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## The Failure of Soft Law to Provide an Equitable Framework for Restitution of Nazi-looted Art

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# THE FAILURE OF SOFT LAW TO PROVIDE AN EQUITABLE FRAMEWORK FOR RESTITUTION OF NAZI-LOOTED ART

## BACKGROUND

It is estimated that over twenty percent of the art in Europe was looted by the Nazi regime during World War II.<sup>1</sup> During this period of “Nazi spoliation,” German forces systematically looted some of the most valuable art in the world from both museums and private owners in what has been called “the biggest robbery in history.”<sup>2</sup>

During the period of Nazi spoliation, the looting of art from rightful owners was a systematic process that deprived owners of their property rights and made it exceedingly difficult to prove post-hoc ownership.<sup>3</sup>

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1 See Greg Bradsher, *Documenting Nazi Plunder of European Art*, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, <https://www.archives.gov/research/holocaust/records-and-research/documenting-nazi-plunder-of-european-art.html> (last visited Sept. 30, 2017). According to legal scholar Bert Demarsin,

[t]he term “Nazi era” refers to the period of the Nazi reign (1933–1945) and thus covers a wider time period than the mere war years, 1939–1945. Hence, “Nazi era looted art” refers to art objects that were stolen or otherwise seized from their owners between the moment of Hitler’s rise to power in 1933 and the fall of the regime in 1945.

Bert Demarsin, *Let’s Not Talk About Terezin: Restitution of Nazi Era Looted Art and the Tenuousness of Public International Law*, 37 *BROOK. J. INT’L L.* 118, n. 1 (2011).

2 See Phil Hirschhorn, *Why Finding Nazi-Looted Art is ‘a Question of Justice,’* PBS (May 22, 2016), <http://www.pbs.org/newshour/updates/why-finding-nazi-looted-art-is-a-question-of-justice/> (noting that “[d]uring World War II, Hitler’s army systematically looted great art collections of Europe from national museums and private families. This government-sponsored theft is considered the biggest robbery in history.”); see also Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524, § 2 (2016) (“Congress finds the following: (1) It is estimated that the Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe as part of their genocidal campaign against the Jewish people and other persecuted groups. This has been described as the “greatest displacement of art in human history.” (2) Following World War II, the United States and its allies attempted to return the stolen artworks to their countries of origin. Despite these efforts, many works of art were never reunited with their owners. Some of the art has since been discovered in the United States.”).

3 See Demarsin, *supra* note 1, at n. 3. Demarsin notes:

The term ‘Nazi spoliation’ refers to the program of systematic plunder of private and public property (often artwork) by agents acting on behalf of the Third Reich in territories that came

Initially, the Nazi regime forced Jewish art dealers to sell their collections at drastically deflated prices before fleeing abroad.<sup>4</sup> Collections belonging to Jewish owners who died during the Nazi regime became property of the state.<sup>5</sup> Many owners' collections were looted after they were deported to concentration or death camps.<sup>6</sup> Paintings deemed "modern or subversive" were stolen from museums.<sup>7</sup>

Besides the obvious financial motivations, the Nazi regime was also motivated to loot such a large amount of cultural treasures due to Adolf Hitler's desire to create the "Führermuseum," an unrealized museum planned for Hitler's hometown of Linz, Austria.<sup>8</sup> The museum had been planned by Hitler for years, and was intended to be a "'super museum' that would contain every important artwork in the world, including a wing of 'degenerate art[.]'"<sup>9</sup> To that end, a special unit of the Nazi Army was

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under Nazi occupation. However, the notion is not restricted to confiscations and plunder, but also includes other involuntary losses that are considered as being precipitated by the Nazi Regime, such as sales of artwork in exchange for export visa.

*Id.*

4 Sophie Hardach, *Art Theft: The Last Unsolved Nazi Crime*, THE ATLANTIC (Nov. 18, 2013), <https://www.theatlantic.com/international/archive/2013/11/art-theft-the-last-unsolved-nazi-crime/281566/>.

5 *See id.*

6 *See id.*

7 *See id.*

8 *See Gemäldegalerie Linz Album*, MONUMENTS MEN FOUND. (Jan. 22, 2010), <https://www.monumentsmenfoundation.org/discoveries/f%C3%BChrermuseum-album>.

9 *See* Noah Charney, *Inside Hitler's Fantasy Museum*, THE DAILY BEAST (Feb. 7, 2014), <https://www.thedailybeast.com/inside-hitlers-fantasy-museum>. According to Charney, Hitler went to great lengths to ensure that the museum would be a new cultural Mecca, and would be filled with some of the world's most significant art:

Hitler's plan for his museum [was] on his mind for more than a decade, at least since 1934 . . . .  
 . . . Designed by Albert Speer, the museum complex was to include an opera house, a hotel, a parade ground, a theater, a library with a quarter-million volumes, and a museum with a five-hundred-foot colonnaded façade in the terrifyingly grand Fascist Neo-Classical style. . . .

created in 1940.<sup>10</sup> This unit, the “Kunstschutz,” was specifically tasked with acquiring significant pieces of art and cultural property.<sup>11</sup>

According to the Jewish Virtual Library, “[a]t the end of World War II, the Allies found plundered artwork in more than 1,000 repositories across Germany and Austria. Under the direction of the U.S. Army, nearly

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From the fall of 1940 on, Hitler regularly received (often as a Christmas present) annotated photo albums full of confiscated art that could be featured in the Führermuseum.

*Id.*

10 See Harry S. Martin, *Art in Time of War: Pillage, Plunder, Repression, Reparations & Restitution*, HARV. L. SCH. | ART L., [http://www.law.harvard.edu/faculty/martin/art\\_law/war.htm](http://www.law.harvard.edu/faculty/martin/art_law/war.htm) (last visited Jan. 14, 2018). Many of the stolen pieces destined for the Führermuseum were stashed in the ancient salt mine at Altaussee, Austria. According to Jim Morrison,

Hitler claimed Altaussee as the perfect hideaway for loot intended for his Linz museum. The complex series of tunnels had been mined by the same families for 3,000 years . . . . Inside, the conditions were constant, between 40 and 47 degrees and about 65 percent humidity, ideal for storing the stolen art. The deepest tunnels were more than a mile inside the mountain, safe from enemy bombs even if the remote location was discovered. The Germans built floors, walls, and shelving as well as a workshop deep in the chambers. From 1943 through early 1945, a stream of trucks transported tons of treasures into the tunnels.

See Jim Morrison, *The True Story of the Monuments Men*, SMITHSONIAN.COM (Feb. 7, 2014), <https://www.smithsonianmag.com/history/true-story-monuments-men-180949569/>.

11 See Martin, *supra* note 10. According to Martin,

[i]n May 1940, the Kunstschutz was created as a unit of the Wehrmacht (German army). Led by Count Wolff-Metternich, its mission was to protect and take inventory of artworks in war zones, in accordance with international agreements. Only one month later, Hitler orders the “securing” of art objects belonging to the French state or to private individuals, notably Jews.

*Id.*

700,000 pieces were identified and restituted to the countries from which they were taken[.]”<sup>12</sup>

Despite the initial efforts of the Allies, it was ultimately left to the governments of these war-torn countries to locate the pieces’ original owners.<sup>13</sup> Ultimately, “thousands of pieces either never made their way back to the rightful owners or the owners could not be tracked down.”<sup>14</sup>

It was not until forty years after the end of the war that “European countries began to release inventory lists of works of art ‘that were confiscated from Jews by the Nazis during World War II, and announced the details of a process for returning the works to their owners and rightful heirs.’”<sup>15</sup>

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12 *Holocaust Restitution: Recovering Stolen Art*, JEWISH VIRTUAL LIBRARY, <http://www.jewishvirtuallibrary.org/recovering-stolen-art-from-the-holocaust> (last visited Jan. 13, 2018) [hereinafter *Recovering Stolen Art*].

