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TIME FOR A CHANGE? RESTORING NAZI-LOOTED ARTWORK TO ITS RIGHTFUL OWNERS

Rebecca L. Garrett[†]

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Few have, up to now, cared about the provenance of artworks; that an auctioneer, an art dealer or a curator often does not know whether a painting is purloined; that there is no database available where a researcher can find this information and, most important, there is no law that forces a seller to search and find out whether an artwork was looted by the Nazis or even stolen.¹

I. INTRODUCTION

The humanity lost during World War II can never be restored, nor can human lives be compared in any respect to

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¹ Hector Feliciano, *Opinion, Confront the Past, Search for Provenance*, L.A. TIMES, March 15, 1998, at M2.

losses of material value. Nevertheless, the return of Nazi-looted artwork to its rightful owners represents an important link in the chain of society's processing the atrocities committed during the war. By restoring property to its rightful owner, we are recognizing fundamental rights - both political rights and property rights - and thereby enriching democracy. Only through this recognition can we now honor the lost humanity of World War II.

The Nazi regime indiscriminately stole and looted items of value from Jewish people. They looted Jewish² property in the occupied countries of Europe, stealing, among other things, art collections, real estate, bank accounts, and antiques.³ In particular, Hitler went to great lengths to amass what he believed would be the world's greatest collection of art.⁴ Although the exact number of stolen artworks is unknown, estimates set the value of the artwork at upwards of hundreds of millions of dollars.⁵

Hitler targeted France because at the time it was the "center of the art world."⁶ Consequently, France suffered the greatest amount of Nazi looting.⁷ The Nazis looted over two-hundred art collections in France, warehousing the works in a

² During World War II many ethnic groups suffered under the Nazi regime, however, European Jewry was specifically and methodically targeted for immediate segregation and ultimate liquidation. Accordingly, they lost an incomparable amount of artwork to calculated Nazi plundering. See Naphtali Lau-Lavie, *In Pursuit of Justice: Recovering Looted Assets of European Jewry*, 20 CARDOZO L. REV. 583 (1998) (estimating Jewish property losses at over \$200 billion). Thus, this Author solely addresses the artwork stolen or looted from the Jewish population.

³ See *id.* Although the Nazi regime was the driving force behind the looting, members of the civil population in Nazi-occupied countries also participated in the looting. For example, members of the civil population would wait for the Jewish victims to be removed from the ghettos and would then flood the temporary Jewish homes for articles of value. See *id.* Indeed, "[t]he prevailing mood was an opportunity of enrichment at the expense of neighbors who were destined to become victims of the Nazi destruction machine." *Id.*

⁴ See Robert Schwartz, *The Limits of the Law: A Call for a New Attitude Toward Artwork Stolen During World War II*, 32 COLUM. J.L. & SOC. PROBS. 1 (1998).

⁵ See *id.* at 2.

⁶ *Id.* at 67. Many countries suffered cultural property losses at the hands of the Nazis. See generally THE SPOILS OF WAR 46-98 (Elizabeth Simpson ed., 1997) (reviewing the pillage in Poland, the Netherlands, Belgium, France, the Former Soviet Republics, the Ukraine, the Czech Republic, Austria, Hungary, and Germany).

⁷ See Hector Feliciano et al., *Nazi Stolen Art*, 20 WHITT. L. REV. 67, 67 (1998).

secret museum called the Jeu de Paume.⁸ At the time, the collection consisted of approximately one-third of the world's privately owned artwork.⁹

The Nazis were systematic in their plundering.¹⁰ They went to great lengths to record and compose an inventory of the works.¹¹ The leaders of the Nazi regime would then view the collections and would lay claim to the works based on a priority system.¹² Hitler had first choice; Goering would then choose whatever works he preferred, and so on down through the Nazi hierarchy.¹³

As a result of the Nazi looting, thousands of works of art have found their way now to museums, art dealers, and private collectors.¹⁴ Concern over the reclamation of Jewish property looted during World War II is mounting at the present time particularly because the generation that lived through the war is disappearing and artwork is beginning to surface through dispositions by heirs.¹⁵

One of the reasons for the great number of looted works of art from the war period is that artwork is cumbersome, and Holocaust victims were unable to carry it with them when relocated.¹⁶ Likewise, victims experienced great difficulty in trying to quickly value and sell their works.¹⁷ Thus, victims were forced to abandon their collections.

Artwork is a unique commodity. It is easily identifiable, and thus, subsequent purchasers may initially succeed in concealing stolen artwork for some time. Eventually, though, with a good faith purchaser, the artwork is likely to resurface.¹⁸ This

⁸ See *id.* at 68.

⁹ See *id.*

¹⁰ See generally Jonathan Petropoulos, *German Laws and Directives Bearing on the Appropriation of Cultural Property in the Third Reich*, in *THE SPOILS OF WAR*, *supra* note 6, at 106-11 (providing a thorough discussion of the Nazi plan to appropriate artwork from Jews and other minority groups).

¹¹ See Feliciano, *supra* note 7, at 68.

¹² See *id.* at 70-71.

¹³ See *id.* at 71.

¹⁴ See Schwartz, *supra* note 4, at 2.

¹⁵ See Feliciano, *supra* note 7, at 73.

¹⁶ See *id.* at 72.

¹⁷ See *id.*

¹⁸ See Owen C. Pell, *The Potential for a Mediation/Arbitration Commission to Resolve Disputes Relating to Artworks Stolen or Looted During World War II*, 10 *DEPAUL-LCA J. ART & ENT. L.* 27 (1999).

resurfacing often gives rise to claims to the work and disputes over its ownership.¹⁹ Furthermore, artwork carries with it great sentimental value, and it is therefore, "the type of asset Holocaust victims might have tried hardest to retain."²⁰ Similarly, sentiment is often the driving force behind Jewish survivors and families of World War II victims seeking to reclaim their artwork that was looted or stolen during the war.²¹

This article considers the different alternatives that individuals may pursue in attempting to reclaim Nazi-looted artwork. First, post-war restitution efforts are discussed. Next, recent innovations in data compilation systems are reviewed and applauded as a step in the right direction. Recent litigation attempts by parties in the United States court system are then briefly discussed and the alternative of litigation is highly criticized because of its national focus and the varied nature of standards now imposed by different courts. Then, the Author explores the existing international treaties that, to some extent, address the return of cultural property. After concluding that the existing alternatives are insufficient mechanisms for claimants to pursue, the Author suggests that the existing treaties provide a basis for recognizing a general obligation of states to negotiate, at the minimum, an international solution for art restitution. Finally, the Author recommends establishing a special tribunal to resolve these claims via a treaty that is binding at the state level.

II. ALTERNATIVES AVAILABLE TO VICTIMS PURSUING CLAIMS

A. *Post-War Efforts*

Post-war efforts of the Allied Control Council to institute a binding solution for the restitution of World War II survivors or victims' families ended primarily in failure. Although the Allied forces initiated many discussions to address cultural restitution, political and logistical complications barred the culmination of a successful solution.²² In terms of political differences among the Allied forces, the smaller nations, especially

¹⁹ See *id.*

²⁰ Feliciano, *supra* note 7, at 72.

