THE HOLOCAUST AND LOOTED ART†
Teresa Giovannini*  

I. INTRODUCTION

I.1. Looted Art in General

Looting in general, and looting of art, in particular, is unfortunately part and parcel of human history. Mexico’s artistic treasures were systematically plundered by the Spanish in the first part of the sixteenth century. The results of such looting with the display of, for example, exceptional Mayas, Toltec or Aztec statues and masks, is evident in our museums today.

The nineteenth century witnessed what can be characterised as systematic looting of western developing countries. The Napoleonic campaign in Egypt, along with the incredible finds of the archaeological dig that the French (not to mention the United Kingdom or Italy) brought back to Europe, is a striking example of this.

I.2. The Holocaust and Looted Art

Looting of art during the Nazi period – which is the subject matter of the present study – presents specific features from an historical standpoint. Indeed, not only did Hitler and his officials want to appropriate (often for their own personal benefit) valuable works of art located all over Europe but in addition, they were specifically determined to deprive Jews of their culture. The Nuremberg Tribunal recognised that calculated economic devastation, including the systematic looting of property, could destroy the cultural heritage and continuity of a group and set

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* Partner, Lalive & Partners, Geneva, Switzerland; email: tgiovannini@lalive.ch. The author gratefully acknowledges the assistance of Carolyn Olsburgh, Associate at Lalive & Partners.
the stage for the ultimate extermination of that group. Ultimately, the Nuremberg Tribunal ruled that the looting and destruction of art and cultural property constituted "systemic plunder of public or private property", in violation of the Nuremberg Charter, and that these actions constituted 'war crimes' under international law.¹ The most notorious example of this is the infamous Alfred Rosenberg, who was convicted of, and executed for, war crimes that included the systematic plunder of museums and libraries throughout Europe and the confiscation of more than 22,000 works of art.²

As Norman Palmer demonstrates in his master book Museums and the Holocaust,³ the material appropriation during the Nazi era included a vast number of cultural objects: not only from Germany, but also from Austria, Belgium, Czechoslovakia, France, Hungary, the Netherlands, Poland, Russia and elsewhere. Adolf Hitler, a failed artist, became a keen collector, appointing a series of experts to amass objects for his planned art museum at Linz. Hermann Göring was a fanatical art collector. Heinrich Himmler, the 'Reichskommissar for the Strengthening of German Folkdom' had a particular interest in the early German period. On 5th July 1940, the 'Einsatzstab Reichsleiter Rosenberg' (ERR) led by the fanatical anti-Semite Alfred Rosenberg the "Custodian of the Entire Intellectual and Spiritual Training and Education of the National Socialist Party and of all Co-ordinated Associations"⁴ was established. This Section was officially charged with the tracking and seizure of art works belonging to Jews and their transfer to Germany.

The Nazis were keen on legal regularity, as demonstrated, for example, by the fact that they used to repay the secured debt that accompanied the looting of Jewish-owned works held as security by the Aryans. Hence, looting in the sense discussed here includes not only deprivation by acts of violence, but also apparently legal transactions or auctions.

¹ See Judgment of the International Military Tribunal of 30 September 1946 in 22. Trial of the Major War Criminals Before the International Military Tribunal, 411-14, 481-86 (1948); see also: Owen C. Pell, The Potential for a Mediation/Arbitration Commission to Resolve Disputes Relating to Artworks Stolen or Looted During World War II, in ASA Special Series No. 13, January 2000, p. 177.
In 1999, the *Cour d'Appel de Paris*, in the well-known Gentili case, specifically confirmed the inclusion of perfectly legal transactions in the notion of looted art.5

Gentili, an Italian Jew, died in Paris in April 1940. His estate had debts and was liquidated by Court order, his family having meanwhile fled France. A collection of his paintings was sold by public auction in spring 1941. Some of these found their way into Göring's private collection and were returned after the war to France, where they were deposited in the *Musée du Louvre*. After fruitless negotiations, Gentili's heirs sued the Museum and the Government in 1998. In its decision of 2nd June 1999, the *Cour d'Appel de Paris* ruled that the 1941 auction, albeit formally perfectly legal, was to be held as null and void. The Court held that owing to the exceptional circumstances prevailing at the time, namely the very clear threats which hung over Gentili's heirs by virtue of the fact that they were Jews, they could not avail themselves of their legitimate rights at the time. As a consequence of this decision, the paintings (amongst which were *La Visitation* by Bernardo Strozzi, *Alexandre et Campaspe chez Apelle*, by Giambattista Tiepolo) were returned to Gentili's heirs.6

Looting as discussed today however does not include the spoils of war in the common sense of the term in international public law.

