WORLD JEWISH RESTITUTION ORGANIZATION

REPORT CONCERNING CURRENT APPROACHES OF UNITED STATES MUSEUMS TO HOLOCAUST-ERA ART CLAIMS

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Executive Summary

The World Jewish Restitution Organization (WJRO) works toward the restitution of property seized during the Holocaust, including the restitution of art stolen by the Nazis. This report demonstrates that major U.S. museums have recently been asserting defenses, such as statute of limitations, to avoid resolving on the facts and merits claims by Holocaust victims and their heirs for the restitution of art looted by the Nazis. Use of these procedural defenses is an attempt to defeat claims for the restitution of art stolen by the Nazis by avoiding any adjudication of the substance of those claims.

This report includes an analysis of cases in federal courts in the United States, in which prominent U.S. museums (Toledo Museum of Art, Detroit Institute of Arts, Museum of Modern Art in New York, Museum of Fine Arts in Boston, and the Fred Jones Jr. Museum of Art at the University of Oklahoma) have asserted these defenses. See Annex I entitled "Legal Analysis Concerning Current Approaches of United States Museums to Holocaust-Era Art Claims" prepared by the law firm of Dickstein Shapiro LLP. Furthermore, the American Alliance of Museums (AAM), the body that develops standards and best practices for the U.S. museum community, has declined to take steps to ensure that museums live up to the standards it has set that member institutions should respond to claims "openly, seriously, responsively, and with

respect for the dignity of all parties involved."[1] As the AAM has testified: "Each claim should be considered on its own merits."[2]

In addition, the overall aggressive litigation conduct of museums that have resorted to these strategies likely deters other Holocaust victims and their heirs from pursuing claims for restitution. The prospect of time-consuming and expensive litigation with museums that are now pursuing these procedural defenses creates a deterrent effect, reducing the likelihood of claimants coming forward with, and pursuing, bona fide claims for restitution against U.S. museums.

In our view, this report shows that a number of U.S. museums, by seeking to block adjudication on the facts and the merits of claims, are failing to live up to the spirit of international declarations regarding restitution of Holocaust-era assets and the "Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era" that were developed by the AAM. The AAM itself is unwilling to ensure that U.S. museums are meeting the goals of justice and fairness for claimants in accordance with international principles accepted by the United States.

Finally, the recent hostile approach of the U.S. museums towards claimants in fighting claims aggressively in the courts through technical defenses is completely contrary to the approach of a number of European countries such as the Netherlands[3] and Austria[4] which have

[1] Statement of Edward H. Able, Jr., President and CEO of the American Association of Museums (1986-2006), before the Subcommittee on Domestic and International Monetary Policy, Trade and Technology of the Committee on Financial Services, U.S. House of Representatives, July 27, 2006, http://archives.financialservices.house.gov/media/pdf/072706eha.pdf.

[2] Ibid.

[3] Information on the work of the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War of the Netherlands (in brief referred to as the Restitutions Committee) may be found at http://www.restitutiecommissie.nl/en

developed claimant-friendly approaches in response to the loss of art during the devastation of the Holocaust. Unlike in a number of other countries, the use by U.S. museums of these procedural defenses prevents adjudication on the facts and the merits of the case made by claimants.

The Washington Conference Principles

In 1998, the United States convened an important conference on Holocaust-era assets that was attended by 44 countries and resulted in a resolution known as the Washington Conference Principles on Nazi-Confiscated Art (the "Washington Conference Principles"). See Annex II. The purpose of the Washington Conference Principles was to "assist in resolving issues relating to Nazi-confiscated art." *Id.* Among other principles, the Washington Conference Principles provide that pre-Holocaust art owners and their heirs "should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis." *Id.* The principles emphasize the need to take steps and implement processes "expeditiously to achieve a just and fair solution" to ownership claims brought by Nazi victims and their heirs. *Id.*

The AAM Guidelines

In a statement of commitment to the restitution of art to Holocaust victims and their heirs, the American Alliance of Museums[5] (the "AAM") adopted *Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era* (approved in November 1999 and amended in

[4] See "The Austrian Art Restitution Law" summary at http://www.commartrecovery.org/sites/default/files/TheAustrianArtRestitutionLaw.pdf. Information on the work of the Austrian Commission for Provenance Research and the Advisory Board in the Federal Chancellery may be found at http://www.provenienzforschung.gv.at/index.aspx?ID=1&LID=2

[5] The American Alliance of Museums was, at the time, known as the American Association of Museums.

April 2001) (the "AAM Guidelines"). See Annex III. The AAM is "the one organization that supports all museums…by developing standards and best practices."[6] The adoption by the AAM of these guidelines came against the backdrop of the establishment of the Presidential Advisory Commission on Holocaust Assets in the United States (PCHA), established by the U.S. Holocaust Assets Commission Act of 1998 (P.L. 105-186), which

- Conducted research into and compiled a record of the fate of assets of Holocaust victims that came into the possession of the U.S. federal government.
- Reviewed research conducted by others regarding assets that came into private hands and non-federal government agencies.
- Advised President Bill Clinton on policies to be adopted through the report *Plunder and Restitution: The U.S. and Holocaust Victims' Assets, Findings and Recommendations of the Presidential Advisory Commission on Holocaust Assets in the United States and Staff Report*.[7]

The thrust of the AAM Guidelines is to promote the just and fair resolution of Holocaust-era restitution claims on the facts and merits. The Guidelines also "represent the standards under which the museum community operates in this area" and express the principle that "direct, respectful engagement between museums and claimants leads to the most rapid settlement of meritorious claims."[8]

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[6] http://www.aam-us.org/about-us

[7] The entirety of this report is available at http://govinfo.library.unt.edu/pcha/PlunderRestitution.html/html/Home_Contents.html

[8] Statement of Edward H. Able, Jr., President and CEO of the American Association of Museums (1986-2006), before the Subcommittee on Domestic and International Monetary Policy, Trade and Technology of the Committee on Financial Services, U.S. House of Representatives, July 27, 2006, http://archives.financialservices.house.gov/media/pdf/072706eha.pdf.

Among other commitments, the AAM Guidelines expressed a commitment, "[w]hen appropriate and reasonably practical," to use "methods other than litigation (such as mediation) to resolve claims that an object was unlawfully appropriated during the Nazi era." Annex III. In service of the objective of promoting just resolution on the facts and merits (and to discourage the use of technical defenses designed to avoid the substance of a claim for restitution), the AAM Guidelines also noted that museums "may elect to waive certain defenses." *Id.*

In testimony before a U.S. congressional hearing in 2006 concerning "Review of the Repatriation of Holocaust Art Assets in the United States," Edward H. Able, Jr., then President and CEO of the AAM, pointed to the AAM Guidelines as a demonstration of the AAM's "strong passion for, and commitment to, correcting the injustices to the victims of the Holocaust." Mr. Able went on to explain that, "if there is a possibility that the museum is holding an unlawfully appropriated Nazi-era object, it has a paramount responsibility to practice ethical stewardship." According to Mr. Able:

> It is the position of AAM that museums should address claims of ownership asserted in connection with objects in their custody openly, seriously, responsively, and with respect for the dignity of all parties involved. Each claim should be considered on its own merits. AAM acknowledges that museums may elect to waive available legal defenses, and the record shows that this is exactly what museums have done and continue to do when presented with meritorious claims. We strongly feel that direct, respectful engagement between museums and claimants leads to the most rapid settlement of meritorious claims with the least cost to both parties, and can think of no alternate system that would improve upon it.[9]

At that same congressional hearing, Stuart E. Eizenstat, former deputy Secretary of the Treasury and former Commissioner of the Presidential Advisory Commission on Holocaust

[9] Statement of Edward H. Able, Jr., President and CEO of the American Association of Museums (1986-2006), before the Subcommittee on Domestic and International Monetary Policy, Trade and Technology of the Committee on Financial Services, U.S. House of Representatives, July 27, 2006, http://archives.financialservices.house.gov/media/pdf/072706eha.pdf.

Assets in the United States, recommended that the congressional committee "encourage American museums [that] litigate cases to do so on the merits rather than on technical defenses like the statute of limitations."

After the Holocaust, survivors focused their attention on rebuilding their lives and their families rather than on seeking assets which had been lost. In addition, information regarding art work available to survivors of the Holocaust and their heirs "is often fragmentary or does not exist at all. Documents of ownership were lost in the turmoil of the Holocaust."[10] For these reasons, a broad consensus arose that institutions should not place procedural obstacles in the way of Holocaust survivors and their families when they sought the return of art that had been stolen during the Holocaust.

The AAM has been requested on a number of occasions to enforce its own guidelines but, when a lawsuit for the return of a piece of looted artwork has been filed, the AAM has indicated that it will not take any steps to review the matter. This was highlighted most recently in a letter sent by WJRO to the AAM on November 10, 2014, in reference to a claim regarding a Camille Pissarro painting at the Fred Jones, Jr. Museum at the University of Oklahoma. In this letter, Gideon Taylor, Chair of Operations for WJRO, writes:

> We believe that it is wholly inappropriate for the AAM to decline to carry out reviews in cases that involve objects unlawfully appropriated during the Nazi era simply because claimants seek to have their legal rights vindicated as is their legal and moral right. Museums are not entitled to ignore the Code of Ethics just because claimants pursue their claims using the legal venues that are open to them nor, we believe, should the AAM ignore its responsibility to ensure that its member museums uphold the standards and guidelines set by the museum profession itself.

[10] Statement of Gideon Taylor, Executive Vice President , Claims Conference and Treasurer, World Jewish Restitution Organization, before the Subcommittee on Domestic and International Monetary Policy, Trade and Technology of the Committee on Financial Services, U.S. House of Representatives, July 27, 2006, Committee Report from the Hearing "Review of Repatriation of Holocaust Art Assets in the United States" before the Subcommittee on Domestic and International Monetary Policy, Trade and Technology of the Committee on Financial Services of the U.S. House of Representatives, July 27, 2006 (http://financialservices.house.gov/media/pdf/072706gt.pdf)

See Annex IV.

In this letter, WJRO took particular note of the actions of the AAM Accreditation Commission on June 17, 2014, when the Commission "unanimously voted to remove the Delaware Art Museum's accredited status" as a result of the Delaware Art Museum "sell[ing] works from the collections for purposes other than acquisitions or direct care of collections. The action of the Delaware Art Museum is in direct violation of museum standards and ethics."[11] WJRO requested the AAM to ensure that the AAM Accreditation Commission should likewise consider the accreditation status of museums that violate museum standards and ethics on how they handle claims for looted art.

The Terezin Declaration

In 2009, 47 countries, including the United States, gathered to endorse the Terezin Declaration on Holocaust Era Assets and Related Issues (the "Terezin Declaration"), which re-affirmed the endorsing countries' commitment to resolving claims involving Nazi-appropriated art and returning the works to their rightful owners. See Annex V. In addition to endorsing the Washington Conference Principles, the Terezin Declaration encourages public and private institutions to apply those principles and work to "facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims." *Id.* (emphasis added)

[11] "Statement on the Deaccessioning by the Delaware Art Museum and the Action taken by the AAM Accreditation Commission" http://www.aam-us.org/about-us/media-room/2014/delaware-accreditation-status

The recent approach of the U.S. museums in challenging claimants on procedural grounds is precisely what the Terezin Declaration was seeking to avoid – a situation where the facts are not reviewed by an independent body and the merits are never determined.

Comparison with Other Countries

During and after World War II, the United States was the principal moral and actual leader in the restitution of art plundered by the Nazis and their allies. The United States continued this leadership in the negotiations leading to the Washington Conference Principles and the Terezin Declaration. Many of the major countries of Europe have followed the encouragement in the Washington Conference Principles to establish national processes for alternate dispute resolution mechanisms, most notably Austria, France, Germany, the Netherlands, and the United Kingdom. A recent review of the work of the relevant commissions may be found in the proceedings of a recent international symposium held in The Hague and published in 2015 under the title *Fair and just solutions? Alternatives to litigation in Nazi-looted art disputes: status quo and new developments*.[12]

Unfortunately, the United States museum community has not developed such a commission or other alternate dispute resolution mechanism in this field. As Douglas Davidson, the United States Special Envoy for Holocaust Issues from April 2010 to August 2014 has stated:

> The US government's approach to Holocaust-related disputes of all kinds has long been to favor dialogue and negotiation over litigation. This principle finds its echo in the encouragement in the Washington Principles of the establishment of national processes for alternate dispute resolution mechanisms. In the wake of the Washington Conference, a number of nations in Europe – not least the Kingdom of the Netherlands – took this encouragement to heart. They established their own national processes, generally in the form of advisory commissions or committees, to review claims for the return of art. They

[12] Available online at http://www.restitutiecommissie.nl/sites/default/files/Fair_and_Just_Solutions-web-compressed.pdf

> could do this in part because much of the art in question was held in national collections. Thus, for them, it was and is mainly an administrative, rather than a legal, matter to deal with claims for looted art. Unfortunately, the US has so far been unable to follow this lead.[13]

A review of the European and American experiences makes the following point:

> While the art commissions in each of the above discussed European countries vary in the way they handle Nazi looted art cases, they uniformly decide these cases on the merits based either on submissions from the parties or their own historical research. Thus, their decisions, whether binding or non-binding, are not subject to preclusion based on technical defenses such as statutes of limitations or laches. The result is that a neutral decision maker, the national art commission, makes its decision based on the historical record and thus gives both the museum and the claimant the possibility of a fair hearing. Contrary to the European approach, the United States has maintained that it is unique with respect to this issue, because unlike Europe, its museums are mostly private, although open to the public. Citing this difference the United States takes the position that claimants and museums should work out the issue of whether the art at stake is Nazi looted art and, if they cannot do so on their own, they should resolve the matter in the courts. However the fatal flaw to the US approach is the historical fact that all Nazi looted art cases arose in the Nazi period in Europe between 1933 and 1945. Therefore, in litigation, the deck is stacked against the claimant from the start, because in most cases the statute of limitations will have already run, or the claim will be barred by the equitable doctrine of laches (undue delay and prejudice).[14]

A comparison of the United States with all the other countries that endorsed the Terezin Declaration may be found in a report by the Claims Conference and WJRO published this past fall entitled *Holocaust-Era Looted Art: An Overview of Worldwide Progress*.[15]

The differing structures of museum ownership in the United States compared to European countries may explain the different historical approaches to this issue – it certainly does not

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[13] Ibid., page 100.

[14] "Nazi Looted Art Commissions After the 1998 Washington Conference: Comparing the European and American Experiences," paper presented by David J. Rowland to the New York County Lawyers Association's Panel *Should Stolen Holocaust Art Be Returned? Legal and Policy Perspectives and Recent Case Developments*, Thursday, March 21, 2013, page 5. See http://www.commartrecovery.org/sites/default/files/docs/resources/NaziLootedArtCommissions.pdf.

[15] http://art.claimscon.org/our-work/looted-art-report/

justify the failure of the AAM and the American museum community to establish a system that enables claims to be resolved fairly based on the merits of each case rather than being determined by the procedural legal obstacles that museums are now starting to place in the way of claimants.

