

# THE GURLITT HOARD: AN APPRAISAL OF THE ROLE OF INTERNATIONAL LAW WITH RESPECT TO NAZI-LOOTED ART

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## Abstract

*Two years ago, German authorities conducting a routine tax investigation stumbled on the largest trove of missing artworks since the end of the Second World War. The collection of paintings and drawings was discovered in a Munich apartment owned by Cornelius Gurlitt, the late son of Hildebrand Gurlitt, one of the art dealers approved by the Nazis. It is likely that most of these artworks were plundered from German museums and Jewish collections in the period 1933-1945. The discovery triggered heated debates about the obligations of the German State and the property rights over this art collection. This article looks at the ongoing Gurlitt case from an international law perspective and discusses two different but interrelated issues. First, it traces the genealogy and extrapolates the influence of the international legal instruments that have been adopted to deal with the looting of works of art committed by the Nazis. Second, it examines the available means of dispute settlement that can lead to the “just and fair” solution of Holocaust-related cases in general and the Gurlitt case in particular. The objective of this analysis is to demonstrate that international law plays a key role in addressing and reversing the effects of the Nazi looting.*

Keywords: Alternative Dispute Resolution (ADR) means; domestic courts; international cultural heritage law; Nazi looted art; Second World War.

## 1. INTRODUCTION

In September 2010, an elderly man named Cornelius Gurlitt was stopped on a train from Zürich to Munich with € 9,000 in cash. The inquiries prompted by the money led German investigators to search Gurlitt’s apartment in Munich in February 2012. There, investigators found a total of 1,406 paintings and drawings, most of them unframed and packed tightly together on shelves, many of which by some of the most celebrated artists, such as Kokoschka, Picasso, Matisse and Renoir. These items were seized as evidence of tax-related crimes and taken to

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a storage facility near Munich.<sup>1</sup> The public prosecutor in Augsburg<sup>2</sup> engaged an art historian specialized in Nazi confiscated art to go through the collection on the suspicion that it included artworks looted by the Nazis. The reason for this suspicion is that it was soon discovered that Cornelius Gurlitt was the son of Hildebrand Gurlitt (1895-1956), one of the four art dealers appointed in 1937 by Joseph Goebbels, Hitler's propaganda chief, to sell confiscated art to customers abroad.<sup>3</sup>

German authorities kept the cache a secret for nearly two years as they were constrained by confidentiality rules surrounding the tax case. However, one can speculate that both Bavarian and Federal Government authorities also waited to divulge the news of the find to carefully examine how best to deal with the various issues intertwined with this unprecedented case. The restitution issues in connection with the artworks that may have been stolen from Jewish owners or acquired through pressure and threats by the Nazis are the most interesting for the purposes of the present analysis.

In order to deal with these issues as quickly and transparently as possible, in November 2013 the German Federal Government and the Government of the State of Bavaria established a Task Force made up of experts in provenance research. As a first measure, the Task Force published the paintings for which data is missing on an internet database in order to receive evidence regarding their history and to establish whether they had been spoliated during the Second World War.<sup>4</sup> Furthermore, on 7 April 2014 the German Federal Government and the Free State of

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<sup>1</sup> MCELROY, "Treasures Lost under Nazis Found in Elderly German's Flat", *The Telegraph*, 3 November 2013, available at: <<http://www.telegraph.co.uk/news/worldnews/europe/germany/10423794/Treasures-lost-under-Nazis-found-in-elderly-Germans-flat.html>>, accessed 21 March 2014.

<sup>2</sup> The public prosecutor's office in Augsburg has jurisdiction over Lindau, the Bavarian town where Gurlitt was stopped by customs agents. "Constitutional Expressionism: Legal Questions Overwhelm Art Find", *Spiegel International*, 18 November 2013, available at: <<http://www.spiegel.de/international/germany/legal-issues-complicate-munich-art-treasure-trove-find-a-934071.html>>, accessed 21 March 2014.

<sup>3</sup> SCHULZ, "Comment: What Next for the Gurlitt Treasures?", *The Art Newspaper*, No. 252, December 2013, p. 8 ff., p. 9.

<sup>4</sup> SONTHEIMER, "Gurlitt Works: A Herculean Task in Identifying Provenance", *Spiegel International*, 19 November 2013, available at: <<http://www.spiegel.de/international/germany/berlin-art-expert-to-lead-research-on-munich-find-a-934279.html>>, accessed 21 March 2014. The database is available at: <<http://www.lostart.de/Webs/EN/Datenbank/KunstfundMuenchen.html>>. Perhaps, Hildebrand Gurlitt's business papers will help to shed light on the history of individual pieces. After the war, Hildebrand Gurlitt was questioned by Allied investigators as they were aware of his dealings with the Nazis. Gurlitt convinced them that he had never cheated Jewish customers and that his collection and business archive burned in the bombing of Dresden in 1945. Eventually, Allied investigators released him. As a result, he was declared "denazified" and was allowed to continue his career as an art dealer. The 2012 seizure demonstrates that Hildebrand had lied. SCHULZ, *cit. supra* note 3, p. 9.

Bavaria reached an agreement with Cornelius Gurlitt with respect to the artworks taken from his Munich apartment.<sup>5</sup>

With this agreement Gurlitt pledged to allow provenance research by the Task Force and to return the objects determined to have been stolen. In exchange, the German Government engaged to return to him the paintings cleared from suspicion and to which hence he had good title (for instance because they were lawfully purchased by Hildebrand Gurlitt before the Nazi era or because they were part of the family estate). The parties established that the Task Force has one year to look into the ownership of the artworks and that the objects for which provenance research is not completed within the year should be returned to Gurlitt without delay. With respect to restitution the parties agreed that, if any claim have been or could be made, the paintings concerned will remain in “fiduciary custody”, even after the year has elapsed.

This agreement created the necessary conditions to allow victims of Nazi terror to assert their claims to the artworks. Further, it represented a suitable basis to find a mutually acceptable solution to the question of what to do about the artworks, especially in light of the fact that German law did not allow the Federal State or other State authorities to dispossess Gurlitt. However, it is not clear whether Gurlitt made an unconditional commitment to accept the conclusions of the Task Force. Further, it appears that the agreement only applied to the objects found in Munich and not to the 238 artworks that were seized in Gurlitt’s house in Salzburg (Austria) in February 2014. Finally, it is not clear from the information provided so far whether the deal contains any procedure for the settlement of disputes over its implementation. This could be a problem in cases where the heir of a victim of the Nazis makes a claim for restitution and the Task Force is unable to demonstrate that the painting was stolen.

