FULFILLING THE WASHINGTON PRINCIPLES:  
A PROPOSAL FOR ARBITRATION PANELS TO RESOLVE HOLOCAUST-ERA ART CLAIMS  

Jessica Mullery*  

I. INTRODUCTION  

The restitution of Nazi-looted art is a matter that is widely debated and contentiously litigated around the world. Over the past decade, there has been renewed interest in the restitution of Nazi-looted art; numerous international conferences have been held to foster the restitution of art stolen during the Holocaust-era.1  

The United States has been a forerunner in promoting restitution efforts within this realm of conferences. Its support of restitution peaked in 1998 when the federal government, in conjunction with the U.S. Holocaust Memorial Museum, hosted the Washington Conference on Holocaust-Era Assets.2 The result of this international meeting was the promulgation of the Washington Principles, which forty-four countries agreed to follow as guidelines in efforts to return Nazi-looted art.3  

Despite the zeal and momentum created by U.S. endeavors in the last decade, renewed efforts toward restitution of Nazi-looted  

* Notes Editor, Cardozo Journal of Conflict Resolution. B.A., magna cum laude, Rutgers University, 2007; J.D. Candidate, Benjamin N. Cardozo School of Law, Yeshiva University, 2010. The author would like to thank Pedram Shahram for his unwavering support and invaluable encouragement. The author would also like to thank the Editors and Staffers of the Cardozo Journal of Conflict Resolution for their contributions.  


643
art has since faded. Countries including the United States, have failed to establish urgently needed alternative dispute resolution ("ADR") mechanisms, recommended by the Washington Principles, to resolve looted art claims.\textsuperscript{4} The failure to implement ADR mechanisms in order to facilitate restitution of Nazi-looted art is particularly regrettable in light of the fact that claims are still being initiated despite the high costs of litigation, as well as the fact that the number of Holocaust survivors available to make these claims lessens every year.\textsuperscript{5} As the time goes on, the likelihood of restitution decreases.

This Note highlights increased efforts to foster the restitution of Nazi-looted art, particularly on the U.S. front, during the 1990s, with emphasis on the Washington Conference in 1998. It is then contended that the Washington Principles have ultimately failed to result in the adoption of ADR mechanisms to deal with continuing Holocaust-era art claims in both the United States and abroad. The lack of both United States and international efforts subsequent to the Washington Conference, especially in failing to establish ADR mechanisms, is stressed in order to demonstrate the inadequacy of the Washington Principles. Ongoing cases and emerging litigation within the United States are identified in order to demonstrate the various costs associated with litigating Nazi-looted art claims. The arduous process and expenses associated with litigation of these claims are then contrasted with the processes and consequences of different ADR mechanisms, and arbitration is proposed as the preferable mechanism to resolve these claims. Lastly, a U.S.-based arbitration panel with limited jurisdiction is proposed as an initial step to foster the alternative dispute resolution of Nazi-looted art claims.


\textsuperscript{5} Bradsher, \textit{supra} note 2.
II. HISTORY AND BACKGROUND INFORMATION

A. Nazi Looting During World War II

Looting art was a fanatical objective of the Nazi Regime due to Hitler’s obsession with artwork and painting.6 “Plunder of art” and destruction of artwork was considered another method of destroying and defeating the Jews and their cultural heritage.7 Author Hector Feliciano notes:

From 1939 to 1945, Hitler, the Nazis and their allies collected hundreds of thousands of works of art . . . . These were confiscated, forcibly purchased or willingly sold from museums, private collections and libraries throughout occupied Europe. From an historical perspective, the looting of art by the Nazis was unique. It differed from preceding instances because, not only was it carried out in a methodical and systematic manner, but it was also directed toward specific individuals within the overall population . . . . Hitler’s policies for dealing with Germany’s enemies included the organized confiscation of the private art collections and libraries of Jews . . . . and political opponents in the occupied countries.8

It has been asserted that Nazis began to confiscate German Jews’ property prior to World War II, as early as 1933.9 The Nazi regime thus constructed an organized, methodological plan for the confiscation of Jewish and occupied-territory art. The official Nazi confiscation service, known as the Einsatzstab Reichsleiters Rosenberg, was formed with the goal of creating the “largest private art collection in Europe.”10 The Nazis also engaged in intelligence work by way of secret police, and Nazi art historians functioned to track down art galleries and dealers.11

Hitler valued masterpieces from Northern Europe and realist artwork, whereas he abhorred modern art, which was labeled “de-

7 Id.
8 Id. at 165–66.
10 Feliciano, supra note 6, at 166.
11 Id. at 166–67.
generate" art. Thus, while many masterpieces favored by Hitler were collected and stored, art that was considered valueless by Hitler’s standards was destroyed or dispersed by auctions and sales, subsequently obscuring later efforts to restitute these works.\footnote{Feliciano, supra note 6, at 168.}

Nazi confiscation efforts were substantial. For example, Germany’s central bank used approximately 40 million francs to buy art and antiques in France alone.\footnote{Id. at 169.} Looting was carried out by numerous means, including raids of museums and homes.\footnote{Looting refers to the “organized confiscation” of Jewish and occupied-territory art by the Nazis. See id. at 164–65 (presenting a detailed account of Hitler’s plan to confiscate art, with a focus on the procedural confiscation of art in France).} Artwork also underwent “Aryanization,”\footnote{“Aryanization” was “the transfer of Jewish property to non-Jewish owners” and included Jewish businesses, houses, and other property, such as art. Lootedart.com: The Central Registry of Information on Looted Cultural Property 1933–1945 Liquidation of Jewish enterprises (1941–1942): Glossary, http://www.upn.gov.sk/likvidacie/english/glossary.php#aryanization (last visited Feb. 19, 2009). The goal of the Nazi regime was “the complete ‘Aryanization’ of art, a process that involved the labeling of Jewish and non-conformist artists as ‘degenerate.’” Correspondence between Wilhelm Furtwängler and Joseph Goebbels about Art and the State (April 1933), http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=1574.} and forced sales of pieces at reduced prices occurred at Jewish auctions.\footnote{Charles Hawley, ‘Nazi Looted Art’: New Handbook Helps Descendents Reclaim Nazi Loot, SPIEGEL ONLINE INTL’, Jan. 31, 2007, http://www.spiegel.de/international/0,1518,463423,00.html. The range of art that was confiscated by the Nazis was not limited to Jewish artwork or to Jewish-owned artwork. Others located in the occupied territories during World War II, such as British and American citizens, also saw their art collections being taken away by Nazis. Simmons, supra note 12, at 88.}

The effects of Nazi plundering were widespread and resulted in the dispersal of looted art across the world, causing the upheaval of art collections and museums throughout Europe.\footnote{See Kennedy, supra note 3.} Although no one knows how much property was looted, misplaced, or destroyed during the Nazi regime,\footnote{Marilyn Henry, The Restitution of Jewish Property in Central and Eastern Europe, International Perspectives 40 (Am. Jewish Comm. 1997); Lowenthal, supra note 9, at 151.} it has been estimated that approximately

\footnote{12 Id. at 165–68. “Degenerate art” consisted of works which the Nazis felt “insult[ed the] German feeling” or were of no artistic value. A commission was authorized to confiscate degenerate art from all major state-owned German museums in 1937, which resulted in the removal of some 16,000 paintings, drawings, prints, and sculptures. Lucian J. Simmons, Provenance and Auction Houses, in 7 The Permanent Court of Arbitration/Peace Palace Papers: Resolution of Cultural Property Disputes 85, 87 (Kluwer Law Int'l 2004).}

\footnote{13 Feliciano, supra note 6, at 168.}

\footnote{14 Id. at 169.}

\footnote{15 Looting refers to the “organized confiscation” of Jewish and occupied-territory art by the Nazis. See id. at 164–65 (presenting a detailed account of Hitler’s plan to confiscate art, with a focus on the procedural confiscation of art in France).}

\footnote{16 “Aryanization” was “the transfer of Jewish property to non-Jewish owners” and included Jewish businesses, houses, and other property, such as art. Lootedart.com: The Central Registry of Information on Looted Cultural Property 1933–1945 Liquidation of Jewish enterprises (1941–1942): Glossary, http://www.upn.gov.sk/likvidacie/english/glossary.php#aryanization (last visited Feb. 19, 2009). The goal of the Nazi regime was “the complete ‘Aryanization’ of art, a process that involved the labeling of Jewish and non-conformist artists as ‘degenerate.’” Correspondence between Wilhelm Furtwängler and Joseph Goebbels about Art and the State (April 1933), http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=1574.}

\footnote{17 Charles Hawley, ‘Nazi Looted Art’: New Handbook Helps Descendents Reclaim Nazi Loot, SPIEGEL ONLINE INTL’, Jan. 31, 2007, http://www.spiegel.de/international/0,1518,463423,00.html. The range of art that was confiscated by the Nazis was not limited to Jewish artwork or to Jewish-owned artwork. Others located in the occupied territories during World War II, such as British and American citizens, also saw their art collections being taken away by Nazis. Simmons, supra note 12, at 88.}

\footnote{18 See Kennedy, supra note 3.}

\footnote{19 Marilyn Henry, The Restitution of Jewish Property in Central and Eastern Europe, International Perspectives 40 (Am. Jewish Comm. 1997); Lowenthal, supra note 9, at 151.}
650,000 works of art were looted in the “biggest art heist ever.” The estimated value of this looted art is $2.5 billion in 1945 prices, the equivalent of $20.5 billion today, which “exceeded the total value of all artwork in the United States in 1945.” Today, the United States alone is estimated to have $5 billion worth of art and cultural property in its control.

