

American University International Law Review

Volume 34
Issue 3 *Academy on Human Rights and
Humanitarian Law Articles and Essays on
Gender Violence and International Human
Rights*

Article 8

2019

Taking Greater Responsibility: Austria's Art Restitution Act and the Need for Further Reform

Victoria Bonadies
American University Washington College of Law

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/auilr>



Part of the [International Law Commons](#)

Recommended Citation

Bonadies, Victoria (2019) "Taking Greater Responsibility: Austria's Art Restitution Act and the Need for Further Reform," *American University International Law Review*. Vol. 34 : Iss. 3 , Article 8.
Available at: <https://digitalcommons.wcl.american.edu/auilr/vol34/iss3/8>

This Comment or Note is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University International Law Review by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

TAKING GREATER RESPONSIBILITY: AUSTRIA’S ART RESTITUTION ACT AND THE NEED FOR FURTHER REFORM

VICTORIA BONADIES*

I. INTRODUCTION	672
II. BACKGROUND	675
A. ARTICLE 13 OF THE 1970 UNESCO CONVENTION AND AUSTRIA’S RATIFICATION	675
B. THE DEVELOPMENT OF AUSTRIA’S ART RESTITUTION ACT	676
i. First Steps	676
ii. Austria’s Response to the Washington Conference Principles	676
iii. Amendment Following the Terezín Declaration....	677
iv. The Scope of Austria’s Current Restitution Law ..	678
C. HISTORICAL CHALLENGES FOR CLAIMANTS SEEKING RESTITUTION FROM AUSTRIAN COLLECTIONS	680
i. Portrait of Wally	681
ii. The Woman in Gold	682
iii. Summer Night at the Beach.....	684
iv. Five Egon Schiele’s Works	685
III. ANALYSIS	685
A. BY NOT APPLYING TO PRIVATE INSTITUTIONS, AUSTRIA’S ART RESTITUTION ACT DOES NOT ENSURE FACILITATION OF THE EARLIEST POSSIBLE RESTITUTION	686
i. Restitution from Private Institutions Occurs Slower than Restitution from Public Institutions.....	687

* J.D. Candidate, American University Washington College of Law (2020); B.A. Humanities Pre-Law, concentrations in Art History and Spanish, Museum Studies minor, Michigan State University (2017). I would especially like to thank my Note & Comment Editor, Shannon Riggins, for her guidance and insightful feedback throughout the writing process.

ii. Claimants Seeking Restitution from Private Institutions Face Undesirable and Often Unsuccessful Alternatives	691
IV. RECOMMENDATIONS.....	696
A. INCLUDING PRIVATE INSTITUTIONS	696
B. MAKING PRIVATE INSTITUTIONS RECEIVING GOVERNMENT FUNDS PUBLIC	697
C. AN EXCEPTION TO THE GOOD-FAITH PURCHASER LAWS	698
V. CONCLUSION	699

I. INTRODUCTION

From 1938 to 1945, and in the years leading up to World War II (War), the Nazis looted nearly one-third of Western Europe's art from Jewish families in German-occupied territories as part of the "Final Solution."¹ With an affinity for nineteenth-century classics, Hitler and other prominent officers amassed countless works of art for placement in Nazi museums and personal collections,² including modern art to be destroyed or sold as "degenerate."³ For Jewish families, outright confiscation and coerced sales of their assets became commonplace during the War.⁴ As a result, the Nazis, through doctored records of

1. See Jennifer Kreder, *Analysis of the Holocaust Expropriated Art Recovery Act of 2016*, 20 CHAP. L. REV. 1, 2-3 (2017) [hereinafter Kreder, *Analysis of the Holocaust Expropriated Art Recovery Act*] (detailing Hitler's obsession with ridding the Third Reich of Jewish culture by confiscating and destroying families' invaluable works of art from their personal collections).

2. *Id.* at 4 (explaining that the art initially collected to fill Hitler's planned Führermuseum also furnished German public and private collections). See generally Phillip Hellwege, *Precluding the Statute of Limitations? How to Deal with Nazi-Looted Art after Cornelius Gurlitt*, 22 SW. J. INT'L L. 105, 108-09 (2016) (recounting Hildebrand Gurlitt's story as a Nazi officer who liquidated confiscated "degenerate" artworks by selling them to museums and private collections while acquiring a 1,300-piece personal collection of tainted works).