Recommendations

This report, together with the WJRO's work in the field of art restitution, leads to the conclusion that certain prominent U.S. museums are not living up to their stated commitment to promote the just resolution of Holocaust-era restitution claims. As the United States District Court for the Central District of California noted in *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. CV 07-2866-JFW (JTLx) (C.D. Cal. Apr. 2, 2015), ECF No. 119:

> [T]hat there is nothing unfair about affording [Von Saher] an opportunity to pursue the merits of her claims against Norton Simon . . . museums are sophisticated entities that are well-equipped to trace the provenance of the fine art that they purchase. After carefully weighing the equities, the [California] Legislature determined that the importance of allowing victims of stolen art an opportunity to pursue their claims supersedes the hardship faced by museums and other sophisticated entities in defending against potentially stale ones. Plaintiff, whose family suffered terrible atrocities at the hands of the Nazis, will now have an opportunity to pursue the merits of her claims, and Norton Simon will have an opportunity to pursue any and all defenses to those claims.

In this vein, the WJRO makes the following three recommendations to promote merits-based resolutions of claims against U.S. museums for the return of artwork stolen by the Nazis:

- U.S. museums must be encouraged to live up to the spirit of the Washington Conference Principles, Terezin Declaration and AAM Guidelines by ceasing to assert defenses to Holocaust-era restitution claims that allow museums to evade adjudication of the facts and merits of such claims.

- To promote the resolution of claims on their facts and merits, the AAM should ensure that museums comply with the spirit of the Guidelines by abstaining from blocking claims on technical grounds. Museums that fail to do so should be subject to a review of their accreditation with the AAM.
- Legislation should be considered to extend statutes of limitations for Holocaust-era restitution claims and otherwise to promote the adjudication of such claims on the facts and merits.

Annexes

- Annex I: Legal Analysis Concerning Current Approaches of United States Museums to Holocaust-Era Art Claims
- Annex II: Washington Conference Principles on Nazi-Era Confiscated Art
- Annex III: Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era, American Alliance of Museums
- Annex IV: Letter from WJRO to AAM on November 10, 2014
- Annex V: Terezin Declaration on Holocaust Era Assets and Related Issues

Annex I

Legal Analysis Concerning Current Approaches of United States Museums to Holocaust-Era Art Claims

Legal Analysis Concerning Current Approaches of United States Museums to Holocaust-Era Art Claims

By: Eric B. Fisher, Colleen Kilfoyle, Woody N. Peterson
Dickstein Shapiro LLP

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During the Third Reich, the Nazis stole or otherwise misappropriated approximately 650,000 works of art,[16] a looting spree unmatched in history.[17] Returning this plundered art to its rightful owners – the victims of the Nazi regime and their heirs – began immediately after World War II, but the United States' direct involvement in the effort to return artwork to the countries from which it was plundered ended decades ago.[18] Today, nearly seventy years after the end of

[16] Jonathan Petropoulos, Professor, Dep't of History, Loyola Coll., Md., Art Looting During the Third Reich: An Overview with Recommendations for Further Research (Dec. 1, 1998), *in* Proceedings of the Washington Conference on Holocaust-Era Assets (1999), at 446, http://fcit.usf.edu/holocaust/resource/assets/heac4.pdf.

[17] Lynn H. Nicholas, Plenary Session on Nazi-Confiscated Art Issues (Dec. 1, 1998), *in* Proceedings of the Washington Conference on Holocaust-Era Assets (1999), at 449, http://fcit.usf.edu/holocaust/resource/assets/heac4.pdf; *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 957 (9th Cir. 2010) ("*Von Saher I*") ("During World War II, the Nazis stole hundreds of thousands of artworks from museums and private collections throughout Europe, in what has been termed the 'greatest displacement of art in human history.'" (citation omitted)).

[18] *Von Saher I*, 592 F.3d at 963. In 1945 at the Potsdam Conference, President Truman approved an external restitution process by which the United States returned Nazi-looted property recovered by Allied Forces to the property's country of origin. *Id.* at 961-63. The country of origin, in turn, would return the property to its rightful owner. *Id.* To implement this policy of external restitution, the United States Department of State established the Interdivisional Committee on Reparations, Restitution and Property Rights. Brief of the United States as Amicus Curiae at 2, *Von Saher v. Norton Simon Museum of Art at Pasadena*, 131 S. Ct. 3055 (2011) (No. 09-1254), 2011 WL 2134984, at *2. The Committee carried out the policy until September 1948, when the Committee stopped accepting claims for restitution. *Id.* at *3; *Von Saher I*, 592 F.3d at 963. The American Military Government, which occupied parts of Germany after the war, subsequently established the Jewish Restitution Successor Organization. This organization continued to administer restitution claims in parts of Germany until the 1970s. *See Jewish Restitution Successor Organization (JRSO)*, The Cent. Archives for the Hist. of the Jewish People Jerusalem (CAHJP), http://cahjp.huji.ac.il/content/jewish-restitution-successor-organization-jrso (last visited Apr. 14, 2015); *M1942 Records Concerning the Central Collecting Points ("Ardelia Hall Collection"):*

World War II, the task of reuniting artworks misappropriated by the Nazis with their rightful owners remains unfinished.[19] Unfortunately, as discussed in this article, it likely will remain unfinished unless disputes over the ownership of such art are decided on the merits by judges and juries on a full record, instead of being denied – without any discovery – based on defenses such as statutes of limitations that are unrelated to the underlying facts and merits of the claims.

In Part I of this article, we survey United States federal court decisions in cases involving efforts by Holocaust victims and their heirs to recover from U.S. museums art that was misappropriated by the Nazis and their collaborators. In the course of that review, we discuss the American Association of Museum Common Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era (the "American Museum Guidelines" or "Guidelines") that many of the museums that were parties to these litigations adopted.[20] By adopting these Guidelines, the museums agreed, at least in principle, that claims for restitution of art looted by the Nazis should be decided on the merits. However, examination of the court decisions confirms that museums in practice have consistently resorted to statute of limitations defenses and other tactical maneuvers to thwart resolution of restitution claims on the merits. As a result of these maneuvers, no United States museum has ever had to convince a court or a jury, on a full record, of the merits of the museum's claim that it is the rightful owner of stolen Nazi art, and no claimants have had the chance to prove to a judge or jury – again on a full record – that the art at issue in fact belongs to them.

Offenbach Archival Depot, 1946-1951 (U.S. Nat'l Archives & Records Admin. 2004), http://www.archives.gov/research/microfilm/m1942.pdf.

[19] Jennifer Anglim Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?*, 88 Or. L. Rev. 37, 38 (2009).

[20] *Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era*, Am. Alliance of Museums, http://www.aam-us.org/resources/ethics-standards-and-best-practices/collections-stewardship/objects-during-the-nazi-era (last visited Mar. 30, 2015).

In Part II, we analyze the 2010 and 2014 *Von Saher* decisions[21] by the United States Court of Appeals for the Ninth Circuit in California, as well as the Court's 2013 decision in *Cassirer*.[22] In its 2010 *Von Saher I* decision, the Ninth Circuit recognized that resolution of these Holocaust-era restitution claims was an integral part of the federal government's power to make and resolve war; and, on that basis, the Ninth Circuit ruled that the federal government's foreign affairs power under the United States Constitution preempted, and thus invalidated, a California statute aimed at opening the doors of California's courts to claims for the return of Nazi-looted art. The Court's subsequent decision in *Cassirer* found no federal preemption of a 2010 amendment to California's statute of limitations that was of more general applicability and not narrowly focused on claims for Holocaust-era restitution. In *Von Saher II*, the Ninth Circuit held that claims for restitution brought under general statutes of limitations are not barred by the federal foreign affairs doctrine. These three Ninth Circuit decisions, when read against the backdrop of the other cases analyzed in this article in which claims for restitution were denied under state law for reasons unrelated to their merits, suggest strongly that federal legislation is needed to ensure that court disputes with U.S. museums about Nazi-looted art are resolved on the facts and merits of each case.

PART I

This section reviews six of the seven court actions arising from disputes between victims of Nazi persecution or their heirs and U.S. museums for restitution of artworks looted during

[21] *Von Saher I*, 592 F.3d 954; *Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712 (9th Cir. 2014) ("*Von Saher II*"), *cert. denied*, 135 S. Ct. 1158 (2015).

[22] *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613 (9th Cir. 2013).

World War II the museums claimed were theirs.[23] The cases were brought either by victims against museums for return of property under state law, or by museums against victims or heirs to quiet title. In almost every case, museums asserted a statute of limitations defense under state law to successfully defeat the victims' claims.[24]

[23] The seventh action (the *Von Saher* case) is discussed in Part II. *See also Cases*, Commission for Art Recovery, http://www.commartrecovery.org/cases (last visited Apr. 17, 2015) (listing other restitution disputes, including those not involving U.S. museums).

[24] This article focuses on claims by victims involving recovery of artwork from U.S. museums. However, statute of limitations and laches defenses are commonly used in World War II-related restitution actions involving various parties. In fact, the defenses have been raised by four different foreign museums as well as private citizens, auction houses and galleries. *See, e.g.*, *Cassirer v. Thyssen-Bornemisza Collection Found.*, No. CV 05-03459 GAF (Ex), 2014 WL 5510996, at *7 (C.D. Cal. Oct. 31, 2014) (striking statute of limitations defense raised by museum); *In re Estate of Flamenbaum*, 22 N.Y.3d 962, 965-66 (2013) (rejecting laches defense so that it did not preclude German museum from seeking return of a golden tablet stolen during World War II); *de Csepel v. Republic of Hungary*, 714 F.3d 591, 603-04 (D.C. Cir. 2013) (rejecting museum's statute of limitations defense against bailment claim); *Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 576-79 (5th Cir. 2010) (Louisiana prescriptive period was not preempted by Terezin Declaration); *Bakalar v. Vavra*, 500 F. App'x 6, 8-9 (2d Cir. 2012) (laches defense served as basis for recognizing possessor's title to drawing purportedly looted by the Nazis); *Westfield v. Federal Republic of Germany*, No. 3:09-0204, 2009 WL 2356554, at *2 (M.D. Tenn. July 28, 2009) (German government raised statute of limitations defense against heir seeking damages for conversion of relative's artwork and tapestry by the Nazis); *Freund v. Republic of France*, 592 F. Supp. 2d 540, 551 (S.D.N.Y. 2008) (French government relied in part on statute of limitations defense in case involving confiscation of property, including artwork, during World War II), *aff'd on other grounds sub nom. Freund v. Societe Nationale des Chemins de fer Francais*, 391 F. App'x 939 (2d Cir. 2010); *Vineberg v. Bissonnette*, 548 F.3d 50, 57 (1st Cir. 2008) (affirming district court's rejection of laches defense because defendant failed to establish prejudice); *Peters v. Sotheby's Inc.*, 34 A.D.3d 29, 35-37 (2006) (claim by heirs of original artwork owner against auctioneer were barred, among other reasons, by statute of limitations and laches); *Adler v. Taylor*, No. CV 04-8472-RGK(FMOX), 2005 WL 4658511, at *4-5 (C.D. Cal. Feb. 2, 2005) (granting motion to dismiss as to conversion and replevin claims because claims were barred by statute of limitations), *aff'd sub nom. Orkin v. Taylor*, 487 F.3d 734 (9th Cir. 2007); *Alperin v. Vatican Bank*, 242 F. Supp. 2d 686, 689 (N.D. Cal. 2003) (religious order argued claims for conversion and unjust enrichment were barred by statute of limitations), *aff'd in part and rev'd in part on other grounds*, 410 F.3d 532 (9th Cir. 2005); *Rosner v. United States*, 231 F. Supp. 2d 1202, 1206 (S.D. Fla. 2002) (United States contended that statute of limitations defense defeated restitution claims, but court applied equitable tolling to determine that claim was not time-barred); *United States v. Portrait of Wally*, No. 99 Civ. 9940(MBM), 2002 WL 553532, at *21 (S.D.N.Y. Apr. 12, 2002) (foreign museum raised statute of limitations and laches defenses against forfeiture action, both of which were rejected by the court); *Wertheimer v. Cirker's Hayes Storage Warehouse Inc.*, Index No. 105575/00, 2001 WL 1657237, at *7-8 (N.Y. Sup. Ct. Sept. 28, 2001) (granting foreign museums' motion for summary judgment based on laches related to claim to recover art work that was stolen as its owner was removing the piece from Nazi-occupied Paris); *Warin v. Wildenstein & Co.*, Index No. 115143/99, 2001 WL 1117493, at *5-10 (N.Y. Sup. Ct. Sept. 4, 2001) (gallery raised defenses of statute of limitations and laches, but court denied gallery's motion to dismiss on those grounds), *aff'd*, 297 A.D.2d 214 (2002);

Statutes of limitations "fix[] a time beyond which the courts generally cannot entertain a cause of action, and the courts are ordinarily required to strictly apply such statutes."[25] Statutes of limitations serve to "compel the exercise of a right within a reasonable time so that the opposite party has a fair opportunity to defend while witnesses are available and the evidence is fresh in their minds."[26] Generally, the limitations period "reflects a value judgment concerning the point at which interests in favor of protecting valid claims are outweighed by interests in prohibiting the prosecution of stale ones."[27] They are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and the witnesses have disappeared."[28] As will be discussed more fully in this section, when it comes to the restitution of Nazi-looted art, many victims and their heirs are unable to bring claims for restitution within the short applicable state statute-of-limitations period, which usually spans two to four years, because of the unique challenges faced by claimants attempting to determine the provenance of art looted by the Nazis during the Holocaust.

A. *Toledo Museum of Art v. Ullin*

In *Toledo Museum of Art v. Ullin*,[29] the museum raised a statute of limitations defense under Ohio law in response to a claim brought by heirs who claimed that Paul Gauguin's "Street

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Menzel v. List, 49 Misc. 2d 300, 304-05 (Sup. Ct. 1966) (replevin claim was not barred by statute of limitations), *modified on other grounds*, 28 A.D.2d 516 (1967), *rev'd on other grounds*, 24 N.Y.2d 91 (1969).

[25] 54 C.J.S. *Limitations of Actions* § 2 (2015).

[26] Defense Against a Prima Facie Case § 1:14 (rev. ed.), *available at* Westlaw DAPFC.

[27] 54 C.J.S. *Limitations of Actions*, *supra* § 2.

[28] *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49 (1944).

[29] *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802 (N.D. Ohio 2006).

Scene in Tahiti" the museum had purchased in 1939 had been sold under Nazi duress in 1938.[30] Martha Nathan had inherited the painting in 1922 upon the death of her husband, Hugo Nathan, a prominent Frankfurt art dealer.[31] In 1937, Ms. Nathan left Germany to escape Nazi persecution and moved to Paris.[32] The Nazis forced her to turn over six artworks that had remained in her home in Germany, but these works did not include the Gauguin, which she had earlier sent to Switzerland.[33] She sold the Gaugin in 1938 to three art dealers. In 1939, Ms. Nathan moved to Switzerland. The Toledo Museum of Art purchased the painting in 1939 from one of the art dealers, and has displayed it ever since.[34]

In 2004, Ms. Nathan's heirs contacted the museum and told it that the painting belonged to them.[35] The museum rejected the claim and brought suit to determine title to the painting.[36] Ms. Nathan's heirs responded with counterclaims for conversion and restitution, and sought a declaratory judgment that they were the rightful owners of the painting.[37] The museum successfully moved to dismiss the counterclaims as time-barred under the applicable four-year Ohio statute of limitations, as no claim of ownership ever had been raised during the sixty-six years the painting had hung in the museum.[38]

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[30] *Id.* at 803.

[31] *Id.* at 804.

[32] *Id.*

[33] *Id.*

[34] *Id.* at 804-05.

[35] *Id.* at 805.