²¹ See *id.*

²² See Michael J. Kurtz, *The End of the War and the Occupation of Germany, 1944-52. Laws and Conventions Enacted to Counter German Appropriations: The*

Belgium, supported the creation of a document that would bind all the signatories to facilitate cultural restitution. The larger nations, however, blocked such a threatening solution. The British, Americans and Soviets resisted binding themselves to the smaller powers primarily because they were hesitant to diminish any hegemony during post-war negotiations.²³ Efforts were further stalled because there were greater post-war conflicts to address, and cultural restitution raised many complex issues, including "the scope of the entire effort, restitution-in-kind, returning property to refugees, and the disposition of heirless property."²⁴

The Allied forces did reach a temporary solution during the post-war period. Central Collecting Points (hereinafter CCPs) were set up throughout Germany to catalog and store artwork until the rightful owners could be found.²⁵ Ultimately, 3.45 million cultural objects were returned as a result of the CCPs.²⁶ The program was subsequently transferred in 1949 to the German government where the works of art were placed in the Trust Administration of the Federal Republic of Germany.²⁷ Likewise, the United States Department of State established a similar program to facilitate the return of artwork.²⁸

Beyond the workings of the CCPs, post-war efforts to facilitate cultural property restitution came to a standstill. Soon, the Allied parties' political agendas changed in focus, and a binding solution became hopeless. Cold War tensions began to mount

Allied Control Council, in *THE SPOILS OF WAR*, *supra* note 6, at 112-16 (Elizabeth Simpson ed., 1997).

²³ See *id.* at 112-13.

²⁴ *Id.* at 113.

²⁵ See *DeWeerth v. Baldinger*, 836 F.2d 103, 111 (2d Cir. 1987).

²⁶ See Kurtz, *supra* note 22, at 116. Complimenting the CCPs was a unit created to investigate Nazi activity and specifically the Nazi practices of looting artwork. See James S. Plaut, *Investigation of the Major Nazi Art-Confiscation Agencies*, in *THE SPOILS OF WAR*, *supra* note 6, at 124-25. In 1944, the Allied forces formed the Art Looting Investigation Unit of the Office of Strategic Services. See *id.* at 124. The purpose of the Unit was (1) "to provide information helpful in the art-restitution process; and (2) to provide evidence for the prosecution of Nazi leaders at the Nuremberg trials." *Id.* Members of the Unit miraculously recovered a Nazi-generated inventory of cultural items taken from Belgium, France, Italy and the Netherlands. The inventory included information about the artworks' provenance, the condition of the artwork and, most important, the works' whereabouts. See *id.* at 125.

²⁷ See *DeWeerth*, 836 F.2d at 111.

²⁸ See *id.*

and the Americans decided to discontinue returning stolen cultural property to the artwork's country of origin.²⁹ According to one scholar, this American trend "symbolized the final failure of Allied diplomacy in the arena of cultural restitution."³⁰

B. *Recent Innovations Regarding the Dissemination of Provenance*

In response to the recent resurfacing of artwork that disappeared during World War II, innovations serving to help victims and their families pursue claims have emerged. Specifically, the international art community has witnessed a sea of change in the transfer of information on artwork. Previously, artists, dealers, collectors, and museums had an incentive to conceal an artwork's provenance.³¹ That is, "each participant in the illicit antiquities market ha[d] an incentive to strip as much information as possible from an artifact before it enters the safe anonymity of the legitimate art market."³²

The legitimization of the illicit art market hinges directly on the dissemination of information regarding an artwork's provenance,³³ and the Internet has offered a valuable forum for the transmission of art information.³⁴ For example, the Art Loss Register contains "an international, permanent, computer-

²⁹ See Kurtz, *supra* note 22, at 116. The Americans also honored individual foreign citizens' requests for the restitution of cultural property. *See id.*

³⁰ *Id.*

³¹ See Randy Gidseg et al., *Intellectual Property Crimes*, 36 AM. CRIM. L. REV. 835, 867-69 (1999).

³² Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 410-11 (1995).

³³ See Pell, *supra* note 18, at 51-54.

³⁴ See, e.g., Stephen K. Urice, *World War II and the Movement of Cultural Property: an Introduction and Brief Bibliography for the Museum Administrator, Legal Problems of Museum Administration*, ALI-ABA Course of Study Materials, March 26, 1998; *The Art Loss Register*, at <http://www.artloss.com/> (visited Nov. 11, 1999) [hereinafter *Art Loss Register*]; Getty Information Institute, *The Work of the Getty Provenance Institute*, at <http://www.getty.edu> (visited Nov. 11, 1999) [hereinafter *Getty Institute*]. The following organizations have participated in the Getty Information Institute: the Bibliothèque et Archives des Musées Nationaux au Musée du Louvre, Paris; CERCAM, Université Michel de Montaigne, Bordeaux; Fondazione San Paolo, Turin; Frick Art Reference Library, New York; Gemeentearchief, Amsterdam; Hermitage Museum, St. Petersburg; Kunsthalle, Hamburg; The Mellon Centre, London; Musées Royaux des Beaux-Arts de Belgique, Brussels; the National Gallery of Art, Washington D.C.; and Rijksbureau voor Kunsthistorische Documentatie, The Hague. *See id.*

ized clearinghouse on stolen and missing art.”³⁵ The Art Loss Register maintains a database consisting of over 60,000 items and has been helpful in the recovery of many stolen cultural objects via its general circulation of art information.³⁶ The web site for the Art Loss Register provides a free service where a victim can register a missing item on a central database, have the service check the artwork daily against the catalogues of auction houses, and obtain assistance in researching a work of art.³⁷

In addition, the Getty Information Institute in Los Angeles maintains the Getty Provenance Index.³⁸ The Index contains information on the provenance of approximately a half-million works of art, including such information as the artwork’s various owners, its history of auction transfers, and the current location of the work of art.³⁹ Finally, a high-technology firm in San Francisco has created a digital registration process called ISIS (Intrinsic Signature Identification System) which is “based on the premise that all objects contain unique microscopic physical features and random anomalies that cannot be duplicated.”⁴⁰ The process may help resolve disputes regarding the authenticity and provenance of artwork, and deter against future art theft.⁴¹

This trend is encouraging, and it serves to promote an international forum for the transfer of provenance. Yet, none of these registries or services has been recognized internationally, either via a treaty or through custom, as the definitive central art registry.⁴² Furthermore, these efforts do not represent a comprehensive legal solution to the return of Nazi-looted artwork. They would certainly enhance a more binding international solution to widely resolve claims disputes and therefore, cannot be disregarded.

³⁵ Gidseg, *supra* note 31, at 868 n. 251; see also *The Art Loss Register*, *supra* note 34.

³⁶ See *The Art Loss Register*, *supra* note 34.

³⁷ See *id.*

³⁸ See Gidseg, *supra* note 31, at 868 n. 252 (discussing the Getty Information Institute, *The Work of the Getty Provenance Institute*, at <http://www.gii.getty.edu/provenance/index.html>, (visited Nov. 11, 1999)).

³⁹ See Getty Institute, *supra*, note 34.

⁴⁰ Gidseg, *supra* note 31, at 879 n.253.

⁴¹ See *id.*

⁴² See Feliciano, *supra* note 7, at 74.

