

NOTES

WHY WAIT SO LONG: THE CORNELIUS GURLITT COLLECTION AND THE NEED FOR CLEAR ADR MECHANISMS IN THE RESTITUTION OF LOOTED ART

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I. INTRODUCTION

When Adolph Hitler rose to power in Germany and began his crusade in the 1930s, he sought to destroy anything he felt was “corrosive to the moral fiber of Germany.”¹ As such, any art classified as “degenerate art” was confiscated by the Third Reich.² Degenerate art consisted of any piece that contradicted what Nazis considered to be real art, including modern art that deviated from classical representationalism,³ art that was created by Jewish artists or featured Jewish subjects, and pieces where the human form was either unfinished or exaggerated.⁴ Between approximately one-fourth to one-third of all the art in Europe was pillaged during World War II.⁵

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¹ Alex Shoumatoff, *The Devil and the Art Dealer*, VANITY FAIR (Apr. 2014), <http://www.vanityfair.com/news/2014/04/degenerate-art-cornelius-gurlitt-munich-apartment>.

² *Id.*

³ From a young age “Hitler loathed anything that smacked of the cosmopolitan or foreign” and would rant that “the art and designs of Klimt, Schiele, and other Viennese Sectionists of the . . . young style, were pornographic and degenerate.” SUSAN RONALD, *HITLER’S ART THIEF* 30 (2015). When a nineteen-year-old Hitler was rejected from the Academy of Fine Arts in Vienna, he wondered why “did the Viennese flock to *see* modernist paintings and not appreciate *his* classicism?” *Id.* at 31.

⁴ Shoumatoff, *supra* note 1; Jessica Schubert, *Prisoners of War: Nazi-Era Looted Art and the Need for Reform in the United States*, 20 *TOURO L. REV.* 675 (2014); Özlem Gezer, *Interview with a Phantom: Cornelius Gurlitt Shares His Secrets*, *DER SPIEGEL* (Nov. 17, 2013) (Ger.), <http://www.spiegel.de/international/germany/spiegel-interview-with-cornelius-gurlitt-about-munich-art-find-a-933953.html>; Emily Henson, *The Last Prisoners of War: Returning World War II Art to its Rightful Owners—Can Moral Obligations be Translated into Legal Duties?*, 51 *DEPAUL L. REV.* 1103 (2002).

⁵ Henson, *supra* note 4.

As the dust from World War II settled, the world had to decide how it would handle the lost art. Homes had been destroyed, museums had been ransacked, and, in some cases, art had been sold for a fraction of its cost in exchange for travel documents for people fleeing the country.⁶ The looted art began resurfacing only to be met with a vast array of legal issues; provenance research would prove to be difficult at best, laws differing across countries and even states would bar victims or their heirs from making claims, and, as time went on, there was an increased likelihood that looted works were sold and now housed in museums, auction houses, or private residences across the globe.⁷ In the interest of fairness and as an attempt to provide consistency in restitution procedures, the Department of State and the U.S. Holocaust Memorial Museum hosted The Washington Conference on Holocaust-Era Assets from November through December of 1998.⁸ The conference was attended by representatives from forty-four countries, who created and signed the Washington Conference Principles on Nazi-Confiscated Art (“the Washington Principles”).⁹ The Washington Principals are a list of eleven “non-binding principals to assist in resolving issues relating to Nazi-confiscated art.”¹⁰ The recommended steps do not constitute a binding treaty, but rather provide a moral guideline that the countries attending agreed to follow.¹¹ Signing countries’ governments have since reached different conclusions regarding the degree to which they would be bound by the Washington Principles.¹²

Recently, restitution of Nazi-looted art was thrust back into the international spotlight with the discovery of the Gurlitt Collection.¹³ On February 28, 2012, German officials executed a search warrant in Cornelius Gurlitt’s apartment and discovered over 1,400

⁶ See Shoumatoff, *supra* note 1; Elizabeth Karlsgodt, *Why are Museums Holding on to Art Looted by the Nazis?*, NEWSWEEK (May 10, 2015), <http://www.newsweek.com/why-are-museums-holding-art-looted-nazis-330393>.

⁷ See Karlsgodt, *supra* note 6; Henson, *supra* note 4.

⁸ *Washington Conference on Holocaust-Era Assets*, A TEACHER’S GUIDE TO THE HOLOCAUST, <https://fcit.usf.edu/holocaust/resource/assets/index.htm> (last visited Jan. 29, 2016).

⁹ Jessica Mullery, *Fulfilling the Washington Principles: A Proposal for Arbitration Panels to Resolve Holocaust-Era Claims*, 11 *CARDOZO J. CONFLICT RESOL.* 643 (2010).

¹⁰ *Washington Conference Principles on Nazi-Confiscated Art*, U.S. DEP’T OF STATE, (Dec. 3, 1998), <http://www.state.gov/p/eur/rt/hlcst/122038.htm>.

¹¹ See Mullery, *supra* note 9.

¹² See, e.g., J.D. Bindenagel, Address at the Holocaust Era Assets Conference Prague and Terezin, Czech Republic: Washington Principles on Nazi-confiscated Art: Ten Years and Promises of the Washington Principles (June 26, 2009).

¹³ See Shoumatoff, *supra* note 1.

pieces of looted art (the “Schwabing Trove”).¹⁴ Gurlitt, an octogenarian residing in the Munich borough of Schwabing, had inherited the works from his father, Hildebrand Gurlitt, a Nazi art dealer.¹⁵ Over two years later, on February 24, 2014, during an ongoing investigation, an additional 238 pieces were discovered in Gurlitt’s Salzburg residence (the “Salzburg Trove”).¹⁶ The governments of Germany and the Free State of Bavaria struggled in dealing with the PR nightmare and many legal implications that came from the massive discovery of these troves (the two troves collectively, “the Gurlitt Collection”) and subsequent attempt at restitution.¹⁷ Because of the many legal issues, which will be discussed in this Note, only two pieces were identified and returned as of February 1, 2016.¹⁸

This Note discusses the legal issues surrounding the Gurlitt Collection at each step of the process, and proposes that the mishandling of the collection should spark the need for an international treaty focusing on alternative dispute resolution (“ADR”) mechanisms for restituting large troves of looted art. Section II of this Note provides a history of the Gurlitt Collection and the Washington Principals, the non-binding principals currently guiding countries in international restitution. Then, Section III critically examines how the collection has been handled since its discovery in 2012: by the German government, by the media, through ADR mechanisms, and through domestic courts. Finally, Section IV proposes that the Gurlitt Collection has sparked the need for a new international conference, culminating with the codification of the Washington Conference Principles on Nazi-Confiscated Art into a binding treaty, and creating a two-step process for restitution

¹⁴ *Chronology*, TASKFORCE SCHWABINGER KUNSTFUND, <http://www.taskforce-kunstfund.de/en/chronology.htm> (last visited Sep. 9, 2016).

¹⁵ Shoumatoff, *supra* note 1.

¹⁶ *Chronology*, *supra* note 14.

¹⁷ Germany has been criticized in its handling of the Gurlitt Collection due to the little that has been accomplished in a long period of time, as well as the government’s lack of transparency. See, e.g., Nicholas O’Donnell, “*Final Report*” of Gurlitt Task Force Presented to German Government—*Process Continues to Raise More Questions Than Answers*, ART LAW REPORT (Jan. 15, 2016), <http://blog.sandw.com/artlawreport/final-report-of-gurlitt-task-force-presented-to-german-government-process-continues-to-raise-more-questions-than-answers>.

¹⁸ Mary Lane, *Two Nazi-Looted Paintings Set for Return to Heirs of Original Owners*, WALL ST. J. (May 12, 2015), <http://www.wsj.com/articles/two-looted-works-from-gurlitt-collection-set-for-return-to-heirs-1431437631>; Nicholas O’Donnell, *Gurlitt Collection May be Displayed Next Year, Real Progress Still Elusive as Focus Remains on Public Relations*, ART LAW REP. (Oct. 13, 2015), <http://www.artlawreport.com/2015/10/13/gurlitt-collection-may-be-displayed-next-year-real-progress-still-elusive-as-focus-remains-on-public-relations/>.

claims regarding art looted during wartime. This process includes seeking an expert determination, and then bringing the claim in front of an international arbitration tribunal. The team of experts and the arbitration tribunal should be used and funded by all signing countries and be used for the return of all cultural property looted during war, focused primarily, but not limited to, WWII.