[36] *Id.*

[37] *Id.*

[38] *Id.* The court's description of the facts of the case reveals its skepticism about the merits of the heirs' claim. The court noted that, in contrast to other art that the Nazis took from Ms. Nathan, she had transferred "Street Scene in Tahiti" in a sale that "occurred outside Germany by and between private individuals who were familiar with each other." *Id.* According to the court, the painting was "not confiscated or looted by the Nazis; the sale was not at the direction of, nor did the proceeds benefit, the

In opposing the motion to dismiss, Ms. Nathan's heirs relied on the fact that the museum had adopted the American Museum Guidelines.[39] Under the Guidelines, a signatory museum agreed to identify every object in its collection (1) that the artist created before 1946 and the museum acquired after 1932, (2) which underwent a change in ownership between 1932 and 1946, and (3) which might reasonably be thought to have been in continental Europe during that time period.[40] The signatory museums also acknowledged that Nazi-looted art restitution claims should be decided on the merits.[41] To that end, the museums pledged that "[w]hen appropriate and reasonably practical" they would seek "methods other than litigation (such as mediation) to resolve claims that an object was unlawfully appropriated during the Nazi era without subsequent restitution" and stated that they "may elect to waive certain available defenses."[42]

According to the court, the "Guidelines were meant to address unlawful appropriation of cultural objects during the Nazi-era without restitution."[43] Pursuant to the Guidelines, the museum had posted the painting on its website, which led Ms. Nathan's heirs to contact the museum regarding the Gauguin painting in 2004.[44] The museum then investigated the painting's

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Nazi regime." *Id.* Later in its decision, the court sounded a further note of skepticism, observing that Ms. Nathan "pursued restitution and damages immediately after the war for property she lost as a result of Nazi persecution, but did not file a claim for the [Gauguin painting]." *Id.* at 807. Because the museum successfully defeated the heirs' claim on statute of limitations grounds, whether the court's skepticism was warranted was never decided.

[39] *Id.* at 808.

[40] *Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era*, Am. Alliance of Museums, http://www.aam-us.org/resources/ethics-standards-and-best-practices/collections-stewardship/objects-during-the-nazi-era (last visited Mar. 30, 2015).

[41] *Id.*

[42] *Id.*

[43] *Toledo Museum*, 477 F. Supp. 2d at 808.

[44] *Id.* at 808-09.

provenance[45] and concluded that the heirs did not have a meritorious claim to the painting, and told the heirs that in 2005.[46] The museum brought an action to quiet title on the painting, and the heirs counterclaimed. Thus, although the heirs did not litigate their claim to the painting until more than 66 years after the sale, they did file counterclaims to the museum's action within a year after the museum rejected the claim.

Ms. Nathan's heirs argued that the museum's posting of the painting on its website pursuant to the Guidelines was a general invitation to the public to make claims related to ownership of the artwork — and thus a waiver of any statute of limitations defense that the museum otherwise may have had.[47] In rejecting this argument and applying Ohio's four-year statute of limitations, the court emphasized that waiver requires the intentional and "voluntary relinquishment of a known right."[48]

The court agreed with the museum that the "Guidelines were not intended to create legal obligations or mandatory rules but rather were intended to 'facilitate the ability of museums to act ethically and legally as stewards' through 'serious efforts" on a 'case by case basis.'"[49] The court also expressed its view that, under the Guidelines, museums can, but do not have to, waive

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[45] *Id.* at 805. The "provenance" of an artwork is the historical record of its ownership. *Provenance Guide*, Int'l Found. for Art Res. (IFAR), https://ifar.org/provenance_guide.php (last visited Mar. 31, 2015). As the Guide notes:

> An ideal provenance history would provide a documentary record of owners' names; dates of ownership, and means of transference, ie.[sic] inheritance, or sale through a dealer or auction; and locations where the work was kept, from the time of its creation by the artist until the present day. Unfortunately, such complete, unbroken records of ownership are rare, and most works of art contain gaps in provenance.

Id.

[46] *Toledo Museum*, 477 F. Supp. 2d at 805.

[47] *Id.* at 808-09.

[48] *Id.* at 809.

[49] *Id.*

statute of limitations defenses "if and when presented with a meritorious claim" concerning art that was transferred during the Holocaust years.[50]

This last observation by the court demonstrates how toothless it found the Guidelines to be. As the court read the Guidelines, a museum *may* elect to waive certain defenses *if* the museum decides that the claimant has a valid claim to the art based upon the museum's own internal conclusions about the provenance of the artwork in its own collection. In other words, the museum itself, decides whether to act against its own self-interest by deciding to waive defenses related to claims to art that may have been unlawfully acquired during the Third Reich. The Guidelines do not put that decision in the hands of a neutral party or require museums to take steps to ensure that disputed claims are resolved by neutral parties, whether by arbitrators, judges or juries, on the merits. If all the Guidelines accomplish is to give museums the right to elect to waive defenses when and if the museums see fit, then the Guidelines are superfluous, because any litigant in any case can always elect to waive defenses.

Having found no waiver of the statute of limitations, the court held that Ms. Nathan's heirs' claims accrued when Ms. Nathan discovered or, in the exercise of reasonable care, should have discovered the complained-of injury.[51] According to the court, at the earliest, accrual occurred when Ms. Nathan filed other restitution claims after the war.[52] The court held that Ms. Nathan's heirs were imputed with her knowledge of the whereabouts of the painting, and their claim had long since expired.[53] Citing numerous congressional hearings on the return of Nazi-looted artwork beginning in 1998, even without imputing Ms. Nathan's knowledge of the

[50] *Id.* As noted *infra* Part I.B, every court that has analyzed the Guidelines has reached the same conclusion.

[51] *Id.* at 806-07.

[52] *Id.*

[53] *Id.* at 807.

painting's whereabouts to the heirs, the court noted that the heirs should have made inquiries into the painting well before 2002.[54]

B. *Detroit Institute of Arts v. Ullin*

Detroit Institute of Arts v. Ullin[55] involved claims to Vincent Van Gogh's "Les Becheurs (The Diggers)" (1889), made by the same heirs to the Nathan estate as in the *Toledo Museum* case.[56] Although the two cases were decided by different judges in different states under the differing laws of those states, the *Detroit Institute* decision employed largely the same reasoning as the *Toledo Museum* decision to reach the same result.

In *Detroit Institute*, the museum asserted that Michigan's three-year statute of limitations precluded the court or a jury from deciding the merits of the case. According to the museum, the claim was time-barred because it had accrued in 1938, when Ms. Nathan originally sold the paintings to the same European art dealers who purchased the Gaugin "Street Scene in Tahiti" painting at issue in the *Toledo Museum* case.[57] The court agreed with the museum that the claim had been filed too late and that the discovery rule, under which the clock on the claim would not have begun to tick until the heirs discovered or reasonably should have discovered the basis for their claims to the painting, did not apply.[58] That meant that Ms. Nathan would have had to

[54] *Id.* at 807-08.

[55] *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007).

[56] *Id.* at *1.

[57] *Id.* at *2-3.

[58] *Id.* at *3. The court noted that, even if the discovery rule applied, the claim would be untimely because, the executor of Ms. Nathan's estate filed claims in 1973 to make the estate whole for Ms. Nathan's wartime losses and, through the exercise of reasonable diligence, would have learned then that there was a possible claim to the painting. *Id.*

bring a claim against the museum no later than 1941, when World War II raged across Europe[59] and when Ms. Nathan could not have known that the museum had the painting.

The court in *Detroit Institute* also ruled, as the *Toledo Museum* court had, that by adopting the Guidelines the museum did not waive its right to assert a statute of limitations defense.[60] The court noted that the Guidelines on their face do not require museums to waive any defenses they have, and that the filing of the quiet title action confirmed that the museum did not "intention[ally] abandon . . . a known right."[61]

C. *Grosz v. Museum of Modern Art*

The *Grosz v. Museum of Modern Art*[62] decision is another example of a museum asserting a state law statute-of-limitations defense to defeat a lawsuit brought by an heir claiming that works of art had been confiscated by the Nazis. [63] In *Grosz*, heirs of the German painter George Grosz sought restitution of three of his works, "Hermann-Neisse with Cognac," "Self-Portrait with Model," and "Republican Automatons," held by the Museum of Modern Art ("MoMA").[64] Although Grosz was not Jewish, his heirs claimed that he was forced to flee Germany in 1933 because his art was strongly anti-totalitarian and deemed "degenerate" by the

[59] *Id.* Those claimants who have had the benefit of the discovery rule have not fared much better than the Nathan heirs. *See* Part I.D, *Museum of Fine Arts, Bos. v. Seger-Thomschitz*, 623 F.3d 1 (1st Cir. 2010), *aff'g* Civil Action No. 08-10097-RWZ, 2009 WL 6506658 (D. Mass. June 12, 2009).

[60] *Detroit Inst.*, 2007 WL 1016996, at *4.

[61] *Id.*

[62] *Grosz v. Museum of Modern Art*, 403 F. App'x 575 (2d Cir. 2010), *aff'g* 772 F. Supp. 2d 473 (S.D.N.Y. 2010).

[63] *Id.* at 576-77.

[64] *Id.*

Third Reich.[65] In 1938, the Nazis branded Grosz as an enemy of the state, revoked his citizenship, and confiscated his remaining assets in Germany.[66]

Before Grosz fled Germany, he consigned the three paintings to an art dealer.[67] After the dealer's death in 1937, the paintings were taken and sold by several art professionals who, Grosz's heirs allege, unscrupulously took advantage of the Third Reich's hatred of Grosz and profited from the paintings.[68] The details of the transfers are unclear, but the heirs contend that one of the paintings was transferred as part of a Nazi-art-laundering ring and another was stolen by an international art thief and Nazi agent.[69] MoMA eventually purchased all three paintings.[70]

In 1953, while he was living in New York, Grosz saw "Hermann-Neisse with Cognac" on display at MoMA. Grosz subsequently sent two letters to his brother-in-law about the painting. In the first, Grosz said, "Modern Museum exhibits a painting stolen from me (I am powerless against that) they bought it from someone, who stole it."[71] In the second, Grosz wrote, "Modern Museum bought a painting that was stolen from me . . . (one cannot do anything) old affair." Grosz never contacted the museum after seeing the painting, and died six years later.[72]

In 2003, Grosz's heirs sent a letter to MoMA demanding the return of the paintings.[73] The museum then hired researchers from Yale to investigate the paintings' provenance.[74] The

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[65] *Grosz*, 772 F. Supp. 2d 473, 476.

[66] *Id.*

[67] *Id.* at 477.

[68] *Id.*

[69] *Id.* at 477-79.

[70] *Id.* at 479-80.

[71] *Id.* at 481.

[72] *Id.* (alterations in original).

[73] *Id.*

[74] *Id.* at 484.

museum also retained outside counsel to review the researchers' provenance report and to provide an opinion on the validity of the heirs' claim and a recommendation as to how the museum should proceed.[75] MoMA's outside counsel ultimately concluded that the museum had no obligation to return the paintings.[76] In 2006, MoMA's board voted to accept counsel's recommendation that the museum keep the paintings.[77]

In 2005, almost two years after the demand letter was sent by Grosz's heirs, but before the board vote, MoMA sent a letter to the heirs advising them that it had concluded that it had superior rights to the artwork, but remained willing to resume looking into the matter if new evidence surfaced.[78] MoMA subsequently informed the heirs in a 2006 letter that the museum would not return the paintings.[79]

In 2009, before New York's three-year statute of limitations had run on the 2006 letter, Grosz's heirs brought an action against the museum for conversion, replevin, declaratory judgment, and constructive trust.[80] MoMA moved to dismiss the suit as time-barred. The district court held that the clock began to run on the heirs' claims in 2005 when MoMA was held to have rejected the heirs' demand to return the paintings, which meant that the heirs' failure to sue by 2008 was fatal to their claim.[81] In so ruling, the court rejected the heirs' contention that

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[75] *Id.*

[76] *Id.* at 484-85.

[77] Defendant the Museum of Modern Art's Memorandum of Law in Opposition to Plaintiffs' Motions "to Supplement the Record" and "To Reconsider, Reargue, Leave to Amend the Complaint and for Relief from Judgment", in Accordance with the Court's Order of January 22, 2010, *Grosz*, 772 F. Supp. 2d 473 (No. 09 Civ. 3706), ECF No. 70.

[78] *Grosz*, 772 F. Supp. 2d at 486-88.

[79] *Id.*

[80] *Id.*

[81] *Id.* at 489.

MoMA did not refuse their demand until it sent the 2006 letter.[82] In the court's view, the 2005 letter, coupled with the museum's continued retention of the art, constituted a refusal of the heirs' demand, despite the language in the 2005 letter suggesting that the museum was open to accepting new evidence relevant to the heirs' restitution claim.[83]

Nor did the district court agree with the heirs' contention that the statute of limitations was tolled by the years-long negotiations between the parties to resolve the restitution claim out of court.[84] The United States Court of Appeals for the Second Circuit affirmed the district court's dismissal of the claim as untimely.[85] As a result, the heirs were out of court before their claim for restitution was heard on the merits, before any discovery into MoMA's internal investigation, and without the investigation ever being evaluated by a neutral third party.

D. *Museum of Fine Arts, Boston v. Seger-Thomschitz*

The Museum of Fine Arts, Boston ("MFA") likewise avoided an adjudication of a restitution claim on the facts and merits by asserting a statute of limitations defense in *Museum of Fine Arts, Boston v. Seger-Thomschitz.*[86] The dispute there was over the ownership of the painting "Two Nudes (Lovers)" by Austrian painter Oskar Kokoschka, which Oskar Reichel, a Jewish doctor living in Vienna, originally owned.[87] In 1938, the Nazis annexed Austria, and later forced Reichel to close his business, give up his home and sell other property.[88]

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[82] *Id.*

[83] *Id.*

[84] *Id.* at 488-90.

[85] *Grosz*, 403 F. App'x, at 577.

[86] *Museum of Fine Arts, Bos. v. Seger-Thomschitz*, 623 F.3d 1 (1st Cir. 2010), *aff'g* Civil Action No. 08-10097-RWZ, 2009 WL 6506658 (D. Mass. June 12, 2009)

[87] *Id.* at 2-3.

[88] *Id.* at 3.

In 1939, before the forced sale, Reichel transferred the painting to an Austrian art dealer, Otto Kallir, then living in Paris.[89] The details of the transfer are sketchy, and it is not clear whether Reichel received any consideration for the painting.[90] Kallir later moved to New York and brought the painting with him.[91] The painting changed hands several times and was eventually donated to the MFA in 1973.[92]

In 2003, when the Museums of Vienna contacted Reichel's sole heir, Claudia Seger-Thomschitz, she learned that she potentially had rights to Reichel's art collection.[93] The museum wanted to return four works of art that the museum had determined Reichel "had to sell . . . due to his persecution as a Jew" under the Third Reich. These four paintings were sold "around the same time" that "Two Nudes (Lovers)" was sold and "under similar circumstances."[94]

The Museums of Vienna's letter prompted Ms. Seger-Thomschitz to investigate the possible restitution of other pieces from Reichel's collection, including the "Two Nudes (Lovers)" the MFA owned.[95] In 2006, Ms. Seger-Thomschitz retained United States counsel who sent a letter to the MFA in 2007 demanding that the MFA return the painting. The MFA undertook an extensive eighteen month investigation of the provenance of the artwork.[96] Unlike the Museums of Vienna, however, the MFA concluded that the transfer from Reichel to Kallir

[89] *Id.*

[90] *Id.* at 3-4.

