

A MOOT ISSUE? RETHINKING HOLOCAUST ERA RESTITUTION OF JEWISH CONFISCATED PERSONAL PROPERTY IN POLAND

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I. INTRODUCTION

The German invasion of Poland began with the widespread confiscation of property in an effort to fund Hitler's war effort and to eradicate Poland of all things "degenerate."¹ In 1939, Poland was the site of the world's largest Jewish population and the center of the European Jewish World.² However, after the German invasion, Poland became the site of Nazi Germany's most extensive concentration camp and ghetto.³ The massacre of Polish Jews accounted for a substantial number of the victims in the Holocaust.⁴ Indeed, three million Jewish citizens of Poland died at the hands of Hitler.⁵ The Nazis ripped the Jews from their homes, closed their businesses, ruthlessly "confiscated" their assets and other belongings, and sent them to camps to do hard labor and die.⁶ Even those

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¹ MARTIN DEAN, *ROBBING THE JEWS: THE CONFISCATION OF JEWISH PROPERTY IN THE HOLOCAUST, 1933-1945* 173 (2008). Degenerate art was a term used by Hitler to describe modern art or art that did not support the Third Reich's ideals of health, hard work, family life and racial purity. World Art Collections Exhibitions, *Art in Nazi Germany*, available at <http://www.scva.org.uk/education/resources/pdfs/17.pdf> (last visited April 23, 2012).

² DARIUSZ STOLA, *The Polish Debate on the Restitution on Property*, in *ROBBERY AND RESTITUTION: THE CONFLICT OVER JEWISH PROPERTY IN EUROPE* 240, 240 (Berghahn Books 2007).

³ Jonathan Huener, *Antifascist Pilgrimage and Rehabilitation at Auschwitz: The Political Tourism of Aktion Sühnezeichen and Sozialistische Jugend*, 24 *GERMAN STUD. REV.* 513, 513 (2001), available at <http://www.jstor.org/stable/1433413>. Auschwitz-Birkenau became the killing center where the largest numbers of European Jews were killed during the Holocaust. Louis Bülow, *Hitler's Women*, available at <http://www.auschwitz.dk/women/faq.htm> (last visited April 23, 2012). The largest ghetto in Poland was the Warsaw ghetto. Over 400,000 Jews were crowded into an area of 1.3 square miles. *Id.*

⁴ MICHAEL C. STEINLAUF, *BONDAGE TO THE DEAD: POLAND AND THE MEMORY OF THE HOLOCAUST* ix (1997).

⁵ United States Holocaust Memorial Museum, *Polish Victims*, *HOLOCAUST ENCYCLOPEDIA*, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005473> (last visited Oct. 2, 2010).

⁶ DEAN, *supra* note 1, at 178-79.

objects classified as “unacceptable for home consumption” were used for Nazi gain, as Hitler was “not unaware of [the object’s] market value . . . and the rejects ended up in collections worldwide.”⁷ Thus far, little has been done to return these possessions to their true owners.

Large international non-binding conferences have strategized efficient methods for the restitution of Holocaust victims’ property plundered by Nazi Germans and their allies.⁸ While Poland has been in attendance at every conference, campaigning for justice alongside other nations, it remains the only major Eastern European country that has not passed legislation for the restitution of Jewish-confiscated personal property.^{9,10} Each bill proposed thus far has been struck down as “unworkable.”¹¹ In fact, besides Lithuania, Poland is the only country that has been admitted into the European Union even though it failed to meet all the mandated pre-requisites; “the restitution of possessions confiscated by the Nazis or communists was a condition of Polish entry according to resolutions published by the European Commission.”¹² As of now, only Jewish communal property can be reclaimed in Poland.¹³

Poland has shown utter indifference to the situation, as approximately 89,000 real property claims remain unresolved.¹⁴ A

⁷ Andrea Cuning, *The Safeguarding of Cultural Property in Times of War & Peace*, 11 TULSA J. COMP. & INT’L L. 211, 217-18 (2003).

⁸ Julius Berman, *The Holocaust-Era Assets Conference in Prague and Its Outcome*, 4 ISR. J. FOREIGN AFF. 49, 49 (2010), <http://forms.claimscon.org/restitution/Holocaust-era-assets.pdf>.

The London Conference on Nazi Gold in December 1997, the Washington Conference on Holocaust-Era Assets in December 1998, and the Vilnius International Forum on Holocaust-Era Looted Cultural Assets in October 2000—not only resulted in direct agreements and guidelines, but also helped move forward a variety of parallel negotiations and actions by individual governments

Id.

⁹ Harry Templeton & Jonathan Czapski, *Property Restitution: Should Poland Pay?* KRAKOW POST, Sept. 2, 2008.

¹⁰ In this essay, personal property includes both non-movable objects such as real estate and moveable assets such as objects of art and pieces of Judaica owned by individuals.

¹¹ See Templeton & Czapski, *supra* note 9.

¹² See *Id.*

¹³ Negotiations: Restitution in Poland Hungary, Romania and Other Countries in Eastern Europe, CLAIMS.CON.ORG, http://www.claimscon.org/?url=negotiations/e_europe (last visited Nov. 5, 2010). Communal property refers to possessions that were owned by Jewish communal or religious entities and used by local Jews. Herbert Block, *The Restitution of Holocaust-Era Jewish Communal Property: An Unfinished Item on the Jewish Diplomatic Agenda*, ISRAEL J. OF FOREIGN AFF. III 1, 1 (2009). Examples include Jewish scriptures, religious texts, and objects related to Jewish traditions and worship. *Id.* at 2.

¹⁴ Templeton & Czapski, *supra* note 9, at 1. Real property refers to immovable property such as real estate or realty. *Id.*

estimation cannot even be extracted for the number of personal property that has been returned by Poland to claimants, as Bogdan Zdrojewski, head of the Polish Ministry of Culture, remarkably asserts that “[t]he Ministry of Culture and National Heritage does not keep such blanket statistical records.”¹⁵ It is estimated that compensation for real property claims alone would amount to approximately forty billion dollars to reimburse claimants at today’s market.¹⁶ While the restitution of Jewish-confiscated real property disputes have taken the spotlight and have dominated scholarly discussion on Polish restitution, the restitution of personal movable property, such as looted artwork and personal Judaica, has fallen by the wayside as an impossible feat. Most personal property has mostly fallen under the rubric of Polish, rather than Jewish losses, in any maintained records.¹⁷ Only in June 2009, at the Holocaust Era Assets Conference in Prague, did Polish historian, Nawjoka Cieślińska-Lobkowicz, step forward to say that the restitution of looted art is a real issue in Poland that has simply been ignored and needs further investigation.¹⁸

This note will expose the restitution of personal movable property, particularly looted art, in Poland as a field that has been inadequately explored and which requires thorough investigation in order to promote justice and redress injuries following the extreme atrocities Jewish Poles faced.¹⁹ Although the author of this note recognizes that non-Jewish Poles also lost property, this note focuses solely on the restitution of Jewish-confiscated assets, as Jews were particularly impacted by Holocaust looting and the sheer unwillingness of the Polish government to help this class of people.²⁰ However, as this article argues, restitution will not occur if such

¹⁵ Judy Dempsey, *Roadblocks Remain in Case of Paintings Lost to Nazis*, N.Y. TIMES, Oct. 29, 2010, available at http://www.nytimes.com/2010/10/29/arts/29iht-loot.html?_r=2&pagewanted=all.

¹⁶ Templeton & Czapski, *supra* note 9, at 1.

¹⁷ Nawojka Cieślińska-Lobkowicz, *The Obligation of the State or a Hobby of the Few: The Implementation of the Washington Principles in Poland*, Presentation at EU- Holocaust Era Assets Conference in Prague- Terezin (Jun. 26–30, 2009), available at www.holocausteraassets.eu/.../WG_LA_2_1_Cieslinska_Lobkowicz.pdf.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* See also Ambassador Naphtali Lau-Lavie, *Confiscated Jewish Property: In Pursuit of Justice: Recovering Looted Assets of European Jewry*, 20 CARDOZO L. REV. 583, 587 (1998). “Polish government did not agree to address the issue of restitution of Jewish communal properties until many years after all other religious denominations received restitution of confiscated properties. One must question whether there has really been progress in the attitude of the Polish leadership since the Narod article of 1942.” *Id.*

responsibility is left with the Polish government. This note addresses the many complexities specific to restitution of property in Poland, including tenuous Jewish-Polish relations and the stubborn and dismissive attitude of Polish leaders.²¹ Restitution is further problematic in Poland due to the numerous claims made by heirs of the true owner, as ninety-percent of the Jewish Polish population died during the Holocaust.²²

Because Poland is not willing to resolve these pressing issues effectively through legislation, victims must pursue their claims through litigation or through settlement.²³ This note demonstrates that while alternative dispute resolution (“ADR”)²⁴ is the preferable method for the restitution of Holocaust era assets, such a process will not work in Poland at this time due to Poland’s unwillingness to take responsibility for its past and present assistance in the theft of Holocaust victims’ property. External adjudication through an international arbitration tribunal and outside pressure from the European Union is necessary to prompt action. The European Union demands that all of its members meet its requirements in order to maintain the benefits it receives as a member.²⁵ This note proposes that a protocol to the European Convention on Human Rights should be created and adopted which would give this international tribunal binding and compulsory jurisdiction over its signatories on issues relating to the restitution of property confiscated during the Holocaust.

Part I of this note will recount the historical events in Poland that resulted in the massive and ruthless appropriation of Jewish property, not only by the Nazis and the Communist regime, but also by non-Jewish Poles. The inadequate restitution policies following Poland’s independence will then be explored, demonstrat-

²¹ Dempsey, *supra* note 15, at 1.

²² Shula Kopf, *Poles Confront the Dark Side*, JERUSALEM REPORT, Oct. 31, 2010, available at <http://www.jpost.com/JerusalemReport/Article.aspx?id=193303>.

