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# Museums and Self-Regulation: Assessing the Impact of Newly Promulgated Guidelines on the Litigation of Cultural Property

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**MUSEUMS AND SELF-REGULATION:  
ASSESSING THE IMPACT OF NEWLY PROMULGATED  
GUIDELINES ON THE LITIGATION OF CULTURAL  
PROPERTY**

RACHEL DUBIN\*

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**I. INTRODUCTION**

As ethical guardians of the arts, museums are among the most trusted secular institutions in the United States.<sup>1</sup> Museums hold objects for the

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public in the public trust<sup>2</sup> and risk losing their sense of authority and expertise if they act irresponsibly regarding the maintenance of their collections. Consequently, museums observe extensive ethical codes to which few outside the museum world are privy. In recent years, such self-imposed regulations have gained a more concentrated focus: the swift return of World War II era art confiscated by the Nazis during the Holocaust.

In the past two decades, organizations in the United States and abroad have communally promulgated principles to guide museums in the restitution of works currently in their collections that are of questionable provenance.<sup>3</sup> This note will focus on the guidelines' practical impact in the United States. As a result, of particular import to this inquiry are three formal guidelines: 1) the Washington Conference Principles on Nazi-Confiscated Art ("Principles"); 2) the Report of the American Association of Museum Directors Task Force on the Spoliation of Art during the Nazi/World War II Era ("AAMD"); and 3) the American Association of Museums' Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era ("AAM"). Because these guidelines are not legally binding, measuring their true impact, if any, requires a multifaceted assessment predicated on an understanding of the guidelines' potential impact on a variety of parties, which include: 1) litigants in restitution lawsuits dealing with Holocaust era art of uncertain

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<sup>1</sup> See AM. ASS'N OF MUSEUM DIRS., ART MUSEUMS AND THE IDENTIFICATION AND RESTITUTION OF WORKS STOLEN BY THE NAZIS 4 (2007), available at [http://www.aamd.org/papers/documents/Nazi-lootedart\\_clean\\_06\\_2007.pdf](http://www.aamd.org/papers/documents/Nazi-lootedart_clean_06_2007.pdf) [hereinafter AAMD, ART MUSEUMS] (describing member museums' mission to "serve the public through art and education"; noting that museums directors remain accountable "to their trustees, staff, donors and community for ensuring that museums fulfill their public service mission and reinforce the leadership position of museums as cultural and educational resources").

<sup>2</sup> See JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 988 (Kluwer Law Int'l Ltd. 3d ed. 1998) (1979) (explaining that as public trusts, museums "hold[] their collections and information as a benefit for those they were established to serve"). Museums are generally structured pursuant to applicable corporate law in two main ways: 1) a charitable trust; or 2) a nonprofit corporation. See MARILYN E. PHELAN, MUSEUMS AND THE LAW 1-7 (1982); see also Jennifer L. White, *When It's OK to Sell The Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses*, 94 MICH. L. REV. 1041, 1049 (1996) ("Because of their common purposes, museums have similar problems regardless of their organizational structure."). Currently, the American Association of Museum Directors estimates that approximately 18 million objects are currently held in the public trust. See AAMD, ART MUSEUMS, *supra* note 1, at 1.

<sup>3</sup> See The J. Paul Getty Museum Frequently Asked Questions, [http://www.getty.edu/research/conducting\\_research/provenance\\_index/faq.html#provenance](http://www.getty.edu/research/conducting_research/provenance_index/faq.html#provenance) (last visited Nov. 22, 2008) (revealing that the word "provenance" means "[t]he history of ownership of a valued object or work of art or literature").

provenance; 2) prospective buyers of European paintings and Judaica<sup>4</sup> from the World War II era; 3) potential sellers of Holocaust-era art; and 4) museum employees involved in provenance research, potential loans of artwork, and in litigation. Further, case law from the pre- and post-guideline implementation periods suggests that irrespective of the guidelines' non-binding status, the adopted provenance-based regulations have had an affect both domestically and internationally. However, statistical data from the Presidential Commission on Holocaust Assets and the Smithsonian Institution, though informative, does not conclusively demonstrate whether the guidelines affected museum acquisitions and/or loans in the post-guideline implementation era primarily due to the limited sample size available.<sup>5</sup> Irrespective of the absence of statistical data, the implementation of the Washington Conference Principles, the AAMD regulations, and the AAM regulations has generated four clear conclusions:

- 1) Holocaust looted art claims are arising in the post-regulation era with greater frequency;
- 2) In these claims, museums are most amenable to alternative dispute resolution mechanisms geared toward avoiding the expense of litigation;
- 3) Court decisions appear in some instances to constitute "judicial affirmation"<sup>6</sup> of the principles set forth at the Washington Conference; and

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<sup>4</sup> See Am. Ass'n of Museums, AAM Recommended Procedures for Providing Information to the Public About Objects Transferred in Europe During the Nazi Era, <http://www.aam-us.org/museumresources/prov/procedures.cfm> (last visited Sept. 25, 2009) (defining the term "Judaica" as follows: "the material culture of the Jewish people," which includes "ceremonial objects for communal or domestic use"; elaborating that the term also includes "historical artifacts relating to important Jewish personalities, momentous events, and significant communal activities, as well as literature relating to Jews and Judaism").

<sup>5</sup> See Provenance in the World War II Era, 1933-1945 – SI Collecting Policy, [http://provenance.si.edu/jsp/si\\_collecting\\_policy.aspx#4](http://provenance.si.edu/jsp/si_collecting_policy.aspx#4) (last visited Mar. 3, 2010) (noting that "Smithsonian collections are very diverse in nature and subject matter . . . [and, a]s a result of this diversity and the nature of provenance for many collections, only a small percentage of Smithsonian collection holdings fall under the parameters of the AAM and AAMD guidelines concerning Nazi-appropriated objects . . . . However, the Smithsonian will adhere to these professional guidelines where applicable.").

<sup>6</sup> See, e.g., Geri J. Yonover, *The "Last Prisoners of War": Unrestituted Nazi-Looted Art*, 6 J.L. & SOC. CHALLENGES 81, 95 (2004) (arguing that "if the Supreme Court upholds the opinions of the district and Ninth Circuit in *Altmann*, it would constitute a judicial affirmation of the principles set out in the Washington Conference . . .").

- 4) Once litigation ensues, the guidelines do not sufficiently mitigate common barriers for claimants to recovery of Holocaust-era art of questionable provenance.<sup>7</sup>

Part II of this paper details the history unique to Holocaust related plundering in an effort to place this assessment in proper context. Because artworks of questionable provenance from other time periods have not attained the level of international attention ascribed to Nazi confiscation of Jewish artwork, it is essential to chronicle the historical development of the Holocaust era, which was responsible for the greatest movement, theft, and destruction of artworks known to history. Further, the Nuremberg Trials determined the systematic, premeditated fashion in which the Nazis confiscated Jewish artwork was a war crime; this marked the first time that plundering cultural property was held explicitly to be a war crime.<sup>8</sup>

Part III describes three selected museum regulations – two of which were promulgated by leading national museum associations – that address provenance research guidelines for looted Holocaust-era cultural property. This portion of the inquiry will address each regulation in turn. Though non-binding, the promulgation and implementation of the guidelines appear to have an effect on the adjudication – or lack thereof – of post-regulation claims.<sup>9</sup>

Part IV examines case law decided both prior to the implementation of the museum guidelines and post-promulgation in an effort to identify cognizable patterns consistent with the implementation of the guidelines. This assessment yields four main conclusions. First, the amount of Holocaust looted art claims experienced a marked increase in the post-promulgation period.<sup>10</sup> However, some scholars suggest that provenance

<sup>7</sup> See Howard N. Spiegler, *Recovering Nazi-Looted Art: Report From the Front Lines*, 16 CONN. J. INT'L L. 297, 299-306 (2001) (describing barriers to asserting a claim for the recovery of Nazi-looted art, including locating the artwork, establishing the right to make a claim, and the statute of limitations).

<sup>8</sup> JOHN H. MERRYMAN ET AL., *LAW, ETHICS AND THE VISUAL ARTS* 20-21 (Kluwer Law Int'l Ltd. 5th ed. 2007) (1979) (describing the trial and eventual conviction of Alfred Rosenberg, the Nazi who was "responsible for a system of organized plunder of both public and private property throughout the invaded countries of Europe"; Rosenberg orchestrated the plunder of almost 70,000 Jewish homes in the West alone).

<sup>9</sup> Nathan Murphy, *Splitting Images: Shared-Value Settlements in Nazi-Era Art Restitution Claims* 15 (Working Paper Jan. 12, 2009) available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=nathan\\_murphy](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=nathan_murphy) (noting that since 1995, there has been a marked increase in looted Nazi art claims).

<sup>10</sup> See *id.*

efforts in recent years are losing momentum.<sup>11</sup> Second, the post-regulation era is dominated by parties' interests in utilizing methods other than litigation to resolve claims. Third, post-promulgation court decisions appear to echo the principles promulgated by the Washington Conference, effectively serving to lend legitimacy to the non-binding principles. Fourth, in the event that litigation commences, the guidelines do not appear to assuage common barriers to claimant recovery, such as statute of limitations issues, and standing generally.<sup>12</sup> This Part also briefly addresses available museum provenance statistics, but cautions that any conclusions drawn from this data are inherently suspect due to the limited, imprecise data available.

## II. HISTORY UNIQUE TO HOLOCAUST RELATED PLUNDERING

The Nazi policies of discrimination, persecution, and extermination had a distinctly economic dimension.<sup>13</sup> The magnitude of this asset-driven campaign was initially discovered following the surrender of Germany in May 1945.<sup>14</sup> The Allies confiscated a myriad of assets in a variety of locations, which included gold, artwork, currency from several countries, securities, and precious metals, among other items.<sup>15</sup>

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<sup>11</sup> *Review of the Repatriation of Holocaust Art Assets in the United States: Hearing Before the Subcomm. on Domestic and Int'l Monetary Policy, Trade and Tech. of the H. Comm. on Fin. Services, 109th Cong. 10-15 (2006)* (statement of Stuart E. Eizenstat, Former Commissioner, Presidential Advisory Commission on Holocaust Assets in the U.S.) [hereinafter Eizenstat Statement].

<sup>12</sup> See, e.g., David J. Rowland, *Nazi-Era Art Claims in the United States: 10 Years After the Washington Conference*, ART & CULTURAL HERITAGE L. NEWSL. (Am. Bar Ass'n Section of Int'l Law) Spring 2009, at 32-33, available at <http://rowlandlaw.com/NAZI-ERA%20ART%20CLAIMS.PDF> (discussing museum's invocation of statute of limitations and laches affirmative defenses even after promulgation of the AAMD and AAMD guidelines).

<sup>13</sup> PRESIDENTIAL ADVISORY COMM'N ON HOLOCAUST ASSETS IN THE U.S., PLUNDER AND RESTITUTION: FINDINGS AND RECOMMENDATIONS OF THE PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES AND STAFF REPORT, CHAPTER II: FROM NAZI EXPROPRIATION TO U.S. CONTROL (2000), available at <http://www.pcha.gov/PlunderRestitution.html/html/StaffChapter2.html> [hereinafter PCHA, CHAPTER II]. See also MERRYMAN ET AL., *supra* note 8, at 20 (obliterating the myth that the purpose of art seizure was protective and meant for preservation by quoting the following directly from a 1939 Nazi decree that contained administrative directions for carrying out the art seizure program: "[the artworks] are confiscated for the benefit of the German Reich, and are at the disposal of the Reich Commissioner for the strengthening of Germanism.").

<sup>14</sup> PCHA, CHAPTER II, *supra* note 13, at The U.S. Army and the Discovery of Assets, para. 1.

<sup>15</sup> *Id.* at Introduction, para. 2. Though the Nazis were responsible for a large portion of the looting of cultural property during World War II, they were not the sole perpetrators. See *Review of the Repatriation of Holocaust Art Assets in the United States: Hearing Before the Subcomm. on Domestic and Int'l Monetary Policy, Trade and*

As a primary matter, it is important to briefly address the foundations of Nazi ideology in order to illustrate how the confiscation of art during this period served as a prominent aspect of the Nazis' economic agenda. The Nazis characterized individuals based on their membership in one of three culturally distinct races: the "culture-creating" race, the "[c]ulture-bearing" race, and the "culture-destroying" race.<sup>16</sup> The "culture-creating" races were heralded as components of the "master race," of which Aryan Germans constituted the superior example.<sup>17</sup> Also included in this classification category were the English, Dutch, and Scandinavians.<sup>18</sup> The second category, which included Asians, Latinos, and Slavs, were viewed as inferior to the culture-creating races.<sup>19</sup> However, the apex of cultural inferiority existed via the culture-destroying race category, which included "Gypsies, Negroes, and Jews."<sup>20</sup> The Nazis believed these classifications were merely the product of a "biologically defined destiny" to expand the influence of the master race on a global scale.<sup>21</sup> Other persecuted groups included the mentally and physically disabled, political opponents, and homosexuals, among others.<sup>22</sup> The Presidential Advisory Commission on Holocaust Assets described the central position that anti-Jewish sentiment occupied in Nazi ideology in its 2000 report:

In this ideology, the master race was in a battle for world domination with its chief enemy, the Jews, who, aware of their "inferiority," used every foul means to subdue the Aryan race. Nazi ideology associated democracy, socialism, capitalism, liberalism, modernism in art, and prostitution with the Jews and postulated that Jews, if not segregated and eventually removed from Germany, would further infect German culture, increase control over Germany's finances, and pollute German blood

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*Tech. of the H. Comm. on Fin. Services*, 109th Cong. 105 (2006) (prepared statement of Stuart E. Eizenstat, Former Commissioner, Presidential Advisory Commission on Holocaust Assets in the U.S.) [hereinafter Eizenstat Prepared] ("The Soviets, in their turn, systematically plundered huge amounts of Nazi art and historic German treasures, from masterpieces in museums to more modes[t] works once owned by Jews.").