New questions arose on 6 May 2014, when Cornelius Gurlitt passed away in his apartment in Munich after complications related to a heart bypass operation. Although this brought the tax investigation to an end,<sup>6</sup> Cornelius Gurlitt’s death opened a new legal can of worms over the future of the collection that was seized from him. First, it remains to be seen whether the Task Force will continue the provenance research. For their part, German authorities declared that Gurlitt’s passing does not alter the terms of the accord and the Task Force review will continue as planned. Second, Cornelius Gurlitt left a will bequeathing the entire collection to the Mu-

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<sup>5</sup> See the Joint Press Release 64/2014 issued by the Federal Government Commissioner for Culture and the Media, the Bavarian State Ministry of Justice and Christoph Edel, the lawyer who has been appointed by the court to look after Mr Gurlitt’s affairs, available at: <<http://www.lostart.de/Webs/EN/Datenbank/KunstfundMuenchen.html>>, accessed 29 April 2014. The precise details of the agreement are still confidential.

<sup>6</sup> Gurlitt had never had a job, but had occasionally sold off paintings as a means of support without declaring the income. As a matter of fact, there exist no pertinent employment or tax records. MCELROY, *cit. supra* note 1.

seum of Fine Arts of Bern (Switzerland).<sup>7</sup> As he had no close relatives, this means that German testamentary law will govern which of his heirs, if any, stand to inherit anything from Gurlitt, to challenge the will itself, or to object to the outcome of the Task Force review. This also means that a Swiss State-funded institution will have a say, along with German authorities and Gurlitt's heirs, in the resolution of a wealth of difficult and sensitive questions of a legal and ethical nature.

For all these reasons it can be expected that the Gurlitt case will appear in the headlines in the future. However, this article moves away from such legal and ethical questions to focus on two public international law issues that are closely related to all Holocaust art cases. On the one hand, it looks at the role of the international legal instruments that have been adopted to deal with the looting of works of art committed by the Nazis (sections 3-4). On the other hand, it examines the question of which dispute settlement means are best suited to deal with Holocaust cases in general and the Gurlitt case in particular (section 5). First, by way of background, this article provides a succinct account of the pillaging of cultural assets perpetrated under the Nazi regime (section 2). The final section (section 6) will offer some concluding remarks.

## 2. THE DIMENSIONS OF NAZI LOOTING

The looting of cultural objects organized by the Nazi regime in the years 1933-1945 was unprecedented for two main reasons. First, for the magnitude of the displacement of artworks that accompanied the infliction of death, torture and forced labour. In that period, various Nazi organs systematically combed the occupied territories for items of cultural value. From Poland and the Soviet Union to France and the Netherlands, and later Italy, the Germans looted monuments, churches, museums, libraries and private collections. Whilst a huge number of artefacts were ruthlessly stolen, many others were confiscated under legislation, bought under duress or through pseudo-consensual transactions. To give an impression of the size of the plunder, consider that a German report dispatched to Berlin in August 1944 recorded that a total of 29,436 train carriages of looted objects, including but not limited to art, had travelled to Germany since the occupation of France began.<sup>8</sup> Moreover, countless artworks were removed from German museums on the ground

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<sup>7</sup> EDDY and SMALE, "Son of Nazi-Era Art Dealer Left Works to Swiss Museum", *The New York Times*, 7 May, 2014, available at: <[http://artsbeat.blogs.nytimes.com/2014/05/07/son-of-nazi-era-art-dealer-left-works-to-bern-museum/?\\_php=true&\\_type=blogs&\\_r=0](http://artsbeat.blogs.nytimes.com/2014/05/07/son-of-nazi-era-art-dealer-left-works-to-bern-museum/?_php=true&_type=blogs&_r=0)>, accessed 9 May 2014.

<sup>8</sup> ANGLADE, "Art, Law and Holocaust: The French Situation", *Art Antiquity and Law*, 1999, p. 301 ff., p. 301. For an overview of the Nazi looting see: FELICIANO, *Le musée disparu*, Malesherbes, 2001; SIMPSON (ed.), *The Spoils of War*, New York, 1997; and NICHOLAS, *The Rape of Europa*, New York, 1994.

that they were “degenerate” (or “un-German”) art, including works that are now considered classic examples of expressionism, surrealism and cubism. Instead, artworks that represented “superior” German culture were destined for the museum that Hitler wanted to establish at Linz, Austria, or the private collections of other members of the Nazi hierarchy, whereas “degenerate art” pieces were destroyed, traded abroad or exchanged for works deemed desirable.<sup>9</sup>

Second, the Nazi spoliations have no equal in history because it constituted one aspect of the “final solution” aimed to eradicate the Jewish race. In other words, looting both foreshadowed, and resulted from, genocide. The *Einsatzstab Reichsleiter Rosenberg* (EER), established in 1940 and led by the fanatical anti-Semite Alfred Rosenberg, was tasked with tracking, destroying or transferring to Germany all artworks belonging to Jewish people or made by Jewish artists. As of 14 July 1944, more than 21,903 art objects, including famous paintings and museum pieces, had been seized by the EER.<sup>10</sup> Many of these objects were then sold on the art market.<sup>11</sup>

By the end of the war, the Allies recovered 10,7 million artworks worth an estimated \$US 5 billion.<sup>12</sup> The Allies returned the objects through the Munich and Wiesbaden Collection Points on the basis of the “territorial principle”: claimant States did not have to demonstrate that one of their nationals owned the object, but simply that it was removed from their territory. Accordingly, restitution proceedings were completed with the handing over of the objects to the claimant State or its authorized representative, whereas the return of such objects to their original owners was governed by the domestic laws of that State. The purpose of restitution was not restoration of the right of ownership of individuals but the reversal of an internationally wrongful act.<sup>13</sup>

As one of the Nazi dealers appointed by Joseph Goebbels with the task of selling “degenerate art”, Hildebrand Gurlitt played a central role in the displacement of artworks.<sup>14</sup> At some point he was also involved in the acquisition of objects for

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<sup>9</sup> OLTERMANN, “Modernist Art Haul, ‘Looted by Nazis’, Recovered by German Police”, *The Guardian*, 4 November 2013, available at: <<http://www.theguardian.com/world/2013/nov/03/nazis-looted-modernist-masterpieces-germany-police>>, accessed 15 March 2014.

<sup>10</sup> KURTZ, *America and the Return of Nazi Contraband*, Cambridge/New York, 2006, p. 26.

<sup>11</sup> In Hamburg alone, more than 100,000 private individuals acquired objects taken from Jewish families (O’DONNELL, “The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?”, *EJIL*, 2011, p. 49 ff., p. 52).

<sup>12</sup> *Ibid.*, p. 54.