C. *Private Lawsuits*

The estimated recovery rate for stolen artwork is approximately twelve percent;⁴³ thus, most artwork is unrecoverable, or alternatively, extremely expensive to recover.⁴⁴ Jewish families who engage in litigation to resolve title disputes can generally expect to be engaged in their claim dispute for seven to twelve years.⁴⁵ As a result, the cost of the suit will likely exceed the value of the artwork, and the prospects that the plaintiff will gain title to the artwork are not promising.⁴⁶

There are a number of hurdles that a claimant must pass to successfully maintain a suit. A leading specialist in the art law field summarizes the legal issues typical to a Nazi-looted art reclamation claim as follows:

- (1) how to establish ownership to title; (2) when must a demand be made and what is the relevant statute of limitations to make it; (3) what rights, if any, does a bona fide purchaser have in a stolen or looted work of art; and (4) what claims run against professional sellers, such as art dealers, who bought and/or sold a stolen or looted work.⁴⁷

The following discussion highlights the legal standards governing ownership claims and focuses solely on litigation outcomes within the United States.

Artwork claim disputes are generally analyzed under the common law theory of stolen property.⁴⁸ Under this theory, a thief cannot pass title to a buyer, even if the buyer is an innocent or a bona fide purchaser.⁴⁹ Therefore, in the context of Holocaust victims, title vests in the original owner, despite the presence of a long chain of innocent owners. Some courts, however, have clouded this rule, declaring a statute of limitations

⁴³ See Ralph E. Lerner, *The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution to Disputes Over Title*, 31 N.Y.U. J. INT'L L. & POL. 15, 36 (1998).

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ Feliciano, *supra* note 7, at 73.

⁴⁸ See Schwartz, *supra* note 4, at 4.

⁴⁹ See *id.* at 3 (citing *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150, 1160 (2d Cir. 1982)).

period that begins when the innocent purchaser gains possession of the artwork.⁵⁰

One of the reasons for the disparity in legal standards regarding lost artwork claims within the United States, is the different standards of duty courts have imposed upon a true owner to recover lost artwork. For example, some courts impose upon true owners the due diligence standard.⁵¹ In other words, to maintain a suit the true owner must prove that he or she diligently attempted to recover the artwork.⁵² Alternatively, other courts have adopted the demand and refusal rule where the true owner has a limited time period to file suit after he or she demands the return of the artwork and the possessor of the artwork refuses to return the artwork.⁵³

In one of the first United States cases concerning this issue, the Supreme Court of New Jersey adopted the due diligence standard in *O'Keeffe v. Snyder*.⁵⁴ Although the claim in dispute in *O'Keeffe* did not arise in the context of World War II, the court's decision applies generally to actions in replevin.⁵⁵ Pursuant to the due diligence standard set forth in *O'Keeffe*, the statute of limitations will begin to run when "the owner knows or reasonably should know of his cause of action and the identity of the possessor of the chattel."⁵⁶ Thus, the burden is shifted onto the true owner.⁵⁷ At the end of the statutory period, title vests in the possessor of the artwork.⁵⁸

Presiding over the jurisdiction containing some of the world's greatest art collections, the New York federal courts have struggled with what standards to apply to stolen art cases. Their line of cases started with *DeWeerth v. Baldinger* (hereinafter *DeWeerth I*).⁵⁹ *DeWeerth I* concerned a claim dispute over a Claude Monet painting that disappeared from Germany at the end of World War II at a time when American soldiers were

⁵⁰ See *id.* at 3.

⁵¹ See *O'Keeffe v. Snyder*, 83 N.J. 478 (1980) (summarily rejecting the doctrine of adverse possession).

⁵² See *id.*

⁵³ See *Menzel v. List*, 267 N.Y.S.2d 804, 808 (Sup. Ct. 1966).

⁵⁴ See *O'Keeffe*, 83 N.J. at 478.

⁵⁵ See *id.*

⁵⁶ *Id.* at 497, 502.

⁵⁷ See *id.* at 499.

⁵⁸ See *id.* at 501.

⁵⁹ *DeWeerth*, 836 F.2d at 103.

quartered in the home of the original owner.⁶⁰ Despite the plaintiff's efforts to recover the painting after the war, the painting eventually resurfaced in a New York City gallery and was bought by a good faith purchaser, the defendant.⁶¹ The plaintiff subsequently learned of the painting's whereabouts, made a demand upon the defendant to return the work, and within three years of the demand, initiated a lawsuit against the defendant for her refusal to relinquish the painting.⁶²

In *DeWerth I*, the Second Circuit focused on the requirement that the demand may not be unreasonably delayed.⁶³ To avoid an unreasonable delay, the court imposed a due diligence duty upon the owner to search for the stolen artwork.⁶⁴ Thus, the statute of limitations would begin to run when the owner could have learned the location of the lost artwork.⁶⁵ In conclusion, the court held that the plaintiff had not met the due diligence requirement and had therefore caused an unreasonable delay.⁶⁶

Next, in *Solomon R. Guggenheim Foundation v. Lubell*,⁶⁷ (hereinafter *Guggenheim*) the Court of Appeals of New York considered the demand rule in a case concerning a lost Chagall gouache.⁶⁸ The Guggenheim museum lost the gouache sometime in the late 1960s, presumably when an employee of the museum absconded with it.⁶⁹ The defendant, Rachel Lubell, later purchased the gouache from an art gallery in 1967.⁷⁰ During preliminary arrangements for an art show in which the defendant was showing the gouache, the Guggenheim learned of its location and the owner's identity. In 1986, the museum made a demand upon the defendant to return the gouache to the museum. The defendant refused to return the gouache and

⁶⁰ See *id.* at 104-05.

⁶¹ See *id.* at 105.

⁶² See *id.* at 106-07.

⁶³ See *id.* at 107.

⁶⁴ See *id.* at 110.

⁶⁵ See *DeWerth*, 836 F.2d at 108.

⁶⁶ See *id.* at 112.

⁶⁷ *Solomon R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311 (1991).

⁶⁸ See *id.* at 314.

⁶⁹ See *id.*

⁷⁰ See *id.*

the Guggenheim responded by initiating a legal action against the defendant.⁷¹

At issue in *Guggenheim* was whether the museum was barred by the three year statute of limitations because the museum had not taken any steps to recover the gouache.⁷² The question was whether the museum had caused an unreasonable delay in attempting to locate the item.⁷³ The museum argued that it is common practice for museums to refrain from publicizing thefts.⁷⁴ The Guggenheim reasoned that museums are generally concerned about the publicity concerning an art theft because it may ultimately lead to the reporting of gaps in museum security and force the artwork further underground.⁷⁵

The Court of Appeals agreed with the *Guggenheim* decision, rejecting the *O'Keeffe* due diligence rule, stating: "it would be difficult, if not impossible, to craft a reasonable diligence requirement that could take into account all of th[e] variables and that would not unduly burden the true owner."⁷⁶ By so holding, the court functionally shifted the burden to the potential purchaser, requiring the purchaser to investigate an artwork's provenance prior to the sale.⁷⁷ The court reasoned this was the equitable result because it would be unfair to place the burden of searching for the artwork on the original owner.⁷⁸

After the *Guggenheim* decision, a district court decided *DeWeerth v. Baldinger* (hereinafter *DeWeerth II*),⁷⁹ holding that laches was the only defense that the defendant could raise, thereby placing the burden back on the plaintiff.⁸⁰ The Second Circuit then held that the district court had abused its discretion in granting relief judgment.⁸¹ Ultimately, the Second Cir-

⁷¹ See *Guggenheim*, 77 N.Y.2d at 316.