<sup>16</sup> See PCHA, CHAPTER II, *supra* note 13, at *The Science of Race*, para. 2 (citing LEON BARADET, *POLITICAL IDEOLOGIES* 246 (5th ed. 1994)).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> PCHA, CHAPTER II, *supra* note 13, at *The Science of Race*, para. 2

<sup>22</sup> See generally MICHAEL BERENBAUM ed., *A MOSAIC OF VICTIMS: NON-JEWS PERSECUTED AND MURDERED BY THE NAZIS* (New York Univ. Press 1990); GUENTER LEWY, *THE NAZI PERSECUTION OF THE GYPSIES* (Oxford Univ. Press 2000).

through miscegenation. The end result of the Jewish infiltration would be a Bolshevik dictatorship that would extinguish the German race.<sup>23</sup>

In January 1933, this paranoid view emerged as the dominant ideology when Adolf Hitler became Chancellor of Germany.<sup>24</sup> Soon thereafter, the Nazis instituted legislation aimed at the systematic dehumanization of Jews and other disfavored groups.<sup>25</sup> Many of the policies targeted the expropriation of Jewish assets, Jewish emigration,<sup>26</sup> citizenship laws,<sup>27</sup> and the banning of marriage and extramarital relations between Germans and Jews, among other restrictive legislation.<sup>28</sup> Nazi policy escalated considerably in scope, culminating in Nazi leaders' 1942 decision to implement the "Final Solution to the Jewish Question," a misnomer for the widespread extermination of Jews and other undesirables via gassing or firing squad.<sup>29</sup>

<sup>23</sup> PCHA, CHAPTER II, *supra* note 13, at The Science of Race, para. 3.

<sup>24</sup> *See id.* at para. 3-4.

<sup>25</sup> *Id.* at Discrimination and Plunder Become Law (describing the Nazi regime's "supplement[ation] [of] unofficial acts of repression with official discriminatory decrees," including the "Transfer (Ha'avara) Agreement of August 28, 1933," among other decrees); *see also* Richard W. Sonnenfeldt, *The Nuremberg Trials: A Reappraisal and Their Legacy*, 27 CARDOZO L. REV. 1609, 1610 (2006) (identifying the Reichstag as the German parliament).

<sup>26</sup> PCHA, CHAPTER II, *supra* note 13, at Discrimination and Plunder Become Law, para. 2-3. Jewish emigration was the byproduct of Nazi laws targeted at depriving Jews of their assets. *Id.* After Jews were deprived of their economic livelihood in Germany, they were forced to leave the country, and did so in increasing numbers from 1933-1938. *Id.* Between 100,000 and 170,000 Jews were forced to leave Germany as a direct result of this legislation. *Id.* It is argued by the PCHA that approximately half of the Jews forced to leave during this period held "significant assets." *Id.*

<sup>27</sup> *Id.* at para. 4. The most prevalent of the restrictive citizenship laws were commonly referred to as the Nuremberg Laws, in which the Nazi Party employed citizenship "experts" to write a law that developed an elaborate classification system for Jews that could determine a person's "degree of Jewishness," called for the segregation of Jews from German society, and formally announced it was the official policy of Germany to discriminate against Jews. *Id.* at para. 6. Jewish business proprietors were subjected to "Aryanization," the process of transferring ownership of Jewish assets to non-Jewish individuals or entities. *Id.* Approximately 60,000 Jewish businesses were wiped out between 1933 and 1938 as a result of this policy. *See id.* In 1938, the Nazi government formally prohibited Jewish ownership of retail businesses. *See generally* AVRAHAM BARKAI, FROM BOYCOTT TO ANNIHILATION: THE ECONOMIC STRUGGLE OF GERMAN JEWS 1933-1943 (William Templer trans., Univ. Press of New England 1989) (discussing the economic situation of German Jews in 1938).

<sup>28</sup> RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 27-37 (Holmes & Meier 1985) (for more information regarding the description of Nazi racial decrees).

<sup>29</sup> *See* CHRISTOPHER BROWNING, NAZI POLICY, JEWISH WORKERS, GERMAN KILLERS 26-57 (Cambridge Univ. Press 2000). The "Final Solution" was conceived at the Wannasee Conference. *See id.* Concentration camps, which had existed prior to the conference, were built with greater fervor post-

The Nazis' "wholesale plunder [of stolen art] was not a mere incident of war, but [was] an official Nazi policy."<sup>30</sup> The Nazis' systematic extortion and pilfering of "degenerate" art was the gradual product of the magnification of existing prejudices and attitudes.<sup>31</sup> The phrase "degenerate" art was coined in 1893 by Jewish writer Max Nordau. Nordau abhorred modern art – which by his definition included the work of the Impressionists, among other painters – and utilized this phrase to denote his distaste.<sup>32</sup> In the post World War I era, anti-modernist sentiments expanded on Nordau's "degeneracy" theory, albeit in "confusedly racist, and ultimately nonsensical" ways.<sup>33</sup> When Nordau developed the phrase, it was devoid of racist underpinnings; however, as the Nazi party gained momentum, an anti-Semitic overtone enveloped the term.<sup>34</sup> Alfred Rosenberg – the Nazi party official predictably later placed in charge of the massive looting campaign – contributed to the crystallization of Nazi art theory via his lengthy, incomprehensible work entitled *Myth of the Twentieth Century*.<sup>35</sup>

In addition to the Nazis' use of looted art as a source of economic revenue, the party actively incorporated art "as a part of their larger political and ideological project" in a fashion that intimately linked art policy with Nazi efforts to seize power in Germany, to subsequently conquer Europe, and to execute their program of mass extermination.<sup>36</sup> Since 1920, the Nazi Party Program equated modern "degenerate" art with political and racial enemies and consequently served to propagate overarching Nazi goals of Jewish dehumanization.<sup>37</sup>

Though art occupied a central role in economic policy following the Nazi party's ascent to power,<sup>38</sup> it was not until 1940 that Hitler formally

Wannassee. *See id.*

<sup>30</sup> Spiegler, *supra* note 7, at 298 (citing Kelly Diane Walton, *Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen Art*, 9 FORDHAM INTELL. PROP. MEDIA & ENT L. J. 549, 557 (1999)).

<sup>31</sup> *See* LYNN H. NICHOLAS, THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR, 6-8 (Alfred A. Knopf, Inc. 1994) (describing the development of the Nazi party's understanding of the term "degenerate" art).

<sup>32</sup> *Id.* at 7.

<sup>33</sup> *Id.* at 8.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (explaining that Rosenberg believed that the Aryan Nordic race was responsible for the creation of all acceptable art; opining that Hitler was baffled by the book's widespread commercial success).

<sup>36</sup> Dr. Jonathan Petropoulos, *Art Looting During the Third Reich: An Overview with Recommendations for Further Research*, NAZI-CONFISCATED ART ISSUES (Wash. Conf. on Holocaust-Era Assets 1998).

<sup>37</sup> *See* NICHOLAS, *supra* note 31, at 6-8.

<sup>38</sup> *Id.* at 9 (stating that "[a]rt was very fashionable in the new regime"; describing legislative

organized an extra-military unit charged with seizing the cultural property of Jews and other races the Nazis deemed inferior, which resulted in what many scholars label the “greatest displacement of art in human history.”<sup>39</sup> Hitler appointed Rosenberg to be the head of this special unit, originally labeled the Center for National Socialist Ideological and Educational Research.<sup>40</sup> Upon its inception, this unit was designed for the establishment of a research library; however, the project evolved into a campaign for the seizure of public and private cultural property and took on a new name: Einsatzstab Rosenberg.<sup>41</sup> As with other Nazi policies – economic or otherwise – the establishment of the Einsatzstab Rosenberg was the product of “cold and criminal calculation.”<sup>42</sup> For example, in March 1942, Hitler issued a decree authorizing the search of libraries, lodges, and cultural establishments as outlets for the seizure of cultural property, as well as cultural property owned by Jews.<sup>43</sup> Provisions were established to govern the seizure of cultural objects of uncertain provenance, as well as to expand the scope of Nazi-looting to all countries occupied by the Nazis.<sup>44</sup> The extent of the confiscation was massive. In the West, 69,619 Jewish homes were plundered – 38,000 in Paris alone – totaling at minimum 21,903 art objects.<sup>45</sup> In the East, the plundering of cultural property operated almost exclusively in conjunction with destruction, resulting in the obliteration of 1,710 cities, more than 70,000 villages and hamlets, and more than 6 million buildings.<sup>46</sup> Over 25 million persons were rendered homeless in the Soviet Union alone.<sup>47</sup> Further, the Nazis destroyed 427 Soviet museums and desecrated Soviet cultural monuments, such as the estate of Soviet poet Alexander Pushkin,

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developments directed at the appropriation of Jewish art).

<sup>39</sup> Lawrence M. Kaye, *Avoidance and Resolution of Cultural Heritage Disputes: Recovery of Art Looted During the Holocaust*, 14 WILLAMETTE J. INT’L L. & DISPUTE RES. 243, 243 (2006) (quoting MICHAEL J. BAZYLER, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS* 202 (New York Univ. Press 2003)).

<sup>40</sup> MERRYMAN ET AL., *supra* note 8, at 19 (reproducing portions of the judgment in the Nuremberg Trials before the International Military Tribunal held in 1948 that addresses the development of the massive Nazi-looting campaign).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*; see also PCHA, CHAPTER II, *supra* note 13, at Discrimination and Plunder Become Law, para. 14 (explaining how this organization, among others, competed “to loot archives, libraries, artwork, and cultural objects from the ‘enemies’ of National Socialism”).

<sup>44</sup> MERRYMAN ET AL., *supra* note 8, at 19.

<sup>45</sup> *Id.* at 17, 20.

<sup>46</sup> *Id.* at 18.

<sup>47</sup> *Id.*

the estate and museum of Leo Tolstoy, and the museum of Tchaikovsky, among other Soviet cultural centers.<sup>48</sup> Rosenberg's own records confirm the large-scale scope of the plundering: his illustrated catalogue contained 39 volumes accompanied by 2,500 photographs of seized artwork.<sup>49</sup> Scholars speculate that if all of the looted cultural objects were catalogued in this fashion, it would result in the production of approximately 300 volumes.<sup>50</sup> Experts estimate that as many as 600,000 paintings were stolen, of which more than 100,000 remain missing half a century after World War II.<sup>51</sup> This figure balloons into the millions if furniture, china, rare books, coins, and items of the decorative arts are taken into account.<sup>52</sup> In addition to Nazi looting of degenerate art and Jewish-owned art within the Reich or from occupied countries, the Nazis also confiscated the property from non-Jews outside of Germany, religious organizations, and the property of other States.<sup>53</sup>

Alfred Rosenberg's conviction at the Nuremberg trials for his role in the massive, systematic cultural property looting campaign that devastated homes and cultural centers in all Nazi-occupied countries during World War II marked the first time that the plunder of cultural property was held to be a war crime.<sup>54</sup> Rosenberg's conviction generated implications in the realm of the application of public international law: prior to Nuremberg, international law was applicable only to States; individuals could be sued criminally or civilly solely under national laws.<sup>55</sup> There, the Allied Powers

<sup>48</sup> *Id.*; see generally NICHOLAS, *supra* note 31 (providing a highly detailed account of the plundering process).

<sup>49</sup> MERRYMAN ET AL., *supra* note 8, at 16.

<sup>50</sup> *Id.* (stating that “[i]f the entire body of loot had been photographed and catalog[u]ed it would have run to about 300 volumes.”).

<sup>51</sup> See Eizenstat Statement, *supra* note 11, at 10.

<sup>52</sup> Eizenstat Prepared, *supra* note 15, at 105.

<sup>53</sup> See PCHA, CHAPTER II, *supra* note 13, at Discrimination and Plunder Become Law, para. 13 (explaining that “[a]s soon as [the Nazis] occupied an area, [they] began identifying and confiscating assets, creating what has been called a ‘plundering bureaucracy’ for art and cultural property[.]” noting that “in Poland Nazis stripped the Catholic Church of most of its regalia and treasure”).

<sup>54</sup> Sania Zgonjanin, *The Prosecution of War Crimes for the Destruction of Libraries and Archives During Times of Armed Conflict*, 40 LIBR. & CULTURE 128, 134-35 (2005).