B. Restitution of Nazi-Looted Art

Restitution of an artwork begins with provenance research into the work’s history. The process involves historical documentation of the object, followed by a cross-checking of the piece with lists of artwork that have gaps in provenance and are part of collections that are deemed suspicious due to a history of looting. It is after this research process that recovery efforts may follow. Provenance research can be an enduring and complex practice, further complicated by the length of time that has elapsed since the end of World War II. Even if a claimant is able to describe the disputed piece of art, it must then be located. Restitution is thus sometimes impossible. Even in the event that the claimant has knowledge as to the current possessor and location of the disputed

---


24 See generally Yeide, supra note 23, at 102–06 (presenting a detailed outline of provenance research and examples of the process).

25 HENRY, THE RESTITUTION OF JEWISH PROPERTY, supra note 19. Recovery efforts include the identification and location of art, as well as the pursuit of claims, which likely means litigating claims, as well as negotiating settlements. See Commission for Looted Art in Europe: About Us, http://www.lootedartcommission.com/Services (last visited Jan. 20, 2010).

26 Lowenthal, supra note 9, at 141.

27 HENRY, supra note 19, at 2.
painting, provenance research must still be carried out to determine whether there is a viable claim.

Approaches and efforts toward restitution of Holocaust-era assets have differed depending on the type of property. Holocaust-era assets include not only artwork: they also consist of various types of property, which include public property—such as cemeteries—and private assets.\textsuperscript{28} Aside from artwork,\textsuperscript{29} looted private assets have included gold, insurance and bank accounts.\textsuperscript{30} The focus here is on the restitution of art looted during the Holocaust, an area of considerable renewed interest since the 1990s and the focal point of the Washington Conference on Holocaust-Era Assets. The objective of the Washington Conference was unique, as “looted art has been carved out of every Holocaust asset settlement . . . art claims have not been funneled into a large process or commission,” whereas “Holocaust-era litigation resulted in the establishment of settlement funds, claims processes, and tribunals set up to resolve claims” centered on bank and insurance accounts.\textsuperscript{31}

C. Revival of Interest in Nazi-Looted Art and Restitution

A renewed interest in the restitution of Nazi-looted art commenced in the 1990s. Both the World Jewish Congress (“WJC”) and the World Jewish Restitution Organization (“WJRO”) actively pursued restitution in Eastern Europe during the 1990s.\textsuperscript{32} A revival of interest in Holocaust-era assets also occurred in the United States during that time.\textsuperscript{33} The U.S. government’s increased restitution efforts and the general public’s heightened interest are attributed to many factors.\textsuperscript{34} Many view the Cold War’s conclusion as a major event contributing to the ability to even consider and begin

\textsuperscript{28} Id. at 7.

\textsuperscript{29} Looted art may also consist of public property, such as it belonged to a public or state gallery at the time it was looted, as opposed to a private individual or institution. Thus, looted art may be categorized as either public or private assets.


\textsuperscript{33} Id.

\textsuperscript{34} Id.
restitution activities anew. The collapse of the Soviet Union also coincided with the 50th anniversary of World War II, an occasion that sparked both a need for and an interest in resolving unsettled War issues.

Perhaps the most influential factor in reinvigorating restitution efforts was the interest taken by the Clinton Administration in the need to deal with unresolved Holocaust-era issues. Indeed, “[t]he WJC and WJRO knew that only American intervention in the former communist countries could lead to achievements” in restitution. The WJC and its president are credited with drawing President Clinton’s attention to Holocaust asset restitution issues. Clinton and his administration expressed zealous support for restitution efforts and became the driving force behind the nation’s restitution endeavors during the 1990s.

Lastly, lengthy and highly publicized litigation of Nazi-looted art claims have generated substantial interest among governments, the public, and the art world. As Wojciech W. Kowalski notes, “Since the beginning of the 1980s, there have been several famous court cases in the United States concerning the return of items of cultural property which were exported from Germany during the War.”

35 Numerous individuals have recognized the conclusion of the Cold War as central to renewed efforts toward Restitution. The current U.S. Special Envoy for Holocaust Issues, J. Christian Kennedy, noted in 2007 that “it was not until the collapse of communism that a serious effort commenced to identify artworks that still had not been returned to their rightful owners.” Kennedy, supra note 3. Marilyn Henry, a frequent writer on Nazi-looted art, similarly notes the fall of communism as providing a boost for restitution of Jewish property. Henry, The Restitution of Jewish Property, supra note 19, at 37. Stuart Eizenstat, whom Henry has recognized as, “the lead American official on property restitution,” has also cited the termination of the Cold War as a significant contributing factor to the renewed interest in restitution. Id. at 3; Interview by Manfred Gerstenfeld with Stuart Eizenstat, supra note 32.

36 Interview by Manfred Gerstenfeld with Stuart Eizenstat, supra note 32; see also Henry, The Restitution of Jewish Property, supra note 19.

37 Interview by Manfred Gerstenfeld with Stuart Eizenstat, supra note 32.

38 Id.

39 Id.

40 Id. See also Bradsher, supra note 2.

41 Kennedy, supra note 3.

42 WOJCIECH W. KOWALSKI, ART TREASURES AND WAR: A STUDY ON THE RESTITUTION OF LOOTED CULTURAL PROPERTY, PURSUANT TO PUBLIC INTERNATIONAL LAW, at vii (Tim Schadla-Hall ed., The Institute of Art and Law 1998); see Argument infra Part III.A.2 (discussing specific restitution cases arising in the United States).
D. The United States Government’s Role in Restitution
From 1996 to the Present

The United States has supported restitution of Holocaust-era art by both hosting and participating in international forums and has consistently expressed the view that Nazi-looted art should be returned to its rightful owners.43 The U.S. government’s support of this position is evident from the establishment of offices, commissions and conferences to advance restitution of Nazi-looted art. The Clinton Administration, starting in 1996, was a major part of the momentum generating renewed interest in restitution of Nazi-looted assets.44 From that time on, efforts among the administration and legislature were on the rise. Since 1996, fourteen hearings have been convened on Holocaust-era assets between the U.S. Senate and the House of Representatives.45

Jerusalem Post columnist Marilyn Henry proclaimed: “1998 was the Year of Nazi-Looted Art.”46 Congress enacted the Nazi War Crimes Records Disclosure Act of 1998, which called for the declassification of records relevant to any Holocaust-era crimes and looted assets.47 The U.S. Presidential Advisory Commission on Holocaust-Era Assets was also created in 1998.48 The Commission, which drafts reports and recommendations for the President on Holocaust-era assets, was created to “describe . . . the record of the United States government in dealing with victims’ assets during the Holocaust and in subsequent years.”49 The following year, the Office of the Special Envoy for Holocaust issues was created, which focuses on addressing looted asset claims stemming from the Holocaust.50

43 This view has been frequently reiterated by the Special Envoy for Holocaust Issues during addresses and press conferences on the issue of restitution of Holocaust-era assets. See Kennedy, supra note 3; Ambassador Edward B. O’Donnell, Special Envoy for Holocaust Issues, Remarks at the Annual Meeting of the Claims Conference Bd. of Directors (July 11, 2006), available at http://www.claimscon.org/index.asp?url=news/board_07-11-06.
44 Bradsher, supra note 2.
45 Id.
46 Henry, supra note 4; see also Benjamin E. Pollock, Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-Looted Art Claims, 43 HOUS. L. REV. 193, 205 (2006) (noting that the “most promising attempts” with regard to U.S. restitution efforts occurred in 1998).
47 Bradsher, supra note 2.
48 Id.
50 Bradsher, supra note 2.
E. The Washington Conference and the Washington Principles