[91] *Id.* at 4.

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.* at 5.

[96] *Id.*

was valid, decided to keep the painting, and in January 2008, rejected Ms. Seger-Thomschitz's demand for restitution.[97]

That same month, the museum brought suit in federal district court to quiet title to the painting and Ms. Seger-Thomschitz filed counterclaims for conversion, replevin, and other state law causes of action.[98] Rather than adjudicating the merits of the competing ownership claims, the MFA instead moved for summary judgment on state statute of limitations grounds.[99]

The district court held that Massachusetts' three-year statute of limitations barred Ms. Seger-Thomschitz's claims.[100] The court applied the Massachusetts discovery rule, under which the restitution claim accrued when the Reichel family and/or Ms. Seger-Thomschitz discovered or reasonably should have discovered the basis for their claims to the painting.[101] The fact that the location of the painting had been publicized for years persuaded the court that the claim for restitution accrued decades before Ms. Seger-Thomschitz filed her suit. [102]

The United States Court of Appeals for the First Circuit affirmed the district court decision, concluding that Ms. Seger-Thomschitz's claim accrued no later than 2003, when the Museums of Vienna contacted her.[103] In support of its holding, the First Circuit agreed with the

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Seger-Thomschitz*, 2009 WL 6506658, at *5-9.

[101] *Id.* at *7.

[102] *Id.* at *7-9. Ms. Seger-Thomschitz had requested additional time to conduct discovery on the theory that Kallir fraudulently concealed the terms of the sale from the Reichel family. If he had, his conduct would have prevented the Reichel family from discovering that they had a claim for restitution of the painting. The district court denied this request to extend discovery. *Seger-Thomschitz*, 623 F.3d at 8.

[103] *Id.* at 9.

lower court that the "location of the [p]ainting has been no secret in this case" because it had long been on display in the MFA and listed in the MFA's provenance database since 2000.[104]

The First Circuit also considered Ms. Seger-Thomschitz's two federal preemption contentions.[105] First, she asked the court to find that because the MFA was a tax-exempt entity under the Internal Revenue Code ("IRC"), the federal government had an interest in "ensuring that charitable organizations [like the MFA] that operate as tax exempt entities provide the public with the benefits for which their tax exemptions were granted," including investigating the provenance of artworks they acquire.[106] Ms. Seger-Thomschitz asserted that in light of this federal interest, the federal courts should apply the more flexible doctrine of laches under federal common law, in lieu of the three-year state statute of limitations. Under the doctrine of laches, in contrast to the statute of limitations defense, the MFA would bear the burden of proof to establish lack of diligence on the part of Ms. Seger-Thomschitz and prejudice to the MFA.[107] The First Circuit disagreed. According to the Court, because the IRC sets out specific remedies for tax-exempt organizations that fail to meet their Code obligations and state law imposes

[104] *Id.* at 7. The database (like the Toledo Museum's) was intended to help determine the correct provenance of artwork that was transferred during the Nazi era. *Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era*, Am. Alliance of Museums, http://www.aam-us.org/resources/ethics-standards-and-best-practices/collections-stewardship/objects-during-the-nazi-era (last visited Mar. 30, 2015) ("The Alliance and ICOM-US support efforts to make archives and other resources more accessible and to establish databases that help track and organize information."). Ironically, in this litigation, the database prevented that from happening: the MFA used the database to avoid a trial on the question of the painting's provenance and the courts relied on its inclusion in the database as a reason why Ms. Seger-Thomschitz should have discovered her claim earlier than she did. *Seger-Thomschitz*, 623 F.3d at 7.

[105] *Id.* at 9-14.

[106] *Id.* at 9-11.

[107] *Id.*

additional obligations on such organizations, there is no need to create federal common law "to punish and deter [their] bad behavior."[108]

Ms. Seger-Thomschitz's other federal preemption argument was that the Massachusetts statute of limitations should not be applied because it conflicted with the federal government's foreign policy.[109] As examples of this policy, Ms. Seger-Thomschitz cited the U.S. Holocaust Victims Redress Act of 1988 and the U.S. adoption of three international declarations: the Washington Conference Principles on Nazi-Confiscated Art, the Vilnius Forum Declaration, and the Terezin Declaration on Holocaust Era Assets and Related Issues.[110]

The Court of Appeals found no merit in this argument either. According to the First Circuit: (1) the Holocaust Victims Redress Act merely expresses the "sense of the Congress" that all governments should undertake good faith efforts to facilitate the return of Nazi-confiscated property; (2) all the Washington Principles say is that when Nazi-looted artwork is located, "steps should be taken expeditiously to achieve a just and fair" resolution of any related claims; (3)the Vilnius Forum Declaration asks governments to "undertake every reasonable effort to achieve the restitution of cultural assets looted during the Holocaust" and recognizes that "solutions may vary according to the differing legal systems among countries and the circumstances surrounding the specific case"; and (4) the Terezin Declaration simply reflects a preference that Nazi-looted art disputes be "resolved based on the facts and the merits rather than on legal technicalities."[111] The First Circuit held that the language in these three sources was not

[108] *Id.* at 11.

[109] *Id.*

[110] *Id.* at 11-12.

[111] *Id.* at 12-13.

specific enough to be used as evidence of an express federal policy that disfavored application of state statutes of limitations.[112]

The First Circuit also pointed out that "[e]ven if there were an express federal policy disfavoring overly rigid timeliness requirements, the Massachusetts statute of limitations would not be in 'clear conflict' with that policy" because "[t]he enactment of generally applicable statutes of limitations is a traditional state prerogative, and states have a substantial interest in preventing their laws from being used to pursue stale claims."[113] The court explained that statutes of limitations serve an important interest of "protect[ing] defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise."[114]

Although the First Circuit is correct that statutes of limitations usually serve a public interest by protecting the courts and defendants from stale claims, that protection runs counter to another public interest: restoring artwork misappropriated by the Nazis to its rightful owner. Ironically, one of the justifications for having statutes of limitations is the very reason why applying such statutes in the context of recovering stolen Nazi art makes the task so difficult for claimants. Claimants are hampered by the loss of evidence by death, disappearance of witnesses and documents caused by the war and Nazi atrocities. This loss of evidence makes identifying missing artwork, how it went missing, and where it now is more challenging, to say the least, than in a typical conversion or replevin action. In a state that does not apply the discovery rule, the claimant has to find what evidence there is in only three or four years. That would mean a

[112] *Id.* at 13.

[113] *Id.* at 13-14.

[114] *Id.* at 14 (quoting *United States v. Kubrick*, 444 U.S. 111, 117 (1979)).

victim of the Holocaust would have had to undertake the impossible task of investigating and then filing a claim in the United States in the middle of World War II.

The First Circuit was not blind to these difficulties. Even on the only-partially-developed factual record before it, the Court acknowledged that "the validity of the transfer [from Reichel to Kallir] 'is not clear-cut.'"[115] Nor was the Court unaware of the dark "sales" history that lies behind some of the priceless art now displayed in United States museums: "Much art was Aryanized, or subjected to forced sales for prices significantly below market value (if any value ever actually materialized for the seller) . . . ."[116] And "some art was sold at infamous 'Jew auctions,' which are now universally recognized as illegal."[117] Finally, because "so many Jews were compelled to forfeit 'flight asset[s]' to pay for their passage out of the Reich, the European art market reflected depressed prices."[118] But thanks to the short Massachusetts statute of limitations, whether the sale from Reichel to Kallir was a forced sale or a legitimate sale never was – and never will be – determined by a judge or jury.

E. *Schoeps v. Museum of Modern Art*

Of all the decided cases, only *Schoeps v. Museum of Modern Art*[119] progressed past the motion to dismiss or summary judgment stage. MoMA ultimately settled with the claimants on the morning of the first day of trial, but only after MoMA tried – and failed – to have the case

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[115] *Id.* at 6.

[116] *Id.* at 6 n.6 (quoting Jennifer Anglim Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for Public Trust?*, 88 Or. L. Rev. 37, 49 (2009)) (internal quotation mark omitted).

[117] *Id.* (quoting Kreder, *supra* at 49).

[118] *Id.* alteration in original (quoting Kreder, *supra* at 49-50).

[119] *Schoeps v. Museum of Modern Art*, 594 F. Supp. 2d 461 (S.D.N.Y. 2009) (*Schoeps II*); *Museum of Modern Art v. Schoeps*, 549 F. Supp. 2d 543 (S.D.N.Y. 2008) (*Schoeps I*).

dismissed based on the defense of laches on the theory that the claimants had delayed too long before asserting their claim.[120]

In *Schoeps*, MoMA and the Guggenheim Foundation sought a declaratory judgment from the federal district court in New York that MoMA owned the Pablo Picasso painting, "Boy Leading a Horse" and Guggenheim owned "Le Moulin de la Galette," also by Picasso.[121] Both pieces had been owned by Paul von Mendelssohn-Bartholdy, a prominent German Jewish banker and art collector.[122] In response to growing anti-Semitic measures taken by the Nazis, Mr. von Mendelssohn-Bartholdy made an allegedly pretextual transfer of the paintings to his second wife, Elsa, who was not Jewish and considered "Aryan."[123] Either Mr. or Ms. von Mendelssohn-Bartholdy eventually sold the paintings to a third-party, purportedly under Nazi duress. In the 1960s, the paintings were donated to MoMA and the Guggenheim Foundation.[124]

In 2007, Mr. von Mendelssohn-Bartholdy's grand-nephew, Julius H. Schoeps, sent letters to each museum stating that he believed that the paintings had been transferred under Nazi duress.[125] After eight months of letter writing, Mr. Schoeps sent letters to both museums demanding the return of the paintings.[126] In response, the museums filed their declaratory judgment action to quiet title on the paintings, asserting that the doctrine of laches barred the

[120] *Schoeps v. Museum of Modern Art*, 603 F. Supp. 2d 673, 674 (S.D.N.Y. 2009) (*Schoeps III*).

[121] *Schoeps II*, 594 F. Supp. 2d at 463.

[122] *Id.* at 464.

[123] *Id.* at 464-65.

[124] *Schoeps I*, 549 F. Supp. 2d at 544-45.

[125] *Id.* at 545.

[126] *Id.*

suit.[127] Mr. Schoeps, joined by Ms. von Mendelssohn-Bartholdys' heirs, then counterclaimed for conversion and replevin.[128]

The museums filed motions for summary judgment, which the Court denied. The Court found there were triable issues of fact as to (1) whether the transfer to Ms. von Mendelssohn-Bartholdy was designed to protect the paintings in response to Nazi persecution; and (2) even if the transfer was not pretextual, whether the transfer from Mr. or Ms. von Mendelssohn-Bartholdy to the subsequent owner was made under duress.[129] The court also denied summary judgment to the museums on their laches defense, ruling that the issue required resolution of disputed facts. Those facts included whether Ms. Von Mendelssohn-Bartholdy knew she had a potential claim to the paintings during her lifetime and whether the museums were barred from invoking the laches by the doctrine of unclean hands because they had reason to know that the paintings had been misappropriated.[130]

In allowing the case to proceed, the district court recognized the many factual and legal complexities of the case.[131] For example, the court had to decide which law applied. The court applied New York's interest analysis, and the test required the court to apply German law to the question of whether the sale by Mr. or Ms. von Mendelssohn-Bartholdy in 1935 was made under

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[127] *Id.*

[128] First Amended Counterclaim, *Schoeps v. Museum of Modern Art*, No. 07 Civ. 11074 (JSR) (S.D.N.Y. June 2, 2008), ECF No. 47.

[129] *Schoeps II*, 594 F. Supp. 2d at 464.

[130] *Id.* at 468.

[131] In a December 30, 2008 order denying the museums' motion for summary judgment, which preceded the eventual published opinion, *Schoeps II*, 594 F. Supp. 2d 461, the court noted that "the combination of the unique historical circumstances that form the backdrop of this case and the absence of living witnesses to most of the events in question" called for "greater liberty . . . [in] the drawing of extended inferences," and therefor precluded summary judgment. *See* Order at 2, *Schoeps v. Museum of Modern Art*, No. 07 Civ. 11074 (JSR) (S.D.N.Y. Dec. 31, 2008), ECF No. 84.

duress or was otherwise sold pursuant to a sale against public policy.[132] First, the Court had to determine whether to apply the Military Government Law put in place by the Allies during the postwar occupation of Germany, or the German Civil Code (Bürgerliches Gesetzbuch ("BGB")).[133] The court ruled that the BGB provisions as to whether a sale could be invalidated due to duress or other such invalidity were controlling.[134] The court identified the key fact question for the jury as whether Mr. von Mendelssohn-Bartholdy's sale resulted from the "historical circumstances of Nazi economic pressures brought to bear on 'Jewish' persons and property."[135]

These issues never reached the jury or the judge because the case was settled pursuant to an agreement whose terms remain confidential.[136] Nevertheless, the case stands as the rare case

[132] *Schoeps II*, 594 F. Supp. 2d at 465-66.

[133] *Id.*

[134] *Id.*

[135] *Id.* at 466.

[136] *Schoeps III*, 603 F. Supp. 2d at 674-76. The court consented to the settlement agreement between the parties remaining confidential, but commented that it found "the confidentiality provision of the settlement agreement and the [heirs'] objection to disclosure to be against the public interest and a troubling reversal of the parties' previously stated positions on the issue." *Id.* at 675. Notably, it was only after "being pressed by the Court" that the museums abandoned their position that the agreement should remain confidential. The court explained that from the beginning of the case, both sides had portrayed the dispute as of particular interest to the public. The court went on to point out that "[the museums] have portrayed themselves as institutions dedicated to serving the public by enriching its cultural life . . . and they have characterized the plaintiffs' claims as entirely baseless and, essentially, extortionate . . . . The plaintiffs, for their part, have claimed loudly throughout that they were vindicating a historical injustice." *Id.* at 674-75.

Despite these assertions, the parties decided to include a confidentiality clause in their settlement agreement. The court found this troubling, because, had the "[m]useums been public agencies of New York State or City, any such provision would have been contrary to the New York Freedom of Information Law . . . It is hard to see why institutions that proclaim their public status and that seek and receive public support should view themselves as not owing a similar obligation, even if one is not imposed by law." *Id.* at 675. Given the precedent in the Second Circuit that "strongly endorses the confidentiality of settlement agreements in virtually all cases," the court had no choice but to preserve the confidentiality of the agreement. *Id.* at 676.

that *could* potentially have been decided on its facts and merits because the claimants were able to present enough facts to require the museums' laches defense to be decided by the jury.

F. *Meyer v. Board of Regents of the University of Oklahoma*

Meyer v. Board of Regents of the University of Oklahoma, another court litigation involving a restitution claim for Nazi-looted art, is still pending.[137] Léone Meyer brought the suit in New York federal court, seeking to recover a painting by Camille Pissarro entitled "Shepherdess Bringing in Sheep" now in a University of Oklahoma museum.[138] Ms. Meyer, an heir of the owners of a high-end department store in Paris, alleged that Nazis stole the painting from the store during World War II.[139] The case was dismissed on personal jurisdiction grounds because the museum lacked sufficient contacts with New York.[140] Although the district court did not address the defense, the University also argued in its motion to dismiss that the claim was time-barred by New York's three-year statute of limitations and Oklahoma's two-year statute of limitations.[141]

Ms. Meyer appealed, and the Second Circuit Court of Appeals directed the district court judge to consider whether the case should be transferred to Oklahoma.[142] On April 7, 2015, the district court transferred the case to the United States District Court for the Western District of

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[137] *Meyer v. Bd. of Regents of the Univ. of Okla.*, No. 13 Civ. 3128(CM), 2014 WL 2039654 (S.D.N.Y. May 14, 2014).