<sup>13</sup> VRDOLJAK, “Gross Violations of Human Rights and Restitution: Learning from Holocaust Claims”, in PROTT, REDMOND-COOPER and URICE (eds.), *Realising Cultural Heritage Law. Festschrift for Patrick O’Keefe*, Pentre Moel, 2013, p. 163 ff., p. 170.

<sup>14</sup> Hildebrand Gurlitt set up the display of 16,000 “degenerate” artworks in the *Haus der Kunst* in Munich in July 1937 together with the other privileged dealers: Bernhard Böhmer, Karl Buchholz and Ferdinand Möller. But they did not have much success with their sales. So, in March 1939, they set fire to about 4,000 works in the courtyard of the Berlin Fire Department. This raised the attention they hoped. Various museums from Switzerland and the United States

Hitler's *Fuehrermuseum*. Therefore, as stated above, it is likely that, beside the "degenerate art", the collection that was seized from Cornelius Gurlitt includes items that were stolen from Jewish people. This means that Cornelius Gurlitt has been the reclusive custodian of a tainted legacy.

### 3. THE INTERNATIONAL RESPONSE TO THE NAZI LOOTING

Before the end of the war the Allies adopted the London Declaration.<sup>15</sup> It publicized the extent of Nazi plunder of works of art and other property and warned enemy States and neutral nations that the Allies intended "to do their utmost to defeat the methods of dispossession practiced by the" Nazis. In particular, the Allies declared "invalid any transfers of, or dealings with property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect of the Governments with which they are at war". These warnings applied "whether such transfers of dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected". This shows that the Allied Governments assumed that all transactions and confiscations of property in the occupied zones were part of a persecutory and genocidal campaign and a matter of international concern. However, the London Declaration did not introduce new international law obligations,<sup>16</sup> it merely reiterated the prohibitions set forth in the Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907 (Hague Regulations).<sup>17</sup>

The London Declaration triggered further Allied declarations and multilateral agreements aimed at addressing the effects of Axis confiscation and destruction of cultural property. The 1944 Final Act of the Bretton Woods Conference called upon neutral governments to undertake measures preventing any disposition or transfer of property, including art objects, taken from occupied countries or citi-

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went to Germany to buy (BARKER, "The Unfinished Art Business of World War Two", *BBC News*, 4 November 2013, available at: <<http://www.bbc.co.uk/news/world-europe-24812078>>, accessed 21 March 2014).

<sup>15</sup> Declaration of the Allied Nations against Acts of Dispossession Committed in Territories under Enemy Occupation or Control, London, 5 January 1943, (1943, 8 Department of State Bulletin 21).

<sup>16</sup> Also, the Declaration provided no information about the obligations that States would need to enact into domestic legislation nor did it detail any implementation mechanism. VRDOLJAK, *cit. supra* note 13, p. 166.

<sup>17</sup> "[I]t is [...] forbidden [...] [t]o [...] seize the enemy's property" (Article 23); "[p]rivate property cannot be confiscated" (Article 46); "[p]illage is formally forbidden" (Article 47) (18 October 1907, 1 Bevans 631).

zens.<sup>18</sup> Moreover, the Charter of the International Military Tribunal of 8 August 1945 established that the “plunder of public or private property [...] not justified by military necessity” is a war crime.<sup>19</sup> In its judgment against Alfred Rosenberg, where he was found “responsible for a system of organised plunder of both public and private property throughout the invaded countries of Europe”, the Nuremberg Tribunal made express references to the norms of the Hague Regulations.<sup>20</sup> With the Agreement in respect of the Control of Looted Works of Arts of 1946, the signatory States agreed to take measures aimed at: seeking out looted art and preventing their exportation; encouraging liberated States to provide lists of looted items not yet recovered and to disseminate the lists to art dealers and museums; and alerting the general public and encouraging the return of looted articles to their rightful owners.<sup>21</sup> Turning to the peace treaties concluded at the end of the Second World War, they included provisions on the restitution of cultural property that clearly corroborated the obligations contained in the Hague Regulations. For instance, Article 75 of the Treaty of Peace with Italy provided that “Italy accepts the principles of the United Nations Declaration of January 5, 1943, and shall return, in the shortest possible time, property removed from the territory of any of the United Nations”.

The presumption that any transaction during the relevant period constituted confiscation was reiterated in the legislation enacted by the Military Governments that were set up in the four occupied Zones into which Germany was divided in June 1945. These laws represent conspicuous examples of international action aimed to remedy wrongs caused by the failure of a State to observe elementary principles of justice and humanity towards human beings. For this reason, these *leges speciales* departed in many respects from the ordinary provisions of the German Civil Code.<sup>22</sup> Law No. 59 of the United States Military Government recognized that the Nazi regime used the law as a tool to oppress various groups, and established that it was not permissible “to plead that an act was not wrongful [...] because it conformed with a prevailing ideology concerning discrimination against individuals in account of their race, religion, nationality, ideology or their political opposition to

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<sup>18</sup> Department of State, United Nations Monetary and Financial Conference: Bretton Woods, Final Act and related documents, 1-22 July 1944, United States Government Printing Office (1944), Chapter VI, pp. 13-20.

<sup>19</sup> Agreement by the United Kingdom, United States, France and USSR for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, 8 August 1945.

<sup>20</sup> “International Military Tribunal”, AJIL, 1947, p. 286 ff.

<sup>21</sup> Agreement between the United States, the United Kingdom and France in respect of the Control of Looted Articles, 8 July 1946 (1951, 25 Department of State Bulletin 340, 15).

<sup>22</sup> BENTWICH, “International Aspects of Restitution and Compensation for Victims of the Nazis”, BYIL, 1955-1956, p. 204 ff., pp. 205, 207.

National Socialism” (Article 2(2)).<sup>23</sup> Finally, the 1943 Declaration influenced the drafting of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention).<sup>24</sup> This constitutes the first specialized treaty for the protection of cultural heritage during armed conflict and belligerent occupation. The 1954 Hague Convention outlaws “theft, pillage or misappropriation of, and any act of vandalism directed against, cultural property” (Article 4(3)). Consequently, any State Party must undertake to prohibit and prevent any requisition of movable heritage located in the territory of another State Party. Provisions on the restitution of looted art are contained in Article I of the First Protocol.

