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**1999 Symposium
Theft Of Art During World War II: Its Legal And
Ethical Consequences**

**THE POTENTIAL FOR A
MEDIATION/ARBITRATION
COMMISSION TO RESOLVE DISPUTES
RELATING TO ARTWORKS STOLEN OR
LOOTED DURING WORLD WAR II**

*Owen C. Pell*¹

I. INTRODUCTION

It can be indelicate, perhaps even crass, to speak publicly about art looted during World War II because the loss of art, on its face, relates to money and property, losses that are insignificant when compared to the lives lost during the Holocaust. At the same time, however, it is well known that an integral part of the Nazi genocide was the planned and coordinated looting of victims' property for the benefit of the Reich and its leaders. As a result of this looting program, art was dispersed across Europe and/or was fed into a market of dealers who bartered with the Nazis and then moved art out of Nazi-controlled territory to neutral nations and beyond.²

1 Mr. Pell is a litigation partner at White & Case LLP in New York with experience in cases involving stolen or looted art, issues of public international law and claims arising out of the Holocaust. The author gratefully acknowledges the comments of Paul D. Friedland and Glenn M. Kurtz, partners at White & Case, and the research and insights of Alycia R. Benenati, Tara A. Hunt and Jonathan Hamilton, associates at White & Case, and Rebecca Garrett and Meghan Murphy, summer associates at White & Case. In addition, the author owes a special debt of gratitude to Hector Feliciano, the gifted writer whose meticulous scholarship, acute sensitivity to the historical and moral issues presented by looted art cases, and thoughtful questions about the litigation process inspired many of the proposals set forth below. Copyright 1998 & 2000 Owen C. Pell.

2 See HECTOR FELICIANO, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART* (1997); Georg von Segesser,

The results of that genocide have never been completely addressed with respect to art looted or stolen by the Nazis. The subject is a peculiarly international one. As noted, looted art often was dispersed. In addition, as it has developed since World War II, international law appears to support the return of looted art, but provides no forum or clear remedies to aggrieved claimants. At the municipal level, the law relating to stolen art varies significantly from state-to-state. Even in those nations where a thief cannot pass title to any subsequent purchaser, true owners or their heirs can have a surprisingly difficult time asserting their rights. Some national laws actually may run counter to international law, in effect, perpetuating crimes of genocide or other human rights violations by frustrating the rights of those with a rightful claim to looted property. In addition, as the global art market has expanded, art dealers and museums around the world have been increasingly confronted with issues of title pertaining to the Holocaust.

A mediation or arbitration commission designed to create a property registration system with binding legal effect *and* to resolve disputes relating to title, formed pursuant to treaty or some other form of collective State action, would provide the surest, most efficient and most consistent way under international law to resolve claims relating to art works looted or stolen during World War II. This approach is particularly appropriate now, in light of the strong consensus that has emerged for an organized, just and fair resolution of the Holocaust-looted art problem. Moreover, a neutral forum with clear rules of law and procedure capable of developing and pooling historical data regarding looted art, providing a means to clear title to art, *and* resolving claims would not only be fairer to victims, but such a forum would be fairer to museums and art dealers seeking repose and/or certainty with

Switzerland and the Art Trade 1939-1945 (an address given at the 1997 Annual Meeting of the International Academy of Estate & Trust Law in Paris, France).

In addition, at the December 1998 Washington, D.C. conference sponsored by the United States to discuss Holocaust art and asset issues representatives of 45 nations and 13 non-governmental organizations attended.

respect to their holdings.³ The existence of such a forum also might deter looting in future conflicts by making it harder to market looted works.

As discussed below, the fact and magnitude of programmatic and systematic looting during the Holocaust has been well-documented. (Section II) The magnitude of this looting supports the idea that a great deal of artwork may be affected by Holocaust-related issues. The creation of an international commission to address title and ownership issues relating to Holocaust-looted art is supported by several factors: (a) developments under international law with respect to human rights and the property rights of individuals (Section III), (b) changes in international commerce that have made a global art market increasingly subject to conflicting national laws and regulations (Section IV), and (c) the unique legal and moral issues presented by art looted or stolen during the Holocaust combined with the fact that the proposed system would not damage the art market (Section V). The potential structure and procedures for the proposed commission are discussed in Section VI.

II. AN OVERVIEW OF LOOTING CONDUCTED DURING THE HOLOCAUST

The looting of art perpetrated by the Nazis during World War II was not merely incidental to the German war effort, but rather was a deliberate and systematic policy of looting and hoarding irreplaceable art and other cultural objects. As has been well-documented by the evidence adduced at the Nuremberg trials and by historians thereafter, the organized looting of art was not only designed to enrich the German state and increase the prestige of its leaders, but was viewed as an integral part of the Third Reich's

3 As Henri Hajdenberg, President of the Representative Council of Jewish Institutions in France recently stated: "The essential, fundamental aspect of the restitution question is historical knowledge and its dissemination. This question should not be obscured by demands for money." Craig R. Whitney, *France Confronts Holocaust Claims*, N.Y. TIMES, Nov. 29, 1998, at A8.

policies on national and racial supremacy.⁴ The expropriation of property, and particularly objects of art, also was an important part of the Nazi effort to dehumanize the Jews as part of the planned process of persecution, dehumanization, and eventual annihilation of the race.⁵ As such, this looting formed an essential aspect of the program of the Holocaust.⁶

A. Control of Art by the State and Early Looting Efforts

The exertion of state control over art and the organized effort by the Third Reich to procure cultural property began in earnest with the “degenerate art” campaign of 1937.⁷ This campaign involved the removal of impressionist and other “modern” art, or “works that featured abstraction or colors which did not conform to nature” from German state collections.⁸ In a speech delivered in July of 1937, Hitler forbade artists to use anything in their paintings but forms seen in nature.⁹ Hitler went on to state, “[w]e will, from now on, lead an unrelenting war of purification, an unrelenting war of extermination against the last elements which have displaced our Art.”¹⁰ From Hitler’s perspective, the world should be purged of these impure and unsuitable works of art and of the artists

4 See *The Nurnberg Trial*, 6 F.R.D. 69, 122, 157-58 (1946); ELIZABETH SIMPSON, *THE SPOILS OF WAR: WAR WORLD II AND IT’S AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY* (Abrams 1997); HECTOR FELICIANO, *THE LOST MUSEUM*, 144 (Basic Books 1995); JONATHAN G. PETROPOULOS, *ART AS POLITICS IN THE THIRD REICH*, 310 (Univ. N.C. Press 1996).

5 PETROPOULOS, *supra* note 4, at 123.

6 Jonathan G. Petropoulos, *German Laws and Directives Bearing on the Appropriation of Cultural Property in the Third Reich*, in *THE SPOILS OF WAR*, *supra* note 4 at 106-11.

7 Lynn H. Nicholas, *World War II and the Displacement of Art and Cultural Property*, in *THE SPOILS OF WAR*, *supra* note 4, at 39.

8 *Id.* This so called “degenerate” or unacceptable art included works by Vasily Kandinsky, Franz Marc, Camille Pissarro, Pablo Picasso, Henri Matisse, and Vincent Van Gogh.

9 LYNN H. NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE’S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR*, 20 (Knopf 1994).

10 *Id.*

responsible for them, as an integral part of creating a “pure” Germanic Empire.¹¹ Accordingly, confiscation of cultural property by the State was done to further the objective of creating a “New Order” that would be perfect and homogeneous.¹² Any undesirable thoughts, sounds, images, and people would be eliminated.¹³

This first phase of the Nazi looting campaign eventually resulted in the removal of over sixteen thousand works of art from public or state collections.¹⁴ The purging of state collections was carried out by the Reich Chamber for the Visual Arts.¹⁵ This committee, armed with a Fuhrer decree permitting the attachment of modernist works, attached over five thousand works by mid-1937.¹⁶ Soon thereafter, the scope of art looting expanded.¹⁷ Distinctions were drawn among the varieties of so-called degenerate art. The Reich perceived modernist art with Jewish themes as irredeemable, and as many as five thousand pieces, including 1,000 paintings and sculptures and 3,825 drawings, watercolors and graphics, were burned or destroyed outright.¹⁸ However, works by renowned artists such as Picasso, Matisse, and Van Gogh, which were likely to fetch high bids on the international art market, were auctioned off to private dealers to raise money for the Nazi Party or to be bartered for inoffensive art, deemed as having cultural value to the Reich.¹⁹ For example Hermann Goering, who had been forming his own art collection, put aside paintings that would have value abroad including works by Cezanne, Munch, and no fewer than two Van Goghs: *Daubigny’s Garden* and the *Portrait of Dr.*

11 *Id.* at 38.

