.*, *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 430 (N.Y. 1991).

²⁵⁰ *E.g.*, *id.*; see also Patty Gerstenblith, *Cultural Property and World War II: Some Implications for American Museums: A Legal Background*, in LEGAL PROBLEMS OF MUSEUM ADMINISTRATION, at 17, 23 (A.L.L.-A.B.A. Course of Study No. SC40, 1998); Alexandre A. Montagu, *Recent Cases on Recovery of Stolen Art—The Tug of War Between Owners and Good Faith Purchasers Continues*, 18 COLUM.-VLA J.L. & ARTS 75, 77 (1994); Hawkins et al., *supra* note 147, at 66-69. It should also be noted that

of which time-bar principle applies in a given state, one thing remains true in the United States: “[T]he principle has been basic in the law that a thief conveys no title as against the true owner.”²⁵¹ Thus, unless the original owner’s claim is time-barred, a plaintiff who can prove ownership and theft should prevail in litigation against a bona fide purchaser.²⁵²

There are valid criticisms of this approach. A Nazi-looted artwork may have passed through many individuals in different nations and

ended up in the hands of good faith purchasers who had no knowledge that the work they acquired ten years ago or more, from a reputable gallery, might have a tainted provenance and may have been stolen property. As a result, one often ends up with two victims: the original owner and the unknowing purchaser.²⁵³

In contrast to the U.S. approaches, civil law nations tend to favor bona fide²⁵⁴ purchasers to promote commercial certainty.²⁵⁵

Some jurisdictions, like Italy, absolutely protect such purchasers, recognizing that they have lawful title from the instant the item is purchased. Other countries, including France, Germany and

California seems to follow a modified approach to the due diligence element such that the statute of limitations would not begin to run until the claimant actually found the object. See CAL. CODE CIV. PROC. § 338(c) (West 2007); *Nafziger v. Am. Numismatic Soc’y*, 49 Cal. Rptr. 2d 784, 786 (Ct. App. 1996); *Soc’y of Cal. Pioneers v. Baker*, 50 Cal. Rptr. 2d 865 (Ct. App. 1996). Additionally, the doctrine of adverse possession may present another nuance to the statute of limitations inquiry. *E.g.*, *Collins*, *supra* note 4, at 130-31.

²⁵¹ *Menzel v. List*, 267 N.Y.S.2d 804, 819 (Sup. Ct. 1966), *modified*, 279 N.Y.S.2d 608 (App. Div. 1967), *rev’d on other grounds*, 246 N.E.2d 742 (1969). The U.C.C. follows the same principle, see U.C.C. § 2-312, but would provide for reimbursement of the bona fide purchaser by the seller if the seller is a merchant regularly dealing in such goods. *Id.* The term “merchant” would apply to “a commercial art gallery, an art auctioneer, and a private art dealer,” but would not apply to “a collector whose occupation is not related to art.” See 1 ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS 77 (Ralph E. Lerner & Judith Bresler eds., 2d ed. 1997). “This provision [of the U.C.C.] seemingly encourages a buyer to purchase goods from a reputable dealer where title may be dubious, and provides dealers with economic incentive to make the greatest efforts to ensure proper title.” Kaplan, *supra* note 211, at 725-26 n.164. English common law is similar. See *id.*

²⁵² See Gerstenblith, *supra* note 250, at 23; Montagu, *supra* note 250, at 75; Hawkins et al., *supra* note 147, at 95.

²⁵³ See Dugot, *supra* note 7, at 390-91.

²⁵⁴ European law tends to use the term “good faith” purchaser. See *id.*

²⁵⁵ See, e.g., John Henry Merryman, *American Law and the International Trade in Art*, in INTERNATIONAL SALES OF WORKS OF ART 425, 428 (Pierre Lalive ed., 1985).

Switzerland allow such purchasers to acquire good title to looted or stolen goods once the applicable limitations period has run.²⁵⁶

Moreover, a successful plaintiff must reimburse the bona fide purchaser the purchase price paid.²⁵⁷ This difference between the U.S. and European approaches to stolen art cases is “one of the few examples of precisely contrary rules in Common Law and Civil Law systems.”²⁵⁸

In the context of Nazi-looted art, the morality dimension should cause us to reconsider the definition and ramifications of bona fide purchaser status. Although the point may be arguable, the law of many civil law nations would have allowed title to pass unless the purchaser should have *known* the art was looted—not merely suspected the possibility of Nazi taint simply because the art predated World War II.²⁵⁹ Today, however, after the Washington Conference and Vilnius Forum, the world has recognized that the breadth of targeted, racially motivated looting led to widespread injustice. Strict adherence to the U.S. discovery-type approaches, however, proves too much for many nations accustomed to the civil law approach. Thus, any remedy today should make some accommodation for one who at the time of purchasing had bona fide purchaser status. That accommodation, however, should not extend to the full length that would be afforded under civil law.