With the aim of re-establishing the *status quo ante* in compliance with the abovementioned instruments, various States passed legislation that provided compensation to those affected, invalidated inequitable transactions or ensured that the principle of restitution would not be negated by conflicting national norms.<sup>25</sup> In other words, private international law rules and domestic law principles regarding standing, time limits and access to judicial adjudication were suspended or modified to ensure compliance with the aims of public international law norms.<sup>26</sup>

However, these pieces of legislation (which are unlikely to have direct relevance to contemporary claims) did not always bring about the desired results as they provided short time limits for bringing claims (from 2 to 6 years),<sup>27</sup> involved intricate bureaucratic processes, and were grudgingly administered. For instance, under the Austrian law of 1946, the Jewish survivors who had succeeded in recovering their works but did not wish to live in the country that had persecuted them found that the Federal Monument Agency required them to donate valuable artworks as a condition to receiving export permits for the remaining objects.<sup>28</sup> In sum, even if the inflexibility of these laws was not the result of a lack of sympathy for the victims, they discouraged claimants or lapsed before all claims could be brought.<sup>29</sup>

The interpretation and application of these international legal sources by domestic courts confirm that the link between the looting of cultural objects and the

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<sup>23</sup> Military Government Regulation No. 59, Restitution of Identifiable Property, Military Government Gazette (Germany, US Zone, Issue G), No. 10, November 1947. Similar provisions were passed for the British and French zones.

<sup>24</sup> 14 May 1954 (249 UNTS 240). The Convention was completed with the adoption of the First Protocol on 14 May 1954 (249 UNTS 358) and the Second Protocol on 26 March 1999 (38 ILM 769, 1999). Article 11 of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (17 November 1970, 823 UNTS 231) also regards as illicit the export and transfer of ownership of cultural materials situated in an occupied country.

<sup>25</sup> For an overview see PALMER, *Museums and the Holocaust: Law, Principles and Practice*, Leicester, 2000, pp. 118-128.

<sup>26</sup> VRDOLJAK, *cit. supra* note 13, p. 178.

<sup>27</sup> By contrast, the 1943 Declaration posed no time limits.

<sup>28</sup> PALMER, *cit. supra* note 25, pp. 119-120.

<sup>29</sup> *Ibid.*, p. 128.

duty of restitution is generally accepted.<sup>30</sup> This case law owes much to the general principle established in the 1943 London Declaration. This is demonstrated by the *Gentili di Giuseppe* case, which concerned the return of various paintings which had been sold at auction during the occupation of France in 1940. In 1990, the Paris *Cour d'appel* invalidated the sale and ordered the return of the paintings pursuant to a French *ordonnance* of 1945, which reproduced the tenets of the Declaration.<sup>31</sup>

In addition to hard law, various soft law initiatives signal that the mass looting of Jewish cultural objects is an international concern. These initiatives arose in the 1990s due to the improved transparency of Eastern Europe governmental and museum archives following the fall of the Iron Curtain. The Principles adopted on the occasion of the 1998 Washington Conference on Holocaust-Era Assets are the most telling example. These Principles were approved by 44 States, which hence formally embraced the idea that Holocaust-related claims relating to art should be settled on the merits of each case rather than on the basis of technical legal arguments. They impose upon States a moral commitment to identify and publicize artworks that are found to have been confiscated by the Nazis, to assist their original owners in obtaining restitution and, more generally, to make every effort to achieve “just and fair” solutions. Interestingly, the Washington Principles’ call for “just and fair” solutions is reminiscent of the London Declaration’s reference to the principles of “solidarity” and “equity” as criteria to invalidate transfers or dealings with property.

The Washington Principles were echoed in subsequent diplomatic initiatives: Resolution No. 1205 (1999) on Looted Jewish Cultural Property of the Council of Europe Parliamentary Assembly; the Vilnius Declaration issued as a result of the 2000 International Forum on Holocaust Era Looted Cultural Assets organized by the Council of Europe; Resolution A5-0408/2003 of 17 December 2003 of the Legal Affairs and Internal Market Committee of the European Parliament; the Terezin Declaration on Holocaust Era Assets and Related Issues adopted in 2009 at the Holocaust Era Assets Conference convened under the auspices of the European Union and of the Czech Presidency; and the 2009 UNESCO Draft Declaration of Principles Relating to Cultural Objects Displaced in relation to the Second World War.<sup>32</sup> The sentiments underpinning these declarations are also incorporated into the ethical guidelines of museums and art trade associations and the Code of Ethics for Museums of the International Council of Museums (ICOM).<sup>33</sup> All in all, these

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<sup>30</sup> For an overview of the relevant judicial practice see CHECHI, *The Settlement of International Cultural Heritage Disputes*, Oxford, 2014, p. 267 ff.

<sup>31</sup> *Cour d'appel de Paris*, 1ere Chambre A, 2 June 1999.

<sup>32</sup> Regrettably, the 35th General Conference merely “decided to take note of the Draft Declaration after having been convinced that all possible paths to find consensus in the intergovernmental meetings of experts have been exhaustively explored to date” (35 C/Resolution 41, 6 October-23 October 2009).

<sup>33</sup> The Guidelines Concerning the Unlawful Appropriation of Objects during the Nazi Era adopted in 1999 (and revised in 2001) by the American Association of Museums are available at:

soft law instruments recognize that any initiative for the restitution of Holocaust-era property could be effected only through solidarity and cooperation, and encourage national governments to implement the public international law principles concerning reparations for serious violations of human rights that are at the heart of the 1943 London Declaration.<sup>34</sup>

#### 4. ON THE LIMITS, MERITS AND INFLUENCE OF THE INTERNATIONAL LEGAL FRAMEWORK REGARDING NAZI SPOILIATED ART

At this juncture, it is worth pausing to assess this complex legal framework *vis-à-vis* Holocaust-related claims in general and the Gurlitt case in particular.

Beginning with the international legal framework, it must be acknowledged that this is affected by important limitations. The first is that treaties are not retroactive.<sup>35</sup> This means that claims relating to events that occurred prior to their entry into force have to be resolved through diplomatic means. However, the fact that, for example, the 1954 Hague Convention does not provide for any retroactive effect of its scope of application does not affect the impact of its rules, most notably those which codify customary international law rules. These include the prohibition on the removal of cultural objects and the corresponding obligation of restitution.<sup>36</sup> Various pronouncements testify that these rules have achieved the status of customary international law. The Judgment of the Nuremberg Tribunal declared that the rules laid down in the 1907 Hague Convention against the seizure of artworks in wartime were recognized by all civilized nations as being declaratory of the laws and customs of war, whereas the International Criminal Tribunal for the former Yugoslavia has affirmed on various occasions that the 1907 Hague Convention and its Regulations and the 1954 Hague Convention constitute customary international law.<sup>37</sup> In addition, even assuming that the 1954 Hague Convention and its protocols were applicable, they would be directed to States only, whereas non-State entities – i.e. natural and legal persons – would have no obligations, rights or standing. The

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<[http://www.wipo.int/tk/en/databases/creative\\_heritage/museum/link0012.html](http://www.wipo.int/tk/en/databases/creative_heritage/museum/link0012.html)> (accessed 22 April 2014); the ICOM Code is available at: <<http://icom.museum/the-vision/code-of-ethics/>> (accessed 22 April 2014).