3. See Kreder, *Analysis of the Holocaust Expropriated Art Recovery Act*, *supra* note 1, at 2, 4-5 (noting that the Nazis required all modern art be turned over to the state for its anti-German status, particularly after realizing the visual propaganda value of Nazi-sponsored, publicly displayed art).

4. See *id.* at 2 (recounting the effect of the Nuremberg Laws on Jewish families, which mandated all Jews to periodically declare their assets and prevented them

this systematic plunder, supplied the public and private collections of occupied territory with thousands of works.⁵

Post-war restitution efforts were largely inadequate⁶ and consisted of many governments, museums, and collectors turning a blind eye to the effects of Hitler's reign, preventing victims from reclaiming valuable possessions.⁷ No longer considered citizens at the end of the War, Austrian Jews' prized works of art became property of the government, and others remained lost to private collectors.⁸

Nations joined forces to enact international agreements in hopes of protecting the world's art and cultural property from further systematic looting.⁹ However, decades passed and the push for justice by way of restitution weakened.¹⁰

from selling property without Nazi authorization).

5. *Id.* at 2, 4, 6-7 (discussing the Nazis' obsessive documentation of their thefts as legal transactions).

6. Thomas Kline, *Where Are We and Where Are We Going: Legal Developments in Cultural Property and Nazi Art Looting*, 15 J. MARSHALL REV. INTELL. PROP. L. 435, 458 (2016) (emphasizing the unsuccessful nature of post-war restitution because many works changed hands during the War and remained lost afterwards).

7. Thérèse O'Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?*, 22 EUR. J. INT'L L. 49, 62 (2011) ("Administering bureaucrats were 'highly passive or even resenting' [and Austrian restitution laws] were denounced as 'full of loopholes with inadequate worldwide notice and short claims periods.'"); see Jennifer Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?*, 88 OR. L. REV. 37, 39 (2009) [hereinafter *The New Battleground of Museum Ethics and Holocaust-Era Claims*] (discussing the challenges and dishonesty Holocaust victims faced in recovering their property during the 1940s and 1950s when collectors, auction houses, and museum curators avoided the issue altogether).

8. *Id.*

9. See, e.g., Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, pmbl., art. 2, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO Convention] (urging international cooperation among state parties to protect the cultural property and considering the appropriation of cultural property one of the largest contributing factors to the depletion of the world's cultural heritage); see also Joseph Fishman, *Locating the International Interest in Intranational Cultural Property Disputes*, 35 YALE J. INT'L L. 347, 357 (2010) (viewing the 1970 UNESCO Convention as one of the most influential cultural property treaties currently in force).

10. See generally Kreder, *Analysis of the Holocaust Expropriated Art Recovery Act*, *supra* note 1, at 8 (explaining the underlying reasons for the reduction in

In the late 1990s, emotional memories unearthed by the fifty-year anniversary of the Holocaust prompted a resurgence of restitution claims.¹¹ Determined to keep the memories of their culture and families alive, claimants dutifully sought the return of their property.¹² This revival in art restitution litigation prompted nations to engage in new efforts to return works to their rightful owners, both nationally and internationally.¹³ While agreements such as the 1998 Washington Conference Principles on Nazi-Confiscated Art¹⁴ and the 2009 Terezín Declaration¹⁵ encouraged Austria to enact more favorable restitution legislation,¹⁶ the scope of Austria's current Art Restitution Act¹⁷ remains limited because it excludes private institutions.

This Comment argues that in limiting application to only public

restitution claims following the War).

11. O'Donnell, *supra* note 7, at 51.

12. Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims*, *supra* note 7, at 43-44 (describing the claimant's decision to pursue restitution as one of deep emotion, rather than financial gain, that has the potential to reconnect the claimant with his or her ancestors).

13. See generally Jessica Schubert, *Prisoners of War: Nazi-Era Looted Art and the Need for Reform in the United States*, 30 *TOURO L. REV.* 675, 680 (2014) (discussing the collaborative efforts of nations participating in international conferences on Holocaust-era art).