Tribunal awards should take into account history and the information that was available at the time of the purchase.²⁶⁰ Thus, just as in evaluating bona fide purchaser

²⁵⁶ Parker, *supra* note 3, at 691 (citations omitted); accord Kaplan, *supra* note 211, at 728 n.165 (providing extensive citations to European laws and stating: “In many European nations, a cause of action accrues [at least with regard to claims to be brought against *bona fide* purchasers] the moment the theft occurs.”). Switzerland, in particular, has come under great criticism for the ease of its laws concerning bona fide purchaser status. *E.g.*, FELICIANO, *supra* note 23, ch. 11. This was particularly true in light of its short limitations period. *Id.* Switzerland recently amended its law. Federal Act on the International Transfer of Cultural Property (June 20, 2003), available in 12 INT’L J. CULTURAL PROP. 467 (2005). Japan still follows a strict two-year statute of limitations. Charles Palmer, *Recovering Stolen Art: Avoiding the Pitfalls*, MICH. BAR J., June 2003, at 20, 22.

²⁵⁷ *E.g.*, Merryman, *supra* note 255, at 428; Alejandro M. Garro, *The Recovery of Stolen Art Objects from Bona Fide Purchasers*, in INTERNATIONAL SALES OF WORKS OF ART 503, 505 (Pierre Lalive ed., 1985).

²⁵⁸ Merryman, *supra* note 255, at 428.

²⁵⁹ *See, e.g.*, Parker, *supra* note 3, at 691; Kaplan, *supra* note 211, at 726 n.165. *But see* Declaration and Expert Report of Dr. Ulf Bischof, Max Stern Estate v. Bissonnette, No. 06-211 (ML) (D.R.I., June 8, 2007) (on file with author) (stating that title cannot pass through a thief under German law despite the passage of the statute of limitations).

²⁶⁰ *See* Lerner, *supra* note 7, at 36-37.

status under either common law or civil law, the circumstances of the transaction, to the extent that they can now be known, should be considered. The benchmark should not be rigidly legalistic and focus solely on whether the applicable law would have allowed title to pass.²⁶¹ Rather, the focus should be on whether, under the circumstances of the transaction, the purchaser *should have suspected* that there was a *reasonable chance* that the art had been looted. Thus, transactions completed during or shortly after the war, particularly after the Nuremberg Laws in 1935, which laid bare the extent of racially motivated persecution in the Third Reich,²⁶² should be viewed through a more critical lens.

Moreover, transactions completed after the publication of widely known and relatively accessible lists of Nazi-looted art²⁶³ should be viewed in light of the availability of that information. For example, purchases of artwork listed in the French Spoliation List (*Répertoire des biens spoliés*),²⁶⁴ after its publication and dissemination in 1947,²⁶⁵ should be viewed through a highly critical lens. The same is true of art with a provenance indicating that it passed through the hands of Nazi dealers or their suspected conspirators when that information could have been fairly easily checked by referencing the Final Report issued by the Office of Strategic Service's Art Looting Investigation Unit.²⁶⁶ More recent transactions should be viewed in light of the availability of *catalogues raisonnés*²⁶⁷ and searchable databases.²⁶⁸

²⁶¹ See Lalive, *supra* note 257, at 728 n.165.

²⁶² See generally SCHNABEL & TATZKOW, *supra* note 17.

²⁶³ Thomas, *supra* note 236 (describing the scope of due diligence and various research sources and databases).

²⁶⁴ Marie Hamon, *Spoliation and Recovery of Cultural Property in France, 1940-94*, in THE SPOILS OF WAR, 63, 64 n.3 (Elizabeth Simpson ed., 1997).

²⁶⁵ *Id.*

²⁶⁶ The Final Report was disseminated in arts circles after the war and provides extensive information about the art market during the war, including the names of individuals and galleries known or suspected to have trafficked in Nazi-looted art. According to the United States Holocaust Memorial Museum, the World Jewish Congress Commission has published an index of the names appearing in the Final Report for Art Recovery and by the Art Newspaper. *Resources and Information: List, by Country, of Governmental and Private Attempts to Trace Holocaust Assets, Including Historical Commissions, and Forced and Slave Labor*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, available at <http://www.ushmm.org/assets/>. The Final Report is available at <http://docproj.loyola.edu/oss1/toc.html> (last visited Nov. 3, 2007).

²⁶⁷ See generally *Catalogues Raisonnés and the Authentication Process: Where the Ivory Tower Meets the Marketplace*, 8 IFAR J. Nos. 3 & 4 (2006) (double issue publishing IFAR Conference proceedings) [hereinafter *IFAR Catalogues Raisonnés*].

²⁶⁸ See *supra* notes 111-120 and accompanying text.

It also must be noted that the circumstances of the transaction would be deeply affected by the market value of the work at the time of sale, as well as the buyer's level of sophistication.²⁶⁹ Low-value objects purchased by dabblers in the art market simply would not render themselves suitable to exhaustive due diligence.²⁷⁰ In contrast, sophisticated parties would have known of the resources available to search for Nazi-tainted provenance information.²⁷¹ Thus, flexible evaluation of and implication of bona fide purchaser status is important to achieve a fair evaluation of claims.

One particular time period poses an interesting moral conundrum for evaluating the claims. Some time after the war (at a point that should be refined through additional historical research), the art world seemed to stop thinking about the likelihood of Nazi-tainted provenance.²⁷² The art world was renowned for its practice of fostering multi-million dollar transactions with little or no questions asked about the provenance of the work.²⁷³ Or, when provenance was a concern, it was most likely in regard to the authenticity of the work, not whether it had ever been looted.²⁷⁴ Thus, assurances that a work of art was from an "old European collection" were enough for the market to allow the seller to remain anonymous.²⁷⁵

Art purchased in 1975 or later poses the conundrum. The French statute of repose as applied to practically all Nazi-looted art disputes would have run in 1975.²⁷⁶ While there is no available data on whether there was a dramatic upsurge in the art market that year, such information could prove to be very informative. For example, should such an upsurge be attributed to "legal rationality" in the art market? In other

²⁶⁹ *E.g.*, Thomas, *supra* note 236.