II. **Specific Legal Instruments**

II.I. **Immediate Post Second World War Period**

A. **International Instruments**

On 5th January 1943, the Allied powers issued a solemn declaration entitled the 'London Declaration'7 notifying all neutral countries that they would take action to prevent belligerent States from taking advantage of their expropriating methods. In particular, the signatories declared that they reserved the right to declare all transactions carried out in occupied countries as non-valid.

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7 Inter-Allied Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation or Control, London, 5th January 1943. (For the text of the Declaration, see Palmer *op. cit.*, note 3, at p. 303).
B. National Legislation

Immediately after the Second World War, various national laws specific to looted assets were adopted.

Switzerland adopted a State Decree on 10th December 1945⁸ (in force until 31st December 1947), which entitled any person who, in an occupied territory, had been dispossessed of an asset through violence or confiscation, to claim it against either a bad or good faith possessor. Pursuant to this Decree, and contrary to civil law, the good faith possessor could be compelled to restitution and obtain compensation not from the victim, but from the Swiss Government. Altogether, 833 claims were brought under the Decree of 1945, most of which concerned securities. Only 77 lawsuits related to works of art which had disappeared in France and most proceedings led to judicial settlements. Seventy-one works of art were returned.⁹

Likewise, Belgium enacted a Law on 12th April 1947 that created a presumption in favour of the original owner of property seized between 9th May 1940 and the date of liberation.¹⁰ In addition, a general restitution law passed in 1947¹¹ provided compensation by the State for damage to privately owned property incurred after 27th August 1939. France¹² Germany,¹³ Greece,¹⁴ Italy,¹⁵ the Netherlands¹⁶ and others also passed a series of laws for the restitution of property despoiled during the war.

All these laws have long-since lapsed, with the sole exception of the French Decree of 21st April 1945 (which set a time-limit for recovery claims of six months after the legal date of

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¹¹ Law of 1 October 1947 and Subordinate Regulation of 7 November 1947.
¹² E.g., Ordinance of 16 October 1944; Ordinance of 14 November 1944; Ordinances of 11 and 21 April 1945.
¹³ Initially, the issue of spoliated property in Germany was recorded in the Convention Between the Three Powers and the FRC on the Settlement of Matters Arising out of the War of 26 May 1952; see also Bundesrückerstattungsgesetz (Federal Restitution Act) of 19 July 1957, re-enacted 24 March 1958.
¹⁴ In particular Law No. 2/1948.
¹⁵ Legislative Decrees No. 252 of 5 October 1944; No. 222 of 12 April 1945; No. 393 of 5 May 1946.
¹⁶ Decree on the Restitution of Legal Rights of 17 September 1944.
the end of the hostilities) under certain conditions. Pursuant to this Decree indeed, the dispossessed owner can still commence proceedings if he or she can prove that it was materially impossible for him or her to act within the deadline set out in the Decree.₁⁷ The Cour d'Appel de Paris, in the above-mentioned Gentili Decision of June 1999, applied this provision of the 1945 Decree.

II.2. Today

The subject returned to the forefront of the public scene in the early 1990s, when the Berlin Wall fell and German archives were reopened. Many private organisations began to work actively on the issue of looted art. One of the key organisations in this category was the Commission for Art Recovery of the World Jewish Congress in New York.₁⁸ At the national level, various commissions and working groups have been set up to scrutinise the archives, to enquire on the provenance of the works of art, and in some cases, to examine individual requests for restitution.

A. International Instruments

At the international level, States are still looking for instruments to harmonise the discrepancies in national legislation. There is no international convention on the subject at present.