[138] *Id.* at *1.

[139] *Id.*

[140] *Id.* at *4.

[141] Memorandum of Law in Support of Motion to Dismiss First Amended Complaint at 21-22, *Meyer*, 2014 WL 2039654 (No. 13 Civ. 03128), 2014 WL 618028, ECF No. 37.

[142] *Meyer v. Bd. of Regents*, 597 F. App'x 27, (2d Cir. 2015). Under 28 U.S.C. § 1406(a), the district court has discretion to dismiss the case that is commenced in the wrong venue or to transfer it to any appropriate district if it is in the interest of justice.

Oklahoma.[143] It remains to be seen whether the University will renew its statute of limitations defense in that court.

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All of these cases demonstrate that it is nearly impossible for victims of the Holocaust and their heirs to have their restitution claims heard on the facts and merits. Courts are constrained by three or four year state statute of limitations periods and forced to dismiss what might otherwise be meritorious Holocaust-related restitution actions. Moreover, courts have agreed with museums that the American Museum Guidelines do not prevent museums from actively pursuing litigation to quiet title on Holocaust-era artwork or from raising defenses, like statute of limitations, to avoid having disputes adjudicated on the facts and merits.

What is not captured in a review of these cases is the deterrent effect state statutes of limitations have on Nazi-era restitution claimants. This article focuses exclusively on actions involving U.S. museums that were litigated in federal court. Those cases played out over lengthy periods of time and involved the expenditure of substantial time by attorneys and experts – and claimants' money – even though the cases ultimately were not even resolved on the facts and merits. Undoubtedly, the prospect of time-consuming, combative, and expensive litigation with U.S. museums over defenses, like statutes of limitations, deters claimants from coming forward with, and pursuing, claims for restitution. [144] It is difficult, and likely impossible, to quantify the

[143] *See* Order Transferring Case to the Western District of Oklahoma, *Meyer v. Bd. of Regents*, No. 13 Civ. 3128 (CM) (S.D.N.Y. Apr. 7, 2015), ECF No. 65.

[144] The *Von Saher* case, which is discussed in Part II of this article, is an example of how protracted and costly it can be to litigate claims for restitution of Nazi-looted art. The complaint in *Von Saher* was filed on May 1, 2007 (ECF No. 1), and, nearly eight years later and after two appeals to the Ninth Circuit, and two petitions for certiorari to the Supreme Court, the case has only just recently advanced beyond motions to dismiss. *See, e.g.*, Order Denying Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) for Failure to State a Claim Upon Which Relief Can Be Granted, *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. CV 07-2866-JFW (JTL x) (C.D. Cal. Apr. 2, 2015), ECF No. 119.

many claims that would have been asserted but for these daunting obstacles.[145] Nor can one measure the extent to which museums have used the threat of a statute-of-limitations defense to prevail in private negotiations and mediations with restitution claimants who asserted claims to art looted by the Nazis. It seems reasonable to conclude that the resort to statute-of-limitations defenses by museums has had a chilling effect on potential claimants and has given U.S. museums the upper hand even in these private negotiations and mediations. What can be said with certainty based upon our review of the cases is that U.S. museums have used statute of limitations defenses to impose costs and burdens on claimants and avoid having to adjudicate claims to Nazi-looted art on the facts and merits.[146]

PART II

In Part I of this article, we showed that museums have successfully used state statute of limitations defenses in cases of restitution brought by victims of Nazi persecution and their heirs to avoid having to prove on the merits that the museums in fact legitimately own the art. That strategy has allowed the museums to keep hidden from claimants, courts, juries, and the public (1) the details of any investigation museums did into the provenance of the art the museums assert is rightfully theirs, and what they knew about the prior ownership of the artwork, and when they knew it; and (2) if they did not conduct an investigation, why they failed to do so. In

[145] The law firm of Herrick, Feinstein LLP has compiled a list of restitution claims for artwork located in the United States that were resolved, either in settlement or restitution of the artwork. Of the fifty-three restitution claims listed, only nine were resolved in court. *See* Herrick, Feinstein LLP, *Resolved Stolen Art Claims, Claims for Art Stolen During the Nazi Era and World War II, Including Nazi-Looted Art and Trophy Art* (2014), http://www.herrick.com/siteFiles/LegalServices/B53A512758429C32B90C9DAB29BF95A0.pdf.

[146] Anna B. Rubin, Dir., Holocaust Claims Processing Office of the N.Y. State Banking Dep't, Filling in the Blanks: Lessons Learned in Holocaust-Era Art Restitution 9, Address before the Sotheby's Amsterdam Restitution Symposium (Jan. 30, 2008), *available at* http://www.lootedart.com/web_images/artwork/Anna%20Rubin%20Filling%20in%20the%20Blanks.doc (noting that claimants face unpredictable litigation outcomes and that, in many cases, the value of the artwork underlying the dispute ends up being less than the litigation costs incurred in the restitution action).

Part II, we consider whether states have the power to amend their statutes of limitations or otherwise enact laws to ensure that victims' claims are heard on the facts and merits. In order to answer that question, we focus on recently enacted California statutes, and recent decisions from the United States Court of Appeals for the Ninth Circuit interpreting them, which show how difficult it is to adequately address the situation under state law.

In 2002, California's state legislature enacted section 354.3 of the California Code of Civil Procedure, a statute intended to open the courthouse doors to persons with restitution claims related to artwork misappropriated during the Holocaust and in the possession of museums and galleries located in or with sufficient jurisdictional contacts with the state.[147] The statute provided relief from the three-year statute of limitations that would otherwise govern such restitution claims under California law.[148] Section 354.3 gave claimants until December 30, 2010 to bring an action to recover "Holocaust-era artwork" taken as a result of Nazi appropriation.[149] A claim brought under section 354.3 was timely regardless of when the claimant discovered the art had been misappropriated and whether the museum or gallery holding the piece was located in California.[150]

As the legislative history of the statute shows, the legislature found that "California has a moral and public policy interest in assuring that its residents and citizens are given a reasonable opportunity to commence an action in court for artworks that were wrongfully taken by the Nazis

[147] Cal. Civ. Proc. Code § 354.3.

[148] *Id.* § 354.3(c).

[149] *Id.* § 354.3(a)(2) & (c).

[150] *See generally id.* at § 354.3; *Von Saher I*, 592 F.3d at 965; Assemb. B. No. 1758, 2001-2002 Reg. Sess. § 1(h)-(i) (Cal. 2002) ("The current three-year statute of limitation, after discovery of the whereabouts of the artwork, is an insufficient amount of time to finance, investigate, and commence an action. To the extent that the enactment of this act will extend the statute of limitation, that extension of the limitation period is intended to be applied retroactively, irrespective of whether the claims were barred by any applicable statute of limitation under any other provision of law prior to the enactment of this act.").

now located in museums and galleries."[151] The legislature recognized that the "current three-year statute of limitation, after discovery of the whereabouts of the artwork, is an insufficient amount of time to finance, investigate, and commence an action."[152] As the legislature explained, "[d]ue to the unique circumstances surrounding the theft of Holocaust-era artwork, commencement of an action requires detailed investigation in several countries, involving numerous historical documents and the input of experts."[153] As a result, "[i]n order to obtain all necessary data, investigating a prospective action may take several years."[154]

The Norton Simon Museum of Art challenged the California state statute as unconstitutional under the United States Constitution on the ground that it was federally preempted in a case that has twice reached the federal appellate courts and has yet to be finally resolved, eight years after it was filed.[155] This case is important to our analysis because it demonstrates that states have limited power to alter their statutes of limitations to protect victims of the Holocaust and their heirs who seek restitution for Nazi-looted art. If the *Von Saher I* precedent is followed by other courts, other state statutes drafted specifically to address claims held by victims of the Holocaust likely will be held preempted under the foreign affairs doctrine.

The plaintiff in *Von Saher I*, Marei von Saher, is the sole heir of Jacques Goudstikker, a Dutch art dealer.[156] Mr. Goudstikker purchased two life-size paintings by Lucas Cranach, "Adam" and "Eve," in 1931 (the "Cranachs").[157] After the Nazis invaded the Netherlands, Mr.

[151] Cal. Assemb. B. No. 1758 § 1(c).

[152] *Id.* § 1(h).

[153] *Id.* § 1(f).

[154] *Id.* § 1(g).

[155] *Von Saher II*, 754 F.3d 712 (9th Cir. 2014); *Von Saher I*, 592 F.3d 954 (9th Cir. 2010).

[156] *Von Saher I*, 592 F.3d at 959.

[157] *Id.*

Goudstikker fled the country.[158] The Cranachs, along with roughly one thousand other pieces of art belonging to Mr. Goudstikker, were stolen by the Nazis and later became part of the collection of looted Nazi art amassed by Hermann Göring, one of Hitler's chief lieutenants.[159]

In 1945, the Allied Forces recovered a portion of the paintings and the United States returned them to the Dutch government in accordance with United States' external restitution policy.[160] The Dutch government kept the paintings in its collection until the 1960s and then sold them to a different family that falsely claimed to own them.[161] Years later, the paintings were sold to the Norton Simon Foundation and have been displayed in the Norton Simon Museum in Pasadena, California since 1971.[162]

Ms. von Saher sued the museum in 2007 in federal district court in California seeking to recover the Cranachs and relied on section 354.3 to establish that the suit was timely.[163] The Norton Simon Museum, which is not a signatory to the AAM Guidelines,[164] moved to dismiss the complaint on the grounds that section 354.3 was unconstitutional as preempted by the foreign affairs doctrine,[165] under which the "power to deal with foreign affairs is a primarily, if not exclusively, federal power."[166]

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[158] *Id.*

[159] *Id.*

[160] *Id.* at 959, 962.

[161] *Id.* at 959; *Von Saher II*, 754 F.3d at 718; Order Denying Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) for Failure to State a Claim Upon Which Relief Can Be Granted at 3, *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. CV 07-2866-JFW (JTL x) (C.D. Cal. Apr. 2, 2015), ECF No. 119.

[162] *Von Saher II*, 754 F.3d at 718.

[163] *Id.*

[164] *See generally Find a Member Museum*, Am. Alliance of Museums, http://www.aam-us.org/about-museums/find-a-museum (last visited Mar. 31, 2015).

[165] *Von Saher I*, 592 F.3d at 959-60.

[166] *Id.* at 960.

The Supreme Court has found state laws unconstitutional under the foreign affairs doctrine when the state law directly conflicts with an exercise of the federal government's power to engage in foreign affairs, whether by treaty, federal statute, or express executive branch policy.[167] More rarely, even in the absence of a direct conflict, state laws have been declared unconstitutional under the field preemption prong of the foreign affairs doctrine if they are "incompatible with the federal government's foreign affairs power" and "infringe on the federal government's exclusive power to conduct foreign affairs."[168] Effectively, the doctrine ensures that the federal government has the exclusive power to decide the country's foreign affairs.[169]

The district court granted the Norton Simon Museum's motion to dismiss Ms. von Saher's claim with prejudice. The court declared Section 354.3 unconstitutional in light of its interference with the "federal government's exclusive power to make and resolve war, including the procedure for resolving war claims."[170] Ms. von Saher appealed to the Ninth Circuit.

On appeal, the Norton Simon Museum again argued that section 354.3 was preempted by the foreign affairs doctrine by virtue of the statute's allegedly direct and implied conflict with federal foreign policy.[171] The museum contended that section 354.3 directly conflicted with the United States' policy of "external restitution" of Nazi-looted art that President Truman approved in 1945 at the Potsdam Conference.[172] Under that policy, the United States agreed to return property recovered by Allied Forces to the property's country of origin with the expectation that

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[167] *Id.*

[168] *Id.* at 961 & 966.

[169] *Id.* at 960-61; Katharine N. Skinner, Note, *Restituting Nazi-Looted Art: Domestic, Legislative, and Binding Intervention to Balance the Interests of Victims and Museums*, 15 Vand. J. Ent. & Tech. L. 673, 687-88 (Spring 2013).

[170] *Von Saher I*, 592 F.3d at 959-60.

[171] *Id.* at 961.

[172] *Id.* at 961-63.

the art would then be returned to its rightful owner.[173] To implement the policy, the United States Department of State established the Interdivisional Committee on Reparations, Restitution and Property Rights.[174] The Committee adopted the same policy of external restitution, and, until September 1948, accepted claims for restitution from nations formerly occupied by the Nazis.[175]

The Ninth Circuit perceived no direct conflict. The court held that, had section 354.3 been enacted in 1945, it would have been in direct conflict with the United States' external restitution policy.[176] But, since this policy ended in 1948 when the United States stopped accepting any additional restitution claims, section 354.3 did not conflict with any current United States' foreign policy. [177]

The Ninth Circuit was persuaded, however, that section 354.3 was preempted by the foreign affairs doctrine under the field preemption prong.[178] The court reasoned that it was required to undertake a field preemption analysis because, although property rights are traditionally regulated by the state, section 354.3 was not "a garden variety property regulation" as the statute only addressed claims by Holocaust victims and their heirs.[179] The Ninth Circuit noted that courts have "consistently struck down state laws which purport to regulate an area of traditional state competence, but in fact, affect foreign affairs."[180]

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[173] *Id.* at 962.

[174] Brief of the United States as Amicus Curiae at 2, *Von Saher v. Norton Simon Museum of Art at Pasadena*, 131 S. Ct. 3055 (2011) (No. 09-1254), 2011 WL 2134984, at *2.

[175] *Id.*at *2-3; *Von Saher I*, 592 F.3d at 963.

[176] *Von Saher I*, 592 F.3d at 963.

[177] *Id.*

[178] *Id.* at 963-68.

[179] *Id.* at 964.

[180] *Id.*

The appeals court acknowledged that California had an interest in regulating museums operating within its borders and its desire to help Holocaust survivors was "a noble legislative goal."[181] But, section 354.3, as drafted, "suggests that California's real purpose was to create a friendly forum for litigating Holocaust restitution claims, open to anyone in the world to sue a museum or gallery located within or without the state."[182] The Ninth Circuit read this as California's expression of "dissatisfaction with the federal government's resolution (or lack thereof) of restitution claims arising out of World War II."[183]

The Ninth Circuit accordingly found that, in light of the text of the statutes and the California legislature's evident rationale for enacting it, section 354.3 violated the foreign affairs doctrine.[184] The statute intruded on the federal government's exclusive power to resolve wars by establishing a state remedy for wartime injuries.[185] The court stated that the power to resolve war, including legislation concerning restitution claims "is one that has been exclusively reserved to the national government by the Constitution" and California's motive to "address wrongs committed in the course of the Second World War" was fatal to section 354.3.[186] The Ninth Circuit was particularly concerned that California would be in the position to review restitution decisions made by foreign governments after World War II, which would interfere with the federal government's exclusive responsibility for conducting affairs with foreign

[181] *Id.*

[182] *Id.* at 965.

[183] *Id.*

[184] *Id.* at 968.

[185] *Id.* at 966-68.