Perhaps the United States’s strongest showing of commitment to Holocaust-era art restitution was the Washington Conference on Holocaust-Era Assets (the Washington Conference), held in 1998.\footnote{See generally Washington Conference on Holocaust-Era Assets, Nov. 30–Dec. 3, 1998: Proceedings (J.D. Bindenagel ed., 1999), available at http://www.state.gov/www/regions/eur/holocaust/heac.html (follow “Letter from the Editor” hyperlink) (presenting a record of all statements and information provided during the Washington Conference).} The Washington Conference was the “first large international governmental meeting to address the unfinished business of art that was forcibly transferred as a result of Nazi policies”\footnote{Lowenthal, supra note 9, at 149.} and resulted in the promulgation of the Washington Principles to serve as a guideline for restitution of Nazi-looted art.\footnote{See generally Washington Conference on Holocaust-Era Assets, Nov. 30–Dec. 3, 1998: Proceedings, supra note 51, at 971–72 (follow “Appendices” hyperlink) (listing the eleven Washington Principles on Nazi-Confiscated Art).} The eleven non-binding principles pressed for the identification of art not yet restituted, the establishment of a central registry for identified art, and the creation of “just and fair solution[s],” by nations, especially in terms of “alternate dispute solution[s],” by nations, especially in terms of “alternate dispute resolution mechanisms.”\footnote{Id.} Forty-four countries\footnote{The forty-four countries included: Albania, Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Israel, Italy, Latvia, Lithuania, Luxembourg, Macedonia, Netherlands, Norway, Poland, Portugal, Romani, Romania, Russia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, United States, and Uruguay. See id. at Appendix A.} attended the conference, held in Washington, D.C., to discuss issues surrounding the restitution of Nazi-looted art and subsequently agreed to abide by the Principles, which encouraged the restitution of stolen art.\footnote{Henry, supra note 4.}

III. The Washington Principles Failed to Result in the Establishment of Preferable ADR Methods to Resolve Nazi-Looted Art Claims

Despite the United States’s past zealous displays of support for the restitution of Nazi-looted art and the resolution of looted art claims, the government’s efforts since the Washington Conference have remained limited to mere encouragement and displays
of support, with progress only occurring in the realm of research and registry. Adherence and endeavors to fulfill the Washington Principles have been limited to those principles calling for the identification and the archiving of Nazi-looted art, as well as for the facilitation of access to this archived information for claimants. Specifically, progress has been limited to procedures that only comprise the beginning of the restitution process, namely research and identification. Advances in research have been impressive as numerous commissions have been developed to identify Nazi-looted art and have been successful in their research and archival efforts.

On a global level, the Commission for Looted Art in Europe ("CLAE") is an example of an institution created with the goal of commitment to the research and the location of missing artwork for claimants and institutions internationally. The CLAE established the Central Registry of Information on Looted Cultural Property (1933–1945), which the CLAE notes fulfilled Washington Principle VI. A similar institution, albeit private, is the International Foundation for Art Research ("IFAR"), which established

---

57 Principle I of the Washington Principles calls for the identification of Nazi-looted art that has not yet been restituted; Principle II calls for open access to archives and records; Principle III calls for availability of resources and personnel to be made to facilitate the identification of Nazi-looted art; Principle IV calls for efforts to be made to publicize identified Nazi-looted art that has not been restituted; Principle V calls for the establishment of a central registry for records, archives, and identified Nazi-looted art. Washington Conference on Holocaust-Era Assets, Nov. 30–Dec. 3, 1998: Proceedings, supra note 51, at 971–72.

58 Although provenance, research, and registry initiatives have been frequently criticized, museums notably took action to fulfill the Washington Principles after the Conference. See Claims Conf. and World Jewish Restitution Org., Nazi-Era Stolen Art and U.S. Museums: A Survey 1–2 (2006), available at http://www.claimscon.org/forms/U.S._Museum_Survey_Report.pdf. However, these efforts have been the product of private American museums and umbrella organizations, such as the American Association of Museums ("AAM") and the Association of Art Museum Directors ("AAMD"). Id. at 7.

59 For example, AAM has created the Nazi-Era Provenance Internet Portal, "a searchable registry of objects in U.S. museum collections that changed hands in Continental Europe during the Nazi era (1933–1945)." Id. AAM's portal includes 25,424 artworks held by 155 U.S. museums. Kennedy, supra note 3.


the Art Loss Register, another database that also identifies and archives information on stolen art. Within the United States, the government has launched similar initiatives to facilitate research and open access to registries that document Nazi-looted art. The National Archives and Records Administration ("NARA") is the United States’s main resource for the documentation of art looted during World War II. NARA maintains information and findings to assist in the research of Nazi-looted art and created an assets website in 1998. The United States also worked closely with the United States Holocaust Memorial Museum and other institutions to reach international agreements with various countries, but most of the agreements that have been reached focus on restitution of Holocaust-era assets other than looted artwork.

The U.S. government’s promotion of research, identification, and registration of Nazi-looted art since the promulgation of the Washington Principles is laudable. There has been little done, however, to facilitate “just and fair solution[s]” or to “develop national processes” to deal with ownership disputes over Nazi-looted art, which were also goals set forth in the Washington Principles.

---


63 In 1998, Sotheby’s decided to financially sponsor the Art Loss Register’s Holocaust Initiative, which allowed for all Holocaust claims to be registered with the Art Loss Register at no cost. Simmons, supra note 12, at 93.

64 Yeide, supra note 23, at 107.


67 Principle VIII states: “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
Thus, while more claims may be brought due to the increased provenance research and the identification of looted art from the Holocaust era, mechanisms have not been established to deal with these claims. Specifically, countries have not created alternatives to litigation for claimants to resolve looted art claims that crop up as a result of increased provenance research and documentation of Nazi-looted art. The Washington Principles clearly advocate avoidance of litigation to resolve these claims and recommend that nations develop ADR mechanisms to settle restitution claims. Despite this clear espousal of ADR as a way to resolve claims and for nations to abide by the Principles, the nations that attended the Washington Conference have done markedly little to implement any ADR mechanisms. Particularly notable is the United States’s failure to employ any ADR mechanism for restitution claims, despite the fact that the United States initiated the Washington Conference and was so vigorous in its efforts to promote restitution during the Clinton Administration.

It is important to analyze the United States’s efforts since the promulgation of the Washington Principles in 1998. The Special Envoy for Holocaust Issues has repeatedly addressed the role of the United States in restitution of Holocaust-era assets, and, more specifically, its role in restitution of Nazi-looted art. A main theme that runs throughout addresses and speeches on the United States’s role is the nation’s continued strong support of restitution efforts. The current Special Envoy for Holocaust Issues, J. Christian Kennedy, nonetheless maintains that “the government does not have any leverage to force compliance,” and also that there is “no specific role for the federal government in the art restitution

---

68 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, 23 (1998) (stating the likelihood of increased Nazi-looted art claims as a result of increased research and access to information).


70 See infra Part III.A.1.

71 Henry, supra note 4.

72 See Kennedy, supra note 3; see also Hearing, supra note 66.

73 See e.g., O’Donnell, supra note 43.
fulfilling the Washington Principles

process,” due to the fact that many museums in the United States are privately owned, unlike European museums.\textsuperscript{74} Thus, the United States has rejected opportunities to intervene and use its influence\textsuperscript{75} and has instead limited its efforts to announcements of support for restitution efforts at international conferences, such as the Vilnius International Forum on Holocaust-Era Looted Cultural Assets in 2000, during which advancement of the Washington Principles was proposed.\textsuperscript{76}

A. Evidence of the Failure of the Washington Principles

1. Disregard of the Washington Principles by National Governments

The failure of the Washington Principles is marked by the lack of adherence to the Principles and the evasion of restitution by countries, most alarmingly by those nations that participated in the Washington Conference.\textsuperscript{77} Russia, which participated in the Washington Conference,\textsuperscript{78} “has traditionally manipulated museums and governments . . . to provide ironclad guarantees of immunity from seizure if museums want to borrow Russian museums’ artworks.”\textsuperscript{79} The United States, hypocritically enough, has also acknowledged the patent failure of Poland, Lithuania, Romania, Croatia, and Slovenia to create laws or implement restitution procedures.\textsuperscript{80} It is true that other countries have blatantly declined to follow the Washington Principles’ encouragement of the use of ADR mechanisms, most notably by choosing to litigate with individual claimants instead. The Hungarian government, which attended the Washington Conference, fought for over four years against an heir’s claims over paintings located in two Hungarian government museums.