<sup>34</sup> VRDOLJAK, *cit. supra* note 13, pp. 181-182.

<sup>35</sup> “Unless a different intention appears from the treaty or is otherwise established” (Article 28 of the Vienna Convention on the Law of Treaties, 23 May 1969 (1155 UNTS 331)).

<sup>36</sup> The obligation to return illicitly taken cultural objects is customary because it is inherent in the prohibition on seizing and pillaging. If cultural objects should not be seized, then, *a fortiori*, they should be returned (HENCKAERTS and DOSWALD-BECK (eds.), *Customary International Humanitarian Law, Rules*, Vol. I, Cambridge, 2003, p. 137).

<sup>37</sup> See, e.g., *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2-T, Judgment of 26 February 2001, para. 206, and *Prosecutor v. Strugar*, Case No. IT-01-42-PT, Judgment of 31 January 2005, paras. 227, 230.

same limit characterizes the soft law mentioned above. Hence, neither the 1954 Hague Convention nor the Washington Principles can be invoked to recover stolen artefacts from private museums or collectors.<sup>38</sup> Another problem is that the relevant treaties lack special mechanisms for resolving cultural heritage disputes. Finally, aside from the 1943 London Declaration and the multilateral agreements enacted immediately after the Second World War, international legal instruments neither regulate the issue of the applicable law nor limit the reach of domestic rules on, *inter alia*, limitations periods, good faith or adverse possession. This means that the efficacy of international attempts to regulate the possession and the trade in looted artefacts is dependent on the content of domestic legislations. It is to these sources we now turn.

National legislation is not free from flaws, either. The main reason for discontent is that domestic laws do not have the effect of setting aside the (private law and private international law) rules that might frustrate restitution claims. Moreover, it is only in recent times that legislators and courts have increased the level of due diligence required of purchasers (be they professionals or *dilettanti*).<sup>39</sup> This means that the rules designed for transactions involving ordinary chattels, such as those protecting good faith possessors or barring legal action, can be applied to Holocaust-related cases. Consequently, many holders of disputed art can seek refuge in

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<sup>38</sup> This problem is exemplified by the *Lans* case. In 1995, the Church in Cyprus brought an action in the Netherlands against the possessor of four icons that had been looted from the *Antiphonitis* monastery in the part of Cyprus occupied by Turkey. The Dutch court held that: pursuant to the Dutch Constitution, only self-executing treaty provisions can prevail over the rights set forth in the Civil Code; the 1954 Hague Convention and its Protocols are not self-executing; and hence they can neither prevent that looted objects were acquired by *bona fide* purchasers under national laws, nor create an obligation of restitution for natural and legal persons, unless this is provided for in national laws. Accordingly, the court was unable to order the restitution of the icons to Cyprus (*Autocephalous Greek Orthodox Church in Cyprus v. Willem O.A. Lans*, District Court, Rb Rotterdam, 4 February 1999, NJkort 1999/37; Hof Den Haag, 7 March 2002, 99/693, unpublished). A change in Dutch law in 2007 allowed the Dutch Government to seize and return the icons to Cyprus. HICKLEY, "Looted Icons Seized by Dutch Government Return to Cyprus", *Bloomberg*, 18 September 2013, available at: <<http://www.bloomberg.com/news/2013-09-17/looted-icons-seized-by-dutch-government-return-to-cyprus.html>>, accessed 15 March 2014.

<sup>39</sup> Today an international standard of diligence for an assessment of the circumstances of the acquisition is codified in Article 4(4) of the Convention on Stolen or Illegally Exported Cultural Objects (24 June 1995, 34 ILM 1995, 1322): "In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances". For an analysis of this principle see FRANCONI, "Controlling Illicit Trade in Art Objects: The 1995 UNIDROIT Convention", in FRANCONI, DEL VECCHIO and DE CATERINI (eds.), *Protezione internazionale del patrimonio culturale: interessi nazionali e difesa del patrimonio comune della cultura*, Milano, 2000, p. 119 ff.

such technical defences to avoid claims.<sup>40</sup> Another problem is that these measures do not control or discipline effectively the demand side of the market. This gap has allowed cynical dealers and museum curators to profit from the gross wrongs committed by the Nazi regime.<sup>41</sup>

These criticisms cannot be levied against the special domestic laws that have been passed with the re-emergence of restitution claims since the 1990s.<sup>42</sup> For instance, the Holocaust (Return of Cultural Objects) Act, which was adopted by the British Parliament in 2009, enables national museums and galleries to deaccession and return artefacts stolen during the Nazi era if so recommended by the Spoliation Advisory Panel. This Panel was formed in 2000 to consider claims from people or their descendants who lost possession of art objects during the period 1933-1945 which are now held in national collections. The Act expires 10 years from the day on which it is passed (Section 4(7)).<sup>43</sup> Therefore, it allows a significant period of time for claims to be considered by the Panel.

In Germany, there are no bespoke restitution laws for the Nazi confiscated art in the hand of private entities.<sup>44</sup> This means that the claimants interested in recovering looted artefacts found in Gurlitt's possession must meet the legal requirements contained in German law. Hence, they must prove that their ancestors owned the requested works, that they have inherited the ownership claim, that ownership had not passed to Cornelius Gurlitt, and that their claim has not run out of time. In this respect, the German Civil Code provides that a purchaser that acquires stolen property from someone other than the owner does not obtain ownership, even if the purchaser is in good faith. In the case of objects sold under duress, German law considers the sale as contrary to public policy and thus void. Accordingly, Hildebrand Gurlitt could not have acquired ownership of the works stolen by the Nazis or sold under duress by Jewish owners. Hence, he could not have passed ownership to Cornelius. However, German law poses a serious obstacle to claimants. The German Civil Code (§ 221) subjects a restitution claim (like any other claim)

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<sup>40</sup> Various museums have taken preventive action to "quiet title" against possible restitution claims. See, e.g., COHEN, "Museums Faulted on Restitution of Nazi-Looted Art", *The New York Times*, 30 June 2013, available at: <[http://www.nytimes.com/2013/07/01/arts/design/museums-faulted-on-efforts-to-return-art-looted-by-nazis.html?\\_r=0](http://www.nytimes.com/2013/07/01/arts/design/museums-faulted-on-efforts-to-return-art-looted-by-nazis.html?_r=0)>, accessed 29 April 2014.

<sup>41</sup> PELL, "Using Arbitral Tribunals to Resolve Disputes Relating to Holocaust-Looted Art", in INTERNATIONAL BUREAU OF THE PERMANENT COURT OF ARBITRATION (ed.), *Resolution of Cultural Property Disputes*, Den Haag, 2004, p. 307 ff., p. 315.

