

NATIONAL REACTIONS TO CULTURAL PROPERTY LOOTING IN NAZI GERMANY: A Window on Individual Effort and International Disarray

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[T]hese objects must ... be so disposed of that they can be used, as the Jews who created them and the Jews who throughout the centuries lovingly collected and cared for them intended that they should be used, to serve the spiritual and religious needs of European Jews, of the Jewish people as a whole, and of all mankind.²

Abstract

Individual countries involved in World War II are being called upon to examine their histories and implement policies or plans that will facilitate the restitution of cultural property looted during the Holocaust. Efforts up to now have had varying degrees of success, depending largely upon the unique circumstances under which a specific piece of art or cultural property was displaced and subsequently found. Domestic property laws, international conventions and museum policies, amongst other considerations, all play a part in the intricate web of cultural property restitution. International diplomacy, rather than strict legal tenets, may provide the strongest means by which to reconstitute individual pieces of art. It is essential that governments, museums, and private parties acknowledge the problem that looted art poses, recognize that laws for returning it are insufficient, and act responsibly, ethically, and collaboratively to facilitate efforts to reconstitute Nazi-looted art.

1. Introduction

Upon the 60th anniversary of the defeat of Nazi Germany, the mass plunder of art – amidst other more sobering topics – has again been brought to the attention of the international

¹ J.D., 2005, University of Washington School of Law. In appreciation of Elie Wiesel, Stanley Saitowitz, and Bryan Stech, for recognizing and confronting ugliness while cultivating just the opposite.

² Letter from Ephraim Rischoff, Executive Secretary, Conference on Jewish Relations, to Dr. John Slawson, American Jewish Committee (Aug. 20, 1946). (On file with the American Jewish Committee, New York, NY.) See also Michael J. Kurtz, *Resolving a Dilemma: The Inheritance of Jewish Property*, 20 CARDOZO L. REV. 625 (1998), for an excellent discussion of cultural restitution policy.

media.³ In Berlin, the Memorial to the Murdered Jews of Europe, designed by U.S. architect Peter Eisenman, opened on May 10; in Boston, on September 18, 2005, the New England Holocaust Memorial held an anniversary celebration.⁴ Under the Nazi regime in Europe, the operation of confiscating the cultural property of Jews was given to a special unit under the direction of Alfred Rosenberg, called the *Einsatzstab Reichsleiter Rosenberg* (“ERR”); its original function was to plan and create a research library but it morphed into a project for the seizure of cultural treasures.⁵ If the entire body of loot appropriated by the Nazis had been photographed and catalogued, it would have run over 300 volumes;⁶ indeed, between one fourth and one third of Europe’s artistic treasures were pillaged by the Nazis in Hitler’s attempt to compile a cultural center of Europe in Germany.⁷ Rosenberg’s personal reports show that he ordered the plundering of 69,619 Jewish homes, and it took 26,984 railroad cars to transport the confiscated furnishings to Germany. “As of July 14, 1944, more than 21,903 art objects, including famous paintings and museum pieces, had been seized by the Einsatzstab in the West.”⁸ The Nuremberg Tribunal sentenced Rosenberg to death by hanging on the “counts of the indictment on which [he had been] convicted.”⁹

When Hitler became Chancellor of Germany, he began to redefine Germany’s culture and general outlook on the arts, reflecting the anti-modernism preference of the Third Reich, under which “[s]eparating Jews from their property was the first step in institutionally dehumanizing [them].”¹⁰ The Nazis eventually accused the Jews of controlling the art market and the press in order to create prominence for modern art, an aesthetic for which Hitler had extreme distaste.¹¹ The Nazi ideal was embodied in paintings by such artists as Vermeer, Rembrandt, Hals, Fragonard, and Dürer because they represented “pure” Northern European

³ See, e.g., *Ainsi Hitler acheta les Allemands*, LE MONDE DIPLOMATIQUE, 22-23 mai 2005.

⁴ See, e.g., *Holocaust Memorial Opens in Berlin*, THE ART NEWSPAPER, available at www.theartnewspaper.com (last visited May 12, 2005). See the New England Holocaust Memorial, Events, available at <http://www.nehm.org/current/eventdetails2.php?id=188> (last visited Aug. 25, 2005).

⁵ Judgment in the Nuremberg Trials, 22 Trial of the Major War Criminals Before the International Military Tribunal 469-70 (Nuremberg, 1948).

⁶ See, e.g., Lynn H. Nicholas, *THE RAPE OF EUROPA* (1994).

⁷ David Wissbroecker, *Six Klimts, a Picasso and a Schiele: Recent Litigation Attempts to Recover Nazi Stolen Art*, 14 DEPAUL LCA J. ART & ENT. L. 39, 40 (2004), citing Emily J. Henson, *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, 1103 (2002).

⁸ Judgment in the Nuremberg Trials, *supra* note 5.

⁹ *Id.*

¹⁰ Emily A. Maples, *Holocaust Art: It Isn’t Always “Finders Keepers, Losers Weepers” – A Look at Art Stolen During the Third Reich*, 9 TULSA J. COMP & INT’L L. 355, 357 (2001).

¹¹ 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, 559 (1999).

art of the highest order.¹² Hitler envisioned a great museum of the “best” European art in his hometown of Linz; it was to be stocked primarily with paintings by artists whom Hitler found most culturally valuable, some of whom are great masters, others of whom reveal his provincial tastes, such as some mediocre nineteenth-century realists.¹³ Indeed, “[o]ne of the Holocaust’s greatest ironies is that its most malevolent perpetrators fancied themselves a new cultural elite.”¹⁴

While the theft and eventual location of art is arguably inconsequential when compared to the horrific violations of human rights during the Holocaust – “Stealing paintings was relatively low on the totem pole in terms of Nazi atrocities”¹⁵ – national policies on cultural property plunder offer some small insight into a country’s social priorities, economic status and perhaps the degree to which its people were affected by the Nazis during World War II. Recognizing the highly emotional nature of the issue and the inevitably incomplete comparative analysis it provides, this writing will explore a delimited group of countries’ reactions regarding cultural property restitution issues and will suggest that it has not been the failure or strength of any particular national government that has led to the displacement or restitution of Nazi-looted artwork, but rather the tireless devotion of a few key people that has focused international attention on the topic and fueled subsequent efforts by governments to cooperate in post-Nazi-era international conversations about the best procedures for restituting looted art.