²⁷⁰ *E.g.*, MARIE C. MALARO, A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS (2d ed. 1998) ("In acquisitions, whether by purchase or donation, museums should . . . make reasonable efforts to probe for indications of trouble (the level of efforts should be commensurate with the value of the material).").

²⁷¹ *See* Thomas, *supra* note 236.

²⁷² *See* Emily J. Henson, Note, *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, 1149 (2002).

²⁷³ *See* Schwartz, *supra* note 4, at 21 (quoting Hector Feliciano, Op-Ed., *Confront the Past, Search for Provenance*, L.A. TIMES, Mar. 15, 1998, at M2).

²⁷⁴ *See id.*

²⁷⁵ *See* Menzel v. List, 246 N.E.2d 742, 745 (N.Y. 1969) (Well-known gallery owner Perls, who purchased a Chagall painting in 1955 that turned out to have been looted, testified that it would be an insult to question a reputable dealer selling a painting about its provenance.).

²⁷⁶ *See* Kreder, *supra* note 74, at 1221.

words, if there were an upsurge, would it be attributable to absorption by the market of the legalistic view that purchasers could rest assured that pre-war art provided a safe investment? Or should such an upsurge be viewed with a more cynical eye? Should we surmise that unscrupulous dealers—and perhaps some clients—were waiting to take advantage of the thirty-year benchmark to knowingly profit from Nazi looting and Jewish suffering?²⁷⁷ As stated by one scholar:

Even assuming, for present purposes, that the present owners were unaware at the time of acquisition of the murky provenance of the cultural items they obtained, one would still have to question seriously whether in this context the normal meaning of good faith has any validity. The great quantities of valuable paintings and even more so of Jewish cultural and religious artifacts that suddenly surfaced after World War II and flooded world markets must have raised—or at the very least should have raised—some very difficult questions in the minds of all those involved in the deals connected with them, including some globally renowned auction houses.²⁷⁸

Without extensive proof of such malicious intent, however, it seems that transactions concluded after May 7, 1975, should be afforded more deference than those entered into earlier.²⁷⁹

Currently, wide disparities in legal systems promote instability in the market for pre-war art. “A chorus of observers has concluded that the lack of uniformity among various nations’ laws on the transferability of title to chattels sold by a thief facilitates the laundering of stolen art.”²⁸⁰ The international “legal framework, made up of nonharmonized national laws . . . enables calculating dealers or purchasers to buy or sell in countries whose solutions favor their personal

²⁷⁷ See Henson, *supra* note 272, at 1148-49 (“Many art dealers were eager to profit from the Nazi sales of ‘degenerate art’ and most knew exactly where it was coming from.”); accord Kelly Diane 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, 563 (1999). *But see* Lee Rosenbaum, *Will Museums in U.S. Purge Nazi-Tainted Art?*, ART IN AMERICA, at 37, 39 (May 1998) (“American museums are at pains to point out that their situation differs from that of various European museums, which knowingly acquired large numbers of art works soon after they were seized by the Nazis through theft or forced sales.”).

²⁷⁸ Yehuda Z. Blum, *On the Restitution of Jewish Cultural Property Looted in World War II*, 94 AM. SOC’Y INT’L L. PROC. 88, 89-90 (2000).

²⁷⁹ The war in Europe ended May 7, 1945 with the signing of the “German Surrender Documents.” The text of these documents can be found at the following web site: <http://www.historyplace.com/worldwar2/timeline/surrender.htm> (last visited Aug. 28, 2007). *See also* James J. Hastings & Goodard Winterbottom, Introduction, GERMANY SURRENDERS, 1945 (1976).

²⁸⁰ 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, 1445 (1992).

transactions, thus potentially enhancing the black market.”²⁸¹ Regardless of the widespread belief that the panoply of national laws creates problems for theft victims to recover their property, it is highly unlikely that individual nations will disregard firmly entrenched laws that favor either the victim or the market.²⁸² Creating the Nazi-Looted Art Tribunal to make a decision on the facts, instead of formalistic interpretations of vague legal principles such as bona fide purchaser status, jurisdiction, choice of law, and statute of limitations, would decrease the legal uncertainty surrounding claims²⁸³ and allow decisions to be made that fairly consider both the theft victim and the honest purchaser.

In light of the inability of nations to reach consensus on the legal standards applicable to Nazi-looted art claims, compromise is necessary. In his 1999 article calling for the creation of a Nazi-looted art commission, Ralph E. Lerner stated that “the commission should possess the authority to award reasonable compensation”²⁸⁴ His statement was in accordance with the vague AAMD guidelines. He went on to clarify his interpretation of what would be “reasonable” as follows:

I underline that the commission’s authority for awarding restitution would be confined to providing reasonable compensation, not the current fair market value of the stolen artwork. The amount of compensation would be determined under guidelines developed by the commission which would balance competing needs, and most likely award a value appropriate at some time in the past or some percentage of current value.²⁸⁵

²⁸¹ Quentin Byrne-Sutton, *Who Is the Rightful Owner of a Stolen Work of Art? A Source of Conflict in International Trade*, in *INTERNATIONAL SALES OF WORKS OF ART* 500, 500 (Pierre Lalive ed., 1985).