<sup>55</sup> Michelle I. Turner, Note, *The Innocent Buyer of Art Looted During World War II*, 32 VAND. J. TRANSNAT'L L. 1511, 1531 (1999) (noting that at the Nuremberg trials, the Tribunal declared that the Hague Convention had become customary international law); see also Formulation of the Nürnberg Principles, G.A. Res. 177(II), at 374-78, U.N. Doc. A/CN.4/L.2 (1950), available at [http://untreaty.un.org/ilc/documentation/english/a\\_cn4\\_l2.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_l2.pdf) (April 12, 1950) [hereinafter Adopted Nuremberg Principles] (codifying the concept of individual; providing in “Principle I” that “[a]ny person who commits an act which constitutes a crime under international law is responsible therefor[.] and liable to punishment.”).

charged *individuals*, rather than a State, for violations of international law.<sup>56</sup> Rosenberg's conviction arguably served as the necessary predicate to the development of museum-promulgated ethical guidelines dedicated to provenance research, as the conviction "established individual accountability" for the plundering of cultural property<sup>57</sup> and served as the predicate to the International Law Commission's formulation of "The Nurnberg Principles," which provided, among other things, that the "plunder of public or private property" constituted a war crime.<sup>58</sup>

Perhaps the approximately half-century gap between post-war awareness of the extent of looted art during the Holocaust and the implementation of ethical guidelines to address provenance issues emerging from this period is symptomatic of the practical limitations associated with post-war issues, including primarily the need to stimulate the devastated European economy.<sup>59</sup> U.S. efforts to properly chronicle and distribute looted assets in the post-war period were also thwarted by Allied troops' and displaced persons' confiscation of looted objects.<sup>60</sup> Consequently, the vast majority of families whose assets were stolen by the Nazis often lacked both the information and the resources to locate and pursue litigation to obtain stolen property.

Toward the close of the millennium, renewed efforts emerged on a global scale to address the collection and restitution of the assets of Holocaust victims.<sup>61</sup> Several factors likely prompted this renewed focus:

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<sup>56</sup> Sheri P. Rosenberg, *The Nuremberg Trials: A Reappraisal and Their Legacy*, 27 CARDOZO L. REV. 1549, 1550 (2006) (opining that "Nuremberg's greatest achievement was to pierce the sovereign veil; to make individuals responsible for crimes against humanity committed by the states they formerly ruled.").

<sup>57</sup> Turner, *supra* note 55, at 1531-32.

<sup>58</sup> Adopted Nuremberg Principles, *supra* note 55, at 377.

<sup>59</sup> See generally PCHA, PLUNDER AND RESTITUTION: FINDINGS AND RECOMMENDATIONS OF THE PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES AND STAFF REPORT, CHAPTER IV: ASSETS IN EUROPE (2000), Initial Activities Following the German Surrender, para. 4, available at <http://www.pcha.gov/PlunderRestitution.html/html/StaffChapter4.html> [hereinafter PCHA, CHAPTER IV] (noting that conditions in Austria during the post-war period were "abysmal. Business and industry were at a complete standstill: postal, telephone, and telegraph services had been cut off, train lines were inoperable, food and fuel were scarce, and the water supply was contaminated. Housing was in short supply.").

<sup>60</sup> See *id.* at Consolidation of Assets – Establishing Collecting Points, para. 3 ("In addition to their concerns about security, Allied leaders learned that in many cases artworks and cultural property were in danger of deterioration if left in the repositories in which they had been discovered.").

<sup>61</sup> PCHA, PLUNDER AND RESTITUTION: FINDINGS AND RECOMMENDATIONS OF THE PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES AND STAFF REPORT, APPENDIX D (2000), available at <http://www.pcha.gov/PlunderRestitution.html/html/AppendixD.html> (listing countries and commissions addressing Holocaust victims' assets).

“the intransigence of Swiss banks, the activities of European insurance companies, the recognition of the experiences of slave and forced laborers, the fall of communism and the commitment to democratic and open societies in formerly communist countries.”<sup>62</sup> The United States emerged as a leader in these efforts with the passage of three federal laws addressing Holocaust restitution in 1998, in addition to involvement in non-binding conferences.<sup>63</sup> The United States Holocaust Assets Commission Act of 1998 in particular merits mention here for two main reasons: 1) the Act specifically addresses the affirmative commitment by the AAMD and the AAM to develop viable and accessible provenance research guidelines; and 2) unlike the guidelines promulgated for internal application within member-museums that are devoid of legal consequence or liability, the Act carries the imprimatur of the United States Congress.<sup>64</sup> In effect, the Act arguably serves to impart legitimacy onto the non-binding museum regulations, refuting any claims that their extra-legal nature materially detracts from their impact on case law and otherwise.

The Presidential Advisory Commission on Holocaust Assets in the United States was created by Public Law 105-186, and passed with unanimous bipartisan support in the United States Congress.<sup>65</sup> The Act was signed into law by President William Jefferson Clinton on June 23, 1998.<sup>66</sup> The Act created a 21-member commission whose main duties involved developing a thorough “historical record of the collection and disposition of the assets” of Holocaust victims in the event that the assets ever came into the “possession or control of the Federal government.”<sup>67</sup> Further, the Commission was also required to compile and review previously conducted research on the topic, and to ultimately prepare a final report to be submitted to the President and Congress that contained recommendations for “legislative, administrative, or other action.”<sup>68</sup> The

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<sup>62</sup> PCHA, PLUNDER AND RESTITUTION: FINDINGS AND RECOMMENDATIONS OF THE PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES AND STAFF REPORT, INTRODUCTION: THE HISTORICAL CONTEXT (2000), available at [http://www.pcha.gov/PlunderRestitution.html/html/Intro\\_HistoricalContext.html](http://www.pcha.gov/PlunderRestitution.html/html/Intro_HistoricalContext.html) [hereinafter PCHA INTRODUCTION HISTORICAL].

<sup>63</sup> The Washington Conference on Holocaust-Era Assets occurred in December 1998, and provided guidance and direction for the Commission’s work. This Conference is addressed at length in Part III.

<sup>64</sup> U.S. Holocaust Assets Commission Act, 22 U.S.C. § 1621 (1998) (approved again on December 2, 2008).

<sup>65</sup> See *id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* § 1621(a)-(b).

<sup>68</sup> *Id.* § 1621(d)(1)-(2).

Commission's role accomplished dual purposes: 1) Americans should be aware of how their government dealt with Holocaust-era looted art in conjunction with "the moral imperative to remember, and learn from, the darkest period in modern times"; and 2) providing potential assistance to Holocaust looted art claimants with the recovery of their stolen property.<sup>69</sup>

The Commission's work is valuable to the inquiry here because it provides thorough foundational research regarding post World War II U.S. restitution efforts, presents approximate statistics regarding the estimated restitution and value of cultural property in the United States (to be addressed *infra*), and reaffirms the American Association of Museum Directors' and American Association of Museums' affirmative commitment to developing viable, accessible standards for Holocaust-era provenance research.<sup>70</sup>

### III. THE MUSEUM GUIDELINES: STANDARDS GOVERNING THE PROVENANCE OF LOOTED HOLOCAUST-ERA CULTURAL PROPERTY

Museums serve as "responsible ethical stewards . . . of education" and the arts,<sup>71</sup> and play a dominant role in the preservation and protection of cultural heritage.<sup>72</sup> This role, bolstered formally by the United States

<sup>69</sup> PCHA, PLUNDER AND RESTITUTION: FINDINGS AND RECOMMENDATIONS OF THE PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES AND STAFF REPORT, INTRODUCTION: THE CREATION OF THE PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES (2000), available at [http://www.pcha.gov/PlunderRestitution.html/html/Intro\\_CreationCommission.html](http://www.pcha.gov/PlunderRestitution.html/html/Intro_CreationCommission.html).

<sup>70</sup> PCHA, PLUNDER AND RESTITUTION: FINDINGS AND RECOMMENDATIONS OF THE PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES AND STAFF REPORT, INTRODUCTION: THE COMMISSION'S WORK (2000), available at [http://www.pcha.gov/PlunderRestitution.html/html/Intro\\_CommissionWork.html](http://www.pcha.gov/PlunderRestitution.html/html/Intro_CommissionWork.html), at para. 6 ("[T]he Association of Art Museum Directors (AAMD) and the American Association of Museums (AAM) agreed that the museum community would affirm its commitment to a series of standards to govern provenance research about art from the Holocaust era, including full disclosure and publication of that research on the Internet in a central and accessible registry.").

<sup>71</sup> Online Digital Video: The Judah L. Magnes Museum: Cultural Property and Asset Repatriation (Edward Luby, 2007), available at [http://fora.tv/2007/04/22/Cultural\\_Property\\_and\\_Asset\\_Repatriation](http://fora.tv/2007/04/22/Cultural_Property_and_Asset_Repatriation) [hereinafter Luby]. For an example of how this sentiment is integrated into museum codes of ethics, see generally Am. Ass'n of Museums, *Code of Ethics for Museums* (2000), available at <http://www.aamus.org/museumresources/ethics/coe.cfm> (opining that the "stewardship of collections entails the highest public trust and carries with it the presumption of rightful ownership, permanence, care, documentation, accessibility, and responsible disposal").

<sup>72</sup> MARILYN E. PHELAN, *MUSEUM LAW: A GUIDE FOR OFFICERS, DIRECTORS AND COUNSEL* 1

Congress,<sup>73</sup> has evolved at rapid rate in the past two decades as a function of many legal-centered developments, which include: increased repatriation claims, the placement of museum collections on the Internet, the development of museum codes of ethics,<sup>74</sup> and the promulgation of guidelines addressing Nazi looted assets, among others. In sharp contrast to federal laws,<sup>75</sup> self-imposed regulations addressing the unlawful appropriation of objects during the Nazi era are not legally binding on museums.<sup>76</sup> Consequently, these regulations serve as mere guidelines. Irrespective of their legally unenforceable nature, these guidelines collectively provide necessary instruction for museums to navigate the myriad of legal doctrines and laws – which are often inconsistently applied – that govern Nazi art litigation. Further, because no single law governs the return of art confiscated by the Nazis during the Holocaust, it is fortunate that leading museum organizations in the United States and abroad have promulgated guidelines to aid museum employees in properly navigating provenance issues.<sup>77</sup>

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(Kalos Kapp Press ed. 2001) (1994) (“Museums serve as depositories of cultural property,” which “constitutes a fundamental part of the identity and dignity of a people.”).

<sup>73</sup> See, e.g., *id.* at 1 n.2 (citing 20 U.S.C. § 951(3) (2008)) (establishing the National Foundation on the Arts and the Humanities; declaring that an “[a]dvanced civilization must not limit its efforts to science and technology alone, but must give full value and support to the other great branches of scholarly and cultural activity in order to achieve a better understanding of the past, a better analysis of the present, and a better view to the future.”).

<sup>74</sup> *Id.* at iv, 460 (“In 1994, I authored the first edition of *Museum Law*. The law has evolved substantially since that date.”). See also Luby, *supra* note 70 (revealing that there has been a striking change in the last 20 years regarding the growing importance of the law in day-to-day museum activities).

<sup>75</sup> See, e.g., Federal False Claims Act, 31 U.S.C. § 3729 (2008).

<sup>76</sup> See, e.g., Press Release, U.S. Dept. of State, Washington Conference Principles on Nazi-Confiscated Art (Dec. 3, 1998), <http://www.state.gov/p/eur/rt/hlcst/122038.htm> [hereinafter Washington Principles] (“In developing a consensus on *non-binding* principles . . . .”) (emphasis added) (released in connection with the Washington Conference on Holocaust-Era Assets, Washington, D.C.).

<sup>77</sup> In addition to the guidelines promulgated by the American Association of Museums, the Association of Art Museum Directors, and at the Washington Conference, many other nations have taken proactive steps to develop museum-centered guidelines that focus on dealing with the spoliation of Jewish cultural property during the Holocaust. See Eizenstat Statement, *supra* note 11, at 10-11. Some of these resolutions are binding, unlike their United States counterparts. See THE DOCUMENTATION PROJECT, FEDERAL LAW ON CULTURAL VALUABLES DISPLACED TO THE U.S.S.R. AS A RESULT OF WORLD WAR II AND LOCATED ON THE TERRITORY OF THE RUSSIAN FEDERATION (1998), available at <http://docproj.loyola.edu/rlaw/r2.html>. For example, in 1998, Russia passed a federal law regulating cultural valuables displaced to the U.S.S.R. as a result of World War II. *Id.* The law explicitly provides that one of its fundamental goals is to “protect said valuables from misappropriation and prevent their illegal export . . . as well as their unlawful transfer. . . .” *Id.* In the United Kingdom, the National Museum Directors’ Conference established an organization to examine the issues pertaining to Jewish looted art during the World War II era, and developed a set of

### A. *The AAMD Guidelines*

Despite the fact that these regulations offer much-needed guidance to member-museums, these principles still occupy a precarious and somewhat unclear role in contemporary Holocaust art litigation.<sup>78</sup> Irrespective of this uncertain posture, the principles developed by the AAM, the AAMD, and the Washington Conference on Nazi Looted Assets reflect a reinvigorated movement to repatriate artwork that was looted by the Nazis during the Holocaust.

The AAMD is a New York-based membership organization that represents about 190 directors of major art museums in the United States, Canada, and Mexico.<sup>79</sup> Its self-described purpose is to

aid its members in establishing and maintaining the highest standards for themselves and for their institutions. AAMD serves as a forum for the exchange of information and for the exploration of ideas, as well as a voice to express the shared concerns and issues facing the art museum community today.<sup>80</sup>

In conjunction with this mission, the AAMD released in June 1998 the *Report of the AAMD Task Force on the Spoliation of Art During the Nazi/World War II Era 1933-1945*.<sup>81</sup> The guidelines provide specific, methodical guidance for museums addressing artwork of questionable provenance from the designated time period in six main areas: 1) research regarding existing collections; 2) future gifts, bequests, and purchases; 3) access to museum records; 4) discovery of unlawfully confiscated works of art; 5)

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principles and guidelines for its members. See NAT'L MUSEUM DIRS.' CONFERENCE, SPOILIATION OF WORKS OF ART DURING THE HOLOCAUST AND WORLD WAR II PERIOD, PROGRESS REPORT ON UK MUSEUMS' PROVENANCE RESEARCH FOR THE PERIOD 1933-1945 (1998), available at [http://www.nationalmuseums.org.uk/spoliation\\_statement.html](http://www.nationalmuseums.org.uk/spoliation_statement.html). For information on other nations that have promulgated codes, or instituted committees dedicated to this effort, see generally Int'l Council of Museums, *Spoliation of Jewish Cultural Property*, ICOM NEWS (2001), <http://icom.museum/spoliation.html> [hereinafter ICOM].