14. Bureau of Eur. and Eurasian Affairs, *Washington Conference Principles on Nazi-Confiscated Art*, U.S. DEP'T OF STATE (Dec. 3, 1998), <http://www.ngv.vic.gov.au/wp-content/uploads/2014/05/Washington-Conference-Principles-on-Nazi-confiscated-Art-and-the-Terezin-Declaration.pdf>.

15. Bureau of Eur. and Eurasian Affairs, *Prague Holocaust Era Assets Conference: Terezín Declaration*, U.S. DEP'T OF STATE (June 30, 2009), <http://www.ngv.vic.gov.au/wp-content/uploads/2014/05/Washington-Conference-Principles-on-Nazi-confiscated-Art-and-the-Terezin-Declaration.pdf>.

16. Bert Demarsin, *Let's Not Talk About Terezín: Restitution of Nazi Era Looted Art and the Tenuousness of Public International Law*, 37 *BROOK. J. INT'L L.* 117, 139 (2011) (noting that numerous countries undertook new efforts to implement more transparent restitution practices in response to the Washington Conference Principles).

17. BUNDESGESETZ ÜBER DIE RÜCKGABE VON KUNSTGEGENSTÄNDEN UND SONSTIGEM BEWEGLICHEM KULTURGUT AUS DEN ÖSTERREICHISCHEN BUNDESMUSEEN UND SAMMLUNGEN UND AUS DEM SONSTIGEN BUNDESEIGENTUM (KUNSTRÜCKGABEGESETZ – KRG)[FEDERAL ACT ON THE RESTITUTION OF WORKS OF ART AND OTHER MOVEABLE CULTURAL ASSETS FROM AUSTRIAN FEDERAL MUSEUMS AND COLLECTIONS AND OTHER FEDERAL PROPERTY] BUNDESGESETZBLATT I [BGBl I] No. 181/1998 (Austria) [hereinafter FEDERAL ACT ON THE RESTITUTION OF WORKS OF ART].

institutions, Section 1 of Austria's Art Restitution Act is not consistent with Article 13(b) of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention or Convention).¹⁸ Part II of this Comment discusses the 1970 UNESCO Convention, focusing primarily on Article 13.¹⁹ Additionally, Part II discusses Austria's enactment of its 1998 Art Restitution Act in response to various international agreements.²⁰ Part II also introduces case law demonstrating the complications surrounding art restitution claims brought in Austria and in the United States.²¹ Part III of this Comment analyzes Austria's Art Restitution Act and addresses the Act's inconsistency with Article 13(b) of the 1970 UNESCO Convention by not applying to private institutions and compares Austria's Art Restitution Act with U.S. laws implicated in restitution claims to demonstrate the complexities of Austrian law.²² Part IV recommends that Austria include in its Art Restitution Act private institutions, or in the alternative, make the government-funded private collections public institutions, and an exception to its good-faith purchaser laws for restitution cases to ensure timely restitution.²³ Finally, Part V provides a brief conclusion.²⁴

II. BACKGROUND

A. ARTICLE 13 OF THE 1970 UNESCO CONVENTION AND AUSTRIA'S RATIFICATION

The 1970 UNESCO Convention's aim of safeguarding nations' cultural property and promoting multiculturalism increased post-war restitution endeavors.²⁵ The Convention imposes a general duty upon States to oppose illicit transfer of ownership of cultural property by

18. UNESCO Convention, *supra* note 9.

19. *See infra* Part II.

20. *See infra* Part II.

21. *See infra* Part II.

22. *See infra* Part III.

23. *See infra* Part IV.

24. *See infra* Part V.