With litigation costs rising far above the price most could pay to repossess family artwork, and with the legal questions brought up in such litigation turning on such esoteric aspects of a situation as choice of law and intricate domestic legal idiosyncrasies, returning looted artwork has become more of a diplomatic gesture than a legal obligation. The eventual return of art looted during World War II may depend more on international negotiation than enforcement of actual law. Moreover, as mentioned above, the comparison in this writing is necessarily incomplete and overly general. Some of the reasons this is so include the fact that countries are variously too poor to consider such questions when they have other pressing needs; some wealthy, litigious countries, like the United States, have had many more cases arise and have therefore needed to respond to the problems with legislation or policies; and some countries were more overrun with Nazi terror than others and therefore inevitably have more claims and interest in the subject. And many claimants, no matter what their nationality, are elderly and

¹² See, e.g., Stephan J. Schlegelmilch, *Ghosts of the Holocaust: Holocaust Victim Fine Arts Litigation and a Statutory Application of the Discovery Rule*, 50 CASE W. RES. 87, 93-94 (1999).

¹³ *Ibid.*, at 93. See also Hector Feliciano, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD’S GREATEST WORKS OF ART*, 21 (1997).

¹⁴ Stuart E. Eizenstat, *IMPERFECT JUSTICE*, 187 (2003).

¹⁵ Kara Platoni, *The Ten Million Dollar Woman*, THE EAST BAY EXPRESS, Aug. 4, 2004, quoting E. Randol Schoenberg, an attorney in Los Angeles who represented Maria Altmann and Tom Bennisson, heirs of Nazi victims, who stand to regain ownership of family paintings looted during the Holocaust.

do not have the money or stamina to file a lawsuit or pay for archival research.¹⁶ The “art world,” furthermore, provides at best an opaque lens for comparing national policies on the topic because of museums’, galleries’, and auction houses’ tendency to conduct business behind closed doors.¹⁷ As one scholar noted, “[i]t is easy to understand why we have little information. Much about the art trade simply is not knowable.”¹⁸ The countries this writing will focus on are the United States, Austria, Russia, and France. Internationally, there are many more case studies and interests than are illustrated here.¹⁹

The Art Loss Register (“ALR”), as a preliminary example, is an international registry of stolen artworks currently based in London, with satellite offices in New York, Germany, and, in the near future, Russia. The ALR has offered free listings of looted artworks to Holocaust victims and their heirs. Indeed:

All Holocaust claims are registered on the ALR database free of charge and are systematically checked against forthcoming auction house sales – over 300,000 lots per annum. Additionally, the ALR attends art trade fairs in Holland, Switzerland, Germany and France, Italy and the United States where dealers’ stock is compared to the database in order to identify stolen and looted art on behalf of theft victims. Claims are also compared to museum records (current holdings and loan exhibits) Nazi confiscation lists, catalogue[s] raisonnés, exhibition catalogues and other literature with the aim of locating the missing artworks.

*Since the project started, the ALR has been responsible for the identification of 21 paintings looted during World War II, located in auction house catalogues or with art dealers including works by Claude Monet, Pierre Bonnard, Alfred Sisley, Max Liebermann, Karl Hofer, Camille Pissarro and Ferdinand Georg Waldmüller.*²⁰

In addition to organizations like the ALR, literature on the topic is being researched and written about much more frequently, bringing about widespread attention and concern. In the mid-1990s, authors began honing in on the topic of art looting during wartime. Lynn Nicholas’s *THE RAPE OF EUROPA* (1994), Konstantine Akinsha’s *BEAUTIFUL LOOT: SOVIET PLUNDER OF EUROPE’S ART TREASURES* (1995), Jonathan Petropoulos’s *ART AS POLITICS IN THE THIRD REICH* (1996), and Hector Feliciano’s *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD’S GREATEST WORKS OF ART* (1997) marked the brave beginnings of publishing and publicizing an uncomfortable topic. At the 1997 London Conference on Nazi

¹⁶ Alan Riding, *Whatever Happened to the Art the Nazis Stole?*, INTERNATIONAL HERALD TRIBUNE, May 13, 2004, at 2.

¹⁷ See, e.g., Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 385 (1995): “The traditions of the art market, steeped in secrecy and what passes for “gentlemanly” informality, provide ideal opportunities for introducing stolen antiquities into the legal art market.”

¹⁸ Paul Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 291 (1982).

¹⁹ Interesting cases, policies, and stories come from a long list of countries, including Switzerland and its notoriety for “art laundering,” the Netherlands, Germany, Italy, and Poland.

²⁰ The Art Loss Register, Holocaust, available at <http://www.artloss.com/Default.asp> (last visited May 2, 2005; emphasis added).

Gold, Mr. Feliciano made an appeal to attendees for increased access to international art archives and, despite his speech being “discomfiting to his audience,” he was the first to publicly address an international group of officials on the topic of looted art.²¹

Art professionals and academics have continued to build on the repertoire of information begun by these authors. In 1999, for example, Norman Palmer, Academic Director of the Institute for Philanthropy at University College London, Chair of the Ministerial Advisory Panel on the illicit Trade in Cultural Objects and a practicing barrister, gave a lecture on Nazi looting at the University of Tasmania and thereafter published a book that has elicited further worldwide discussion on the web of legal problems that have prevented people from recovering art and other property that is rightfully theirs.²² Other individuals, ranging from academic scholars to powerful businesspeople,²³ have taken a keen interest in cultural property restitution policy; these people are the reason the world is making progress in providing some nominal compensation to Holocaust victims.