II. BACKGROUND

A. *Discovering Lost Art*

Looted art has resurfaced slowly since the end of World War II. Discovery of the Gurlitt Collection began in September of 2010.¹⁹ During a routine check of passengers on the train from Zurich to Munich, Bavarian officials asked for papers from a “frail, well-dressed, white-haired man traveling alone.”²⁰ Although he was carrying just under the threshold amount that passengers are required to declare, his nervous behavior coupled with his name, Rolf Nikolaus Cornelius Gurlitt, aroused suspicion and he was flagged for further investigation.²¹ Upon further inquiry, customs and tax investigators found literally nothing: Gurlitt had no pension, health insurance, tax records, employment records, or bank accounts, though he lived in a million dollar apartment in one of Munich’s more expensive neighborhoods.²² Curious about this ghost man, German officials executed a search warrant in accordance with a tax evasion investigation in February 2012.²³ During the search, law enforcement officers discovered and secured over 1,400 paintings and drawings, according to the public prosecutor’s office in Augsburg.²⁴ The pieces were taken into police custody for further investigation.²⁵ One theory that never gained legal or factual traction was that Gurlitt was involved in a major art-trafficking

¹⁹ Shoumatoff, *supra* note 1.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Melissa Eddy & Alison Smale, *Cornelius Gurlitt, Scrutinized Son of Nazi-Era Art Dealer, Dies at 81*, N.Y. TIMES (May 6, 2014), http://www.nytimes.com/2014/05/07/arts/design/cornelius-gurlitt-son-of-nazi-era-art-dealer-has-died.html?_r=0.

²⁴ *Chronology*, *supra* note 14.

²⁵ Mary Lane & Bertrand Benoit, *Inside the Deathbed Deal With Cornelius Gurlitt to Return Art Looted by Nazis*, WALL ST. J. (May 14, 2014), <http://www.wsj.com/articles/SB10001424052702304908304579561840264114668>.

operation.²⁶ Though the investigation proved fruitless, it was the only reason the prosecutor's office was allowed to retain possession of the collection and begin provenance research.²⁷ "Under current law, which is part of Germany's civil code, former owners cannot seek the return of their property more than 30 years after it was taken from them. For property taken during World War II, this means that the window to seek legal restitution closed in 1975."²⁸ While German officials proposed changing this strict statute of limitations in 2014, the government has not yet reached a conclusive resolution as of September 2016, thought it was deemed "unlikely to succeed."²⁹

The Schwabing Trove had been passed down from Cornelius' father, Hildebrand Gurlitt,³⁰ and was "a sensational treasure trove, including paintings by Marc Chagall, Max Beckmann, Franz Marc, Pablo Picasso and Henri Matisse."³¹ The art was Gurlitt's life.³² "He spoke to his paintings. They were his friends, the loyal companions that didn't exist in his real life. He considered it is his life's mission to protect his father's treasure, and over the decades he lost touch with reality."³³ To the rest of the world, the art represented the last prisoners of war, objects to be returned their original owners or their heirs.³⁴ When the works were confiscated by the Free State of Bavaria, the Munich district court appointed a legal custodian in accordance with § 1913, S. 1 of the German Civil Code BGB to manage Gurlitt's personal affairs and estate.³⁵

²⁶ *Id.*

²⁷ *Id.*

²⁸ Melissa Eddy, *Germans Propose Law to Ease Return of Art Looted by Nazis*, N.Y. TIMES (Feb. 13, 2014), <http://www.nytimes.com/2014/02/14/world/europe/germany-considers-lifting-statute-of-limitations-on-cases-involving-stolen-art.html>.

²⁹ As of date of publication of this Note, the new law, dubbed Lex Gurlitt, has not been passed. The sense of urgency in passing this law that was initially felt by Germany and Bavaria may have subsided once Gurlitt agreed to be bound by the Washington Principles in April 2014. Peter Beret, *Art Law: Bavarian Legislative Proposal "Unlikely to Succeed," Minister Says*, DISP. RESOL. IN GER. (Mar. 10, 2014), <http://www.disputeresolutiongermany.com/2014/03/art-law-bavarian-legislative-proposal-unlikely-to-succeed-minister-says/>; *Chronology*, *supra* note 14; Soeren Kern, *German Pledges to Return Nazi-Looted Art*, GATESTONE INST. (Apr. 7, 2014), <http://www.gatestoneinstitute.org/4249/germany-gurlitt-looted-art>.

³⁰ This Note will briefly touch upon Hildebrand Gurlitt's complicated life. For a more detailed biography, see ROLAND, *supra* note 3.

³¹ Gezer, *supra* note 4.

³² *Id.*

³³ *Id.*

³⁴ "The view that these artworks are 'the last prisoners of war' gained ground in the 1990s." *How is Nazi-looted Art Returned?*, ECONOMIST (Jan. 12, 2014), <http://www.economist.com/blogs/economist-explains/2014/01/economist-explains>.

³⁵ *Chronology*, *supra* note 14.

The largest trove discovered since the end of World War II came into Cornelius' possession upon the death of his father, Hildebrand Gurlitt.³⁶ Although Hildebrand had distant Jewish heritage, he developed Nazi connections upon Hitler's rise to power.³⁷ In 1938, Joseph Goebbels formed the Commission for the Exploitation of Degenerate Art and appointed Hildebrand, a former curator, as an art expert and dealer for the Third Reich.³⁸ Despite the 1907 Hague Convention on the Laws and Customs of War on Land explicitly making looting a war crime and forbidding the seizure and destruction of cultural property, looting is still a reality of war. During WWII Nazis stole and forced sales of art in part to fund their forces,³⁹ a practice being used by ISIS today.⁴⁰ Back in the 1930s and 40s, Hildebrand and the Commission confiscated and forcibly purchased art from museums, private collections, and abandoned homes across Europe to be sold abroad.⁴¹ Hildebrand also secretly purchased works from Jewish families at prices well below market value in exchange for safe passage out of Germany, rationalizing to himself that he was helping the families.⁴² Eventually, the Nazi government saw the potential to make a profit by creating a Degenerate Art Museum, and began saving pieces.⁴³ At this point Hildebrand Gurlitt double-crossed the Nazis. He claimed that art had been destroyed during a bombing, when in

³⁶ See Shoumatoff, *supra* note 1.

³⁷ Hildebrand's reputation as an art dealer kept him from being persecuted, but his ¼ Jewish heritage kept the Nazis suspicious of him. *Art Dealer to the Führer: Hildebrand Gurlitt's Deep Nazi Ties*, DER SPIEGEL (Dec. 23, 2013), <http://www.spiegel.de/international/germany/hildebrand-gurlitt-and-his-dubious-dealings-with-nazi-looted-art-a-940625.html>.

³⁸ Shoumatoff, *supra* note 1.

³⁹ Christa Roodt, *State Courts or ADR in Nazi-Era Art Disputes: A Choice "More Apparent Than Real"?*, 14 *CARDOZO J. CONFLICT RESOL.* 421, 427 (2013).

⁴⁰ While it is beyond the scope of this Note, there is currently "heavy looting in ISIS-controlled areas" of the Middle East, such that "Syria's cultural heritage has become a casualty of war." The "trade in antiquities, estimated to be worth billions of dollars a year" is booming. Daniela Deane, *Islamic State is Selling Looted Syrian Art in London to Fund its Fight*, WASH. POST (Feb. 25, 2015), https://www.washingtonpost.com/world/is-looted-syrian-art-showing-up-in-london-to-fund-activities/2015/02/25/785ab630-bcd0-11e4-b274-e5209a3bc9a9_story.html; CBS Interactive Inc., *Following the Trail of Syria's Looted History*, CBS NEWS (Sept. 9, 2015), <http://www.cbsnews.com/news/isis-looted-syrian-ancient-artifacts-black-market-us-and-europe/>; Steven Lee Myers & Nicholas Kulish, *'Broken System' Allows ISIS to Profit From Looted Antiquities*, N.Y. TIMES (Jan. 9, 2016), http://www.nytimes.com/2016/01/10/world/europe/iraq-syria-antiquities-islamic-state.html?_r=0.