At the institutional level the European Commission on Looted Art (ECLA),₁⁹ set up in 1999, enacted various rules aimed at facilitating the restitution of looted art. By the same token, the Parliamentary Assembly of the Council of Europe adopted a Resolution on Jewish Cultural Property²⁰ on 4th November 1999 and requested the organisation of a European Commission, with special reference to the return of cultural property and the relevant legislative reform, to be entrusted with the restitution of looted art and to enact the necessary legislative reforms to facilitate this restitution.

In addition to these rules, numerous countries adopted 'non-binding' principles. Thus, on 3rd December 1998, on the

₁⁷ Ordinance No. 45-770 of 21 April 1945, Article 21.
occasion of a diplomatic conference on Holocaust Era Assets in Washington.\(^{21}\) 44 States morally undertook to research and to return looted art within their legislation. Eleven principles were enacted on that occasion, which constitute mere recommendations. In a nutshell, the signatory States undertook to take all the necessary measures to identify and distribute a list of works of art of doubtful origin and to develop mechanisms allowing the resolution of ownership issues. Taking into account the difficulties for some claimants to establish their title of ownership, the Washington principles also provide that the requirements in matter of burden of proof should be made easier.\(^{22}\)

The Washington Conference was followed by the Stockholm International Forum on Holocaust Education in January 2000\(^{23}\) and the Vilnius International Forum on the Holocaust Era Looted Cultural Assets, in October 2000.\(^{24}\) The Vilnius Conference was essentially aimed at bringing the Washington principles and the 1999 Council of Europe Resolution into operation. The various protagonists of the art market (in particular Merchants and Museums) were invited to give all useful information for that purpose, in particular in the framework of a website created in collaboration with the Council of Europe.

B. Current National Legislation

At the national level, most countries have not yet adopted specific legislation on looted art, besides those early post-war national enactments now long expired. Thus, and for example, in Switzerland, there has been no specific legislation adopted since December 1945. Any despoiled party must bring his or her action


\(^{22}\) See Cyrille Piguet, _op. cit._ note 9, at p. 1534.

\(^{23}\) See [http://www.holocaustforum.gov.se](http://www.holocaustforum.gov.se). The main topics of the Conference are summed up as follows:

"- What can we learn from the Holocaust and how can the study of these events alert contemporary society to the dangers of racism, anti-Semitism, ethnic conflict and other expressions of hatred and discrimination? Can we foresee the circumstances that give rise to persecution and genocide in order to prevent their recurrence?"

"- What can politicians and other forces in the community do to support education, remembrance and research about the Holocaust? And what should they do?"

\(^{24}\) See [http://vlinusforum.it](http://vlinusforum.it).
pursuant to the provisions of the Civil Code generally applicable to dispossession.

There are however some exceptions – albeit limited in scope – such as:

(i) Austria, which adopted specific legislation for victims of looted art on 4th December 1998. This law empowers but does not instruct on return of the Holocaust-looted objects from State museums. Such returns are to be without compensation to the returning bodies. Under this law, a two hundred-piece collection of pictures and other objects was restored to the Austrian branch of the Rothschild family.

(ii) Likewise, the Russian Parliament modified its law on cultural assets in 2000 and introduced a distinction between Holocaust victims' and the German States' or citizens' assets: the principle of restitution is applicable with respect to the former, while the latter belong to Russia unless compensation is paid.

(iii) In France, an Edict dated 10th September 1999 created a new Commission ('Commission Drai') to examine recovery claims. Beside the method of operating outside courts, discussed below, the Edict implicitly enjoins a relaxation of strict rules of tort and property law (such as limitation periods). In parallel, the Mattéoli Mission ('Mission Mattéoli'), set up by a Decree of 25th March 1997, received the mandate to determine the fate of missing valuables, the identity of those who benefited from them, and whether any public authorities were still in possession of property seized during the war.