\textsuperscript{74} Kennedy, supra note 3.
\textsuperscript{75} Henry, supra note 4.
\textsuperscript{77} See Henry, supra note 4.
\textsuperscript{79} Henry, supra note 4.
\textsuperscript{80} In 2007, the Special Envoy for Holocaust Issues cited these five countries as those which had not passed laws or created implementation measures that prohibit discrimination based on “claimants’ . . . citizenship or ethnicity.” Hearing, supra note 66. All of these nations attended the Washington Conference in December of 1998. See Washington Conference on Holocaust-Era Assets, Nov. 30–Dec. 3, 1998: Proceedings, supra note 51, at Appendix F.
museums. Even more alarming, the Hungarian government appealed upon losing to the heir in 2000. Spain is likewise guilty of ignoring the Principles, as the Spanish government has stalled in negotiations over a Camille Pissarro painting, despite the fact that “this dispute began after the Washington Conference and Spain had subscribed to the Washington Principles . . .”

2. Failure to Adhere to the Washington Principles by Private Institutions and Individuals

The Washington Principles have also been largely ignored by private individuals and by institutions within the United States. This is demonstrated by the small amount of pending and emerging litigation in the United States, despite the promulgation of the Washington Principles. Furthermore, “[it] is evident from the handful of [World War II looted-art] lawsuits,” filed in the United States, “[that] litigation is not the most productive avenue for reaching fair and appropriate solutions to these types of cases.”

Republic of Austria v. Altmann is an infamous example of lengthy and costly litigation being pursued despite the Washington Principles’ recommendation that parties to looted art disputes pursue alternative dispute mechanisms. Indeed, the Special Envoy for Holocaust Issues has cited Altmann to warn of the consequences that result from disregarding the Washington Principles. The Altmann case will be discussed in greater detail below.

Another highly publicized matter is the litigation surrounding ownership of Egon Schiele’s “Portrait of Wally.” Litigation over the painting has endured for years in U.S. courts, and is currently at a standstill. The Museum of Modern Art (“MoMA”) exhibited the painting in 1997, having obtained it on loan from the Leopold Collection.

81 Lowenthal, supra note 9, at 155–56.
82 Id.
83 Id. at 155.
84 Henry, supra note 4.
85 Dugot, supra note 31, at 390.
87 O’Donnell, supra note 43.
88 See infra Part III.B.
2010] FULFILLING THE WASHINGTON PRINCIPLES  657

Foundation, an Austrian institution.91 The Manhattan District At-
torney then seized and blocked the return of the painting to Aus-
tria by way of a grand jury subpoena after claimed heirs came
forward and asserted ownership of the painting.92 Almost a decade
later, the dispute remains unresolved, and the famed painting re-

91 Celestine Bohen, Judge Revives Case of Nazi-Looted Art, N.Y. TIMES, Apr. 27, 2002,
9649C8B63.
92 Id.
93 Wally Suit Suspended for New Evidence, supra note 90; see Henry, Talking Looted Art,
supra note 4.
94 This case also illustrates another implicit cost of employing litigation for looted art dis-
putes: when a piece is seized and stored away, no one, neither the museum, and thus the public,
nor the rightful owner, benefits, as a masterpiece is hidden away from all. See Free “Portrait of
html.
95 Bohen, supra note 91.
Nudes” is particularly contentious due to the Boston Museum of Fine Art filing suit in court,
against the heir, to establish its legal title over the painting. Geoff Edgers, Holocaust historians
com/ae/theater_arts/articles/2008/05/28/holocaust_histories_blast_mfa_stance_in_legal_dispute/
?page=3; see also Henry, supra note 4.
97 In the case of Westfield v. Federal Republic of Germany, No. 08-2202-I (Ch. Ct., Davidson
County, Tenn. filed Oct. 3, 2008), heirs in Tennessee brought suit against the German govern-
ment for damages resulting from Nazi-looted art. Catherine Hickley, Nazi Victim’s Family Sues
pute a claim that two Picassos in the museums' possession are works that were sold under duress during the Nazi regime.98

3. Failure to Develop and Implement ADR Mechanisms for Resolution of Claims

As mentioned, there has been little development of just and fair solutions or alternative dispute resolution mechanisms to deal with art restitution claims within the U.S., as well as among other countries.99 Conferences subsequent to the Washington Conference, such as the Vilnius Forum in 2000, have focused on implementation and furthering of the Washington Principles,100 but have failed to result in any further efforts towards the implementation of ADR mechanisms to resolve Nazi-looted art disputes.101 One can infer that the conferences convened subsequent to the creation of the Washington Principles have focused on how to enforce the Washington Principles because little progress was made in creating ADR mechanisms for claimants to resolve disputes. Indeed, it has been noted that “[a] wider implementation of the Washington Principles would be most helpful. At the negotiating level, an understanding of the Principles and the need to abide by them is too often lacking.”102

Given the failure of the Washington Principles to result in the implementation of fair solutions and ADR mechanisms for Nazi-looted art claims, further action by the U.S. government is needed to establish and channel claimants into such mechanisms. To understand what the process of litigating a Nazi-looted art claim entails, as well as to generate a better design for the settlement of these disputes, it is important to identify potential reasons as to why the Washington Principles failed.

Perhaps the most apparent cause for this failure was the lack of any kind of enforcement mechanism or penalty to ensure compliance.103 The Special Envoy for Holocaust Issues cites this as the

---

99 Henry, supra note 4.
100 Vilnius International Forum on Holocaust-Era Looted Cultural Assets, supra note 76.
101 “The Vilnius Forum generated a declaration expressing continued support of the Washington Principles without significantly redefining them or expanding them.” Jennifer Anglim Kreder, Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes, 73 BROOK. L. REV. 155, 173 (2007); see also Prott, supra note 1, at 132.
102 Lowenthal, supra note 9, at 156.
103 Kennedy, supra note 3.
“genius” of the Washington Principles and claims that “moral authority . . . is probably more effective than the threat of civil or criminal proceedings.”104 It is, however, precisely this lack of enforcement that may be the reason few countries have resorted to ADR mechanisms for dealing with Holocaust-era art claims.105

Also, the broad and “highly generalized” nature of the Washington Principles likely provided only nominal guidance for countries.106 There was neither a model nor any specific guidelines to assist countries in the creation of the “fair solutions” and “alternative dispute resolution mechanisms” to which the Washington Principles referred.107 This is a major deficiency in the Washington Principles because many nations, particularly European governments, need to be induced to act.108 The United States is similarly culpable because it too has declined to create any ADR mechanism for claimants to resolve Nazi-looted art disputes. The United States has largely relied upon institutions within the United States, such as the American Association of Museums, as well as international agencies, such as the CLAE, to guide claimants in their restitution efforts.109 Moreover, the United States continues to distinguish itself from European countries and claims that it has no “leverage to force compliance” because most U.S. museums are privately owned.110

B. Alternative Dispute Resolution Mechanisms are Needed as an Alternative to Litigation

Numerous authorities111 have recognized that alternative dispute resolution of Nazi-looted art claims is potentially the best method for settling these claims.112 ADR is the preferred method

104 Id.
105 See Henry, supra note 4.
106 Kennedy, supra note 3.
107 Prott, supra note 1, at 132.
108 Henry, supra note 19, at 8.
109 For example, the Special Envoy for Holocaust Issues notes AAM and other private museums’ provenance and restitution efforts in a 2007 address on the role of the U.S. government in art restitution. Kennedy, supra note 3.
110 Id.
111 Directors of various museums and related associations have suggested that alternative dispute resolution be used to resolve Nazi-looted art claims. Schwartz, supra note 68, at 23–24.
for resolving these claims since litigation has frequently failed both within the United States and in foreign courts.\textsuperscript{113} Litigation has been unsuccessful in many aspects,\textsuperscript{114} and its failure is attributed to many factors.\textsuperscript{115} One of the most oft-noted concrete reasons that litigation is an undesirable route for the resolution of these claims is that it proves to be expensive to both claimants and defendants.\textsuperscript{116} Even the research alone that is necessary to both bring and defend Holocaust-era looted art claims exhausts resources.\textsuperscript{117} The prohibitive cost may result in claimants being barred from asserting ownership, as they may be unable to initiate a suit, let alone maintain litigation. Indeed, legal expenses “can easily end up being a sizable [sic] percentage of the actual value of the work . . . [and] can easily exceed the value of the work.”\textsuperscript{118}

Parties may not adhere to the Washington Principles without an incentive to do so, especially when they have the means to litigate.\textsuperscript{119} Likewise, the parties may not be motivated to settle for disputes are especially appropriate for resolution by arbitration panels). Pell also notes that “[a]n international consensus developed regarding the need for a more uniform, efficient and just approach to these claims,” and cites the Washington Conference Principles as a source which has been a part of this consensus. \textit{Id.} at 308. Washington Principle XI specifically suggests that ADR is the preferred mechanism for resolution of Nazi-looted art disputes: “Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.” \textit{Washington Conference on Holocaust-Era Assets, Nov. 30–Dec. 3, 1998: Proceedings, supra} note 51, at 971–72.