²³ *Urged by Claims Conference, Both Houses of Congress to Call for Eastern European Property Restitution*, CLAIMS RESTITUTION, http://www.claimscon.org/index.asp?url=news/eerestitution_063008 (last visited Oct. 10, 2010). Lithuania has also not met the EU requirements as it has no law to enable recovery of or compensation for Jewish communal assets lost during the Shoah. *Id.*

²⁴ ADR includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation. *Alternative Dispute Resolution Practitioners’ Guide*, CENTER FOR DEMOCRACY AND GOVERNANCE 58, available at http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacb895.pdf (last visited May 23, 2012).

²⁵ *The Campaign for Restitution of Polish Nazi Victims*, POLISHRESTITUTION.COM, <http://www.polishrestitution.com/about.php> (last visited Oct. 30, 2010).

ing Poland's unwillingness to deal with the theft that occurred within its borders, instead favoring sheer dismissal of the issue in the hopes of concentrating on rebuilding its war-torn country.

Part IIA will explore Poland's continued refusal to create and enforce policies that would assist in the restitution process, marking Poland as a country that lags behind other EU members in this regard and as a violator of EU mandates. This section will reveal that Poland's continued inadequate restitution policies is due to: Polish officials' resistance to take responsibility, preferring to paint and preserve an image of Poland as the victim of the Holocaust; the steadfast anti-Semitic views that are implanted into Poland's culture and that pre-date World War II; the incomplete and faulty cataloguing techniques Poland used both after Poland re-gained its independence and at present; and finally, the lack of legislation passed to expedite the return of stolen property that rightfully belongs to these victims. Part IIB will discuss the effectiveness of ADR in dealing with these time-sensitive, costly and emotional restitution claims, and will argue that ADR will not work in Poland. Additionally this section will demonstrate that even where negotiations would work and, in fact, have worked between individuals, the government's investment in this property would undo any success achieved and prevent the property's return.

Part III will emphasize the need for external mandates from a central authority in order for ADR to be effective in solving restitution of looted property in Poland. It will demonstrate the need for European Union to pressure countries, like Poland, that have not fulfilled their responsibility to return property stolen from Jews during the Holocaust and to take action through awarding sanctions and withholding EU member benefits. Additionally this section, will explore the possibility of the establishment of an international arbitration tribunal to resolve claims for the restitution of personal property looted during the Holocaust, supported by the cooperation of the European Union and as a protocol to the European Court of Human rights.

Part IV will conclude this note and will call for immediate action for Poland to finally restore the property robbed from innocent victims.

II. BACKGROUND

A. Under Germany's Control

Less than two weeks prior to Germany's invasion of Poland, Germany and the USSR entered into a non-aggression pact designating which portions of Poland each side would conquer.²⁶ A dual invasion and partitioning of Poland by Germany and the Soviet Union marked September 1939.²⁷ These two forces left Poland in economic and political ruin.²⁸ The conquerors looted the country, "carrying off with them priceless art works, industrial equipment, and anything else of value. Stalin seized Poland's extensive Eastern Borderlands, replacing the old Polish legal, economic, social, political, and cultural systems with a Soviet one."²⁹ The Soviets attempted "Sovietization," or a "wholesale expropriation of private, religious and Polish state property assets."³⁰ The invaders shut down or "Aryanized" economic enterprises and businesses.³¹ This was especially problematic for the Jews, since the Jews dominated the entrepreneurial class in the eastern Polish lands.³²

Germany dominated the West side, which Hitler incorporated directly into the Reich, transplanting this parcel of land with German laws and institutions.³³ In 1938, "various decrees enabled the Nazis to confiscate Jewish" property.³⁴ In order for West Poland to uphold the ideals of the Reich and to help finance the war effort, German invaders destroyed or looted any Polish artwork or architecture considered to be "degenerate," and either immediately

²⁶ *Poland: Poland Obstacles To Restitution And A Complex Post-War History*, COMMISSION FOR ART RECOVERY, <http://www.commartrecovery.org/cases/poland> (last visited April 25, 2012).

²⁷ Marek Jan Chodakiewicz & Dan Currell, *Restytucja: The Problems of Property Restitution in Poland (1939 – 2001)*, in *POLAND'S TRANSFORMATION: A WORK IN PROGRESS* 157, 160 (2003).

²⁸ *Id.* at 160.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* "Aryanized" refers to the sifting of conquered peoples by the Nazis in order to "improve" the population by removing individuals (along with their businesses and possessions) who failed to conform to the Third Reich's racial Ideals. *Liquidation of Jewish enterprises*, ÚSTAV PAMÄTI NÁRODA, <http://www.upn.gov.sk/likvidacie/english/glossary.php> (last visited April 25, 2011).

³² Chodakiewicz & Dan Currell, *supra* note 27, at 4.

³³ *Id.* at 160.

³⁴ Lawrence M. Kaye, *Looted Art: What Can and Should Be Done*, 20 CARDOZO L. REV. 657, 657 (1999).

killed the Poles living in the area or deported them to central Poland.³⁵ Special looting “commandos were established in Poland with art historians on staff.”³⁶ These military units were responsible for authenticating and confiscating artworks in 1939.³⁷

While the destruction hurt both Jews and non-Jews, the Nazi decrees introduced were “accompanied by specific waves of anti-Jewish violence.”³⁸ Along with the first mass shootings, “Jewish places of worship were destroyed and areas with high concentration of Jewish residents were systematically robbed.”³⁹ Jewish businesses were particularly targeted, as many Jewish businesses dominated the leather, fur, and textile industries, and many Jewish owners had left their businesses and homes in attempt to flee the Nazis.⁴⁰ Much of this property would be sold at less than market price to further the integration of ethnic Germans.⁴¹ In November 1939, the bank accounts of Polish Jews were frozen, and those Jews who had not managed to withdraw their funds in time suffered great losses.⁴² Another decree administered the by *Haupttreuhandstelle* (HTO), an organization under the Reich responsible for property confiscation in Poland, came in January 1940, when Germans demanded compulsory registration by Jews of all valuables in Jewish possession.⁴³ This 1940 decree became the basis for the massive loss of privately owned valuables for both Jews and Poles.⁴⁴ Around 6,000 case files of the HTO have survived in the archives of Berlin documenting the administration and sale of “various types of assets, including businesses, life insurance policies, banks accounts, securities, real estate, silverware, and other household items.”⁴⁵

The central part of Poland, called the General Government (*Generalgouvernement*), became its own entity, but was still under total Nazi control.⁴⁶ While destruction in the General Government

³⁵ Chodakiewicz & Dan Currell, *supra* note, 27, at 5.

³⁶ Kaye, *supra* note 34, at 657.

³⁷ *Id.* at 657.

³⁸ Dieter Pohl, *The Robbery of Jewish Property in Eastern Europe Under German Occupation*, in *ROBBERY AND RESTITUTION: THE CONFLICT OVER JEWISH PROPERTY IN EUROPE* 68, 71 (2007).

³⁹ *Id.* at 71.

⁴⁰ DEAN, *supra* note 1, at 177.

⁴¹ *Id.* at 184.

⁴² Pohl, *supra* note 38, at 71.

⁴³ *Id.* at 71.

⁴⁴ *Id.* at 71-72. See also DEAN, *supra* note 1, at 151.

⁴⁵ DEAN, *supra* note 1, at 151.

⁴⁶ Chodakiewicz & Currell, *supra* note 27, at 4.

began at a much smaller scope than in western Poland, and some Jewish businesses were able to stay open for business, this soon changed as the German companies began to move their businesses into the central parcel, partly to escape the Allied air raids.⁴⁷ In 1941, as the invasions pressed deeper into Poland, Hitler captured Stalin's share of Poland and incorporated it into the General Government.⁴⁸ As the Germans conquered, they stripped Poland of its own laws, and fashioned increasingly stricter decrees punishable by death, restricting Jewish economic activities and eventually stripping all Jews of their property.⁴⁹

The forced resettlement into ghettos led to further Jewish property loss.⁵⁰ The largest ghetto, Warsaw, the Polish capital, confined almost a half million Jews.⁵¹ As the Germans relocated the Jews into these confined areas, they became obsessed with uncovering and seizing all of their valuables and "tried to drain the ghettos of all assets."⁵² A "deal" was made with the Jews in Polish ghettos, forcing them to buy food at exorbitant prices.⁵³ Any Jew who violated Nazi Germany's laws while in the Ghetto, would, if "lucky enough," be punished by monstrous fines.⁵⁴ Besides a single suitcase that each Jew was allowed to bring, all other possessions had to be left behind.⁵⁵ All parts of "abandoned" Jewish homes would eventually be looted and sold to help the war effort and to bolster the "Aryanization" ideal.⁵⁶

As the Jews saw the walls closing in on them, many desperately bargained with non-Jewish Poles and even the Gestapo in an attempt to save themselves and loved ones from deportation.⁵⁷ Although bribery of assets between Jews and non-Jewish Poles saved some Jews, it also perpetuated corruption, as some non-Jewish Poles used the Jews' vulnerability to their benefit, acquiring property through extortion and false promises.⁵⁸ As the Jews faced

⁴⁷ Pohl, *supra* note 38, at 70.

⁴⁸ Chodakiewicz & Currell, *supra* note 27, at 4-5.

⁴⁹ *Id.* at 5.

⁵⁰ Pohl, *supra* note 38, at 73.

⁵¹ *Ghettos in Poland*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/outreach/en/article.php?ModuleId=10007706> (last visited Nov. 5, 2010).

⁵² Pohl, *supra* note 38, at 73.

⁵³ *Id.* at 73.

⁵⁴ *Id.* at 73.