⁷² See *id.* at 316-17.

⁷³ See *id.* at 316-17.

⁷⁴ See *id.* at 316.

⁷⁵ See *id.* at 320.

⁷⁶ *Id.*

⁷⁷ See *Guggenheim*, 77 N.Y.2d at 320.

⁷⁸ See *id.*

⁷⁹ *DeWeerth v. Baldinger*, 804 F. Supp. 539 (S.D.N.Y. 1992) [hereinafter *DeWeerth II*].

⁸⁰ See *id.* at 552-53.

⁸¹ See *DeWeerth v. Baldinger*, 38 F.3d 1266, 1271 (2d Cir. 1994).

cuit's due diligence rule appears to stand in New York,⁸² despite the Court of Appeals' decision in *Guggenheim*.

These cases are just a sampling of the case law concerning lost artwork ownership disputes and simply illustrate how the governing legal standards are very much subject to the vagaries of courts. In general, judicial systems have been criticized as being ineffective mechanisms to help Jewish families recover stolen artwork.⁸³ In addition to the time commitment and exorbitant costs of pursuing a claim in a national court, the legal standards are in no way uniform. Furthermore, in many cases, assertions of ownership implicate more than one country, leaving great disputes as to what law should govern.

D. *International Support for the Return of Nazi-Looted Artwork*

The following discussion reviews the international treaties entered into from 1910 to the present.⁸⁴ The United Nations has been the driving force in drafting these treaties and offering them for adoption. The following discussion introduces these treaties and their relevant provisions. The Author then identifies the limitations of these treaties in respect to Jewish claims and ultimately suggests that the inefficacy of these treaties in their applicability to Jewish claims can be attributed to a lack of acceptance of the specific World War II restitution principles pursuant to international law.

The first treaty protecting cultural property during war times was signed at the Hague in 1910.⁸⁵ The Convention Respecting the Laws and Customs of War on Land explicitly prohibits the "destruction or willful damage" to historic

⁸² See generally *Guggenheim*, 77 N.Y.2d at 311.

⁸³ See Schwartz, *supra* note 4, at 2.

⁸⁴ See Lawrence M. Kaye, *Laws in Force at the Dawn of World War II: International Convention and National Laws*, in *THE SPOILS OF WAR*, *supra* note 6, at 100-05 (discussing pre-nineteenth century international efforts to preserve cultural property, including the 1815 Convention of Paris, and the Lieber Code of 1863). These early efforts resulted in forty states adopting the Hague Convention at the turn of the century. See *id.* at 102. At the conclusion of World War II, the Hague Convention was the only ratified treaty addressing cultural restitution. See *id.*

⁸⁵ See Convention Respecting the Laws and Customs of War on Land, Jan. 6, 1910, 36 Stat. 2277, art. 27 at 2303 [hereinafter 1910 Convention].

monuments and works of art.⁸⁶ The 1910 Convention, however, failed to protect cultural property during World War I and was an even greater failure during World War II.⁸⁷

In addition to these shortcomings, the 1910 Convention is further limited in application because it applies only to destruction caused by military action.⁸⁸ Thus, it appears to bind particular actions of a state as opposed to actions of private citizens or public depositories of cultural property, leaving individual parties recourse only through their home governments. The application of the treaty is limited, furthermore, to action taken during a war, and excludes the post-war period.⁸⁹ For these two reasons, the 1910 Convention is of little utility to post-war restitution efforts.

In 1952, members of the Council of Europe signed into force the Convention for the Protection of Human Rights and Fundamental Freedoms.⁹⁰ Protocol I of this convention protects general principles of human rights, such as the right to own and enjoy property.⁹¹ Protocol I certainly renders support to Jewish families seeking the return of their artwork but is quite general in scope.⁹²

As a response, in part, to the atrocities of World War II, contracting parties signed into force the Convention for the Protection of Cultural Property in the Event of Armed Conflict in 1954.⁹³ The 1954 Convention generally recognizes that "cultural heritage is of great importance for all peoples of the world, and that it is important that this heritage should receive international protection."⁹⁴ Pursuant to the 1954 Convention, a country's cultural property includes works of art.⁹⁵ The 1954 Convention further provides that the contracting parties "un-

⁸⁶ *Id.*

⁸⁷ See Kaye, *supra* note 84, at 100-05.

⁸⁸ See generally 1910 Convention, *supra* note 85.

⁸⁹ See generally *id.*

⁹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262.

⁹¹ See Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262.

⁹² See *id.*

⁹³ Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215.

⁹⁴ *Id.* at preamble.

⁹⁵ See *id.* at 242, art. 1.

dertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of . . . cultural property.”⁹⁶

The 1954 Convention has been criticized as falling short in that it does not address the issue of restitution.⁹⁷ The Protocol to the 1954 Convention does provide, however, that contracting parties will undertake to return cultural property at the end of the hostilities.⁹⁸ Furthermore, the Second Protocol to the 1954 Convention provides that “[p]arties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings” brought pursuant to an offense committed under the convention, including the obtaining of evidence necessary for the proceedings.⁹⁹

The Second Protocol also contains applicable law provisions. That is, the parties bound by the 1954 Convention are obligated to assist each other in legal proceedings “in conformity with any treaties or other obligations on mutual legal assistance that may exist between them.”¹⁰⁰ In the absence of such treaties or arrangements, the Second Protocol provides that the contracting parties “shall afford one another assistance in accordance with their domestic law.”¹⁰¹

Although the 1954 Convention goes one step further than the 1952 Convention by specifically rendering protection to artwork in the event of armed conflict, it does not present a comprehensive international solution for the return of Jewish artwork. Its provisions have not been greatly relied upon, most likely because the 1954 Convention does not recognize a private right of action for parties seeking to reclaim cultural property.¹⁰² In addition, even though the 1954 Convention’s Second Protocol mandates that parties shall assist each other with legal proceedings, it does not specifically indicate how the parties

⁹⁶ *Id.* at 244, art. 4.

⁹⁷ See Steven Costello, *Must Russia Return the Artwork Stolen from Germany During World War II?* 4 ILSA J. INT’L & COMP. L. 141, 145 (1997).

⁹⁸ See Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215.