<sup>78</sup> Though the guidelines and Conference continue to gain attention on an international scale, they remain absent from case law.

<sup>79</sup> Association of Art Museum Directors: Members, <http://www.aamd.org/about/#Members> (last visited Mar. 3, 2010).

<sup>80</sup> Press Release, AAMD, Association of Art Museum Directors' 2008 State of North America's Art Museums Survey (Aug. 19, 2008), <http://www.aamd.org/newsroom/documents/2008SNAAMFINAL.pdf>.

<sup>81</sup> AAMD, REPORT OF THE AAMD TASK FORCE ON THE SPOILIATION OF ART DURING THE NAZI/WORLD WAR II ERA 1933-1945 (1998), available at <http://www.aamd.org/papers/guideln.php> [hereinafter AAMD, REPORT].

response to claims against the museum; and 6) incoming loans.<sup>82</sup> Further, the guidelines recognize the importance of fostering viable collaborative solutions that can be implemented on an international level, such as the development of provenance databases to facilitate the exchange of often-elusive provenance information.<sup>83</sup> Of particular import to the inquiry here is a section addressing claims filed against museums. This section advises the “prompt[] and thorough[]” review of illegal confiscation claims, proposes the resolution of matters in “an equitable, appropriate, and mutually agreeable manner,” and advises the use of mediation “wherever reasonably practical.”<sup>84</sup> Overall, the guidelines impart an activist stance that favors thorough research, access, and mediation.

In 2001, the AAMD Task Force issued an Addendum to its 1998 report.<sup>85</sup> The majority of the five-paragraph Addendum is a summary of the findings of the Presidential Advisory Commission on Holocaust Assets that convened in mid-December 2000.<sup>86</sup> The addendum is predicated on the notion that museums are committed to continuing in-depth provenance research on the items in their collections and disseminating that information abroad.<sup>87</sup> Unlike the prior guidelines devoted to the suggestion of procedural mechanisms for provenance research, the Addendum acknowledges the practical limitations – despite marked progress in collaborative provenance research – that could serve to impede research efforts.<sup>88</sup> The Addendum provides in pertinent part,

<sup>82</sup> *Id.*

<sup>83</sup> Many provenance databases have been created since 1998, including the Art Loss Register, a private database of stolen art and antiquities; the Museum Provenance list, available only by subscription; the Holocaust Art Restitution Project (HARP), located within the Klutznick Jewish Museum in Washington, D.C.; and the Central Registry of Information on Looted Cultural Property in the United Kingdom. For a more specific description of these databases, see generally Int'l Council of Museums, *Spoliation of Jewish Cultural Property* (2007), <http://icom.museum/spoliation.html#databases>. The development of provenance databases was not novel to the United States; other nations developed and utilized databases prior to the United States, including France, Hungary, and Italy, among others. See *id.* (listing databases maintained by other nations).

<sup>84</sup> AAMD, REPORT, *supra* note 81, at § II(E)(1)-(3).

<sup>85</sup> AAMD, ADDENDUM TO THE REPORT OF THE AAMD TASK FORCE ON THE SPOILIATION OF ART DURING THE NAZI/WORLD WAR II ERA, 1933-1945 (2001), available at <http://www.aamd.org/papers/guideln.php> [hereinafter AAMD, ADDENDUM].

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* (adopting the position that “[i]t should be the goal of member museums to make full disclosure of the results of their ongoing provenance research on those works of art in their collections created before 1946, transferred after 1932 and before 1946, and which were or could have been in continental Europe during that period, giving priority to European paintings and Judaica”).

<sup>88</sup> *Id.*

“[t]he Commission recognized that provenance research is difficult, expensive and time-consuming, often involving access to records that are hard or impossible to obtain, and that most museums lack the resources to accomplish this.”<sup>89</sup> The actual text of the one-sentence addendum professes that the goal of member museums should be full disclosure of provenance research from this era, and establishes an unofficial hierarchy that grants “priority to European paintings and Judaica.”<sup>90</sup> Essentially, the addendum serves as a reaffirmation of the AAMD’s previous commitment to provenance research, but provides a more centered focus.

AAMD guidelines have materialized into the development of practical, viable solutions to the coordination of provenance information. As a result of these and other similarly dedicated guidelines, as of May 2007, ten museums in the United States are actively working to publicize Nazi-era provenance information on their collections, and also to list works with questionable provenance during the World War II era for public review.<sup>91</sup> These museums include: Art Institute of Chicago, Cleveland Museum of Art, Harvard University Art Museums, J. Paul Getty Museum, Los Angeles County Museum of Art, Metropolitan Museum of Art, Museum of Modern Art (MoMA), Boston Museum of Fine Arts, National Gallery of Art, and the Seattle Art Museum.<sup>92</sup> As a result of the AAMD guidelines, affirmative steps have been taken to ensure that World War II era works of questionable provenance are exposed in an attempt to locate proper heirs, or to resolve gaps in provenance.<sup>93</sup>

The AAMD reaffirmed its commitment in 2007 to the completion of thorough research to ascertain whether artwork in member museums’ collections was stolen by the Nazis and not properly restituted.<sup>94</sup> The AAMD also reiterated that member museums value meticulous, timely responses to associated restitution inquiries.<sup>95</sup> The museum association also heralded the success of provenance research in the post-rule promulgation period, attributing much progress to the widespread accessibility of provenance research via the Internet.<sup>96</sup> Between the initial

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<sup>89</sup> *Id.*

<sup>90</sup> AAMD, ADDENDUM, *supra* note 85.

<sup>91</sup> See ICOM, *supra* note 77, at Individual Museums Provenance Research Projects, para. 5 (identifying ten compliant United States museums).

<sup>92</sup> *Id.*

<sup>93</sup> See *id.*

<sup>94</sup> See generally AAMD, ART MUSEUMS, *supra* note 1.

<sup>95</sup> See *id.* at 3.

<sup>96</sup> *Id.* at 2.

installation of the AAMD guidelines and July 2006, the association reported that 22 works in American museum collections were identified as Nazi-looted art that were not properly restituted.<sup>97</sup> All 22 cases have since been resolved via restitution or settlements.<sup>98</sup>

### B. *The AAM Guidelines*

The American Association of Museums is the only organization that represents all types of museums, museum professionals, and non-paid museum staff who work for and with museums.<sup>99</sup> At present, AAM “currently has 193 members, 40 emeritus, and 20 honorary members. The Association maintains a ceiling of 200 active members.”<sup>100</sup> AAM’s central mission is

to support its members in increasing the contribution of art museums to society . . . by establishing and maintaining the highest standards of professional practice; serving as forum for the exchange of information and ideas; acting as an advocate for its member art museums; and being a leader in shaping public discourse about the arts community and the role of art in society.<sup>101</sup>

Just as the AAMD developed ethical guidelines for museums to dictate the parameters of provenance research for suspected Nazi looted art, the AAM also promulgated regulations for its members to address the same purpose.<sup>102</sup> In 1999, the American Association of Museums Board of Directors approved the *Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era*.<sup>103</sup> The AAM guidelines address in notably greater detail acquisitions, loans, existing collections, research, the discovery of evidence of unlawfully appropriated objects, claims of ownership, fiduciary obligations, and the commitment of the AAM to the

<sup>97</sup> *Id.* at 1.

<sup>98</sup> *Id.*

<sup>99</sup> Association of Art Museum Directors: Mission Statement, <http://www.aamd.org/about/#Mission> (last visited Mar. 3, 2010).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> AAMD, REPORT, *supra* note 81; AAM, Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era, *available at* [http://www.aam-us.org/museumresources/ethics/nazi\\_guidelines.cfm](http://www.aam-us.org/museumresources/ethics/nazi_guidelines.cfm) (last visited Mar. 3, 2010) [hereinafter AAM, Guidelines].

<sup>103</sup> AAM, Guidelines, *supra* note 102.

identification and dissemination of Holocaust era looted art.<sup>104</sup> These guidelines are substantially similar to the AAMD guidelines, with the exception of one provision addressing the “equitable and appropriate resolution of claims,” which provides in paragraph 4(f) that “museums may elect to waive certain available defenses.”<sup>105</sup> The AAM echoes many of the same standards for provenance research elucidated by the AAMD, such as the case-by-case examination of each provenance issue, the development of a central database of looted objects from the Holocaust period, and the identification and discovery by individual museum members of unlawfully appropriated objects, among other goals.<sup>106</sup> However, where the AAMD uses permissive language to imply that the procedures are mere suggestions, the AAM guidelines opt to utilize more affirmative language and include legal undertones.<sup>107</sup> For example, the AAM overtly and explicitly specifies that the guidelines “should not be interpreted to place an undue burden on the ability of museums to achieve their missions.”<sup>108</sup> Further, the AAM dedicates an entire section of the ethical guidelines to the fiduciary obligations of museums in connection with Holocaust era provenance research and repatriation efforts.<sup>109</sup>

Following the promulgation of generalized guidelines, both the AAM and the AAMD convened with the members of the Presidential Advisory Commission on Holocaust Assets in the United States (“PCHAH”) to develop even more specific recommended procedures for the public dispersal of Nazi era provenance information.<sup>110</sup> The AAM *Recommended Procedures for Providing Information to the Public About Objects Transferred in Europe During the Nazi Era* represents the physical manifestation of their collaboration.<sup>111</sup> Though these guidelines affirmed familiar refrains, such as placing priority on European paintings and Judaica during this period and expanding online access to museum collection information, the

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at Guidelines § 4(f).

<sup>106</sup> See generally AAMD, REPORT, *supra* note 81; AAM, Guidelines, *supra* note 102.

<sup>107</sup> See, e.g., AAM, Guidelines, *supra* note 102, at General Principles, para. 2 (noting that “[w]hen faced with the possibility that an object in a museum’s custody might have been unlawfully appropriated . . . the museum’s responsibility to practice ethical stewardship is paramount”).

<sup>108</sup> *Id.* at General Principles, para. 8.

<sup>109</sup> See *id.* at Guidelines § 5.

<sup>110</sup> *Id.* at Introduction, para. 5.

<sup>111</sup> See AAM, AAM Recommended Procedures for Providing Information to the Public About Objects Transferred in Europe During the Nazi Era, available at <http://www.aam-us.org/museumresources/prov/procedures.cfm> (last visited Mar. 3, 2010).

recommended procedures grew in specificity.<sup>112</sup> For example, the guidelines elucidate 20 categories of object and provenance information to aid potential claimants in the identification of a potentially looted object.<sup>113</sup> Further, the AAM announced the creation of its Nazi-Era Provenance Internet Portal, designed to provide users the ability to search by the artist/maker, the nationality of the artist/maker, and the object type, among other characteristics.<sup>114</sup> As of December 2008, there are 27,280 objects from 162 participating museums listed in the Portal.<sup>115</sup> Additionally, the Portal maintains an updated list of museums without relevant objects in their collections.<sup>116</sup> Surprisingly, despite the non-binding nature of these and other related guidelines, 162 museums responded to the AAM's call for streamlined provenance research.<sup>117</sup>

### C. *The Washington Conference Principles*

Coinciding with the wave of Holocaust repatriation litigation, the Department of State convened the Washington Conference on Holocaust Era Assets in 1998.<sup>118</sup> Forty-four countries attended and adopted by consensus the Washington Principles on Nazi-Confiscated Art.<sup>119</sup> The AAMD asserts that their 1998 guidelines "formed the basis of the Washington Principles,"<sup>120</sup> which provide a framework for museums to systematically approach resolving issues related to Nazi confiscated art. This framework involves the identification artwork of questionable provenance from the World War II era, suggests the utilization of

<sup>112</sup> See, e.g., *id.* at Recommended Procedures § 1.

<sup>113</sup> *Id.* (providing comprehensive chart of recommended information, including the name of the artist/maker, the nationality of the artist/maker, life dates of the artist/maker, medium/materials used in work, among other descriptors).

<sup>114</sup> Nazi-Era Provenance Internet Portal Project, <http://www.nepip.org> (last visited Mar. 3, 2010) [hereinafter *Nazi-Era Provenance*].

<sup>115</sup> *Id.*

<sup>116</sup> Nazi-Era Provenance Internet Portal Project, Museums Holding No Relevant Objects, [http://www.nepip.org/public/info/nocov.cfm?menu\\_type=search](http://www.nepip.org/public/info/nocov.cfm?menu_type=search) (last visited Dec. 6, 2008).

<sup>117</sup> See *Nazi-Era Provenance*, *supra* note 114. In addition to its 162 member museums, the Portal actively solicits the aid of other museums to complement its growing database by providing ample participation information. See *id.*

<sup>118</sup> Edward O'Donnell, Special Envoy for Holocaust Issues (July 11, 2006) [http://www.claimscon.org/index.asp?url=news/board\\_07-11-06](http://www.claimscon.org/index.asp?url=news/board_07-11-06) (explaining that the role of the United States government is limited in specific cases because most claims filed in the United States generally have a claimant on one side and a private institution on the other).