12 *Id.* at 97.

13 *Id.*

14 Nicholas in THE SPOILS OF WAR, *supra* note 4, at 39.

15 NICHOLAS, *supra* note 9, at 106.

16 *Id.* at 107.

17 *Id.* at 22.

18 *Id.* at 25.

19 Nicholas in THE SPOILS OF WAR, *supra* note 4, at 39. Goering, being the first to comprehend the financial potential of undesirable art, purged Van Gogh’s famous *Portrait of Dr. Gachet* from a state museum in Germany and sold it to a dealer. In 1990, this painting was sold to a Japanese collector for \$82.5 million. See *id.* Ernst Ludwig Kirchner’s *Street Scene*, now on display at the Museum of Modern Art in New York, was sold for \$160. See *id.*

Gachet.²⁰ He used these paintings to obtain cash for the Old Masters and tapestries which he preferred, as well a means to raise money for the Reich.²¹

The next phase of the art expropriation program was aimed at the private collections of German and Austrian Jews.²² Artwork was seized as part of a campaign to “aryanize” Jewish assets (through forced sales to non-Jews), which included the seizure or forced sale of Jewish-owned businesses, including many art galleries.²³ In a pattern that was to repeat itself again and again, the confiscation of art was meticulously planned and carefully coordinated with other German operations following the occupation of Austria.²⁴ When German forces took control of Austria they immediately went off in search of declared enemies of the Reich and their property.²⁵ Those who had managed to flee left behind homes that were quickly stripped by SS troops.²⁶ In addition, in the eighteen months preceding the invasion of Poland, the Germans allowed more than eighty thousand Jews to leave Austria, but only by buying their way out through the surrender of all personal possessions to the Office of Emigration.²⁷ Those who remained were required to register their property with the Gestapo, thereby providing excellent inventories for future confiscation.²⁸

In 1938, the Ordinance for the Registration of Jewish Property required that all Jews register their possessions and that these

20 NICHOLAS, *supra* note 9, at 23.

21 *Id.*

22 Petropoulos in THE SPOILS OF WAR, *supra* note 4, at 107.

23 *Id.*

24 Nicholas in THE SPOILS OF WAR, *supra* note 4, at 40.

25 Petropoulos in THE SPOILS OF WAR, *supra* note 4, at 107. The most famous example involved Louis Rothschild, who was apprehended as he attempted to flee Austria. While he was imprisoned by the Gestapo, his palace, which contained more than four thousand artworks, was occupied, and the contents secured and seized by the Nazis. By 1941, the ERR (defined below) had assembled works from most of the Rothschild collection. Nearly the entire collection was sent to Germany, with nineteen crates going to Hitler and twenty-three to Goering.

26 NICHOLAS, *supra* note 9, at 39.

27 *Id.* at 39.

28 *Id.* at 39.

objects would be “secured in accordance with the dictates of the German economy.”²⁹ This property then was subject to the so-called *Fuhrevorbehalt*, under which Hitler had authority over all objects which were “given over to become property of the Reich.”³⁰ The *Fuhrevorbehalt* was used as a premise in future confiscation laws, first in Austria and then eventually in all occupied territories.³¹ Thereafter, additional laws, including the Ordinance for Attachment of the Property of the Peoples’ and State’s Enemies, and the Ordinance for the Employment of Jewish Property enabled the German government to “aryanize” Jewish businesses and seize Jewish property, including fine art.³²

B. Looting in Conquered Europe

As Germany conquered much of continental Europe the Nazis expanded their looting program to include the property of Jews in Poland, France, Greece, Eastern Europe and the Soviet Union.³³ The looting was carried out by a network of agencies, that included staffs of art historians empowered by Goering to confiscate art work in the conquered countries.³⁴ One such agency, the Einsatzstab Reichsleiter Rosenberg (ERR), was empowered to secure all “ownerless” property and became dominant among the art plundering agencies, eventually seizing over 21,000 objects of art.³⁵ Although a civilian unit, the ERR worked in a military environment, even wearing uniforms which bore a striking resemblance to those of the SS.³⁶ The ERR combed the conquered

29 *Id.*

30 Petropoulos in *THE SPOILS OF WAR*, *supra* note 4, at 107.

31 *Id.*

32 *Id.*

33 *Id.* at 107-108.

34 *See id.*

35 *Id.* at 109. *See The Nurnberg Trial*, 6 F.R.D. at 157. The ERR was commanded by Alfred Rosenberg, a virulent fascist who had been one of the original members of the National Socialist Party and a principal party theorist. *Id.* Alfred Rosenberg was convicted by the Nuremberg Tribunal of crimes against humanity that included looting, and was hanged. *Id.* at 158.

36 James S. Plaut, *Loot for the Master Race*, *THE ATLANTIC MONTHLY*, Sept. 1946, at vol. 178, no. 9.

territories for every possible art object which might have been subject to confiscation.³⁷ Armed with detailed lists, the ERR, the SS and, other agencies searched for artistic treasures.³⁸ According to a directive issued by Goering, the artwork seized by the ERR and other art agencies was to be distributed in the following order: Hitler had first selection, followed by Goering, Alfred Rosenberg (head of the ERR), and then German museums.³⁹

The Nazi art agencies had different policies regarding the confiscation of Eastern and Western European art.⁴⁰ In the East, Slavic cultures and their artifacts were to be eliminated and only “Germanic” items would be preserved.⁴¹ In Western Europe, Hitler planned to rearrange the distribution of major art treasures, and eventually to take back to Germany anything that had been removed pursuant to the Versailles Treaty.⁴² Accordingly, Hitler ordered a secret, three hundred page list (known as the Kummel Report) made of every major piece of art that had left Germany since 1500 and ordered the pieces to be located and returned.⁴³ To this end, the leaders of the Reich bought, bartered, and stole to obtain the pieces on the Kummel Report for the “greater glory of Germany,” as well as for the personal gratification of Hitler, Goering and other Nazi elite.⁴⁴ By July 1940, three hundred and twenty-four paintings from this list had been acquired by the Nazis for the planned Fuhrermuseum in Linz, Austria.⁴⁵

Perhaps the best example of the ERR’s looting activities occurred in France.⁴⁶ Following the surrender of France in June 1940, the Vichy regime, acting at the behest of the occupying German authorities, enacted decrees under which anyone who had left France without government approval was deemed to have

37 NICHOLAS, *supra* note 9, at 72.

38 *Id.*

39 PETROPOULOS, *supra* note 4, at 109.

40 Nicholas in THE SPOILS OF WAR, *supra* note 4, at 41.

41 *Id.*

42 *Id.*

43 *Id.*

44 PETROPOULOS, *supra* note 4, at 310.

45 NICHOLAS, *supra* note 9, at 49.

46 Nicholas in THE SPOILS OF WAR, *supra* note 4, at 42.

forfeited their citizenship. By this pretext, the property of Jews who had fled was rendered “stateless” and was subject to immediate seizure.⁴⁷ As the Germans reasoned it, property no longer belonging to French “citizens” could be taken because the former owners were now stateless and had no standing under domestic or international law.⁴⁸

When the Nazis arrived in Paris, they were armed with lists of collections targeted for looting.⁴⁹ Ultimately, approximately 21,903 objects, taken from 203 private collections, were looted by the Germans,⁵⁰ and more than 29 transports, 137 trucks, and 4,174 cases of art were shipped from France to Germany and the Third Reich.⁵¹ Most, if not all works looted in France were first taken to Paris, classified, photographed, and arranged in exhibits so that Nazi leaders could take their pick of the loot.⁵² Any pieces considered desirable by German officials were shipped to Germany.⁵³ The so-called “Degenerate Art,” was quarantined in a special area near the Louvre and bartered for more desirable works, such as Old Masters, or sold to dealers who did business with the Germans.⁵⁴

47 *See id.*

48 *Id.*

49 FELICIANO, *supra* note 2, at 53. Before fleeing to the United States, dealer Paul Rosenberg left 162 major works in the vault of a bank in Libon, in the Bordeaux region of France. NICHOLAS, *supra* note 9, at 91. The deposit contained no less than five Degas, five Monets, seven Bonnards, twenty-one Matisses, and thirty-three Picassos. *Id.* In addition, more than one hundred other pictures were sent by Rosenberg to a nearby rented chateau. *Id.* By 1953, Rosenberg was still missing approximately seventy-one of these pictures which were confiscated by the SS soon after the Occupation of France. *Id.* at 421.