⁴¹ In 1938 the Nazi government enacted a law making this looting legal. Michael Rebbholz, *Recovery of Nazi-Related Art: Legal Aspects Under German and U.S. Law Exemplified by the Gurlitt Case*, 37 *HASTINGS COMM. & ENT. L.J.* 305, 306 (2015); see Shoumatoff, *supra* note 1.

⁴² Shoumatoff, *supra* note 1.

⁴³ *Id.*

reality he had secretly moved the art to a secure location.⁴⁴ This would later become the Gurlitt Collection.

B. *Washington Conference Principles on Nazi-Confiscated Art*

The Washington Conference on Holocaust Era Assets occurred during the last peak in international support of restitution efforts.⁴⁵ The Washington Principles called for open and accessible provenance research, which should be guided by the intent of achieving just and fair solutions.⁴⁶ They conclude by encouraging nations to develop ADR mechanisms to achieve these goals.⁴⁷ While the Washington Principles are not binding, the intent was for signing nations to codify the principles within the context of their own laws, and, at the very least, to provide a moral authority within the art world that can be “more effective than the threat of civil or criminal proceedings.”⁴⁸ The Washington Principles have been re-examined, and the policies have been reaffirmed several times since their inception.⁴⁹ Most notably, the Terezin Declaration, signed by 46 countries in the Czech Republic in 2009, emphasized that restitution should be decided on the merits rather than being barred by statutes of limitation.⁵⁰ In the seventeen years since the Conference, the 44 nations in attendance that signed the Washington Principles have adopted the policies in various degrees.⁵¹ It is important to note that even countries that have fully adopted the Washington Principles into their legislation cannot bind private institutions or individuals to adhere to these rules.⁵² The Principles

⁴⁴ *Id.*

⁴⁵ See Mullery, *supra* note 9.

⁴⁶ *Washington Conference Principles on Nazi-Confiscated Art*, *supra* note 10.

⁴⁷ *Id.*

⁴⁸ *Id.*; Charles Goldstein, Holocaust Art Restitution Symposium: Restitution Experience Since the Washington Conference (1998): An Overview (Jun. 23, 2011); J. Christian Kennedy, Remarks at the University of Potsdam, Germany: The Role of the United States Government in Art Restitution (Apr. 23, 2007), <http://2001-2009.state.gov/p/eur/rls/rm/83392.htm>.

⁴⁹ These include the Declarations of the Vilnius in 2000, and the Terezin Declaration in 2009. Swiss Confederation, *Explanations Relating to the Principles of the Washington Conference (1998) and to the Declarations of the Vilnius (2000) and Terezin (2009) Conferences* (Jan. 2014).

⁵⁰ The Terezin Declaration did not add much, but rather reaffirmed the Washington Principles, and the Washington Principles are still widely cited. As such, extensive discussion of the Terezin Declaration is beyond the scope of this Note. , Prague Holocaust Era Assets Conference: Terezin Declaration, U.S. DEP'T OF STATE (June 30, 2009), <http://www.state.gov/p/eur/rls/or/126162.htm>.

⁵¹ Goldstein, *supra* note 48.

⁵² Kennedy, *supra* note 48.

only apply to national governments and government organizations.⁵³ While governments can encourage private institutions to follow the Washington Principles, they lack the ability to force compliance.⁵⁴ Restitution efforts therefore vary greatly between the United States, where many museums are privately owned institutions capable of ignoring the Washington Principles, and most European countries, where museums are typically owned and run by the government.⁵⁵

In 2014, the World Jewish Restitution Organization examined the progress made with respect to implementing the Washington Principles and Terezin Declaration in each of the signatory countries and placed them into the four categories: “a) countries that have made *major progress* . . . b) countries that have made *substantial progress* . . . c) countries that have taken *some steps* . . . and d) countries that *do not appear to have made significant progress*.”⁵⁶ Notably, Austria and Germany fall into the category of countries that have made major progress, and the United States falls into the category of countries that have made substantial progress.⁵⁷ However, while progress has been made with respect to government organizations and auction houses researching collections, there has been little to no progress made on the establishment of ADR mechanisms and claims procedures with respect to individuals or private institutions.⁵⁸ While Germany is held in high esteem for its adoption of the Washington Principles,⁵⁹ for nearly two years after seizing the Schwabing Trove from Gurlitt, “Augsburg prosecutors made no effort to contact potential Jewish claimants, some well into their 90s. The Augsburg prosecutors’ office didn’t respond to inquiries.”⁶⁰

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Wesley Fisher & Ruth Weinberger, *Holocaust-Era Looted Art: A Current World-Wide Overview* (Sept. 10, 2014), http://www.lootedart.com/web_images/pdf2014/Worldwide-Overview.pdf. Rankings were “based on available data regarding whether or not during the past decade and a half a country put in place mechanisms to carry out provenance research and to process claims for restitution.” *Id.*

⁵⁷ *Id.* at 5.

⁵⁸ *Id.* at 9.

⁵⁹ In addition to legally binding the German government to follow the Washington Principles, Germany has created a number of databases to guide with provenance research as well as several non-binding guidelines that outline “ways to discover and retribute looted cultural property.” *Id.* at 22–24.

⁶⁰ Lane & Benoit, *supra* note 25, at 4.

III. DISCUSSION

A. *Negotiating a Deal*

While Germany has made “substantial progress” toward the implementation of the Washington Principles, including creating lost art databases and encouraging provenance research, the Principles are still not enforceable against individuals.⁶¹ Since Germany has a 30-year statute of limitations for cases involving stolen property beginning at the time the property was taken, the last time a former owner could have filed a claim for restitution of Nazi-looted art against an individual was in 1975.⁶² Legally, Gurlitt had no duty to return any part of the Schwabing Trove to the Holocaust victims who formerly owned the pieces, or to their heirs. Morally, the ghost man, who did not own a television or computer and left his apartment only to buy groceries and other necessities, identified the collection as his life’s only love, and could not understand why it would ever be taken from him.⁶³ The German and Bavarian governments felt the weight of the artwork as it reopened an international wound that had never healed, coupled with the knowledge that they had no legal ability to do anything about it. Their best option was to utilize negotiation, a voluntary process “whereby the people involved communicate directly with each other to try and reach an agreement.”⁶⁴

When initially questioned about the Collection, Cornelius Gurlitt vowed never to return any of the paintings.⁶⁵ Two months later, he made an about-face, executing a will leaving Kunstmuseum Bern, a museum in Switzerland, as his sole beneficiary, and later coming to an agreement with the Bavarian government in which he agreed to bind himself, his heirs and assigns by the Washington Principles and return the pieces to their rightful owners.⁶⁶

⁶¹ *Id.*; *Washington Conference Principles on Nazi-Confiscated Art*, *supra* note 10.

⁶² Eddy, *supra* note 28.

⁶³ Gezer, *supra* note 4.

⁶⁴ *Alternative Dispute Resolution*, LAW SOC’Y OF NEW SOUTH WALES, <https://www.law-society.com.au/community/disputesandmediation/ADR/index.htm> (last visited Nov. 20, 2015). It is important to recall that there are no laws in Germany which legally bind individuals to return looted art after the 30-year statute of limitations. It therefore logically follows that all artworks that have been restituted after 1975 have required either the willingness of the individual in possession or negotiation. *See also* Eddy, *supra* note 28.

⁶⁵ Gezer, *supra* note 4.

⁶⁶ Lane & Benoit, *supra* note 25.