<sup>42</sup> For an overview see PALMER, *cit. supra* note 25, pp. 129-166.

<sup>43</sup> See at: <<http://www.legislation.gov.uk/ukpga/2009/16/contents>>, accessed 15 April 2014.

<sup>44</sup> A series of laws were passed in West Germany in the 1950s regulating the restitution of property and the payment of damages to victims of the Nazi persecutions (LEHMANN-RICHTER, "Die gerichtliche Beurteilung rückwirkender Gesetzesänderungen im Wiedergutmachungsrecht", *Forum Historiae Iuris*, 1 December 2002, available at: <<http://fhi.rg.mpg.de//articles/pdf-files/0212lehmann-richter.pdf>>, accessed 29 April 2014). In addition, in Germany no specific measure has been adopted so far to implement the Washington Principles.

to a general 30-year statute of limitation, regardless of whether the dispossessed owner was aware of the whereabouts of the property during that period. Ostensibly Cornelius Gurlitt could have relied on this rule as he had been in possession of the collection for more than 30 years. However, it must be considered that, first, the 30-year rule does not extinguish the title of original owners and, second, this legal defence can be waived.<sup>45</sup>

Proposals to set aside the 30-year time limitation are now being discussed at the *Bundesrat*, before being passed on to the *Bundestag*. An amendment of the Civil Code will certainly diminish obstacles to resolving the case, but it will also increase litigation incentives. More generally, it will represent a further recognition of the enormity of the Jewish genocide and an additional tool to reverse (or ameliorate) the effects of Axis policies and actions upon occupied countries and their inhabitants. The re-emergence of restitution claims for cultural materials by Holocaust survivors and their heirs highlights the ongoing and long-term impact of gross violations of human rights and humanitarian law committed under the Third Reich.<sup>46</sup>

In conclusion, it must be emphasized that the role of international law cannot be belittled or ruled out because of the limits of the relevant treaties, on the one hand, and the perceived effectiveness of special national laws, on the other. On the contrary, international law is germane to the efforts aimed at reversing the effects of the Nazi looting. Indeed, all initiatives taken by the international community of States – whether national or multinational, binding or hortatory – were inspired by the international norms that: (i) attach a special meaning to cultural objects and distinguish them from ordinary goods; (ii) affirm the understanding that the removal and destruction of cultural property was connected with the crimes of persecution and genocide; (iii) pursue the prosecution of the persons accused of war crimes and crimes against humanity, such as the persecution of ethnic and religious groups; and (iv) afford protection of cultural property during armed conflict and belligerent occupation. Therefore, international law plays a crucial role, first, in establishing the interconnection between international crimes and the seizure and destruction of cultural heritage and, second, in promoting the idea that the destruction of a group or people and all attacks against its cultural heritage are an affront to the international community as a whole.<sup>47</sup> In this sense, it is instructive to recall that the preamble of the 1954 Hague Convention states that “damage to the cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world”,

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<sup>45</sup> VALENTIN, “Getting Back Art from Gurlitt’s Hoard”, *The Art Newspaper*, No. 253, January 2014, p. 46.

<sup>46</sup> VRDOLJAK, “Genocide and Restitution: Ensuring Each Group’s Contribution to Humanity”, *EJIL*, 2011, p. 17 ff. However, it has been stressed that a rule privileging Holocaust claims over those of other theft victims would raise questions regarding equal protection under law (O’DONNELL, *cit. supra* note 11, pp. 70-71).

<sup>47</sup> VRDOLJAK, *ibid.*

whereas the preamble of the Statute of the International Criminal Court affirms that “all peoples are united by common bonds, their cultures pieced together in a shared heritage, and [...] that this delicate mosaic may be shattered at any time”.

##### 5. THE SETTLEMENT OF HOLOCAUST-RELATED ART CASES: AN ASSESSMENT OF THE AVAILABLE OPTIONS

On 5 March 2014, David Toren filed a civil claim in the US District Court for the District of Columbia against the Free State of Bavaria and the Federal Republic of Germany (as the holders of the paintings) for the return of the Max Liebermann painting “Two Riders on the Beach”, plus any other works belonging to his family that the Gurlitt trove might hold.<sup>48</sup> It can be expected that other lawsuits will follow this first claim, whether in Germany or in other jurisdictions, as a result of the publication of the artworks by the Task Force, the dissatisfaction with the inaction of German authorities<sup>49</sup> (which is most probably due to the fact that discussions about the amendment of the 30-year limitation time are still ongoing), and the fact that the Task Force does not serve as a court or an arbitration tribunal.

These considerations naturally lead to the crucial question of which dispute resolution procedures are best suited to deal with Holocaust-related art cases involving private parties. More precisely, it is worth examining whether the existing judicial and non-judicial mechanisms may provide “just and fair” solutions to cases concerning the restitution of artworks looted from Jewish families by the Nazis and found in Cornelius Gurlitt’s possession.

Litigation before domestic courts is the principal method for the settlement of disputes. This preference is accorded because of the assumption that courts can best provide justice after close examination of facts, law and of the arguments of the parties. Moreover, there is the fact that at the end of court proceedings there is a definitive verdict that can be enforced through the ordinary State machinery. However, it is almost universally accepted that litigation is a flawed medium for resolving Holocaust-related cases.<sup>50</sup> Various flaws can dissuade a claimant from bringing a lawsuit, such as the fact that litigation – if not precluded by the expiry of limitation periods or anti-seizure legislation – is public, entails considerable economic and human costs, causes antagonism between winners and losers, and offers inconsis-

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<sup>48</sup> GAMERMAN, “American Files Suit Against Germany for Nazi-Era Art Trove”, *The Wall Street Journal*, 5 March 2014, available at: <<http://blogs.wsj.com/speakeasy/2014/03/05/american-files-suit-against-germany-for-nazi-era-art-trove/>>, accessed 21 March 2014.

<sup>49</sup> The Augsburg public prosecutor’s office has given no answer to the numerous lawyers who have made inquiries on behalf of their clients (SONTHEIMER, *cit. supra* note 4).