25. Fishman, *supra* note 9, at 390 ("The intent to foster multiculturalism has continued to underlie all subsequent international legislation on cultural property rights.").

eliminating causes, ridding the State of dishonest practices, and making the necessary reparations.²⁶ Specifically, Article 13(b) provides that States must “co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner.”²⁷ In 2015, Austria ratified the 1970 UNESCO Convention, making it bound to fulfill its obligations under Article 13.²⁸

B. THE DEVELOPMENT OF AUSTRIA’S ART RESTITUTION ACT

i. First Steps

Prior to passing its Art Restitution Act, Austria faced unrelenting criticism for its wavering approach to Holocaust restitution.²⁹ As a remedy, in 1955, the Austrian government signed the State Treaty of Vienna into effect, which obligated Austria to “transfer all assets which remained without heir or which were not claimed within half a year to government departments or victim organizations” to aid in “relief, support, and rehabilitation.”³⁰

ii. Austria’s Response to the Washington Conference Principles

In 1998, forty-four nations signed the Washington Conference Principles on Nazi-Confiscated Art.³¹ Although non-binding, the

26. See UNESCO Convention art. 2, *supra* note 9. See generally Kelly Falconer, Comment, *When Honor Will Not Suffice: The Need for a Legally Binding International Agreement Regarding Ownership of Nazi-Looted Art*, 21 U. PA. J. INT’L ECON. L. 383, 389 (2000) (discussing the obligations the 1970 UNESCO Convention imposes on member-states).

27. UNESCO Convention art. 13(b), *supra* note 9.

28. *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*. Paris, 14 November 1970, UNESCO, <http://www.unesco.org/eri/la/convention.asp?order=alpha&language=E&KO=13039&toprint=yes> (last visited Mar. 26, 2019).

29. See O’Donnell, *supra* note 7, at 62 (considering the nation’s apprehensiveness about complicity in the Holocaust as the root of its begrudging attitude toward restitution).

30. *The Austrian Legislation on Art Restitution After World War Two*, NAT’L FUND OF THE REPUBLIC OF AUSTRIA FOR VICTIMS OF NAT’L SOCIALISM, <https://www.kunstdatenbank.at/the-austrian-legislation-on-art-restitution-after-world-war-two.html> (last visited Mar. 26, 2019); see also Falconer, *supra* note 26, at 416 (noting that the nation received further praise for facilitating an auction for these “heirless” works of art to benefit Holocaust survivors).

31. *Washington Conference Principles on Nazi-Confiscated Art*, *supra* note 14.

Washington Conference Principles legitimized the restitution of Nazi-looted works of art on an international scale and initiated a wave of progress among nations by encouraging just and fair solutions through more probing provenance research.³²

Austria's participation in the Washington Conference contributed to the reformation of Austrian restitution laws, as only one law in place concerning "heirless" art left numerous claimants without recourse.³³ After further negative exposure surrounding Austrian museums' post-war art dealings,³⁴ parliament passed the Austrian Art Restitution Act³⁵ in 1998, providing "restitution notwithstanding such legal obstacles as the statute of limitations."³⁶

iii. Amendment Following the Terezin Declaration

A decade later, in response to the 2009 Terezin Declaration (Declaration),³⁷ Austria amended the Art Restitution Act. Signed by forty-six nations, the Declaration was a non-binding international agreement regarding Nazi-era assets that encouraged all signatories to

32. *Id.* (calling for nations to reach just and fair solutions by identifying Nazi-confiscated art, opening records and archives, publicizing looted works to notify owners, establishing registries containing provenance information, encouraging rightful owners to bring forward restitution claims, maintaining a balanced membership within any commissions formed to aid in ownership issues, and implementing national procedures to carry out these principles); see Lucia Foulkes, *The Art of Atonement: How Mandated Transparency Can Help Return Masterpieces Lost during World War II*, 38 B.C. INT'L & COMP. L. REV. 305, 313 (2015) (viewing the Washington Conference Principles as a major progression that raised awareness and prompted countries to re-evaluate their treatment of Holocaust restitution claims); see also *Washington Conference Principles on Nazi-Confiscated Art*, *supra* note 14. *But see* Falconer, *supra* note 26, at 390-91 (criticizing the Washington Conference Principles as an overly optimistic moral commitment to taking responsibility for redressing the Nazis' grave injustices).

33. Foulkes, *supra* note 32, at 313 (stating that Austria passed the 1998 Art Restitution Act in response to the Washington Conference Principles).

34. See Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims*, *supra* note 7, at 53-54 (explaining Austrian journalist Hubertus Czernin's publication of a series of articles detailing the Belvedere Gallery's extortion of art from Holocaust survivors fleeing Austria by demanding 'donations' of art in exchange for government export permits).