\textsuperscript{113} “National courts have shown themselves unable to offer consistent and efficient adjudication of these claims.” \textit{Pell, supra} note 112, at 308.

\textsuperscript{114} Litigation can be costly in terms of legal expenses and time and potentially can stretch on for years. The public nature of litigation may also cost litigants by deterring resolution. \textit{Prott, supra} note 1, at 136.


\textsuperscript{116} Civil litigation may be “beyond the resource of claimants.” \textit{Prott, supra} note 1, at 132. Victims and heirs often must turn over 30 to 50 percent of a piece’s auction price to lawyers at the outset. \textit{Hickley, supra} note 20.

\textsuperscript{117} Museums frequently claim that they lack the funds necessary to conduct provenance research. \textit{Henry, supra} note 4.

\textsuperscript{118} Dugot, \textit{supra} note 31, at 390.

\textsuperscript{119} \textit{Henry, supra} note 19, at 34.
money damages. These claims are often full of emotion, since they are closely tied to Holocaust experiences and family losses, and as a result, restitution-in-kind or monetary compensation may not be an avenue the claimant is willing to consider.\textsuperscript{120} This applies with equal force to nations involved in these proceedings. Professor Lyndel V. Prott explains:

Disputes associated with historic conflicts such as World War II are often associated with deep emotions created by the conflict and related to human losses and inhumane behavior. This makes them particularly sensitive to states, needing careful handling, and, often, discreet discussions by very skilled negotiators. Inept handling can worsen relations and set back important goals of reconciliation.\textsuperscript{121}

Concern over soured foreign relations and barriers to restitution due to litigation are indeed valid, with cases such as \textit{Altmann} serving as foreboding examples.\textsuperscript{122} “Portrait of Wally”\textsuperscript{123} raises similar international relations concerns, specifically among museums seeking to loan artwork from foreign collectors and galleries.\textsuperscript{124} Contentious litigation may thus have the effect of worsening foreign relations among nations, as well as among foreign private entities such as museums. Where relations among countries are still strained, whether by World War II, or more likely by communism, and anti-Semitism is blatant, there is a decreased likelihood of claimants succeeding in Nazi-looted art claims.\textsuperscript{125} Swift resolution of these claims is particularly important in these settings, especially to prevent “long-lasting bitterness” between both nations and peoples.\textsuperscript{126} Thus, an alternative to litigation is necessary in situations like these where “litigation results in resolutions that are unpredictable, often cash-driven and anything but amicable.”\textsuperscript{127}

\textsuperscript{120} Id.
\textsuperscript{121} Prott, supra note 1, at 135.
\textsuperscript{122} Marilyn Henry notes that it is unlikely that Austria wants to deal with restitution again post-\textit{Altmann}. Henry, supra note 4. It is estimated that the Austrian Gallery in the \textit{Altmann} case stood to lose $300 million due to loss of the artworks, and also loss of revenue due to declined tourism. Pollock, supra note 46, at 227.
\textsuperscript{124} Bohen, supra note 91.
\textsuperscript{125} The United States has urged new European democracies, such as Poland, among others, to adopt laws that prevent discrimination based on the citizenship or ethnicity of claimants. Hearing, supra note 66, at 5.
\textsuperscript{126} Prott, supra note 1, at 135.
\textsuperscript{127} Dugot, supra note 31, at 390.
Time costs are also a major obstacle when litigation is pursued. Research can take years, let alone the potentially enduring litigation that may follow.\textsuperscript{128} For aging Holocaust survivors and heirs\textsuperscript{129} this means it may take decades for claims to be resolved by litigation, or worse yet, claims may not be resolved in their lifetime.\textsuperscript{130} \textit{Republic of Austria v. Altmann}\textsuperscript{131} illustrates the many costs generated by Nazi-looted art litigation.\textsuperscript{132}

Maria Altmann filed a claim against the Austrian government in 1998 for the return of various Gustav Klimt pieces of which she claimed ownership as the heir of the pre-War owner.\textsuperscript{133} Following the Austrian government’s rejection of her claim and refusal to settle the matter by private arbitration in June of 1999, Altmann then attempted to sue the Austrian government.\textsuperscript{134} Austria, however, requires the plaintiff to a suit to pay a filing fee which consists of a percentage of the amount claimed.\textsuperscript{135} For Altmann, this meant a payment of $1.8 million just to have her claim heard.\textsuperscript{136} Unable to pay the fee, Altmann instead brought suit against the Austrian government and against its National Gallery in U.S. federal court.\textsuperscript{137} After the Ninth Circuit Court of Appeals affirmed the District Court’s denial of Austria’s motion to dismiss Altmann’s suit for

\textsuperscript{128} See Lowenthal, supra note 9, at 139–43 (citing examples that demonstrate the lengthy process that research and location of art can entail).

\textsuperscript{129} See Kennedy, supra note 3; Hearing, supra note 66 (stating that “[a]s Holocaust survivors age, we have less and less time to . . . help them receive a measure of justice in their lifetime.”). In \textit{Altmann}, the heir claimed ownership of paintings she allegedly inherited from her grandfather. The claimant won against the Hungarian government in 2000, but the government appealed, and two years later, the appellate court remanded the case for clarification of certain issues. The onslaught of continuing litigation is particularly distressing as “[i]t may well take ten years for [the claimant] (who is now elderly) to resolve this claim.” Lowenthal, supra note 9, at 155–56.

\textsuperscript{130} America’s Role in Addressing Outstanding Holocaust Issues: Hearing Before the House of Representatives’ Committee on Foreign Affairs, Subcommittee on Europe, supra note 66, at 4; see also Ralph Blumenthal, \textit{New Efforts to Recover Nazi Plunder; But Pessimism Grows for Recoveries}, N.Y. Times, Feb. 27, 2003, at E1, available at http://query.nytimes.com/gst/fullpage.html?res=9C02EFD7143CF934A15751C0A9659C8B63&sec=&spon=&pagewanted=2 (acknowledging the lessening chances of recovery due to owners passing or disappearing as time lapses).

\textsuperscript{131} 541 U.S. 677 (2004).

\textsuperscript{132} The Special Envoy for Holocaust Issues has noted that when the approach encouraged by the Washington Principles is ignored, “lengthy and costly legal proceedings can ensue, as we all saw in the Altmann case.” O’Donnell, supra note 43.


\textsuperscript{134} Id. at 4.

\textsuperscript{135} Id.

\textsuperscript{136} Id.

\textsuperscript{137} Id.
lack of jurisdiction, the United States Supreme Court granted certiorari. In 2004, the Supreme Court affirmed, allowing Altmann to continue her case in U.S. federal court. On remand, the Austrian government’s motion to dismiss was again denied by the California District Court. After seven years of litigation, the parties agreed to an Austrian arbitration panel in 2005 and settled in 2006. Although litigation of the dispute endured for years, the claim was ultimately resolved by arbitration.