The story of the art collector's change of heart is filled with legal maneuvering, delicate negotiations and personal appeals to Mr. Gurlitt by German government officials urging him to let go of art he so loved. His about-face culminated in frenzied and fragile negotiations between his lawyers and the government that climaxed just before his death.⁶⁷

Meaningful steps toward negotiation began two years after the police executed their search warrant, when a Munich court assigned Christoph Edel as Gurlitt's temporary legal guardian.⁶⁸ Edel then hired a legal team, a spokesman, and an art expert to help deal with the publicity, and navigate the legal issues.⁶⁹ Around the same time, Gurlitt began following the media coverage of his story.⁷⁰ He saw that he and his father were being painted as villains and wanted to clear the family name, claiming that his father "opposed the Nazis and served them only to save works of art."⁷¹ Gurlitt began blaming the German government for not only taking his art away, but also for thrusting his family into an international spotlight.⁷²

In December 2013, at the peak of negotiations, Gurlitt spoke with a government official who suggested he transfer his collection to a foundation that would return the art to its rightful owners.⁷³ A few weeks later, Gurlitt wrote a will from his deathbed appointing Kunstmuseum Bern, an art museum in Bern, Switzerland, as his unrestricted and unfettered sole heir.⁷⁴ This bequeath came as "like a bolt from the blue, since at no time has Mr. Gurlitt had any connection with Kunstmuseum Bern."⁷⁵ In executing this will, Gurlitt hoped to clear his family name, return the art to its rightful owner, and "snub his native land."⁷⁶

If the Kunstmuseum Bern agreed to take the art upon Gurlitt's death, it would be bound by the Washington Principles as the museum is a government owned entity. However, two problems remained. First, what should be done with artwork during the remainder of Gurlitt's life? Had negotiations stopped, the works

⁶⁷ *Id.*

⁶⁸ *Chronology, supra* note 14.

⁶⁹ Lane & Benoit, *supra* note 25.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Press Release, KUNSTMUSEUM BERN* (Jul. 5, 2014), <http://www.kunstmuseumbern.ch/en/service/media/the-gurlitt-collection/07-05-14-the-gurlitt-collection-1139.html>.

⁷⁵ *Id.*

⁷⁶ Lane & Benoit, *supra* note 25.

would be held in a stasis while Holocaust victims and their heirs aged and proof of ownership diminished.⁷⁷ Second, wills can be revoked and rewritten at any time during a person's life. To solve these problems, on April 7, 2014, Gurlitt signed an agreement with the Federal Republic of Germany and the Free State of Bavaria.⁷⁸ In it, Gurlitt gave the Taskforce, an agency that had been established by the German government, a year to continue to research the provenance of the artworks.⁷⁹ Additionally, he agreed to bind himself and his heirs by the Washington Principles, thereby waiving the right to use Germany's stringent statute of limitations as a legal defense against restitution claims.⁸⁰

B. *The Taskforce and the German Lost Art Foundation*

One way for true owners to prove that a specific piece of artwork was theirs between 2013 and December 31, 2015 was by filing a claim with the Schwabinger Kunstfund Taskforce for provenance research.⁸¹ "The provenance of a work of art is a historical record of its ownership," and research would "provide a documentary record of owners' names; dates of ownership, and means of transference; . . . and locations where the work was kept, from the time of its creation by the artist until the present day."⁸² The Schwabinger Kunstfund Taskforce ("Taskforce") was created and funded equally by the Federal Government of Germany and the Free State of Bavaria "in acknowledgment of their responsibility for their country's past."⁸³ The Taskforce was made up of an international team of experts such as provenance researchers, museum professionals, and historians from seven different countries.⁸⁴ They were tasked with determining which pieces from the Gurlitt Collection were appropriated as a result of Nazi persecution and determining

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Chronology*, *supra* note 14.

⁸⁰ *Id.*

⁸¹ *FAQ*, TASKFORCE SCHWABINGER KUNSTFUND, <http://www.taskforce-kunstfund.de/en/nc/fragen.htm> (last visited Sept. 8, 2016). *See also* GURLITT PROVENANCE RESEARCH, <http://www.kulturgutverluste.de/en/gurlitt-provenance-research> (last visited Jan. 30, 2016).

⁸² *Provenance Guide*, IFAR, https://www.ifar.org/provenance_guide.php (last visited Jan. 28, 2016).

⁸³ *About Us*, TASKFORCE SCHWABINGER KUNSTFUND, http://www.taskforce-kunstfund.de/en/about_us.htm (last visited Jan. 30, 2016).

⁸⁴ *Id.*

who is the rightful owner.⁸⁵ Thus, the Taskforce's sole purpose was to research the provenance of the Gurlitt Collection, prioritizing works for which claims had been filed.⁸⁶ Pictures of the works were posted on the Taskforce's website, and possible claimants were urged to contact the Taskforce with any information that may have aided in the restitution process.⁸⁷ When the Taskforce was dismantled at the end of 2015, they had received about 300 letters, approximately 200 of which concerned specific pieces.⁸⁸

Once a claimant had a final report proving that they were the owner or the owner's heir, they took the report to the current owner to discuss restitution.

The Taskforce [was] not . . . free to dispose of the artworks as it [saw] fit. Nor [was] it entitled to identify the living heirs of the former victims. The Taskforce therefore [did] not have the power to make restitution decisions. Neither [did] it have the authority of a court or board of arbitration. The power of disposition over the artworks lies solely with their owner. Until his death, that right lay with Cornelius Gurlitt.⁸⁹

Because of the will contest discussed *infra*, a claimant with a final report from the Taskforce must currently get consent from the Federal Government of Germany, the Kunstmuseum Bern, and the possible legal heirs or beneficiaries, as well as approval of the probate court, before restitution is possible.⁹⁰ Though Gurlitt agreed to waive the statute of limitations defense, neither he nor his heirs are bound to return a painting without a formal legal process.⁹¹ While the result in either case is restitution, having to litigate a claim after months of provenance research would be costly and waste precious time.⁹² This process, whereby the Taskforce researched the provenance of the artwork and the claimant presented the results to the owner who decided on restitution, was the German government's response to the Washington Principles' recommendation for ADR mechanisms in restitution of Nazi looted art.⁹³

⁸⁵ *Id.*

⁸⁶ *FAQ*, *supra* note 81.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Chronology*, *supra* note 14.

⁹² *See generally* Roodt, *supra* note 39.

⁹³ *About Us*, *supra* note 83.

After researching the Gurlitt Collection for two full years, a year longer than anticipated, and spending nearly \$2 million in investigations, the Taskforce compiled a “Final Report” which it released on January 12, 2016.⁹⁴ Of the 1,258 artworks examined from the Schwabing Trove, 507 were conclusively “found not to be Nazi-looted,” and the remaining 751 works either require additional research or were found to have been looted.⁹⁵ In total, there are only eleven works whose “identity [is] assured; [and] provenance established,”⁹⁶ and of these eleven, the Taskforce was only “able to clearly identify ownership of only five.”⁹⁷ Because of the length of time and the “meager” findings, the Taskforce has received strong criticism.⁹⁸ One member of the Art Recovery Group claimed:

It has been clear since the beginning that the Task Force, which is made up of some immensely talented individuals, was fatally underfunded and understaffed. . . . We know provenance research cannot be rushed, but for projects as important as the Gurlitt hoard we would have expected to see much greater support, funding and resources to aid in its efficiency. . . . The German government dropped the ball on this one and have missed a golden opportunity to show real leadership around provenance research and restitution issues.⁹⁹

The German government defended the Taskforce, claiming that the “results are much better than this number indicates,”¹⁰⁰ and that the Taskforce had hit significant roadblocks due to privacy issues surrounding the will contest, the state of the works when they were discovered, and the lack of records found in either of Gurlitt’s apartments.¹⁰¹ Regardless of whether or not the Taskforce was

⁹⁴ The Final Report was released only in German, the Taskforce also released a Fact Sheet summarizing the results in English. *Fact Sheet*, TASKFORCE SCHWABINGER KUNSTFUND (Jan. 12, 2016), http://www.taskforce-kunstfund.de/fileadmin/_downloads/factsheet_en.pdf. An English translation is expected to be made available in several weeks. Melissa Eddy, *Few Answers on True Owners of Art Found in Gurlitt Trove*, N.Y. TIMES (Jan. 14, 2016), <http://www.nytimes.com/2016/01/15/world/europe/gurlitt-art-collection-germany.html>. See also Henri Neuendorf, *Germany Rushes to Defend Gurlitt Taskforce Amid Harsh International Criticism*, ARTNET (Jan. 15, 2016), <https://news.artnet.com/art-world/germany-defends-gurlitt-taskforce-408095>; Nicholas O’Donnell, *supra* note 17.

⁹⁵ *Fact Sheet*, *supra* note 94.

⁹⁶ *Id.*

⁹⁷ Eddy, *supra* note 94.

⁹⁸ Neuendorf, *supra* note 94.

⁹⁹ *Id.*

¹⁰⁰ Eddy, *supra* note 94.