2. Efforts made by the United States

In 1998, the United States Presidential Advisory Commission on Holocaust Assets was created by Public Law 105-186, which is known as the U.S. Holocaust Assets Commission Act.²⁴ Its purpose was to investigate U.S. assets acquired after 1933 and determine whether any U.S. assets – focusing on gold, gems, bank accounts, financial instruments, insurance policies, and art works – were originally the property of European Jews.²⁵ In addition to this legislation, the American Association of Museums (AAM) established a Task Force on the Spoliation of Art during the Nazi Era, producing a guide to provenance research.²⁶ Beyond these established laws and policies, Washington, D.C., was the site of the international conference on Nazi-confiscated art,²⁷ which was scheduled with both plenary and small sessions regarding such topics as Nazi-looted art, Holocaust-era insurance claims, archives, books, remembrance, and research; prior to the Washington Conference, few of these issues

²¹ Eizenstat, *supra* note 14, at 190-191.

²² Norman Palmer, *MUSEUMS AND THE HOLOCAUST* (2000). Other publications that have sparked interest in this topic include Nicholas’s *RAPE OF EUROPA*, *supra* note 6, and Feliciano’s *LOST MUSEUM*, *supra* note 13.

²³ See information about Sophie Lillie and Ronald Lauder, *infra*.

²⁴ See 22 U.S.C. 1621.

²⁵ See Bill Summary and Status for the 106th Congress, H.R. 2401, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d106:HR02401:@@L&summ2=m&> (last visited May 7, 2005).

²⁶ Nancy H. Yeide, Konstantin Akinsha, and Amy L. Walsh, *THE AAM GUIDE TO PROVENANCE RESEARCH* (2001).

²⁷ Washington Conference Principles on Nazi-Confiscated Art; released in connection with the Washington Conference on Holocaust-Era Assets, Washington, D.C., Dec. 3, 1998. See 7 *INTERNATIONAL JOURNAL OF CULTURAL PROPERTY* 545 (1998).

had been the focus of any international attention.²⁸ Beyond these meetings, private non-profit organizations have been formed, such as the Commission for Art Recovery in New York and the Holocaust Art Restitution Project, dedicated to assisting in the identification and recovery of “Holocaust art.” Prominent United States museums have inventoried their collections to identify and publish information about works with questionable provenance information for the period preceding and during World War II,²⁹ and the Holocaust Claims Processing Office of the New York State Banking Department has organized itself to play an integral role in helping individuals of all backgrounds obtain just resolution for the theft of property during the Holocaust.³⁰

And the U.S. effort to rectify a horrific chapter in history does not start or stop there; its efforts have been laudable since the end of World War II. The end of the German occupation, the urgency of the Cold War, and the necessity of maintaining German goodwill were difficult factors weighing against any country helping the Jews in the late 1940s, but the United States recognized a successor organization to the initial clean-up efforts of the American Military Government (Office of Military Government, U.S. Zone – OMGUS), which had to deal with most of the looted cultural treasures in Europe in 1945.³¹ Indeed, beginning in the summer of 1945, the overworked American men and women in the cultural restitution section of OMGUS located, inventoried, and returned over 1.6 million items to foreign governments before it ceased operations in 1949.³²

On the other hand, the American effort was perhaps only partly successful because only a fragment of Jewish heritage has survived; much of it disappeared along with the Jewish people of Europe and, despite heroic efforts on any or all fronts, “reconstruction [can] only be partial at best.”³³ But any measure of failure on a grand scale likely speaks not to the United States’ effort specifically; rather the impossibility of making great strides as an individual country when restitution of World War II property is inherently an international issue. The Allies, for example, never implemented a coordinated, quadripartite program for restituting cultural property or any other kind of property.³⁴ Indeed, “[a]ttempts at international

²⁸ Eizenstat, *supra* note 14, at 196.

²⁹ For examples of museums’ work and reactions to the question of Holocaust provenance, *see, e.g.*, The Metropolitan Museum of Art’s Provenance Research webpage, available at http://www.metmuseum.org/Works_Of_Art/provenance/index.asp (last visited May 2, 2005) and the National Gallery of Art’s Provenance Research Overview, available at <http://www.nga.gov/collection/provfeat.shtm#overview> (last visited May 2, 2005).

³⁰ *See* Holocaust Claims Processing Office: History and Mission, available at <http://www.claims.state.ny.us/hist.htm> (last visited Aug. 25, 2005).

³¹ Kurtz, *supra* note 2, at 641.

³² *Ibid.*, at 632.

³³ *Ibid.*, at 654.

³⁴ *Ibid.*, at 631.

cooperation to restitute property stolen during wartime have not been totally effective ... What seems feasible is to move toward effectuating guiding principles that can be followed in this area and then to use the power of world opinion to enforce their application.”³⁵

This is the opinion of Lawrence Kaye, who is one of the “key people” – mentioned above – who have made substantial contributions to an endeavor to rectify Holocaust looting. Mr. Kaye, who is a partner at a New York law firm, has written prolifically on the topic, participated in several complex international art law cases, and notably represented victims of the Holocaust in an effort to locate and reclaim their property. He currently represents several museums, collectors, and foreign governments in connection with a variety of cultural property matters.³⁶ Another American who has accomplished a remarkable amount of work in the field is Stuart Eizenstat. Mr. Eizenstat, currently an attorney in Washington, D.C., has held an array of positions in the United States government, including Chief Domestic Policy Adviser and Under Secretary of Commerce for International Trade. He was Ambassador to the European Union from 1993 to 1996, had pivotal roles in the development of several international initiatives, and was the Clinton Administration’s leader on Holocaust-era issues, helping to negotiate major agreements with Switzerland, Germany, Austria, and France. Indeed, “[t]he renewal of interest in World War II-era issues owes much to his efforts.”³⁷

Interestingly, related to Europe, the United States has been involved in two significant lawsuits with Austria regarding Nazi-looted art. The first case commenced in 1999, when the New York Attorney General issued a *subpoena duces tecum* for two Egon Schiele paintings lent by the Leopold Foundation in Austria for an exhibition at New York’s Museum of Modern Art (MoMA), an action that symbolized a willingness to provide a much-needed forum to redress past wrongs.³⁸ Heirs of the Holocaust victim who originally owned the paintings claimed them, although it had been presumed by the international art community that artworks exchanged through museums were protected against such seizure by federal statute.³⁹ The New York Court of Appeals eventually decided that, although the case presented “profound and opposing interests” that were magnified by the circumstances of Nazi atrocity, the New York legislature had made a policy decision 30 years prior when it enacted its Arts and Cultural Affairs Law that specifically exempted transient artwork from

³⁵ Lawrence M. Kaye, *Looted Art: What Can and Should Be Done*, 20 CARDOZO L. REV. 657, 664-666 (1998).