⁹⁹ *Id.* at art. 19 (discussing mutual legal assistance).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, *supra* note 98, at 215.

will render such assistance.¹⁰³ Finally, its applicable law provisions present an opportunity for the disparity of treatment of ownership claims, depending on the whims of judges interpreting domestic laws.¹⁰⁴

Next, in 1970 the United Nations Educational, Scientific, and Cultural Organization (UNESCO) created the Convention for Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property.¹⁰⁵ The 1970 Convention more specifically addresses the situation of Jewish artwork stolen during World War II in that it prohibits "the import of cultural property stolen from a museum."¹⁰⁶ Cultural property, as defined by the 1970 Convention, includes "property of artistic interest," including works in a number of medium.¹⁰⁷

The 1970 Convention further provides that the member country shall "take appropriate steps to recover and return" cultural property, provided that "an innocent purchaser" or "a person who has valid title" to the cultural property receives just compensation.¹⁰⁸ This convention imposes on member states the obligation to ensure the "earliest possible restitution of illicitly exported cultural property to its rightful owner."¹⁰⁹ Member states are also obligated under the 1970 Convention to "admit actions for recovery of lost or stolen items of cultural property brought or on behalf of the rightful owners."¹¹⁰

An innovation of the 1970 Convention centers around the registration of artwork. That is, the 1970 Convention imposes certain obligations on the member states to maintain information systems about artwork.¹¹¹ Pursuant to Article 5, member states are obliged to establish "national services" for the protection of cultural heritage.¹¹² The national service is charged with drafting laws and regulations regarding the prevention of

¹⁰³ See *id.*

¹⁰⁴ See *id.*

¹⁰⁵ Convention for Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 [hereinafter 1970 Convention].

¹⁰⁶ *Id.* at art. 7.

¹⁰⁷ *Id.* at art. 1.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at art. 13.

¹¹⁰ *Id.*

¹¹¹ See 1970 Convention, *supra* note 105, at art. 5.

¹¹² *Id.*

illicit export of cultural property, and, more significantly, establishing and maintaining a national inventory of protected property.¹¹³ The aim of the inventory is to identify those cultural objects "whose export would constitute an appreciable impoverishment of the national cultural heritage."¹¹⁴

Next, the 1970 Convention requires antique dealers to maintain a register recording the origin of the cultural property, the names and addresses of the suppliers, and a description and price of each item the dealer sells.¹¹⁵ Also, the dealer is required to inform purchasers of cultural property of the 1970 Convention's export prohibitions.¹¹⁶

Although the 1970 Convention seeks the return of cultural property, it also is not specific enough to address ownership claims concerning artwork looted during World War II. Rather, the 1970 Convention is a broad remedial measure, with an aim at preserving a member state's cultural heritage. Jewish artwork stolen during World War II may qualify as cultural property; yet the 1970 Convention is too broad to handle the unique title disputes raised by Jewish claimants. In addition, even though the 1970 Convention establishes a registry, its registry's aim is to identify cultural objects worthy of the convention's protections. A registry maintaining information specific to Nazi-looted artwork would more effectively help to resolve title disputes.

Most recently, in 1995, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects was adopted.¹¹⁷ The Preamble to the 1995 Convention provides that the treaty "is intended to facilitate the restitution and return of cultural objects."¹¹⁸ Article 3 requires a possessor of a stolen cultural item to return it.¹¹⁹ Claims may be brought in the contracting state

¹¹³ *See id.*

¹¹⁴ *Id.*

¹¹⁵ *See id.* at art. 10.

¹¹⁶ *See id.*

¹¹⁷ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322. [hereinafter UNIDROIT Convention].

¹¹⁸ *Id.*

¹¹⁹ *See id.* at art. 3. A good faith purchaser who returns a cultural object to its rightful owner will be awarded "fair and reasonable compensation" for their interest in the object. *Id.* at art. 4.

where the cultural property is located, or another court or tribunal if the parties so agree.¹²⁰

The 1995 Convention goes one step further than previous treaties in that it sets forth a statute of limitations for when parties may bring claims. A claimant must bring a claim within three years of the time when the claimant had knowledge of the location of the cultural property and the identity of the current individual in possession of the item, and "in any case within a period of fifty years from the time of the theft."¹²¹ The convention provides, however, that contracting states may limit the statute of limitations period of specific claims to a seventy-five year time period.¹²² Like the court in *O'Keefe*, the 1995 Convention requires the claimant to have exercised due diligence in searching for lost cultural property.¹²³

The 1995 Convention recognizes the necessity of establishing a registry, but does not contain provisions to provide for a registry.¹²⁴ The major shortcoming of the 1995 Convention in terms of its utility in helping resolve Holocaust claims is that it does not apply retroactively. Rather, the Convention applies to claims arising from the date when the convention enters into force.¹²⁵ Article 10(3) explicitly states that claims arising out of confiscation before the convention are not legitimized and that parties should take alternative routes to recover such stolen cultural property.¹²⁶

These treaties may have shortcomings in terms of their application to Nazi-looted art claims, but they generally provide support to survivors or victims' families asserting claims. The question then remains: why is it that these claimants have not

¹²⁰ See *id.* at art. 8.

¹²¹ *Id.* at art. 3.

¹²² See UNIDROIT Convention, *supra* note 117, at art. 3.

¹²³ See *id.* at art. 6. The Convention also requires a possessor to exercise due diligence. *Id.* at art. 4. A court or tribunal will consider a number of circumstances to determine whether a possessor has successfully met the due diligence requirement to be a bona fide purchaser including: "the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances." *Id.*; see also *O'Keefe v. Snyder*, 83 N.J. 478, 499 (1980).

¹²⁴ See UNIDROIT Convention, *supra* note 120, at Preamble.

¹²⁵ See *id.* at art. 10.

¹²⁶ See *id.* at art. 10(3).

been successful in pursuing their claims on an international level? This question can only be answered by analyzing international legal principles and customary law.

III. CUSTOMARY INTERNATIONAL LAW

Although national law is binding on a states' citizens, international law differs in that there is "no universal system for the compulsory enforcement of international laws."¹²⁷ That is, whether a treaty binds a state depends on the state's voluntary willingness to recognize and abide by the treaty's terms.¹²⁸ On the other hand, "customary practices reach the status of international law when a large number of the states within the international system suppose these practices establish appropriate guidelines for the relations of states."¹²⁹

Also, principles of international law may derive from "established custom, from the principles of humanity and from the dictates of public conscience."¹³⁰ Thus, customary international law can aptly be described as "the product of general and consistent practice of states coupled with a sense of legal obligation."¹³¹

In *The Concept of Custom in International Law*,¹³² Anthony D'Amato critically analyzes¹³³ a framework establishing ele-

¹²⁷ Kaye, *supra* note 84, at 100.

¹²⁸ See *id.* See also M.O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, VA. J. INT'L. L. 829 (2000). Chibundu argues that "[i]n the absence of an explicit treaty undertaking . . . the most charitable reading of the authority of a national court to assert jurisdiction over events occurring outside of the national territory is to be based on the quite fluid notion of 'customary international law.'" *Id.* at 1121.

¹²⁹ Craig L. Carr & Gary L. Scott, *Multilateral Treaties and the Environment: A Case Study in the Formation of Customary International Law*, 27 DENV. J. INT'L L. & POL'Y 313, 314 (1999) [hereinafter Scott].

¹³⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

¹³¹ Stephan Wilske, *International Law and the Spoils of War: to the Victor the Right of Spoils?*, 3 UCLA J. INT'L L. & FOREIGN AFF. 223, 241-42 (1998).

¹³² ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 104 (1971).