²⁸² See, e.g., Grover, *supra* note 280, at 1457-58 (explaining entrenchment of repose doctrine in civil law nations).

²⁸³ E.g., Pell 1999, *supra* note 10, at 43-44. Moreover, in determining whether a purchaser qualifies for bona fide purchaser status, courts inherently impose some degree of duty on buyers, but no one can be sure exactly what standard a court will apply until a suit is filed and decided. Generally, the duty imposed is one of diligence, and it requires that a buyer do some “requisite checking” to find out if the work being bought was stolen. The law, however, usually does not require that a buyer actually learn the truth. The problem is that most buyers (excluding those in the art industry) lack the sophistication or the means to do this sort of research before making a purchase. Rostomian, *supra* note 75, at 288 (citing Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 431 (N.Y. 1991); Linda Pinkerton, *Due Diligence in Fine Art Transactions*, 22 CASE W. RES. J. INT’L L. 17 (1990)).

²⁸⁴ Lerner, *supra* note 7, at 36.

²⁸⁵ *Id.* at 36-37.

This Article seeks to reign in Mr. Lerner's proposal in that 100% restitution should be awarded where warranted, as under the *Altmann* facts, but should not be awarded in most cases involving a good faith purchaser. What is "reasonable" must turn on all circumstances of a given case. Leaving art that deserves full restitution where it lies is not the right solution because it cannot be denied that a significant number of "museums, art dealers and collectors, through their postwar practice of turning a blind eye towards art with suspicious provenance that suddenly appeared on the marketplace, are responsible for creating a market that permits looted art to be purchased by innocent buyers."²⁸⁶ In conclusion, reasonableness is relative.

D. *Post-War Settlements and Res Judicata Principles*

While the art never should have been looted, and the Nazis never should have committed atrocities, it nevertheless seems that fair settlements reached after the war should be honored.²⁸⁷ Failure to honor fair post-war settlements would undermine the commercial certainty necessary for a viable market in pre-war art.²⁸⁸ More historical research is required to

²⁸⁶ Bazyler & Fitzgerald, *supra* note 12, at 711-12 (citing Judith Dobrzynski, *Loot-Holders Learn that Honesty Can Be Tricky*, RALEIGH NEWS & OBSERVER, Sept. 13, 1998, at G3: "When the idea of levying a tax on dealers and auction houses, or their transactions, has come up at symposiums and conferences, it has not won resounding support from the art trade, with few people in the business feeling a responsibility for what happened in the war."); *see also* Rosenbaum, *supra* note 277, at 39.

A comparison can be drawn to post-war views concerning heirless property. After the war, Jewish leaders felt quite strongly that "heirless property should not revert to the local government, as was customary under international law, because many of these governments had committed crimes against the Jews." KURTZ 2006, *supra* note 23, at 154.

²⁸⁷ *Cf.* David Rising, *German Panel Rules Against Return of Nazi-Looted Posters*, CHI. TRIB., Jan. 26, 2007, at 9 (describing the German Limbach Commission's panel ruling against a Holocaust victim's heir who sought his father's poster collection held by Berlin's Historical Museum and now estimated to be worth between \$10 million and \$50 million, partially on the ground that his father received \$50,000 in compensation from the West German government in 1961 when it was believed that the collection had been destroyed in the war). *But see* *Germany to Return Presidential Painting to Jewish Heirs*, Feb. 22, 2007, available at <http://msn-list.te.verweg.com/2007-February/006933.html> (describing a family's recent successful effort for restitution despite the failure of a post-war compensation claim). The Draï Commission offsets previous compensation, but such compensation does not preclude an award. French Agreement, *supra* note 57, at Annex B, ¶ I(C). The same is true of the Austrian Agreement, *supra* note 59, at Annex A, ¶ 2(f).

²⁸⁸ Bazyler & Fitzgerald, *supra* note 12, at 710 (quoting Norman Kempster, *Tracking the Nazi Plunder*, L.A. TIMES, Nov. 30, 1998, at F1); Georgina Adam, *The Nazi Bounty Hunters*, THE ART NEWSPAPER, Dec. 1, 2006, available at

determine whether the Tribunal should presume that post-war settlements were fair. At least in the case of the Austrian post-war mechanism, such a presumption does not seem warranted.²⁸⁹ As to other post-war settlements, without compelling evidence of governmental misconduct after the war, it seems that post-war settlements should be given deference. Perhaps those settlements that exceeded 50% of the higher of either the work's post-war or pre-1945 market value should be presumptively deemed "fair" and given *res judicata* effect.

E. Summary of Considerations for the Tribunal

In conclusion, arbitrators for the Tribunal should consider the following non-exclusive factors:

1. Strength of the factual evidence that the artwork at issue was looted from the claimant (or that the claimant is the valid heir of a proven art theft victim).
2. Whether any post-war compensation paid on the claim was reasonably fair at the time.
3. The extent of the claimant's attempts to find and claim the artwork after the war, and the extent of publication of the claim which would avoid prejudicing bona fide purchasers who had conducted provenance research at the time of purchase.
4. Circumstances of the purchase.
5. Level of publication of the artwork after the war such that one searching for the artwork could have located it and identified the possessor.