⁵⁵ DEAN, *supra* note 1, at 187-88.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ DARIUSZ STOLA, *supra* note 2, at 242.

death, their homes and businesses continued to be raided—this time by the locals, who considered such property “abandoned.”⁵⁹

Some Holocaust victim’s property went into the hands of Polish individuals, who acquired the objects either directly or from the (occupying) state. Most often they simply took possession of it as the owners were deported or murdered. Sometimes the German authorities sold to the local population remnants of Jewish property that they found to be useless for the German state.⁶⁰

The last remains that Jews possessed in the ghettos often ended up in the hands of Poles through “black-market” trade.⁶¹ Jews would trade whatever they had left to their Polish counterparts in order to receive “illegal contraband,” such as food and other sources of sustenance, in order to remain alive and avoid starvation.⁶²

In June 1941, the systematic genocide began.⁶³ Hitler ordered his Security Police to take any remaining moveable property from the Jews either directly before they were murdered or immediately following their death.⁶⁴ As the Jewish population dwindled, the Security Police continued their search for property going back to the victims’ homes and taking any valuables that had been missed.⁶⁵ Although these missions were to provide property to the Reich, many of these last looted valuables would end up in the pockets of Hitler’s officers.⁶⁶

B. *The Soviet Regime and Inadequate Restitution After the War*

Stalin began to regain power between 1944 – 1947 and, moving inward from the east, reincorporated the Polish eastern border.⁶⁷ The Communist invasion led to the expulsion of several million Christian Poles to Central Poland.⁶⁸ Stalin then expelled Germans from Eastern Germany, awarding the land to Poland.⁶⁹

⁵⁹ Chodakiewicz & Currell, *supra* note 27, at 161.

⁶⁰ STOLA, *supra* note 2, at 240.

⁶¹ *Id.* at 242.

⁶² *Id.*

⁶³ Pohl, *supra* note 38, at 73.

⁶⁴ *Id.* at 73.

⁶⁵ *Id.* at 74.

⁶⁶ *Id.*

⁶⁷ Chodakiewicz & Currell, *supra* note 27, at 7.

⁶⁸ *Id.*

⁶⁹ *Id.* at 162.

State sponsored persecution of the Jews under the auspices of the Nazi regime continued at the hands of the new Communist Polish government even after World War II.⁷⁰ Two years after the War had ended, approximately 1,000 more Jews were murdered in the state of Poland while the Communist Polish government nationalized the country's property through mass expropriations."⁷¹

Although the Communists could have passed laws that restored all property stolen by the Nazis to their rightful owners, the Marxist-Leninist rulers did not.⁷² The survivors who managed to return to a Soviet Poland were once again rejected and desolate, as all of their property had been divided during the years they were tortured, beaten and humiliated.⁷³ In an attempt to appease the Polish lower classes that would benefit from this expropriation, the Communists refused to give property and businesses back to the Polish Jews.⁷⁴ Property disputes sparked violence and Jews were once again targeted.⁷⁵ As a result of this anti-Semitic violence, most of the remaining Jews in Poland fled, valuing their lives more than the return of their property.⁷⁶

The Post-War Polish government passed a law on March 8, 1946, stating that all property not claimed by December 31, 1946 was to become nationalized as State property. While this deadline was later extended to December 31, 1948, this "favor" did not help very many Jews, as most who returned to Poland did so after the

⁷⁰ Joshua A. Kirstein, *Commerce Flaws: "Taking Exception" with Garb v. Poland's Misinterpretation of the Commercial Activity and Takings Exceptions of the FSIA*, 17 CARDOZO J. INT'L & COMP. L. 315, 316 (2009).

⁷¹ *Id.* at 316. Nationalized refers to actions taken by a government to expropriate privately owned property or businesses.

⁷² Chodakiewicz & Currell, *supra* note 27, at 11.

⁷³ *Id.*

⁷⁴ *Id.* at 161.

⁷⁵ Pohl, *supra* note 38, at 77.

⁷⁶ *Id.* at 77 (citing Marek Jan Chodakiewicz, *Sources of Conflict: The Polish Independentist Insurgency and the Jews in Poland, 1944-1947* (New York and Boulder, Colo.: East European Monographs, and Columbia Press 2003), "At the time, many Jews who left Poland asserted that they could not live in a graveyard. Later, many survivors stressed Polish anti-Semitism as the chief factor triggering their flight. It seems that the refusal to return property to rightful owners, the desire to build a Jewish state in Palestine, the fear of an allegedly impending war between the East and West, the concern for personal security stemming from an ongoing anti-Communist insurrection, and a swelling tide of common banditry in the countryside encouraged a great wave of Jewish emigration from Poland after 1946. Historically, Jews were used to various attitudes of the local population toward them, which oscillated . . . But Polish Jews also persevered in the face of even the most acute hatred from the majority ethnic group as long as the central authorities could guarantee Jewish property and security. This the Communists were unwilling to do.").

deadline lapsed.⁷⁷ Claims were further complicated after new secession laws, which restricted succession to surviving spouse, parents or direct descendants, were introduced in 1947.⁷⁸ The problem is readily apparent, as many direct family lines were completely eradicated during the Holocaust.

After 1989 and the fall of Communism, any looted assets were considered state property under the control of Poland's democratic government.⁷⁹ While attempts were made to recover Jewish properties from Poland, now a democratic country, "the small Jewish community had neither the resources nor political strength to confront its government with claims for restitution."⁸⁰ No property that had been looted by the Nazis and remained in Poland could leave the State.⁸¹ As Poland began to put the pieces of its country back together and mend its war-torn economy, it put little thought into accounting for the stolen property looted during the War, and ignored the issue of Jewish restitution.⁸² As Ambassador Wojciech Kowalski recounts, "[a]lso very distressing for them [Poles] was the attitude of official authorities toward the still unsolved problem of the effects of World War II in the field of culture. The Ministry had no interest whatsoever in this issue."⁸³ Post-war restitution was especially difficult in Poland due to the "unprecedented scale and severity of looting," by the Nazi and Soviet Regimes.⁸⁴ Changes in governing powers, laws and territory as well as tense relations between Poles and Jews particularly made the process of restitution difficult.⁸⁵ While Jews lost their property, "they had at least escaped with their lives."⁸⁶

⁷⁷ NORMAN PALMER, *MUSEUMS AND THE HOLOCAUST* 127 (Institute of Art and Law Ltd, 2000).

⁷⁸ *Id.*

⁷⁹ Toby Axelrod, *Polish Holocaust Survivors Press on with Restitution Claims*, THE GLOBAL NEWS SERVICE OF THE JEWISH PEOPLE, Apr. 7, 2004, http://www.kleinsolomon.com/tiny_data/File/jta_article1.pdf.

⁸⁰ Ambassador Naphtali Lau-Lavie, *Confiscated Jewish Property: In Pursuit of Justice: Recovering Looted Assets of European Jewry*, 20 CARDOZO L. REV. 583, 584 (1998).

⁸¹ Cieślńska-Lobkowitz, *supra* note 17.

⁸² PALMER, *supra* note 77, at 127.

⁸³ Wojciech Kowalski, *World War II Cultural Losses of Poland: A Historical Issue or Still a "Hot" Political and Legal Topic*, in THE SPOILS OF WAR 235, 236 (Elizabeth Simpson, ed. 1997).

⁸⁴ *Id.* at 235.

⁸⁵ Pohl, *supra* note 38, at 77.

⁸⁶ *Id.*

III. ANALYSIS

Poland continues to withhold personal property robbed from Jewish victims during the Holocaust, and has done nothing to assist in its return. This section will demonstrate the factors contributing to Poland's status as one of the leading violators of the European Union's mandate to take steps to return Holocaust looted assets.⁸⁷ Such an understanding is necessary in order to demonstrate why ADR will not work in Poland and also to show that without external pressure and mechanisms to ensure accountability, Poland will continue to turn a blind eye to these victims, who at present have no venue for relief.

A. *Reasons for Inadequate Restitution at Present*

Tense relations between Jews and non-Jewish Poles have severely hampered the restitution process in Poland.⁸⁸ While most Poles steadfastly believe that Poland is one of the most tolerant countries in the world and that anti-Semitism exists only in small pockets, most Jews claim that Poland has been one of the most hostile European countries towards Jews.⁸⁹ Even before WWI, Poland officials turned Jews into the country's scapegoat, campaigning for the "Polonization" of other ethnic groups and asserting that Polish troubles were due to centuries of "Jewish invasion."⁹⁰ While most Jewish genocide occurred at the site of Poland's largest death camp, Auschwitz, the majority of Poles "reacted with indifference if not tacit approval" to the Jewish onslaught by Nazi Germany.⁹¹ Although Polish Jews who returned or came out from hiding after the war believed that relations with non-Jewish Poles would improve, violence against Jews continued.⁹² The Communist regime introduced its own anti-Semitic measures, stifling any discussion on the problem of Jewish-Polish relations.⁹³ This silence created a

⁸⁷ JTA, Prague Conference Attempts to Ease Holocaust Property Restitution, THE JEWISH DAILY FORWARD, Jun. 29, 2009, available at <http://www.forward.com/articles/108700/#ixzz10sr3F5JL>.

⁸⁸ Dempsey, *supra* note 15, at 1.

⁸⁹ Piotr Wrobel, *Double Memory: Poles and Jews after the Holocaust*, 11 E. EUR. POL. AND SOCIETIES 560, 560 (University Press 1997).

⁹⁰ Abraham Brumberg, *Poles and Jews*, 81 FOREIGN AFFAIRS 174, 176 (2002).

⁹¹ *Id.* at 176.

⁹² Wrobel, *supra* note 89, at 560.

⁹³ Brumberg, *supra* note 90, at 177.

myth of Polish generosity towards Jews during WWII.⁹⁴ Poland saw itself as the victim, making no distinction between Jewish and non-Jewish suffering.⁹⁵ As Abraham Brumberg recounts:

New myths compounded old ones. Nazi policies were declared equally lethal to Jews and Poles, thus obliterating the essential distinction between a population slated for complete eradication and one treated brutally yet allowed to survive. Nearly all references to Jews were expunged from the country's textbooks, and Poles en masse were portrayed as having helped the Jews during the occupation. (A number of Poles did indeed admirably aid the Jews, always at great risk to themselves; others helped only for money. Most reacted with either *schadenfreude* or indifference.)⁹⁶

It was not until the demise of the Communist regime that relations began to improve.⁹⁷ Still, Poles refuse to pay for the errors of previous generations, separating themselves from past wrongs committed and emphasizing that Poland was not sovereign until 1989, and that Poles should therefore not be held accountable.⁹⁸ The latest opinion polls reported that sixty-percent of Poles are against private restitution.⁹⁹ Some Jews fear that protest for the return of Jewish property will only increase anti-Semitic sentiment in Poland and worsen Polish-Jewish relations.¹⁰⁰

Poland's resistance towards restitution is most evident at the level of the Polish government. While delegates from Poland have attended every leading Holocaust conference and campaigned for restitution alongside other countries, Poland is consistently listed as a "problem country," and will not take responsibility for its own part in the Holocaust.¹⁰¹ As the director of the Polish Ministry of Culture and National Heritage Department expressed, "[w]e re-

⁹⁴ *Id.* at 177.