50 *Nazi Conspiracy and Aggression English Translation of Doc. No. 044-ps*, (last modified or visited on June 29, 1999); <http://www.yale.edu/lawweb/avalon/imt/documents/014-ps>.

51 *Id.* In December 1941, Alfred Rosenberg had the ERR implement another “action” by which over 69,000 Jewish homes were plundered in Western Europe, 38,000 in Paris alone. Almost 27,000 rail cars were needed to transport the looted articles to Germany. 6 F.R.D. at 157.

52 Nicholas in THE SPOILS OF WAR, *supra* note 4, at 42.

53 *Id.*

54 *Id.*

This systematic pillaging of art by Nazi Germany from across Europe ultimately involved a tremendous number of art and cultural objects.⁵⁵ By 1945, German forces had seized or forced the sale of nearly one-fifth of all the art of the Western world.⁵⁶ One expert has estimated that by the end of World War II, the Nazis had looted approximately one hundred and fifty thousand art objects in Western Europe and about a half a million works in Eastern Europe including priceless paintings, sculptures, and drawings by the great masters.⁵⁷ During October 1943 alone, with war raging on two fronts, approximately forty box cars loaded with objects of cultural value were transported to the Reich.⁵⁸

In Germany, as the Allied bombings increased in intensity, the amassed art treasures were moved into bunkers, castles, churches, salt mines, and even cow sheds to protect them from destruction.⁵⁹ By 1944-45 this secret inventory contained 6,755 old master paintings, of which 5,350 were destined for Hitler's museum in Linz, 230 drawings, 1,039 prints, 95 tapestries, 68 sculptures, 43 cases of objects of art, and innumerable pieces of furniture.⁶⁰ The last convoy headed to the secret depots arrived less than a month before V-E Day.⁶¹

C. Post-War Movement of Looted Property

Following the war, the Allies and various Western restitution organizations embarked upon the enormous task of securing and storing the vast quantities of art uncovered by Allied forces as they

⁵⁵ 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, 1 (1998).

⁵⁶ *Id.* at n. 2.

⁵⁷ Jonathan Petropoulos, *Art Looting During Third Reich: An Overview with Recommendations for Further Research*, (last modified or visit on June 29, 1999); <http://www.state.gov/www/regions/eur/holocaust/heac4>.

⁵⁸ *Judgment: War Crimes & Crimes Against Humanity*, (last modified or visited June 29, 1999);

<http://www.yale.edu/lawweb/avalon/imt/proc/judwarcr.htm>

⁵⁹ Plaut, *supra* note 36.

⁶⁰ *Id.*

⁶¹ *Id.*

liberated Europe.⁶² Officers of the Monuments, Fine Arts and Archive Services unit were specifically charged with locating German repositories of art, protecting them from loss and deterioration, and returning looted items to their rightful owners.⁶³ American and British policy was to return art to the country from where it came, whether by purchase or by confiscation.⁶⁴ Soviet policy, however, was to take all objects liberated by Soviet troops back to the Soviet Union. Although some items were later returned to Poland, Germany, Hungary and other Eastern European countries, many others objects remain in the former Soviet Union.⁶⁵

By the time the Allied art collecting points were closed down in 1951, several million items of art had been processed.⁶⁶ The American collection unit located approximately fourteen hundred repositories containing over fifteen million items of looted cultural property.⁶⁷ Eventually, 3.45 million items were identified and returned to their countries of origin.⁶⁸ For example, more than sixty-one thousand works were returned to France. Although more than forty-five thousand (80%) were returned to their former owners, some fifteen thousand works recovered by the French government remain in government hands.⁶⁹

III. INTERNATIONAL LAW RECOGNIZES THE RIGHTS OF INDIVIDUAL OWNERS OF LOOTED ART

Prior to World War II, the international law relating to looting focused on the responsibilities of States during war. Thus, the 1907 Hague Convention prohibited looting but it did not expressly

62 Nicholas in *THE SPOILS OF WAR*, *supra* note 4, at 43.

63 *Id.*

64 *Id.* at 44.

65 *Id.* at 45.

66 *Id.*

67 Michael J. Kurtz, *The End of the War and the Occupation of Germany, 1944-52. Laws and Conventions Enacted to Counter German Appropriations: The Allied Control Council*, in *THE SPOILS OF WAR*, *supra* note 4, at 117.

68 *Id.* at 116.

69 FELICIANO, *supra* note 2, at 216-18.

establish rights in individuals with respect to looting or the return of looted art.⁷⁰ Since World War II, however, international law has developed to the extent that *individuals* now have the right to be free from certain abuses of rights defined and recognized in treaties (some of which are cited below) and in a growing body of cases arising before municipal courts.

The Charter of the Nuremberg Tribunal, and the judgments it rendered, demonstrated the extent to which international law had come to recognize that individuals are endowed with certain rights under international law—the violation of which can be a criminal act.⁷¹ The Nuremberg proceedings set important precedents by holding that, at least in the context of the genocidal policies and acts of the Nazis, these rights included a prohibition against looting.⁷²

Nazi leaders (i.e., Alfred Rosenberg) were prosecuted for war crimes that included the calculated looting and theft of assets

70 See Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 1 Bevens 631, C.T.I.A. Num. 8425.000, 1910 WL 4483 at *15 (Articles 46 & 47 (prohibiting seizure by a state of private property during war)).

71 See Treaty Regarding the Prosecution and Punishment of Major War Criminals of the European Axis and annexed Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 279 (hereinafter cited as the “Nuremberg Charter”). Prior to World War II, States were viewed as subject to international law, but individuals were viewed as bound only by the municipal laws of states with jurisdiction over them, as opposed to by some code of international law. See Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT’L L. 38, 55-56 (1947); 11 WHITEMAN’S DIGEST OF INTERNATIONAL LAW 835; see also Henry T. King, *The Meaning of Nuremberg*, 30 CASE W. RES. J. INT’L L. 143, 144 (1998).

72 Earlier in the War, the Allied governments had indicated their willingness to recognize individual property rights in a non-binding “declaration”. See Inter-Allied Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation or Control, Jan. 5, 1943, 8 Dep’t St. Bull. 21 (1943) (Allied governments reserve the right to declare invalid “any transfers of, or dealings with, property, rights and interests of any description whatsoever . . . whether such transfers or dealings have taken the form of open looting or plunder or of transactions apparently legal in form, even when they purport to be voluntarily effected.”).

belonging to Jews.⁷³ Other Nazi leaders were prosecuted for crimes against humanity that included the organized plundering and pillaging of the occupied territories and for the systematic exclusion of the Jewish people from the economic life of Germany.⁷⁴ Ultimately, the Nuremberg Tribunal ruled that the looting and destruction of art and other cultural property constituted “systemic ‘plunder of public or private property,’” in violation of Nuremberg Charter Article 6(b) and that these actions constituted “war crimes” under international law.⁷⁵ In the wake of the war, subsequent treaties focused more generally both on the rights of the individual under international law and rights respecting art and/or cultural objects. All, however, are subject to enforcement only by States.

A. Rights of the Individual

Other post-war treaties then recognized a person’s right to be free from (i) religious and/or cultural persecution and (ii) deprivation of property without due process or discrimination. Under certain circumstances, violation of these rights might constitute “genocide” as that term is used in the United Nations (hereinafter “U.N.”) Genocide Convention.⁷⁶

73 See Indictment of the International Military Tribunal (Count III) in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, 27, 42, 55 (1947) (hereinafter cited as the “Nuremberg Indictment”).

74 See Nuremberg Indictment (Count IV), at 65-79; see also, Bernard Meltzer, *Critical Perspectives on the Nuremberg Trial*, 12 N.Y.L. SCH. J. HUM. RTS. 453, 506-07 (1995).

75 See Judgment of the International Military Tribunal (Sept. 30, 1946) in 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411-14, 481-86 (1948). Article 6 of the Nuremberg Charter lists among the “war crimes” the “plunder of public or private property” or “devastation not justified by military necessity.”