<sup>119</sup> See *Washington Principles*, *supra* note 76.

<sup>120</sup> See *AAMD, ART MUSEUMS*, *supra* note 1, at 2.

heightened resources and involvement of additional personnel, proposes publicizing recovered confiscated art, recommends the creation of a “central registry” for recovered pieces, and encourages other nations to develop “national processes” to implement the principles.<sup>121</sup> Further, the Principles dictate that involved parties must strive for a “just and fair solution,” but that because these matters are often heavily fact-driven, the remedy for one claim may not apply to another.<sup>122</sup> Where the AAM and AAMD guidelines excel in the promulgation of specific, restitution-minded procedures, the Principles fail to provide specific guidance. As a practical guide for museums, the Principles falter on three main fronts: 1) the permissive nature of the language; 2) the lack of specificity in restitution procedures; and 3) though the guidelines encourage pre-War owners and heirs to “come forward and make known their claims,”<sup>123</sup> the procedures do not provide guidance in the event that litigation arises.<sup>124</sup> Like the AAM and AAMD, the Washington Principles affirmatively recommend alternative dispute resolution to resolve claims.<sup>125</sup> A statement released by the United States Department of State in 2007 clarified the true role of the guidelines, inadvertently accounting for the guidelines’ lack of specificity by explaining that

[f]rom our experience in the immediate post war period, we are aware that . . . it is quite possible for objective experts to come to quite different conclusions in any one case. The idea behind the Washington Principles *was not to establish a specific process* or mechanism to achieve the objective of returning art to rightful owners, but instead to provide guidelines that could be applied by all countries under their own national laws, procedures and practices.<sup>126</sup>

Irrespective of the Principles’ stated goals, they provided a necessary foundation for the mobilization of the museum industry in addressing cultural property claims from the Holocaust era. Because the Principles

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<sup>121</sup> Washington Principles, *supra* note 76.

<sup>122</sup> *Id.*

<sup>123</sup> *See id.*

<sup>124</sup> *See id.* The Principles appear to prefer “alternative dispute resolution mechanisms,” and fail to address formal litigation. *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> J. Christian Kennedy, Special Envoy for Holocaust Issues, Remarks on the Role of the United States Government in Art Restitution (Apr. 23, 2007) *available at* [http://germany.usembassy.gov/kennedy\\_speech.html](http://germany.usembassy.gov/kennedy_speech.html) (emphasis added).

were enterprising in scope in that the regulations requested compliance on an international level, the regulations served to sanction contemporary trends toward expedited repatriation efforts.<sup>127</sup> As a result of the Conference, similar sessions were convened on an international scale to promulgate similarly minded guidelines.<sup>128</sup>

The absence of an enforcement mechanism in the Washington Principles and other like-minded guidelines is not the result of poor drafting. Rather, because the United States government does not own and operate most museums in the country – only a few institutions are federally owned and operated – the government is “without leverage to force compliance.”<sup>129</sup> Consequently, the federal government occupies an undefined role in the art restitution process. The State Department asserts that the absence of an enforcement mechanism in the Washington Principles serves as an advantageous, rather than limiting, characteristic in that the lack of enforcement permits the guidelines to “assume[] a moral authority that is probably more effective than the threat of civil or criminal proceedings.”<sup>130</sup> This stance is arguably misguided, as it purports that a diminished reputation in the art world serves as a “punishment more far reaching . . . than most legal proceedings could ever hand down.”<sup>131</sup> This notion is defeated partially by the generalized language in the Principles that fosters the development of a highly subjective inquiry.<sup>132</sup> Irrespective of the State Department’s stance, the Principles remain a component of art restitution inquiries on an international scale,<sup>133</sup> suggesting that their non-binding nature does not adversely affect their potential influence on Holocaust era provenance research.

<sup>127</sup> See generally Washington Principles, *supra* note 76.

<sup>128</sup> See, e.g., ICOM, *supra* note 77, at Guidelines and Legislation (citing examples of regulations and conferences in the Czech Republic, Austria, Germany, and the Netherlands, among others).

<sup>129</sup> Kennedy, *supra* note 126 (comparing the United States’ situation to Europe, in which national governments often have full responsibility for the majority of museums).

<sup>130</sup> *Id.* (opining that “[t]he genius of the Washington Principles lies in the very characteristic for which they have been criticized – the lack of any specific enforcement mechanism.”).

<sup>131</sup> *Id.*

<sup>132</sup> For example, Guideline 5 provides in pertinent part that “[e]very effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.” Washington Principles, *supra* note 76. Because the guidelines are non-binding and acknowledge that in many instances, limited resources will stifle the museum’s ability to undergo complete provenance research, in any given case, a collector, buyer, or museum professional can allege that “every effort” was made to develop a complete provenance history. I argue instead that the fiduciary duties implicated, such as the duty of loyalty, operate more prominently to reduce or deter actions that do not comply effectively with the Washington Principles and other associated guidelines.

<sup>133</sup> See, e.g., John Mangan & Heath Gilmore, *Nazi Loot Claim Fuels Demand for Art’s Return*,

Many impediments exist to the proper implementation of these principles, such as the lack of time, funding, and training to properly address the task.<sup>134</sup> Despite these economic limitations, the AAMD guidelines, the AAM guidelines and Portal, and the Washington Conference Principles collectively represent the present affirmative effort to provide a viable mechanism to expedite repatriation claims and chronicle items of questionable provenance from the Holocaust era. Though the guidelines are the subject of ample congressional testimony<sup>135</sup> and news articles internationally, whether or not they have collectively impacted the decisions of the judiciary or the rate in which museums acquire Holocaust era art remains unclear.

#### IV. THE PROMULGATION OF ETHICAL GUIDELINES GENERATED MATERIAL CHANGES TO ASPECTS OF CULTURAL PROPERTY JURISPRUDENCE

Legislative pioneers in the area of Holocaust looted art restitution emphasize the interrelated nature of the AAMD guidelines, the AAM guidelines, and the Washington Conference Principles.<sup>136</sup> Some experts further solidify this connection, and argue that the Washington Principles “internationalized the AAMD [and AAM] principles.”<sup>137</sup> With 44

AGE, July 8, 2007, available at <http://www.theage.com.au/news/national/nazi-loot-claim-fuels-demand-for-arts-return/2007/07/07/1183351523703.html> (revealing that Australia respects and cites the Washington Conference Principles; providing in pertinent part that “[u]nder the Washington Conference Principles on Nazi-Confiscated Art, we will request a conclave of experts with balanced membership to assess our claim. If the gallery won’t agree to that request, then litigation would be a last resort.”).

<sup>134</sup> AAM, Guidelines, *supra* note 102, at Existing Collections, para. 1 (“Recognizing that resources available for the often lengthy and arduous process of provenance research are limited, museums should establish priorities, taking into consideration available resources and the nature of their collections.”).

<sup>135</sup> See, e.g., *Review of the Repatriation of Holocaust Art Assets in the United States: Hearing Before the Subcomm. on Domestic and Int’l Monetary Policy, Trade and Tech. of the H. Comm. on Fin. Services*, 109th Cong. 13–15 (2006) (statement of Gideon Taylor, Executive Vice President, Conference on Jewish Material Claims Against Germany) (directly citing the Principles as well as their content, importance, and scope).

<sup>136</sup> See, e.g., Stuart E. Eizenstat, who served as Commissioner of PCHA during the Clinton administration.

<sup>137</sup> Eizenstat Statement, *supra* note 11, at 11. This effort was not without much struggle, however. Signatory nations expressed considerable trepidation regarding preliminary drafts of the Washington Principles because these nations did not wish to adhere to American law. See Eizenstat Prepared, *supra* note 15, at 108–10. After Eizenstat and others offered to include language specifying that member nations can follow the procedures in accordance with their laws, many European nations acquiesced and signed off on the Principles. See *id.* at 110 (describing the modifications made to the Washington Principles in order to coalesce major European nations into signing the Principles).

signatory countries, the Washington Principles effectively and significantly altered the manner in which the art world conducted business by imposing stringent provenance research requirements on member-museums.<sup>138</sup> United States museums on the whole have proactively taken steps to observe these guidelines.<sup>139</sup> As a result of this transformation, a reinvigorated focus on the repatriation of Nazi looted art emerged in the late 1990s.<sup>140</sup> That the implementation of ethical regulations had a marked impact is indisputable; however, whether the guidelines materially impacted cultural property litigation of objects from this period is not as readily observable. This note submits that the promulgation and implementation of the aforementioned guidelines generated four demonstrable effects – discussed in turn *infra* – all of which materially affected the litigation of Holocaust looted art in the United States. Further, this note argues that irrespective of experts' claims that provenance research efforts are losing momentum,<sup>141</sup> the legal precedent established in the post-promulgation period has served to lay the proper foundation for increasing the viability of claimant recovery, though certain obstacles remain.

A. *Holocaust Looted Art Claims are Arising in the Post-Promulgation Period with Greater Frequency than Pre-Promulgation*

The development of the AAMD guidelines, the AAM guidelines, and the Washington Principles collectively stressed not only the completion of

<sup>138</sup> Ambassador J.D. Bindenagel, Former U.S. Special Envoy for Holocaust Issues, Remarks at the Holocaust Era Assets Conference: *Washington Principles on Nazi-confiscated Art: Ten Years and Promises of the Washington Principles*, at The Washington Principles, para. 2 (June 26-30, 2009), available at <http://www.commartrecovery.org/docs/bindenagel.pdf> (noting that as a result of the Washington Principles, "The art world will never be the same"); *Id.* at 5-6 (noting that "[f]ollowing the Washington Conference[,] an international consensus for consistent and efficient resolution developed.").

<sup>139</sup> See, e.g., *id.* at 11 (noting that some United States museums have engaged in the practice of preemptively suing potential claimants before the claimants have filed suit to recover the art in an effort to avoid statute of limitations bars to claimants' recovery, among other impediments to recovery); see also MoMA.org, Provenance Research Project, <http://www.moma.org/explore/collection/provenance/> (last visited Mar. 10, 2010) (explaining that the museum has published a "List of Works" to further the efforts of the AAM, as the museum "owns approximately 600 paintings created before 1946 and acquired after 1932, that were or could have been in Continental Europe during the Nazi era.").

<sup>140</sup> See Bindenagel, *supra* note 138, at 3 (explaining that after the adoption of the Washington Principles, "we saw more positive action by nations on this issue in the last six months than at any time since 1950").

<sup>141</sup> See, e.g., Eizenstat Statement, *supra* note 11, at 10 (commenting that "[a] certain art restitution fatigue [seems to have] set-in, particularly in many foreign countries.").

thorough provenance research, but also placed a premium on information accessibility.<sup>142</sup> This concerted effort by AAM and AAMD members resulted in the multiplication of available resources for potential Holocaust looted art claimants by utilizing arguably the most accessible contemporary medium: the Internet.<sup>143</sup> This note submits that the limited amount of pre-regulation case law is a reflection of the lack of resources for potential claimants to locate art looted during the Holocaust. In the pre-regulation period, the questionable viability of potential claims was the product of two main impediments: 1) the manner in which the U.S. dealt with looted cultural property issues emphasized national autonomy, rather than individual autonomy;<sup>144</sup> and 2) the U.S.S.R. classified records that chronicled the provenance of looted objects.<sup>145</sup>

The influx of post-regulation claims is also arguably a reflection of how the United States dealt with cultural property claims in the period immediately following World War II. During this time, President Truman ordered that the looted objects be repatriated by the military and returned to their countries of origin.<sup>146</sup> According to then-prevailing international legal precedent, U.S. and British forces relied on the government of each sovereign nation to find and promptly return the cultural property to its true owners.<sup>147</sup> This procedure promoted individual national autonomy for the development repatriation procedures, rather than advocating for a victim-centered paradigm that favored the widespread sharing of provenance information.<sup>148</sup> Though

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<sup>142</sup> See AAMD, REPORT, *supra* note 81, at Statement of Principles § D; AAM, Guidelines, *supra* note 102, at Existing Collections; Washington Principles, *supra* note 76.

<sup>143</sup> See AAMD, AAMD Object Registry, <http://aamdobjectregistry.org/> (last visited Mar. 10, 2010) (online database providing information on AAMD members' collections; containing information detailing new acquisitions of archaeological material and works of ancient art, as well as information regarding the resolution of claims for Nazi-era cultural assets); see also Nazi-Era Provenance, *supra* note 114 (internal database providing a "searchable registry of objects in U.S. museum collections that changed hands in Continental Europe during the Nazi era (1933-1945)").

<sup>144</sup> See Eizenstat Prepared, *supra* note 15, at 106 (explaining that the U.S. returned looted art to "their countries of origin and relied on each government to trace the owners and ultimately return the stolen property.").

<sup>145</sup> Murphy, *supra* note 9, at 15 (noting that "[t]he earliest impetus for the current wave of claims was provided by the collapse of the Soviet Union" because the "Cold War prevented access to key records and documents concerning Nazi looting located in Eastern Bloc countries").