³⁶ See Lawrence Kaye, Herrick Feinstein LLP, available at <http://www.herrick.com/ourattorneys/bio.asp?page=bio&emp=33> (last visited Aug. 24, 2005).

³⁷ See Stuart E. Eizenstat, Covington & Burling, available at <http://www.cov.com/lawyers/eizenstat/biography.html> (last visited Aug. 25, 2005).

³⁸ Lawrence M. Kaye, *A Quick Glance at the Schiele Paintings*, 10 DEPAUL LCA J. ART & ENT. L. 11, 13 (1999).

³⁹ John Henry Merryman and Albert E. Elsen, *LAW, ETHICS AND THE VISUAL ARTS*, 41 (2002).

seizure.⁴⁰

Immediately following the decision, the United States government brought an action for forfeiture of an Egon Schiele painting, the *Portrait of Wally*. In 2000, the story of the MoMA's Schieles continued, although the judge ultimately found that the controlling law, based in stolen property tenets, was not applicable and the verdict therefore must be in favor of the Leopold Foundation; the painting was scheduled to return to Austria.⁴¹ Had the case reached its merits, the more interesting question requiring an analysis of the Act of State doctrine may have been raised. This Doctrine applies to property seizure by a foreign sovereign government when the foreign government is recognized by the United States at the time of the lawsuit and when the taking of the property occurred within the foreign sovereign's own territorial boundaries.⁴² In actuality, *Wally* remains in New York, in the custody of the MoMA. "The *Portrait of Wally* by Egon Schiele has been in storage for almost seven years since it was subpoenaed by the Manhattan district attorney in 1998. It was on loan at the time. And since then, there's been a battle over who really owns it."⁴³ The next phase of the proceeding will likely be to determine whether the painting was actually legally stolen under the relevant Austrian law and whether the painting should therefore be returned to the heirs of the Holocaust victim; there seems little doubt that a new trial will ensue.⁴⁴ In the event that a settlement is not reached, *Wally* may end up in possession of the United States government, an undesirable outcome for all parties to the controversy.⁴⁵

The second case involving the United States and Austria is 2004's *Republic of Austria v. Maria Altmann*.⁴⁶ Maria Altmann, a Jewish woman living in California, is the octogenarian niece and sole surviving heir of Adele Bloch-Bauer, whose portrait was done by Viennese painter Gustav Klimt. This portrait, valued at approximately USD150 million, is one of six paintings at the center of this United States Supreme Court case; the problem once again is threaded with Nazi matters and a menu of other unrelated legal issues.⁴⁷ Altmann fled Vienna during the war and has lived in Los Angeles since 1942. She and her family have made

⁴⁰ See *People v. The Museum of Modern Art*, 93 N.Y. 2d 729, 719 N.E. 2d 897 (1999). The relevant law is the New York Arts and Cultural Affairs Law, § 12.03.

⁴¹ *U.S. v. Portrait of Wally, a painting by Egon Schiele*, 105 F. Supp. 2d 288 (S.D.N.Y. 2000).

⁴² See, e.g., David Epstein *et al.*, INTERNATIONAL LITIGATION: A GUIDE TO JURISDICTION, Practice and Strategy, 3d. edn. (1998).

⁴³ Robert Siegel and Melissa Block, *Dispute over Rightful Owner of "Portrait of Wally" by Egon Schiele*, National Public Radio, All Things Considered, Dec. 27, 2004.

⁴⁴ Wissbroecker, *supra* note 7, at 50, citing Celestine Bohlen, *Judge Revives Case of Nazi-Looted Art*, NEW YORK TIMES, April 27, 2002, at B9.

⁴⁵ *Ibid.*, at 52.

⁴⁶ *Republic of Austria et al. v. Maria V. Altmann*, 541 U.S. 677, 124 S. Ct. 2240 (2004).

⁴⁷ See, e.g., Rosalie Higson, *Heir Can Sue Austria for War Spoils*, THE AUSTRALIAN, June 11, 2004.

several unsuccessful efforts to retrieve the Klimt paintings; indeed, Altmann has now fought a four-year legal battle to simply win the right to sue for the return of the paintings and, as per the U.S. Supreme Court decision, she may now do so. The Austrian Government suggests that the paintings, held in the national Austrian Gallery in Vienna, belong to the State. “Governments across the world are watching the case because of implications for national sovereignty and international law.”⁴⁸

It is essential to note that the United States government has been willing to spend time and money in its effort to provide opportunities for Holocaust victims and their heirs, notwithstanding the nationality of any of the parties, to recover artwork taken from them and their families during Nazi occupation. This is evident not only in the state of New York’s participation in the litigation over *Wally*, but also in the federal State Department’s hosting the Washington Conference on Holocaust-Era assets and the formation of the Presidential Advisory Commission on Holocaust Assets in the United States. Ronald Lauder, Chairman of the MoMA and a major collector of Viennese artists Gustav Klimt and Egon Schiele, has made huge efforts to compel museums around the world to inventory their collections for Nazi-looted art.

The U.S. government also recently settled a lawsuit with Hungarian survivors of the Holocaust, agreeing to pay USD 25.5 million and acknowledge U.S. Army officers’ plunder of Jewish valuables during the final days of World War II; the bulk of that money is dedicated to charities and agencies serving Holocaust survivors while the remainder is set aside for legal fees and creation of historical archives.⁴⁹ Israel Singer, Chairman of the World Jewish Congress in New York said that this act is a “moral and ethical victory,”⁵⁰ although Holocaust survivor Alex Moscovic takes a different stance: “The USD 25.5 million is just peanuts. The whole issue was not about money.”⁵¹ Numerous people align themselves on both sides of this issue. One author, siding with Mr. Moscovic’s point of view about the inadequacy of monetary remuneration but recognizing its potential usefulness, states his case eloquently:

[R]estitution cannot simply be a discourse in property law terms or in the “bottom-line” language of cost-accountants, though clearly there is a property and “bottom-line” accounting dimension to restitution; rather, we are talking of the value and worth of human life itself – of the value and worth of entire European Jewish communities selected for genocide, of the “what might have been” as well as the “what was” in existential as well as in property terms. ... Restitution, then is about the inherent dignity and worth of every human being – the inherent dignity and worth of an entire community. While restitution can never restore these lives, it can seek to restore their dignity.⁵²

⁴⁸ *Ibid.*

⁴⁹ Ann W. O’Neill, *U.S. Will Pay USD 25.5 Million in WWII Thefts: Settlement Addresses 1945 Looting of Nazi Gold Train*, SUN-SENTINEL, March 12, 2005.