76 See, e.g., Universal Declaration of Human Rights (is there more to this citation?): Article 15 provides that individuals have a right to a nationality and that no one shall be arbitrarily deprived of that right; Article 17 addresses an individual’s fundamental right to own property and prohibits the arbitrary deprivation of one’s property; and Article 18 provides that individuals have a right to freedom of thought, conscience and religion, including freedom to practice that religion. See also International Covenant on Civil and Political

Article 2(c) of the U.N. Genocide Convention provides that genocide includes deliberately inflicting upon a group conditions calculated to bring about the physical destruction in whole or in part of the members of that group.⁷⁷ As recognized by the Nuremberg Tribunal, calculated economic devastation, including the systematic looting of property, can destroy the cultural heritage and continuity of a group and set the stage for the ultimate extermination of that group. Thus, while the Genocide Convention does not directly address looting, it is arguable that such conduct carried out as part of a broader state plan could constitute a crime under international law.⁷⁸

Rights (is there more to this citation?): Article 1 provides that in no case may a people be deprived of their means of subsistence; Article 18 provides that everyone shall have the right to freedom of religion, including the worship, observance, practice and teaching of that religion. *See also* European Convention for the Protection of Human Rights and Fundamental Freedoms (is there more to this citation?): Protocol Article 1 provides that every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

⁷⁷ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

⁷⁸ As noted by Raphael Lemkin, the Polish attorney and scholar credited with defining the term, genocide involved a two step process: the destruction of the “national pattern of the oppressed group” and the “imposition of the national pattern of the oppressor.” The first step did not necessarily involve the immediate extermination of a group, rather, Lemkin observed that it involved “the slow suffocation” of the group by coordinated destruction of the group’s institutions, language, religion and integrity. *See* RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 79-80 (1944). It should be noted, however, that the delegates drafting the Genocide Convention rejected a proposal to include the concept of “cultural genocide” in the Convention. *See* Matthew Lippman, *The Convention on the Prevention of the Crime of Genocide: Fifty Years Later*, 14 *ARIZ. J. INTL. & COMP. L.* 415, 457-58 (1998). In addition, claims relating to looting generally will not support tort claims for money damages against individuals under international law. For example, U.S. courts have held that torts such as trespass and conversion (torts relating to property) are not actionable under the U.S. Alien Tort Claims statute (28 U.S.C. § 1350) as violations of international law. *See Bigio v. The Coca-Cola Co.*, 1998 U.S. Dist. LEXIS 8295, *5-7 (S.D.N.Y. June 4, 1998); *Hamid v. Price Waterhouse*, 51

B. Rights in Art and Cultural Objects.

Other post-war treaties have, in turn, broadened and strengthened the protections afforded under international law to art and other cultural objects. While the first treaty designed to protect cultural property only applied in the event of war,⁷⁹ subsequent treaties have extended protection to cultural property in times of peace. In particular, international law can no longer be said to tolerate the free movement in international commerce of stolen art or cultural objects. Correspondingly, the rights of private owners are now afforded comparable protection that originally extended only to museums or religious or secular public monuments. Finally, in a significant recent development, some nations, particularly the United States, have entered into bilateral treaties designed to protect cultural property and, in some cases, to provide for the restitution of cultural objects.⁸⁰

F.3d 1411, 1418 (9th Cir. 1995); *Dreyfus v. Von Finck*, 534 F.2d 24 (2d Cir. 1976), *cert. denied*, 429 U.S. 835 (1976).

⁷⁹ See Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 1 Bevans 631, C.T.I.A. Num. 8425.000, 1910 WL 4483.

⁸⁰ See, e.g., 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (the Hague Convention); Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 239 U.N.T.S. 215. See also 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231. See also 1972 Convention on the Protection of World Cultural and Natural Heritage and related bilateral treaties between the United States and Czechoslovakia, Romania and the Ukraine regarding the protection and maintenance of Jewish-community historical structures and sites; Convention on the Protection of World Cultural and Natural Heritage, Nov. 16, 1972, 1037 U.N.T.S. 151; Agreement on the Protection and Preservation of Cultural Heritage, Mar. 4, 1994, U.S.-Ukr., C.T.I.A. Num. 7461.000, 1994 WL 927753; Agreement for the Protection and Preservation of Cultural Properties, Mar. 17, 1992, U.S.-Czech., T.I.A.S. No. 11,399; Agreement for the Protection and Preservation of Certain Cultural Properties, July 8, 1992, U.S.-Rom., C.T.I.A. Num. 7343.000, 1993 WL 850910. See also 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects; Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1330.

Based on these post-World War II developments in international law, municipal laws that frustrate either the right of genocide survivors or their heirs to recover looted art or the maintenance of State-owned museum collections of looted art would appear to run afoul of international law to the extent they perpetuate crimes committed during World War II or they deprive property and cultural heritage now prohibited under international law. As such, there appears to be a strong foundation for a treaty providing for (i) the return of looted or stolen art work to rightful owners *and* (ii) the invalidity of title to works of art as to any holder other than the true owner.

IV. ART WORKS ARE INCREASINGLY SUBJECT TO INCONSISTENT GLOBAL REGULATION

As international law has developed to better recognize rights in looted art, the art market has become increasingly global with respect to both the sale and auction of art and the movement of art by museums and galleries for exhibitions. More art is moving across borders than ever before. At the same time, national art ownership laws remain in conflict on key issues such as limitations or repose periods and duties to discover lost art.

Looted art cases generally present the following issues: (i) establishing ownership or title; (ii) when must a demand be made and what is the relevant statute of limitations; (iii) what rights, if any, does a bona fide purchaser have in a stolen or looted work of

See also treaties between the United States and Guatemala, Peru, and Mexico regarding the return of lost or stolen cultural objects; Agreement for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, May 21, 1984, U.S.-Guat., T.I.A.S. No. 11,077; Agreement for the Recovery and Return of Stolen Archeological, Historical, and Cultural Properties, Sept. 15, 1981, U.S.-Peru, 33 U.S.T. 1607; Agreement for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, July 17, 1970, U.S.-Mex., 22 U.S.T. 494, 791 U.N.T.S. 313; *see also* Treaty on Good-Neighborliness, Partnership and Cooperation, Nov. 9, 1990, F.R.G.-U.S.S.R., 30 I.L.M. 504 (agreeing “that lost or unlawfully transferred art treasures which are located in their territory will be returned to their owners or their successors.”)

art; and (iv) what claims run against professional sellers such as art dealers who bought or sold a stolen or looted work.

As noted, the approach of municipal laws to these issues varies. Some civil law jurisdictions, like Italy, absolutely protect bona fide purchasers of looted or stolen art and recognize title from the moment of purchase. Others, like France, Germany and Switzerland allow bona fide purchasers to acquire good title to looted or stolen goods once the applicable limitations period has run, which period generally begins at the time of the theft.⁸¹ Even where an original owner is entitled to recover possession, he may be compelled to repurchase the work from the bona fide purchaser.⁸²

Common law jurisdictions generally do not permit a thief to pass good title to anyone, even a good faith purchaser for value. Thus, a seller cannot pass better title to a buyer than he himself possesses without the consent of the owner of the goods.⁸³ Generally, the original owner retains a right to ownership because the title of the bona fide purchaser is deemed “void.”⁸⁴ A bona fide purchaser may establish good title (i) if he or she purchased the goods under certain circumstances without any suspicion that they were stolen (England)⁸⁵ (ii) if the statute of limitations has run or if the party is

81 See Codice civile [C.C.] art. 1153 (Italy); Code Civil [C. CIV.] art. 2279 (Fr.); Bürgerliches Gesetzbuch (Civil Code) § 937 BGB (Ger.); Schweizerisches Zivilgesetzbuch ZGB tit. 24, art. 934 (Switz.). See generally Steven F. Grover, Note, *The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study*, 70 TEX. L. REV. 1431, 1449 (1992) (hereinafter cited as “Grover”); Evangelos I. Gegas, Note & Comment, *International Arbitration and the Resolution of Cultural Property Disputes: Navigating the Stormy Waters Surrounding Cultural Property*, 13 OHIO ST. J. ON DISP. RESOL. 129, 149 (1997) (hereinafter cited as “Gegas”).

82 See C. CIV. Art. 2280 (Fr.); ZGB tit. 24, art. 934 (Switz.).

83 See Sale of Goods Act, 1979, ch. 54, § 21 (Eng.) (providing that “where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had”); U.C.C. § 2-403(1) (“A purchaser of goods acquires all title which his transferor had or had power to transfer”). See generally Grover at 1445.