⁹⁵ *Id.* at 178.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 178-80.

⁹⁹ *Poland—Jews Who Had Property Seized During World War II Want Compensation*, Vos Iz NEIAS (Oct. 16, 2009, 12:02 PM), <http://www.vosizneias.com/39895/2009/10/16/poland-jews-who-had-property-seized-during-world-war-ii-want-compensation>.

¹⁰⁰ *Id.*

¹⁰¹ JTA, *Prague Conference Attempts to Ease Holocaust Property Restitution*, THE JEWISH DAILY FORWARD, Jun. 29, 2009, <http://www.forward.com/articles/108700/#ixzz10sr3F5JI> ("Some countries were singled out at the conference as particularly problematic. Among those cited were Poland, the only country in the former Eastern bloc not to have enacted private restitution or compensation; Lithuania, which has no communal property restitution program; Germany, which has only begun researching its stolen art; and Russia, which closes most archives to researchers and has made it impossible for claimants to obtain looted art.").

spect the decisions of the Washington conference. [. . .] But we have no such problem. Poland was not in coalition with Hitler and has looted nothing.”¹⁰² As recently as 2009, Polish leaders publicly denied that they have any fault in this issue and are therefore not responsible.¹⁰³ At the 2009 Holocaust Era Assets Conference in Prague, Secretary of State Wladyslaw Bartoszewski stated that “differently to other Countries we Poles never formed a collaborative government. We never established any joint military formations with the SS or Wehrmacht. Only in Poland did helping Jews in hiding carry the treat of the death penalty.”¹⁰⁴ Officials further argue that no looted property remains in Poland’s possession.¹⁰⁵ In 2005, an official for the Polish Foreign Minister expressed “[t]he so-called problem of the Holocaust victims’ property has to consider [sic] the fact that the victims of Nazi looting were both Jews and Poles, and that the looted objects did not end up in Polish collections.”¹⁰⁶ Sentence doesn’t really make sense.

At the Washington Conference on Holocaust-Era Assets, Poland was one of forty-four countries that “signed on to international principles that include identifying looted Nazi art, opening museum archives, establishing a central registry of displaced property and encouraging claims by original owners and their heirs”; yet Polish officials have ignored and resisted these goals.¹⁰⁷ The lack of investigation and reporting on seized Jewish property make many Jews believe the fight for the return of their personal property is a hopeless endeavor since the burden of evidence would be too great.¹⁰⁸ Many of these claimants would be heirs of the true owners, only further adding to the evidentiary burden.¹⁰⁹ Because the Germans took pride in destroying degenerate objects, not only is there the burden of proving that a person owned the object and

¹⁰² Cieslińska-Lobkowicz, *supra* note 17.

¹⁰³ Intervention by Secretary of State Wladyslaw Bartoszewski, Head of the Polish Delegation, Presentation at EU- Holocaust Era Assets Conference (Jun. 26 – 30 2009), https://docs.google.com/viewer?a=v&q=cache:VXAbNy3BdbgJ:www.holocausteraassets.eu/files/200000254-d26a965652/DEL_02_Poland.pdf+Intervention+by+Secretary+of+State+Wladyslaw+Bartoszewski,+Head+of+the+Polish+delegation&hl=en&gl=US&pid=bl&srcid=ADGEESglEC8TQL2JWHmmGOFwszd7fjx6pk-Qq83cg0syu3YBHRu4U4Edcy9obI6wD_6ZQU1iyBo9LPipSWx3VOwPkq924_EoUR6Qw4-nuUJaZCiY6mGlFqppBIJsl88Py81NJOiTm8Yd&sig=AHIEtbRhr3auSze-FQleoOm6CurE14Yjjw.

¹⁰⁴ *Id.*

¹⁰⁵ Cieslińska-Lobkowicz, *supra* note 17.

¹⁰⁶ *Id.*

¹⁰⁷ Dempsey, *supra* note 15.

¹⁰⁸ *Id.*

¹⁰⁹ Cuning, *supra* note 7, at 216.

that the object was illegally seized during the Nazi regime, but also that the object was not destroyed and currently exists in Poland's borders.¹¹⁰ Although the Poles created detailed listings of art within the country at the onset of the Nazi invasion with the expectation of destruction and loss, no real estimates of artwork or other personal property stolen from the Jews can be made, as meticulous record keeping was not performed after the War.¹¹¹ The Office for Revindication and Reparation established within the Ministry of Culture and Art in 1945, and only in existence for six years, was "concerned with repatriation of national cultural property, not with the restitution of property taken from individual victims, Jewish or otherwise."¹¹²

Only in 1991 did the Polish Ministry of Foreign Affairs establish the Government Commissioner for Polish Cultural Heritage Abroad, which aims "to make the final effort to sum up wartime losses, both from a quantitative and a qualitative way, but also to try to liquidate the effects of the last war in the sphere of culture to a degree which is still possible today."¹¹³ The catalogue created, however, is extremely limited, as "[o]nly museum collections had information in the form of inventories or iconographic materials."¹¹⁴ The catalogue is further limited because it only includes those areas, which, in 1939, were part of the present Polish state.¹¹⁵ Territories that were lost by Poland after 1945 are not included.¹¹⁶

Further, like its successor, the catalogue created by the Government Commissioner for Polish Cultural Heritage Abroad appears to promote repatriation of national cultural property rather than the return of property taken from individuals.¹¹⁷ While twelve volumes of Poland's wartime losses have been published, there is no distinction between art looted from the museums' own holdings and art from private collections.¹¹⁸ Significantly, the Min-

¹¹⁰ *Id.* at 216.

¹¹¹ PALMER, *supra* note 77, at 127.

¹¹² *Id.* at 127.

¹¹³ Involvement of the Ministry of Foreign Affairs in Art Restitution, MINISTRY OF FOREIGN AFFAIRS OF THE REPUBLIC OF POLAND, <http://bip.msz.gov.pl/Involvement,of,the,Ministry,of,Foreign,Affairs,in,art,restitution,17876.html> (last visited Oct. 10, 2010).

¹¹⁴ Monika Kuhnke, *Wartime Losses: Polish Painting*, <http://www.washington.polemb.net/sites/LostART/intro.htm> (last visited Oct. 10, 2010).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* The catalogue does distinguish pieces of communal Judaica that were looted from synagogues, but because of the nature of these objects and the fact that they were seldom inventoried or photographed prior to the seizure, records for such property are also limited. *Id.*

¹¹⁸ Dempsey, *supra* note 15.

istry of Culture has yet to create a registry of what Poland's museums hold at present and keeps no records of how much art has been returned to claimants. There is no registry of what Poland's museums hold today.¹¹⁹

Particularly challenging to the restitution of Jewish assets looted during the Holocaust, the official website of the Ministry of Foreign Affairs of the Republic of Poland, which describes the catalogue, does not distinguish Jewish property.¹²⁰ It does not reflect an effort to return looted assets to their true owners, as the Holocaust Conferences that Poland has attended have all promoted, but instead only addresses the issue of the return of Poland's cultural war losses.¹²¹ While the government of Poland has, with little success, continuously tried to document its own losses to recover looted objects by the USSR, when Jewish claimants from abroad assert that they are the true owner and are entitled to restitution, Poland consistently turns its back on the Holocaust victims and their heirs and creates roadblocks, either ignoring or denying such claims.¹²²

However, during the Holocaust Era Assets Proceeding in Prague on June 26 – 30 2009, Polish Art Historian, Nawojka Cieślińska-Lobkowicz, began to tear away Poland's veil of innocence Ms. Cieślińska-Lobkowicz stated:

During the occupation, the closed Polish museums and libraries were often used by Germans as repositories for valuable cultural goods looted from the Jews during their deportation into the ghettos, and then during ghetto liquidations. Such was the situation, for example in Warsaw, Cracow, Łódź, Poznań, and Lublin. We know that just after the war some objects that were rescued that way were returned, if their pre-war owners claimed them. But we cannot be sure if such restitution was consistently prac-

¹¹⁹ *Id.*

¹²⁰ Involvement of the Ministry of Foreign Affairs in art restitution, MINISTRY OF FOREIGN AFFAIRS OF THE REPUBLIC OF POLAND, <http://www.msz.gov.pl/Involvement,of,the,Ministry,of,Foreign,Affairs,in,art,restitution,17876.html> (last visited April 25, 2011).

¹²¹ Restitution of Works of Art, MINISTRY OF AFFAIRS OF THE REPUBLIC OF POLAND <http://www.mfa.gov.pl/Restitution,of,works,of,art,2186.html?PHPSESSID=ee1625ea734c447603648dec7eed9949> (last visited Oct. 10, 2010).