13 *See id.* These early efforts to repatriate Nazi-looted art were spearheaded by the Americans and the British. *See The Holocaust: Looted Art from Bruges and Belgium*, JEWISH VIRTUAL LIBRARY (Dec. 2014), <http://www.jewishvirtuallibrary.org/looted-art-from-bruges-and-belgium>. The decision to return art to governments and not to individual owners is reflective of the massive nature of the Allies’ undertaking. *See id.* According to the Jewish Virtual Library:

Discussions between Britain and America illustrate how it was decided early on that the only feasible way to administer the return of the items would be to deal with governments, who were keen to have their items returned to them as soon as possible. Many of these items were returned promptly, including the statue of the Madonna and Child, which is now on display in its rightful home in Bruges today.

Many however have still not been returned. For example, there was a recent discovery of 1,300 works of art in Munich, many of which were looted by Nazis. The large number of items that remain unaccounted for are a reflection of the size of the task that the Allied commissions undertook, a task which, given the sheer size, should be considered a huge success.

*Id.*

14 *See Recovering Stolen Art*, *supra* note 12.

15 *See id.*

Tens of thousands of pieces of art are still missing as a result of the Nazi invasions and occupation of Europe.<sup>16</sup> Despite the amount of time since World War II and the Holocaust, heirs of Nazi-looted art are still actively seeking to reclaim the property of their ancestors.<sup>17</sup> Therefore, the need for a uniform set of laws and processes governing claims remains as important as ever. In this Note, I will discuss the current state of the law with respect to repatriation of Nazi-looted art, some contemporary examples of repatriation efforts, and offer my thoughts on how the laws can be reformed to better serve the interests of justice.

### I. CURRENT STATE OF THE LAW

In 1998, forty-four countries signed the Washington Conference Principles on Nazi-Confiscated Art.<sup>18</sup> Although the ultimate resolution was non-binding, the signatory countries indicated their willingness to open records and make it easier for heirs and original owners of looted art

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<sup>16</sup> See Bradsher, *supra* note 1.

<sup>17</sup> See Cleve R. Wootson Jr., *A Painting Stolen by Nazis is Up for Auction — Despite a Jewish Family's Demand for its Return*, THE WASH. POST (Apr. 24, 2017), <https://www.washingtonpost.com/news/worldviews/wp/2017/04/24/a-painting-stolen-by-nazis-is-up-for-auction-despite-a-jewish-family-s-demand-for-its-return/>; see generally Sam Hananel, *Descendants of Jewish Art Dealer Win US Court Case in Bid to Recover Relics Looted by the Nazis*, THE INDEPENDENT (Apr. 6, 2017), <http://www.independent.co.uk/arts-entertainment/art/jewish-art-dealer-descendants-nazi-looted-relics-us-court-case-win-lawsuit-precedent-germany-guelph-a7670431.html> (discussing a recent U.S. district court case involving heirs of Nazi-looted art pursuing a claim).

<sup>18</sup> See Erin Blakemore, *Reclaiming Nazi-Looted Art is About to Get Easier*, SMITHSONIAN.COM (Dec. 12, 2016), <http://www.smithsonianmag.com/smart-news/new-law-will-make-it-easier-reclaim-nazi-looted-art-180961394/>.

to reclaim their property.<sup>19</sup> However, the non-binding tenets of the Washington Conference Principles have yet to be implemented in many signatory nations.<sup>20</sup>

For example, in Germany, as of 2014, the statute of limitations for stolen property claims was merely thirty years from the date of the crime.<sup>21</sup> This short time period effectively bars contemporary claims from the Holocaust era, since Nazi Germany fell in 1945.<sup>22</sup> In 2014, German authorities proposed lifting the thirty-year statute of limitations in certain situations.<sup>23</sup> However, as of 2018 this legislation appears to not be in effect.<sup>24</sup> The laws regarding the repatriation or reclamation of stolen art

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19 See U.S. DEP'T OF STATE, WASHINGTON CONFERENCE PRINCIPLES ON NAZI-CONFISCATED ART (Dec. 3, 1998), <https://www.state.gov/p/eur/rt/hlcst/270431.htm>. See also Melissa Eddy, *Germans Propose Law to Ease Return of Art Looted by Nazis*, N.Y. TIMES (Feb. 13, 2014), <https://www.nytimes.com/2014/02/14/world/europe/germany-considers-lifting-statute-of-limitations-on-cases-involving-stolen-art.html?> (discussing a proposed change in German law that would “lift the country’s 30-year statute of limitations for certain cases involving stolen property, a move that would make it easier for Jewish families to seek the return of art, furniture or other valuables taken from them by the Nazis.”).

20 See *Recovering Stolen Art*, *supra* note 12. According to the Jewish Virtual Library:

The Claims Conference on Jewish Material Claims Against Germany (the Claims Conference) and the World Jewish Restitution Organization (WJRO) announced on September 11, 2014, that there has been extremely minimal effort put forth by individual countries since The Washington Conference to return Jewish artwork stolen by the Nazis. The two organizations had been studying the identification of Jewish artwork and historical artifacts stolen by the Nazis for the past 15 years and have come to the conclusion that the majority (2/3) of countries who had signed on to Jewish art [reparation] agreements have done “little or nothing” to implement the requirements of these agreements.

*Id.*

21 See Eddy, *supra* note 19.

22 See *id.*

23 See *id.*

24 See *Germany*, in LIMITATION PERIOD, PRACTICAL LAW (Jan. 1, 2018), Thomson Reuters Practical Law.

vary from country to country, and rightful owners may run into relatively short statutes of limitation.<sup>25</sup>

In response to restrictive statutes of limitation found in some states, the U.S. Congress passed the Holocaust Expropriated Art Recovery Act (“HEAR Act”) in 2016, which standardized the statute of limitations for reclaiming Nazi-looted art in the United States, and gave rightful owners “six years [from] the time they locate where the art now resides and who currently has it” to bring lawsuits.<sup>26</sup>

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<sup>25</sup> See generally *id.*

<sup>26</sup> See Blakemore, *supra* note 18. The HEAR Act explicitly recognizes the difficulties that survivors and heirs faced due to the patchwork statute of limitations law across the country:

Victims of Nazi persecution and their heirs have taken legal action in the United States to recover Nazi-confiscated art. These lawsuits face significant procedural obstacles partly due to State statutes of limitations, which typically bar claims within some limited number of years from either the date of the loss or the date that the claim should have been discovered. In some cases, this means that the claims expired before World War II even ended. The unique and horrific circumstances of World War II and the Holocaust make statutes of limitations especially burdensome to the victims and their heirs. Those seeking recovery of Nazi-confiscated art must painstakingly piece together their cases from a fragmentary historical record ravaged by persecution, war, and genocide. This costly process often cannot be done within the time constraints imposed by existing law.

Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524, § 2(6) (2016) (citations omitted). Moreover, the actual text of the HEAR Act explicitly affirms the United States’ dedication to the international agreements, such as the Washington Conference Principles:

The purposes of this Act are the following:

- (1) To ensure that laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the Washington Conference Principles on Nazi- Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration.
- (2) To ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner.

Other nations have been less generous. In Poland, a country where 90% of the Jewish population was murdered during the Holocaust, the government recently gave individuals with claims to art in the city of Warsaw just *six months* to come forward, or else risk forfeiting their property to the city.<sup>27</sup> In Switzerland, heirs to Nazi-looted art have encountered resistance and delays in response to requests to repatriate stolen art despite the fact that Swiss bankers played an instrumental role in laundering money for the Nazi regime.<sup>28</sup>

Several organizations and databases track the patchwork of laws across the world that govern the return of stolen art and property. New York State operates the Holocaust Claims Processing Office (“HCPO”), which

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HEAR Act § 3.

27 Blakemore, *supra* note 18; see Adam Easton, *Jewish Life Slowly Returns to Poland*, BBC NEWS (Apr. 20, 2012), <http://www.bbc.com/news/world-radio-and-tv-17741185> (discussing the difficult post-war history of the Polish Jewry). Poland’s president recently signed legislation making it “a crime to suggest that Poland bore any responsibility for atrocities committed by Nazi Germany,” compounding the difficulty of any hope of recovery for the Polish Jewish community. See Marc Santora, *Poland’s ‘Death Camp’ Law Tears at Shared Bonds of Suffering with Jews*, N.Y. TIMES (Feb. 6, 2018), <https://www.nytimes.com/2018/02/06/world/europe/poland-death-camp-law.html>. Moreover,

[a]lthough many Poles risked their lives to save Jews, others energetically took part in pogroms, murdering at least 340 Jews in the town of Jedwabne in 1941 and 42 in the city of Kielce in 1946, after the war ended, to take two notorious examples. Still others extorted or betrayed their Jewish neighbors.