¹⁰¹ *German Task Force Finds Five Nazi-Looted Works in Gurlitt Trove*, DEUTSCHE WELLE (Jan. 14, 2016), <http://www.dw.com/en/german-task-force-finds-five-nazi-looted-works-in-gurlitt-trove/a-18981388>.

successful, everyone can agree that there is still significant work to be done. The task of researching the remaining pieces in the Schwabing Trove as well as beginning to examine the Salzburg Trove will be carried out by the German Lost Art Foundation.¹⁰² Because of the secrecy and mystery that has surrounded this collection since its discovery, it is unclear what steps the new agency will take and whether it will change its methodology.¹⁰³

C. *The Final Hurdle to Restitution: Contesting the Will*

When Cornelius Gurlitt died in 2014 at age 81, he left his entire estate to Kunstmuseum Bern as his sole beneficiary.¹⁰⁴ On November 24, 2014, after months of deliberation, Kunstmuseum Bern accepted the bequest and announced that it will ensure that any looted art is returned to its rightful owner.¹⁰⁵ The bequest came as a surprise to Kunstmuseum Bern since Gurlitt had no connections to the museum and only tenuous connections to Switzerland.¹⁰⁶ On November 21, 2014, right before Kunstmuseum Bern announced its intentions to accept the Gurlitt Collection, Uta Werner, Cornelius Gurlitt's first cousin, and other family members contested the validity of Cornelius' will.¹⁰⁷ The family's decision to challenge the will came after they received the expert opinion from psychiatrist Helmut Hausner that questioned Gurlitt's capacity to execute a will.¹⁰⁸ In his report, Dr. Hausner expressed concerns that "Gurlitt was suffering from 'paranoid delusions'" that he had

¹⁰² Eddy, *supra* note 94.

¹⁰³ *Id.* The only information as of the submission of this Note is that the German Lost Art Foundation will launch a new project titled "Gurlitt Provenance Research" whose research findings will be published in German and English. GURLITT PROVENANCE RESEARCH, *supra* note 81.

¹⁰⁴ Philip Oltermann, *Swiss Museum Sole Heir in Will of Art Collector Cornelius Gurlitt*, *GUARDIAN* (May 7, 2014), <http://www.theguardian.com/world/2014/may/07/swiss-museum-heir-will-art-collector-cornelius-gurlitt>.

¹⁰⁵ Melissa Eddy, *Swiss Museum Accepts Art Trove Amassed Under Nazis: Kunstmuseum Bern Obtains Trove From Gurlitt Collection*, *N.Y. TIMES* (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/arts/design/swiss-museum-kunstmuseum-bern-cornelius-gurlitt-nazi-era-art.html>.

¹⁰⁶ As previously noted, Gurlitt had an apartment in Switzerland but did not use it often. Eddy, *supra* note 28.

¹⁰⁷ Nicholas O'Donnell, *Gurlitt Relatives Formally Challenge Will that Named Kunstmuseum Bern as Heir*, *ART LAW REP.* (Nov. 21, 2014), <http://www.artlawreport.com/2014/11/21/gurlitt-relatives-formally-challenge-will-that-named-kunstmuseum-bern-as-heir/>.

¹⁰⁸ *Id.*

been persecuted by the Nazis for several decades and feared a plot to take away the art he had inherited.¹⁰⁹

Dr. Hausner's testimony, combined with the fact that Gurlitt was an out-of-touch recluse whose whole life had been turned upside down when his apartment was raided and who left his entire estate to a museum with which he had no prior affiliation, provided the basis for Uta to bring a contest. Under German law, qualitative capacity necessary to execute a will is equivalent to capacity required to enter into a contract.¹¹⁰ That standard says a person cannot make a will if, "because of diseased defect of mental capacity, due to imbecility or impaired consciousness, he is incapable of realizing the significance of a declaration of intention made by him and of acting with this understanding."¹¹¹ If the will is invalidated on these grounds, Cornelius Gurlitt's estate will pass through intestate succession according to the German Civil Code and pass to Uta and the other relatives contesting the will.¹¹² However, the implications of invalidating the will go far beyond determining how Gurlitt's estate should be divided. Because the capacity requirements are equivalent for executing wills and contracts in Germany, invalidating Gurlitt's will, which was executed in December 2013, would necessarily invalidate the agreement reached in April 2014.¹¹³ Thus, if the court declares that Gurlitt was incapacitated to execute his will, then both the will and the agreement are not valid, and Gurlitt's estate passes through intestate succession to his cousins and their children.¹¹⁴ As private citizens, they will not be bound by the Washington Principles, will not have to waive the statute of limitations defense for restitution claims, and will have no duty to continue provenance research.¹¹⁵ Any progress made towards restitution since 2013 would be erased.

¹⁰⁹ Nicholas O'Donnell, *Expert Opinion Casts Doubt on Gurlitt's Testamentary Capacity to Make the Will that Names the Kunstmuseum Bern as Heir*, ART LAW REP. (Nov. 17, 2014), <http://www.artlawreport.com/2014/11/17/expert-opinion-casts-doubt-on-gurlitts-testamentary-capacity-to-make-the-will-that-names-the-kunstmuseum-bern-as-heir/>.

¹¹⁰ Ryan MacDonald, *For the Sake of Restitution: an Analysis of Cornelius Gurlitt's Will, its Court Challenge, and Why Public Policy Should Diverge from the Court's Decision*, 16 RUTGERS J. L. & RELIGION 443, 453 (2015).

¹¹¹ Ronald J. Scalise Jr., *Undue Influence and the Law of Wills: a Comparative Analysis*, 19 DUKE J. COMP. & INT'L L. 41, 80 (2008).

¹¹² MacDonald, *supra* note 110, at 452.

¹¹³ See *Chronology*, *supra* note 14; Scalise Jr., *supra* note 111, at 80.

¹¹⁴ See MacDonald, *supra* note 110, at 452.

¹¹⁵ Kennedy, *supra* note 48.

The will contest, which began in November 2014, has already continued for two years.¹¹⁶ During this time the artwork has remained tucked away just out of reach for potential claimants.¹¹⁷ The Taskforce continued to research the provenance of the pieces, but any plans for any of the pieces, including restitution or display, had to be agreed upon by all potential beneficiaries and approved by the probate court.¹¹⁸ Despite Kunstmuseum Bern being aware of these restrictions, the museum in conjunction with German Cultural Minister Monika Grütters planned and announced a joint exhibition of the Gurlitt Collection with the Bundeskunsthalle, a museum in Bonn, Germany, for late 2016.¹¹⁹ This announcement was criticized as “premature” by Uta’s attorney, who does not expect a verdict until at least late 2016.¹²⁰ Another issue surrounding the current status of the art stems from the fact that the agreement that created the Taskforce and gave it authority for a year is being contested; this means that for the last year of its existence and the first year of German Lost Art Foundation’s existence, it was unclear under whose authority these groups were working.¹²¹ Uta has claimed that if the will is invalidated, she will continue working with the Taskforce or the German Lost Art Foundation and, as a sign of good faith, agreed to release two paintings whose original owners had filed claims for restitution prior to Gurlitt’s death.¹²² The family claims it is not disputing the will to gain ownership of looted art, but, rather, to gain ownership of pieces to which Cornelius Gurlitt had clear title.¹²³

D. *Alternative Dispute Resolution and Litigation in Restitution Cases Involving Art Looted During Wartime*

“Art and cultural heritage disputes are often multidimensional, involving not only complex legal issues, but also sensitive,

¹¹⁶ As of September 2016, the will contest is ongoing, having been appealed to the Upper Regional Court in Munich. Catherine Hickley, *Bonn and Bern Team Up to Show Controversial Gurlitt Collection*, ART NEWSPAPER (Apr. 5, 2015), <http://theartnewspaper.com/news/news/bonn-and-bern-team-up-to-show-controversial-gurlitt-collection/>.

¹¹⁷ *Id.*; *FAQ*, *supra* note 81.

¹¹⁸ *FAQ*, *supra* note 81.