<sup>146</sup> See, e.g., Eizenstat Prepared, *supra* note 15, at 106 (explaining that the decision to require individual nations to provide for the return of the looted objects resulted in mixed success in France and in the U.S.S.R., among other nations).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

the U.S. government's decision to act in the former fashion certainly provides some practical advantages, such as the disbursement of provenance duties to the country that likely contains the requisite provenance information, considerable impediments to this sovereign-centered approach persist. For example, the true owners of the artwork in the post-World War II period perished in concentration camps or did not return to their country of origin.<sup>149</sup> Consequently, provenance efforts were doubly impeded because the country had to locate the refugee owners in addition to completing the necessary provenance research to discern the identity of the true owner. Further, because individual nations were charged with distributing the looted art, the extent and scope of the nation's provenance research efforts were left to the discretion of the nation.<sup>150</sup> Essentially, a country could disband provenance research at its pleasure, irrespective of whether all of the looted art was returned. This is precisely the scenario that evolved in France, where a commendable effort was initially put forth.<sup>151</sup> France collected more than 60,000 stolen pieces of artwork, of which 45,000 were returned to their owners.<sup>152</sup> However, only four years following Germany's surrender, the French disbanded the commission charged with returning the stolen pieces, resulting in 15,000 not restituted.<sup>153</sup> Two thousand works were placed in French museums, while the remainder were sold at auction.<sup>154</sup>

The decision of the U.S.S.R. to keep provenance records classified in the post-war period also served as a substantial barrier to the identification and return of looted artwork to owners. World War II plundering is commonly attributed to the Nazis; however, other powers were responsible for looting on a grand scale.<sup>155</sup> The Red Army was responsible for the seizure of property in the territories the Soviets controlled during World War II, but refused to provide access to archives that provided

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<sup>149</sup> See, e.g., Gwen Ackerman, *Nazi-Plundered Matisse, Seurat in Israel Museum Have No Owners*, BLOOMBERG.COM, May 1, 2008, <http://www.bloomberg.com/apps/news?pid=20601088&sid=a5noAhjEyF38&refer=home> (discussing Pnina Yakir's attempt to locate plundered art that belonged to her grandfather, who died in a German concentration camp); see also Rowland, *supra* note 12, at 3-5, (discussing how Marthan Natan, a Jewish woman from Germany who owned an important art collection, was forced to flee Germany).

<sup>150</sup> See *supra* notes 144-148 and accompanying text.

<sup>151</sup> See Eizenstat Prepared, *supra* note 15, at 106.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*; see also Murphy, *supra* note 9, at 15.

provenance information for these stolen objects.<sup>156</sup> The dissolution of the Soviet Union in 1991 resulted in the declassification of these documents, revealing archives kept secret for over five decades.<sup>157</sup>

An assessment of the volume of Holocaust looted art claims before and after the promulgation of the museum guidelines reveals that claims for the return of cultural property appear to have increased significantly post-guideline implementation. This conclusion is bolstered by compiling data regarding the number of lawsuits filed or disputes settled both prior to and following guideline implementation. For the purposes of this inquiry, claims filed and adjudicated prior to 1998 constitute pre-regulation claims, whereas claims filed from 1998 to the present constitute post-implementation claims.<sup>158</sup> However, this evaluation requires a notable caveat: because provenance issues do not require resolution in a formal legal forum, the number of private settlements in either period cannot effectively be factored into this assessment.<sup>159</sup> In the pre-regulation period, approximately 11 cases and disputes were filed and/or settled.<sup>160</sup> Since the application of the AAMD and AAM guidelines, as well as the ratification of the Washington Principles, 34 settlements and/or litigation have been commenced or resolved as of April 2008.<sup>161</sup>

At first blush, the number of settlements and commenced litigation may appear insignificant in comparison to the number of looted art objects of questionable provenance from this period.<sup>162</sup> However, AAM

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<sup>156</sup> See Eizenstat Prepared, *supra* note 15, at 106.

<sup>157</sup> Press Release, The Cold War Museum, Cold War Museum Approved for Combined Federal Campaign Designation Number 7475 (July 26, 2000), available at <http://www.coldwar.org/education/press6.html> (explaining that the Cold War Museum is “dedicated to education, preservation, and research on the global, ideological, and political confrontations between East and West from the end of World War II to the dissolution of the Soviet Union”).

<sup>158</sup> See *supra* Part III (detailing the promulgation and adoption of the AAMD and AAM guidelines in 1998 and 1999; noting that the Washington Conference convened in 1998).

<sup>159</sup> See *Review of the Repatriation of Holocaust Art Assets in the United States: Hearing Before the Subcomm. on Domestic and Int'l Monetary Policy, Trade and Tech. of the H. Comm. on Fin. Services*, 109th Cong. 17 (2006) (statement of Edward H. Able, Jr., President and CEO, American Association of Museums) (revealing that discerning an actual figure of returned looted art cases is very difficult to assess due to the nature in which business was conducted prior to the 1970s via “handshake deals” that resulted in impregnable provenance gaps).

<sup>160</sup> See Constance Lowenthal, *An Annotated Checklist of Cases and Disputes Involving Art Wrongfully Taken During the Nazi Era and Its Aftermath*, 40 ALI-ABA 11 (1998). Of these 11 cases, scholars point to two – *Menzel v. List*, 298 N.Y.S.2d 979 (N.Y. 1969) and *Price v. U.S.*, 69 F.3d 46 (5th Cir. 1995) – as indicative of the principles of the litigation of the period.

<sup>161</sup> For a substantial list of these claims see Stephen W. Clark, *World War II Restitution Cases*, ALI-ABA Course of Study: Legal Issues in Museum Administration (Mar. 29-31, 2006).

<sup>162</sup> See Gail Russell Chaddock, *Art World Wary of New Rules*, CHRISTIAN SCI. MONITOR, Feb. 10,

officials assert that U.S. museums receive three to four ownership claims per year against their collections.<sup>163</sup> Further, other experts argue that museums underreport the number of claims they receive, and fail to disclose the amount of suspect art in their collections.<sup>164</sup> Irrespective of these claims, scholarship lends credence to the notion that Holocaust-era provenance claims and settlements are arising with greater frequency in the post-regulation era.<sup>165</sup>

The Washington Conference arguably served as the primary catalyst for increased Holocaust-era looted art litigation, as it is responsible for “chang[ing] the way in which the art world did business.”<sup>166</sup> The Principles’ repetitious emphasis on the completion of stringent, thorough provenance research that is readily accessible via the Internet propelled the development of a novel “psychology” that reflects this innovative and multi-faceted focus.<sup>167</sup> The practical impact of these non-binding principles, as addressed in Part III *supra*, rests in the fact that they provided both international attention<sup>168</sup> and legitimacy to the return of Nazi-looted art.<sup>169</sup> This impact is visible via chronicling the increased amount of settlements and claims in the post-implementation period, as noted above.

Holocaust-era looted art also gained visibility via a test case brought in 1998 that still has yet to be fully resolved.<sup>170</sup> The action involved two

1998, available at <http://www.csmonitor.com/1998/0210/021098.feart.arts.1.html?s=wided> (“Experts say that as much as a fifth of the world’s Western art changed hands during World War II, and some of it is still working its way through commercial markets or is already in museum collections.”).

<sup>163</sup> April Austin, *Complex Justice in a Nazi-Looting Case*, CHRISTIAN SCI. MONITOR, Nov. 1, 2006, available at <http://www.csmonitor.com/2006/1101/p15s02-alar.html>.

<sup>164</sup> *Id.* (explaining journalist Hector Feliciano’s position that museums underreport provenance claims).

<sup>165</sup> See Murphy, *supra* note 9, at 15-16 (noting that since 1995, “[m]ore of these [looted art] claims are now being brought than ever before”; noting that this rise in claims is due in part to the “skyrocketing art market”).

<sup>166</sup> See, e.g., Eizenstat Statement, *supra* note 11, at 11.

<sup>167</sup> Eizenstat Prepared, *supra* note 15, at 110-11 (quoting Philippe de Montebello, the long-time director of the Metropolitan Museum of Art in New York).

<sup>168</sup> See Randy Dotiga, *US Lawsuits Pursue Lost Art*, CHRISTIAN SCI. MONITOR, July 5, 2005, available at <http://www.csmonitor.com/2005/0705/p03s01-alar.html?s=wided> (“In both the US and abroad, some museums have returned plundered artwork to their owners or their descendants, especially during in the 1990s when art stolen during the Holocaust became a cause célèbre.”).

<sup>169</sup> See Eizenstat Prepared, *supra* note 15, at 107.

<sup>170</sup> The case first began in 1998 when the New York District Attorney’s Office issued a subpoena for the *Portrait of Wally* and *Dead City III* after the paintings had been on exhibit at the Museum of Modern Art. The Supreme Court of New York quashed the subpoena. *In re Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*, 677 N.Y.S.2d 872 (N.Y. Sup. Ct. 1998). The case has been ongoing ever since. In April 2002, the United States District Court for the Southern District of New York reversed its

paintings by Austrian artist Egon Schiele, *Portrait of Wally* and *Dead City III*, which were on loan from Austria's Leopold Foundation to New York's Museum of Modern Art for a special exhibition.<sup>171</sup> Though this case is of little practical use for future litigants, other than as an illustration of the outer limits of judicial activism, the litigation marked the first time that the "normally cozy ties among museums and dealers in the international art world" were tested, as it constituted the first time a civilian claim for a painting seized by the Nazis evolved into a criminal case.<sup>172</sup> The potential implications of this case at its inception were substantial: in the event that American prosecutors consistently intervened in private disputes over artwork ownership, it could become very difficult for U.S. museums to borrow art from international museums. Because the AAMD and AAM guidelines as well as the Washington Conference Principles were promulgated during this litigation, the aforementioned fear was arguably mitigated by virtue of museums' commitment to thorough and accessible provenance research designed to preemptively avoid ownership issues.

The development of ethical regulations in 1998 arguably impacted the frequency with which ownership claims for Nazi-looted art were brought because the guidelines mitigated a central impediment to the pursuit of these claims in the pre-promulgation period: the lack of centralized resources to locate, research, and obtain objects of questionable provenance. This assessment is confirmed via an evaluation of the volume of case law and settlements arising in the ten years post-regulation implementation versus the volume pre-implementation.

B. *In the Event that Ownership Claims Arise, Museums Favor Arbitration Methods over the Expense of Litigation in Concert with the Guidelines Promulgated by AAMD, AAM, and the Washington Conference*

The AAMD, AAM, and Washington Conference Principles all specifically contemplate and provide guidance to member museums in the

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previous dismissal and denied motions to dismiss the renewed action, and allowed the forfeiture action to proceed. Most recently, in 2009, the United States District Court for the Southern District of New York denied motions by all parties for summary judgment. *U.S. v. Portrait of Wally*, 663 F. Supp. 2d 232, 236-37 (S.D.N.Y. 2009).

<sup>171</sup> *In re Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*, 677 N.Y.S.2d 872 (N.Y. Sup. Ct. 1998) (quashing a subpoena issued by the New York District Attorney's Office for the two paintings after they had been on exhibit at the Museum of Modern Art from October 1997 through January 1998).

<sup>172</sup> See Eizenstat Prepared, *supra* note 15, at 107.

event that claims against the museum are asserted. In this situation, all three guidelines declare that the use of alternative dispute resolution mechanisms is preferred to litigation. The AAMD guidelines provide in pertinent part:

AAMD recommends that *member museums consider using mediation wherever reasonably practical* to help resolve claims regarding art illegally confiscated during the Nazi/World War II era and not restituted.<sup>173</sup>

The AAM guidelines explicitly echo this mediation-driven sentiment, and provide:

When appropriate and reasonably practical, *museums should seek methods other than litigation (such as mediation) to resolve claims* that an object was unlawfully appropriated during the Nazi era without subsequent restitution.<sup>174</sup>

The Washington Conference Principles replicate this position, and expand its application to international Conference signatories:

Nations are encouraged to develop national processes to implement these principles, *particularly as they relate to alternative dispute resolution mechanisms* for resolving ownership issues.<sup>175</sup>

An assessment of post rule promulgation litigation and settlements reveals that the common ground provided by the aforementioned guidelines is bolstered by the desire to avoid the expense of litigation and potential associated financial losses, as well as negative publicity.<sup>176</sup> This anti-litigation stance appeared to take hold immediately following the promulgation of the ethical guidelines. For example, in 1999, the J. Paul Getty Museum voluntarily returned a fragment of a marble statute of the god Mithra that, after provenance research, was determined to be stolen.<sup>177</sup> In that same year, the Berlin National Gallery returned a \$5

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<sup>173</sup> AAMD, REPORT, *supra* note 81, at Guidelines § (E)(3) (emphasis added).

<sup>174</sup> AAM, Guidelines, *supra* note 102, at Guidelines 4(e) (emphasis added).

<sup>175</sup> Washington Principles, *supra* note 76.

<sup>176</sup> See ROY S. KAUFMAN ET AL., ART LAW HANDBOOK 314 (Roy S. Kaufman ed., Aspen Law 2000).