The table on pages 208-209 depicts potential Tribunal awards in light of the relevant circumstances of a case. It is not intended to depict all possible equitable solutions. The arbitrators would need a wide degree of equitable discretion to decide cases. Thus, their decision-making process would be a hybrid between the flexibility of mediation and the finality of binding arbitration.

<http://www.theartnewspaper.com/article01.asp?id=526> ("The increasing number of Nazi loot claims and the shifting legal ground on which they are based is worrying museums as well as art market professionals. At stake are works of art worth hundreds of millions of dollars; many have been hanging in major museums for decades, others belong to owners who bought them in good faith on the open market.").

²⁸⁹ See *supra* Part II.B.

Sample of Potential Tribunal Awards			
Tribunal Award Including Commission^a Paid to Tribunal	Objective "Due Diligence" Criteria Concerning Publication of Looting by Time of Defendant's Purchase	"Laches" Criteria Concerning Plaintiffs Search and Other Facts in Plaintiff's Possession	Circumstances of Defendant's Purchase
100% restitution; conveyance of actual art (or cash if both parties agree). 3% commission payable by defendant.	Listed in <i>Repertoire</i> or other widely distributed post-war listing of looted art highly likely to be seen by a sophisticated purchaser or claimant doing a diligent search.	Active search after the war that did not reveal location of art or correct defendant.	Concealment of claim and/or purchase by sophisticated party from dealer on U.S. military list of dealers in looted art. Purchase price and timing of purchase irrelevant.
75% restitution. 3% commission if present FMV over \$500,000; or 1.5% commission if present FMV under \$500,000. Payable by defendant.	Subsequent to claimant's search, work was listed in <i>catalogues raisonnés</i> or very visible catalogs such as globally distributed fliers from very large museums highly likely to be seen by one performing diligent search.	Active search immediately after the war, but no active search since expiring of period for asserting claims to relevant national post-war tribunal(s).	Purchase from questionable (but not listed) dealer. Paid less than 75% of FMV at time of purchase.
50% restitution, less the sum of (1) post-war compensation from a national tribunal, and (2) bonafide purchaser purchase price up to 25% of present FMV. 3% commission if present FMV over \$500,000; 2% commission if present FMV between \$200,000–\$500,000; or 1.5% commission if present FMV under \$200,000. Shared equally by both parties.	Listed in few sources not highly likely to be found by purchaser or claimant doing diligent search.	Active search after the war but abandoned after ten years. Received compensation of less than 50% of the higher of post-war or pre-1945 market value from any post-war national tribunal (overcomes any fairness presumption).	Purchased before 1975. Paid 75% or more of FMV at time of purchase. Possible remainder warranty-type claim against gallery or other intermediary if still in existence.

Sample of Potential Tribunal Awards (continued)			
Tribunal Award Including Commission ^a Paid to Tribunal	Objective "Due Diligence" Criteria Concerning Publication of Looting by Time of Defendant's Purchase	"Laches" Criteria Concerning Plaintiffs Search and Other Facts in Plaintiff's Possession	Circumstances of Defendant's Purchase
25% restitution. 1% commission payable by plaintiff or defendant, as is equitable.	Never listed in <i>Repertoire</i> , any post-war list of looted art, Art Loss Register, or any other post- war database.	Peremptory search after the war; no recovery from any post-war national tribunal. Painting of relatively low present FMV (under \$100,000).	No evidence of knowledge of or cause to suspect theft. Purchased before 1975.
No compensation. \$3000 commission payable by plaintiff.	Never listed in <i>Repertoire</i> , any post-war list of looted art, Art Loss Register, or any other post- war database.	Cannot prove with any certainty that the painting was looted or subjected to forced sale although it went missing in the war. ^b	No evidence of questionable purchase or purchased after 1975.

^a All commissions would be based on present fair market value (FMV).
^b One scholar would disagree with this proposal. See Andrew Adler, *Expanding the Scope of Museums' Ethical Guidelines with Respect to Nazi-Looted Art: Incorporating Restitution Claims Based on Private Sales Made as a Direct Result of Persecution*, 14 INT'L J. CULT. PROP. 57 (2007).

The table also reflects recommended commission payments to help fund the Tribunal, which the arbitrators should have flexibility in assessing. Besides this source of funding, signatory nations should provide a significant reserve for the Tribunal's administrative budget.²⁹⁰

Any arbitral awards could be enforced against the losing party by the claimant under the New York Convention.²⁹¹ This financing structure would avoid underfunding problems, such as those experienced in the Iran-United States Claims Tribunal.²⁹²

F. Database Searching and Title Clearinghouse

In 1980, the New Jersey Supreme Court, in deciding a dispute involving Georgia O'Keefe, bemoaned the absence of "a reasonably available method for an owner of art to record the ownership or theft of paintings."²⁹³ We have already seen the resolution of some stolen art claims because of the existence of the Art Loss Registry ("ALR"). The ALR may be searched for a fee and remains private to prevent thieves from profiting from knowing which thefts have not yet been reported.²⁹⁴ Its success stories include the recovery of works by Claude Monet, Pierre Bonnard, Alfred Sisley, Max Liebermann, Karl Hofer, Camille Pissarro, and Ferdinand Georg Waldmuller.²⁹⁵ The ALR reunites claimants with their stolen works when the claimants register the theft and a potential purchaser performing due diligence searches the database to make sure that the purchase can be completed in good faith.²⁹⁶

In 1998, the Art Loss Registry ("ALR") dedicated a portion of its site to a listing of works of art missing since World War II. Here,

²⁹⁰ See *supra* note 176 and accompanying text.