¹¹⁹ Hickley, *supra* note 116.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

not necessarily legal elements, of an emotional, ethical, historical, moral, political, religious, or spiritual nature.”¹²⁴ As such, litigation may not be a good fit. Resolving restitution claims through the use of alternative dispute resolutions (“ADR”)

seems attractive enough in view of assumptions that the legal framework is inadequate and unyielding; litigation is too time-consuming and costly; and burdens and standards of proof of ownership and title are too hard to discharge. Also, non-forensic resolution and alternative methods of recovery appear immi- nently preferable because the recovery rate of Nazi Spoiled Art through litigation has been low.¹²⁵

While litigation is typically disadvantageous, frustrating, and time consuming in these situations, the multitude of issues involved in restitution of looted art naturally lends itself to ADR mechanisms such as negotiation, expert determination, or arbitration.¹²⁶ As discussed *supra*, negotiation is the voluntary “deliberation, discussion, or conference upon the terms of a proposed agreement” between two or more parties.¹²⁷ Negotiation tends to be the first step in the restitution process as the claimants have hopes that things will be resolved quickly and amicably.¹²⁸ If the parties cannot reach an agreement on their own, they may wish to enter into arbitration, “a procedure in which a dispute is submitted . . . to one or more arbit- rators who make a binding decision on the dispute.”¹²⁹

[T]hese private, out-of-court dispute resolution mechanisms allow [parties] to solve their disputes in a timely, cost-efficient, sustainable and responsible manner with the assistance of one or several qualified independent mediators, arbitrators or experts. A mediator can assist parties in settling their dispute through facilitating dialogue and helping identifying their interests but without imposing any decision. An arbitrator renders a final, binding and internationally enforceable decision on the parties’ dispute.¹³⁰

¹²⁴ Sarah Theurich, *Art and Cultural Heritage Dispute Resolution*, WIPO MAG. (July 2009), http://www.wipo.int/wipo_magazine/en/2009/04/article_0007.html.

¹²⁵ Roodt, *supra* note 39, at 243.

¹²⁶ Theurich, *supra* note 124.

¹²⁷ *Negotiation*, BLACK’S LAW DICTIONARY (10th ed., 2014). See also *Alternative Dispute Res- olution*, *supra* note 64.

¹²⁸ Ellen Gamerman, *American Files Suit Against Germany for Nazi-Era Art Trove*, WALL ST. J. (Mar. 5, 2014), <http://blogs.wsj.com/speakeasy/2014/03/05/american-files-suit-against-ger- many-for-nazi-era-art-trove/>.

¹²⁹ *Arbitration*, WIPO, <http://www.wipo.int/amc/en/arbitration/what-is-arb.html> (last visited Jan. 28, 2016).

¹³⁰ Theurich, *supra* note 124.

While some believe that binding arbitration may be too private a forum, or could become biased, “proponents say the use of arbitration would create a more equitable and credible forum because the arbitrators would be well versed in the complexities of art.”¹³¹

Another creative dispute mechanism that may prove especially beneficial in art and cultural heritage law is expert determination. In expert determination, the parties “submit a specific question, for example on authenticity, to one or more independent experts who makes a determination on the referred matter.”¹³² It can therefore “operate on a more informal and expeditious manner than broader processes such as arbitration,” and can be “used on a stand-alone basis or in connection with an arbitration.”¹³³

In addition to the benefits of using ADR described above, there are also benefits specific to the art and cultural heritage sector. First, ADR can provide a single, international, neutral procedure.¹³⁴ Since looted art is just as likely to end up in a new country as it is to end up in its homeland, having a uniform system can help to avoid obtaining different results from different courts.¹³⁵ This uniform process can also lead to a uniform application of law, which diverges in many ways, including

- (i) how ownership or title is established; (ii) when a demand must be made for the return of property, and the relevant statute of limitations; (iii) what rights, if any, a *bona fide* purchaser has in stolen or looted art (and whether the purchaser must be compensated in any way by a true owner recovering a looted or stolen work); (iv) what claims run against professional sellers, such as art dealers, who have bought or sold a stolen or looted work; and (v) if the artwork is recovered, whether there are limitations on an owner’s ability to export a stolen or looted work.¹³⁶

¹³¹ Rebecca Keim, *Filling the Gap Between Morality and Jurisprudence: The Use of Binding Arbitration to Resolve Claims of Restitution Regarding Nazi-Stolen Art*, 3 PEPP. DISP. RESOL. L.J. 295, 297 (2003).

¹³² Sarah Theurich, *Art, Cultural Institutions and Heritage Law August 2009 Theurich*, INT. BAR ASSN. (Aug. 2009), <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=c93cf2fa-f5f6-4a64-a7d1-8bd907fdf3dd>.

¹³³ *What is Expert Determination*, WIPO, <http://www.wipo.int/amc/en/expert-determination/what-is-exp.html> (last visited Jan. 30, 2016).

¹³⁴ *Id.*

¹³⁵ Roodt, *supra* note 39, at 442. See also Owen Pell, *Using Arbitral Tribunals to Resolve Disputes Relating to Holocaust-Looted Art*, in 7 THE PERMANENT COURT OF ARBITRATION/PEACE PALACE PAPERS: RESOLUTION OF CULTURAL PROPERTY DISPUTES 307, 309 (Kluwer Law Int’l 2004) (“At present, Holocaust-looted art cases often turn on the sheer happenstance of where the art has come to rest.”).

¹³⁶ Pell, *supra* note 135, at 311. See also Theurich, *supra* note 124.

Second, parties can choose their arbitrator or mediator and can ensure that they are “experts with expertise in the specific legal area and subject matter of art or cultural heritage at issue.”¹³⁷ Finally, arbitration and mediation provide a creative method of resolving emotionally charged disputes.¹³⁸ The Gurlitt collection represents much more than stolen property that was taken outside of the statute of limitations.¹³⁹ Treating it as such a simple claim would ignore the historical and emotional implications and tip the scale against someone claiming ownership. Using alternative dispute mechanisms can help to rebalance those scales by allowing additional evidentiary and procedural rules.¹⁴⁰

E. *In Practice: Analysis of the Use of Litigation versus ADR in Restitution of the Gurlitt Collection*

1. Femme Assise

By February 2016, when the Taskforce handed the reigns over to the German Lost Art Foundation, only two paintings had been returned; “Femme Assise” (“Seated Woman”) by Henri Matisse, and “Zwei Reiter am Strand” (“Two Riders on a Beach”) by Max Lieberman were both returned in May 2015.¹⁴¹ These two paintings exemplify the differences between litigation and ADR with respect to the Gurlitt Collection. “Seated Woman” was returned to Elaine Rosenberg, a descendant of Paul Rosenberg, residing in New York.¹⁴² Paul Rosenberg was one of the world’s leading Modern art dealers.¹⁴³ His collection, including Matisse’s “Seated Woman,” had been stolen by the Nazis, and—at least that piece—ended up in the Gurlitt Collection.¹⁴⁴ The Rosenberg family chose

¹³⁷ Theurich, *supra* note 124. See also Keim, *supra* note 131, at 309 (“The fact that many judges are not familiar with the customs of art communities creates unpredictability and inconsistency of rulings in such disputes.”).

¹³⁸ *Id.*

¹³⁹ “Mass looting, such as Holocaust-related looting, is more than an issue of simple theft (which, unfortunately, is how disputes in this area are often treated under national law.” Pell, *supra* note 124.

¹⁴⁰ Theurich, *supra* note 135.

¹⁴¹ Lane, *supra* note 18.

¹⁴² *Id.*

¹⁴³ Melissa Eddy, *Matisse From Gurlitt Collection is Returned to Jewish Art Dealer’s Heirs*, N.Y. TIMES (May 15, 2015), http://www.nytimes.com/2015/05/16/arts/international/matisse-gurlitt-collection-femme-assise-seated-woman.html?_r=0.