Aside from excessive expenses and time costs, differences in laws among nations, or a complete lack of procedure to deal with these claims, may result in inequitable results. This is particularly certain with looted art disputes because “[t]hey involve a range of legal issues which are often complicated by . . . [the introduction of] issues of private international law as well as public international law.” Bakalar v. Vavra is a recent example of conflicting laws arising in a Nazi-looted art dispute. The suit was initiated by Bakalar, a Massachusetts art collector, who sought a declaratory judgment that he was the rightful owner of an Egon Schiele sketch. Bakalar claimed that Swiss substantive law applied, while the defendants, two purported heirs claiming that the
drawing was unlawfully taken from their ancestors by Nazis, argued that Austrian law should be applied to the Nazi-looted art dispute. The District Court, applying the choice of law rules of New York State, concluded that the substantive law of Switzerland would govern the parties’ dispute, but that New York’s rules would apply in terms of procedure.\footnote{Hamblett, supra note 147.} \footnote{Bakalar v. Vavra, 550 F. Supp. 2d 548, 550–51 (S.D.N.Y. 2008).} \footnote{Henry, supra note 4.} \footnote{Bazyler & Everitt, supra note 133, at 6.}

The current lack of coherent law is a problem that also plagues U.S. courts, further complicating efforts to deal with restitution claims. “In the [United States], claimants and museums can resort to the courts to try to establish their rights, but American civil laws were not designed to deal with World War II-era losses.” Thus, already complex litigation is made more difficult by a lack of governing law. As perhaps one of the most significant U.S. cases in the realm of Nazi-looted art, Altmann was “the first time . . . a foreign entity [was] forced to go to trial in an American court on a Holocaust restitution claim.” Post-Altmann, there remains a large void in the law on how to deal with Nazi-looted art claims and choice of laws conflicts that arise in the United States. The lack of procedure and law is troubling, as contentious claims are continuously being initiated in the United States.\footnote{The number of Nazi-looted art claims is increasing in part due to the increase in access and availability of information on Holocaust-era art. Dugot, supra note 31, at 391.}

Alternative dispute resolution offers more flexible mechanisms to resolve these claims as opposed to litigation; this flexibility is the reason why ADR would likely be successful as an alternative method of resolving complex Nazi-looted art claims.\footnote{See generally Palmer, Arbitration and the Applicable Law, supra note 115 (explaining various types of ADR mechanisms that may be used to resolve looted-art claims).} \footnote{An example of negotiation resulting in optimal agreements that benefit both parties, and even the public, is when museums compensate the claimant in part while retaining the artwork and indicating the claimant’s partial ownership of the artwork to the public. Pollock, supra note 46, at 229–30.} \footnote{Palmer, Litigation: The Best Remedy?, supra note 115 (outlining arbitration, mediation, and other ADR methods for the resolution of claims).}

\footnote{154}{149}
For example, codes and resolutions setting forth guidelines for conduct are one suggested ADR method for these claims.\textsuperscript{157} Although these “codes are not devoid of legal effect,”\textsuperscript{158} they often lack the necessary enforcement mechanisms to channel both claimants and entities, whether they are national governments or private institutions, toward settlement.\textsuperscript{159} After numerous conferences, such as the Washington Conference and the Vilnius Forum, it is evident that the establishment of principles and guidelines only creates so much impetus for implementation of ADR mechanisms, and that the establishment of practical procedures is needed to resolve restitution claims.\textsuperscript{160}

Mediation is one major ADR mechanism recommended for the resolution of these claims.\textsuperscript{161} Non-binding mediation has been suggested as an alternative to litigation to resolve Nazi-looted art disputes at meetings prior to the Washington Conference.\textsuperscript{162} Mediation is a less formal dispute resolution procedure, as the parties are not required to have legal representation, and mediation may be conducted by a non-lawyer.\textsuperscript{163} Mediation would be particularly preferable because it would allow parties to forego law that would otherwise bar claims, as mediation is usually based on different principles than standard strict law.\textsuperscript{164} Also beneficial is the privacy of the proceedings, which may be kept confidential.\textsuperscript{165}

Arbitration, on the other hand, is a more formal proceeding,\textsuperscript{166} and has repeatedly been proposed as the best mechanism for resolution of Nazi-looted art claims.\textsuperscript{167} Arbitration is typically

\textsuperscript{157} An example cited by Norman Palmer is a code that has been drafted to govern the holding and treatment of human remains by museums located in England and in Wales. \textit{Id.} at 280–81.
\textsuperscript{158} \textit{Id.} at 281.
\textsuperscript{159} The Washington Principles are a prime example of the lack of an enforcement mechanism for channeling claimants toward ADR. Although the Principles raised “global awareness of the . . . need to redress the injustice which arose as a result of art looted by the Nazis, [the Principles] have not managed to improve the legal position of a claimant.” Hartung, supra note 115, at 331.
\textsuperscript{160} Marilyn Henry notes that these conferences resulted in “high-minded principles, and in the wake of underwhelming activity since these conferences, governments must take the responsibility of creating “functioning mechanisms to fairly adjudicate art claims . . . .” Henry, supra note 4.
\textsuperscript{161} Palmer, \textit{Litigation: The Best Remedy?}, supra note 115, at 280.
\textsuperscript{162} \textit{Roundtable Discussion on Nazi-Looted Art: Summary}, supra note 30.
\textsuperscript{163} Palmer, \textit{Litigation the Best Remedy?}, supra note 115, at 280.
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Id.} This may be of particular importance to museums.
\textsuperscript{166} \textit{Id.} at 279–80.
\textsuperscript{167} See Pell, supra note 112 (suggesting the establishment of an arbitral tribunal to resolve claims); Palmer, \textit{Arbitration and the Applicable Law}, supra note 115, at 291 (assessing the value of arbitration in resolution of disputed art claims); Hartung, supra note 115, at 335 (arguing that
characterized by the parties having legal representation and the arbitrator being bound by certain rules contracted to by the parties. More noteworthy is the fact that arbitration may also, like mediation, protect privacy. Arbitration also typically involves utilizing the laws of the specific legal system of a nation to resolve disputes. This characteristic may be problematic in the context of Nazi-looted art claims, as certain national laws have proven to be rigid and inadequate for resolution of these disputes. The parties may, however, circumvent this by contracting for the choice of law. This potential flaw in arbitrating claims may also be avoided by delocalizing the law governing the arbitration proceedings or by allowing the arbitrator to resolve the issue based on equitable principles within limits. The positive side to this potential flaw is that using arbitration to resolve these international claims may deter “forum shopping.” Also, resorting to arbitration usually shortens disputes in general, particularly with respect to conflicts over choice of laws. This is a major benefit, as disputes over choice of laws can constitute a separate stage of litigation, before litigation over the merits of the dispute actually begins.

Arbitration would be the preeminent ADR mechanism for resolving Nazi-looted art disputes. As noted, confidentiality may once common legal patterns are formed, arbitration will be the best remedy to resolve looted-art issues.

168 But see Keim, supra note 143, at 312 (noting that representation by attorneys may frustrate the goal of compromise in arbitration).

169 For example, the arbitrator is usually unable to speak with one party without the other’s presence. Palmer, Litigation: The Best Remedy?, supra note 115, at 279–80.

170 For example, rules governing the arbitration can require parties to the tribunal, as well as any experts or officials, to maintain confidentiality about the arbitration proceedings, or that publication of the result depends on the consent of the parties. ISABELLE FELLRATH GAZZINI, CULTURAL PROPERTY DISPUTES: THE ROLE OF ARBITRATION IN RESOLVING NON-CONTRACTUAL DISPUTES 70 (2004). Gazzini notes that “[c]onfidentiality and privacy are generally inferred from the private character of arbitration.” Id. at 72. But see Keim, supra note 143, at 297 (citing concerns that binding arbitration may be “too private of a forum”).


172 Palmer, Arbitration and the Applicable Law, supra note 115.

173 Id. at 295–301.

174 Gazzini notes that forum shopping may arise when the “locus arbitrii” are disputed, and that recourse to arbitration may “quell any temptation” to do so. GAZZINI, supra note 170, at 95–96.

175 Id. at 96.

176 See supra text accompanying notes 138–42 (discussing Bakalar v. Vavra, 550 F. Supp. 2d 548 (S.D.N.Y. 2008) in which litigation about the choice of law to be applied to the Nazi-looted art dispute occurred prior to reaching the merits of the parties’ claims).
be kept, which could be imperative to certain parties. The more formal aspect of and the reliance on legal representation is also preferable, especially where claims may involve foreign governments. Most importantly, the arbitration process is more flexible than litigation in the courts, which is limited to strict law. Arbitration is typically characterized by flexibility and could take into account the difficult issues that arise during Nazi-looted art disputes. For example, the parties may choose a law different from that of where the arbitration occurs to control the proceeding, or the parties may agree that equitable principles will govern the arbitration. Arbitration is able to retain both this formality and flexibility, and as a result, is better-tailored to resolve Nazi-looted art claims than mediation.