⁵⁰ *Ibid.*, quoting Israel Singer.

⁵¹ *Ibid.*, quoting Alex Moscovic.

⁵² Irwin Cotler, *Confiscated Jewish Property: The Holocaust, Thefticide, and Restitution – A Legal Perspective*, 20 CARDOZO L. REV. 601, 623 (1998).

3. Austria

The *Wally* litigation originally elicited outrage from the Austrian government.⁵³ But, in direct response to the heated debate that came from that litigation, and perhaps from the attention paid to the auctioning of the Rothschild family collection in 1999,⁵⁴ Austria passed legislation permitting the return of confiscated artwork hanging in its own national museums.⁵⁵ The above-mentioned Ronald Lauder, the Chairman of the World Jewish Congress Commission for Art Recovery, is a former U.S. Ambassador to Austria. Many of Austria's strides in implementing cultural property policies have been credited to him. Mr. Lauder described his first recognition of the problem of looted art when he visited a monastery in Mauerbach.⁵⁶ In part thanks to him, in 1996, the Austrians turned 8,000 unclaimed artworks from the confines of this monastery over to Jewish groups. A subsequent auction by Christie's raised USD14.5 million for victims of the Holocaust. The *Wally* affair then triggered a series of exposés on war-related issues by Hubertus Czernin and Tomas Trenkler in the Viennese daily DER STANDARD.⁵⁷ Within 12 months, the Austrian Parliament approved legislation to return Jewish property from Federal museums, and in February 1999 agreed to begin the process with the well-documented Rothschild collection.⁵⁸ Mr. Lauder, in turn, credits Elisabeth Gehrler, a former Austrian Minister of Culture, with playing an essential role in the country's cultural policies as well. But he fears that the country's interest in the kingly prices of the Rothschild art has since clouded their intent to aid in restitution:

What has changed is that Austria has started to go back after they returned the 1,000 pieces to the Rothschild family. After the Rothschild family received their art, arms and armor and decorative arts, they made the decision to sell them at auction at Christie's. What happened in Austria is that they saw how much money these objects brought, and they started to change the law. I think the most flagrant change has been the change about the *Bloch-Bauer* case. This was the property, now, of a Mrs. Altmann, and she has tried to sue the Austrian courts. What's interesting is, for the Bloch-Bauer family the state returned porcelain sets and pencil drawings by Gustav Klimt. But they would not return the major paintings. We have here a collection worth tens of millions, if not hundreds of millions of dollars.

⁵³ Kaye, *supra* note 35.

⁵⁴ See Christie's, *Works of Art from the Collection of the Barons Nathaniel and Albert von Rothschild* (1999).

⁵⁵ Jane Perlez, *Austria Is Set to Return Artworks Confiscated from Jews by Nazis*, THE NEW YORK TIMES, March 7, 1998, at A1. The Austrian legislation is codified at 1390 of the *Beilagen zu den Stenographischen Protokollen des Nationalrates XX. GP Ausgedruckt am 25.9.1998*, CULTURAL HERITAGE STATUTES, 2d. edn., 89 (2004).

⁵⁶ Hearing of the House Banking and Financial Services Committee, Holocaust Assets. Chaired by Representative James Leach (R-IA), Feb. 10, 2000.

⁵⁷ Jason Edward Kaufman, *Austria Returns War Booty to Rothschilds*, THE WALL STREET JOURNAL, July 6, 1999, at A13.

⁵⁸ *Ibid.*

All of a sudden Austria changes its laws because of value.⁵⁹

Mr. Lauder's emphasis on the money the auction brought is to be reiterated; indeed, "[t]he treasures of the Rothschild family fetched more than double their expected prices, with the Christie's sale earning a total of USD 90.7 million, the biggest auction ever held in Europe."⁶⁰ The Christie's sale took place in London but obviously received international attention and "exceptional interest."⁶¹ When Nazi Germany annexed Austria in 1938, the Rothschild family fled, and the Nazis seized its fortune. The Rothschilds' abandoned home was at one point used as a headquarters of the Gestapo.⁶² Since the war, the collection had been in the hands of the Austrian government, which displayed it throughout the country's museums and libraries. The government agreed to return the collection to the Rothschild family in February of 1999 and the family, desirous of the proceeds the sale of the artwork might bring, sold the collection through Christie's.⁶³

Mr. Lauder made another important point at the Hearing of the Holocaust Assets Committee in 2000 that ties back to the introduction to this writing, regarding the weight, importance, and intricacy of the topic. The newspaper article reporting on the Christie's auction said that the Austrian government had "finally" returned the artwork to the Rothschild family. While it is difficult to disagree with this sentiment, it is essential to note that there are other factors in play in the totality of the question of Holocaust reparations. Mr. Lauder states:

I believe there are 75,000 apartments today in Vienna alone that were owned by Jews that are now not obviously owned by Jews. And there are many, many more questions. One of the things I feel is that before any agreement is made, *we have to look at the entire picture and come to a solution of it.* ... What you have to understand, at that time you had *enormous human suffering*. You had hundreds of thousands if not more of Jewish people in from concentration camps, you had DP, displaced person[s] camps all over, and you had problems of major starvation within Germany, Austria and different places. And although art was extremely important, it was much less down there; and there was a feeling of getting it done as quickly as possible. ... The answer is, yes, procedures were set up. But *nobody had the manpower to go in and look at the things. The obvious ones were sent back. But an enormous amount they didn't know what to do with, plus the fact that most of the owners were dead.* So the result is there [were] no records, and it's only been in the last two years that you have these type[s] of records we have.⁶⁴

Like the United States' history of dealing with post-Holocaust goings-on, Austria has had to deal with a number of other restitution problems including, as Mr. Lauder mentioned,

⁵⁹ Hearing of the House Banking and Financial Services Committee, Holocaust Assets, *supra* note 56.