¹²² *Poland: Restitution Obstacles and Complex War Experience*, COMMISSION OF ART RECOVERY, <http://www.commartrecovery.org/cases/poland> (last visited April 25, 2011). *See also* STOLA, *supra* note 2, at 252. "The question of 'formerly Jewish' property was not alien even to the proponents of an apologist version of Polish history. Yes they accused those in favor of a critical analysis of Polish attitudes of serving an influential Jewish lobby, which wanted to take over a considerable amount of property in Poland or force Poland to pay compensation, similar to the compensation paid recently by Swiss banks." *Id.*

ticed then. Moreover, a great majority of the confiscated objects were stored without any indication of to whom they belonged. All other goods found throughout the liberated Polish territories in warehouses, offices and apartments left by the fleeing Germans—if not by chance—were being routinely classified as abandoned property, which, according to the 1945 and 1946 State decrees, became State property.¹²³

Ms. Cieślińska-Lobkowicz then reminded the participants of the proceeding that it was not only the Nazis who plundered Jewish homes and rid the Jews of their personal possession, but also the local Polish population. She asserted that many of these looted objects eventually made their way to the public collection after the war to be purchased by private owners and antique stores.¹²⁴

The artwork was stored without identification and the Polish Ministry of Culture and National Heritage has made no attempts for the past twenty years to treat Judaica owned by individuals and Jewish-confiscated objects as a separate category when documenting and collecting property looted during WWII; the burden for Jews is not only to find their personal property, but also to provide evidence that those object belong to them.¹²⁵ Poland should be responsible for further investigation to lighten this burden as has been promoted at the Washington Conference Principles On Nazi-Confiscated Art and reemphasized at the more recent conference in Prague.¹²⁶

Governmentally sponsored research into the ownership history of cultural objects is essential to the restitution process. While locating and identifying these looted objects would by no means be an easy task, such an endeavor is not unthinkable. There were extensive catalogues of art in private Jewish collections before the war whose owners were mentioned by name.¹²⁷ This would facilitate return.¹²⁸ For example, catalogues from the nineteen thirties listed artwork by Polish artists Jacek Malczewski, Józef Mehoffer, Leon Wyczółkowski and Teodor Axentowicz, that were owned by named Jewish collectors.¹²⁹ However, few of these owner's names

¹²³ Cieślińska-Lobkowicz, *supra* note 17.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Jessica Mullery, *Fulfilling the Washington Principles: A Proposal for Arbitration Panels to Resolve Holocaust-Era Art Claims*, 11 *CARDOZO J. CONFLICT RESOL.* 643, 651 (2010).

¹²⁷ Cieślińska-Lobkowicz, *supra* note 17.

¹²⁸ *Id.*

¹²⁹ *Id.*

are published in the documentation of war losses.¹³⁰ As Ms. Cieślińska Lobkowics suggests, “[m]aybe that is because, as written in 1977 in a confidential letter by the director of the Ministry Museums’ department, this would necessitate an earlier ‘research in the museums, which had obtained some objects as a result of restitution or purchase.’”¹³¹ Thus purposeful omission of Jewish names allowed Poland to keep restituted (stolen) art as part of Polish property for the last sixty years and label it part of Polish patrimony.¹³² Polish officials and scholars purport the need to keep “Polish property” within the country after all the upheavals that Poland has faced.¹³³ As Pawel Kowalski, a lecturer at the School of International Law at Warsaw’s School of Social Sciences argues, “[s]o much was already lost. We now want to keep part of our history here. You have to imagine that if some Polish paintings would be taken out of Poland, the government that would do this would be thrown out of office.”¹³⁴

Along with the obstacles that victims face in trying to reclaim their property, Poland remains the only country in the European Union without legislation to accelerate or foster the restitution of Jewish personal property.¹³⁵ Despite numerous proposals advanced to Poland’s Parliament in recent years, none have passed.¹³⁶ Even taking one’s claim against Poland to the United States, which has had some success for the restitution of Jewish looted property from other European countries, has often proved futile.¹³⁷ In cases of real property, because most claims are for the restitution of property under government control, the United States has dis-

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Intervention by Secretary of State Władysław Bartoszewski*, *supra* note 103.

¹³⁴ Dempsey, *supra* note 15.

¹³⁵ *Urged by Claims Conference, Both Houses of Congress to Call for Eastern European Property Restitution*, CLAIMS CONFERENCE, http://www.claimscon.org/index.asp?url=news/eerestitution_063008 (last viewed Oct. 10, 2010). Lithuania has also not met the EU requirements as it has no law to enable recovery of or compensation for Jewish communal assets lost during the Shoah. *Id.*

¹³⁶ *Id.*

¹³⁷ STOLA, *supra* note 2, at 249. “The best-known case is that of the class action brought against Poland (the Republic of Poland, the Polish government, and other Polish persons and institutions) in 1999 before a New York Court in the name of eleven American Jews and ‘others similarly situated.’ The statement of the complaint demanded the return of property and compensation for loss of use during the period when the defendant administered this property. . . . After nearly three years the court dismissed the class action on the grounds that Poland has immunity by state sovereignty.” *Id.*

missed these cases due to Poland's sovereign immunity.¹³⁸ While there have been a few returns,¹³⁹ Poland's "best" offer in most cases is "symbolic monetary compensation" rather than actual return of property. Describing why Holocaust survivors will not be satisfied with symbolic compensation, Jehuda Evron, a victim of property theft himself and President of the Holocaust Restitution Committee, explained, "[w]e survivors lost all of our families. The homes that are left are the only thing left from our family. There is no money in the world that can compensate for this house, and we don't want any money."¹⁴⁰

Without legislation mandating the restitution of looted property to its true owners or their heirs, one must fend for himself to see the return of one's property. Much has been written about the inadequacies of litigation for this process.¹⁴¹ Some of these arguments are that litigation is extremely costly and can easily end up being a sizable percentage or easily exceed the value of the actual

¹³⁸ *Id.*; see also *Garb v. Republic*, 440 F.3d 579 (2006) (holding that the United States did not have subject matter jurisdiction to decide on claims against stolen property in Poland where Poland has immune sovereignty and could not be held liable in the Court of the US where the claimants had not satisfied the "commercial activity exception the FSIA, 28 U.S.C. § 1605(a)(2) nor had they satisfied the "takings" exception of the FSIA, 28 U.S.C. § 1605(a)(3)). See also Nathaniel Popper, *Restitution Battle Shifts to Stalled Polish Front*, THE JEWISH DAILY FORWARD (Aug. 6, 2004), available at <http://www.forward.com/articles/5074>.

Without any legislation, property owners have been forced to rely on litigation, including the nascent plan to bring cases to the European courts in Strasbourg and Luxembourg. In an American federal court, a group of Jewish Holocaust survivors, including Koppenheim, has been pressing their case against the Polish government since 1998. While that case has struggled to gain traction against Poland's claims of sovereign immunity, it helped spawn the Holocaust Restitution Committee, of which Koppenheim is the European leader.

Id.

¹³⁹ Cieślińska-Lobkowicz, *supra* note 17. For example, one restitution success story concerns the seventeenth century painting by Pieter de Grebber, which appeared on a London Christie's auction in 2006. The Art Loss Register Identified this painting in the catalogue of Polish war losses and informed the auction house and the Polish Embassy in London. Polish diplomats in the United States informed Warsaw that the painting's owner's heirs are living in Philadelphia; the owner was a well known Jewish pre-war antiquarian from Warsaw, Abe Gutnajer who had been murdered in the ghetto there in 1942. The Polish authorities decided to help the heirs disinterestedly. The matter was finalized in 2008 by an agreement between the current proprietor of the painting and Gutnajer's heirs. This was "the first case in which our Foreign Affairs Ministry acted for restitution on behalf of rightful heirs, who happen not to be Polish citizens." *Id.*

¹⁴⁰ Maureen T. Walsh, *Property Restitution Efforts Examined*, COMMISSION ON SECURITY & COOPERATION IN EUROPE, available at http://csce.gov/index.cfm?FuseAction=ContentRecords.ViewDetail&ContentRecord_id=39&Region_id=77&Issue_id=0&ContentType=G&ContentRecordType=G&CFID=77035768&CFTOKEN=75180815 (last visited April 25, 2012).

¹⁴¹ Mullery, *supra* note 126, at 643.

value of the work.¹⁴² Litigation can also drag on for years.¹⁴³ Time and money expended on litigation is a concern, as victims are getting older and most likely cannot easily afford the high costs of litigation and evidentiary investigations. Further, as a considerable number of Jews who have raised claims to property in Poland are foreign nationals, not Polish citizens, the investigation process is even more difficult.¹⁴⁴ Many scholars also argue that due to the adversarial nature of litigation and the sensitivity of the subject on all sides, litigation is not a proper forum to resolve these disputes.¹⁴⁵ Further, contentious litigation “may have the effect of worsening foreign relations among nations, as well as among foreign private entities such as museums.”¹⁴⁶ The obvious but significant procedural barriers, such as statute of limitations and choice of law also makes litigation an ineffective forum.¹⁴⁷ European law is also “much more protective of the innocent buyer and adheres to the legal rule that a good-father purchaser may acquire a legitimate title to stolen goods.”¹⁴⁸

The rigidity of litigation does not lend itself to the sensitivity of these cases and the need for justice. Besides the inherent aforementioned problems surrounding the use of litigation to resolve these disputes, victims demanding that Poland return their property are faced with an even heavier burden due to Poland’s campaign to preserve all property within its borders. Therefore, a more effective method is needed to resolve these disputes. Such a method should consider the uniqueness of these claims and surmount both the high evidentiary burdens placed on the victims at present and the Polish government’s and population’s resistance to return property [due to ingrained anti-Semitic beliefs and a desire to maintain a clandestine reputation]. Sentence is too long, maybe take bracketed portion out.

¹⁴² *Id.* at 643.

¹⁴³ *Id.*

¹⁴⁴ STOLA, *supra* note 2, at 249.

¹⁴⁵ *Id.* at 366-67.

¹⁴⁶ Mullery, *supra* note 126, at 643.

¹⁴⁷ *Id.*

¹⁴⁸ Michael J. Bazyler, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS* 212 (New York University Press 2003).

IV. PROPOSAL

Since litigation entails “high costs, an adversarial setting, publicity, and the chance of a decision leaving both parties dissatisfied as the starting foundation for future disputes,” alternative dispute resolution (ADR) has been promoted as a more attractive avenue, as it offers flexible mechanisms to resolve these cases and can address the emotional sensitivities of this subject.¹⁴⁹ However, as this section will demonstrate, without external pressure from a centralized and powerful force, such as the European Union, even ADR will prove unsuccessful in settling these disputes. Still, ADR’s benefits should not be hastily dismissed given its ineffectiveness in Poland, but should instead be incorporated into a more dynamic and promising plan that calls for a global rather than domestic solution. This section will therefore propose the use of an international arbitral tribunal with the assistance of the European Union as a mechanism to ensure accountability and to demand action.