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25 *Code civil suisse* (Swiss Civil Code), Articles 932 ff.
26 See *Arrêté du Conseil fédéral* of 10 December 1945, Article 11 paragraph 3.
29 See Norman Palmer, *op. cit.* note 3, at p. 103.
30 The Russian Federation Law on Cultural Valuables Displaced to the USSR as a Result of World War II and Located on the Territory of the Russian Federation (Federal Law N64-FZ of 15 April 1998); see *The Art Newspaper* 105, July-August 2000, p. 5.
32 The conclusions of the Mattéoli Mission were presented to the French Prime Minister on 17 April 2000: [http://www.ladocumentationfrancaise.fr/brp/notices/984000110.shtml](http://www.ladocumentationfrancaise.fr/brp/notices/984000110.shtml).
Other Countries have adopted Decrees or recommendations with a view to organising research and enquiry on looted art through State Commissions. This is the case in Belgium\textsuperscript{33} and in Great Britain.\textsuperscript{34} Finally, others such as the United States\textsuperscript{35} and Luxembourg\textsuperscript{36} are actively working on projects of law on the subject.

III. SPECIFIC SUBSTANTIVE ISSUES AND PRACTICAL ANSWERS – A COMPARATIVE APPROACH

III.1. Introduction

There is what we can call an international trend towards specific legal solutions to the problem of looted art today. This general trend is embodied in the first place in the Washington Principles, which introduced the concept of “a just and fair solution”\textsuperscript{37} (equity rather than law). More precisely, Resolution No. 1205 of the Council of Europe (1999) recommends a general easing of laws and regulations as follows:

“It may be necessary to facilitate restitution by providing legislative change with particular regard being paid to:

a) extending or removing statutory limitation periods;
b) removing restrictions on alienability;
c) providing immunity from actions for breach of duty on the part of those responsible for collections;
d) waiving export controls”;\textsuperscript{38}

adding that:

Such legislative change may require modification and clarification of human rights laws in relation to security and enjoyment of property.\textsuperscript{39}

\textsuperscript{34} Report of Culture, Media and Sport Committee [House of Commons]: Cultural Property: Return and Illicit Trade, 25 July 2000, the principal conclusions and recommendations of which can be found in Norman Palmer, op. cit. note 3, at p. 319 et seq.
\textsuperscript{35} See for example H.R. 4138, The Stolen Artwork Restitution Act.
\textsuperscript{36} Proposition de loi portant création d’une commission d’étude sur les spoliations des Juifs du Grand-Duché de Luxembourg durant l’occupation nazie, filed on 20 December 2000.
\textsuperscript{37} Washington Principles No. 8 and 9.
\textsuperscript{38} Council of Europe, Resolution 1205 (1999), Clause No. 13.
\textsuperscript{39} Council of Europe, Resolution 1205 (1999), Clause No. 14.
We have already mentioned the very few national laws (in particular France, Russia, Austria) existing at present on the subject, as well as their limited scope. In particular, there is no actual legislation aimed at resolving the substantive issues raised by the problem of looted art during the period of history under scrutiny. Key issues are in particular constituted by:

(i) the problem of the legal definition of the good faith owner;
(ii) the problem of the statute of limitations.

There are however some guidelines and some court cases that give some – albeit limited – answers to these problems.

III.2. The Practical Solutions

A. The Good Faith Purchaser: the Notion

a. Ordinary Conditions

Good faith is generally presumed and the law in civil law countries protects the good faith possessor’s title.

b. In the case of looted art

Resolution No. 1205 of the Council of Europe indirectly recommends the cancellation of the good faith owner’s title in providing that:

Consideration should also be given to [...] annulling later acquired titles, that is, subsequent to the divestment.

Besides and in addition to the ordinary criteria permitting the distinction between a good faith purchaser and a bad faith purchaser (such as the price paid), a specific concept is emerging with respect to looted art.

The concept of good faith purchaser in the matter of looted art has developed in the first place into a distinction between the caution required of an art merchant and an amateur. This distinction was introduced for the first time by the Tribunal fédéral Suisse (Swiss Supreme Court) in 1951 in the Bührle vs Galérie

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40 See for example Code civil suisse (Swiss Civil Code), Article 3.
41 Council of Europe, Resolution 1205 (1999), Clause No. 15 (c).
42 See with respect thereto for example Tribunal de Grande Instance de Strasbourg, Judgment of 11 January 1999 in the case Grunwald and Beant v. La Ville de Strasbourg, concerning the painting Die Erfüllung by Klimt.
Fischer case. In this case, the private collector Bührle had acquired, during the war, paintings and drawings that were later declared to be 'looted art'. In compliance with the Swiss Decree of 1945 mentioned above, Bührle was compelled to return these works of art to their legitimate owners, Paul Rosenberg and the Baroness Rothschild in particular. Bührle had purchased most of these paintings at the Fischer Gallery, in Lucerne. The Gallery admitted Bührle's good faith and claimed to have acted in good faith as well, thus being entitled to compensation by the Swiss Government as provided for in the 1945 Decree. The Swiss Government contested – for obvious reasons – Bührle's good faith.