84 See Gegas at 149 n.78.

85 England still applies the law of “market overt,” which permits a bona fide purchaser to acquire good title to stolen goods if he or she purchases the goods

guilty of laches (United States),⁸⁶ or (iii) if he or she is deemed to have “voidable” title, which results from a purchase from a seller who acquired the goods from the original owner by deception, undue influence, or misrepresentation.⁸⁷

In any event, common law jurisdictions (even as among individual U.S. states) may differ with respect to the standards of proof or the presumptions to be overcome by a putative owner, including with regard to proof of theft, application of statutes of limitations, laches, or a prescriptive period of adverse possession.⁸⁸

As a consequence, even in common law jurisdictions looted art cases are not simple, are not generally resolved quickly, and often tax or exhaust the resources of undeniably rightful owners.⁸⁹

Given the diversity of standards under municipal law, looted art cases often turn on the sheer happenstance of where the art has come to rest—with certain jurisdictions completely precluding recovery. This seems particularly unfair to victims of genocide or their heirs who, of course, had no control over the disposition or movement of their art.⁹⁰ As a result, the legal system is neither consistent nor predictable, and does not encourage the voluntary or efficient settlement of claims or protect the rights of looting victims seeking recovery of what is rightfully theirs.

At the same time, based on treaties and other cooperative measures between States, art market participants are increasingly

“during daylight hours in a public market or in a shop in the City of London” without any suspicion that the goods are stolen. See Grover at 1446 (citing Sale of Goods Act, 1979, ch. 54 § 22 (Eng.)).

86 The seminal case in this area is *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 567 N.Y.S.2d 623, 569 N.E.2d 426 (1991) (where White & Case successfully represented the Museum claimant).

87 See Gegas at 149 n.78.

88 See Robin Morris Collin, *The Law and Stolen Art, Artifacts, and Antiquities*, 36 HOW. L.J., 17, 25 (1993).

89 As such, the suggestion by some that certain limitations periods be waived as to Holocaust-looted art claims is not, in and of itself, a realistic response to the myriad issues presented by such cases. 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, 34 (1998).

90 In addition, as time passes, problems of proof are compounded for claimants as evidence becomes stale and/or memories fade or disappear.

susceptible to multi-jurisdictional litigation.⁹¹ Thus, the ability of a party to cloud title or otherwise interfere with the movement of art in the international market has increased. This could seriously affect art dealers and museums, especially in the current environment, where governments and Holocaust survivors or their heirs are increasingly pressing claims for restitution or damages. This confusing web of municipal laws and litigation risks has created an increased need for uniformity, particularly with respect to art works looted or stolen in violation of international law or in connection with crimes against humanity or genocide.

V. ART PRESENTS SPECIAL PROBLEMS THAT FAVOR A UNIFORM INTERNATIONAL LEGAL APPROACH

Art is different from other property and presents unique problems that favor a uniform international approach to Holocaust-looted art. For example, art is difficult to hide because it does not, like money, “disappear” when commingled with other like assets. Art also is comparatively illiquid, often being too bulky for those fleeing to take with them. At the same time, art and cultural objects touch emotions, imaginations and memories in ways other assets do not. Indeed, art and cultural objects can be viewed as a tangible connection to those who perished in the Holocaust and to the suffering they endured. As such, these objects were perhaps the assets Holocaust victims might have tried hardest to retain and are the assets that international law should work hardest to see returned. Indeed, given the express terms of the Nuremburg

91 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters; Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163. *See also* Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters; Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555. *See also* Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention); European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 8 I.L.M. 229.

Charter and the findings of the Nuremberg Tribunal regarding Nazi looting, Holocaust-looted art has a particularly clear and favored status under international law that would merit a focused international approach.

As the safe deposit boxes and vaults that have not been touched for many years are opened, can there be much doubt that rather than money or gems, which could be sewn into clothes or stuffed into pockets, some of them will reveal paintings, manuscripts, and other objects of art or culture which could not be easily sold, carried or transported? Similarly, as the generation that lived through World War II shrinks, works of art that made their way out of Nazi-controlled Europe or the chaos of post-war Europe will begin to resurface through donations or dispositions by heirs. These developments will make for a growing number of Holocaust-looted art claims in the coming years.

Finally, with the end of the Cold War, there appears to be a growing willingness on the part of many nations to address and resolve issues of looted art. In just the last few years, many nations have undertaken to identify and begin returning looted works of art housed in their national museums. For example, the United States passed the 1998 Holocaust Victims Redress Act.⁹² The Act recognized that “[t]he Nazis’ policy of looting art was a critical element and incentive in their campaign of genocide against individuals of Jewish and other religious and cultural heritage.”⁹³ The Act states that “all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.”⁹⁴ Many of these same principles were echoed in a November 1999 resolution adopted by the Parliamentary Assembly of the Council of Europe.⁹⁵

92 112 Stat. 15, 18, P.L. 105-158.

93 *Id.* at § 201(4).

94 *Id.* at § 202.

95 See Council Resolution 99/1205, *reprinted at* stars.coe.fr/ta/ta99/eres1205.

In November 1998, Austria enacted a law providing for the restitution of art found in state-run museums and art collections that was looted by the Nazis or donated under coercion.⁹⁶ Under the auspices of various laws passed in 1996 and 1997, Swiss authorities have been investigating the fate of assets deposited with Swiss financial institutions before and during World War II, including property taken from Jews by the Nazis.⁹⁷

In November 1998, the French Foreign Ministry published a catalogue identifying artworks that were looted by the Nazis during World War II and placed in a special museum established by Hitler.⁹⁸ The Ministry intends to publish the catalogue on the Internet. French government documents show that almost 16,000 artworks returned to France after the war have not been returned to their rightful owners.⁹⁹ French museums are in possession of 2,058 of these works.¹⁰⁰ Furthermore, French Prime Minister Lionel Jospin announced an increase of nearly \$2 million in funding for the Matteoli Commission, which was established by the French government in 1997 to investigate various sectors of the French economy and determine the property confiscated during the German occupation.¹⁰¹ Jospin also announced that a claims commission would be formed to address restitution claims.¹⁰²

At the most recent U.S.-sponsored conference on Holocaust asset issues, 45 nations and 13 non-governmental organizations committed themselves to a set of principles regarding the restitution of Nazi-plundered art. Those principles could be best carried out by the treaty and arbitration chamber discussed below. The Washington Conference resolved:

96 See "Rückgabe von Kunstgegenständen aus den Österreichischen Bundesmuseen," § 1 Nr. BGB1 181/1998.

97 See Reports issued by the Independent Committee of Eminent Persons at www.icep-iaep.org and the reports issued by the Bergier Commission and the Swiss Special Task Force at www.switzerland.taskforce.ch.

98 CNN Interactive, *France Publishes Catalogue of Looted Nazi Art*, www.cnn.com/TRANSCRIPTS/9811/10/wr.03.html, (November 10, 1998).

99 *Id.*

100 *Id.*

101 Samer Iskandar, *French Bankers to Support Government's Plans*, *Financial Times*, Dec. 2, 1998, at A12.

102 *Id.*

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

1. Art that has been confiscated by the Nazis and not subsequently restituted should be identified.

2. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.

3. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.

4. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.

5. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.

6. Efforts should be made to establish a central registry of such information.

7. Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was

confiscated by the Nazis and not subsequently restituted.

8. If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.

9. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, can not be identified, steps should be taken expeditiously to achieve a just and fair solution.

10. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.

11. Nations are encouraged to develop national processes to implement these principles, particularly as they related to alternative dispute resolution mechanisms for resolving ownership issues.¹⁰³

103 See www.state.gov/www/regions/eur/wash_conf_more. In addition, a recent report prepared for Congressman Benjamin A. Gilman, Chairman of the Committee on International Relations of the United States House of Representatives by the Congressional Research Service of the United States Library of Congress, is available at www.house.gov/international_relations/crs/letter. The report summarizes the status of Holocaust-asset litigation in the United States, the current status of federal legislation relating to Holocaust assets, web sites relating to Holocaust assets (including those maintained by foreign nations), and reviews the status of Holocaust asset issues and claims in 31 nations throughout Eastern and Western Europe and North and South America.