¹⁴⁴ AFP, *Deal Reached on Restitution of Nazi-Looted Matisse*, TIMES OF ISRAEL (Mar. 25, 2015), <http://www.timesofisrael.com/deal-reached-on-restitution-of-nazi-looted-matisse/>.

to pursue negotiations for restitution. The process took almost two years and

involved combing through roughly 250,000 documents, letters and photographs in the Rosenberg family's records; chasing down signatures of the rightful heirs and Mr. Gurlitt's descendants; and pressing the authorities, past one failed agreement and through numerous phone calls and emails—including one exchange with the leading German researcher in which she insisted that “provenance research can't be rushed.”¹⁴⁵

The Rosenberg family wrote to Gurlitt directly and lawyers for each party began negotiating.¹⁴⁶ An agreement was almost finalized when Gurlitt fired his lawyer and negotiations had to begin anew.¹⁴⁷ When Gurlitt died, the Rosenbergs faced negotiations not only with the Taskforce but also the Munich probate court.¹⁴⁸ For two years, “[a]ll that time, the paintings sat in a warehouse outside Munich.”¹⁴⁹ While Elaine Rosenberg was able to retrieve “Seated Woman” without going through the courts, the alternate route took two full years to reconstitute a relatively straightforward claim with a substantial amount of evidence, and the family still incurred legal fees.¹⁵⁰

2. *Zwei Reiter am Strand*

Though litigation has its flaws, due to the continued mishandling of the Gurlitt Collection, litigation may provide the squeaky wheel that reunites victims and their artwork. David Toren was thirteen years old the last time he saw Max Liebermann's “Two Riders on the Beach” hanging in his uncle's estate in Breslau, Germany in 1938.¹⁵¹ It was the morning after Kristallnacht, when

“[m]y mother and I rushed to the villa with warm underwear and socks because we knew my father would be sent to the camps after the business dealings were over,” Mr. Toren said. “While my father handled the deal, I sat in a side room in a chair opposite the Liebermann. It was a dark room, but there was a strong light hitting the painting.”¹⁵²

¹⁴⁵ Eddy, *supra* note 143.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ AFP, *supra* note 144; Eddy, *supra* note 143.

¹⁵¹ Kelly Crow, *Newly Recovered Art Has Poignant Tale*, WALL ST. J. (May 21, 2015), <http://www.wsj.com/articles/newly-recovered-art-has-poignant-tale-1432249121>.

¹⁵² *Id.*

Toren was able to flee Germany with a kindertransport to safety in Sweden, before moving to New York.¹⁵³ “After Toren left Germany, the Nazis murdered every member of Toren’s extended family, other than his brother and aunt.”¹⁵⁴

“Two Riders” resurfaced in 2013 when the German prosecutors office held a press conference regarding the Gurlitt Collection, and showed five paintings to the audience, including the long lost Liebermann.¹⁵⁵ Like Elaine Rosenberg, David Toren had clear proof of provenance including documents showing that his uncle was the last-known owner of “Two Riders” and that he and his brother were the closest living heirs.¹⁵⁶ And, like Elaine Rosenberg, David Toren did not receive satisfactory answers to his inquiries about the painting. After attempting to negotiate, Toren “lost [his] patience”¹⁵⁷ and filed a complaint in the U.S. District Court in Washington D.C.¹⁵⁸ “Two Riders” had surfaced more than two years ago by the time the Complaint was filed.¹⁵⁹ “So why should it have taken two years? This slowness is the reason why I brought a lawsuit against Germany and Bavaria, which is going its course in a Federal Court in Washington to rush things.”¹⁶⁰ David Toren was the first American to file a lawsuit against the Federal Republic of Germany and the Free State of Bavaria for the return of Liebermann’s “Two Riders on the Beach.”¹⁶¹ The complaint sought recovery of the painting under two theories: bailment and wrongful possession.¹⁶² Toren was able to bring suit in the U.S. under the Foreign Sovereign Immunity Act (“FSIA”), “which essentially makes a foreign state immune to law-

¹⁵³ David Toren, *The Nazis Stole My Art*, FORTUNE (May 7, 2014), <http://fortune.com/author/david-toren/>.

¹⁵⁴ Toren v. Federal Republic of Germany, et al., No. 14-CV-00359-ABJ, D.D.C., (Mar. 5, 2014) (Summary of the Action, Section 5).

¹⁵⁵ Toren, *supra* note 153.

¹⁵⁶ Gamerman, *supra* note 128.

¹⁵⁷ *Id.*

¹⁵⁸ Toren v. Federal Republic of Germany, et al., No. 14-CV-00359-ABJ, D.D.C., (Mar. 5, 2014).

¹⁵⁹ Susanne Lenz-Gleissner, *David Toren: ‘Why wait so long?’*, DEUTSCHE WELLE (Oct. 11, 2014), <http://www.dw.com/en/david-toren-why-wait-so-long/a-18051950>.

¹⁶⁰ *Id.*

¹⁶¹ Gamerman, *supra* note 128.

¹⁶² Nicholas O’Donnell, *New York Man Sues Germany for Liebermann Found With Gurlitt, but Allegations Face Real FSIA and Pleading Challenges*, ART LAW REP. (Mar. 6, 2014), <http://www.artlawreport.com/2014/03/06/david-toren-sues-germany-for-liebermann-found-with-gurlitt-but-allegations-face-real-fsia-and-pleading-challenges/>.

suit in this country with some exceptions.”¹⁶³ Jurisdiction relied on one of these exceptions, which states:

[a] foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.¹⁶⁴

This jurisdictional maneuvering successfully defeated Germany’s motion to dismiss.¹⁶⁵ Eventually, Toren’s claim was successful and “Two Riders” was returned in early 2015.¹⁶⁶

David Toren’s lawsuit against Germany and Bavaria was a tactical move resulting in restitution. Additionally, because Germany fought back against their public statements claiming to be for restitution, the suit “may be the only way to demonstrate just how strange the behavior of the Germans has been in the Gurlitt case.”¹⁶⁷

IV. PROPOSAL FOR A BINDING TREATY IMPLEMENTING ADR MECHANISMS FOR RESTITUTION OF LOOTED ART

A. Overview

The Federal Republic of Germany’s handling of the Gurlitt Collection shows that the world is ill-prepared for the discovery of large scale troves of looted art. The Collection was discovered in 2012, not made public until 2013,¹⁶⁸ and restitution of the first two pieces was not completed until 2015.¹⁶⁹ As of the most recent report in 2016, provenance research has only conclusively identified the history of five pieces.¹⁷⁰ Germany and Bavaria have been widely criticized for their lack of transparency and the length of

¹⁶³ Lenz-Gleissner, *supra* note 159.

¹⁶⁴ 28 U.S.C. § 1605(a)(2) (2008).

¹⁶⁵ Germany’s motion to dismiss seemed counter to their stated mission of transparency and justice. Lenz-Gleissner, *supra* note 159.

¹⁶⁶ Lane, *supra* note 18.

¹⁶⁷ Ulrike Knöfel, *Gurlitt Fallout: New Yorker Fights to Regain Family Heirloom*, DER SPIEGEL (Mar. 11, 2014), <http://www.spiegel.de/international/germany/new-york-holocaust-survivors-sues-germany-over-gurlitt-painting-a-958029.html>.

¹⁶⁸ *Chronology*, *supra* note 14.

¹⁶⁹ Lane, *supra* note 18.

¹⁷⁰ Eddy, *supra* note 94.

time they have taken as they have run into almost every possible road-block to restitution.¹⁷¹ Despite all of the evidence of the advantages of utilizing ADR over litigation for cultural heritage restitution claims, alternative means of restituting the Gurlitt Collection have fallen short.¹⁷² Utilizing ADR should not take the same amount of time and resources, nor yield the same results as litigation.¹⁷³ This sloppiness displayed since 2012 can in part be attributed to the German government's lack of implementation of ADR mechanisms, as well as the lack of clarity in the Washington Principles when they state that "Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues."¹⁷⁴ It is therefore proposed that the Gurlitt Collection should spark a new international conference that is modeled after the Washington Conference, but with the goal of creating an international treaty as opposed to another set of non-binding guidelines. The treaty should first call for nations to loosen and standardize their federal statutes of limitations for recovering looted art.¹⁷⁵ Next, it should define the ADR mechanisms that should be used in cultural heritage restitution cases, preferably including a non-binding expert determination to be used in front of an international arbitration tribunal for binding arbitration. It is proposed that if a claim is brought before the arbitration panel, the piece in question will first be subject to non-binding expert determination. Finally, the treaty should discuss restitution of all art looted during war, and not be limited to restitution of Nazi-looted art.¹⁷⁶ This would ensure that ADR mechanisms are in place

¹⁷¹ Neuendorf, *supra* note 94.

¹⁷² *Id.*

¹⁷³ Theurich, *supra* note 124.

¹⁷⁴ *Washington Conference Principles on Nazi-Confiscated Art*, *supra* note 10.