An understanding of the benefits of ADR to settle these disputes is vital to this discussion. Because the negotiation process involved with ADR is not as regimented as litigation, it is also a much faster process and legal obstacles such as statute of limitations can be averted.¹⁵⁰ The Washington Conference, along with the conferences that followed, advocated the use of ADR to resolve these disputes.¹⁵¹ As Stuart Eizenstat, the head of the US delegation on the Holocaust Era Assets Conference, stated on December 3, 1998 at the Washington Conference “[w]e can begin by recognizing this as a moral matter—we should not apply the ordinary rules designed for commercial transactions of societies that operate under the rule of law to people whose property and very lives were taken by one of the most profoundly illegal regimes the world has ever known.”¹⁵² Monica Dugot at the Holocaust Claims Processing Office has also asserted “to truly assist claimants in recovering

¹⁴⁹ Alexander MacKintosh Ritchie, *Victorious Youth In Peril: Analyzing Arguments Used in Cultural Property Disputes to Resolve the Case of the Getty Bronze*, 9 PEPP. DISP. RESOL. L.J. 325, 369. (2009). ADR includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation. *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Stuart E. Eizenstat, Under Sec’y for Econ. & Bus. Affairs, U.S. Dep’t of State, In Support of Principles of Nazi-Confiscated Art, Presentation at the Washington Conference on Holocaust-Era Assets (Dec. 3, 1998), http://www.state.gov/www/policy_remarks/1998/981203_eizenstat_heac_art.html.

¹⁵² *Id.*

their art objects, the discussion needs to be taken out of an exclusively legal context and elevated to a moral and political level.”¹⁵³

However, ADR will not work internally in Poland without the pressure of external international outcry to right past wrongs. First, ADR has not yet gained validity within legal circles in Poland and fails to bring significant effects as only 233 cases of the total 406 mediation proceedings held in Poland have had any success.¹⁵⁴ Further, the obstacles raised earlier, such as anti-Semitism, will deter negotiation as scholars have stressed that ADR tools are not as efficient in countries “where the accountability of public authorities is still very low, the main responsibility in solving administrative disputes staying with the courts.”¹⁵⁵ The Polish authorities’ denial and disregard of looted objects within the borders of Poland is a testament to this lack of accountability.

An example further illustrates the Polish government’s obduracy in doing justice. A painting that had belonged to Baron Mór Lipót Herzog, a wealthy Jewish collector from Hungary, was confiscated in 1943.¹⁵⁶ When the Allies discovered the painting after the war, they accidentally sent it to Poland in 1946 and the painting became a part of the Foreign Art Collection at the National Museum in Warsaw.¹⁵⁷ The Polish officials were aware that this painting was not from any of the Polish collections, as Poland never owned a Courbet painting before the War.¹⁵⁸ In 2001, Martha Nierenberg, heir of Baron Herzog, located the painting and requested its return.¹⁵⁹ After negotiation the Polish museum agreed to the painting’s return.¹⁶⁰ However the return was ultimately voided because the Ministry of Culture dismissed Mrs. Nierenberg’s request for permission to export the piece and also asserted that the beneficiaries did not present complete documentation.¹⁶¹ In reference to this case, Mr. Zdrojewski of the Polish Culture of Ministry asserts,

¹⁵³ Monica Dugot, *The Holocaust Claims Processing Office’s Handling of Art Claims*, 25 FORDHAM INT’L L.J. 133, 137 (2001).

¹⁵⁴ Andrzej Skoczylas and Mariusz Swora, *Administrative Judiciary in Poland in Search for Fairness And Efficiency – An Overview*, TRANSYLVANIAN REV. OF ADMIN. SCIENCES 116, 124 (2007).

¹⁵⁵ *Id.*

¹⁵⁶ Claim of Martha Nierenberg against Poland, COMMISSION FOR ART RECOVERY, <http://cfar.website-testing.net/disabled/cases/claim-martha-nierenberg-against-poland> (last visited Oct. 25, 2010).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

“[u]nder current legal conditions, the state is not obliged to return works of art it does not possess, as they belong to specific institutions or private individuals.”¹⁶² At the same time, Ms. Cieslinska-Lobkowicz asserts, “[w]ithout the consent of the minister of culture, no director of a public museum can remove items from the inventory of the collections.”¹⁶³ A Catch-22 situation is created, completely hindering a victim’s right to his property.¹⁶⁴

This case shows that even where ADR might work between individuals in Poland, the Polish officials still have the power to reject the decision, making ADR an ineffective mechanism within the constructs of Poland. Because of the Polish government’s stance that the country is “not rich enough to return such property,” Poland fears giving up such an influential painting would open the floodgates to more claims.¹⁶⁵ Explaining the Polish government’s reluctance, Pawel Kowalski, a lecturer at the School of International Law at Warsaw’s School of Social Sciences asserted, “[t]he Jewish community was so big here that compensation would be expensive. Before 1939, more than 3 million Jews lived in Poland, one of the biggest populations in Europe. Today, there are no more than 20,000.”¹⁶⁶ The Polish government is therefore adamant “to keep part of *its* history” [emphasis added], even going so far as overseeing and halting private negotiations as was seen in Martha Nierenberg’s case.¹⁶⁷

External mandates from a central authority are necessary in order for ADR to be effective in solving restitution of looted property in Poland.¹⁶⁸ This central authority must be set up to “regulate, direct, and sift reparation demands and deliveries.”¹⁶⁹ As Ambassador Naphtali Lau-Lavie, Vice Chairman of the Executive of the World Jewish Restitution Organization, argues:

It must be emphasized that without international intervention, there is little reason to anticipate a change in attitude. This international pressure needs to focus on the ongoing violation of

¹⁶² Dempsey, *supra* note 15.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ NEHEMIAH ROBINSON, INDEMNIFICATION AND REPARATIONS: JEWISH ASPECTS 250 (New York, Institute of Jewish Affairs of the American Jewish Congress and World 1944)

¹⁶⁹ *Id.*

human rights being exercised by Poland, as well as by all the other governments in Eastern and Central Europe.¹⁷⁰

Therefore, an international arbitration tribunal with compulsory jurisdiction over claims for the restitution of personal property looted during the Holocaust should be established to resolve these disputes. An international tribunal is a formal process “for obtaining a binding decision regarding the dispute between states without the greater costs, time and formalities of judicial dispute resolution.”¹⁷¹ In the past these tribunals have been established to resolve disputes between states and between states and non-state actors.¹⁷² While such a tribunal has been proposed for the restitution of personal property, as the creation of tribunals provided for success in resolving claims dealing with banks and insurance accounts, such a tribunal to resolve personal property claims has never been executed.¹⁷³ However, because the restitution of Jewish confiscated property is an international issue involving nations with a wide range of legal systems and millions of missing objects worldwide, a “global solution is required.”¹⁷⁴

In order for the tribunal to have jurisdiction over such claims and have any international power, all parties must consent to its jurisdiction.¹⁷⁵ An international binding agreement would also be necessary “in order to prevent litigation over the panel’s jurisdiction and to ensure enforcement of the panels’ decisions.”¹⁷⁶ Receiving consent from countries, particularly Poland, which has been so recalcitrant about cooperation, will be a complicated and difficult task, but not impossible when one considers the power of European Union (EU)¹⁷⁷ status and the European Convention of Human Rights (The Convention).¹⁷⁸

¹⁷⁰ Ambassador Naphtali Lau-Lavie, *supra* note 79, at 587.

¹⁷¹ SAM D. MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* 117 (Thomson West 2006).

¹⁷² *Id.*

¹⁷³ Jennifer Anglim Kreder, *Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes: Creation of an International Tribunal*, 73 *BROOK. L. REV.* 155, 157-58 (2007).

¹⁷⁴ *Id.* at 180.

¹⁷⁵ MURPHY, *supra* note 169, at 117.

¹⁷⁶ Mullery, *supra* note 124, at 669.

¹⁷⁷ Poland was admitted into the EU on May 1, 2004. See Willard M. Oliver, *Democratic Reform in Polish Policing*, *THE POLICE CHIEF*, available at http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=934&issue_id=72006 (last visited April 25, 2012).

¹⁷⁸ Provisions Amending the Treaty Establishing the European Community with a View to Establishing the European Community, *The Maastricht Treaty* (Feb. 7, 1992), available at <http://www.eurotreaties.com/maastrichtec.pdf>. In 1993, the Maastricht Treaty established the EU, a

The EU has demonstrated a strong interest in the protection of International Humanitarian Law (IHL), which includes an individual's right to property, through declarations, resolutions conventions, and treaties.¹⁷⁹ All members of the EU must abide by these laws and regulations.¹⁸⁰ In December 1995, the EU adopted a resolution demanding the return of plundered property to Jewish communities in Central and Eastern Europe. In its resolution, "the Parliament recalled the first additional protocol to the European Convention on Human Rights. . .and in particular Article One [of Protocol Number One to the European Convention on Human Rights] thereof. . ."¹⁸¹ Based on the EU's commitment to these issues, the Parliament called on member states to adopt legislation regarding the plunder of Jewish confiscated property.¹⁸² Poland has yet to comply.¹⁸³

The EU and Council of Europe have a long tradition of cooperation as "each benefits from the other's respective strengths and

grouping of twenty-seven democratic countries, in order to promote peace, economic stability, liberty, and the respect for human rights and fundamental freedoms amongst its members in the aftermath of the Communist Regime. *Id.*

¹⁷⁹ Charter of Fundamental Rights of the European Union, art. 17, 2000 O.J. C 364, at 1. For example, Article 17 of the EU Charter states:

Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss."