¹³³ The author notes significant shortcomings of the 5 element theory. Although it has these shortcomings, this theory offers a framework for analyzing custom as a source of international law. See *id.*

ments necessary for the “emergence of a principle or rule of customary international law:”¹³⁴

- (1) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations;
- (2) continuation or repetition of the practice over a considerable period of time;
- (3) conception that the practice is required by, or consistent with, prevailing international law;
- (4) general acquiescence in the practice by other States;
- (5) the establishment of the ‘presence of each of these elements . . . by a competent international authority.’¹³⁵

As the following analysis demonstrates, the concept of art restitution for Nazi-looted art victims and their families has not approached the status of custom according to this framework. The general concept of cultural restitution, however, is fairly well embedded in international law as custom.

Certainly, Nazi-looted artwork claims transcend national borders and likely do not qualify as “purely internal” affairs that are excluded from the first element.¹³⁶ Whether the practice is concordant and involves a number of States is fairly indeterminable. That is, this particular requirement of element one is subjective and may depend upon the determination of the other elements.¹³⁷ In the context of a general obligation for cultural restitution, the conventions discussed in Part II.D evidence a concordant practice by a number of states regarding a situation that is in the domain of international relations, that is, cultural restitution at the international level.

Element two is also subjective. Inquiry would focus on what constitutes “continuation or repetition” and “practice.” In general, “[a] practice becomes customary international law when states engage in it consistently and out of a sense of obligation.”¹³⁸ In this instance, “practice” has two connotations for the purpose of this Article. There is the general practice of art

¹³⁴ *Id.* at 7.

¹³⁵ *Id.* (approach derived from Manley Hudson, *reprinted in* [1950] 2 Y.B. INT’L L. COMM’N 26, U.N. Doc. A/CN.4/SER.A/1950/Add.1).

¹³⁶ *See id.*

¹³⁷ *See id.*

¹³⁸ Edward H. Sadtler, *A Right to Same-Sex Marriage under International Law: Can it be Vindicated in the United States?*, 40 VA. J. INT’L L. 405, 444 (1999).

preservation and reparations as discussed in Part II.D, and the specific practice of the return of Nazi-looted artwork.

With regard to the former, recent trends suggest that states are beginning to recognize the importance of making reparations to World War II victims' families.¹³⁹ Although not recognized in the international arena, the practice of Nazi-looted art restitution has been in practice in domestic courts for some time.¹⁴⁰ Using the United States as an example, in terms of length of practice, the suits date as far back as 1980,¹⁴¹ and have been brought consistently up to the recent time period.¹⁴²

In *S.S. Lotus*,¹⁴³ the Permanent Court of International Justice focused on "a general practice of functioning conventions and domestic court decisions. It investigated the opinions of publicists, but appropriately set aside the question of whether such opinions played any role in the establishment of rules of customary law."¹⁴⁴ Certainly, domestic courts have begun to entertain Nazi-looted art claim disputes.¹⁴⁵ What is missing in terms of the *S.S. Lotus* analysis is a functioning convention. On the other hand, the general obligation imposed on states regarding cultural restitution dates as far back as the turn of the century and is well recognized in international treaties.¹⁴⁶ Temporal requirements in the context of custom have lost some of their importance. For example, in *North Sea Continental Shelf*,¹⁴⁷ the International Court of Justice stated that "passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law,"

¹³⁹ See *infra* notes 160-163 and accompanying text.

¹⁴⁰ See discussion, *infra* Part II.C.

¹⁴¹ See *O'Keefe v. Snyder*, 83 N.J. 478, 487 (1980).

¹⁴² See discussion, *infra* Part II.C.

¹⁴³ *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 4 (Sept. 7)).

¹⁴⁴ Hiram E. Chodosh, *Neither Treaty Nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT'L L.J. 87, 100 (1991). The *Paquete Habana*, 175 U.S. 677, 686-700 (1900) (also involved the United States Supreme Court's reliance on "a variety of treaties, military orders, and decisions as evidence of practice reflecting a rule of customary international law").

¹⁴⁵ See *supra* Part I. C.

¹⁴⁶ See this article, *supra* note 87 (discussing early efforts).

¹⁴⁷ *North Sea Continental Shelf* (W. Ger. v. Den. and Neth.), 1969 I.C.J. 4 (Feb. 20).

if the practice is both extensive and virtually uniform.¹⁴⁸ Certainly the general obligation of cultural preservation and restitution has withstood the passage of considerable time. The concept of Nazi-looted art restitution does not rise to the level of custom as defined in *North Sea Continental Shelf*, however, because the practice has not approached the level of being "both extensive and virtually uniform."¹⁴⁹

The third element is where the two components critical to this Author's argument intersect. That is, the general obligation placed on states to provide cultural restitution provides a basis for an obligation on the states to at least try to negotiate an international solution to the Nazi-looted art problem. As the previous discussion highlighted, the practice of cultural restitution is firmly embedded as a customary "practice" in international law. Placing the obligation of Nazi-looted art restitution on states is certainly well supported by this general principle, and, pursuant to the third element, consistent with prevailing international law.

Arthur Weisburd has refined the element of acceptance into law and he offers the following framework: "(first) the nation breaching the rule will grant the right of the injured party to investigate the violation; and (second), that the nation in violation of the rule will acknowledge, at least in principle, a duty to make reparation for its breach."¹⁵⁰ Reparation is broadly defined, and includes restitution compensation, and a simple acknowledgment of the violation.¹⁵¹

In the case of Nazi-looted works, the difficulty that claimants face in making trans-national claims suggests that reparations have not become firmly imbedded in international legal principles. On the other hand, the practice of returning cultural property as a general category is gaining momentum in the international arena, as evidenced by the 1910 Convention, the

¹⁴⁸ *Id.* at 43 (cited in Chodosh, *supra* note 144, at 101 (1991)). Mr. Chodosh explains that *North Sea Continental Shelf* illustrates a prime example of "instant customary law." *Id.* at 101.

¹⁴⁹ *North Sea Continental Shelf*, *supra* note 147, at 43.

¹⁵⁰ Chodosh, *supra* note 144 at 103-04 (discussing Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. INT'L L.J. 8, 9 (1988)).

¹⁵¹ *See id.*

1952 Protocol I, the 1954 Convention, the 1970 Convention, and the 1995 Convention.¹⁵²

Other states have not come to a general acquiescence in the practice of returning art on an international level. The recent Washington Conference evidences a step in the right direction. Forty-five nations met to discuss and bind themselves to a set of principles regarding the art restitution for World War II victims and their families.¹⁵³ In addition to the treaties analyzed in Part II.D, the Washington Conference provided further support for recognizing an obligation on states to resolve Nazi-looted art claims at the international level.

Because there is no treaty encompassing the first four elements in the context of Nazi-looted art, the fifth element fails. The treaties discussed in Part II.D, however, illustrate that the fifth element has been met in the context of a general obligation of states to recognize cultural restitution. Thus, establishing a special tribunal pursuant to a specific treaty to resolve art claims is necessary because the specific practice does not rise to the level of custom.