<sup>50</sup> PALMER, *cit. supra* note 25, p. 49.

tent jurisprudence.<sup>51</sup> In addition, there is the fact that the substantive law changes from one jurisdiction to the next, with the result that the choice of the forum heavily influences the outcome of recovery proceedings. In this regard, it is interesting to note that claimants who will choose to bring suit in England regarding works in the Gurlitt collection could be favoured by a judicial authority concerning § 221 of the German Civil Code, the decision in the case *City of Gotha and Federal Republic of Germany v. Sotheby's and Cobert Finance S.A.*<sup>52</sup> In this case, Moses J. held that he would have refused to apply the 30 year limitation period if this had barred legal action and given title to a *mala fide* possessor.<sup>53</sup>

Various non-judicial means, such as negotiation, mediation, conciliation and arbitration – the so-called Alternative Dispute Resolution (ADR) means – are available to private parties and are becoming more and more common as a substitute for court adjudication. Numerous scholarly works and hard cases testify that these methods offer brighter prospects for private disputants.<sup>54</sup> Here it suffices to emphasize that these means offer a non-public and conciliatory approach that facilitates mutually satisfactory settlements which are consensual rather than imposed. In effect, these dispute settlement means are not necessarily based on strict law – and therefore are not bound to statutes of limitation – and can focus on ethical concerns and fairness. Even arbitration, though adjudicatory, can take account of non-legal factors.<sup>55</sup> Furthermore, non-adversarial, forward-looking ADR means facilitate the identification of alternative solutions to outright restitution that domestic judges may be unable to consider, such as exchanges, loans, production of copies, and shared management and control. Yet, ADR means are characterized by some shortcomings. The most significant handicap is their voluntary nature. Outside the realm of contractual disputes, litigants may be reluctant to resort to negotiation, mediation or arbitration in the absence of significant incentives. A related problem is that of enforcement. Negotiation cannot guarantee that a dispute will eventually be settled and cannot secure a definitive enforceable solution. Likewise, there are no mechanisms by which parties can be compelled to honor a mediated settlement.

Against this background, it is necessary to emphasize a number of crucial aspects. The first is that on many occasions domestic courts have been able to render

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<sup>51</sup> See PALMER, “Statutory, Forensic and Ethical Initiatives in the Recovery of Stolen Art and Antiquities”, in PALMER (ed.), *The Recovery of Stolen Art*, Leicester, 1998, p. 1 ff., pp. 18-19; and CHECHI, *cit. supra* note 30, p. 140 ff.

<sup>52</sup> Queen’s Bench Division, Judgment of 9 September 1998 (unreported), reproduced in PALMER, *cit. supra* note 25, p. 222 ff.

<sup>53</sup> Para. II.4, reproduced in *ibid.*, p. 263 ff.

<sup>54</sup> See CHECHI, *cit. supra* note 30, p. 167 ff. See also PALMER, “Waging and Engaging – Reflections on the Mediation of Art and Antiquity Claims”, in RENOLD, CHECHI and BUNDLE (eds.), *Resolving Disputes in Cultural Property*, Geneva, 2012, p. 81 ff.; and RAU, “Mediation in Art-Related Disputes”, in BYRNE-SUTTON and GEISINGER-MARIÉTHOZ (eds.), *Resolution Methods for Art-Related Disputes*, Zürich, 1999, p. 153 ff.

<sup>55</sup> PALMER, *cit. supra* note 25, p. 107.

some justice to the Jewish families that were targeted by the Nazis – even if at the expense of innocent possessors. For instance, the United States District Court of Rhode Island in the *Vineberg* case ordered the restitution of the painting “Girl from the Sabiner Mountain” to the heirs of the original owner, Max Stern. The Court forcefully emphasized that domestic courts have the great responsibility to end the consequences of the acts arising out of “a notorious exercise of man’s inhumanity to man” through “the mundane application of common law principles”.<sup>56</sup> This expanding jurisprudence stems from the application by United States courts of the exceptions to immunity from suit laid down in Section 1605(a) of the 1976 Foreign Sovereign Immunities Act to cases involving the large-scale and discriminatory misappropriations of art objects that occurred in the Nazi era.<sup>57</sup>

Second, it should be made clear that, just as for many disputes there is no possible substitute for court proceedings, it is rather unlikely that all controversies can be resolved through ADR methods. This is the case when the possessor is unwilling to reach a win-win solution involving the diminution or loss of property. This is well illustrated by the *Altmann* case, where the Republic of Austria rejected the initial proposal of Maria Altmann to submit the dispute to arbitration.<sup>58</sup>

Third, a number of European States have established special advisory bodies for addressing the problems surrounding art stolen by Nazis, in compliance with the Article 16 of Resolution 1205 (1999) (“The [Parliamentary Assembly of the Council of Europe] encourages [...] the exploration and evolution of out of court forms of dispute resolution such as mediation and expert determination”) and Washington Principle 11 (“Nations are encouraged to develop [...] alternative dispute resolution mechanisms for resolving ownership issues”). These bodies operate outside the national court systems and do not have the power to deliver binding judgments. They can only make recommendations through schemes that, to some extent, resemble conciliation and mediation. Among these bodies there is the German “Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property” (*Beratende Kommission*).<sup>59</sup> This

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<sup>56</sup> *Vineberg v. Maria-Louise Bissonnette*, 529 F.Supp.2d 300, 2007, *aff’d*, 548 F.3d 50, 58-59 (2008).

<sup>57</sup> For an analysis of three exceptions to immunity from suit that may apply in cases involving cultural property (“commercial exception”, “ownership, possession and use of property”, and “expropriation exception”) see PAVONI, “Sovereign Immunity and the Enforcement of International Cultural Property Law”, in FRANCONI and GORDLEY (eds.), *Enforcing International Cultural Heritage Law*, Oxford, 2013, p. 79 ff., pp. 82-92.

<sup>58</sup> *Maria Altmann v. Republic of Austria*, 541 US 677 (2004). This case was litigated in the United States but was settled in 2006 through arbitration in Austria.

<sup>59</sup> Apart from the abovementioned UK Spoliation Advisory Panel, other specialized bodies have been established in Austria, France and the Netherlands. For an overview, see ROWLAND, “Nazi Looted Art Commissions After the 1998 Washington Conference: Comparing the European and American Experiences”, *Journal für Kunstrecht Urheberrecht und Kulturpolitik*, 2013, p. 83 ff.

Commission, which was established in 2003, can give recommendations on how to settle restitution claims with “just and fair” solutions as envisaged by the Washington Principles. However, the competence of the *Beratende Kommission* is limited in that it can only deal with claims concerning objects located in public institutions. Therefore, it cannot receive claims regarding the Gurlitt collection.