<sup>177</sup> *Museum Sending Artworks to Italy; The J. Paul Getty Museum in Los Angeles has Determined the Pieces Were Stolen and is Returning Them*, ORLANDO SENTINEL, Feb. 7, 1999, at A14.

million Van Gogh drawing to Gerta Silberberg, the daughter-in-law of a German machine-tool magnate and Impressionist painting collector, after the drawing was revealed as stolen property.<sup>178</sup> Further, the guidelines stress that the success of alternative dispute resolution mechanisms is dependent partially, if not substantially, on the museum's commitment to providing thorough provenance research that is highly accessible to potential claimants.<sup>179</sup> Because Holocaust looted art litigation is subject to a myriad of technical defenses that operate to preclude recovery and an assessment on the merits, the individuals behind the development of the AAMD, AAM, and Washington Conference Principles advocated the use of mediation methods to avoid these practical impediments to recovery<sup>180</sup> and were motivated by the desire "to provide a modicum of justice to Holocaust victims and their heirs."<sup>181</sup>

At times, museums opt to retroactively implement the guidelines' preference for mediation. In *Rosenberg v. Seattle Art Museum*, the provenance of a Henri Matisse painting, *L'Odalisque*, was in controversy.<sup>182</sup> The painting disappeared from Rosenberg's collection in France during World War II, eventually was transported to a New York art gallery (owned by Knoedler & Co.),<sup>183</sup> and was subsequently sold to private buyers. The private buyers both made a bequest in their wills to the Seattle Art Museum, which took possession in 1991.<sup>184</sup> In 1997, the Rosenberg heirs located the Matisse painting and contacted the museum, but the museum refused to return the painting.<sup>185</sup> This decision was met

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<sup>178</sup> John Marks, *Doing the Right Thing: A Half-Century Later*, U.S. NEWS & WORLD REP., June 28, 1999, at 42.

<sup>179</sup> See AAMD REPORT, *supra* note 81, at Guidelines § (E)(3); AAM, Guidelines, *supra* note 102, at 4(e); Washington Principles, *supra* note 76.

<sup>180</sup> Eizenstat Statement, *supra* note 11, at 12 (stating that he wanted to "encourage American museums who litigate cases to do so on the merits rather than on technical defenses like the statute of limitations.").

<sup>181</sup> PCHA, PLUNDER AND RESTITUTION: FINDINGS AND RECOMMENDATIONS OF THE PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES AND STAFF REPORT, INTRODUCTION: OVERVIEW OF THE COMMISSION'S FINDINGS (2000), available at [http://www.pcha.gov/PlunderRestitution.html/html/Intro\\_CommissionFindings.html](http://www.pcha.gov/PlunderRestitution.html/html/Intro_CommissionFindings.html) [hereinafter PCHA, INTRODUCTION OVERVIEW].

<sup>182</sup> *Rosenberg v. Seattle Art Museum*, 42 F. Supp. 2d 1029 (W.D. Wash. 1999), *vacated*, 124 F. Supp. 2d 1207 (W.D. Wash. 2000). See generally Robin Updike, *SAM to Return Matisse Stolen During WWII*, SEATTLE TIMES, June 15, 1999, at A1 available at <http://community.seattletimes.nwsourc.com/archive/?date=19990615&slug=2966648> (describing the events leading up to and surrounding the *Rosenberg* case).

<sup>183</sup> *Rosenberg*, 42 F. Supp. 2d at 1031-32.

<sup>184</sup> *Id.* at 1032.

<sup>185</sup> See MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S

with much public criticism.<sup>186</sup> This resulted in the Rosenberg heirs filing suit.<sup>187</sup> During the litigation, the Holocaust Art Restitution Project conducted an investigation that confirmed the Nazis took the painting from the Rosenberg vault; the Seattle Art Museum subsequently agreed to return the painting to the Rosenberg heirs.<sup>188</sup> Additionally, an out-of-court settlement was reached between the Seattle Art Museum and the Knoedler, which provided in pertinent part that Knoedler agreed transfer to the Seattle museum “one or more works of art to be selected by the museum from Knoedler’s holdings, or the equivalent value in cash.”<sup>189</sup> Though the Seattle Art Museum eventually followed guideline mediation recommendations, the lawsuit generated negative publicity, which highlighted in part the museum’s alleged insistence that a lawsuit should have been instituted by the Rosenbergs to require return of the painting.<sup>190</sup>

Where museums faced with Nazi-looting claims become entangled in litigation (despite the guidelines’ suggestions to the contrary), often times the attempt to resolve these disputes illustrates the two main pitfalls of litigation for the art world: bad publicity and immense financial expense. For example, the *Portrait of Wally* debacle “jolted New York museums and lenders around the globe, with the . . . latter concerned about the extent to which their artwork would be protected while on exhibit in New York.”<sup>191</sup> Leading European museums publicized their lack of confidence in the American Exemption from Seizure laws at both the state and federal level

COURTS 223-24 (2003).

<sup>186</sup> See, e.g., Thomas R. Kline, *Resolving Stolen Art Theft Claims*, CONGRESS MONTHLY, Nov./Dec. 1999, available at <http://www.degenevieve.com/files/Resolving%20Stolen%20Art%20Theft%20Claims.pdf>. Kiesha Minyard, Comment, *Adding Tools to the Arsenal: Options for Restitution from the Intermediary Seller and Recovery for Good-Faith Possessors of Nazi-Looted Art*, 43 TEX. INT’L L.J. 115, 124 (2007).

<sup>187</sup> Updike, *supra* note 182, at A1.

<sup>188</sup> See *id.*

<sup>189</sup> Clark, *supra* note 161, at 544.

<sup>190</sup> Judith H. Dobrzynski, *Seattle Museum is Sued for a Looted Matisse*, N.Y. TIMES, Aug. 4, 1998, at E3, available at <http://www.nytimes.com/1998/08/04/arts/seattle-museum-is-sued-for-a-looted-matisse.html?scp=1&sq=seattle%20museum%20matisse&st=cse>.

<sup>191</sup> Alexander Kaplan, *The Need for Statutory Protection from Seizure for Art Exhibitions: The Egon Schiele Seizures and the Implications for Major Museum Exhibitions*, 7 J.L. & POL’Y 691, 695-96 (1999). See also Chaddock, *supra* note 162 (opining that “[t]he art world doesn’t like bad headlines. But it especially doesn’t like litigation, and the Schiele seizures are a lesson in how not to resolve such disputes, museum officials say.”). New York museums were not strangers to publicity fiascos in the pre-promulgation period. See KARL E. MEYER, *THE PLUNDERED PAST* (1973) 50-54 (discussing deaccessioning controversies that gained public attention in the 1920s and 1970s).

in a brief submitted to the New York Appellate Division.<sup>192</sup> Similarly, in *Republic of Austria v. Altmann*, plaintiff Maria Altmann was required to pay approximately \$350,000 for the lawsuit to proceed in Austria, a substantial financial expense to incur before any litigation commences.<sup>193</sup> The length and expense of Holocaust looted art litigation often creates what PCHA labels as “delays [that] are prejudicial” for survivor-claimants who “are generally in the last years of their lives.”<sup>194</sup> This was certainly the case for Maria Altmann, the lone surviving heir to the Klimt paintings at issue, who was eighty-four years of age at the time the lawsuit was filed in California.<sup>195</sup>

In addition to the AAMD’s desire to promote mediation, rather than litigation, as an outlet to resolve Holocaust looted art claims, post-promulgation settlements reflect a commitment to the observation of guidelines advocating the “amicable and often creative settlement of claims.”<sup>196</sup> The AAMD regulations provide in pertinent part:

If after working with the claimant to determine the provenance, a member museum should determine that a work of art in its collection was illegally confiscated during the Nazi/World War II era and not restituted, *the museum should offer to resolve the matter in an equitable, appropriate, and mutually agreeable manner.*<sup>197</sup>

This subsection operates in concert with the AAMD’s endorsement of a “process of reviewing, reporting, and researching the issue . . . which

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<sup>192</sup> Brief for The Museum of Modern Art-Albright-Knox Art Gallery et al. as Amici Curiae Supporting Respondents, *People v. Museum of Modern Art*, 719 N.E.2d 897 (1999) (No. 28012-98), 1999 WL 33660022 at \*5-6 (stating that “[t]he actions of the Manhattan District Attorney have shaken our confidence in the worth of the . . . laws. . . European museums require reassurance on this point, if they are to lend again to exhibitions in the United States.”).

<sup>193</sup> *Republic of Austria v. Altmann*, 541 U.S. 677, 684-85 (2004) (explaining that “Austrian court costs are proportional to the value of the recovery sought”; noting Altmann’s decision to dismiss the suit in Austria in favor of filing a claim in the United States to avoid Austrian pre-litigation court costs).

<sup>194</sup> See PCHA, *PLUNDER AND RESTITUTION: FINDINGS AND RECOMMENDATIONS OF THE PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES AND STAFF REPORT, FINDINGS: AGREEMENTS NEGOTIATED BY THE COMMISSION IN THE PUBLIC AND PRIVATE SECTORS* (2000), available at [http://www.pcha.gov/PlunderRestitution.html/html/Findings\\_Agreements.html](http://www.pcha.gov/PlunderRestitution.html/html/Findings_Agreements.html).

<sup>195</sup> See E. RANDOL SCHOENBERG, *THE HOUSE COMMITTEE ON BANKING AND FINANCIAL SERVICES, STOLEN BY AUSTRIA* (Feb. 4, 2000), <http://financialservices.house.gov/banking/21000blo.htm> (providing biographical information about Maria Altmann).

<sup>196</sup> See MERRYMAN ET AL, *supra* note 8, at 23.

<sup>197</sup> AAMD REPORT, *supra* note 81, at Guidelines § (E)(2) (emphasis added).

respects the dignity of all parties and the complexity of the issue.”<sup>198</sup> In essence, these two provisions instruct member-museums to develop amicable settlements that reflect the unique nature of the situation at bar. Settlements in the post-promulgation period adhere to the sentiment of these provisions. For example, the Wadsworth Athenaeum in Hartford, Connecticut and the Italian government settled a claim that centered on *The Bath of Bathsheba*, a painting by Jacopo Zucchi that was stolen from the Italian embassy during or immediately following World War II.<sup>199</sup> Although the settlement took 12 years to complete due to changes in the Italian government, both parties agreed that the painting would be returned to the Italian government in exchange for an extensive exhibition from the Galleria Nazionale to the Athenaeum.<sup>200</sup> The exhibition took place in 1998.<sup>201</sup> This settlement preserved both the goal of completing thorough provenance research and conceding these pieces to true owners when found to be stolen, as well as the greater goal of retaining this artwork in a publicly accessible forum so that society at large can enjoy the works.

A common post-regulation alternative dispute resolution mechanism outlet involves the payment by the museum to true heirs to the artwork in exchange for the heirs’ donation of their interest in the artwork to the museum.<sup>202</sup> The Museum of Fine Arts in Boston followed this popular paradigm when it paid the heirs of Gentili di Giuseppe for a partial interest of a painting entitled *Adoration of the Magi*.<sup>203</sup>

Other parties opt to fashion unique, novel settlements to accommodate all involved parties’ interests. For example, in October 2001, Eric Weinmann and other heirs contested the ownership of a painting entitled *Le Grand Pont*.<sup>204</sup> At the time of the dispute, the painting was on display at the Yale University Art Gallery as a result of a loan from a private donor, a former Nazi Party member.<sup>205</sup> Instead of observing the common pattern of paying the heirs in exchange for an interest in the painting, here, the settlement provided that the private owner donate his entire ownership interest in the painting to Yale, which will in turn loan

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<sup>198</sup> *Id.* at Statement of Principles § (E).

<sup>199</sup> See Clark, *supra* note 161, at 543.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> See, e.g., *id.* at 544 (detailing how Museum of Fine Arts in Boston paid heirs of former art owner for a partial interest in a painting).

<sup>203</sup> *Id.*

<sup>204</sup> Clark, *supra* note 161, at 545.

<sup>205</sup> *Id.* at 545-46.

the painting to Mr. Weinmann for a maximum of ten years.<sup>206</sup> Following the termination of the loan period, the picture will return to Yale indefinitely.<sup>207</sup>

On the whole, museums have opted to follow the AAMD, AAM, and Washington Conference Principle guidelines that strongly advise the use of alternative dispute mechanisms in lieu of litigation. As a result, limited museum resources are safeguarded, and the expense of litigation and often accompanying bad publicity are avoided. The point of instituting lawsuits, one American lawyer asserts, “is to generate pressure [so] that these people come back to the bargaining table.”<sup>208</sup>

### C. Court Decisions Constitute “Judicial Affirmation” of Washington Conference Principles

Considerable emphasis is placed on the fact that the guidelines promulgated by the AAMD, the AAM, and the Washington Conference are not legally binding.<sup>209</sup> However, the guidelines’ broad mandate that requires stringent, accessible provenance research to Holocaust survivors with displaced artwork arguably obtained judicial affirmation on the human rights level in *Republic of Austria v. Altmann*.<sup>210</sup> When coupled with the imprimatur of the 44 signatory nations, the Supreme Court’s decision in *Altmann* serves to foster additional legitimacy for the beliefs advanced in the Washington Principles; namely the desire to “effect the maximum measure of justice possible for the victims of Nazi crimes.”<sup>211</sup> In this fashion, *Altmann* illustrates “the ability of American courts to make a valuable contribution in achieving Holocaust-era justice.”<sup>212</sup> As a preliminary matter, it is important to note the highly unique nature of the facts in *Altmann*, which as a result, limits the scope of the Court’s holding. However, irrespective of this limitation, the case appears to reflect a clear

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<sup>206</sup> *Id.* at 546.

<sup>207</sup> *Id.*

<sup>208</sup> Dottinga, *supra* note 168 (stating that “[i]n both the US and abroad, some museums have returned plundered artwork to their owners or their descendants, especially during in the 1990s when art stolen during the Holocaust became a cause célèbre.”).

<sup>209</sup> Rowland, *supra* note 12, at 30 (noting that “[s]ome have called these principles ‘softlaw’ because they are morally based but are not enforceable in court”).