Id. See also UPDATED EUROPEAN UNION GUIDELINES ON PROMOTING COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW, art. II (2009). Further, the European Union Guidelines on Promoting Compliance with International Humanitarian Law "is intended to alleviate the effects of armed conflict by protecting those not, or no longer, taking part in conflict and by regulating the means and methods of warfare." *Id.* at art. II (4). Members are bound to comply with rules of IHL to which they are bound. *Id.* at art. II (5). The IHL includes the Hague Conventions of 1907 and 1954, which were created to protect an individual's right to property confiscated during war. See also Yehuda Z. Blum, *On the Restitution of Jewish Cultural Property Looted In World War II*, 94 AM. SOC. OF INT. L. 88, 90-91. (2000). While the 1907 Convention does not provide for the restitution of property there certainly does exist, under Article 3 of the Hague Convention of 1907, a duty to compensate. Hague Convention of 1907, art III. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict is much more explicit on this issue defining property to include movable objects and further purports a duty for all parties to the protocol to restitute property as distinct from the duty to compensate for the looting of such property. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, available at <http://unesdoc.unesco.org/images/0008/000824/082464mb.pdf> [hereinafter Hague Convention of 1954]. Poland ratified this protocol on August 6, 1956. *Poland: Ratified Conventions*, UNESCO.ORG, http://www.unesco.org/eri/la/conventions_by_country.asp?language=E&contr=pl&typeconv=1 (last visited April 25, 2012).

¹⁸⁰ IHL, *supra* note 179, art II (5).

¹⁸¹ Ambassador Naphtali Lau-Lavie, *supra* note 80, at 586.

¹⁸² *Id.* at 586.

¹⁸³ *Id.*

comparative advantages, competences and expertise, whilst avoiding unnecessary duplication.”¹⁸⁴ The European Convention, which became effective in 1953, is an international treaty under which the member states of the Council of Europe promise civil and political rights.¹⁸⁵ The European Court of Human Rights (Court) has jurisdiction over all parties of European Convention on issues designated in the treaty.¹⁸⁶ Article One of Protocol Number One to the European Convention on Human Rights guarantees the right to property and provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.¹⁸⁷

Poland’s withholding of property that came into its possession through criminal acts of the Nazis is a clear violation of the principles of “human rights to own and enjoy private property, which are clearly enshrined in Protocol One of the European Convention for the Protection of Human Rights.”¹⁸⁸ As a signatory to the European Convention on Human Rights, Poland is legally bound to abide by this Protocol.¹⁸⁹

The Court has adjudicated the Holocaust restitution cases, including the famous Polish case involving the Pikielny family, to compel Poland to address the issue of restitution.¹⁹⁰ However, because the Court is backlogged—it is scheduled to oversee 120,000 cases in 2010 and has a multi-year waiting list—the process is slow

¹⁸⁴ The Council of Europe’s Relation’s with the European Union, COUNCIL OF EUROPE, http://www.coe.int/t/der/eu_EN.asp (last visited Nov 1, 2010).

¹⁸⁵ Tom Allen, *Restitution and Transitional Justice in the European Court of Human Rights* 13 COLUM. J. EUR. L. 1, 7 (2006).

¹⁸⁶ *Id.*

¹⁸⁷ PROTOCOL TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS ART. 1, 213 U.N.T.S. 262 (May 18, 1954).

¹⁸⁸ Ambassador Naphtali Lau-Lavie, *supra* note 80, at 588.

¹⁸⁹ Eric J. Greenberg, *Poland Faces Property Restitution Claim*, THE JEWISH DAILY FORWARD, Feb. 11, 2005, <http://www.forward.com/articles/2913>.

¹⁹⁰ *Human Rights Case Against Poland Opens New Legal Front in Seeking Restitution for Victims of Holocaust*, PRWEB.COM, <http://www.prweb.com/releases/2005/2/prweb206330.htm> (last visited Oct. 30, 2010). Born in Lodz, Poland, Mr. Henryk Pikielny is a survivor of several Nazi concentration camps and is now seeking the restitution of his property where his family’s factory stood before it was ruthlessly taken away from him from the Nazis. *Id.* While Mr. Pikielny expected its return after the War, the property remained in governmental control through out the Communist regime. *Id.* After twelve years of unsuccessfully petitioning the Polish government for compensation for their confiscated properties, Mr. Pikielny filed a case with the European Court of Human Rights as a last resort.

and its resources are not directly geared towards this issue.¹⁹¹ Further, the Court is intended as a last resort after all other avenues are exhausted.¹⁹² Some EU members have dragged their feet in implementing the Court's decisions, since a mechanism to hold these countries accountable is lacking.¹⁹³ As Ambassador Naphtali Lau-Lavie has argued, "[t]he institutions established to enforce international justice and international agreements cannot continue to turn a blind eye to such a fundamental and brazen violation of justice, decency, human rights, and natural law."¹⁹⁴

Thus, an arbitration tribunal should be established within the European Court of Human Rights that would resolve disputes surrounding the restitution of property confiscated during World War II. The Court would be better equipped to hold parties accountable and oversee that parties are brought justice in a timely manner. In order for this tribunal to be legitimate, a protocol¹⁹⁵ to the European Convention would need to be added which would give it jurisdiction and describe its structure. Because the protocol was not part of the original Convention, such a protocol would need to be adopted by the States in order for jurisdiction to be compulsory and for the tribunal's decisions to be binding them. If Poland receives pressure from the EU, as one of two states who did not meet the requirement for EU membership to implement legislation fostering the restitution of personal property confiscated during World War II,¹⁹⁶ the country will be more likely to adopt the protocol. EU membership has provided the country with economic stability and access to trade with other members, EU resources, including employment for Poland's citizens in EU institutions, and a role in the developments in the Community law and institutional practice.¹⁹⁷ The same incentives would apply to other EU members, all of which enjoy these benefits through their EU status.

¹⁹¹ Rob Seal, *European Human Rights Court Faces Significant Backlog, Says Roucounas*, V.A. L. NEWS & EVENTS, http://www.law.virginia.edu/html/news/2008_spr/roucounas.htm (last visited Oct. 30, 2010).

¹⁹² CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOM AS AMENDED BY PROTOCOL NO. 11, 213 U.N.T.S. 222 (Nov. 4, 1950).

¹⁹³ Allen, *supra* note 185, at 3.

¹⁹⁴ Ambassador Naphtali Lau-Lavie, *supra* note 80, at 588.

¹⁹⁵ In this note the strategized protocol which if adopted would give the tribunal jurisdiction is distinguished from Article One of Protocol Number One through the use of a lowercase p.

¹⁹⁶ Harry Templeton and Jonathan Czapski, *Property Restitution: Should Poland Pay?* KRAKOW POST, Sept. 2, 2008, available at <http://www.krakowpost.com/article/1153>.

¹⁹⁷ JAKUB WIŚNIEWSKI ET AL., 4 YEARS OF POLAND'S MEMBERSHIP IN THE UE ANALYSIS OF SOCIAL AND ECONOMIC BENEFITS AND COSTS, 1, 7-8 (Office of the Committee for European Integration 2008).

The implementation of post-accession compliance mechanisms by the EU is not unrealistic, as “sanctions or restrictive measures have been frequently imposed by the EU in recent years, either on an autonomous EU basis or implementing binding Resolutions of the Security Council of the United Nations.”¹⁹⁸ One of the most powerful tools, in view of the EU’s economic significance, is placing economic and financial sanctions on its members.¹⁹⁹ For example, both Romania and Bulgaria have been threatened with economic sanctions due to their failure to meet benchmarks set by the EU.²⁰⁰ Because Bulgaria and Romania did not improve “deficiencies particularly with regard to the judicial reform and the fight against corruption by the date of their EU accession,”²⁰¹ the Commission of the European Union was given the right to closely monitor these areas of concern regularly and to publish their findings in special reports.²⁰² Although there is no requirement that States act on these public reports, they are intended to mobilize public pressure for a State to comply.²⁰³ In 2008, the EU Commission imposed its first financial sanctions on Bulgaria due to repeated noncompliance. As a result of the fraud the EU discovered during its investigations, the EU suspended its assistance in a variety of Bulgaria’s domestic programs, totaling a loss of _825 million in support from the EU.²⁰⁴ While the loss of EU funds created tense EU-Bulgarian relations, it effectively prompted Bulgaria to step up its efforts to reform.²⁰⁵ According to the interim report of February 2009, “Bulgaria made ‘significant developments’ in combating corruption and organized crime, and some developments in reforming the judiciary.”²⁰⁶ This progress was again substantiated in July 2009 when the Commission noted a “positive change of attitude and a new momentum of the country’s efforts to improve the judi-

¹⁹⁸ Sanctions or Restrictive Measures, EUROPEAN UNION EXTERNAL ACTION, http://ec.europa.eu/external_relations/cfsp/sanctions/index_en.htm (last visited Feb. 13, 2011). “Sanctions are an instrument of a diplomatic or economic nature which seek to bring about a change in activities or policies such as violations of international law or human rights, or policies that do not respect the rule of law or democratic principles.” *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Florian Trauner, *Post-accession Compliance with EU Law in Bulgaria and Romania: A Comparative Perspective*, 13 EUR. INTEGRATION ONLINE PAPERS 1, 9 (2009), available at <http://eiop.or.at/eiop/texte/2009-021a.htm>.

²⁰¹ *Id.* at 9.

²⁰² *Id.*

²⁰³ *Id.* at 3.

²⁰⁴ *Id.* at 10.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

ciary and combat corruption.”²⁰⁷ EU sanctions on Romania produced even greater success as the EU even conceded in July 2008 that “Romanian authorities displayed a serious commitment towards implementing the benchmarks set by the EU” and that “The Romanian government had swiftly prepared and adopted an action plan on how to meet the benchmarks and advanced the reform of the judiciary.”²⁰⁸

If the European Union held its members equally accountable for the EU mandate that all members assist in the restitution process of assets stolen during the Holocaust, similar success would be seen. In pressuring members, particularly Poland, to adopt the protocol through threats of sanctions and other restrictive measures, EU states would be more much more likely to adopt the protocol in fear of losing all the benefits they acquired when they became an EU member. The protocol would stipulate that the tribunal has compulsory jurisdiction over its parties and that its decisions be binding on the parties. Once Poland became a party, Poland would at last be held accountable for its theft and situations like Herzog’s would finally be resolved.