⁶⁰ Gary Tuchman, *Rothschild Auction Becomes Largest Ever in Europe*, CNN.COM, July 8, 1999.

⁶¹ *Ibid.*, quoting Lord Charles Hindlip, then chairman of Christie's.

⁶² *Ibid.* See also Nicholas, *supra* note 6, at 38-40.

⁶³ *Ibid.*

⁶⁴ Hearing of the House Banking and Financial Services Committee, Holocaust Assets, *supra* note 56 (emphasis added).

residences and bank accounts. And, as is traditional in the “art world,” there is both an atmosphere of secret dealings and hushed scandals on the one hand, and high-visibility celebrity and pomp on the other.⁶⁵ This leads to incomplete stories, settlements outside of court that are never publicly aired and gentleman’s agreements that skirt traditional legal protocol, none of which contribute to a solid record or a comprehensive understanding. In an effort to push past this traditional art world veil of secrecy, Sophie Lillie, an Austrian art historian hired by the Jewish Community Association in Vienna, recently published a 1,500-page study and inventory of Vienna’s plundered art collections from World War II; it is packed with information and illustrations of paintings, rooms, and the people who lived there, along with Nazi files listing confiscated items from artworks to household objects.⁶⁶ Ms. Lillie said, regarding her book: “I know who took the house, took the business, who made an application to get another painting. I put all the names. I figure if you’re going to write about it ... My feeling is that if you are going to write about victims, and they usually get written about in detail, then it’s only just to also have all of the names of the people who were involved.”⁶⁷

4. Russia

Russia has recently received an unprecedented degree of attention regarding its retention of Nazi-era art. Russia and Germany have argued for years over the fate of tens of thousands of artworks that the Soviet Union captured and claimed as compensation for the incalculable damage caused by the Nazi invasion in 1941.⁶⁸ Ostensibly, it may soon return some of its trophy art and archives taken from Nazi Germany and its allies on a case-by-case basis.⁶⁹ In 1991, two Russian journalists writing for an American art journal reported the existence of an enormous collection of “trophy art” taken from Berlin by the Soviet Red Army at the end of World War II.⁷⁰ When two Russian museums opened exhibitions in 1995 that contained works of art widely thought to be lost or destroyed, the journalists’ report was confirmed.⁷¹ In 2000, a Russian law went into effect that distinguishes between illegal trophies, taken without

⁶⁵ See, e.g., Anthony Haden-Guest, *Art Scandal: Art World Shake-Up?*, FORBES.COM, Feb. 13, 2001. See also Borodkin, *supra* note 17.

⁶⁶ Rosalie Higson, *Sleuth in the Picture*, THE AUSTRALIAN, May 14, 2004.

⁶⁷ *Ibid.*, quoting Ms. Lillie.

⁶⁸ Steven Lee Myers, *In Moscow, a Proud Display of Spoils of War*, THE NEW YORK TIMES, May 17, 2005.

⁶⁹ *Russia Will Consider Return of World War II-era Trophy Art Only on Case-by-Case Basis*, KYIV POST, Feb. 11, 2005.

⁷⁰ Merryman and Elsen, *supra* note 39, at 69.

⁷¹ See also Konstantin Akinsha *et al.*, BEAUTIFUL LOOT: THE SOVIET PLUNDER OF EUROPE’S ART TREASURES (1995).

military sanction, and “legal” trophies, seen by Moscow as partial restitution for the 27 million lives lost during the Holocaust.⁷² Indeed, after the war ended, Joseph Stalin took reparation into his own hands and ordered Trophy Brigades to retrieve “price and quality equivalents of the artworks destroyed or removed from Russia during the War.”⁷³ Even as recent as 1997, the lower house of the Russian Parliament (the *Duma*) voted overwhelmingly to assert Russia’s ownership of these works of art seized from Nazi Germany.⁷⁴ One Russian World War II veteran said flatly: “I don’t think Russia should return art booty to Germany. We suffered a lot from the war, and those treasures should be viewed as a paltry compensation for the damage and sufferings.”⁷⁵

This year, upon the sixtieth anniversary of the defeat of Nazi Germany, Russian President Vladimir Putin has shown some readiness to negotiate Germany’s pursuit of a return of cultural objects. He has said that Russia “would like to resolve it in a way that does not harm relations, but makes them better,” and suggested that an exhibition of art returned to Germany from Russia could be shown in Russia to create an atmosphere conducive to further progress.⁷⁶ The ease with which certain collections or pieces may be returned depends a great deal on whether they were looted from State or private hands in Germany. The silver collection of the German Anhalt family, for example, had been private property before its removal and therefore is not subject to the State Duma for its return.⁷⁷ Anatoly Vilkov, Deputy Director of the Federal Service for Cultural Legacy, seems to hold the traditional Russian stance on the matter, however, as he very recently explained the Service’s reasons for retaining cultural valuables:

[War trophies] are not illegal military trophies but our lawful compensation for the losses suffered by the Soviet Union in World War II. Today, Russia and our federal service in particular are conducting a resolute search for and documentation of the valuables removed by the Nazis and are registering all the information in catalogues. ... The unprecedented scale of the losses the Nazis caused to Russian culture became clear even during the war. ... It was on [a] legal basis and in keeping with the legislation that was in effect in the occupation zones of Germany and the orders of the Soviet military command that exercised authority ... that valuables later described as trophy art were brought. ... We believe that *everything that remains after all that we returned at least partly compensates for our enormous*

⁷² *Ibid.*

⁷³ Maples, *supra* note 10, at 361, citing Trey G. Elmer, *A Question of Dignity: An Equitable Solution to the Trophy Art Debate*, 20 N.Y.L. SCH. J. INT’L & COMP. L. 117, 119-120 (2000).

⁷⁴ Lev Krichevsky, RUSSIAN LAWMAKERS STAKING CLAIM FOR LOOTED NAZI ART (1997). The Soviet Union withstood a horrific death toll during World War II; in the 900-day siege of Leningrad alone, one million Russians died.