[186] *Id.* at 966-68, alteration in original ("California may not improve upon or add to the resolution of the war.").

countries.[187] The case was remanded to the district court with Ms. von Saher allowed to amend her complaint.[188]

Shortly after *Von Saher I* was remanded, the California legislature extended the statute of limitations for claims for the recovery of stolen art under section 338(c) of the California Code of Civil Procedure from three years to six.[189] The amendment of section 338(c) also provided that a cause of action does not accrue until the plaintiff actually discovers both the identity and location of the artwork.[190]

Though this amendment clearly was the legislature's response to the Court's finding section 354.3 unconstitutional, the amended section 338(c) makes no reference to the Holocaust or its victims. Instead, the California legislature explained generally that the amendment was necessary because "objects of fine art often circulate in the private marketplace for many years before entering the collections of museums or galleries" and "existing statutes of limitation,

[187] *Id.* at 967.

[188] *Id.* at 969. Victims and their heirs have argued unsuccessfully that state statute of limitations should be preempted by federal law. In *Museum of Fine Arts Boston v. Seger-Thomschitz*, 623 F.3d 1, 9-14 (1st Cir. 2000), Ms. Seger-Thomschitz argued that Massachusetts' statute of limitations should be preempted by federal timeliness principles because of the important federal interest in restitution related to the Holocaust and that the state statute of limitations conflicted with the federal government's foreign policy. Specifically, Ms. Seger-Thomschitz referenced the government's adoption of the Washington Principles and Terezin Declaration which favored resolution of Nazi-era art disputes on their merits rather than on legal technicalities. *Id.* at 11-14. The First Circuit rejected the argument, holding the adoption of the two international resolutions was not evidence of "an express federal policy disfavoring statute of limitations." *Id.* at 12-13. Similarly, in *Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 578-79 (5th Cir. 2010), which involves a restitution claim by Ms. Seger-Thomschitz against a private individual, not a museum, the U.S. Court of Appeals for the Fifth Circuit held that Louisiana's statute of limitations was not preempted by federal foreign policy. The court noted that the Terezin Declaration was not evidence of an express federal policy disfavoring application of state statute of limitations and that that Louisiana has a strong interest in regulating property rights within the state. *Id.* at 577-79.

[189] Assemb. B. No. 2765 § 2, 2009-2010 Reg. Sess. (Cal. 2010).

[190] *Id.*

which are solely creatures of the Legislature, often present an inequitable procedural obstacle to recovery of these objects by parties that claim to be their rightful owner."[191]

The Ninth Circuit reviewed the constitutionality of section 338(c) in *Cassirer v. Thyssen-Bornemisza Collection Foundation*,[192] and held the statute did not violate the foreign affairs doctrine. *Cassirer* involved a lawsuit to recover the painting "Rue Saint-Honoré, après-midi, effet de pluie" by Camille Pissarro.[193] The painting was purchased by Julius Cassirer, a member of a prominent Jewish family in Germany, and later inherited by his daughter-in-law, Lilly.[194] In 1939, Ms. Cassirer fled Germany due to Nazi persecution.[195] The Nazis prohibited her from taking the painting and she was forced to sell it.[196]

After the war, Ms. Cassirer tried to locate the painting but without success.[197] She was later compensated in the German courts for its loss.[198] The Thyssen-Bornemisza Collection Foundation, an agency of the Kingdom of Spain, eventually purchased the painting, which now hangs in the Thyssen-Bornemisza Museum in Madrid.[199] In 2000, Ms. Cassirer's heirs discovered the painting's location and, in 2005, filed suit to recover it under section 338(c).[200]

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[191] Assemb. B. No. 2765 § 1(a)(2), 2009-2010 Reg. Sess. (Cal. 2010).

[192] *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 617-19 (9th Cir. 2013).

[193] *Id.* at 615.

[194] *Id.*

[195] *Id.*

[196] *Id.* at 615-16.

[197] *Id.* at 616.

[198] *Id.*

[199] *Id.*

[200] *Id.*

The museum moved to dismiss on the ground that section 338(c) was unconstitutional as preempted under the foreign affairs doctrine.[201] The district court granted the museums' motion and Cassirer's heirs appealed to the Ninth Circuit.[202] The Ninth Circuit reversed, holding that, because section 338(c) extends the statute of limitations for a preexisting claims and does not require that those claims arise out of any specific wartime injuries, section 338(c) on its face is unrelated to the foreign affairs power.[203]

Although the Ninth Circuit held section 338(c) is not preempted by the federal foreign affairs powers, the Ninth Circuit emphasized that "[t]he Constitution gives the federal government the exclusive authority to administer foreign affairs."[204] Comparing section 338(c) to section 354.3, the Ninth Circuit noted that section 338(c) did not explicitly create a new cause of action to remedy wartime injuries and, therefore, there were no grounds to find preemption.[205] But the court also noted that its holding was based, in part, on the fact that there was no "evidence in the record" that California courts were applying the statute to apply the state's "own

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[201] *Id.*

[202] *Id.*

[203] *Id.* at 617-19. On remand to the district court, the museum filed a motion for summary judgment which was granted on June 4, 2015. *Cassirer v. Thyssen-Bornemisza Collection Found.*, No. CV 05-03459 GAF (Ex) (C.D. Cal. June 4, 2015) (ECF 315). In its decision, the district court ruled that Spanish, rather than California law, applied in the case, and that, under Spanish law, the museum had acquired full title to the painting by adverse possession. *Id.* at 5, 11-17. The district court went on to hold that the heirs' claims were time-barred under California law. *Id.* at 20. The district court declined to apply the limitations period under amended section 338(c), explaining that, because the museum had acquired ownership of the painting by adverse possession before the California legislature amended section 338(c), application of this extended limitations period would violate the museum's due process rights. *Id.* Anticipating that the decision would be appealed to the Ninth Circuit, the district court suggested that the museum "pause, reflect, and consider whether it would be appropriate to work towards a mutually-agreeable resolution of this action, in light of Spain's acceptance of the Washington Conference Principles and the Terezin Declaration, and, specifically, its commitment to achieve 'just and fair solutions' for victims of Nazi persecution." *Id.* On June 19, 2015, the Cassirer heirs filed a notice of appeal of the judgment to the Ninth Circuit. *Cassirer v. Thyssen-Bornemisza Collection Found.*, No. CV 05-03459 GAF (Ex) (C.D. Cal. June 19, 2015) (ECF 327).

[204] *Id.* at 617.

[205] *Id.* at 619.

foreign policy."[206] That suggests that perhaps even statutes with generalized language might still run afoul of the foreign affairs doctrine in certain circumstances.

The Ninth Circuit again highlighted the federal government's interest in resolving restitution claims related to Nazi-looted art in *Von Saher II*. In *Von Saher II*, Ms. von Saher repled her claim for restitution of the Cranachs, now under section 338(c), as amended.[207] The museum once again moved to dismiss, this time arguing that Ms. von Saher's specific claim and the remedies she sought, not section 338(c) itself, conflicted with the United States' federal policy on art restitution.[208] The court concluded that Ms. von Saher's claims did not conflict with federal policy because, based on the record before the court, the Cranachs were not subject to postwar restitution proceedings in the Netherlands.[209]

In the decision, however, the Ninth Circuit again cautioned that any exercise of state power that "touches on foreign relations must yield to the National Government's policy."[210] The court then went on to summarize federal foreign policy on restitution of Nazi-looted art as "(1) a commitment to respect the finality of 'appropriate actions' taken by foreign nations to facilitate the internal restitution of plundered art; (2) a pledge to identify Nazi-looted art that has not been restituted and to publicize those artworks in order to facilitate the identification of

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[206] *Id.*

[207] *Von Saher II*, 754 F.3d at 718-19.

[208] *Id.* at 719.

[209] *Id.* at 721-25. The case was remanded for further development on the issue of whether Ms. von Saher's claim implicated the act of state doctrine. *Id.* at 725. Specifically, the Ninth Circuit was concerned that adjudication of the case might require an evaluation of the Dutch government's decision to transfer the paintings to a family other than Goudstikker after the war. *Id.* at 725-27. Such a decision would violate the act of state doctrine if it would require the court "to declare invalid the official act of a foreign sovereign performed within its own territory." *Id.* at 725. Under the act of state doctrine, "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." *Id.*

[210] *Id.* at 719.

prewar owners and their heirs; (3) the encouragement of prewar owners and their heirs to come forward and claim art that has not been restituted; (4) concerted efforts to achieve expeditious, just and fair outcomes when heirs claim ownership to looted art; (5) the encouragement of everyone, including public and private institutions, to follow the Washington Principles; and (6) a recommendation that every effort be made to remedy the consequences of forced sales."[211] Citing the Washington Conference Principles and Terezin Declaration, the court went on to explain that the U.S. policy on restitution of Nazi-looted art did not end in 1948 and that the restitution of this art work remains an important aspect of U.S. foreign policy to this day. [212]

On remand from the Ninth Circuit, the Norton Simon Museum once again moved to dismiss von Saher's claim on the sole ground that it was time barred under section 338 of California's civil procedural code.[213] In its third motion to dismiss, the museum contended that von Saher's predecessor in interest, Goudstikker's wife, Desi, discovered that the Cranachs were in the custody of the Dutch government sometime between 1946 and 1952.[214] The museum argued that because Desi's discovery of the whereabouts of the paintings occurred decades before, section 338's six year statute of limitations period had expired in the 1950s, long before von Saher first asserted a claim.[215] The court denied the museum's motion to dismiss because, even if the statute of limitations had expired as to claims against the Dutch government, the museum's purchase of the Cranachs constituted a new act of conversion under California law and the six year statute of limitations did not begin to run on a claim against the museum until

[211] *Id.* at 721.

[212] *Id.* at 720-21.

[213] Order Denying Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) for Failure to State a Claim Upon Which Relief Can Be Granted at 5, *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. CV 07-2866-JFW (JTLx) (C.D. Cal. Apr. 2, 2015), ECF No. 119.

[214] *Id.* at 6.

[215] *Id.*

Desi, or her heirs, actually discovered the Cranachs were in the museum's possession.[216] The court explained that, "each time stolen property is transferred to a new possessor, a new tort or act of conversion has occurred." The statute of limitations, therefore, "begins to run anew" after each transfer, even if the limitations period had long since expired as to the original theft and the subsequent possessor of the artwork took it in good faith and without knowledge of the claim that it had been stolen.[217]

The court also noted that the California legislature had specifically enacted section 338 so that restitution claims, like those of Ms. von Saher, would be heard on their facts and merits. The court stated:

> [T]hat there is nothing unfair about affording [von Saher] an opportunity to pursue the merits of her claims against Norton Simon. . . . [M]useums are sophisticated entities that are well-equipped to trace the provenance of the fine art that they purchase. After carefully weighing the equities, the [California] Legislature determined that the importance of allowing victims of stolen art an opportunity to pursue their claims supersedes the hardship faced by museums and other sophisticated entities in defending against potentially stale ones. Plaintiff, whose family suffered terrible atrocities at the hands of the Nazis, will now have an opportunity to pursue the merits of her claims, and Norton Simon will have an opportunity to pursue any and all defenses to those claims.[218]

California's second attempt at modifying its statute of limitations to ensure that claims for restitution are heard on the facts and merits passed constitutional muster in *Cassirer*. But, even with the benefit of this extended statute of limitations, claimants must go to great lengths to have their claims heard on the merits and are not assured of such a hearing. *Von Saher II* illustrates what claimants may face. It took eight years of hard-fought litigation, including two trips up and down to the appellate court with related petitions to the Supreme Court, as well as enactment of two different statutes by the California legislature, in order for von Saher to

[216] *Id.* at 11.

[217] *Id.* at 8-10.

[218] *Id.*

possibly have the courthouse doors open to her for an eventual adjudication of the facts and merits of her claim to restitution. The cases discussed in Part I show that, in states where statutes of limitations are not modified to protect Holocaust restitution claimants, claims rarely survive motions to dismiss. *Von Saher I* demonstrates that when states, like California, enact laws intended to ensure a forum for the adjudication of claims to Nazi-looted art, the states run the risk of their laws being invalidated on the ground that states cannot encroach upon the federal government's powers to conduct foreign affairs. Although California's more generic statute of limitations, which did not specifically focus on Holocaust-era restitution claims, survived the preemption challenge in *Cassirer*, these on-going California cases still highlight that courts recognize that there is a strong federal interest in resolving restitution claims brought by victims of the Third Reich.

Taken together, these cases show that the ability of states to ensure that Holocaust victims or their heirs have a forum to have their claims heard on the merits is uncertain, at best, and at risk of being found to be preempted by the federal government's foreign affairs powers. Further, even if such efforts to expand the statute-of-limitations period for Holocaust-era claims are not preempted, leaving this issue to the states will create a patchwork of inconsistent rules in an area that, as the *Von Saher I* court recognized, should be considered a matter of the federal government's foreign affairs power.

If the objective is to ensure adjudication on the facts and merits, there is a need either for a clear definitive commitment by the entire museum community that it will waive the use of defenses such as statute of limitations and laches, or for the federal government to legislate and ensure an available forum. Unless one of these approaches is followed, museums can be

expected to continue to use statute of limitations defenses to deny Holocaust victims and their heirs the opportunity to have their claims for restitution adjudicated on the facts and merits.

Annex II

Washington Conference Principles on Nazi-Confiscated Art

Washington Conference Principles on Nazi-Confiscated Art

[*Released in connection with* ***The Washington Conference on Holocaust Era Assets****, Washington, DC, December 3, 1998*]

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

1. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.
2. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.
3. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.
4. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.
5. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.
6. Efforts should be made to establish a central registry of such information.
7. Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.
8. If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.
9. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, can not be identified, steps should be taken expeditiously to achieve a just and fair solution.
10. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.
11. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.

Annex III

Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era

Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era

AMERICAN ASSOCIATION OF MUSEUMS BOARD OF DIRECTORS

Approved, November 1999, Amended, April 2001

Introduction

From the time it came into power in 1933 through the end of World War II in 1945, the Nazi regime orchestrated a system of theft, confiscation, coercive transfer, looting, pillage, and destruction of objects of art and other cultural property in Europe on a massive and unprecedented scale. Millions of such objects were unlawfully and often forcibly taken from their rightful owners, who included private citizens, victims of the Holocaust, public and private museums and galleries, and religious, educational and other institutions.

In recent years, public awareness of the extent and significance of Nazi looting of cultural property has grown significantly. The American museum community, the American Association of Museums (AAM), and the U.S. National Committee of the International Council of Museums (AAM/ICOM) are committed to continually identifying and implementing the highest standard of legal and ethical practices. AAM recognizes that the atrocities of the Nazi era demand that it specifically address this topic in an effort to guide American museums as they strive to achieve excellence in ethical museum practice.

The AAM Board of Directors and the AAM/ICOM Board formed a joint working group in January 1999 to study issues of cultural property and to make recommendations to the boards for action. The report that resulted from the initial meeting of the Joint Working Group on Cultural Property included the recommendation that AAM and AAM/ICOM offer guidance to assist museums in addressing the problems of objects that were unlawfully appropriated during the Nazi era without subsequent restitution (i.e., return of the object or payment of compensation to the object's original owner or legal successor).

The efforts of the Working Group were greatly informed by the important work on the topic that had gone before. In particular, three documents served as a starting point for the AAM guidelines, and portions of them have been incorporated into this document. These include: *Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era (1933-1945); ICOM Recommendations Concerning the Return of Works of Art Belonging to Jewish Owners; and Washington Conference Principles on Nazi-Appropriated Art* (released in connection with the Washington Conference on Holocaust-Era Assets cohosted by the U.S. Department of State and the United States Holocaust Memorial Museum).