²⁹¹ See *supra* note 177 and accompanying text.

²⁹² See generally Lillich & Barstow Magraw, *supra* note 176, at 13-14, § 1.3.1.

²⁹³ O'Keefe v. Snyder, 416 A.2d 862, 872 (N.J. 1980).

²⁹⁴ Since the project started, the ALR has been responsible for identifying twenty-one works stolen during World War II, found in auction house catalogs or with art dealers. The Art Loss Register, <http://www.artloss.com/Default.asp> (last visited Aug. 28, 2007).

²⁹⁵ *Id.*

²⁹⁶ Although the potential purchaser paying for the search may not disclose the identity of the seller, it seems that many cases that raise a red flag lead to resolution. *E.g., id.* But see Amiram Barkat, *Lawyers Halt Auction House Sale of Nazi-Looted Paintings*, HAARETZ, Jan. 12, 2006, available at <http://www.haaretz.com/hasen/pages/795066.html>; Howard Reich, *Answers Just Out of Reach in Art Hunt: Christie's Won't Reveal Possible Holder of Painting*, CHI. TRIB., Dec. 22, 2002, available at <http://www.museum-security.org/02/154.html#5>.

interested parties can search the database in French, German, Italian, Czech, Hebrew and Spanish. The site encompasses art works that have been reported missing from collections in France, Germany, Belgium, Hungary, Russia, Italy, Austria, Poland and Holland. To maintain this effort, representatives of the ALR visit art trade fairs in Holland, Switzerland, Germany, France, Italy and the United States, comparing the dealers' stock to the database to identify stolen and looted art. Claims are also compared to museum records, Nazi confiscation lists, catalogue raisonnés, exhibition catalogues and other literature to locate missing works.²⁹⁷

The ALR and other databases are essential for restitution of Nazi-looted art, but more needs to be done. Unfortunately, the creation of one comprehensive database would be impossible for many reasons, including the vastness of the information.²⁹⁸ The Nazi-Looted Art Tribunal should therefore hire and train individuals to research all publicly available and fee-based databases.²⁹⁹ One example of untapped information that could be cataloged systematically is provided by members of the American Association of Museums and located on the individual museums' web sites. In September 2003, AAM launched the Nazi Era Provenance Internet Portal ("NEPIP"), "an online searchable database of Nazi-looted artworks that made their way into the collections of U.S. museums."³⁰⁰ A widespread problem with much of the information, however, is the absence of search engines to search the information.³⁰¹

²⁹⁷ See Dugot, *supra* note 7, at 390.

²⁹⁸ Konstantin Akinsha, *supra* note 116, at 159, 162-63 (describing the impossibility of the effort and the inadequacy of one such attempt by the Central Registry of Information of Looted Cultural Property 1933-1945, which was created by the Looted Art Research Unit in Europe of the Commission for Looted Art in Europe). The Central Registry of Information web site, which is managed by the Coordination Office for Lost Cultural Assets, is located at: <http://www.lootedart.com> (last visited Aug. 28, 2007).

²⁹⁹ Some authors have proposed that one central database be created to deal with the problem of Nazi-looted art or even all looted art worldwide. Hawkins et al., *supra* note 147, at 88-89 (proposing legislatively creating a central stolen art registry that "should cover as much of the stolen art universe as is feasible"); Dugot, *supra* note 7, at 389, 393 (Director of Restitution at Christie's commenting on "the lack of one single repository of archival information or central global database which would greatly facilitate and expedite provenance research"); Collins, *supra* note 4, at 117, 153-55 (calling for the creation of a central registry); Pell 1999, *supra* note 10, at 56. Although this seems ideal, it is not practicable in light of the volume of data involved and the amount of work already done in different languages and different formatting schemata used in developing existing governmental (including those of the FBI and Interpol), museum and private databases. See Akinsha, *supra* note 298, at 162-63.

³⁰⁰ Parker, *supra* note 3, at 678 (referencing The Nazi-Era Provenance Internet Portal Project, <http://www.nepip.org>); see also Kennedy, *supra* note 131.

³⁰¹ For example, in 2003, the Ministry of Culture of the Russian Federation published a database of "cultural trophies" within many public institutions, including

Thus, finding information within the jumble of photos, descriptions, and data can be close to impossible.³⁰² A trained, funded, and committed staff employed by the Nazi-Looted Art Tribunal to correct these problems would be an essential step toward resolving remaining claims to Nazi-looted art.