⁷⁵ *Ibid.*, quoting Isaak Gelbwasser.

⁷⁶ Robin Munro, *Putin Says Trophy-Art Return Is Negotiable*, THE ST. PETERSBURG TIMES, Jan. 18, 2005.

⁷⁷ *Ibid.*, citing German Culture Minister Christina Weiss and art experts knowledgeable about the Anhalt Collection.

losses.⁷⁸

Mr. Vilkov's statement regarding his country's losses is certainly not exaggerated. Indeed, in an official memorandum of the German command, the Nazis had planned the complete annihilation of entire Soviet cities. In a secret order of the Chief of the Naval Staff addressed to his officers, it was written that the "Führer has decided to erase from the face of the earth St. Petersburg. The existence of this large city will have no further interest after Soviet Russia is destroyed."⁷⁹ The stance of the cultural ministers of Russia is reflective of the fact that amends have yet to be felt; they have "steadfastly refused to reopen the issue. They cite Russian law that allows the return only of trophies taken without authorization – as opposed to those officially seized as compensation – and of works belonging to anyone who suffered from Nazi repression."⁸⁰

5. France

In Hector Feliciano's 1997 book *LOST MUSEUM*, he showcased some of the most negligent and nefarious acts of art looting and provided several examples from France.⁸¹ Feliciano concedes that France was the most looted country in Western Europe with "one-third of all the art in private hands ... [having been] pillaged by the Nazis."⁸² Baron Alphonse de Rothschild, for example, had the bulk of his art stolen from his Paris residence and, in an incriminating letter to Hitler in his capacity as the head of the ERR, Alfred Rosenberg wrote: "I am pleased moreover to inform the Fuehrer that the painting by Jan Ver Meer of Delft [*sic*], to which he made mention, has been found among the works confiscated from the Rothschilds."⁸³ Despite the looting suffered by the French Jewish population, Feliciano charged the curators of French museums with having "made no huge effort" to find the rightful owners for "thousands of unclaimed works" at the end of the war.⁸⁴ According to the French Ministry of Culture, 61,000 works were returned to France after the war and 45,000, or approximately 80 percent, were returned to the proper owners. Of those that went unclaimed, 2,000 of the most important works were distributed to national museums, and the remainder was sent to auction houses.⁸⁵ The French government also created a website in

⁷⁸ *Trophy Art Cannot Be Considered Illegal*, INTERFAX NEWS AGENCY, May 9, 2005 (emphasis added).

⁷⁹ Merryman and Elsen, *supra* note 39, at 29, citing Staff IA No. 1601/41, dated 29.IX.1941.

⁸⁰ Myers, *supra* note 68.

⁸¹ See generally Feliciano, *supra* note 13.

⁸² *Ibid.*, at 4.

⁸³ *Ibid.*, at 15.

⁸⁴ *Ibid.*, at 215.

⁸⁵ *Ibid.*, at 216.

1997 to publicize works that it had discovered as looted during the Nazi era. Since 1999, 25 of these works, including Monet's *Nymphéas*, have been restituted.⁸⁶ "But France has refused to carry out a thorough provenance research of its major collections."⁸⁷ Whether it is thorough or not, the French government, through les *Musées Nationaux Récupération* (National Museums Recuperation – "MNR") has produced some catalogued compendia, such as a *Catalogue sommaire illustré des peintures du Musée du Louvre et du Musée d'Orsay* (illustrated summary catalogue of paintings of the museums Louvre and d'Orsay), published by *Réunion des musées nationaux* in 1986.⁸⁸

Jean Matteoli, who is a former French resistance fighter and a non-Jewish concentration camp survivor, recently headed a commission to report on the looting of Jewish assets under the wartime Vichy regime.⁸⁹ The 3,000-page "Matteoli Report" suggests that France had previously underestimated the extent to which Nazi Germany and its French collaborators had looted both money and property from Jews living in France. Matteoli stated that it was "profoundly revolting" that, as early as 1940, the Vichy government took measures "beyond what the Nazis demanded."⁹⁰ The commission recommended, as part of its findings, that the French government and French banks contribute USD 350 million to a Holocaust memorial foundation as compensation for unreturned Jewish assets and proposed that several artworks without known heirs be donated to the Israel Museum in Jerusalem.⁹¹

The Matteoli Commission rendered a very important service in helping to identify what may be as many as 2,000 or more pieces of looted art, many of which had been housed or hanging in the Louvre, the Jeu-de-Paume, and other French museums. The museums have begun the process of identifying those artworks and several have been posted on the Internet. "We know that actual paintings are now being returned to families. This has occurred to the Rothschild family and others."⁹² Stuart Eizenstat, Deputy Secretary of the U.S. Department of Treasury mentioned above, made an important point regarding France's recent change of stance on its involvement in the Holocaust, highlighting President Chirac's long-awaited recognition of France's responsibility for its actions during the Vichy regime and the subsequent creation of

⁸⁶ Riding, *supra* note 16.

⁸⁷ *Ibid.*

⁸⁸ Mr. Robert Fohr, Direction des musées de France, Country Reports, available at http://spoils.libfl.ru/spoils/eng/spoil2_4.html (last visited May 11, 2005).

⁸⁹ Joshua Schuster, *France Issues Report on Looted War Assets*, JEWISH TELEGRAPHIC AGENCY, Apr. 21, 2000.

⁹⁰ *Ibid.*, quoting Jean Matteoli.