*Id.*

28 See John Miller, *Swiss Museum Revisits Demand for Nazi-Era Art Return After 2008 Denial*, REUTERS (Jan. 15, 2018), <https://www.reuters.com/article/us-art-nazis-swiss/swiss-museum-revisits-demand-for-nazi-era-art-return-after-2008-denial-idUSKBN1F41FP>; see also *The Sinister Face of Neutrality*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/nazis/readings/sinister.html> (last visited Sept. 30, 2017). According to the Institute of the World Jewish Congress (Jerusalem),

Switzerland served as a repository for Jewish capital smuggled out of Nazi Germany and the states threatened by it, and also for vast quantities of gold and other valuables plundered from Jews and others all over Europe. Right up until the end of the war, Switzerland laundered hundreds of millions of dollars in stolen assets, including gold taken from the central banks of German-occupied Europe.

*Id.*

facilitates the return of various assets, including art, to rightful owners.<sup>29</sup> The HCPO maintains databases that track the claims organizations, claims processes, and relevant laws for countries around the world.<sup>30</sup> The Central Registry of Information for Looted Cultural Property 1933-1945 and the Commission for Looted Art in Europe provide similar services.<sup>31</sup> The Center for Art Law, while not specifically focusing on Nazi-looted art, provides helpful insight into the state of art law.<sup>32</sup>

The laws relevant to reclaiming cultural property vary greatly between countries. Despite the unification efforts underlying the Washington Conference Principles, European countries still generally have more stringent statutes of limitations and a wider variety of “good-faith purchaser” defenses available to them.<sup>33</sup> At the conclusion of the 2009

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29 See *About the HCPO*, N.Y. ST. DEP’T OF FIN. SERVS., <http://www.dfs.ny.gov/consumer/holocaust/hcpoindex.htm> (last visited Sept. 30, 2017).

Specifically, the HCPO “provide[s] institutional assistance to individuals seeking to recover: 1) Assets deposited in banks. 2) Monies that insurance companies failed to pay policy beneficiaries. 3) Artwork that was lost, stolen, or sold under duress between 1933 and 1945.” *Id.*

30 See generally *id.*

31 See LOOTED ART, <http://www.lootedart.com/> (last visited Sept. 30, 2017); *About Us*, COMMISSION FOR LOOTED ART IN EUROPE, <https://www.lootedartcommission.com/Services> (last visited Oct. 7, 2018).

32 *Art Law Resources*, CTR. FOR ART L., <https://itsartlaw.com/art-law-resources/> (last visited Sept. 30, 2017).

33 According to Thomas R. Kline,

One very significant difference between American and European law is the availability of a good faith purchaser defense in several European countries, which can create title in someone who purchases an item for value without notice of the true owner’s claim to the property. In some cases, the good faith purchaser’s title even becomes incontestable after a period of

Holocaust Era Assets Conference in Prague, forty-seven countries approved the Terezin Declaration on Holocaust Era Assets and Related Issues (“Terezin Declaration”), which states in part:

Noting the importance of restituting communal and individual immovable property that belonged to the victims of the Holocaust (Shoah) and other victims of Nazi persecution, the Participating States urge that every effort be made to rectify the consequences of wrongful property seizures, such as confiscations, forced sales and sales under duress of property, which were part of the persecution of these innocent people and groups, the vast majority of whom died heirless.<sup>34</sup>

The Terezin Declaration, which was signed by the United States, reads as a broad affirmation of the goals set forth in the Washington Conference Principles.<sup>35</sup> However, despite international agreements such as the Washington Conference Principles and the Terezin Declaration, claims for restitution of looted art have only grown *more complex* in recent years.<sup>36</sup> International agreements such as these have been referred to as “soft law,” whereby

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years. The dominant rule in U.S. restitution cases, on the other hand, is that a thief does not acquire and cannot pass good title to stolen property. Nor can one who obtains artwork from a thief — even if acquired in utmost good faith — receive title to the object or pass good title to a subsequent purchaser. Hence, a good faith purchaser is protected from claims brought by original owners — to some extent — under European law, but is vulnerable under U.S. law.

Thomas R. Kline, *Restitution Roulette: A Comparison of U.S. and European Approaches to Nazi-Era Art Looting Claims*, 16 INT’L FOUND. FOR ART RES. J. 56, 59 (2015) (citations omitted), <https://www.law.upenn.edu/live/files/6412-kline-thomas-2015-restitution-roulette.pdf>.

34 Terezin Declaration on Holocaust Era Assets and Related Issues, June 30, 2009 [hereinafter Terezin Declaration], <https://www.state.gov/p/eur/rls/or/126162.htm>.

35 See Kline, *supra* note 33, at 63.

36 See *id.* at 56 (Kline argues that “Restitution claims have, if anything, grown in complexity in recent years and have become more difficult to resolve. Approaches on both sides of the Atlantic have led to uncertainty and unpredictable outcomes.”).

signatory countries agreed not to enact the provisions into positive law, but rather intended that these statements would encourage museums and others to apply the doctrines, particularly to publicize items that could have changed hands during the Nazi era and to pursue “just and fair” solutions to claims based on Nazi-era looting.<sup>37</sup>

Scholars have noted that these “soft law” agreements have had little effect on the decision-making of U.S. courts.<sup>38</sup> Thus, the actual implementation of the spirit of these agreements relies on the goodwill of the relevant decision-makers in the signatory states. In the U.S., which has had a particularly visible problem of museums displaying items of questionable provenance, this reliance on goodwill has been misplaced—museum attorneys have rigorously used statute of limitations and laches defenses in the face of suits for replevin of Nazi-looted art.<sup>39</sup> Prominent

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37 *See id.* at 63.

38 *See* Demarsin, *supra* note 1, at 118 (stating that “in spite of numerous international declarations proclaiming moral obligations for governments to effectuate the return of Nazi-looted art and cultural property to Holocaust victims and their heirs, United States courts have shown little difficulty dismissing these important international commitments by denying numerous claims for recovery.”).

39 *See id.* at 63. According to Demarsin,

We like to think that museums, and perhaps even private owners, will only assert defenses based on the passage of time when they believe the claim of Nazi-era looting is weak and will not do so when they believe the claim is well founded, but this is not always the case. At least one prominent museum attorney, general counsel to The J. Paul Getty Trust, argues that museums should utilize statutes of limitations and laches defenses because they are “designed to stabilize property rights and encourage resolution of claims when evidence and witnesses are more readily available.”

American museum associations have offered little help, and “appear to have turned their attention to other issues and abandoned the field of Nazi-era art looting.”<sup>40</sup>

## II. CONTEMPORARY EXAMPLES OF DIFFICULTIES IN GLOBAL RESTITUTION LAW

### A. *The Guelph Treasure*

In 1935, a consortium of three Jewish art dealers was forced to sell the “Guelph Treasure,” a collection of precious artifacts once owned by the medieval dynastic House of Guelph, to the state of Prussia.<sup>41</sup> At the time of the sale, Prussia was governed by the infamous Nazi Hermann

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*Id.*

40 *See id.* at 64. According to Demarsin,

[t]he two American museum associations (AAM and AAMD) appear to have turned their attention to other issues and abandoned the field of Nazi-era art looting. Standards for museums have not been clarified or updated since 2001, and financial resources for provenance research have not been provided to museums that need the assistance. The Nazi-Era Provenance Internet Portal ([www.nepip.org](http://www.nepip.org)) created by the AAM has been allowed to become outdated. As a result, although some of the largest, most prominent and wealthiest museums have been able to make a sincere effort, for example by digitizing records concerning their collections and posting them online, the same cannot be said of the smaller and medium sized-museums.