35. FEDERAL ACT ON THE RESTITUTION OF WORKS OF ART, *supra* note 17.

36. Falconer, *supra* note 26, at 416.

37. *Prague Holocaust Era Assets Conference: Terezin Declaration*, *supra* note 15.

implement the Washington Conference Principles.³⁸ Although the Declaration was non-binding,³⁹ Austria amended its Art Restitution Act by establishing a “committee . . . in the Federal Ministry of Education, Art, and Culture to advise the Federal Ministers . . . on determining the persons to whom the objects indicated in Section 1 are to be transferred.”⁴⁰ Section 3(4) states that “[t]he committee shall make its recommendations on the basis of reports by the Commission for Provenance Research of the Federal Ministry of Education, Art and Culture [and that] [i]t may also consult other experts and suitable persons to provide information.”⁴¹ Other modifications to the Art Restitution Act included an expansion of the term “works of art” to include “and other moveable cultural assets,” since the law previously remained silent on whether the term included solely artwork; the possibility for restitution of works obtained by the Austrian government from Nazi coerced sales; and an application to all federal property.⁴²

iv. The Scope of Austria’s Current Restitution Law

Section 1(1) of the Art Restitution Act, entitled “Objects Liable to Restitution,” states that the “Federal Minister of Finance shall be empowered to return free of charge to their original owners or their legal heirs, those art objects and other moveable cultural assets from Austrian federal museums and collections, including the collections of

38. *Id.*

39. See Demarsin, *supra* note 16, at 145 (criticizing the Terezín Declaration for doing little to further the restitution cause, as a mere reaffirmation of the Washington Conference Principles, relying solely on nations’ moral commitments to advance restitution initiatives).

40. ÄNDERUNG DES BUNDESGESETZES ÜBER DIE RÜCKGABE VON KUNSTGEGENSTÄNDEN AUS DEN ÖSTER-REICHISCHEN BUNDESMUSEEN UND SAMMLUNGEN [AMENDMENT TO THE FEDERAL LAW ON THE RETURN OF WORKS OF ART FROM THE AUSTRIAN FEDERAL MUSEUMS AND COLLECTIONS] BUNDESGESETZBLATT I [BGBL I] No. 117/2009 (Austria) [hereinafter AMENDMENT TO THE FEDERAL ACT ON THE RESTITUTION OF WORKS OF ART]; FEDERAL ACT ON THE RESTITUTION OF WORKS OF ART, *supra* note 17, § 3(1).

41. FEDERAL ACT ON THE RESTITUTION OF WORKS OF ART, *supra* note 17, § 3(4).

42. *Id.* § 1(1); see also the 1998 Art Restitution Act and its 2009 Amendment, JEWISH COMMUNITY VIENNA, http://www.restitution.or.at/schwerpunkte/s-kunst-kunstrueckgabegesetz_e.html (last visited Feb. 10, 2019).

the Federal Administration of Moveable Objects, and other directly owned federal property.”⁴³ The scope of Section 1(1) includes “those art objects and other moveable cultural assets . . . that were the subject of restitution to their original owners or their heirs or were to be restituted under regulations at the time and that became the property of the Federal State after 8 May 1945 . . . and that remain State property.”⁴⁴

Additionally, the Act requires restitution of objects “that legally became the property of the State but had been previously the object of a legal transaction or legal act under § 1 of the Federal Law on the Declaration of Annulment of Legal Transactions and Other Legal Acts Occurring During the German Occupation of Austria and are still State property.”⁴⁵ Moreover, the scope pertains to cultural property, which was “the object of a legal transaction . . . between 30 January 1933 and 8 May 1945 in a territory of the German Reich outside the present Republic of Austria” akin to the legal transactions that took place “during the German occupation of Austria and are still State property.”⁴⁶ Finally, Section 1(1) of the Art Restitution Act applies to objects “that were not returned to the original owners or their legal heirs on conclusion of restitution proceedings and without payment became the property of the State as abandoned goods are still State property.”⁴⁷ Thus, the law only applies to works in public institutions, rendering many works in private collections untouchable,⁴⁸ like those in Austria’s Leopold Museum—a private foundation housing art from collector Rudolf Leopold’s personal collection.⁴⁹

43. FEDERAL ACT ON THE RESTITUTION OF WORKS OF ART, *supra* note 17, § 1(1).

44. *Id.* § 1(1)(1).