⁹¹ *Ibid.*

⁹² U.S. House of Representatives, Committee on Banking and Financial Services, Washington, D.C., Sept. 14, 1999, Hon. James A. Leach presiding, statement of Hon. Stuart E. Eizenstat, Deputy Secretary, U.S. Department of the Treasury.

the Matteoli Commission; both were extremely important events.⁹³

Indeed, the Vichy government was French – not German – and there were innumerable crimes committed by French nationals; “the plunder of property of French Jewry, 75,000 of whom were deported to the death camps, was carried out by French Vichy and not German officials.”⁹⁴ In this vein, Mr. Elan Steinberg, Executive Director of the World Jewish Congress, acknowledges the formation of the Matteoli Commission as a positive but insufficient step:

It does not, as it currently functions, meet the standards of accountability and transparency. To cite an example: French banks have handed the Matteoli Commission a list of some 63,000 accounts held by Jews during World War II. Neither the Matteoli Commission nor the French banks has agreed to publish this list. More importantly, these accounts were generated through the internal audits of the French banks and without any process of independent verification handed over to the Matteoli Commission. This is not accountability. It were as if the Swiss banks, without the independent oversight of the Volker Commission, were allowed to unilaterally determine which were relevant accounts. We are also disappointed that France has yet to follow through on its promise to contribute 20 million francs from looted Nazi gold to a fund for needy Holocaust victims.⁹⁵

France, then, is dealing with a poor international reputation regarding its management of Holocaust-era assets. Having made a public statement that it accepts responsibility for its Vichy government, it seems in a better position to address the stockpile of looted art in its national museums. And recent litigation, such as the case concerning Picasso’s *Femme en Blanc*⁹⁶ – a painting bought by Americans through a New York dealer from a private collection in Paris – highlights the residual problem of Nazi-looted art with strong ties to France.

6. Conclusion

The policies implemented by various countries affected by Nazi art and cultural property looting demonstrate a seemingly incoherent tapestry of international reactions to Nazi atrocities, domestic property law and the question whether “trophy art” should be kept as reparation or returned as a gesture of diplomacy. While the Russian position and the American position are outwardly contradictory, the reality is that very few works of art from

⁹³ President Chirac deserves an enormous amount of credit for his political courage. After some fifty years, he was the first French president to recognize the fact that France had responsibility for the actions of the Vichy regime, that they had to be explored in depth, and that the government of France had to assume responsibility for the actions of the Vichy French government during the War. This is an important initiative, and the fact that he helped create the Matteoli Commission is something to his credit. *Ibid.*

⁹⁴ Cotler, *supra* note 52, at 605.

⁹⁵ *Ibid.*, statement of Elan Steinberg, Executive Director of the World Jewish Congress.

⁹⁶ *United States of America v. One Oil Painting Entitled “Femme en Blanc” by Pablo Picasso*, 2005 U.S. Dist. LEXIS 5977, 2005. See also *Alsdorf v. Bennigson*, 2004 U.S. Dist. LEXIS 24696, 2004.

any country have been returned to the heirs of Nazi victims. Domestic laws – in almost all countries – do not directly address the issue and the outcome of most litigation, and therefore turn on domestic legal idiosyncrasies rather than on grounds of substantive legal policies. The majority of works of art that have been returned have been returned as acts of goodwill and diplomacy or to avoid national or museum-world embarrassment. The international “art world” is perhaps more acutely aware of Nazi-era provenance than it was even twenty years ago, thanks to publications on the topic and online lists of stolen art, as well as agencies like the Art Loss Register that proactively try to provide a repository of information and specialized service to people who are looking for stolen goods.

Given these factors and circumstances, it is likely unhelpful to draw any solid conclusions regarding the efforts of specific governments, groups of people or their respective systems of restitution law. I do not suggest that this research or analysis has been entirely unfruitful, but I am aware that it is one thin slice of the entire complex, international story that could be told on the topic; the whole story is unknowable. Indeed, “[c]omparative law has rarely shown itself capable of generating broad and deep insight of general interest ... into the structure and development of legal systems or into the relationship between law, society, and culture on a regional or worldwide basis.”⁹⁷

The topic is, furthermore, highly emotional. Those who experienced the Holocaust automatically have a different point of view than those who did not. Those whose art was confiscated, those who are Jewish, and those who suffered a range of repercussions from the Holocaust are likely to feel more strongly about the usefulness and merit of the restitution of war booty. What this writing has hopefully highlighted is that individual countries, whether they have implemented policies on the subject of cultural property restitution or not, have to wade through a wide range of facts that make every case unique. Domestic property laws, for example, along with international conventions, museum policy considerations, the stigma of Nazism and its ties to Germany, and a host of other factors come into play before and during any actual litigation. Efforts to cull public interest in the topic have prompted governments to look at the issue and occasionally to go so far as to legislate. But in terms of actually getting a piece of looted art back to its rightful owners, each case must be carefully reviewed in light of the specific countries concerned, their current and prior laws, and the impact the ultimate restitution may have on diplomatic relations between the countries involved. Nazi-victim heirs do continue to bring lawsuits and instances of restitution do continue to happen, thankfully, even if one at a time.⁹⁸

Despite the fact that it is individuals and families that have suffered as a consequence of the stolen art, the issue seems to turn on international relations, intricacies of conflict of laws issues, conflicts of cultural perspective, and willingness to meaningfully confront an

⁹⁷ Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 685 (2002).

⁹⁸ See, e.g., David Rosenzweig, *San Diego Man Sues Spain for Return of Art Taken by Nazis*, LOS ANGELES TIMES, May 11, 2005. See also Clerke Bustard, *Nazi-Looted Art to Be Returned: Virginia Museum Will Give 1500s Flemish Painting to Poland*, RICHMOND TIMES, Sept. 24, 2005.

extremely difficult reality. Regarding the Holocaust years, Elie Wiesel, in his foreword to Stuart Eizenstat's book *IMPERFECT JUSTICE*, notes:

[S]omehow their simple economic dimension seems to have been utterly neglected. Why? Is it because many of us felt the remembrance of the Tragedy to be so sacred that we preferred not to mention its financial implications? Is it because the task of protecting the memory of the dead was conceived by us as so noble, so painful, and so compelling that we considered it undignified and unworthy to think of anything else, and surely not bank accounts? In truth, some of us feel reticent to talk about it even now.⁹⁹

Ann Webber, Executive Director of the Commission for Looted Art in Europe, recently noted that there is "an avoidance of the obligation to right these injustices, and we're very aware that time is running out."¹⁰⁰ Governments and individuals must maintain and intensify current efforts to improve the state of this important international dilemma.

⁹⁹ Eizenstat, *supra* note 14, at Foreword, x.

¹⁰⁰ Nathaniel Popper, *Suit Highlights Failures on Art Restitution*, MUSEUM SECURITY NETWORK, May 13, 2005.