The Presidential Advisory Commission on Holocaust Assets in the United States (PCHA) was created in June 1998 to study and report to the President on issues relating to Holocaust victims' assets in the United States. AAM and the Association of Art Museum Directors (AAMD) worked with the PCHA to establish a standard for disclosure of collections information to aid in

the identification and discovery of unlawfully appropriated objects that may be in the custody of museums. In January 2001, the PCHA issued its final report, which incorporated the agreed standard for disclosure and recommended the creation of a searchable central registry of the information museums disclose in accordance with the new standard. AAM and AAMD agreed to support this recommendation, and these guidelines have been amended to reflect the agreed standard for disclosure of information.

Finally, AAM and AAM/ICOM acknowledge the tremendous efforts that were made by the Allied forces and governments following World War II to return objects to their countries of origin and to original owners. Much of the cultural property that was unlawfully appropriated was recovered and returned, or owners received compensation. AAM and AAM/ICOM take pride in the fact that members of the American museum community are widely recognized to have been instrumental in the success of the postwar restitution effort. Today, the responsibility of the museum community is to strive to identify any material for which restitution was never made.

General Principles

AAM, AAM/ICOM, and the American museum community are committed to continually identifying and achieving the highest standard of legal and ethical collections stewardship practices. The AAM Code of Ethics for Museums states 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."

When faced with the possibility that an object in a museum's custody might have been unlawfully appropriated as part of the abhorrent practices of the Nazi regime, the museum's responsibility to practice ethical stewardship is paramount. Museums should develop and implement policies and practices that address this issue in accordance with these guidelines.

These guidelines are intended to assist museums in addressing issues relating to objects that may have been unlawfully appropriated during the Nazi era (1933-1945) as a result of actions in furtherance of the Holocaust or that were taken by the Nazis or their collaborators. For the purposes of these guidelines, objects that were acquired through theft, confiscation, coercive transfer, or other methods of wrongful expropriation may be considered to have been unlawfully appropriated, depending on the specific circumstances.

In order to aid in the identification and discovery of unlawfully appropriated objects that may be in the custody of museums, the PCHA, AAMD, and AAM have agreed that museums should strive to: (1) identify all objects in their collections that were created before 1946 and acquired by the museum after 1932, that underwent a change of ownership between 1932 and 1946, and that were or might reasonably be thought to have been in continental Europe between those dates (hereafter, "covered objects"); (2) make currently available object and provenance (history of ownership) information on those objects accessible; and (3) give priority to continuing provenance research as resources allow. AAM, AAMD, and PCHA also agreed that the initial focus of research should be European paintings and Judaica.

Because of the Internet's global accessibility, museums are encouraged to expand online access to collection information that could aid in the discovery of objects unlawfully appropriated during the Nazi era without subsequent restitution.

AAM and AAM/ICOM acknowledge that during World War II and the years following the end of the war, much of the information needed to establish provenance and prove ownership was dispersed or lost. In determining whether an object may have been unlawfully appropriated without restitution, reasonable consideration should be given to gaps or ambiguities in provenance in light of the passage of time and the circumstances of the Holocaust era. AAM and AAM/ICOM support efforts to make archives and other resources more accessible and to establish databases that help track and organize information.

AAM urges museums to handle questions of provenance on a case-by-case basis in light of the complexity of this problem. Museums should work to produce information that will help to clarify the status of objects with an uncertain Nazi-era provenance. Where competing interests may arise, museums should strive to foster a climate of cooperation, reconciliation, and commonality of purpose.

AAM affirms that museums act in the public interest when acquiring, exhibiting, and studying objects. These guidelines are intended to facilitate the desire and ability of museums to act ethically and lawfully as stewards of the objects in their care, and should not be interpreted to place an undue burden on the ability of museums to achieve their missions.

Guidelines

1. Acquisitions

It is the position of AAM that museums should take all reasonable steps to resolve the Nazi-era provenance status of objects before acquiring them for their collections whether by purchase, gift, bequest, or exchange.

a) Standard research on objects being considered for acquisition should include a request that the sellers, donors, or estate executors offering an object provide as much provenance information as they have available, with particular regard to the Nazi era.

b) Where the Nazi-era provenance is incomplete or uncertain for a proposed acquisition, the museum should consider what additional research would be prudent or necessary to resolve the Nazi-era provenance status of the object before acquiring it. Such research may involve consulting appropriate sources of information, including available records and outside databases that track information concerning unlawfully appropriated objects.

c) In the absence of evidence of unlawful appropriation without subsequent restitution, the museum may proceed with the acquisition. Currently available object and provenance information about any covered object should be made public as soon as practicable after the acquisition.

d) If credible evidence of unlawful appropriation without subsequent restitution is discovered, the museum should notify the donor, seller, or estate executor of the nature of the evidence and should not proceed with acquisition of the object until taking further action to resolve these issues. Depending on the circumstances of the particular case, prudent or necessary actions may include consulting with qualified legal counsel and notifying other interested parties of the museum's findings.

e) AAM acknowledges that under certain circumstances acquisition of objects with uncertain provenance may reveal further information about the object and may facilitate the possible resolution of its status. In such circumstances, the museum may choose to proceed with the acquisition after determining that it would be lawful, appropriate, and prudent and provided that currently available object and provenance information is made public as soon as practicable after the acquisition.

f) Museums should document their research into the Nazi-era provenance of acquisitions.

g) Consistent with current practice in the museum field, museums should publish, display, or otherwise make accessible recent gifts, bequests, and purchases, thereby making all acquisitions available for further research, examination, and public review and accountability.

2. Loans

It is the position of AAM that in their role as temporary custodians of objects on loan, museums should be aware of their ethical responsibility to consider the status of material they borrow as well as the possibility of claims being brought against a loaned object in their custody.

a) Standard research on objects being considered for incoming loan should include a request that lenders provide as much provenance information as they have available, with particular regard to the Nazi era.

b) Where the Nazi-era provenance is incomplete or uncertain for a proposed loan, the museum should consider what additional research would be prudent or necessary to resolve the Nazi-era provenance status of the object before borrowing it.

c) In the absence of evidence of unlawful appropriation without subsequent restitution, the museum may proceed with the loan.

d) If credible evidence of unlawful appropriation without subsequent restitution is discovered, the museum should notify the lender of the nature of the evidence and should not proceed with the loan until taking further action to clarify these issues. Depending on the circumstances of the particular case, prudent or necessary actions may include consulting with qualified legal counsel and notifying other interested parties of the museum's findings.

e) AAM acknowledges that in certain circumstances public exhibition of objects with uncertain provenance may reveal further information about the object and may facilitate the resolution of its status. In such circumstances, the museum may choose to proceed with the loan after

determining that it would be lawful and prudent and provided that the available provenance about the object is made public.

f) Museums should document their research into the Nazi-era provenance of loans.

3. Existing Collections

It is the position of AAM that museums should make serious efforts to allocate time and funding to conduct research on covered objects in their collections whose provenance is incomplete or uncertain. 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.

Research

a) Museums should identify covered objects in their collections and make public currently available object and provenance information.

b) Museums should review the covered objects in their collections to identify those whose characteristics or provenance suggest that research be conducted to determine whether they may have been unlawfully appropriated during the Nazi era without subsequent restitution.

c) In undertaking provenance research, museums should search their own records thoroughly and, when necessary, contact established archives, databases, art dealers, auction houses, donors, scholars, and researchers who may be able to provide Nazi-era provenance information.

d) Museums should incorporate Nazi-era provenance research into their standard research on collections.

e) When seeking funds for applicable exhibition or public programs research, museums are encouraged to incorporate Nazi-era provenance research into their proposals. Depending on their particular circumstances, museums are also encouraged to pursue special funding to undertake Nazi-era provenance research.

f) Museums should document their research into the Nazi-era provenance of objects in their collections.

Discovery of Evidence of Unlawfully Appropriated Objects

g) If credible evidence of unlawful appropriation without subsequent restitution is discovered through research, the museum should take prudent and necessary steps to resolve the status of the object, in consultation with qualified legal counsel. Such steps should include making such information public and, if possible, notifying potential claimants.

h) In the event that conclusive evidence of unlawful appropriation without subsequent restitution is found but no valid claim of ownership is made, the museum should take prudent and necessary

steps to address the situation, in consultation with qualified legal counsel. These steps may include retaining the object in the collection or otherwise disposing of it.

i) AAM acknowledges that retaining an unclaimed object that may have been unlawfully appropriated without subsequent restitution allows a museum to continue to care for, research, and exhibit the object for the benefit of the widest possible audience and provides the opportunity to inform the public about the object's history. If the museum retains such an object in its collection, it should acknowledge the object's history on labels and publications.

4. Claims of Ownership

It is the position of AAM that museums should address claims of ownership asserted in connection with objects in their custody openly, seriously, responsively, and with respect for the dignity of all parties involved. Each claim should be considered on its own merits.

a) Museums should review promptly and thoroughly a claim that an object in its collection was unlawfully appropriated during the Nazi era without subsequent restitution.

b) In addition to conducting their own research, museums should request evidence of ownership from the claimant in order to assist in determining the provenance of the object.

c) If a museum determines that an object in its collection was unlawfully appropriated during the Nazi era without subsequent restitution, the museum should seek to resolve the matter with the claimant in an equitable, appropriate, and mutually agreeable manner.

d) If a museum receives a claim that a borrowed object in its custody was unlawfully appropriated without subsequent restitution, it should promptly notify the lender and should comply with its legal obligations as temporary custodian of the object in consultation with qualified legal counsel.

e) 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.

f) AAM acknowledges that in order to achieve an equitable and appropriate resolution of claims, museums may elect to waive certain available defenses.

5. Fiduciary Obligations

Museums affirm that they hold their collections in the public trust when undertaking the activities listed above. Their stewardship duties and their responsibilities to the public they serve require that any decision to acquire, borrow, or dispose of objects be taken only after the completion of appropriate steps and careful consideration.

a) Toward this end, museums should develop policies and practices to address the issues discussed in these guidelines.

b) Museums should be prepared to respond appropriately and promptly to public and media inquiries.

Commitment of AAM

As part of its commitment to identifying and disseminating best practices, AAM will allocate resources:

a) to disseminate these guidelines widely and frequently along with references to other guidelines, principles, and statements that exist on the topic

b) to track the activity and purpose of the relevant databases and other resources and to compile bibliographies for dissemination to the United States museum community

c) to collect examples of best practices and policies on Nazi-era provenance research and claims resolution from the museum field, both in the United States and abroad, as guidelines for other museums

d) to make the above information available to the museum community through reports, conference sessions, and other appropriate mechanisms

e) to assist in the development of recommended procedures for object and provenance information disclosure

f) to provide electronic links from AAM's Web site to other resources for provenance research and investigate the feasibility of developing an Internet tool to allow researchers easier access to object and provenance information about covered objects in museum collections.

g) to encourage funding of Nazi-era provenance research.

Annex IV

Letter from World Jewish Restitution Organization to American Alliance of Museums

Letter from World Jewish Restitution Organization to American Alliance of Museums

November 10, 2014

Mr. Ford W. Bell, DVM
President
Mr. Burt Logan
Chair, Accreditation Commission
American Alliance of Museums
1575 Eye Street, NW, Suite 400
Washington, DC 20005
E-mail:fbell@aam-us.org

Dear Mr. Bell and Mr. Logan,

As Mr. Bell is aware, the World Jewish Restitution Organization (WJRO) together with the Conference on Jewish Material Claims Against Germany (Claims Conference) have previously urged that the AAM Accreditation Commission enforce the American Alliance of Museums Code of Ethics by reviewing museums that have received accreditation but nonetheless have engaged in behavior that may not be in accord with the standards set by the AAM. We believe that the AAM needs to be willing to consider appropriate remedies and sanctions up to and including removal of an offending museum's accredited status. We consider this particularly important in regard to the AAM's Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era.

We find the comment of Mr. Bell that was reported recently by the Associated Press to the effect that the Accreditation Commission does not review cases in which litigation is ongoing to be, if indeed true, totally contrary to a commitment to resolve claims regarding art confiscated during the Nazi era.

The fact that legal steps have been taken by a claimant does not excuse the American museum community from ensuring, through vigorous review, that the principles laid down in the AAM Code of Ethics are indeed being applied by US museums.

We believe that it is wholly inappropriate for the AAM to decline to carry out reviews in cases that involve objects unlawfully appropriated during the Nazi era simply because claimants seek to have their legal rights vindicated as is their legal and moral right. Museums are not entitled to ignore the Code of Ethics just because claimants pursue their claims using the legal venues that are open to them nor, we believe, should the AAM ignore its responsibility to ensure that its member museums uphold the standards and guidelines set by the museum profession itself.

We take particular note of the actions of the AAM Accreditation Commission in other areas (e.g., "Statement on the Deaccessioning by the Delaware Art Museum and the Action taken by the AAM Accreditation Commission" - http://www.aam-us.org/about-us/media-room/2014/delaware-accreditation-status). The American public expects no less when it comes to claims relating to objects confiscated during the Holocaust.

As a matter of policy, we do not involve ourselves in individual cases, and we have no involvement in the current lawsuit brought against the Fred Jones Jr. Museum of Art of the University of Oklahoma. We are concerned with general matters of policy in regard to looted art. Attached please find copies of some of the previous correspondence with Dr Wesley Fisher on behalf of the Claims Conference and WJRO with the AAM on this topic.

We respectfully request that you urgently clarify that the AAM will in fact review the handling by its member museums of all cases of dispute regarding art that was looted during the Holocaust.

Sincerely yours,

Gideon Taylor
Chair of Operations
World Jewish Restitution Organization

Cc: Wesley Fisher, Director of Research, Conference on Jewish Material Claims Against Germany

Enclosures

Annex V

Prague Holocaust Era Assets Conference: Terezin Declaration

Prague Holocaust Era Assets Conference: Terezin Declaration

June 30, 2009

Upon the invitation of the Prime Minister of the Czech Republic we the representatives of 46 states listed below met this day, June 30, 2009 in Terezin, where thousands of European Jews and other victims of Nazi persecution died or were sent to death camps during World War II. We participated in the Prague Holocaust Era Assets Conference organized by the Czech Republic and its partners in Prague and Terezin from 26-30 June 2009, discussed together with experts and non-governmental organization (NGO) representatives important issues such as Welfare of Holocaust (Shoah) Survivors and other Victims of Nazi Persecution, Immovable Property, Jewish Cemeteries and Burial Sites, Nazi- Confiscated and Looted Art, Judaica and Jewish Cultural Property, Archival Materials, and Education, Remembrance, Research and Memorial Sites. We join affirming in this

Terezin Declaration on Holocaust Era Assets and Related Issues

- Aware that Holocaust (Shoah) survivors and other victims of Nazi persecution have reached an advanced age and that it is imperative to respect their personal dignity and to deal with their social welfare needs, as an issue of utmost urgency,

- Having in mind the need to enshrine for the benefit of future generations and to remember forever the unique history and the legacy of the Holocaust (Shoah), which exterminated three fourths of European Jewry, including its premeditated nature as well as other Nazi crimes,

- Noting the tangible achievements of the 1997 London Nazi Gold Conference, and the 1998 Washington Conference on Holocaust-Era Assets, which addressed central issues relating to restitution and successfully set the stage for the significant advances of the next decade, as well as noting the January 2000 Stockholm Declaration, the October 2000 Vilnius Conference on Holocaust Era Looted Cultural Assets,

- Recognizing that despite those achievements there remain substantial issues to be addressed,

because only a part of the confiscated property has been recovered or compensated,

- Taking note of the deliberations of the Working Groups and the Special Session on Social Welfare of Holocaust Survivors and their points of view and opinions which surveyed and addressed issues relating to the Social Welfare of Holocaust Survivors and other Victims of Nazi Persecution, Immovable Property, Nazi Confiscated Art, Judaica and Jewish Cultural Property, Holocaust Education, Remembrance and Research, which can be found on the weblink for the Prague Conference and will be published in the Conference Proceedings,

- Keeping in mind the legally non-binding nature of this Declaration and moral responsibilities thereof, and without prejudice to applicable international law and obligations,

1. Recognizing that Holocaust (Shoah) survivors and other victims of the Nazi regime and its collaborators suffered unprecedented physical and emotional trauma during their ordeal, the Participating States take note of the special social and medical needs of all survivors and strongly support both public and private efforts in their respective states to enable them to live in dignity with the necessary basic care that it implies.