*Id.* (citations omitted).

41 *See* Hananel, *supra* note 17; *see also* Laura Gilbert, *Germany Can be Sued for the Return of Guelph Treasure, US Court Decides*, THE ART NEWSPAPER (Apr. 3, 2017), <http://theartnewspaper.com/news/germany-can-be-sued-for-the-return-of-guelph-treasure-us-court-decides/> (discussing the ownership of the Guelph Treasure by the House of Guelph).

Goering.<sup>42</sup> The collection was allegedly presented to Adolf Hitler himself, and since the 1960s has been on display in Berlin.<sup>43</sup> It is considered to be “the largest collection of German church treasure in public hands.”<sup>44</sup>

German officials have been reticent to acknowledge the circumstances of the sale. According to Sam Hananel, a reporter for *The Independent*,

German officials claim the sale was voluntary and say the low price was a product of the Great Depression and the collapse of Germany's market for art. In 2014, a special German commission set up to review disputed restitution cases concluded it was not a forced sale due to persecution and recommended the collection stay at the Berlin museum.<sup>45</sup>

After the sale of the art, two of the three dealers fled Germany, while the other died there.<sup>46</sup>

Three heirs of the dealers, Jed Leiber, Gerald Stibel, and Alan Philipp, sued Germany and the Prussian Cultural Heritage Foundation in the U.S.

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42 See Hananel, *supra* note 17. Hermann Goering was himself known for personally hoarding looted art. His valuable collection included over 1,000 paintings, many of which were stolen from Jews. See Catherine Hickley, *Painting from Goering's Collection is Returned to Banker's Heirs*, N.Y. TIMES (July 21, 2017), <https://www.nytimes.com/2017/07/21/arts/design/painting-from-goerings-collection-is-returned-to-bankers-heirs.html>.

43 See Hananel, *supra* note 17.

44 *Id.*

45 *Id.*

46 *Id.*

District Court for the District of Columbia for replevin of the art.<sup>47</sup> The German government tried to have the case dismissed under the Foreign Sovereign Immunities Act (“FSIA”).<sup>48</sup> However, in April of 2017 District Court Judge Colleen Kollar-Kotelly rejected this challenge, holding that the heirs could argue the sale was “part of the genocide of the Jewish people during the Holocaust and, accordingly, violated international law.”<sup>49</sup>

This case raises interesting facts, as it is one of the first to be directly affected by the HEAR Act, which, as noted above, standardized the statute of limitations for reclaiming Nazi-looted art in the United States. That the heirs turned to and were successful in the U.S. suggests that U.S. courts could become courts of last resort for similar plaintiffs whose efforts in the German legal system prove fruitless.<sup>50</sup>

#### B. *Camille Pissarro’s Shepherdess Bringing in Sheep*

In 2000, the University of Oklahoma received a \$50 million gift that included Camille Pissarro’s 1886 painting *Shepherdess Bringing in Sheep*.<sup>51</sup> *The painting had been previously appraised by Sotheby’s at \$1.5*

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47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.* As stated in the Hananel article,

[t]he ruling will encourage other families to pursue stolen art cases in American courts, said Jonathan Petropoulos, a history professor at Claremont McKenna College who specialises in Nazi art restitution. “The German system for civil litigation presents so many obstacles to claimants,” Petropoulos said. “Victims and heirs deserve their day in court in front of an impartial judge.”

*Id.*

51 See Max Kutner, *How a Painting Stolen by the Nazis Ended up at the University of Oklahoma*, NEWSWEEK: NEWSWEEK MAG. (Sept. 4, 2016),

*million*.<sup>52</sup> However, the painting was originally owned by Raoul Meyer, a wealthy Parisian whose art collection was looted by the Nazi regime during its occupation of France.<sup>53</sup>

Léone Meyer, Raoul's adopted daughter and a Holocaust survivor herself, had "spent her adult life searching for [the painting]."<sup>54</sup> Her family had previously sued to recover the painting in Switzerland in 1952, but the Swiss courts ruled against them because the Meyers could not prove the buyer had known it was stolen at the time of acquisition.<sup>55</sup> The painting made its way across the Atlantic and later ended up in the collection of a

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<http://www.newsweek.com/2016/10/14/nazi-looted-art-shepherdess-bringing-sheep-university-oklahoma-505736.html>.

52 *See id.*

53 *See id.* Kutner notes that

[p]rior to World War II, *Shepherdess* belonged to Théophile Bader, who co-founded the upscale department store chain Galeries Lafayette. It later went to Bader's daughter Yvonne and her husband, Raoul Meyer. In 1940, around the time Paris fell to the Nazis, the Meyers stashed the painting and the rest of their art collection in a bank vault in southern France. But the Nazis accessed the vault a year later and seized the collection, which also included at least three Renoirs and a Derain. They hauled it back to Paris, where they operated a depot for their cultural plunders in a building near the Louvre Museum called the Jeu de Paume. Scholars have described the site, which once served as Napoleon III's indoor tennis court, as a "concentration camp" for more than 22,000 stolen art objects.

*Id.* *See also* Graham Bowley, *University of Oklahoma Agrees to Return Pissarro Painting Looted by Nazis*, N.Y. TIMES: ARTSBEAT (Feb. 23, 2016), <https://artsbeat.blogs.nytimes.com/2016/02/23/university-of-oklahoma-agrees-to-return-pissarro-painting-looted-by-nazis/?mcubz=0>.

54 Kutner, *supra* note 51.

55 *Id.* Kutner notes that the Swiss dealer "had a reputation for handling stolen art, offered to sell it to the Meyers, but they refused to buy something they already owned." *Id.*

wealthy Oklahoma family, the same family that would later donate the painting to the University.<sup>56</sup> According to Kutner,

around 2009, an associate curator at the Indianapolis Museum of Art discovered that the chain of custody for *Shepherdess* was questionable; the Holocaust Art Restitution Project learned of the finding and later published a blog post about it. Meyer's son spotted the post in March 2012. Some eight months later, Meyer contacted University President David Boren and asked him to return the work. His response: The University of Oklahoma Foundation owned the painting, not the university. Finding that response unhelpful, she sued.<sup>57</sup>

Meyer filed suit in New York, but the University's lawyer successfully got the suit dismissed on jurisdictional grounds.<sup>58</sup> After Meyer refiled in Oklahoma, the University tried to get the case dismissed for expired statute of limitations (Meyer's suit was filed prior to the passage of the HEAR Act).<sup>59</sup> In May 2015, the Oklahoma legislature got involved, passing a resolution demanding that the University wrap the case up expeditiously.<sup>60</sup> In February of 2016, the parties negotiated a settlement.<sup>61</sup>

According to the terms of the settlement,

the painting will return to France . . . . It will go on view for five years at an institution of [Meyer's] choice. Then it will rotate every three years or so between a French institution and the Fred Jones Jr.

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

Museum [at the University of Oklahoma]. The ownership title goes to Meyer, and she will eventually gift it to a French institution “either during her lifetime or through her will[.]”<sup>62</sup>

This case demonstrates some of the procedural difficulties associated with American claims for ownership, as well as the denial of responsibility and byzantine court processes heirs often face when trying to reclaim looted art.<sup>63</sup>

*C. Rosenberg v. Seattle Art Museum*

Not all institutional owners have been as obstructive as the University of Oklahoma. In 1998, in the first lawsuit against an American museum by a Jewish family attempting to reclaim Nazi-looted art, the heirs of French art dealer Paul Rosenberg sued the Seattle Art Museum for a Matisse

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<sup>62</sup> *Id.*

<sup>63</sup> *See generally id.* This lawsuit may be just the beginning of the University of Oklahoma’s legal woes. According to Kutner:

Representative Wesselhoft and others think the Fred Jones Jr. Museum’s Weitzenhoffer collection has additional art stolen from Jews. Meyer’s lawsuit noted that a Renoir was apparently sold by a collector fleeing Nazi Germany, a red flag. A work by Mary Cassatt allegedly lacks ownership information for 1939 to 1957. A Degas is allegedly missing information for 1918 to 1963. A Monet allegedly has no ownership information before 1957. Three other works are allegedly connected to a gallery the Nazis raided or to dealers who were known Nazi collaborators. At least seven additional paintings allegedly have little to no provenance information prior to the 1950s or 1960s, or at all. Museum Director Mark White says by email that they are making progress on filling in ownership history gaps, but “such research is an exhaustive process.”