First, the Tribunal's staff could more effectively assist claimants in finding their art than any existing organization or national governmental office.³⁰³ Efforts to raise funds for private restitution databases have not led to overwhelming success;³⁰⁴ thus governmental funding is necessary to fulfill the promises made in Washington and Vilnius. In addition to funds, each participating nation could provide staff for the Tribunal, ensuring a diverse array of language abilities to allow for more efficient research across databases. For the Tribunal's staff to perform these searches in the most

the Pushkin State Museum of Fine Arts, the Hermitage Museum, the State Historical Museum, the Schusev State Research Museum of Architecture, as well as various libraries, archives, and provincial museums. *See* Akinsha, *supra* note 298, at 165. The information on the web site "is published only in Russian, and the website does not have a search engine, which makes any search extremely time consuming." *Id.* "Hours of browsing can yield unexpected results however: immediately after the publication of information about the 'replaced' paintings kept in the Pushkin Museum in Moscow, Polish experts recognized an important painting by Daniel Schultz that was looted by the Nazis from the City Museum in Gdansk." *Id.* at 165-66 n.10. The website is known as the "Internet Project Restitution." *See* Fyedyeral'noye Agyentstvo po Kul'turye i Kinyematografii [Federal Agency on Culture and Cinema], *Kul'turye Tsyennosti: Zhyertvi Voyni* [Cultural Treasures: Victims of War], <http://www.lostart.ru/ru/> (last visited Aug. 28, 2007).

³⁰² For example, although the German Lost Art Internet Database is regarded as "probably the best of the national databases, as it is fully searchable," its organization can be troubling. Akinsha, *supra* note 298, at 164-65; *see* Lost Art Internet Database, <http://www.lootedart.de> (last visited Oct. 12, 2007). Akinsha notes:

It appears that classification of the listed objects has been designed not by art experts but by software designers. The "generic terms system" designed for the classification of paintings by subject uses such sub-categories as: "Allegory, Architecture, People / figure, Still-life, Coats of arms / Emblem, Landscape, Animal motif, Person / figure Male person / figure Child / adolescent person / Female person, etc."

Akinsha, *supra* note 298, at 164-65 n.8 (quoting the Lost Art Internet Database); *see also* 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 11, at 169.

³⁰³ *Cf.* Pell 2004, *supra* note 11 (suggesting establishing a claims intake process modeled after that of the Drai Commission to assist claimants); *see also* Hans Dans, *Claims for Looted Cultural Assets: Is There a Need for Specialized Rules of Evidence?*, in *RESOLUTION OF CULTURAL PROPERTY DISPUTES*, *supra* note 11, at 193. In creating the Tribunal, the signatory nations should also consider whether to allow claimants to petition their governments or the Tribunal during the claim intake process to permit a claim that falls below the jurisdictional threshold when the facts are extremely strong.

³⁰⁴ *See* Akinsha, *supra* note 298, at 168.

competent manner, they need access to information housed in governmental archives.

Only nations that have opened their archives to generate databases in accordance with the promises made in Washington and Vilnius should be eligible to sign the treaty establishing the Tribunal. Although in the past reaching international agreement on firm principles was diplomatically impossible, the passage of time has demonstrated that signing on to the Tribunal would carry a significant benefit because it would insulate a signatory nation's nationals from litigation³⁰⁵ and enable them to take advantage of certain market benefits discussed below. Thus, full compliance with the non-binding resolutions reached in Washington and Vilnius should be demanded before granting immunity from litigation.

Second, individuals considering whether to purchase art can pay a relatively small fee to search the database.³⁰⁶ Currently, a purchaser seeking to buy any significant pre-World War II work in good faith would most certainly search the artist's *catalogue raisonné*³⁰⁷ to investigate the work's provenance, as well as its authenticity.³⁰⁸ Most present-day purchasers of pre-war works above \$100,000 probably would pay for a search of the ALR, and perhaps other databases and resources depending on the circumstances.³⁰⁹ Nonetheless, searches would not be conducted as to all purchases:

The extent of due diligence a purchaser can perform as part of the purchase of art will vary from transaction to transaction based on several different factors—time, value of the art, seller and buyer demands and available resources. The collector should be certain that the art can be transferred by the seller free of title defects. In short, what “diligence” is “due” in each transaction will be a product of the factors involved in the respective transaction.³¹⁰

These first two functions (assisting claimants searching for art and assisting purchasers with provenance research) of

³⁰⁵ See *supra* Part I.C.

³⁰⁶ The ALR currently charges a \$45 fee per search. <http://www.artloss.com/content/searching> (last visited Aug. 28, 2007).

³⁰⁷ See, e.g., Thomas, *supra* note 236.

³⁰⁸ Cf. Charlotte Higgins, *The Auction House, the Fashion Designer, and the \$78,000 Refund*, THE GUARDIAN, Nov. 8, 2006, at 9 (describing authenticity scandal).

³⁰⁹ Thomas, *supra* note 236; see generally IFAR *Catalogues Raisonnés*, *supra* note 267.

³¹⁰ Thomas, *supra* note 236, at 485. It also should be noted that only recently have insurers offered title insurance. See Steve Yahn, *An Idea Whose Time Has Come? The Model for Art Ownership Protection: Real-Estate Title Insurance*, WALL ST. J. ONLINE, June 2, 2007, <http://online.wsj.com/public/article/SB118074570591822171.html>.

the proposed title clearinghouse are served to a certain degree by existing databases, as well as a few organizations such as the New York State Banking Department's Holocaust Claims Processing Office,³¹¹ the International Foundation for Art Research,³¹² and national bodies assisting claimants in European countries.³¹³ As such, they are fairly uncontroversial.