As discussed above, artwork, particularly Holocaust-looted art, is unique and “[t]he value attached to cultural property mandates acknowledgment of its significance and the need for protection of such property, both by law and by public awareness.”¹⁰⁴ Moreover, artwork is transferred on a continual basis, and constantly crosses international boundaries. Yet, until recently, “[f]ew have . . . 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.”¹⁰⁵ In the face of this seeming tension, commentators have recognized that the present international art market system is well positioned for reform.¹⁰⁶

The current international art market is viewed as so poorly regulated that “the illegal art trade is larger than any other area of international crime except arms and narcotics trafficking.”¹⁰⁷

104 See Marilyn Phelan, *The Unidroit Convention on Stolen or Illegally Exported Cultural Objects Confirms a Separate Property Status for Cultural Treasures*, 5 VILL. SPORTS & ENT. L.J. 31, 32 (1998).

105 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) (quoting Hector Feliciano, *Confront the Past, Search for Provenance*, L.A. Times, March 15, 1998, at M2). See also *O’Keeffe v. Snyder*, 83 N.J. 478 (1980).

106 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, 34 (1998) (suggesting that artwork, even stolen works, should remain in American museums and a commission should be established to determine ownership); Steven A. Bibas, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437 (1994); Ashton Hawkins et al., *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 FORDHAM L. REV. 49 (1995); Alexandre A. Montagu, *Recent Cases on the Recovery of Stolen Art - The Tug of War Between Owners and Good Faith Purchasers Continues*, 18 COLUM.-VLA J.L. & ARTS 75 (1994).

107 See J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 377-78 (1995); James A. R. Nafziger, *The New International Legal Framework for the Return, Restitution or Forfeiture of Cultural Property*, 15 N.Y.U. J. INT’L L. & POL. 789, 791 (1982).

According to one economist, the war on drugs is immaterial in comparison to copyright crime, theft, and fraud, in combination with the illegal importation of antiquities and art theft and fraud.¹⁰⁸

As of 1993 the amount of annual art crime was estimated to be approximately three billion to six billion dollars.¹⁰⁹ Art looted during World War II is a major contributing factor to this trend, as it is valued at over \$200 billion.¹¹⁰

Far from having a destructive effect on the international market, precedent suggests that a property registration system that would make it possible to legally bind others to “perfected” title in Holocaust-affected art and a title dispute resolution system that provides a well-defined and predictable set of legal rules and procedures, would have a positive affect on the market. In particular, the Uniform Commercial Code stands as a powerful example of the beneficial effects that can flow from a system that provides information to the marketplace *and* provides a set of clear rules for resolving disputes.

A. The Value of Disclosure Through Legal Mechanisms

Economic theory supports the value of governmental intervention to correct certain types of market deficiencies. The present art market condones (and, in civil law jurisdictions, perhaps even rewards) incomplete information and an absence of certainty regarding title to artworks. This system makes for an inefficient market that does not effectively protect the rights of true owners or museums and other parties which receive artworks by way of donation or gift. This type of market can benefit from legal regulation. As Karl Llewellyn, father of the UCC, observed: “the effectiveness of competition between sellers of the same class of goods . . . depends on the adjustment or maladjustment of . . . legal institutions.”¹¹¹

108 See Borodkin, *supra* note 107, at 377-78.

109 See *id.*

110 See *id.*

111 See Karl Llewellyn, *The Effect of Legal Institutions Upon Economics*, 15 AM. ECON. REV. 665, 679 (1925); Jody S. Kraus, *Legal Design and the Evolution of Commercial Norms*, 26 J. LEGAL STUD. 377, 409-10 (1997)(stating

In an unregulated system, sellers have an incentive to conceal information regarding an artwork's provenance.¹¹² In fact, information gained by a seller can quickly become a liability in the art market. For example, "each participant in the illicit antiquities market has an incentive to strip as much information as possible from an artifact before it enters the safe anonymity of the legitimate art market."¹¹³ Thus, "[s]ellers must spend resources concealing information rather than producing it."¹¹⁴ This unfortunate circumstance results in both an inefficient market and, more tragically, artwork that often is "divorced from its cultural roots."¹¹⁵

The solution generally is quite simple – information with legal effect. "For a competitive market to function well, buyers must have sufficient information to evaluate competing products. They must identify the range of buying alternatives and understand the characteristics of the buying choices they confront."¹¹⁶ Disclosure through a title registration and clearing system that has binding legal effect is critical to the creation of a viable market system; it provides "an obvious remedy to problems of inadequate information"¹¹⁷ when the market is unable to provide all of the information a consumer would be willing to pay for.¹¹⁸ Healthy functioning markets require accurate information, and disclosure "can be viewed as augmenting the preconditions of a competitive marketplace rather than substituting regulation for competition."¹¹⁹

That any registration system must have *binding legal effect*, an effect now missing from the current market – in which a hodgepodge of private companies have sprung up offering information on works registered with them – is clear because there

that "there are good reasons to believe that legal design can in principle produce more efficient rules than the evolutionary process producing commercial practice").

112 See Borodkin, *supra* note 107, at 410-11.

113 See *id.*

114 See *id.* at 411.

115 See *id.* at 410-11.

116 See STEPHEN BREYER, REGULATION AND ITS REFORM 26 (1982).

117 See *id.* at 193.

118 See *id.* at 28.

119 See *id.* 161.

must be a positive legal incentive to cause a potential seller to disclose information to the marketplace. Because the art market has not historically valued (i.e., required) this type of information, the proposed system is a necessary link in creating an incentive for disclosure.

The proposed system would provide a uniform method for the dissemination of information regarding title to certain works of art, while the dispute resolution mechanism would provide a more certain means to confirm a holder's claim to a work of art. Absent the proposed system, "the complexity of the art market . . . make[s] it extremely inefficient to require individual purchasers in each transaction to investigate all possibilities that the work in question had been smuggled or laundered."¹²⁰ As it is, the burden placed on the purchaser to obtain information regarding the artwork's provenance far exceeds the seller's relatively easier task of facilitating the monetary aspect of the transaction.¹²¹ Furthermore, as the present system lacks transparency, controversies arise and parties must engage in costly litigation. As noted above, title disputes to artworks can be extremely lengthy. In general, "a matter involving a claim for an artwork stolen during World War II will take between seven and twelve years to resolve."¹²² The legal cost of such suits will likely exceed the value of the artwork, and the likelihood that the plaintiff will succeed in the suit is not promising.¹²³ Instead of encouraging the concealment of provenance, the proposed system would *reward* potential sellers and current holders for the disclosure of information relating to the work of art by giving them an ability to perfect title. In turn, the market could set a value to information regarding an artwork's provenance that does not include a component for the potential cost of defending future title disputes.¹²⁴ As noted by a leading art

120 See Borodkin, *supra* note 107, at 407.

121 See Karen Theresa Burke, *International Transfers of Stolen Property: Should Thieves Continue to Benefit from Domestic Laws Favoring Bona Fide Purchasers?*, 13 LOY. L.A. INT'L & COMP. L.J. 427, 444 (1990).

122 See Lerner, *supra* note 106, at 36.

123 See *id.*

124 One author notes that art dealers are commonly blamed for encouraging the illicit movement of artwork and can be viewed in two different ways. See

academician, “[i]n an open, legitimate trade, cultural objects can move to the people and institutions that value them most and are therefore most likely to care for them.”¹²⁵

B. The Art Market is Suitable for Regulation

Legal regulation often is justified in a specific market if parties engaging in commercial transactions in that market seek to mislead each other.¹²⁶ The art market may very well fit this profile because sellers now have incentives to conceal, ignore or not fully develop information about an artwork’s past. Moreover, given the difficulties discussed above for true owners to pursue their rights, purchasers (or museums receiving gifts) often have an incentive to not investigate provenance for fear of what they may discover (which discovery might undercut a claim to bona fide purchaser status). Under these circumstances, the art market has been especially susceptible to trafficking in stolen or looted goods because there is no comprehensive system of regulation. Indeed, corruption arguably is self-perpetuating as money paid for tainted art goes in part to fund more illegal activities.¹²⁷

In general, “[t]he rationale for governmental action to prevent false or misleading information rests upon the assumption that court remedies and competitive pressures are not adequate to provide the consumer with the true information he would willingly pay for.”¹²⁸ An example of this type of government intervention is the legislation implemented regarding the dissemination of information in the securities market. Prior to regulation, the market had developed such that issuers of securities had an

John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 848 (1986). First, the art dealer can be viewed as an agent who is serving an already existing demand. *See id.* The second view blames the dealers for creating and nurturing the demand. *See id.* Through disclosure, the dealer will be better positioned to facilitate the healthy development of the art market.