The protocol establishing the tribunal would mandate all signatories to conduct investigation and release significant documents and catalogues essential to the restitution process. Using this information, a designated commission created through the tribunal should provide a title clearinghouse and hire individuals competent to research all publicly available and fee-based databases—essentially to conduct title searches.²⁰⁹ Once this investigation requirement is met, those victims of signatory nations would be able to register their claims with the arbitration tribunal for a designated number of years.²¹⁰ In order for this process to be reasonable, such registration should be mandatory even if the piece has not yet been located.²¹¹ The registration process will also be beneficial, as it “will develop the critical mass of information necessary to more efficiently match claims with tainted artworks.”²¹² The Protocol should also provide that once claims are registered with the tribunal, the latter has sole jurisdiction over such property and therefore

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Kreder, *supra* note 173, at 211.

²¹⁰ *Id.* at 186.

²¹¹ *Id.*

²¹² *Id.*

it cannot be adjudicated in domestic courts or commissions in the signatory nations.²¹³

The structure of the tribunal would be largely based on that of the Court, which already describes methods for effecting “friendly settlements,” which is akin to the processes surrounding arbitration and has become increasingly resorted to by applicants and Contracting States.²¹⁴ Unlike standard civil proceedings, “friendly settlements” procedure has a “mixed legal character: while settlements are an inter-partes procedure, they are also binding under international law, as the [European Court of Human Rights] often hands them down in the form of a judgment.”²¹⁵ Using these “friendly settlement procedures” as its guide, the arbitration tribunal could settle disputes in a manner that is familiar to the Court and which State parties of the Court have already agreed to in ratifying and adopting the Convention. States can therefore be comforted by the fact that the tribunal will use a similar framework in resolving these disputes and will be more likely to adopt the protocol necessary for the States to become a party to the tribunal.

Additionally, like the Court, the arbitration would consist of a number of judges equal to those of the High Contracting Parties, as each state would pick one representative to sit on the panel.²¹⁶ The criteria for these judges would be the same as described for the judges of the Court.²¹⁷ The Court’s case law can also be used to foster the arbitration process. For example, a line of case law exists in determining when the “[s]tate has exceeded its margin of appreciation and has violated the right to property guaranteed by Article One of Protocol Number One.”²¹⁸

²¹³ *Id.* at 167.

²¹⁴ MAGDALENA FOROWICZ, *FRIENDLY SETTLEMENTS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS* 701 (2010).

²¹⁵ *Id.*

²¹⁶ CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, AS AMENDED BY PROTOCOL No. 11, art. 20, 213 U.N.T.S. 222 (Nov. 4, 1950)

²¹⁷ *Id.* at art. 21.

²¹⁸ See, e.g., *Sporrong v. Sweden*, 52 Eur. Ct. H.R. (ser. A) (1982); *Hentrich v. France*, 296 Eur. Ct. H.R. 3 19-20 (1994); *Holy Monasteries v. Greece*, 301 Eur. Ct. H.R. (ser. A) (1994); *Pressos Compania Naviera SA v. Belgium* 332 Eur. Ct. H.R. (ser. A) (1995); *Aka v. Turkey*, App. No. 19639/92, 1998-VI (1998); *Papachelas v. Greece*, App. No. 31423/96, 1999-II Eur. Ct. H.R. (1999); *Brumarescu v. Romania*, 2001-I Eur. Ct. H.R. 155 (1999); *Immobiliare Saffi v. Italy*, App. No. 22774/93, 1999-V Eur. Ct. H.R. 65 (1999); *Spacek v. the Czech Republic*, 30 E.H.R.R. 1010 (1999); *Beyeler v. Italy*, 2000-I Eur. Ct. H.R. 57 (2000); *Chassagnou v. France*, 1999-III Eur. Ct. H.R. 21 (2000); *Carbonara and Ventura v. Italy*, 2000-VI Eur. Ct. H. R. 71 (2000); *Former King of Greece and Others v. Greece*, 36 Eur. Ct. H.R. 43 (2000).

In order to account for the uniqueness of each case and each object, this tribunal, like the Claims Resolution Tribunal that resolved claims against the Swiss Banks, should resolve cases “in a judicial case by case manner rather than through an administrative procedure using predetermined criteria.”²¹⁹ Also mirroring the Claims Resolution Tribunal, the arbitration panel must recognize the difficulty of establishing a claim given the passage of time and destruction of documents, and therefore lighten the burden of proof to a requirement that it is “plausible in light of all the circumstances” that the claimant is entitled to the property.²²⁰

While individual states would bear the burden of the final judgment when warranted, the tribunal would allow both the claimant and the defendant to dramatically reduce litigation costs and risk, particularly “by allowing compromise cash awards and cost shifting.”²²¹ According to Article 50 of the European Convention, the expenditures of the Court are to be borne by the Council of Europe. The Protocol to this Convention would also extend Article 50 to include the tribunal. While all expenditures would need to be approved by the Committee of Ministers of the Council of Europe, the tribunal can use this budget to further lessen costs of both sides and to conduct its own investigations and cataloguing.²²²

V. CONCLUSION

While the establishment and implementation of such an international arbitration tribunal will by no means be an easy process, a resource like it is needed in order for Holocaust victims to have an avenue to resolve their claims against Poland and to see the return of their property. An environment that includes ADR mechanisms will allow for a more flexible, less expensive and more rapid outcome, qualities that are essential for this type of restitution.²²³ However, as this note demonstrated, Poland will not act on its own. There are too many obstacles, such as anti-Semitic beliefs ingrained in Polish culture, a desire to maintain an image of Poland

²¹⁹ Roger P. Alford, *Stefan A. Riesenfeld Symposium 2001: The Claims Resolution Tribunal and Holocaust Claims Against Swiss Banks*, 20 *BERKELEY J. INT'L L.* 250, 260 (2002).

²²⁰ *Id.* at 262.

²²¹ Jennifer Anglim Kreder, *A Nazi-Looted Art Tribunal*, 1 *World Arbitration & Mediation Review* 693, 697 (2007).

²²² The Budget of the Court, *EUROPEAN COURT OF HUMAN RIGHTS*, <http://www.echr.coe.int/ECHR/EN/Header/The+Court/How+the+Court+works/Budget> (last visited Oct. 20, 2010).

²²³ Ritchie, *supra* note 149, at 325 (2009).

as innocent and a victim of Hitler's final solution, lack of incentive to conduct internal investigation into art collections, and most detrimental, a lack of legislation that would assist victims and their families in their quest to regain their property.

This note has shown that even ADR will not work in Poland's hostile climate toward restitution. Therefore, this note has argued that an international arbitration tribunal with compulsory jurisdiction over claims for the restitution of personal property looted during the Holocaust should be established with the Convention to resolve these disputes. Numerous hurdles will need to be surpassed in order for the tribunal to be successful. The countries must consent to the tribunal's jurisdiction and must be held accountable for the decisions rendered. The tribunal must therefore contain an internal mechanism, such as a commission responsible for monitoring countries and ensuring that they are following the settlement agreement. If the EU pressures its members to accept by withholding EU benefits, punishing with large fines, or more drastically and thus less likely, eliminating its EU status, it is much more likely that countries will adopt the protocol which would give the tribunal jurisdiction over such disputes. The EU should further require the protocol's adoption for countries that are not yet EU members to join in the future.

It must be clear that any country withholding property from these victims is in violation of international humanitarian law.²²⁴ Under Article 4(3) of the Hague Convention for the Protection of Cultural Property, in the event of Armed Conflict, of May 14, 1954, parties have the duty to "prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property."²²⁵ As a member of the EU, all parties must abide by the IHL treaties to which they are signatories.²²⁶ The Hague Convention is included within the scope of IHL treaties.²²⁷ Because most members, including Poland, are members of the Hague Convention for the Protection of Cultural Property in the event of Armed Conflict, the EU should demand that these countries are meeting their international obligations as a matter of humanitarian interest.²²⁸ Guide-

²²⁴ Yehuda Z. Blum, *On the Restitution of Jewish Cultural Property Looted In World War II*, 94 AM. SOC'Y INT'L L. PROC. 88, 90-91 (2000).

²²⁵ *Id.*

²²⁶ UPDATED EUROPEAN UNION GUIDELINES ON PROMOTING COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW, art. 2(5) (2009).

²²⁷ *Id.*

²²⁸ *Id.*

lines requesting such compliance without consequences for those countries that do not fulfill these mandates are meaningless.

As of now, Article One of Protocol Number One to the European Convention on Human Rights does not apply to those who expect property in the future, such as heirs.²²⁹ Also, the Court may only be used as a last resort after all other domestic remedies have been exhausted. Given the nature of these cases, their time-sensitivity, and the need for justice, exceptions to these requirements must be made for this arbitration tribunal in order for it to be effective. Lastly, there must be word-wide notice of this tribunal, so that victims and heirs are aware of this venue and therefore register their complaints with the tribunal.²³⁰ While such notice may be a challenge, it would not be as difficult as one might suspect as “mailings were sent to more than one million persons, and questionnaires were returned by approximately 580,000 persons in the Swiss bank litigation alone. . . .A massive database of potential claimants, that is, Holocaust survivors and heirs, needed to be created to affect such notice.”²³¹

It is also important to remember that it will never be enough to compensate victims and their families who have suffered losses much greater than personal possessions. Nothing can bring back the lives of those who died in the Holocaust. These families deserve the highest measure of justice achievable. As Ambassador Naphtali Lau-Lavie, a victim of the Holocaust himself asserts, “[w]e are unable to bring back to life those who perished. We cannot undo the crimes perpetrated upon us. What we can do is to offer some remedy to the memory of our past, some remembrance of our heritage, so that it should not be permanently erased.”²³² As an issue facing the world, an international resolution is most suitable for success.

²²⁹ PROTOCOL TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS Art. 1, 213 U.N.T.S. 262 (May 18, 1954).

²³⁰ Kreder, *supra* note 173, at 167. “This policy mirrors that of the Iran-U.S. Claims Tribunal foundational documents.” *Id.* at 186.

²³¹ Kreder, *supra* note 173, at 185-86.

²³² Ambassador Naphtali Lau-Lavie, *supra* note 79, at 589.