More controversial, however, is the third way in which the Tribunal's database should be utilized: those already in possession of art with unexplained gaps in provenance seemingly related to World War II should be able to register their art and title should be deemed to pass after a certain amount of time from registration if no claims are matched to the artwork.³¹⁴ As an incentive for registration, only those who register their artwork should be entitled to repose after a five-year period. Pre-war art offered for sale without clearance from the Tribunal would be suspect.

Establishing a registry and clearinghouse "would have a positive affect on the market"³¹⁵ because it would provide the repose so desperately needed—more so than an arbitral tribunal alone. Additionally, a nation's fine arts collectors (and museums deaccessioning artwork) would benefit because processing artwork through the Tribunal would render currently tainted artworks readily saleable on the international market, which often will bear a significantly higher price than a strictly domestic market. Thus, the international agreement establishing the Nazi-Looted Art Tribunal also should effectuate the call of scholars from the mid-1990s to create a registry and title clearinghouse. As for the small window of purchases after the creation of the Tribunal, and before the claimant registration deadline, a database search that returns a clean provenance should be a complete bar to claims filed after the search unless a remainder claim for the full purchase price can be asserted successfully by the present-day possessor against the seller.

Without enabling the art market to purge potential claims, lawsuits for Nazi-looted art will continue to be filed in

³¹¹ See Dugot, *supra* note 7, at 389.

³¹² See *id.*

³¹³ See *supra* notes 111-120 and accompanying text.

³¹⁴ Cf. Hawkins et al., *supra* note 147, at 88-93 (calling for legislative creation of international art registry). Heirless art held by national museums may need different treatment. See *supra* notes 22, 99, 199, 286 and accompanying text.

³¹⁵ Pell 1999, *supra* note 10, at 51.

the United States in perpetuity.³¹⁶ “It has become clear that the World War II spoliation issues are with the art world for the long term.”³¹⁷ Thus, an extraordinary, comprehensive solution is appropriate. The Nazi-Looted Art Tribunal provides the appropriate remedy.

CONCLUSION

Since the art reparations movement began in the early 1990s, massive funds have been created to pay claimants for slave and forced labor, dormant bank accounts, unpaid insurance policies and other assets. Looted art, however, has not been met with the same internationally concerted effort to remedy past injustice. Efforts within individual nations to research and publicize provenance information also have not been universally satisfactory. Moreover, the art world seems to be on the cusp of a possible backlash to restitution of Nazi-looted art—with survivors being criticized for auctioning newly restituted art on the grounds that such sales are harmful to the public’s interest in enjoying art. Establishing the Nazi-Looted Art Tribunal would provide the necessary independence to resolve these claims without emotional attachment to the artwork interfering with what is just.

Additionally, common law and civil law limitations and repose doctrines, as well as rights of bona fide purchasers, are in stark contrast. It seems highly unlikely that national laws on these issues will change. Thus, litigation in the United States will be filed in perpetuity, continuing to undermine the international market in pre-war art. Moreover, widespread injustice will continue to go unremedied unless the artwork in question is worth a substantial amount of money and the claimants are able to locate the art and identify the correct entity to sue. Establishing the Tribunal would provide justice while stabilizing the market in pre-war art, and the Tribunal could be funded in large part by payment of commissions based on awards.

The complexity and non-uniformity of Nazi-looted art cases should not be underestimated. A solution that provides for flexibility is therefore desirable to reach fair decisions in

³¹⁶ Bazzyler & Fitzgerald, *supra* note 12, at 711-12; Lasserson, *supra* note 16.

³¹⁷ Dugot, *supra* note 7, at 391; *see also* Parker, *supra* note 3, at 693 (stating that a “binding international agreement” to resolve claims to heirless works would “bring closure to countries still grappling with displaced Holocaust assets”).

light of all circumstances of the case, including the strength of the looting evidence, the payment of any post-war compensation, the diligence of the claimant's post-war search for the work, the circumstances of the purchase, and the ability of the purchaser to search for tainted provenance evidence. The Nazi-Looted Art Tribunal should be created to allow for binding arbitration in a flexible manner that takes these facts into account. Moreover, to increase the impact the Tribunal can have on the market, scholars' proposals to create stolen art registries and clearinghouses should be adopted as well. This proposal is not inexpensive, but allowing for commissions on restitutions will help decrease the cost while prompting nations to fulfill the promises made in Washington and Vilnius.

Unlike the works of earlier scholars, this Article proposes that use of the registry, clearinghouse, and Tribunal should be mandatory, not optional, for claimants and purchasers. Considering all of the options available, a mandatory forum would likely generate the most participation by both the survivor and art communities—and only widespread participation can calm the present instability in the market for pre-war art. Moreover, in light of the effectiveness of past mass notice campaigns, notice is achievable, and a mandatory forum would be fair.

As this Article draws heavily from the work of Owen Pell, an early proponent of a Nazi-looted art commission, it seems appropriate to conclude with his words spoken almost ten years ago:

A mediation or arbitration commission designed to create a property registration system with binding legal effect and to resolve disputes relating to title, formed pursuant to treaty or some other form of collective State action would provide the surest, most efficient and most consistent way under international law to resolve claims relating to art works looted or stolen during World War II. This approach is particularly appropriate now, in light of the strong consensus that has emerged for an organized, just and fair resolution of the Holocaust-looted art problem.³¹⁸

³¹⁸ Pell 1999, *supra* note 10, at 28.