125. *See* John Henry Merryman, *The Free International Movement or Cultural Property*, 31 N.Y.U. J. INT’L L. & POL. 1, 10 (1998).

126 *See* Breyer, *supra* note 116, at 27.

127 *See* Merryman, *supra* note 124, at 848.

128 *See* Breyer, *supra* note 116, at 162.

incentive to mislead purchasers by disseminating false or incomplete information.¹²⁹ The securities laws were put in place to regulate the market. By requiring potential sellers of securities to provide a prospectus of specified information to purchasers that was subject to uniform federal criminal and civil standards, these laws established mechanisms for encouraging consistent disclosure, thereby filling the information gap that had existed between the parties to securities transactions.¹³⁰

Another example is the UCC, which was established to create an efficient and predictable system for commercial transactions. As distinguished from the rules regulating the securities market, the primary purpose of the UCC was “to affect the underlying substantive law, not simply to improve the information flow among buyers and sellers.”¹³¹ This same rationale is applicable to the art market, in that better information must be coupled with clearer and more certain legal standards to improve market efficiency and fairness.

As shown above, the current substantive law on title to art contains inconsistencies.¹³² As a result, parties resort to lengthy and costly litigation to resolve ownership disputes. The law is difficult to navigate precisely because there are no uniform rules regulating the market. Karl Llewellyn, the driving force behind the UCC, recognized the success of uniform laws in very practical terms. In his remarks on the Negotiable Instruments Law (“NIL”), he declared that NIL had been so successful because the relevant layperson abiding by NIL could more easily follow legal advice and know when to seek out legal advice.¹³³ “[S]imply stated, well-drawn statutory commercial law which makes working sense,”

129 *See id.* at 27.

130 *See id.*

131 *See id.* at 162.

132 *See* Ruth Redmond-Cooper, *Time Limits in Actions to Recover Stolen Art*, in *THE RECOVERY OF STOLEN ART: A COLLECTION OF ESSAYS*, 154-162 (Norman Palmer ed., 1998).

133 *See* Karl N. Llewellyn, *Why We Need the Uniform Commercial Code*, 10 U. FLA. L. REV. 367, 369 (1957).

according to Llewellyn, is extremely valuable to lawyers, bankers, and business-persons.¹³⁴

Llewellyn recognized the inefficiency of a system where disputes are not handled uniformly, stating, “[f]or the Code to bring such a welter into a simplified, unified, functional scheme, too, readily accessible to *any* intelligent lawyer-has been a major achievement.”¹³⁵ A central title clearing process combined with a dispute resolution mechanism would allow parties to avoid many title disputes and efficiently resolve others, as opposed to the current system which actively deters true owners from pursuing legitimate claims.

The proposed system would also provide a uniform solution to the international disputes that now surround many looted art cases. Indeed, with an international solution in place, buyers would be less likely to avert regulation and engage in transactions in a forum having rules favoring the seller.¹³⁶ This, in turn, may ultimately reduce the number of illegal art transactions.¹³⁷

C. There is Precedent for a Personal Property Registration System

There presently is no effective registration system that attaches binding legal effects to the cataloguing of ownership to artwork.¹³⁸

Because artwork is unique and, in many instances, an extremely valuable commodity, a separate property registration system for artwork looted during World War II should be established.¹³⁹ Similar personal property registration systems have been successful before.

134 See *id.* at 370. See also Steven Walt, *Novelty and the Risks of Uniform Sales Law*, 39 VA. J. INT’L L. 671 (1999)(stating that “uniform rules promote efficiency”).

135 See Llewellyn, *supra* note 133, at 371

136 See *id.* at 464.

137 See *id.*

138 See Patty Gerstenblith, *Picture Imperfect: Attempted Regulation of the Art Market*, 29 WM. & MARY L. REV. 501, 543-44 (1988).

139 See Phelan, *supra* note 104, at 45.

In particular, Article 9 of the UCC is the most sophisticated system of property registration next to land registration systems.¹⁴⁰ Article 9 applies to all transactions where a security interest is created in personal property.¹⁴¹ The filing system under Article 9 is the “heart of Article 9” and “serves a seal of good faith, signaling less informed or occasional creditors that they may engage in asset-based financing on a level playing field with more experienced lenders.”¹⁴² Notwithstanding its recognized administrative costs,¹⁴³ the existence of Article 9 across the United States has increased parties’ access to lending secured by a broad range of non-real estate assets that includes everything from factory equipment and airplanes to vast fleets of rental automobiles and has fueled a massive secondary market in debt instruments backed by those securitized assets. Recent efforts to expand analogous uniform international laws include the United Nations Convention on Contracts for the International Sale of Goods(CISG)¹⁴⁴ and the International Institute for the Unification of Private Law’s Principles of International Commercial Contracts.¹⁴⁵ These regimes have been driven by the perceived advantages of uniformity in areas where diversity in domestic laws can create costly externalities in transactions.¹⁴⁶ Such international legal systems serve as a valuable precedent *both* for the benefits that can flow

140 *See id.*

141 *See id.* (citing James S. White & Robert S. Summers, Uniform Commercial Code ch. 9 (3d ed. 1988)).

142 *See* Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783, 1829 (1994).

143 *See id.* (discussing some of the “systemic” problems that have emerged in the filing system under Article 9).

144 CISG has been adopted by over 50 countries, including France, Germany, Italy, Switzerland, and the U.S. *See* Michael B. Carsella, *Payment Methods in International Trade*, A.B.A. C.L.E. NAT’L INST. (1998), available in WL N98DBWB.

145 *See* Walt, *supra* note 134, at 672 (citing United Nations Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, U.N. Doc. A/Conf.97/18, Annex I; International Institute for the Unification of Private Law, UNIDROIT Principles of International Commercial Contracts (1994)).

146 *See* Walt, *supra* note 136, at 672.

from proper market regulation *and* for the fact that such regulations do *not* destroy or harm the markets they seek to regulate.

VI. ATTRIBUTES OF A COMMISSION TO RESOLVE LOOTED ART CLAIMS

A treaty establishing a commission to mediate or arbitrate and otherwise resolve looted art claims (as discussed below, the “Commission”) could create a system that (i) encouraged the return of art looted during World War II, (ii) provided greater assurance that a current holder’s title was valid against any future claims, (iii) lowered litigation exposure and costs to all parties and (iv) assured uniformity in the handling of claims relating to looted art. Such a system would be fairer to victims and to museums and art dealers, while perhaps discouraging certain types of looting in the future by reducing the marketability of looted goods.

Among the major attributes of the proposed Commission would be its ability to consider claims by individuals against private or public entities (i.e., including museums and auction houses). Also proposed is a jurisdictional limitation for “major” works of art above some established value. This would limit disruption to the art market and reduce the likelihood that the Commission would be overwhelmed by claims. Further, in light of the treaty’s goal of encouraging the return of looted art to its rightful owners, holders of art from civil law jurisdictions would lose the protections typically afforded to bona fide purchasers. However, balanced against this loss would be the treaty’s creation of a system for clearing or perfecting title. Set forth below are some of the key attributes of the treaty and the Commission, as well as some policy questions that should be addressed by the Member States.

A. *Creation of the Commission*

The treaty, or other form of collective state action,¹⁴⁷ should provide for the creation of the Commission to resolve claims and

147 It is quite likely that the goals of the proposed Commission could be accomplished by a process short of a formal treaty. The process would take

other issues of ownership with respect to art or cultural objects located within the borders of the signatory nations. The Commission should be a non-governmental “person” at international law (i.e., by treaty and treatment the Commission should have appropriate and useful immunities under international law). The Commission would provide facilities and rosters of mediators and arbitrators for non-binding mediation and binding arbitration of disputes relating to the ownership of art works or cultural objects falling within the subject matter jurisdiction of the Commission. The Commission would establish rules of mediation and arbitration, including by adopting the existing rules of other major mediation or arbitration bodies.