IV. Proposal for Binding Arbitration Panels Based in the United States to Resolve Restitution Claims

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 pro-

177 Aside from museums desiring privacy, individual claimants may also desire that the proceedings be kept confidential, as these proceedings may involve deep emotions. Also, as previously noted, publicity may lead to setbacks in resolution. Prott, supra note 1, at 136.

178 Nations may be sensitive to the “historic conflicts” to which these claims are tied, and therefore the skillful negotiation involved in arbitration is preferable. Id. at 135. An additional reason for retaining lawyers in the process, aside from maintaining a formal, conciliatory atmosphere, is that the claims often involve complex law, making it better practice to retain legal representation. This would not result in the same heightened legal costs as litigation, because the goal of arbitration is to reach an agreement quickly.


180 Keim, supra note 143, at 310.

181 Id. at 301.

182 Id. at 301.

183 Aside from the potential conflicts or negotiating blocks the informal aspects of mediation may result in, mediation also has the goal of sustaining future relationships, which is likely unnecessary for most claims, but may concededly be beneficial for museums wishing to negotiate against removal of pieces from exhibitions. Palmer, Litigation: The Best Remedy?, supra note 115, at 273. Also, mediation “does not benefit from any international enforcement convention,” which would be vital in international claims. Id. at 280.

184 See Keim, supra note 143, at 298 (proposing international law or treaty that designates arbitration as the most suitable forum to resolve Nazi-looted art disputes); Kreder, supra note 101 (proposing the creation of an international tribunal with compulsory jurisdiction to resolve restitution claims).
procedure has been devised. This is unwise, as litigation arising from Nazi-looted art disputes is unlikely to cease. The creation of U.S.-based arbitration panels for a specific subset of Nazi-looted art claims is proposed to assist in the resolution of these disputes. The arbitration panels would have jurisdiction limited to a distinct category of Holocaust-era art claims characterized by their ties to the United States. Limiting the arbitration panels’ jurisdiction to claims related to the U.S. is simply more viable. Jurisdiction should include claims made by U.S. citizens; disputes where both parties are U.S. citizens, including disputes involving entities such as private and public museums within the United States; and any foreign claim against U.S. citizens, the U.S. government, or U.S.-based institutions, private or public. For claims involving only U.S. parties, the requirement that U.S. arbitration panels constitute the compulsory forum is not an unreasonable one, as such claims would likely take place in U.S. courts were litigation pursued.

More controversial would be the imposition of U.S.-based arbitration panels where foreign parties are involved. An international binding agreement would thus be necessary where foreign entities are involved as claimants or defendants, despite the connection of the claim to the United States, in order to prevent litigation over the panel’s jurisdiction and to ensure enforcement of the

185 Hartung, supra note 115, at 331; Dugot, supra note 31, at 392 (stating that “there is no viable dispute resolution mechanism to resolve claims that arise as an alternative to avoiding lengthy judicial proceedings” for Holocaust-era looted art issues).


187 Subject matter jurisdiction should be limited to Nazi-stolen art claims that occurred during the Holocaust, i.e., from 1933 to 1945, a time period suggested by Owen Pell. Pell, supra note 112, at 319.

188 Hannes Hartung has noted that many have been skeptical, i.e. at the Washington Conference, about the possibility of adopting a set of standards to be applied to all countries due to widely varied legal systems, and maintains that a set of binding legal standards must apply to all internationally. Hartung, supra note 115, at 331–35. However, compelling countries to completely forgo choice of law and apply broad international laws may not only result in reservations about compliance and inefficient results, but may also result in an arbitration award that is incapable of enforcement because the award is invalid according to a country’s law. Palmer, Arbitration and the Applicable Law, supra note 115, at 293–94.

189 Parties should, however, have the opportunity to settle the looted art dispute on their own, without being compelled to submit to arbitration proceedings. See Keim, supra note 143, at 311 (proposing a period of time where parties may attempt good faith negotiation prior to appearing before an arbitration committee).
panels’ decisions.190 It is unlikely that foreign nations would simply concede to the imposition of U.S. law, especially where the litigation involves sensitive Holocaust-era issues. Conversely, such imposition may be harmful to the United States in terms of foreign relations, as “[t]here is a widely held view around the world that U.S. courts are overly aggressive in asserting jurisdiction in an unpredictable, often plaintiff-friendly way.”191 The United States should thus once again convene with other national governments to come to an agreement compelling arbitration by proposing U.S. arbitration panels.

Such compelled arbitration may not, however, be unrealistic, especially in light of the Altmann decision, and it has already been proposed that, “claims not already covered by an international agreement or diplomatic negotiations should be heard by U.S. courts . . . .”192 Thus, the Altmann decision “could open the door to Holocaust-era litigation, as the [U.S. Foreign Sovereign Immunities Act of 1976] (FSIA) and its immunity exceptions may now grant jurisdiction over foreign nations to U.S. courts in claims arising for that time period.”193 Consequently, Altmann made it much easier for Holocaust-era claimants to bring foreign nations within the jurisdiction of U.S. courts.194 With this reality in the background, it is more likely that nations would be willing to consider and comply with an international arbitration agreement proposed by the United States, which is a more favorable alternative to being reined into U.S. courts by the authority of Altmann and FSIA. Thus, claims involving any foreign entity, including national governments, institutions, and individuals, against U.S. individuals or institutions, or conversely, by U.S. individuals and institutions against foreign entities, should be compelled to arbitrate as well, but under an inter-governmental agreement, ensuring enforcement of the arbitration resolution.195 This is a route preferable for both

190 See Pell, supra note 112, at 316 (suggesting that a less formal inter-governmental agreement and legislation, as opposed to a formal treaty, could be used to establish and govern arbitral tribunals).


192 Pollock, supra note 46, at 209.

193 Id. Specifically, the U.S. Supreme Court held that “FSIA applies retroactively to events that occurred before the Act’s enactment in 1976, including events before the government adopted the ‘restrictive theory’ of sovereign immunity in 1952.” Id. at 211.

194 Id. at 212.

195 In his proposal for international arbitral tribunals for looted art claims, Pell proposed that jurisdiction for the tribunals be accepted by way of informal “inter-governmental agreements.” Pell, supra note 112, at 316.
the United States and foreign nations, as the United States will be less likened to a jurisdictional tyrant, and nations will have the opportunity to structure any binding international arbitration agreement. Most importantly, restitution claims will be channeled into binding arbitration proceedings.

The use of U.S. law and a U.S. forum is preferable for a host of reasons. The United States is an optimal forum because there is no hefty fee to file a claim, which was a prohibitive barrier in Altmann facing a U.S. claimant initiating suit in Austria. Likewise, there should not be a prohibitive fee to file a claim before a U.S. arbitration panel. With regards to another major issue in restitution disputes, conflict of laws, it is less likely that conflict over choice of law will arise in these arbitration proceedings where both the claimant and the defendant are located within the United States. Determining which laws govern the dispute is, however, a major hurdle that parties must often overcome in litigation. This is due to numerous issues that arise during the complex litigation of restitution claims, and is further complicated by the reality that among nations, and even states, laws “regarding property rights, good-faith purchasers, statutes of limitations, means of adjudication, [and] costs and methods” vary greatly. Arbitration would be beneficial to resolve these issues, as it would cut out time and costs usually spent litigating choice of law.

Nonetheless, the laws governing the dispute before arbitration would still have to be chosen. Although it would be optimal to have the parties contract as to what law governs, parties may not necessarily be able to agree in a timely manner, or agree at all. As a result, certain default rules should be provided as a backdrop. The parties should be able to stipulate what laws apply to the dispute, and where the parties decline to agree on the choice of laws or leave the decision to the arbitrator, the arbitrator should apply U.S. law. The default rule providing that U.S. law should apply is a reasonable one in light of the fact that it is Holocaust-era disputes which are before the arbitration panels. Likewise, certain equitable principles based on U.S. law should govern the parties’ ability

---

196 Perhaps the most vital features of the United States and its law are its prohibition against discrimination on claimants race or ethnicity and its lack of an overwhelming filing fee, such as the one encountered by Maria Altman to initiate her claim.