That is, the general obligation of cultural restitution as a customary legal principle renders support for the restitution of Jewish victims and their families. Custom falls short, however, because this situation is specific and requires a deliberate response. Treaty formation is the solution because it offers a "deliberate and explicit" solution to the problem of Jewish art claims and will resolve disputes through "prescribed procedures."¹⁵⁴

¹⁵² It is true that there "are few areas of international law [that are] untouched by the complex network of international treaty law." D'AMATO, *supra* note 132, at 104. The conventions listed which address cultural restitution, however, are general in scope. A treaty containing provisions that speak specifically to the return of Nazi-looted art restitution will result in the desired behavior. That is, "[w]here international law is crystal clear, there is no need for a treaty; but short of crystal clarity, or where existing law is undesirable from the parties' viewpoints, a treaty is a handy instrument for effectuating modification in the law." *Id.*

¹⁵³ See Pell, *supra* note 18, at 47.

¹⁵⁴ Chodosh, *supra* note 144, at 108 (citing Michael Reisman, *The Cult of Custom in the Late 20th Century*, 17 CALIF. W. INT'L L.J. 133 (1987)). Mr. Reisman questions the importance of custom in international law, finding that custom falls short in addressing conflict in international relations. See *id.* at 142-43. Instead, Reisman argues that "[c]ustom will not displace legislation. The world community will legislate for itself in the last decades of the twentieth century, perhaps not badly, but not democratically." *Id.* at 145. Cf. D'AMATO, *supra* note 132, at 4 (find-

In summary, post-war efforts at restitution ultimately failed as a result of the political climate, and since that time, relevant treaties have not contained provisions that effectively resolve stolen art disputes.¹⁵⁵ In addition, as illustrated by the difficulties claimants face in the context of civil lawsuits, the restitution of artwork stolen during World War II has not become custom as a matter of practice.¹⁵⁶ An international tribunal is therefore necessary to facilitate states accepting the principle that Jewish artwork should be returned.¹⁵⁷

As the discussion in Part II.D illustrated, the principle of cultural restitution has become firmly embedded in states' consciences since the nineteenth century. The Hague Convention codified the nineteenth century formulations regarding the protection of cultural property and later gave rise to the ensuing United Nations' conventions and protocols. The 1954 Convention, the 1970 Convention, and the 1995 Convention recognize the general importance of preserving cultural property. Thus, although there is no specific obligation binding states to practice the restitution of World War II artwork at the current time, what exists today is a general obligation requiring states to cooperate at some level in this particular and unique area.

The political climate is conducive to establishing a treaty to resolve Nazi-looted art claims. The Cold War, which stalled restitution efforts from the post-war period until recently, has ended and the political climate is more receptive to the concept of rebuilding. Also, such a tribunal would likely be well received at this time because great numbers of artwork are now resurfacing as the generation that lived through the war is diminish-

ing that between treaty and custom, "perhaps custom is the more important, for it is generally regarded as having universal application, whether or not any given state participated in its formation or later 'consented' to it").

¹⁵⁵ For example, the 1952 Convention provides generally for the recognition of personal property rights. See discussion *infra* Part C. Although the 1954 Convention is more specific to the protection of cultural property, it is limited in scope, only binding states and not private parties. See *id.*

¹⁵⁶ See Anthony Paul Kearns, *The Right to Food Exists Via Customary International Law*, 22 SUFFOLK TRANSNAT'L L. REV. 223, 246 (1998).

¹⁵⁷ See Scott, *supra* note 129, at 113 (arguing that some treaties may generate "instant custom"). But see Wilske, *supra* note 131, at 241 (maintaining that international conventions and customary law are different sources of international law).

ing and artwork is being divested from their estates.¹⁵⁸ National courts have been increasingly challenged by an influx of claims and would likely welcome an international solution.¹⁵⁹

Furthermore, other efforts at retrieving property lost during World War II have ended in relative success in recent times. For example, survivors or victims' families have successfully recovered such assets as money deposited in Swiss bank accounts,¹⁶⁰ insurance policy premiums,¹⁶¹ slave labor compensation,¹⁶² and money procured by several German and Austrian banks as a result of Nazi looting.¹⁶³

Finally, the atmosphere in the world community may be more receptive to such a tribunal.¹⁶⁴ Cases where other Jewish assets have been recovered illustrate a readiness on behalf of the courts and disputing parties to compensate survivors or victims' families, especially considering that a number of these disputes have resulted in an actual settlement of the claim. Even Germany, "aware of her guilt[,] . . . is looking for a means to balance the disparity [between different states' physical possession of cultural property] and convey her goodwill."¹⁶⁵

IV. OBLIGATION TO NEGOTIATE

At the least, this Author argues that states have an obligation to negotiate the creation of an international solution for the

¹⁵⁸ See Pell, *supra* note 18, at 46.

¹⁵⁹ In the United States, over fifty civil lawsuits have been filed in federal and state courts and the number of filings is increasing steadily. See Michael J. Bazylar, *Litigating the Holocaust*, 33 U. RICH. L. REV. 601, 604 (1999).

¹⁶⁰ See *id.* Litigation against the Swiss banks resulted in a settlement of \$1.25 billion, "the largest settlement of a human rights case in United States history." *Id.* at 608.

¹⁶¹ See *id.* at 609-11. Settlement negotiations will most likely result in the establishment of a fund to pay off claimants. See *id.* at 611.

¹⁶² See *id.* at 612-20. The German government decided to fund compensation for wartime slave laborers in 1998. Estimates set the fund amount at over \$1.7 billion. See Bazylar, *supra* note 159, at 614.

¹⁶³ See *id.* at 620-23. Several banks settled in March of 1999 for between \$30 and \$40 million. See *id.* at 623.

¹⁶⁴ In certain cases, and the Author argues in this case, "law owes its declarative quality to insufficient time for its internalization." Chodosh, *supra* note 144, at 95. Declarative rules, Mr. Chodosh argues, are "those that are declared by law by a majority of states but not actually enforced by them, or rules that are both practiced and accepted as law, but only by a minority of states." *Id.* at 89.

¹⁶⁵ Wolfgang Eichwede, *Models of Restitution (Germany, Russia, Ukraine)*, in *THE SPOILS OF WAR*, *supra*, note 6, at 216. .

return of Nazi-looted art. Although there is no duty for states to negotiate, "[a]n obligation to negotiate on the part of states can arise from commitments made in international agreements to which they are parties."¹⁶⁶

For example, in *North Sea Continental Shelf*, the ICJ determined that the states had an obligation to negotiate the dispute (and reach an ultimate agreement) pursuant to customary international law.¹⁶⁷ In support of its holding, the ICJ derived this obligation from a proclamation and a treaty. Not only were the states under an obligation to negotiate, but the ICJ imposed a duty on the parties to negotiate in a meaningful manner:

[T]he parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation to conduct themselves so that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it . . .¹⁶⁸

The treaties discussed in Part II.D, it can be argued, present evidence of customary international law that provides the basis for states to enter into meaningful negotiations to reach an international solution for the return of Nazi-looted art to its rightful owners. In addition to the treaties in existence, recent developments in this area include the Washington Conference. At the Conference, states reached an agreement on general principles of restitution for Nazi-looted art claimants.¹⁶⁹ This development suggests that states are ripe to enter an international treaty because once parties engage in successful international negotiations, there is a greater likelihood of the "conclusion of a legally binding international agreement or treaty."¹⁷⁰

¹⁶⁶ Martin A. Rogoff, *The Obligation to Negotiate in International Law: Rules and Realities*, 16 MICH. J. INT'L L. 141, 161 (1994).