¹⁷⁵ While Germany's "Lex Gurlitt" has become stagnant, the United States Senate Judiciary Committee heard the Holocaust Expropriated Art Recovery (HEAR) Act on June 7, 2016. The Act "proposes a federal statute of limitations on restitution claims as opposed to statutes of limitations that vary by state in order to 'lift unfair restrictions from heirs' claims.'" On a larger scale, standardizing statutes of limitations across international borders would allow equal access among survivors and their heirs regardless of where the art was discovered. Nina Mesfin, *HEAR and the Guelph Treasure Recovery Efforts: Restitution in Review*, CENTER FOR ART LAW (Aug. 9, 2016), <https://itsartlaw.com/2016/08/09/hear-and-the-guelph-treasure-recovery-efforts-restitution-in-review/>; see also Beret, *supra* note 29.

¹⁷⁶ As discussed *supra* note 40, it can safely be predicted that ISIS looting and destruction will be a problem in the future. We must get mechanisms in place that are applicable to all wartime looted art in order to avoid re-inventing the wheel every time an atrocity takes place. This way, we can focus our resources on fixing international relations. See, e.g., Deane, *supra* note 40; CBS Interactive Inc., *supra* note 40; Ben Taub, *The Real Value of the ISIS Antiquities Trade*,

should a mass looting occur in the future, or when the dust settles in Syria.

B. *Expert Determination*

To ensure speed and accuracy and decrease the cost of filing a claim, non-binding expert determination should be the first step in international restitution of looted art. For restitution to occur under the laws of many countries, “sufficient documentation must be provided proving the claimant’s right of inheritance and power of attorney.”¹⁷⁷ However, provenance research is often difficult, especially since looted art will typically not have the same degree of careful record-keeping attached to it that art purchased leisurely would, and the report may come out as inconclusive.¹⁷⁸ The Expert team will thus be tasked with producing a provenance report which will provide a strong evidentiary function during arbitration. Both parties will submit written and oral “submissions outlining their case” to the Expert,¹⁷⁹ who would then utilize their own expertise and resources to determine as accurate a provenance as possible. While expert determinations are typically binding decisions,¹⁸⁰ the parties will enter the determination with the express goal of determining provenance. If the Expert’s report comes out showing that the work definitively did or did not belong to the claimant, parties may wish to settle. In the case that the parties do not settle, or the report is inconclusive, the report will be used as evidence in front of the arbitration panel.

We should use the Taskforce’s successes and failures as an example to establish this internationally funded Expert team dedicated to provenance research for looted art. The Expert would thus fill the role of the Taskforce or the German Lost Art Foundation. Like these organizations, the Expert would be entrusted with determining provenance, not with disposing of the artworks as it

NEW YORKER (Dec. 4, 2015), <http://www.newyorker.com/news/news-desk/the-real-value-of-the-isis-antiquities-trade>.

¹⁷⁷ *FAQ*, *supra* note 81.

¹⁷⁸ See Howard N. Spiegler, *Recovering Nazi-Looted Art: Report From the Front Lines*, 16 *CONN. J. INT’L L.* 297, 302 (2001) (explaining that original owners are rarely available to make claims, and that evidence may come from family records, old photographs, or government archives); *Provenance Guide*, *supra* note 82.

¹⁷⁹ *What is Expert Determination?*, *LEGAL VISION*, <https://legalvision.com.au/what-is-expert-determination/> (last visited Aug. 27, 2016).

¹⁸⁰ *What is Expert Determination*, *supra* note 133.

sees fit.¹⁸¹ All members of the Expert team would have to be qualified in the field and therefore create a team of researchers, experts, and art historians, similar to the Taskforce.¹⁸² The Expert team would be created by the Treaty and therefore should be funded by the governments of the signing countries. This internationally funded team would severely decrease the cost of provenance, while increasing the consistency and accuracy of results worldwide. Additionally, it would provide all claimants with the ability to access high quality provenance research regardless of their prior knowledge, record keeping, or cost. Having a team of qualified researchers acting consistently within international guidelines would greatly impact the ability for victims of Nazi looting to reclaim their cultural property. Finally, having this mechanism in place would be beneficial, as a majority of art stolen during World War II has still not been restituted, and current wars will provide claims for looted art and antiquities in the future.

C. Arbitration Tribunal

As discussed *supra*, arbitration is preferable to litigation for cases involving looted art and cultural property. This is due to many factors, including the emotional nature of these cross-border disputes in having to revisit historical atrocities, as well as the low likelihood of discovering such property within the statute of limitations, the time-sensitive nature of the claims due to the age of Holocaust victims, and the complex nature of the art world.¹⁸³ Additionally, since these cases are high-stakes and time-sensitive, arbitration as a less formal procedure than litigation that is also more formal than mediation, is the best forum for disputes surrounding Nazi looted art. “Despite the fact that arbitration has been repeatedly proposed by scholars and is continually recognized as the desirable method for resolving Nazi-looted art claims, no corresponding procedure has been devised.”¹⁸⁴ While it is challenging at best to get a group of nations to agree to and implement a treaty, the existing provisions executed by individual nations are

¹⁸¹ *FAQ*, *supra* note 81.

¹⁸² *Id.*

¹⁸³ Pell, *supra* note 135. *See also* Keim, *supra* note 131, at 297 (explaining that an understanding of the complexities of the art world includes “a collective awareness of the difficulties faced by claimants, museums and private collectors, as well as critical knowledge of the laws regarding Nazi-stolen artwork.”).

¹⁸⁴ Mullery, *supra* note 9, at 667.

proving insufficient.¹⁸⁵ It is time to follow the scholarly works advocating for an arbitration tribunal.¹⁸⁶ During an arbitration, “one or several independent arbitrator(s) render a final and binding decision on the dispute which can be internationally enforced under the 1958 New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards.”¹⁸⁷ Thus, arbitration, which can be mandated by treaty,¹⁸⁸ would be binding regardless of where the claim originated.

It is therefore proposed that in addition to the creation of an Expert team, a treaty be created establishing an arbitration tribunal consisting of three members with subject matter jurisdiction over art and antiquities that were looted during war. If the proposal is followed, “inconsistent outcomes would end, and litigation, which wastes not only time and financial resources, but also burdens the courts, would not be needed.”¹⁸⁹ Like the Expert team, the panel of five arbitrators should be filled with experts in the field of art law. “Creating a board of arbitrators where the arbitrators are selected due to their expertise is essential for the forum’s factual determinations to receive the respect of the parties. A board made up of experts also nearly guarantees acceptance by the parties involved in the arbitration.”¹⁹⁰ Having a tribunal of three arbitrators will help to alleviate some of the fears expressed by arbitration critics. A team of three will maximize the chances of ensuring that the panel will be experienced enough, understand the details of a particular claim, avoid bias, and come to a sound resolution.¹⁹¹

V. CONCLUSION

Art looted during wartime carries the weight of a culture torn apart and families lost. When these last prisoners of war are discovered years later after the dust has settled and nations have been

¹⁸⁵ See, e.g., Fisher & Weinberger, *supra* note 56.

¹⁸⁶ See Mullery, *supra* note 9; Goldstein, *supra* note 48.

¹⁸⁷ Theurich, *supra* note 132.

¹⁸⁸ *Id.*

¹⁸⁹ Keim, *supra* note 131, at 310.

¹⁹⁰ *Id.* at 310.

¹⁹¹ Mayer Brown International, LLP, *The Pros and Cons of Arbitration*, LEXIS NEXIS, https://www.mayerbrown.com/files/News/04165fd5-5165-41ea-bb6f-19d9235c171d/Presentation/NewsAttachment/7e531e5e-4040-4251-b1a8-1d4b6168c99b/Practice%20Note_Duncan_Pro-Con-Arbitration_oct12.pdf (last visited Feb. 28, 2016).

rebuilt, they can provide hope and continued healing. However, when individuals, institutions, or governments stand in the way of restitution of cultural property that was looted during war, it becomes difficult to “achieve a just and fair solution.” It is thus proposed that there should be a new international conference, during which countries will reflect on restitution efforts and the ADR mechanisms that have been put in place since the implementation of the Washington Principles. It is further proposed that this conference result in an international treaty in which ADR mechanisms are clearly defined. Finally, it is proposed that the treaty create a two-step process to restitution of art looted during wartime, starting first with an expert determination and ending in front of an international arbitration tribunal.