197 Bazyler & Everitt, supra note 133.

198 See supra text accompanying notes 141–48.

199 Keim, supra note 143, at 309.

200 The American arbitration system has also been cited as the most suitable process for resolving Nazi-stolen art claims. Id. at 307.
Fulfilling the Washington Principles

2010] FULFILLING THE WASHINGTON PRINCIPLES 671
to agree on the choice of law. To demonstrate why U.S. law is
particularly favorable for the resolution of Nazi-looted art disputes,
two major issues that frequently arise in the context of these dis-
putes are highlighted. First, the law governing the statute of limita-
tions, which is “often the greatest barrier to [the] Holocaust
plaintiffs’ claim of ownership,” is often more relaxed in the
United States, since a majority of states in the United States em-
ploy what is known as the “discovery rule.” Under this rule, the
statute of limitations period “begins to run when the plaintiff dis-
covers, or after the exercise of reasonable diligence, should have
discovered” the location of the looted art. Although the rule has
been criticized as favoring plaintiffs in these disputes, this is not
an unreasonable rule, but instead one that equitably takes into ac-
count the “unique challenges” faced by Holocaust plaintiffs.
Second, the choice of law governing good-faith purchasers is also a
major issue which is often contentiously litigated in Nazi-looted art
disputes. U.S. law, unlike that of civil code countries, maintains
that a good-faith purchaser cannot acquire good title to property
stolen despite how long the property has been in the purchaser’s
ownership. Once again, the U.S. rule takes into account the ob-
stacles faced by claimants and should therefore be applied against
choice of law decisions by parties and arbitrators.

Aside from U.S. laws being more aligned with equitable prin-
ciples, the “politics of restitution” are notably less divided in the
United States, which also makes adoption of the United States for
the location of forum and choice of law preferable for arbitration.
“Property Restitution in Central and Eastern Europe is a realm of
rivals, with competing interests and agendas, varying degrees of
sympathy and sensitivity, or hesitation and hostility, different con-
ceptions of justice and truth, and outright greed.” The United
States is more neutral and forgiving in its laws, as well as with re-
spect to the history of World War II. Another reason for basing
arbitration panels in the United States and having U.S. law govern

201 Kelly Ann Falconer, Comment, When Honor Will Not Suffice: The Need for a Legally
Binding International Agreement Regarding Ownership of Nazi-Looted Art, 21 U. PA. J. INT’L
202 Lawrence M. Kaye, Avoidance and Resolution of Cultural Heritage Disputes: Recovery of
203 Id.
204 Id.
205 Pollock, supra note 46, at 225.
206 For example, Italy protects good-faith purchasers from the moment of the purchase. Id.
208 Henry, supra note 19, at 37.
is the reality that the United States has been a clear proponent for resolving looted art claims through ADR and other equitable resolutions. Also relevant is the existence of numerous art museums in the United States, which has resulted in various claims involving U.S. museums. Thus, U.S. courts have frequently dealt with looted-art claims. This can also be attributed to the size of the art market in the United States, as well as to the fact that U.S. laws are often “receptive to claims involving non-U.S. acts and actors.” Consequently, although nations can negotiate the respective locations of the panels, it is proposed that arbitration panels be stationed in the United States. Panels should be based out of the district courts, which have typically handled these claims, and certain district judges should be appointed to arbitrate Nazi-looted art claims.

After the parties have submitted their dispute to the arbitration panel, the panel should first begin by referring the parties to the Art Loss Registry, CLAE, or an equivalent commission to “assist claimants in framing and researching their claims . . . lead[ing] to faster claims processing and . . . encourag[ing] settlements,” especially if a party lacks the funds to continue the research necessary to carry out a claim. The Art Loss Registry or an equivalent commission, enlisted by the panel, should conduct research without charges to the parties where the value of the disputed artwork falls below a minimum amount. After all issues have been submitted, the arbitration panel should decide the dispute according to the governing law, which, as mentioned, should not depend merely on jurisdiction. Instead, the parties should agree, or contract for, the governing law, subject to set international standards and equi-

209 Id. at 48.
211 Id. at 235.
212 Pell proposes thorough qualifications for judges, such as training or background in the art trade. This stringent criteria is optimal and would likely be more cost effective as opposed to having experts in art restitution act as arbitrators. Federal judges are recommended for their ability to handle inter-state and foreign claims, as well as for their past experience with Nazi-looted art claims. Pell, supra note 112, at 317.
213 Id. at 318.
214 Roundtable Discussion on Nazi-Looted Art: Summary, supra note 30. Again, this would be an effective alternative to litigation and would allow for an equitable result in that an injured party may recover its asset despite the asset’s low financial value.
FULFILLING THE WASHINGTON PRINCIPLES

Where the parties fail to make a choice, the default law will apply. Lastly, the parties should be presented with all findings and conclusions made by the arbitration panel when a decision is rendered.

The decisions of the arbitration panels should be binding to ensure that a panel’s decision is legally enforceable. This should also be required of international agreements governing arbitration involving foreign nations or parties, so that the goal of maintaining positive foreign relations is advanced: “[g]iven the nature of the disputes and the common failure of good faith negotiation, it is essential that any determination on the matter be binding, forcing the parties to treat the compromise seriously and removing the litigation ‘safety net.’” Typically, one of the trade-offs of binding arbitration is that the parties forgo the right to appeal. To resolve any weariness that parties may have of binding arbitration, especially where it is compelled, a higher arbitration panel, also consisting of judges, should be established to review decisions. This panel should have the discretion to review and to remand selected decisions that are found to be inconsistent with international standards or with equitable principles. This obligation to review decisions would not be overly burdensome for the higher arbitration panel, as Nazi-looted art claims, while on the rise, cannot be characterized

---

216 For example, when dealing with laws on good-faith purchasers, the panel will apply equitable remedies upon an agreement between the parties that a good-faith purchase has been made. Good-faith purchasers are to be compensated, with parties splitting any costs. See Palmer, Arbitration and the Applicable Law, supra note 115.

217 Id. at 295. Thus, it is preferable to have the United States as a jurisdiction, where laws are not only more flexible, but often in accord with international standards and moral norms surrounding Holocaust-era art restitution.

218 Keim, supra note 143, at 308–09.

219 Ensuring enforcement of decisions is particularly crucial where foreign nations are involved. Aside from cushioning foreign relations in order to prevent a result where a country is left resentful, similar to Austria following the Altmann proceedings, requiring enforcement of decisions is central to the entire purpose of resorting to arbitration: to reach a more equitable result, where the wronged party is recompensed, without either party having to suffer the financial, social, and time costs that are incurred during litigation. Thus, it is vital that parties have the assurance of binding arbitration to guarantee the resulting decision will be enforced, especially where the obligation falls upon a foreign entity, and that they will not have to resort to litigation or post-arbitration procedures to enforce the decision.

220 Keim, supra note 143, at 311 (citing Michael S. Fields, California Alternative Dispute Resolution Practice: Arbitration Mediation Reference of Tactics, Statutes & Rules 30–09 (1999)).

221 See id. at 311 (suggesting vacature of arbitration decisions for Holocaust-era art claims only where there is a finding of bias or a clear error of law); see also Pell, supra note 112, at 318–20 (suggesting binding enforceability of arbitral tribunal decisions for these claims with a provision for certification of issues post-arbitration).
as common. This higher panel would thus reassure parties that inequitable decisions may be remanded for further arbitration proceedings, while still forgoing the appeals process. In addition, the higher panel’s reviewing function would result in quality control of the precedent established by the lower panels, in order to “lend predictability and develop a body of precedent that would encourage claims resolution.”

V. Conclusion

The Washington Principles’ recommendation for the development of alternative dispute resolution mechanisms to resolve restitution claims has largely been unfulfilled on both global and national levels. The United States should strive to fulfill these Principles, as the U.S. government acted as a driving force behind the initiation of the Washington Conference and renewed restitution efforts in the last decade. The lack of enforcement and vagueness of the Washington Principles with respect to ADR strategies should be remedied with a specific plan for structured implementation of a U.S.-based arbitration panel for Nazi-looted art claims. After establishing functional, equitable arbitration panels for parties to resolve Nazi-looted art disputes, the United States should then advocate its structure to other countries for the resolution of claims over which the panels lack jurisdiction, focusing on the implementation of ADR techniques abroad to achieve the equitable resolution of Nazi-looted art claims internationally.

222 The decisions of the arbitration panels should be published, subject to redaction for the privacy needs of the parties. See Keim, supra note 143, at 311–12; Pell, supra note 112, at 320.
223 Pell, supra note 112, at 320.