¹⁶⁷ See *id.* at 157 (discussing *North Sea Continental Shelf*, *supra* note 150).

¹⁶⁸ *Id.* at 157 (citing *North Sea Continental Shelf*, *supra* note 150, at 25-26).

¹⁶⁹ See Pell, *supra* note 18.

¹⁷⁰ See Rogoff, *supra* note 166, at 143.

V. RECOMMENDATION

As the ownership claims over Nazi-looted art greatly increase, so mounts the criticism of the legal mechanisms currently addressing this situation.¹⁷¹ National solutions are inadequate; an international solution is paramount precisely because the stolen artwork has crossed numerous boundaries, further complicating claim disputes.¹⁷² The creation of a tribunal specific to cultural restitution arising out of Nazi looting is a step in the right direction.

Although legal principles regarding this specific form of cultural restitution have not become recognized as customary international law, a treaty (the "Treaty")¹⁷³ setting forth carefully tailored provisions for a tribunal to definitively resolve disputes will likely facilitate an international acceptance for the return of Jewish artwork. The likelihood of states making reparations to Jewish claimants would greatly increase.¹⁷⁴ That is, as between custom and treaty as sources of international legal principles, "the latter is . . . increasingly significant as states find it in their self-interest to make explicit agreements with other states for their mutual benefit and to avoid future conflicts."¹⁷⁵ With any hope, states will recognize the Treaty, abide by its terms, and the indoctrination of the principle of cultural

¹⁷¹ See Schwartz, *supra* note 4, at 2; see also Lau-Lavie, *supra* note 2, at 587.

¹⁷² See Stephanie Cuba, *Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art*, 17 CARDOZO ARTS & ENT. L.J. 447, 487-89 (1999). One noteworthy national effort, however, is the United States Congress' enactment of the Holocaust Victims Redress Act ("HVRA") which calls for a return of possessions, looted by the Nazis, to their rightful owners. See Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15 (1998).

¹⁷³ See Cuba, *supra* note 172, at 447. The author recognizes the work of Owen Pell in this regard, specifically Mr. Pell's suggestions regarding the creation of a special tribunal to resolve Nazi looted art claims. Many of this Author's ideas regarding the specifics of the Treaty, Tribunal, and Register are derived from Mr. Pell's work. See generally Pell, *supra* note 18.

¹⁷⁴ [A] necessary ingredient of change is the articulation of the practice as an issue of international law. Simple repetition is insufficient; all matters of comity do not eventually 'harden' into customary law. Repetition, no matter how frequent, cannot transform tourism or the use of French as a primary language in diplomacy into legally binding obligations.

D'AMATO, *supra* note 132, at 78. But see *Paquete Habana*, 175 U.S. 677 (1900) (introducing the concept of practice based on comity evolving into customary law).

¹⁷⁵ See D'AMATO, *supra* note 132, at 4.

restitution for World War II survivors or victims' families into international law will follow.

The Treaty would provide for the establishment of a tribunal (the "Tribunal") to decide claim disputes. As opposed to pursuing a claim in a civil lawsuit, the Tribunal would be specialized, and therefore more efficient than general courts, thereby reducing parties' costs. Moreover, the Tribunal's decision would be binding, and would present a unified and certain outcome because the Tribunal would apply consistent legal principles.

Perhaps the most important provision of the Treaty would be the statute of limitations provision. As illustrated by the previous discussion regarding claims brought in the United States, courts have struggled over this concept. The basic policy goals behind any statute of limitations, however, is to "bar stale claims" which "present evidentiary problems: witnesses die, memories fade, and evidence is lost."¹⁷⁶ For several reasons, the demand and refusal rule, as discussed in *Guggenheim*, as opposed to the due diligence rule, as discussed in *O'Keeffe*, is the equitable choice for Nazi-looted art claims. First, the evidence supporting these claims is just beginning to surface.¹⁷⁷ Second, individuals have only recently gained access to government records that provide insight into an artwork's provenance.¹⁷⁸

Applying the due diligence standard would be unduly harsh to survivors or victims' families. The due diligence standard would not realize the statute of limitations' policy goal of limiting stale claims; rather, it would bar valid claims. Because government records contain a substantial amount of the information necessary to pursue a Nazi-looted art claim, "a statute of limitations could arbitrarily foreclose a plaintiff's claim which is not truly stale."¹⁷⁹

Furthermore, the New York Court of Appeals correctly reasoned in *Guggenheim* that the due diligence standard falls short in that it fails to take into consideration a number of factors that overburden a true owner.¹⁸⁰ For example, survivors or vic-

¹⁷⁶ See Cuba, *supra* note 172, at 461.

¹⁷⁷ See *id.*

¹⁷⁸ See *id.*

¹⁷⁹ *Id.* at 462.

¹⁸⁰ See discussion *supra* Part C.

tims' families may have been prohibited from searching for their lost artwork precisely because they did not have access to informative documents. Also, parties, like the Guggenheim, may have valid reasons for foregoing a search for their lost artwork. In light of these circumstances, the burden should not fall on survivors or victims' families. They bear enough of a burden without having to meet the due diligence requirement.¹⁸¹

Next, because "there is currently no reasonable means available to a purchaser to ascertain the provenance of a painting,"¹⁸² an integral part of the Treaty would be the establishment of an official registry (the "Registry"). The Registry would contain information about an artwork's provenance, a physical description of the artwork, and any decisions made by the Tribunal regarding the work of art. Instead of having to research a number of databases, a central registry specifically containing information about Nazi-looted art would offer parties a definitive research tool for researching the provenance of an artwork. In addition, such a registry would provide a new purchaser of artwork with information verifying certainty to title. Above all, an official registry would provide uniform and accurate information, thereby reducing uncertainties in the art world.

As discussed in Part II.D, there is a general obligation placed on states to provide cultural restitution. This obligation extends to states an obligation to, at the least, negotiate a treaty similar to the one described above. The reason this general obligation has not resulted in an international solution for Nazi-looted art restitution is best explained by the complicated details that courts and claimants face in attempting to resolve claims. That is, the principle exists, but the details have complicated the natural development of an international solution.

Most significantly, other principles of law existing at the state level, such as the statute of limitations issue, have stymied the development of the general obligation into a specific solution at the international level. The Treaty would resolve the conflict among courts regarding the statute of limitations placed on suits and create a specific obligation for states to re-

¹⁸¹ See Cuba, *supra* note 172, at 460.

¹⁸² O'Keeffe v. Snyder, 83 N.J. 498 (1980).

solve conflict regarding Nazi-looted art in a uniform and predictable manner.

VI. CONCLUSION

It has been over fifty years since the downfall of Hitler and the Nazi regime. Yet, Jewish families still seek the return of their stolen artwork. With the Cold War subsided, and states' consciences raised regarding World War II reparations, it is time for artwork to be restored to its original owners. An international treaty establishing a tribunal is the most effective solution to resolve Nazi-looted art claim disputes. Through the Tribunal, families may finally lay to rest their desires to collect their ancestors' treasured works of art and thereby gain a sense of closure.