B. Qualifications

Commission arbitrators and mediators should be judges or attorneys from the Member States with substantial litigation or arbitration experience. The Member States shall set appropriate terms for the Commission members and judges. Any case properly commenced before the Commission would be considered by one judge chosen by a random assignment system. Existing rules from other mediation or arbitration bodies regarding the avoidance of conflicts of interest would be adopted by the Commission. All

advantage of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done* June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (the “New York Convention”). The New York Convention has been signed by over 150 nations, including the members of the European Community and Switzerland. The title clearing mechanism discussed below could be implemented by a declaratory proceeding convened before the Commission on a periodic basis as to works satisfying the notice period. Notice of the declaratory proceedings would be published in some pre-agreed fashion, including by posting on the Internet and with established art loss registries. By executive agreement, signatories to the New York Convention could agree that a declaratory proceeding so noticed and then resulting in a “final award” confirming title would be recognized and enforced in those states under the Convention. This approach should work, for example, under U.S. law. *See Dames & Moore v. Regan*, 453 U.S. 654 (1981); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 303 (1992).

rulings by the Commission would be final and binding on the parties. Issues the Commission should be prepared to address are: (i) where the claimant and holder are from the same Member State should the judge also be from that Member State and (ii) should a losing party be permitted to petition the judge following the final ruling to certify issues to the full Commission (or some panel of Commission judges) for reconsideration? Absent such certification there would be no appeal of any ruling.

C. Dollar Limits on Jurisdiction

The jurisdiction of the Commission should extend only to major works of art with significant dollar values. A value of over \$250,000 or \$500,000 might be appropriate, and presumably, would vary by category of art.

D. Subject Matter Limit on Jurisdiction

The treaty should limit the jurisdiction of the Commission to claims relating to the period March 28, 1933 through May 9, 1945. The Member States should consider including a provision by which additional claims periods could be added to the Commission's jurisdiction (i.e., more recent claims for looted art, such as those originating from the conflict in the former Yugoslavia).

E. Termination Date

The treaty should indicate whether the Commission will have a finite termination date (i.e., fifteen or twenty years) or whether it will continue indefinitely.

F. Binding Authority

Member States should agree to the binding enforceability of Commission rulings within their borders. Proceedings before the Commission should take precedence over those of Member State courts (and should stay parallel with Member State proceedings).

G. Limit on Protection for Bona Fide Purchasers

The treaty would adopt the rule that a thief (or anyone in the chain of possession from a thief) cannot pass good title to a bona fide purchaser. In addition, under the treaty the doctrine of laches would only be a defense if shown by clear and convincing evidence, subject only to the provisions discussed below regarding the clearing of title. A party opposing a claim would be permitted to attempt to prove that the claimant voluntarily parted with title or otherwise lacked standing to make a claim.

H. Authority to Determine Whether Prior Litigation is Res Judicata

The Commission should be authorized to determine and publish advisory opinions on whether and to what extent prior litigation regarding ownership of a work should bind the parties. The Commission should be able to determine whether a prior adjudication is, in essence, overturned by this treaty (i.e., because in a civil law nation a thief can no longer pass good title), or whether a prior adjudication should nevertheless stand.

I. Publication of Decisions and Confidentiality

Decisions of the Commission should be published but should provide anonymity for the parties and art works involved. Principles of stare decisis should apply to the Commission's rulings. By providing predictability, the development of a body of precedent would encourage claims resolution.

J. Archiving Facilities

The treaty should provide that the President of the Commission also shall oversee the creation and maintenance of archives of information on looted art developed or collected by the Commission, including archived information from Member States. The Commission's Archive should be open to the public and to

inquiries. To the extent the Commission terminates at some point in the future, the treaty should provide for disposition of the Archives.¹⁴⁸

K. Cooperation

Member States would agree that their state museums will cooperate with the Commission to help claimants formulate claims. The Member States should consider to what extent the Commission may request Member State museums to look for particular works of art. Should the Commission have subpoena power to *require* state-owned museums to provide information regarding their collections? Should this power extend to other entities licensed by Member States, such as auction houses or private galleries?

L. Waiver of Secrecy

Member States would agree to waive any secrecy restrictions imposed by municipal law.

M. Procedures for Clearing Title

The treaty should establish a central registration system through which art owners (including auction houses and dealers) may pre-clear title to art works. The Commission would hold the works in trust and publish a list of works so held for a period of time (i.e., twelve to eighteen months). If no claims were filed regarding the work, all Member States would recognize (and the Commission would record and certify) valid title in the owner who had placed the work with the Commission.

148 There have been prior archiving efforts, most notably those by Interpol and the International Foundation for Art Research (“IFAR”), although neither was focused on art looted during World War II.

N. Amnesty for Voluntary Participants

The treaty should establish a procedure by which a party can give a work of art to the Commission, relinquish title, and automatically cut off all potential claims under municipal law relating to that work, including from others in the chain of possession. The Commission would post notice and hold the work in trust for a period of time (i.e., five years). Member States would determine what should be done with unclaimed or “heirless” works. If a work of art was located in a Member State collection as of the date the treaty enters into force, should that Member State receive back good title to the work after voluntarily depositing it with the Commission?

O. The Question of Heirless Property

Heirless property holds enormous symbolic value and may, in some respects, be viewed as a form of “eternal flame” that could be used to memorialize in a special and continuing way those who perished. Heirless property traceable to a Member State might be placed on permanent or long-term loan in chosen museums in that State. Such property that cannot be traced either could be made available for loans to museums or could be organized into traveling exhibits that would move on a regular and continuing basis through chosen museums throughout the world. This treatment of heirless property would be consistent with the U.N. Convention for the Protection of World Cultural and Natural Heritage and the related bilateral treaties entered into by the United States with the Ukraine, the Czech Republic, and Romania in which Jewish sites and cultural collections in those nations have been designated for special protection under the U.N. Convention.

P. Multiple Claimants

The Commission should be authorized to hold works of art in trust where it is clear that the current owner does not have good title but it is not clear that all potential claimants are before the Commission (i.e., the claimant may have siblings or other relatives

who may have interests in the work). The Commission would publish notice of such holdings. Works would be held for a substantial period of time (i.e., two to three years), after which those claimants who had appeared would have clear title recorded and certified by the Commission.

Q. Evidentiary Issues

1. Burdens of Proof

The Commission should establish uniform indicia of ownership. These might include definitive treatises (catalogues raisonnés), bills of sale, provenance records (such as those sometimes listed in gallery or exhibition catalogs), accession or inventory records, artist's records, insurance records, or personal testimony. The treaty should provide that catalogues of looted works created by the Allied Commissions after World War II are prima facie evidence that a work was looted, shifting the burden of proof to the party opposing the claim.

To the extent a claimant can prove a certain number of these indicia by a preponderance of the evidence, the burden of proof would shift to the party opposing the claim. The Commission shall establish procedures allowing for such a preliminary determination during a proceeding. In addition, if a presumption of ownership arises, the party opposing the claim should have the burden of proving that a work was not looted. Any defense that a claimed art work was not looted should have to be established by clear and convincing evidence.

2. Hearsay and Authentication

The treaty should permit the Commission to publish its own rules of evidence, including rules that relax standard evidentiary burdens, specifically, with respect to hearsay and document authentication.

R. Impleading

The Commission should restrict a defendant's ability to implead additional defendants. Defenses would be limited to those going to the claim of ownership by claimant. All additional claims (e.g., breach of warranty or contract claims) would be preserved for courts of the Member States.

S. Monetary Damages

The treaty contemplates that disputes before the Commission generally will relate to the return of actual art works or cultural objects. However, nothing in the treaty should prevent parties from reaching monetary settlements. In addition, the treaty should provide that the Commission shall provide a procedure whereby the parties to a dispute could agree to have the Commission resolve a claim by way of money damages, based on valuations done by the Commission. (As noted above, such valuations would then be res judicata in the courts of Member States with respect to additional claims.)

Damage claims also should be permitted against any party who, after the effective date of the treaty, sells or transfers looted art to parties in non-Member States. Damages should be calculated based on current market values. The Commission should be postured to address whether Member States should allow punitive damages to be awarded against professional dealers or museums who (i) transfer works to parties in non-Member States or (ii) engage in misleading practices, such as failing to register looted works, failing to cooperate with the broad discovery scheme of the treaty, or misrepresenting provenance.

T. Fee Shifting

The treaty should provide that the losing party shall pay the fees and costs of the prevailing party. In addition, if a prevailing claimant can show that proof of the required indicia of ownership

(as discussed above) was provided to the other party prior to trial, the fees to be awarded shall be doubled.¹⁴⁹

149 This a variation on offer of judgment procedures available in some nations and is meant to strongly encourage pre-trial settlements.