*Id.*

painting that was seized by the Nazi regime in 1941.<sup>64</sup> The Seattle Art Museum “essentially asked the family to sue so that it could reach a comprehensive settlement that would include Knoedler & Company, the Manhattan art dealer, which purchased the painting in Paris in 1954 . . . .”<sup>65</sup>

The Rosenberg heirs only figured out the whereabouts of the painting, *Odalisque*, in 1997 when the grandchild of its donors recognized the work in a book about Nazi-era art-looting.<sup>66</sup> The donors’ daughter, who was also a trustee of the Seattle Art Museum, notified the Rosenbergs, who filed the aforementioned suit against the museum.<sup>67</sup>

Despite the museum’s initial reluctance to return the painting, after its own commissioned investigation eventually concluded *Odalisque* was indeed stolen from the Rosenbergs, the museum returned the painting to the Rosenberg heirs.<sup>68</sup> Although the museum eventually returned

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64 Judith H. Dobrzynski, *Seattle Museum is Sued for a Looted Matisse*, N.Y. TIMES (Aug. 4, 1998), <http://www.nytimes.com/1998/08/04/arts/seattle-museum-is-sued-for-a-looted-matisse.html>.

65 *Id.*

66 *Id.* According to Judith Dobrzynski, an award-winning journalist,

[t]he whereabouts of the painting, “Odalisque” were unknown to the Rosenbergs until last summer, when a grandchild of the couple who donated it to the museum in 1996, Virginia and Prentice Bloedel, a founder of the Canadian timber giant MacMillan Bloedel Ltd., recognized it in “The Lost Museum: The Nazi Conspiracy to Steal the World’s Greatest Works of Art” by Hector Feliciano. The Bloedels, now deceased, had bought “Odalisque” in 1954 from Knoedler.

*Id.*

67 *See id.* The demand was unsuccessful despite clear and convincing evidence that the *Odalisque*’s provenance was problematic. *See id.* The New York Times reported at the time of the suit that Hector Feliciano, the author of the very book that led the Bloedel’s granddaughter to contact the Rosenbergs, “had traced the painting’s provenance for his book, [and] was also mystified by the museum’s action. ‘This is a very, very solid claim where you have documents all the way through from the 1930’s through the 1960’s showing that the painting belonged to the Rosenbergs . . . .’” *Id.*

68 *See* BRUCE L. HAY, NAZI-LOOTED ART AND THE LAW: THE AMERICAN CASES 2 (2017).

*Odalisque* on its own accord, it was not without cost to the Rosenberg heirs. It was only by chance that the Good Samaritan grandchild of the painting's donor discovered doubts about its provenance—by that time the Rosenberg heirs had lost track of its whereabouts. Moreover, the Rosenberg heirs still had to take the time and expense to file suit against the museum to recover their ancestral property. If the museum had not voluntarily commissioned its own investigation and voluntarily returned the paintings to the Rosenbergs, it is unclear if they would have been able to recover *Odalisque* through the courts.

#### D. *George Grosz Oil Paintings*

The saga of three works by expressionist artist George Grosz highlights the difficulties created by the patchwork statutes of limitation in the pre-HEAR Act era. His heirs vigorously sought the return of three paintings that “fell prey to a network of unscrupulous dealers who took advantage of the Nazi regime’s disfavor with the artist to divest him of his ownership.”<sup>69</sup> Grosz fled Nazi Germany in 1933, leaving behind two of his oil paintings and one of his watercolors with his Berlin-based art dealer.<sup>70</sup> According to the N.Y. Times,

Grosz, a prominent member of the Dada movement best known for his biting caricatures, was a staunch critic of Hitler and emigrated to America just as the Nazi regime was coming to power. Grosz, who

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<sup>69</sup> See Demarsin, *supra* note 1, at 119.

<sup>70</sup> See Patricia Cohen, *Family's Claim Against MoMA Hinges on Dates*, N.Y. TIMES (Aug. 23, 2011), <http://www.nytimes.com/2011/08/24/arts/suit-against-moma-highlights-time-limit-rule-in-nazi-looting-claims.html>. The works in question were, “the portrait ‘Poet Max Herrmann-Neisse’ (1927), ‘Self-Portrait with Model’ (1928) and the watercolor ‘Republican Automatons’ (1920) . . .” *Id.*

was not Jewish, left the three works with Alfred Flechtheim, his dealer, who was Jewish. Under the Nazis, Jewish businesses were boycotted, and within months Flechtheim also left Germany. He died penniless in London four years later.<sup>71</sup>

The famed Museum of Modern Art (“MoMA”) in New York acquired all three paintings in the early 1950s and claimed its purchasing agents were “unaware of any doubts about the chain of ownership.”<sup>72</sup> In 1953, “Grosz himself saw [one of the three disputed portraits] hanging on the museum’s walls . . . and wrote to his brother-in-law, ‘Modern Museum exhibits a painting stolen from me (I am powerless against that) they bought it from someone, who stole it.’”<sup>73</sup> Grosz died in 1959 without ever having contacted the museum about regaining possession.<sup>74</sup>

In 2003, Grosz’s heirs made their first formal request to MoMA to return the three paintings.<sup>75</sup> In July of 2005, MoMA’s director “wrote to the Groszes’ representative that evidence challenging the museum’s ownership was unpersuasive and that the transfers were not forced.”<sup>76</sup>

On April 10, 2009, the heirs filed their initial lawsuit against MoMA seeking the return of the paintings.<sup>77</sup> MoMA argued that the Grosz’s initial demand letter started the clock ticking on the three-year statute of limitations that applied in New York at the time.<sup>78</sup> However, the Grosz’s

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71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.* Cohen notes that “[u]nder New York law, claimants have three years to sue after their request for the return of their property is rejected.” *Id.*

representatives and other interested parties alleged bad-faith conduct on the part of MoMA, arguing that MoMA purposefully stalled the proceedings triggered by the Groszs' initial demand letter in an attempt to run out the statute of limitations clock.<sup>79</sup>

On December 16, 2010, the Court of Appeals for the Second Circuit affirmed the decision of the U.S. District Court for the Southern District of New York dismissing the suit on the bases of the "three-year statute of limitations for conversion and replevin under New York law."<sup>80</sup> Had the HEAR Act been in place at the time of the Grosz heirs initial demand and subsequent lawsuit, they presumably would not have time-barred under the Act's six-year statute of limitations.<sup>81</sup>

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79 *Id.* According to Cohen:

The family members, however, argue that Mr. Lowry told them that only the museum trustees could make a final decision, and the Groszes say that they were still negotiating with the museum until April 2006, when the museum board rejected their claim. In their view the board's vote is what started the clock, and so their lawsuit, filed on April 10, 2009, would have fallen within the allotted three-year period.

Charles A. Goldstein, counsel to the Commission for Art Recovery, said "the museum strung along" the Groszes, holding out the possibility of a settlement while the clock ran out. "The museum was dead wrong," he said.

*Id.*

80 See Demarsin, *supra* note 1 at 119 (summarizing the holding of *Grosz v. Museum of Modern Art*, 403 F. App'x 575, 576–77 (2d Cir. 2010), *cert. denied* 565 U.S. 819 (2011)). The Supreme Court subsequently declined to grant a writ of certiorari, thus quashing the hopes of the Grosz heirs. *Grosz v. Museum of Modern Art*, 565 U.S. 819 (2011), *cert. denied*.

81 The Second Circuit, in affirming the District Court, held that since MoMa formally refused the Grosz heirs demand on July 20, 2005 (at the latest), yet the suit was not filed until April 10, 2010, it exceeded the three-year statute of limitations under existing New York law. See *Grosz*, 403 F. App'x at 575–77.