The Swiss Supreme Court first stated that good faith was presumed, and that Bührle could be considered as a *mala fide* purchaser only if he knew or could have known about the possible illegal provenance of the works of art. In deciding on Bührle's alleged good faith, the Swiss Supreme Court affirmed that the requirements of precaution and awareness for the former were to be considered less strictly for a private collector than for a professional. In the Court's opinion, Bührle was a private collector and not an art dealer. According to the decision, it was not established that Bührle knew or could have known that the works of art had been looted. Moreover, the seller was a well known and highly regarded art dealer in Switzerland and abroad. Further, the works of art were to be sold at public auctions, which excluded their doubtful origin. Finally, Bührle had paid a high price and the acquisition of the works of art took place between the end of 1941 and 1942, at a time when the French authorities and the public were not aware of the looting. The Swiss Supreme Court consequently decided that Bührle had acted in good faith. The Swiss Government was therefore ordered to compensate Fischer, which it did.

In 1996, the Swiss Supreme Court confirmed the distinction between private collectors and the professional art dealers, extending it to *any* acquisition of works of art or antiques. 44

In France, the requirements for a good faith purchaser in matters of art will be considered more strictly when dealing with professionals. 45 Recently, in the famous Schloss case, 46 the

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43 *Tribunal fédéral suisse* (Swiss Supreme Court), Decision of 5 July 1951 in the case *Emil Bührle v. Theodor Fischer, Galerie Fischer and Swiss Confederation*.

44 *Tribunal fédéral suisse* (Swiss Supreme Court), ATF 122 III 1; see also: SJ 1999 I 1.

45 See *Tribunal de Grande Instance de Strasbourg*, Judgment of 11 January 1999 in the case *Grunwald and Beant v. La Ville de Strasbourg*.

French *Cour de Cassation*\(^{47}\) introduced what might be considered as a presumption of bad faith against art dealers in particular in cases of acquisition of art where looting is strongly documented.\(^{48}\) Adolph Schloss was an important Flemish and Dutch art collector, and the Nazis lucked after his collection already before the invasion. In 1990, one of Schloss' heirs discovered a painting by Franz Hals called *Portrait of Pastor Adrianus Tegularius* at the XVth Antique Dealers' Biennial at the Grand Palais (Paris) and recognised that this work came from Adolphe Schloss collection. Criminal proceedings were introduced against Mr Adam Williams, Director of the New House Galleries, who exhibited it in Paris; the painting was seized and confiscated. The *Cour de Cassation* held that the fact that the painting was looted in 1943 was sufficiently documented\(^{49}\) to question the gallery owner's good faith. In a subsequent decision in the same case, the *Haute Cour de Nanterre*\(^{50}\) held:

So obvious a gap in its (the painting's) history must necessarily have attracted the attention of a professional as Adam Williams, who is the director of a prestigious gallery and universally acknowledged as an outstanding art expert [...] in old masters [...] and [by] the fact that he is a specialist, particularly in 17th century Flemish Masters, one of whom is Franz Hals. He is bound to keep himself informed in order to remain at the forefront of his field, so that [...] he must know the books on that painter [...].

As a result, Mr Williams was held guilty of receipt of stolen goods and sentenced to eight months' imprisonment.

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\(^{48}\) Cyrilie Piguet, *op.cit.* note 9, at p. 1531.