<sup>210</sup> See, e.g., Yonover, *supra* note 6, at 81, 95 (arguing that “if the Supreme Court upholds the opinions of the district and Ninth Circuit in *Altmann*, it would constitute a judicial affirmation of the principles set out in the Washington Conference”).

<sup>211</sup> PCHA, INTRODUCTION HISTORICAL, *supra* note 62, at para. 1.

<sup>212</sup> Yonover, *supra* note 6, at 95.

judicial position that favors the adjudication of Holocaust looted art claims when raised.

The United States Court of Appeals for the Ninth Circuit opinion in *Altmann* also reflected a cognizant awareness of the moral imperative to facilitate Holocaust survivors' opportunity to have their day in court via the manner in which the Court framed the issue before it as follows: "whether Austria would have been entitled to immunity for its alleged complicity in the pillaging and retention of treasured paintings from the home of a Jewish alien who was forced to flee for his life."<sup>213</sup> Maria Altmann even appealed to this human rights-driven argument by asking the Supreme Court to consider the issue of the retroactivity of the Federal Sovereign Immunities Act within a "historical backdrop" in which the United States made clear to Austria that Nazi-looted artwork should be returned to its rightful owners.<sup>214</sup>

The mandate of the AAMD, AAM, and Washington Conference Principles obtained further legitimacy in *Altmann* primarily because the case recognized the United States legal system's commitment to acknowledging the uniquely tragic context shrouding Holocaust-looted art claims and to providing an available forum for the adjudication of these disputes. Perhaps the mandate of the Washington Conference Principles will expand in the future, following the ten-year follow-up to the Conference, which occurred in late June 2009 in Prague and Terezin.<sup>215</sup>

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<sup>213</sup> *Altmann v. Republic of Austria*, 317 F.3d 954, 964 (9th Cir. 2002); see also Svetlana Shirinova, Comment, *Challenges to Establishing Jurisdiction Over Holocaust Era Claims in Federal Court*, 34 GOLDEN GATE U. L. REV. 159, 189-90 (2004) (arguing that the Ninth's Circuit's review of *Altmann's* case was "a morally correct decision based on improper legal grounds.").

<sup>214</sup> Brief for Respondent, *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) (No. 03-13) 2003 WL 23002713 at \*6-8 (detailing several pronouncements by the United States that put the Republic of Austria on notice that individual claims could be made for Nazi-looted property).

<sup>215</sup> Lootedart.com, The Central Registry of Information on Looted Cultural Property 1933-1945, <http://www.lootedart.com> (last visited Dec. 8, 2008) (explaining that "[t]he inter-governmental conference will focus on real estate, art, Judaica and education and will be held under the banner of the EU of which the Czech government will hold the Presidency next spring.").

D. *Where Lawsuits are Brought, Practical Limitations to Recovery Remain, Irrespective of the Presence and Observation of AAMD, AAM, and Washington Conference Principles*

Although the guidelines promulgated by the AAMD, AAM, and by Washington Conference attendees and subsequent case law appear to dilute some of the obstacles to looted art recovery, ultimately, many practical impediments persist. For example, the AAM guidelines recognize that “in order to achieve an equitable and appropriate resolution of claims, museums may elect to waive certain available defenses.”<sup>216</sup> However, because of the non-binding nature of this guideline, museums have the ability to invoke certain defenses, such as the statute of limitations tolling, which in many cases result in the disposal of the claim.<sup>217</sup> In the absence of an affirmative duty or binding obligation to waive such defenses, it is improbable museums will refrain from invoking them.

Additionally, some standing issues have been simplified in the post-promulgation period that have resulted in recovery where the plaintiff recognizes and implements Foreign Sovereign Immunities Act exceptions. For example, in *Cassirer v. Kingdom of Spain et al.*, the United States District Court for the Central District of California addressed the provenance of a Camille Pissaro painting that was allegedly extorted from its Jewish owner in 1939 as a condition to issuance of an exit visa.<sup>218</sup> In 2001, the original owner’s heir petitioned Spain’s then Minister of Education, Culture, and Sports for return of the painting.<sup>219</sup> The petition was denied, and a lawsuit was filed in July 2003 seeking recovery of the painting and a variety of other remedies.<sup>220</sup> Spain moved to dismiss on the basis of the Foreign Sovereign Immunities Act, alleging that the court lacked subject matter jurisdiction over the dispute, lacked personal

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<sup>216</sup> AAM, Guidelines, *supra* note 102, at 4(f) (available defenses include statute of limitations, among other defenses).

<sup>217</sup> See, e.g., Rowland, *supra* note 12, at 32-33 (describing how the Toledo Museum of Art and the Detroit Institute of Art “refused to waive their statute of limitations and laches defenses, . . . and asserted them as affirmative defenses”; noting that the federal court in Toledo found that the statute of limitations expired no later than four years after the Washington Conference in 1998, and that the federal court in Detroit found that the statute of limitations expired four years after the 1938 sale of the artworks at issue there).

<sup>218</sup> *Cassirer v. Kingdom of Spain et al.*, 461 F. Supp. 2d 1157, 1161 (C.D. Cal. 2006), *aff’d in part, rev’d in part*, 580 F.3d 1048 (9th Cir. 2009).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

jurisdiction, and improper venue.<sup>221</sup> Ultimately, the court held that the heir “alleged and supported with jurisdictional discovery a ‘non-frivolous’ claim that the expropriation exception to the [Act] applie[d].”<sup>222</sup> Consequently, subject matter jurisdiction was proper.<sup>223</sup> For the purposes of this inquiry, *Cassirer* stands for the proposition that some developments in the post-promulgation period have yielded increased odds of recovery for Holocaust looted art claimants.

However, many practical obstacles to recovery remain. First, though significant strides have been made to facilitate the completion of thorough, accessible provenance research of objects from this period, a severe lack of precision persists with respect to the number of artworks still not discovered and catalogued. Irrespective of the AAMD and the AAM’s fervent efforts to develop central Internet databases to chronicle this information, the sheer volume of unknown objects provides an obstacle to locating an object, much less recovering it. Additionally, though the United States operates accessible databases, this work is limited to objects found currently in United States museums. In the absence of a central international database that is accessible in all signatory nation’s languages, provenance efforts will ultimately remain incomplete. Further, proving that a good faith acquisition occurred is extremely difficult because of the time elapsed since the conclusion of World War II.

In the event that an out-of-court settlement proves unfruitful, many potential claimants lack the requisite resources to litigate the claim, as addressed *supra*. The potential time and corresponding expense of litigation is evident in recent case law. For example, in *United States v. Portrait of Wally*, the case proceeded for a number of years against two independent museums.<sup>224</sup> Similarly, in *United States v. One Oil Painting Entitled “Femme en Blanc” by Pablo Picasso*, extensive, multi-state litigation ensued after initial talks between the Holocaust victim’s heirs and a Los Angeles art dealer failed.<sup>225</sup> Eventually, the heirs received a \$6.5 million settlement only after the U.S. Attorney’s Office and a federal magistrate judge intervened.<sup>226</sup> Unlike national governments, which can employ diplomatic channels to facilitate the return of looted art, individual

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<sup>221</sup> *Id.* at 1161-62.

<sup>222</sup> *Id.* at 1178.

<sup>223</sup> *Cassirer*, 461 F. Supp. 2d at 1178.

<sup>224</sup> See Clark, *supra* note 161, at 550.

<sup>225</sup> *Id.* at 552.

<sup>226</sup> *Id.*

claimants must determine the best possible mode of recovery in the absence of expertise and subject to limited resources.<sup>227</sup>

Another obstacle to recovery in looted art litigation is the effective use of technical defenses to thwart a court's review of the case on the merits. Perhaps the most common technical defense employed is a good faith purchaser's statute of limitations defense,<sup>228</sup> which some scholars label the most significant hurdle in stolen art litigation.<sup>229</sup> Without a basis for tolling the statute of limitations or postponing the time of accrual of the cause of action, the vast majority of claims for the recovery of stolen art are time-barred. Further complicating the assessment of the viability of a statute of limitations defense are the differing laws of the countries involved in international stolen art transactions, which makes choice of law a central issue.<sup>230</sup> Many commentators suggest that the historical context of Holocaust looted art claims requires the permanent suspension of statute of limitations defenses.<sup>231</sup> This stance has been adopted in Germany.<sup>232</sup>

Even in the face of these practical limitations, however, commentators maintain that the United States remains the best forum for Holocaust survivors and heirs to recover looted art.<sup>233</sup> This assessment appears accurate, as the United States has emerged as a world leader in Holocaust looted art litigation via its enactment of state and federal laws addressing the subject, as well as its decision to convene multiple conferences devoted to expediting the looted art recovery process.<sup>234</sup> Further, approximately 70 percent of Washington Principles signatory nations have not completed *any* provenance research, or have completed research limited to a particular time frame, rather than from 1933-1945.<sup>235</sup> In Germany, for example, repeated requests by the government for

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<sup>227</sup> See *id.*

<sup>228</sup> Statute of limitations set "maximum time periods during which certain actions can be brought or rights enforced." BLACK'S LAW DICTIONARY 927 (6th ed. 1990).

<sup>229</sup> See KAUFMAN, *supra* note 176, at 286-87.

<sup>230</sup> *Id.* at 315-16.

<sup>231</sup> See Leon Symons, *No Time Limit For Art Claims*, JEWISH CHRONICLE, Dec. 18, 2008, available at <http://www.lootedart.com/news.php?r=NEFF2D178411> (revealing that "Germany has pledged there will be no time limit for descendants of Nazi victims to reclaim looted art.").

<sup>232</sup> *Id.*

<sup>233</sup> See Dotinga, *supra* note 168, (stating "[t]hat's where the US comes in. 'If you want to sue, you sue in this country'").

<sup>234</sup> See Eizenstat Prepared, *supra* note 15, at 116 ("While some American museums still have additional work to implement the Washington Principles, their progress is generally light years ahead of most other countries who were signatories of the Washington Principles.").

<sup>235</sup> *Id.* at 117.

provenance research have been entirely ignored by a majority of their museums.<sup>236</sup> In addition, there are no AAMD or AAM counterparts in other signatory nations to create “comprehensive standards to govern provenance research.”<sup>237</sup>

## V. CONCLUSION

The PCHA’s ultimate assessment of the Holocaust reflects the complex nature of the period, highlighting the moral and criminal implications of the period succinctly as follows: “[t]he Holocaust was an immeasurable human tragedy and a profound moral failure. It was also the greatest mass theft in history.”<sup>238</sup> By virtue of the promulgation of ethical guidelines, American member-museums occupy a central role in an effort to rectify the results of the premeditated and large-scale art looting conducted in large part by the Nazis. Despite the fact that the ethical guidelines are not binding and, as a result, non-compliance is without legal consequence, the promulgation of these principles has impacted the litigation and settlement of cultural property disputes from the World War II era in four main ways. First, extensive provenance research efforts and the development of an Internet database to provide accessibility to interested parties has likely played a vital role in increasing the frequency with which claims are instituted and settlements are filed. Second, adherence to the guidelines prompts a preference for the utilization of alternative dispute resolution mechanisms, rather than litigation, to solve Holocaust looted art disputes. Third, some commentators assert that the United States legal system’s role in the adjudication of looted art claims preserves an underlying human rights agenda propagated by the Washington Conference Principles, and echoed in the AAMD and AAM guidelines: it is “appropriate to provide a modicum of justice to Holocaust victims and their heirs.”<sup>239</sup> Finally, though the guidelines provide increased outlets to locate looted art

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<sup>236</sup> *Id.*; see also Symons, *supra* note 231 (explaining that less than half of the government-funded allotment for provenance research has been utilized, which in turn reveals that some museums are ignoring the process entirely).

<sup>237</sup> Eizenstat Prepared, *supra* note 15, at 118.

<sup>238</sup> PCHA, PLUNDER AND RESTITUTION: FINDINGS AND RECOMMENDATIONS OF THE PRESIDENTIAL ADVISORY COMM’N ON HOLOCAUST ASSETS IN THE UNITED STATES AND STAFF REPORT, CHAPTER I: THE HISTORY OF THE PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES AND ITS REPORT (2000), at Estimate of Assets in U.S. Possession or Control, para. 1, available at <http://www.pcha.gov/PlunderRestitution.html/html/StaffChapter1.html>.

<sup>239</sup> PCHA, INTRODUCTION OVERVIEW, *supra* note 181, at para. 8.

objects, they still do not sufficiently serve to mitigate common barriers to claimant recovery, such as statute of limitation defenses. Even in the face of these practical limitations, the United States remains the best forum for Holocaust survivors and heirs to recover looted art. Much of this success is attributable to the promulgation and implementation of the ethical guidelines devised by the AAMD, the AAM, and the Washington Conference attendees.

The former Commissioner of the Presidential Advisory Commission on Holocaust Assets aptly described the ironic nature of the Nazis' extensive looting campaign: "One of the Holocaust's greatest ironies is that its most malevolent perpetrators fancied themselves a new cultural elite."<sup>240</sup> In time, museum organizations responded affirmatively to this misguided characterization with the AAMD and AAM guidelines, as well as the Washington Principles. These guidelines represent a commendable, concentrated effort to rectify Nazi atrocities, and provide a viable avenue to obtain restitution for Holocaust survivors and their heirs.

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<sup>240</sup> Eizenstat Prepared, *supra* note 15, at 105.