*E. Republic of Austria v. Altmann*<sup>82</sup>

The circumstances leading to the landmark Supreme Court case of *Republic of Austria v. Altmann* highlight the myriad difficulties heirs to Nazi-looted art often face due to the defensive behavior exhibited by governments of former Nazi-occupied nations.<sup>83</sup> The issues that led to the *Altmann* case are common to many heirs, and the suit represents just “one of many brought by private plaintiffs seeking redress in American courts against foreign states.”<sup>84</sup>

Ferdinand Bloch-Bauer was an Austrian-Jewish art collector.<sup>85</sup> His heir Maria Altmann “sought to recover six [Gustav] Klimt paintings that the

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82 *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) (the Supreme Court upheld the Ninth Circuits’ denial of the Austrian government’s motion to dismiss and found that the Foreign Sovereign Immunities Act of 1976 applies to “claims based on pre-enactment conduct . . .”).

83 *Id.* Survivors and heirs have reason to be skeptical that Germany and former Nazi-bloc countries will handle their claims in good-faith. According to an investigation by Doreen Carvajal and Alison Smale, hundreds of pieces of art stolen by the Nazis were later returned by the German government to the families of the very Nazis that originally stole the art. See Doreen Carvajal & Alison Smale, *Nazi Art Loot Returned ... to Nazis*, N.Y. TIMES (July 15, 2016), <https://www.nytimes.com/2016/07/16/arts/design/nazi-art-loot-returned-to-nazis.html>. According to Carvajal and Smale, archives reveal that

hundreds of works were actually sold back at discounted prices in the 1950s and the 1960s to the very Nazis who had taken possession of them, including the widow of Hermann Goering, a senior aide to Hitler who pillaged art to amass a collection of more than a thousand works.

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Anne Webber, a founder of the [Commission for Looted Art in Europe], said her researchers concluded that the resale of looted art to Nazi-tied families had hardly been isolated. “They called them a ‘return sale,’” she said. “Why were they returned to them rather than the family from whom they were looted? Nobody knew.”

*Id.*

84 Mark J. Chorazak, *Clarity and Confusion: Did Republic of Austria v. Altmann Revive State Department Suggestions of Foreign Sovereign Immunity*, 55 DUKE L. J. 373, 374 (2005).

85 See Linda Greenhouse, *Justices Allow Suit Against Austria to Regain Art*, N.Y. TIMES (June 8, 2004), <http://www.nytimes.com/2004/06/08/us/justices-allow-suit-against-austria-to-regain-art.html>.

Nazis had confiscated from him after he fled Vienna in 1938, several of which were later placed in [Austrian] state museums.”<sup>86</sup>

Through Ms. Altmann’s efforts, the Austrian government returned “\$1 million worth of art to the family . . . including drawings by Klimt . . . .”<sup>87</sup> But despite the Bloch-Bauer family’s clear connection to the Klimt paintings sought, the Austrian government refused to return them.<sup>88</sup> Although Ms. Altmann attempted to negotiate with the Austrian government directly in the late 1990s, her efforts were unsuccessful.<sup>89</sup>

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86 HAY, *supra* note 68, at 4; *see also* Greenhouse, *supra* note 85.

87 Greenhouse, *supra* note 85.

88 *Id.* Greenhouse detailed the connection between the Bloch-Bauer family and the Klimt paintings and Maria Altmann’s difficulty with the Austrian court system and noted:

The connection between the Bloch-Bauer family and the art at issue in this case is stunningly apparent: two of the paintings are portraits of Adele Bloch-Bauer, Ferdinand’s wife and Ms. Altmann’s aunt. Mrs. Bloch-Bauer died in 1925, leaving a will in which she asked her husband at his own death to leave the paintings to the Austrian Gallery.

However, the works belonged not to her but to her husband. By the time he fled Vienna in 1938, he had made no legal arrangements to donate the paintings to the government or its museum. When he died in Switzerland in 1945, the paintings remained in his estate although they were no longer in his hands. Ms. Altmann, who also escaped Austria and has lived in California since 1942, is his only surviving heir.

After the war, the family made several efforts to retrieve the paintings. The current effort began in 1998, after a newspaper report based on the museum’s records indicated that the Austrian government was aware that the Bloch-Bauers had not donated the paintings. Ms. Altmann turned to the federal courts when she learned that under Austrian court rules, she would have to pay \$350,000 in court costs in order to bring her lawsuit there.

*Id.*

89 *See* HAY, *supra* note 68, at 4.

Eventually, Ms. Altmann filed suit in U.S. federal district court against the Austrian government under the FSIA.<sup>90</sup>

Instead of addressing the merit of the heirs' claims, the Austrian government brought numerous jurisdictional defenses, including "improper venue and dismissal under the doctrine of forum non conveniens."<sup>91</sup> However, the Austrian government's main defense was that it was entitled to sovereign immunity, and was therefore immune from suit in U.S. courts.<sup>92</sup>

The district court and the Ninth Circuit found in favor of Ms. Altmann, and the Supreme Court affirmed, holding that the FSIA has retroactive effect and therefore applied to the Austrian government's conduct in the 1930s.<sup>93</sup> However, this victory was merely jurisdictional and did not address the merits of the suit; the Supreme Court also noted that Austria could still raise various diplomatic defenses.<sup>94</sup> Ms. Altmann expressed

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90 *See id.* Chorazak provides further background on the lawsuit and the identity of the plaintiff:

For Maria Altmann, a Holocaust survivor in her late eighties, 1938 is not just a year. It marked the beginning of the "Anschluss," the Nazi invasion and annexation of her native Austria, and her family's subsequent flight from Vienna. More than sixty years later, following a discovery by a journalist conducting research in the state archives at the Austrian Gallery, Altmann learned that six Gustav Klimt paintings that she thought had been donated to the Gallery by her uncle had actually been confiscated from him by the Nazis and transferred to the Gallery under a cover letter signed "Heil Hitler." After the Republic of Austria rejected her proposals for private arbitration, and after litigating in Austrian courts proved overly burdensome, Altmann brought suit against Austria in a Los Angeles federal district court.

Chorazak, *supra* note 84, at 373-75 (citations omitted).

91 *Id.* at n. 5; *see also* Republic of Austria v. Altmann, 541 U.S. 677 (2004).

92 *See* Greenhouse, *supra* note 85; *see also* Altmann, 541 U.S. at 686.

93 *See* Greenhouse, *supra* note 85; *see also* Altmann, 541 U.S. at 686-88.

94 *See* Greenhouse, *supra* note 85; *see also* Altmann, 541 U.S. at 700-02 (affirming that the Republic of Austria can still raise the "act of state doctrine" as a substantive defense on the merits, and noting that nothing "prevents the State Department from filing statements of interest suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity.")

deep frustration with the tactics of the Austrian government, telling the *Los Angeles Times*, “[t]hey [the Austrian government] delay, delay, delay, hoping I will die. . . . But I will do them the pleasure of staying alive.”<sup>95</sup>

Eventually Ms. Altmann and the Austrian government “agreed to have the matter resolved by an arbitration panel, which ordered five [of the six] paintings returned to the family.”<sup>96</sup>

#### F. *Westfield v. Federal Republic of Germany*

Despite the ruling in the *Altmann* case, subsequent claims against the governments of former Nazi territories have been less successful.<sup>97</sup> Walter Westfield was a prominent Jewish art dealer in Germany during the 1930s.<sup>98</sup> The Nazi government targeted Westfield’s collection for confiscation in order to raise funds:

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95 Anne-Marie O’Connor, *Maria Altmann Dies at 94; Won Fight for Return of Klimt Portrait Seized by Nazis*, *L.A. TIMES* (Feb. 8, 2011), <http://articles.latimes.com/2011/feb/08/local/la-me-maria-altmann-20110208>.

96 See HAY, *supra* note 68, at 4.

97 See e.g., *Westfield v. Fed. Republic of Ger.*, 633 F.3d 409 (6th Cir. 2011) (dismissing a suit challenging the illegal expropriation of artwork by the German government).