\(^{49}\) In the catalogues of the auctions of 3 November 1967 (Park Bernet Gallery), 24 March 1972 (Christie's) and 28 March 1979 (Sotheby's), there were specific indications about the origin ('Schloss collection', 'Schloss, Paris, bought in 1901' or even 'stolen during World War II' or 'recorded as missing work'). The work was recorded as a missing work in the *Catalogue of Goods Despoiled in France During the 1939-1945 War*; this information was also repeated in the 1979 *World Collection Annuary*. The official catalogue of Franz Hals' works by Seymour Slive (1974) referred to the gap in the history of the painting. The historical information in the Christies' catalogue (auction of 21 April 1989) mentioned that the painting was acquired by Adolphe Schloss, Paris, in 1901 and formed part of the Schloss collection until World War II; it only referred to the 1967 and 1972 sales and did not indicate the "*Catalogue of Goods Depoited". New House Galleries, represented by Adam Williams, acquired the picture in the 1989 auction for a price of £110,000.

\(^{50}\) *Haute Cour de Nanterre*, Judgment of 6 July 2001.
B. The statute of limitation

a. In general (normal conditions)

National laws ordinarily provide for a limitation period within which a claim for restitution must be filed. The deadline can vary depending upon the characterisation of good or bad faith acquisition. Thus, with respect to the good faith owner, the statute of limitations period is three years in France\(^{51}\) and five years in Switzerland.\(^{52}\)

As to the bad faith owner, English law provides that time will not run in favour of a thief or a person who acquires property through a thief; however, a good faith purchase will mark the start of a six-year limitation period.\(^{53}\) Other national laws, such as Switzerland, which sets no time limitation for actions against a bad faith purchaser are more flexible.\(^{54}\)

Germany is even more flexible and provides for a 30-year limitation period which starts to run afresh each time the chattel changes hands.\(^{55}\)

b. In the case of looted art

The immediate post-war laws or decrees also provide for a distinct statute of limitations. The Swiss Decree of 1945 for example introduced a *de facto* derogation to the five-year legal limitation period applicable to claims brought against good faith purchasers, providing that restitution could be demanded from December 1945 until December 1947 on art looted since 1\(^{st}\) September 1939. This retroactive right to restitution was indeed expressly admitted by the Swiss Supreme Court in the *Rosenberg v. Fischer* case (1946)\(^{56}\) where the Gallery was compelled to return to Rosenberg 22 paintings looted in 1939.

After the Second World War, the United Nations General Assembly passed the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (the 1968 UN Convention). Pursuant to the 1968 UN Convention:

No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:

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\(^{51}\) *Code civil français* (French Civil Code), Article 2279.

\(^{52}\) *Code civil suisse* (Swiss Civil Code), Article 934.

\(^{53}\) Limitation Act 1980, ss. 3 and 4.

\(^{54}\) *Code civil suisse* (Swiss Civil Code), Article 936.

\(^{55}\) *Bürgerliches Gesetzbuch (BGB*, German Federal Code), Article 195.

\(^{56}\) *Tribunal fédéral suisse* (Swiss Supreme Court), Decision of 3 June 1948 in the case *Paul Rosenberg v. Theodor Fischer and others.*
(a) War crimes as they are defined in the Charter of the International Military Tribunal, Nuremberg [...] particularly the "grave breaches" enumerated in the Geneva Convention of 12 August 1949 for the protection of war victims.57

As noted above with reference to the conviction of Alfred Rosenberg at Nuremberg, the Military Tribunal there held that war crimes included the systematic plunder and confiscation of works of art.

More recently, Resolution No. 1205 of the Council of Europe (1999) expressly provides that "it may be necessary to facilitate restitution by providing for legislative change with particular regard being paid to...extending or removing statutory limitation periods".58

Case law however shows that the issue of the statute of limitations is far from being resolved in matters of civil litigation. An example of such difficulties is given by the New York case DeWeerth vs Baldinger.59 This case involved a painting by Monet – Champ de Blé à Vetheuil – purchased by Mrs DeWeerth's father in 1908 and reported missing from the family estate in Germany in 1945. In 1981, Mrs DeWeerth discovered the painting in a catalogue published by the Wildenstein Gallery in New York. The painting had been acquired by the Gallery in New York from a Swiss dealer and sold to Mrs Baldinger as a good faith purchaser in 1957.60 The New York Appellate Court held that, under the New York statute of limitations, the plaintiff had to show that she had been reasonably diligent in searching for the stolen property. This, the Court ruled, Mrs DeWeerth had failed to do.61 The saga did not end there, but as a result, Mrs DeWeerth was unable to recover the property.62 Likewise, the United States Courts showed themselves rather conservative in (implicitly) refusing, for example in the Egon Schiele case, to examine whether the New York legislature (in this case the New York Arts and Cultural Affairs Law) had anticipated the problem of art taken during the Holocaust.63