2. Noting the importance of restituting communal and individual immovable property that belonged to the victims of the Holocaust (Shoah) and other victims of Nazi persecution, the Participating States urge that every effort be made to rectify the consequences of wrongful property seizures, such as confiscations, forced sales and sales under duress of property, which were part of the persecution of these innocent people and groups, the vast majority of whom died heirless.

3. Recognizing the progress that has been made in research, identification, and restitution of cultural property by governmental and non-governmental institutions in some states since the 1998 Washington Conference on Holocaust-Era Assets and the endorsement of the Washington Conference Principles on Nazi-Confiscated Art, the Participating States affirm an urgent need to strengthen and sustain these efforts in order to ensure just and fair solutions regarding cultural property, including Judaica that was looted or displaced during or as a result of the Holocaust (Shoah).

4. Taking into account the essential role of national governments, the Holocaust (Shoah) survivors' organizations, and other specialized NGOs, the Participating States call for a coherent and more effective approach by States and the international community to ensure the fullest possible, relevant archival access with due respect to national legislation. We also encourage States and the international community to establish and support research and education programs about the Holocaust (Shoah) and other Nazi crimes, ceremonies of remembrance and commemoration, and the preservation of memorials in former concentration camps, cemeteries and mass graves, as well as of other sites of memory.

5. Recognizing the rise of Anti-Semitism and Holocaust (Shoah) denial, the Participating States call on the international community to be stronger in monitoring and responding to such incidents and to develop measures to combat anti-Semitism.

The Welfare of Holocaust (Shoah) Survivors and other Victims of Nazi Persecution

Recognizing that Holocaust (Shoah) survivors and other victims of Nazi persecution, including those who experienced the horrors of the Holocaust (Shoah) as small and helpless children, suffered unprecedented physical and emotional trauma during their ordeal.

Mindful that scientific studies document that these experiences frequently result in heightened damage to health, particularly in old age, we place great priority on dealing with their social welfare needs in their lifetimes. It is unacceptable that those who suffered so greatly during the earlier part of their lives should live under impoverished circumstances at the end.

1. We take note of the fact that Holocaust (Shoah) survivors and other victims of Nazi persecution have today reached an advanced age and that they have special medical and health needs, and we therefore support, as a high priority, efforts to address in their respective states the social welfare needs of the most vulnerable elderly victims of Nazi persecution – such as hunger relief, medicine and homecare as required, as well as measures that will encourage intergenerational contact and allow them to overcome their social isolation. These steps will enable them to live in dignity in the years to come. We strongly encourage cooperation on these

issues.

2. We further take note that several states have used a variety of creative mechanisms to provide assistance to needy Holocaust (Shoah) survivors and other victims of Nazi persecution, including special pensions; social security benefits to non-residents; special funds; and the use of assets from heirless property. We encourage states to consider these and other alternative national actions, and we further encourage them to find ways to address survivors' needs.

Immovable (Real) Property

Noting that the protection of property rights is an essential component of a democratic society and the rule of law,

Acknowledging the immeasurable damage sustained by individuals and Jewish communities as a result of wrongful property seizures during the Holocaust (Shoah),

Recognizing the importance of restituting or compensating Holocaust-related confiscations made during the Holocaust era between 1933-45 and as its immediate consequence,

Noting the importance of recovering communal and religious immovable property in reviving and enhancing Jewish life, ensuring its future, assisting the welfare needs of Holocaust (Shoah) survivors, and fostering the preservation of Jewish cultural heritage,

1. We urge, where it has not yet been effectively achieved, to make every effort to provide for the restitution of former Jewish communal and religious property by either in rem restitution or compensation, as may be appropriate; and

2. We consider it important, where it has not yet been effectively achieved, to address the private property claims of Holocaust (Shoah) victims concerning immovable (real) property of former owners, heirs or successors, by either in rem restitution or compensation, as may be appropriate, in a fair, comprehensive and nondiscriminatory manner consistent with relevant national law and regulations, as well as international agreements. The process of such restitution or compensation

should be expeditious, simple, accessible, transparent, and neither burdensome nor costly to the individual claimant; and we note other positive legislation in this area.

3. We note that in some states heirless property could serve as a basis for addressing the material necessities of needy Holocaust (Shoah) survivors and to ensure ongoing education about the Holocaust (Shoah), its causes and consequences.

4. We recommend, where it has not been done, that states participating in the Prague Conference consider implementing national programs to address immovable (real) property confiscated by Nazis, Fascists and their collaborators. If and when established by the Czech Government, the European Shoah Legacy Institute in Terezin shall facilitate an intergovernmental effort to develop non-binding guidelines and best practices for restitution and compensation of wrongfully seized immovable property to be issued by the one-year anniversary of the Prague Conference, and no later than June 30, 2010, with due regard for relevant national laws and regulations as well as international agreements, and noting other positive legislation in this area.

Jewish Cemeteries and Burial Sites

Recognizing that the mass destruction perpetrated during the Holocaust (Shoah) put an end to centuries of Jewish life and included the extermination of thousands of Jewish communities in much of Europe, leaving the graves and cemeteries of generations of Jewish families and communities unattended, and

Aware that the genocide of the Jewish people left the human remains of hundreds of thousands of murdered Jewish victims in unmarked mass graves scattered throughout Central and Eastern Europe,

We urge governmental authorities and municipalities as well as civil society and competent institutions to ensure that these mass graves are identified and protected and that the Jewish cemeteries are demarcated, preserved and kept free from desecration, and where appropriate under national legislation could consider declaring these as national monuments.

Nazi-Confiscated and Looted Art

Recognizing that art and cultural property of victims of the Holocaust (Shoah) and other victims of Nazi persecution was confiscated, sequestered and spoliated, by the Nazis, the Fascists and their collaborators through various means including theft, coercion and confiscation, and on grounds of relinquishment as well as forced sales and sales under duress, during the Holocaust era between 1933-45 and as an immediate consequence, and

Recalling the Washington Conference Principles on Nazi-Confiscated Art as endorsed at the Washington Conference of 1998, which enumerated a set of voluntary commitments for governments that were based upon the moral principle that art and cultural property confiscated by the Nazis from Holocaust (Shoah) victims should be returned to them or their heirs, in a manner consistent with national laws and regulations as well as international obligations, in order to achieve just and fair solutions,

1. We reaffirm our support of the Washington Conference Principles on Nazi-Confiscated Art and we encourage all parties including public and private institutions and individuals to apply them as well,

2. In particular, recognizing that restitution cannot be accomplished without knowledge of potentially looted art and cultural property, we stress the importance for all stakeholders to continue and support intensified systematic provenance research, with due regard to legislation, in both public and private archives, and where relevant to make the results of this research, including ongoing updates, available via the internet, with due regard to privacy rules and regulations. Where it has not already been done, we also recommend the establishment of mechanisms to assist claimants and others in their efforts,

3. Keeping in mind the Washington Conference Principles on Nazi-Confiscated Art, and considering the experience acquired since the Washington Conference, we urge all stakeholders to ensure that their legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the

facts and merits of the claims and all the relevant documents submitted by all parties. Governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property, in order to achieve just and fair solutions, as well as alternative dispute resolution, where appropriate under law.

Judaica and Jewish Cultural Property

Recognizing that the Holocaust (Shoah) also resulted in the wholesale looting of Judaica and Jewish cultural property including sacred scrolls, synagogue and ceremonial objects as well as the libraries, manuscripts, archives and records of Jewish communities, and

Aware that the murder of six million Jews, including entire communities, during the Holocaust (Shoah) meant that much of this historical patrimony could not be reclaimed after World War II, and

Recognizing the urgent need to identify ways to achieve a just and fair solution to the issue of Judaica and Jewish cultural property, where original owners, or heirs of former original Jewish owners, individuals or legal persons cannot be identified, while acknowledging there is no universal model,

1. We encourage and support efforts to identify and catalogue these items which may be found in archives, libraries, museums and other government and non-government repositories, to return them to their original rightful owners and other appropriate individuals or institutions according to national law, and to consider a voluntary international registration of Torah scrolls and other Judaica objects where appropriate, and

2. We encourage measures that will ensure their protection, will make appropriate materials available to scholars, and where appropriate and possible in terms of conservation, will restore sacred scrolls and ceremonial objects currently in government hands to synagogue use, where needed, and will facilitate the circulation and display of such Judaica internationally by adequate and agreed upon solutions.

Archival Materials

Whereas access to archival documents for both claimants and scholars is an essential element for resolving questions of the ownership of Holocaust-era assets and for advancing education and research on the Holocaust (Shoah) and other Nazi crimes,

Acknowledging in particular that more and more archives have become accessible to researchers and the general public, as witnessed by the Agreement reached on the archives of the International Tracing Service (ITS) in Bad Arolsen, Germany,

Welcoming the return of archives to the states from whose territory they were removed during or as an immediate consequence of the Holocaust (Shoah),

We encourage governments and other bodies that maintain or oversee relevant archives to make them available to the fullest extent possible to the public and researchers in accordance with the guidelines of the International Council on Archives, with due regard to national legislation, including provisions on privacy and data protection, while also taking into account the special circumstances created by the Holocaust era and the needs of the survivors and their families, especially in cases concerning documents that have their origin in Nazi rules and laws.

Education, Remembrance, Research and Memorial Sites

Acknowledging the importance of education and remembrance about the Holocaust (Shoah) and other Nazi crimes as an eternal lesson for all humanity,

Recognizing the preeminence of the Stockholm Declaration on Holocaust Education, Remembrance and Research of January 2000,

Recognizing that the Universal Declaration of Human Rights was drafted in significant part in the realization of the horrors that took place during the Holocaust, and further recognizing the U.N. Convention on the Prevention and Punishment of the Crime of Genocide,

Recalling the action of the United Nations and of other international and national bodies in establishing an annual day of Holocaust remembrance,

Saluting the work of the Task Force for International Cooperation on Holocaust Education, Remembrance and Research (ITF) as it marks its tenth anniversary, and encouraging the States participating in the Prague Conference to cooperate closely with the Task Force, and

Repudiating any denial of the Holocaust (Shoah) and combating its trivialization or diminishment, while encouraging public opinion leaders to stand up against such denial, trivialization or diminishment,

1. We strongly encourage all states to support or establish regular, annual ceremonies of remembrance and commemoration, and to preserve memorials and other sites of memory and martyrdom. We consider it important to include all individuals and all nations who were victims of the Nazi regime in a worthy commemoration of their respective fates,

2. We encourage all states as a matter of priority to include education about the Holocaust (Shoah) and other Nazi crimes in the curriculum of their public education systems and to provide funding for the training of teachers and the development or procurement of the resources and materials required for such education.

3. Believing strongly that international human rights law reflects important lessons from history, and that the understanding of human rights is essential for confronting and preventing all forms of racial, religious or ethnic discrimination, including Anti-Semitism, and Anti-Romani sentiment, today we are committed to including human rights education into the curricula of our educational systems. States may wish to consider using a variety of additional means to support such education, including heirless property where appropriate.

4. As the era is approaching when eye witnesses of the Holocaust (Shoah) will no longer be with us and when the sites of former Nazi concentration and extermination camps, will be the most important and undeniable evidence of the tragedy of the Holocaust (Shoah), the significance and integrity of these sites including all their movable and immovable remnants, will constitute a

fundamental value regarding all the actions concerning these sites, and will become especially important for our civilization including, in particular, the education of future generations. We, therefore, appeal for broad support of all conservation efforts in order to save those remnants as the testimony of the crimes committed there to the memory and warning for the generations to come and where appropriate to consider declaring these as national monuments under national legislation.

Future Action

Further to these ends we welcome and are grateful for the Czech Government´s initiative to establish the European Shoah Legacy Institute in Terezin (Terezin Institute) to follow up on the work of the Prague Conference and the Terezin Declaration. The Institute will serve as a voluntary forum for countries, organisations representing Holocaust (Shoah) survivors and other Nazi victims, and NGOs to note and promote developments in the areas covered by the Conference and this Declaration, and to develop and share best practices and guidelines in these areas and as indicated in paragraph four of Immovable (Real) Property. It will operate within the network of other national, European and international institutions, ensuring that duplicative efforts are avoided, for example, duplication of the activities of the Task Force for International Cooperation on Holocaust Education, Remembrance and Research (ITF).

Following the conference proceedings and the Terezin Declaration, the European Commission and the Czech Presidency have noted the importance of the Institute as one of the instruments in the fight against racism, xenophobia and anti-Semitism in Europe and the rest of the world, and have called for other countries and institutions to support and cooperate with this Institute.

To facilitate the dissemination of information, the Institute will publish regular reports on activities related to the Terezin Declaration. The Institute will develop websites to facilitate sharing of information, particularly in the fields of art provenance, immovable property, social welfare needs of survivors, Judaica, and Holocaust education. As a useful service for all users, the Institute will maintain and post lists of websites that Participating States, organizations representing Holocaust (Shoah) survivors and other Nazi victims and NGOs sponsor as well as a website of websites on Holocaust issues.

We also urge the States participating in the Prague Conference to promote and disseminate the principles in the Terezin Declaration, and encourage those states that are members of agencies, organizations and other entities which address educational, cultural and social issues around the world, to help disseminate information about resolutions and principles dealing with the areas covered by the Terezin Declaration.

A more complete description of the Czech Government´s concept for the Terezin Institute and the Joint Declaration of the European Commission and the Czech EU Presidency can be found on the website for the Prague Conference and will be published in the conference proceedings.

List of States

1. Albania
2. Argentina
3. Australia
4. Austria
5. Belarus
6. Belgium
7. Bosnia and Herzegovina
8. Brazil
9. Bulgaria
10. Canada
11. Croatia
12. Cyprus
13. Czech Republic
14. Denmark
15. Estonia
16. Finland
17. France
18. FYROM
19. Germany

20. Greece
21. Hungary
22. Ireland
23. Israel
24. Italy
25. Latvia
26. Lithuania
27. Luxembourg
28. Malta
29. Moldova
30. Montenegro
31. The Netherlands
32. Norway
33. Poland
34. Portugal
35. Romania
36. Russia
37. Slovakia
38. Slovenia
39. Spain
40. Sweden
41. Switzerland
42. Turkey
43. Ukraine
44. United Kingdom
45. United States
46. Uruguay

The Holy See *(observer)*
Serbia *(observer)*