98 See *Westfield, et al. v. Federal Republic of Germany — FSIA Shields [sic] Germany from Defending the Case on the Merits*, *CTR. FOR ART L.* (Feb. 6, 2011) [hereinafter *FSIA Shields Germany*], <https://itsartlaw.com/2011/02/06/westfield-et-al-v-federal-republic-of-germany-fsia-shields-germany-from-defending-the-case-on-the-merits/>. See also Elnaz Zarrini, Note, *Of Hitler and Camille Pissarro: Jurisdiction in Nazi Art Expropriation Cases Under the Foreign Sovereign Immunity Act*, 16 *FORDHAM J. CORP. & FIN. L.* 437, 437 (2011).

In November 1938, Walter Westfield . . . was arrested, beaten, and imprisoned by the Nazis for an alleged violation of currency exchange laws. The true purpose of the arrest was to seize Westfield's art collection for private resale, "a typical practice of the Nazi government." On December 12 and 13 of the following year, a portion of Westfield's art collection was seized and auctioned off through an order of the District Attorney's Office [in] Dusseldorf. In 1943, three years after Westfield was fined for the alleged violation and later sent to the Auschwitz death camp and "exterminated," the Nazi government sold other works from his art collection.<sup>99</sup>

His nephew Fred sued the German government under the FSIA, seeking damages for the theft of his murdered uncle's art collection.<sup>100</sup> Since the German government auctioned off Westfield's paintings, Fred argued that the actions fell within the "commercial activity exception" of the FSIA, which, if coupled with a direct effect on the United States, would allow him to sue the German government.<sup>101</sup>

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99 See Zarrini, *supra* note 98 (citations omitted); see also *FSIA Shields Germany*, *supra* note 98.

100 See Zarrini, *supra* note 98, at 438-39 (noting that "[t]he FSIA is the only jurisdictional basis for suing a foreign state in the United States, unless one of certain specified exceptions applies.").

101 *Id.* at 439. According to Zarrini:

Among the exceptions to the jurisdictional bar is the "commercial activity exception" provided in 28 U.S.C. § 1605(a)(2), which was invoked by the plaintiff to bring suit in federal court. That section provides three bases on which a plaintiff can sue a foreign state:

1. When the plaintiff's claim is based upon a commercial activity carried on in the United States by the foreign state. That section provides three bases on which a plaintiff can sue a foreign state.
2. When the plaintiff's claim is based upon an act by the foreign state which is performed in the United States in connection with commercial activity outside the United States.
3. When the plaintiff's claim is based upon an act by the foreign state which is performed outside the United States in connection with commercial activity outside the United States and which causes a direct effect in the United States . . . .

*Id.* (citations omitted).

However, the district court and the Sixth Circuit dismissed the case due to lack of jurisdiction.<sup>102</sup> The Sixth Circuit, in finding that Germany was entitled to sovereign immunity, held that “[t]hese actions, even though they have been declared null and void, and even though they constituted an abuse of police and prosecutorial powers by the German government at the time, were nonetheless the acts of a sovereign.”<sup>103</sup> The Court expressed sympathy to the plight of Westfield’s heirs, but nonetheless refused to grant relief under the commercial activity exception to the FSIA, writing:

We are deeply sympathetic to the loss the Heirs suffered as a result of Germany’s unspeakable acts. However, our jurisdiction is limited by both Article III of the Constitution and the statutes Congress enacts. We must operate within those restrictions, and because the Heirs failed to establish that Germany’s actions caused a direct effect in the United States, their claims do not fall within the commercial activity exception to sovereign immunity.<sup>104</sup>

#### IV. APPROACH

The current global patchwork of statutes of limitations and the availability of the “good faith purchaser defense” in some jurisdictions makes proceedings so confusing and unpredictable that one author has compared the process for repatriating Nazi-looted art to “restitution

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102 *See id.* at 438 (noting that “[o]n July 28, 2009, the District Court for the Middle District of Tennessee, basing its decision on the Foreign Sovereign Immunities Act (“FSIA”), dismissed the complaint due to lack of subject matter jurisdiction.”); *see also FSIA Shields Germany*, *supra* note 98 (“On Feb. 2, 2011, 6th Cir. Court of Appeals dismiss [sic] the case for lack of jurisdiction.”).

103 *Westfield v. Fed. Republic of Ger.*, 633 F.3d 409, 418 (6th Cir. 2011).

104 *Id.*

roulette because the likely outcome of a claim depends on so many factors other than whether the object was looted by the Nazis.”<sup>105</sup>

In the decade that passed between the adoption of the Washington Conference Principles and the Terezin Declaration, little progress was made on the stated goal of providing a predictable and fundamentally fair process for rightful owners and heirs of Nazi-looted art to begin their claims process against the persons or institutions unjustly holding their property.<sup>106</sup> Clearly, the “soft law” approach of these international agreements has been a resounding failure.

I believe that only a centralized claims administrator that has the authority to make binding decisions on the citizens and institutions of signatory states will guarantee that Holocaust survivors and their heirs have a fair chance to reclaim their stolen property. The success of positive, binding law in this regard has been demonstrated by the modest but demonstrable progress brought by the HEAR Act.

As can be seen in the example of efforts to reclaim “The Guelph Treasure,” the federal statute of limitations established by the HEAR Act has already granted heirs frustrated by the toothless laws abroad access to a court.<sup>107</sup> Before the federal HEAR Act standardized the statute of limitations across the country, individual states had short statute of limitations periods ranging from three to six years, and various rules dictating when the statute of limitations clock began to run.<sup>108</sup>

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105 Kline, *supra* note 33, at 64.

106 *See supra* text accompanying notes 18–40.

107 *See supra* text accompanying notes 41–50.

108 *See Kline, supra* note 33, at 60 (commenting on pre-HEAR Act statute of limitations in the United States). Kline notes:

Although statute of limitations periods, which bar plaintiffs from bringing untimely claims, are much shorter in the U.S. (three to six years) as compared to the longer European limitations periods, several limited exceptions can allow claims to remain alive today. For

After examining existing examples of international dispute resolution bodies, I believe that the dispute resolution system of the World Trade Organization<sup>109</sup> (“WTO”) (consisting of the Dispute Settlement Body (“DSB”) and the Appellate Body) offers a workable base framework from which an international dispute resolution system could be created for adjudicating the ownership of Nazi-era looted art.<sup>110</sup>

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example, New York applies a “demand and refusal rule,” under which the statute of limitations does not begin to run against a good faith possessor until the true owner has demanded her property and the wrongful possessor refuses to return it. Other states, like California, have variations of “the discovery rule,” which delays commencement of the limitations period until the owner discovers or should have discovered that her property was stolen.

*Id.* (citations omitted).

109 Headquartered in Geneva, Switzerland, and established on January 1, 1995, the WTO is “the only global international organization dealing with the rules of trade between nations[.]” and its stated goal is “to ensure that trade flows as smoothly, predictably and freely as possible.” *See* WORLD TRADE ORG., *The WTO*, [https://www.wto.org/english/thewto\\_e/thewto\\_e.htm](https://www.wto.org/english/thewto_e/thewto_e.htm) (last visited Nov. 5, 2017). As of July 29, 2016, 164 countries are members of the organization. Functions of the WTO include, “[a]dministering WTO trade agreements[.], [providing] forum[s] for trade negotiations[.], handling trade disputes[.], monitoring national trade policies[.], [providing] technical assistance and training for developing countries[.], [facilitating] cooperation with other international organizations[.]” *Id.*

110 As noted by Professor Donald McRae:

The general perception of the WTO dispute settlement process is that it works well. . . . And that position is, I think, generally accepted in European and in most if not all developed countries. The assessment of WTO dispute settlement by Western scholars has been positive. There has been some reaction by scholars in the United States against what they view as judicial activism by the WTO Appellate Body, and while this resonates in some political quarters in Washington, in my view, it is largely a minority position. The more common view, particularly amongst legal scholars, is that dispute settlement is the success story of the WTO.

Donald McRae, *Measuring the Effectiveness of the WTO Dispute Settlement System*, 3 *ASIAN J. WTO & INT’L HEALTH L. & POL’Y* 1, 2-3 (2008) (citations omitted).