58 Clause No. 13 [a].
60 658 F. Supp. at 691.
61 836 F.2d at 107-112.
63 Court of Appeals of New York: 93 NY2d 729,719 NE2d 897,697 NYS2d 538 (1999); Supreme Court of New York, Appellate Division: 253 AD 2d 211, 688 NYS 2d 3 (1999); Supreme Court of New York, New York County: 177 Misc 2d 985, 677 NYS 2d 872 (1998).
There are however some court decisions which demonstrate more flexibility with regard to the core issue of the statute of limitations in cases of looted art during the Holocaust period. In *Menzel v. List*, a painting by Marc Chagall bought by Mr and Mrs Menzel in 1932, had been confiscated by the Nazis from the latter’s apartment in Brussels. The legitimate owners located the painting from an art book as being the property of Mr List in 1962. The Court interpreted the statute of limitations in a manner more favourable to the original owner than had been the case in *DeWeerth*, and applied the New York ‘demand and refusal rule’, which holds that where one comes into possession of stolen property, no wrong is committed until the holder is notified of the claim of the true owner and refuses to return the property on demand. Thus, although the limitation period in New York is three years, it does not begin to run until the true owner demands return of his/her property and that the possessor, i.e. upon demand and refusal, refuses demand.

Be that as it may, it is worth mentioning the very interesting recent approach to the problem by the English High Court, which has held that the application of a statute of limitations might, in some circumstances, constitute a violation of public policy in cases of looted art. Thus, in the decision of of 9th September 1998 relating to the painting of Joachim Wtewael (1603) *The Holy Family with Saints John and Elizabeth*, which most likely had been taken away by the Russians from the collection in the gallery of the Ducal Family of Saxe-Coburg-Gotha in the City of Gotha in January 1946, Mr Justice Moses declared:

To permit a party which admits it has not acted in good faith to retain the advantage of lapse of time during which the plaintiffs had no knowledge of the whereabouts of the painting and no possibility of recovering, it is, in my judgment, contrary to public policy [...] To allow C. to succeed, when, on its own admission it knew or suspected that the painting might be stolen or that there was something wrong with the transaction or acted in a manner in which an honest man would not, does touch the conscience of the Court [...] I can discern no conflict with the essential public interest in a law of limitation by recognising that the victim of a theft who had no opportunity of bringing the claim earlier should be entitled to assert his rights

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however long the time which has elapsed since the original theft. 65

III.3. Conclusion on Specific Substantive Issues

The few existing national laws on looted art and the absence of any international convention on the subject, coupled with the difficulty for Courts to diverge from legal requirements (albeit public policy might partially resolve some sensitive issues such as the statute of limitations) show that, even in the cases where the original title and the looting had been demonstrated, it remains very difficult for the victims or their heirs to recover their possession.

As an alternative to these difficulties, specific and alternative dispute resolutions have been recommended at the international level and exist at (some isolated) national levels.

IV. DISPUTE RESOLUTION

IV.I. In General

Recovery of stolen art generally falls under the prerogative of ordinary civil courts.

IV.II. In the Case of Looted Art

As mentioned above with respect to the substantive issues, there is no existing international convention dealing with looted art dispute resolution mechanisms.

At the level of non-binding instruments, both the Washington Principles adopted on 3rd December 1998 by 44 countries and the Resolution of 4th November 1999 of the Council of Europe recommend alternative dispute resolution mechanisms for looted art claims in the context of Nazi spoliation.

The eleventh principle adopted in Washington in 1998 encourages nations:

To develop national processes to implement the principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.

65 High Court of Justice, Decision of 9 September 1998 in the case City of Gotha and Federal Republic of Germany v. Sotheby’s and Cobert Finance SA. The transcript of the decision can be found in Palmer, op. cit. note 3, at p.
Similarly, Clause 16 of Resolution of 4th November 1999 of the Council of Europe recommends:

The exploration and evolution of out of court forms of dispute resolution such as mediation and expert determination.