Fourth, the conditions that are necessary to achieve “just and fair” solutions have long been identified by the international community through the abovementioned diplomatic documents on Nazi-confiscated art: archives should be open and accessible to facilitate the identification and the subsequent publication of data regarding confiscated art objects; Holocaust-related art disputes should be dealt with expeditiously and impartially by an accessible body with a balanced membership of experts; such a body should deal with disputes by setting aside statutory time limitations and taking into account the specific facts and circumstances of the loss; this appraisal should permit to verify, inter alia, whether the requested object was actually spoliated by the Nazis, whether pre-war owners and their heirs have diligently attempted to find them, and whether the current possessors exercised due diligence at the moment of the acquisition. Therefore, it should come as no surprise that the accord between German authorities and Cornelius Gurlitt makes one reference to the Washington Principles as the key instrument to achieve “fair and just solutions [...] in particular by means of restitution, for persons claiming ownership of the works”.<sup>60</sup>

In light of the foregoing analysis, there are grounds to affirm that the available means of dispute settlement can lead to the “just and fair” resolution of Holocaust cases not involving State entities. ADR means provide the necessary flexibility for handling claims relating to Nazi confiscated art held by private collectors. On the other hand, international practice provides copious and persuasive evidence that the mere possibility that a lawsuit is launched against museums, art trade professionals or individual collectors usually leads these stakeholders to seek an amicable settlement out of the public eye through ADR. In other words, litigation (or the threat of it) may bring a recalcitrant disputant to the negotiating table. The vast number of out-of-court settlements and voluntary returns also signal that institutions and private individuals possessing contested art have realized that positive law may fail to give satisfactory answers<sup>61</sup> and that restitution claims should not be rebuffed as this would be to ratify the gross wrongs committed by the Nazis.<sup>62</sup> Therefore, it appears that the private and public stakeholders concerned by the Gurlitt collection have at their disposal the dispute resolution means to reverse the effects of discriminatory and genocidal Axis policies. Aside from moral imperatives, manifold legal sources and concrete examples show that it is possible to effectively address one of the

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<sup>60</sup> See the Joint Press Release 64/2014, *cit. supra* note 5.

<sup>61</sup> SIEHR, “Restitution of Looted Art in Private International Law”, in RENOLD and GABUS (eds.), *Claims for the Restitution of Looted Art*, Geneva, 2004, p. 71 ff., p. 93.

<sup>62</sup> PELL, *cit. supra* note 41, p. 315.

unfinished businesses of the Second World War by way of win-win settlements involving either the restitution of looted objects or other alternative solutions. It is for this reason that every week new cases of voluntary restitution or friendly settlement concerning artefacts looted during the Nazi reign are reported in the press. Of course, this does not mean that claimants are relieved of the burden of proving ownership. This remains a daunting obstacle for Holocaust survivors and their families because evidence can be lost or extremely difficult to collect now after more than half a century since the end of the Second World War. While many of those involved have passed away, those who are still alive or their descendants may have no documentation, photographs or witnesses.

Having said this, it is also necessary to discard the proposals regarding the creation of a specialized body for the settlement of Holocaust looted art cases.<sup>63</sup> However meritorious, a realistic appraisal permits one to conclude that these proposals would hardly obtain the necessary State consent to address the private law issues present in disputes involving private parties. This aspect can be illustrated by considering the difficulties that arose as regards the amendment of the mandate of the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (ICPRCP). Created in 1978, the ICPRCP is a permanent intergovernmental body entrusted with the mandate to assist UNESCO Member States in dealing with cases falling outside the scope of application of the 1970 UNESCO Convention.<sup>64</sup> The ICPRCP has no jurisdictional power to rule in disputes between States, it can simply act in an advisory capacity. The ICPRCP Statutes was amended in 2005 to empower this body to make proposals for mediation or conciliation to the States that have submitted a dispute to it. However, the broad consensus on the amendment could not be replicated as regards the rules of procedure on mediation and conciliation as States disagreed on the involvement of non-State entities. A compromise was reached after a lengthy debate. Article 4 now establishes that the mediatory and conciliatory functions of the ICPRCP do not apply to cases where the holder of a contested object is an individual. This means that the interest in protecting individual property rights prevailed, though a great number of cases indicated that restitution claims often concern wrongfully removed objects held by individual collectors.

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<sup>63</sup> See, e.g., TOMPKINS, “Gurlitt Art Collection OpEd: An ad-hoc International Art Crime Tribunal for the Munich Gurlitt Pictures?”, *ARCA Blog*, 5 November 2013, available at: <<http://art-crime.blogspot.ch/2013/11/oped-ad-hoc-international-art-crime.html>>, accessed 21 March 2013; ANGLIM KREDER, “Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes: Creation of an International Tribunal”, *Art Antiquity and Law*, 2008, p. 243 ff.; PELL, *cit. supra* note 41; KEIM, “Filling the Gap Between Morality and Jurisprudence: The Use of Binding Arbitration to Resolve Claims of Restitution Regarding Nazi-Stolen Art”, *Pepperdine Dispute Resolution Law Journal*, 2002-2003, p. 295 ff.

<sup>64</sup> *Cit. supra* note 24.

## 6. CONCLUDING REMARKS

The art collection discovered in Cornelius Gurlitt's possession is certainly the most remarkable find of Nazi looted art since 1945. The estimated value of the collection is thought to be more than € 1 billion.<sup>65</sup> Therefore, this case cannot be compared to any of the Holocaust-related cases that have received extensive news coverage in the past decades.<sup>66</sup>

This discovery has presented many challenges for German authorities, not the least of all how to undo the harm caused by the massive and systematic misappropriations of works of art that were part of the "final solution" conceived by the Nazi regime to eradicate the Jewish race. On the other hand, the discovery of Gurlitt collection shows that, although one of the professed aims of Allied Governments was to enable the victims of the Nazis to recover their property, the restitution programme was hindered by various loopholes. Allied agencies worked vigorously in the early post-war years to locate and return cultural objects and other assets to their original owners. Nonetheless, thousands of works of art reached the international art market where they soon disappeared. Moreover, art that was not found in the aftermath of the war was presumed to have been destroyed. As a result, it is estimated that some tens thousands of works of art are still missing.<sup>67</sup> As such, it is not unlikely that other large collections like the Gurlitt one are out there.

By looking at the genealogy of the international legal instruments that have been adopted to deal with the looting of works of art committed by the Nazis and at the available means of dispute settlement, this article has shown that international law has an important role – albeit indirect – in the resolution of Holocaust-related art disputes. At one level, international law has made the discriminatory depredation of cultural property in connection with armed conflict an element of the international crime of persecution. Hence, international law identifies restitution as the necessary remedy to acknowledge and reverse the effects of the evil perpetrated by the Nazis. At another level, existing international legal instruments provide clear parameters for the "just and fair" resolution of all Holocaust cases.

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<sup>65</sup> MCELROY, *cit. supra* note 1. However, this value is only theoretical given that no notorious auction house, dealer or collector would take the paintings unless their history is cleared.

<sup>66</sup> Many of these cases are commented in the database *ArThemis*, available at: <<http://unige.ch/art-adr>>.

<sup>67</sup> FELICIANO, *cit. supra* note 8, p. 13.