The WTO considers resolving disputes to be part of its core mission—and considering the breadth of its mandate, disputes between member states are common.<sup>111</sup> If a grievance against another member nation is filed, the case first goes to the DSB, which consists of all WTO members.<sup>112</sup> The DSB has the “sole authority to establish ‘panels’ of experts to consider the case, and to accept or reject the panels’ findings or the results of an appeal.”<sup>113</sup> The DSB then “monitors the implementation of the rulings and recommendations, and has the power to authorize retaliation when a country does not comply with a ruling.”<sup>114</sup>

Despite convening the panel of experts, the first step of the DSB is an informal mediation between the adverse parties.<sup>115</sup> As evidenced by the dispute over *Shepherdess Bringing in Sheep*, Nazi-era looted art litigants can jointly benefit from settling the dispute outside of formal processes—potentially saving time and money, as well as protecting party confidentiality.<sup>116</sup> I believe mandatory mediation as a first step can lead to mutually acceptable solutions for both sides, especially in disputes

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111 The WTO “has one of the most active international dispute settlement mechanisms in the world. Since 1995, over 500 disputes have been brought to the WTO and over 350 rulings have been issued.” WORLD TRADE ORG., *Dispute Settlement*, [hereinafter *Dispute Settlement*] [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm) (last visited Nov. 5, 2017).

112 See WORLD TRADE ORG., *Understanding the WTO: Settling Disputes* [hereinafter *Understanding the WTO: Settling Disputes*], [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm) (last visited Nov. 5, 2017).

113 See *id.*

114 See generally *Dispute Settlement*, *supra* note 111. See also *Understanding the WTO: Settling Disputes*, *supra* note 112.

115 According to the WTO, “[b]efore taking any other actions the countries in dispute have to talk to each other to see if they can settle their differences by themselves. If that fails, they can also ask the WTO director-general to mediate or try to help in any other way.” *Understanding the WTO: Settling Disputes*, *supra* note 112.

116 See Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution,”* 1 J. OF EMPIRICAL LEGAL STUD. 843, 848–49 (2004).

between a private party and a public museum, as the rightful owner may want the work of art to retain some degree of public accessibility.

In the second stage of the DSB process, the panel of experts creates a report about how to resolve the dispute. The final report can only be rejected by a consensus vote of the DSB, so the losing member state cannot unilaterally block the adoption of the report.<sup>117</sup> If the losing member-state believes the decision of the DSB was unjust, it has the right to appeal to the WTO's Appellate Body, whose decisions are final.<sup>118</sup>

As a first step, I believe that the forty-seven countries who approved the Terezin Declaration should reconvene to establish a similar dispute-resolution body. For reference, I will hereinafter call this hypothetical body the Holocaust Claims Dispute Settlement Body ("HCDSB").

The bylaws governing the HCDSB should expressly disavow the "good-faith purchaser" defense allowed in many European countries. These good-faith defenses have already been generally rejected when

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117 According to the WTO:

Under the previous GATT procedure, rulings could only be adopted by consensus, meaning that a single objection could block the ruling. Now, rulings are automatically adopted unless there is a consensus to reject a ruling—any country wanting to block a ruling has to persuade all other WTO members (including its adversary in the case) to share its view.

*Id.*

118 See WORLD TRADE ORG., *Dispute Settlement: Appellate Body*, [https://www.wto.org/english/tratop\\_e/dispu\\_e/appellate\\_body\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm) (last visited Nov. 5, 2017). According to the WTO, The Appellate Body (which consists of seven persons) "hears appeals from reports issued by panels in disputes brought by WTO Members. The Appellate Body can uphold, modify or reverse the legal findings and conclusions of a panel, and Appellate Body Reports, once adopted by the [DSB], must be accepted by the parties to the dispute." *Id.*

advanced by litigants in U.S. courts.<sup>119</sup> The Terezin Declaration pledged its signatories to take historical circumstances into account when adjudicating claims, and underscored the moral obligation of the international community to reunite Holocaust survivors and their heirs with their stolen property.<sup>120</sup> It follows that any defense which allows thieves to pass good title to unscrupulous art buyers cannot be morally reconciled with this laudable goal.

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119 As noted by Kline:

Litigants have made the argument that a good faith purchase in Europe should be respected in the U.S. under choice of law principles, but that defense has mostly failed. In *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*, the U.S. Court of Appeals for the Seventh Circuit upheld the trial court's decision to apply Indiana law, as opposed to Swiss law, in a suit to recover mosaics stolen from a Greek-Orthodox Church in the Turkish-occupied area of Cyprus. The court noted that although Switzerland was the place where the conversion of the mosaics took place because the buyer acquired them there, Switzerland's contacts with the case were too attenuated to justify the application of Swiss law. Since the defendants were Indiana residents, the purchase money came from Indiana bank accounts, and the mosaics were promptly shipped to Indianapolis, Indiana law applied and the defendants could not rely on the Swiss good faith purchaser rule to provide title. Relying on *Cyprus v. Goldberg*, U.S. courts have mostly refused to apply the European good faith purchaser rule in analyzing Nazi-era art looting claims primarily because an analysis of competing interests generally points to the forum as the jurisdiction with the greater interest in the outcome of the case as compared to the jurisdiction where the sale took place.

*See* Kline, *supra* note 33, at 59-60 (citations omitted).

120 The Terezin Declaration under heading "Nazi-Confiscated and Looted Art" states:

Keeping in mind the Washington Conference Principles on Nazi-Confiscated Art, and considering the experience acquired since the Washington Conference, we urge all stakeholders to ensure that their legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties. Governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property, in order to achieve just and fair solutions, as well as alternative dispute resolution, where appropriate under law.

Terezin Declaration, *supra* note 34.

The bylaws of the HCDSB should standardize the statute of limitations for survivors and heirs to bring their claims, and adopt the “discovery rule” (which “delays commencement of the limitations period until the owner discovers or should have discovered that her property was stolen”).<sup>121</sup> This way, the statute of limitations will be rightfully tolled until the claimant discovers or should have discovered the location of the disputed artwork(s).

If the claimed property is physically located within a member-state or is owned by a citizen of a member-state, a Holocaust survivor or heir with a claim to the Nazi-era looted art should be able to file their initial grievance with the HCDSB. Allowing claimants to present their case in the first instance to the HCDSB will be vital to its success. Local discrimination against survivors and heirs (as evidenced by the six-month statute of limitations in Warsaw) still exists in Europe.<sup>122</sup> By allowing survivors and heirs to file their initial claims with the HCDSB as opposed to a local court or administrative body, claimants can rest easy that their case will not be subject to parochial biases it will be judged by members of an international body as opposed to individuals from the community where disputed art is located.

Those HCDSB member-states without direct involvement in the dispute can then appoint a panel of art experts to prepare a report discussing the provenance of the disputed works. If the panel reports that the art in question was either 1) taken under the system of “Nazi spoliation,” or 2) sold under duress for below its market value, the art

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<sup>121</sup> See Kline, *supra* note 33, at 60.

<sup>122</sup> See, e.g., Blakemore, *supra* note 18.

should be returned to the claimant, whether that be the original owner or his/her heir. In order to promote finality and efficiency, there should be no right to appeal the expert's decision. This system will ensure that another unjust result such as that in *Westfield v. Fed. Republic of Germany* is not reached—i.e., a result where the court feels bound by statute to allow a great injustice.

## V. CONCLUSION

The lack of a cohesive body of law for the restitution of Nazi-looted art has presented myriad problems for Holocaust survivors and heirs attempting to reclaim historically significant possessions. In passing the HEAR Act, the United States acted unilaterally to standardize its statute of limitations and thereby ease the barriers to filing claims. In contrast, former Nazi territories in Europe such as Germany and Poland have signed non-binding accords, such as the Terezin Declaration, yet failed to meaningfully modify their laws to ease the process of filing claims for repatriation of looted art. The signatories of the Terezin Declaration should take more concrete action and create a neutral, centralized body with the power and jurisdiction to definitively process and adjudicate claims over potential Nazi-looted art. Until this happens, survivors and heirs will continue to face unconscionable barriers to reclaiming what is rightfully theirs.

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