With respect thereto, and as emphasised by Clause 13 of the Resolution:

It may be necessary to facilitate restitution by providing for legislative change.

However, there are still very few national or institutional regulations dealing with dispute resolution methods peculiar to looted art recovery even today. For instance:

(i) the above mentioned French Edict of 10th September 1999. The Commission for the examination of recovery claims set up by this Edict: shall proceed to the examination of the files [...] It should try to reconcile the parties with a view to obtaining an agreement between the claimant and the relevant institution. In case it fails to reach such an agreement, the Commission may issue recommendations.\(^{66}\)

(ii) The Swiss example is more restricted: the Swiss Government set up a Contact Bureau on Looted Art in January 1999, which is entrusted with handling claims relating to looted art that may be in possession of the Confederation.\(^{67}\)

In the United States, three recent proposals have been made at the legislative level. In particular, Congressman Charles Schumer proposed an Act in 1998\(^{68}\) which provided that:

Parties disputing the ownership of stolen artwork should attempt to resolve their disputes by alternative means, such as by arbitration, before seeking judicial remedies.

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67 About the Contact Bureau on Looted Art: see http://www.admin.ch/bak/arkgt/ar/index_e.htm. Pursuant to the research conducted by the Federal Office of Culture, the Swiss Confederation does not hold any stolen art or any artwork identified in the lists published by different States as looted art; see: Report of the Federal Office on Culture, inquiry on the period from 1933 until 1945.
68 H.R. 4138, the Stolen Artwork Restitution Act.
IV.III. Towards a Global Solution for Looted Art Dispute Resolution: Mediation and Arbitration

As can be seen from the above analysis, there is an institutional preference for mediation over litigation or arbitration. The problem resides in the fact that mediation is not enforceable and can in turn be challenged through the ordinary courts or otherwise. The sole possible solution in our view is arbitration, which results in a final and binding award, enforceable almost everywhere pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention).

Arbitration indeed allows for both a smooth procedure and the dislocation of the body of rules normally applicable pursuant to the conflict of laws system.

An example is provided by the Rules of Procedure for the Claims Resolution Tribunal I adopted by the Board of Trustees of the Independent Claims Resolution Foundation on 15th October 1997. The Swiss Bankers Association adopted these Rules following the publication of the names of holders of ‘dormant accounts’, i.e. accounts dormant since 9th May 1945. These Rules of Procedure governed the procedure (including the issue of burden of proof) and the body of rules of law before the Claims Resolution Tribunal to resolve all these claims by an enforceable Award.

However, practice shows that individuals, and in particular respondents, are not yet ready for this form of dispute resolution, which, as shown by the example of the dormant accounts, require their express agreement.

In addition, arbitration does not generally resolve the substantive issues inasmuch as the law applicable to the merits of the dispute generally embodies a specific national body of laws, unless the parties agree that their dispute be settled pursuant to the general principles of law or merely by the rule of equity. However, even this approach might result in a very hazardous outcome.

V. GENERAL CONCLUSION

This short overview of both the procedural and substantive problems raised by the issue of the Holocaust and looted art shows that there is still an undoubtedly strong resistance by national legislative bodies and courts to adopting specific rules of law to deal with the problem. This resistance results in our view from both:
(i) the fear of opening a Pandora’s box which would put State museums at risk, in particular by forcing them to return what might constitute their most valuable works of art;

(ii) the fear of modifying case law that has been built up over decades.

The sole solution probably consists in the adoption of an International Convention setting up:

- specific rules with regard in particular to title, statute of limitations, compensation of the good faith purchaser and the like;
- specific resolution mechanisms that lead to a rapid and final decision binding on both parties.

This solution, already proposed on various occasions,69 should be seriously considered as a consequence of the present awareness of the problem by numerous States, as shown by the Washington and Vilnius Diplomatic Conferences and Principles.

The matter is urgent: how long will the dispossessed owners or their heirs be in the situation to bring any evidence, if probably not knowledge, about rights lost under unacceptable circumstances? The more we wait, the more difficult it will be. And the international community has clearly declared that the issue at stake relates to war crimes.

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69 See Owen C. Pell, op. cit. note 1.
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Teresa Giovannini