45. *Id.* § 1(1)(2).

46. *Id.* § 1(1)(2a).

47. *Id.* § 1(1)(3).

48. See *The Austrian Art Restitution Law*, COMM’N FOR ART RECOVERY, <http://www.commartrecovery.org/docs/TheAustrianArtRestitutionLaw.pdf> (last visited July 20, 2018); see also Foulkes, *supra* note 32, at 315 (observing that Austria’s Art Restitution Act only allows for the examination of government property).

49. *The Leopold Collection*, LEOPOLD MUSEUM, <https://www.leopoldmuseum.org/en/leopoldcollection/history> (last visited Feb. 10, 2019).

C. HISTORICAL CHALLENGES FOR CLAIMANTS SEEKING RESTITUTION FROM AUSTRIAN COLLECTIONS

While Austria certainly became more receptive to restitution with the enactment of the Art Restitution Act and its subsequent amendment⁵⁰, it is necessary to understand the history behind Austria's resistance to restitution.⁵¹ Following the War, as with many other claimants in European nations occupied by the Third Reich, Austrian Jews faced the serious obstacle of proof of ownership when reclaiming their property.⁵² The essential elements for reclamation required the claimant or family member to show proof of prior ownership, misappropriation by the Nazis, and, most importantly, proof that the work had not been abandoned.⁵³ Proving these elements presented claimants with an immense challenge, as much of the art that the Nazis seized was either stored without ownership identification or classified as abandoned property and transferred to the government.⁵⁴ Additionally, as a civil law country, Austrian law allows any buyer who makes a good-faith effort to investigate provenance and honestly believes in the legality of the purchase to retain title to stolen property.⁵⁵ Moreover, with many Nazi-era works valued at millions of dollars, seeking restitution in Austrian court appears to be an impossible challenge for most, as the filing fee must equal the amount in controversy under Austrian law. However, the

50. See Falconer, *supra* note 26, at 416-17 (noting that Austria restituted, at a minimum, over 200 works of art after passing its Art Restitution Act in 1998).

51. See generally O'Donnell, *supra* note 7 (criticizing Austria for its post-war efforts which deemed restitutions consisting of partial refunds for stolen works successful).

52. See Lara Weissman, Note, *A Moot Issue? Rethinking Holocaust Era Restitution of Jewish Confiscated Personal Property in Poland*, 13 CARDOZO J. CONFLICT RESOL. 679, 692-93 (2012) (explaining that the lack of investigation into Nazi-confiscated art, coupled with the fact that many claimants were heirs of true owners, caused Jews to believe the evidentiary burden was too great to pursue claims).

53. See *id.*

54. See Kline, *supra* note 6, at 440 (noting that whether the contested property was abandoned is integral to many Holocaust restitution cases).

55. See generally *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 263 (S.D.N.Y. 2009) (describing the nature of Austria's law regarding good-faith acquisition).

“Austrian refusal to accept any co-responsibility for Nazi crimes”⁵⁶ is perhaps the core of the country’s sluggish efforts to facilitate restitution.⁵⁷

Modern restitution initiatives in Austria demonstrate progress,⁵⁸ yet the nation still receives criticism for creating legal obstacles that prevent restitution.⁵⁹ The following restitution cases involving claims brought against Austrian collections, both in Austria and the United States, provide insight into the complications claimants face when challenging either the Austrian government or private institutions.

i. Portrait of Wally

One of the first modern restitution cases, *United States v. Portrait of Wally*,⁶⁰ “highlighted the extreme inadequacy of Austrian post-war restitution efforts,”⁶¹ arguably initiating Austria’s implementation of the Art Restitution Act.⁶² Ironically, the case involved the privately-owned Leopold Museum to which the Art Restitution Act did not apply. In 1998, while on loan from the Leopold Museum at the Museum of Modern Art (MoMA) in New York, the District Attorney subpoenaed Egon Schiele’s *Portrait of Wally* on the suspicion it was

56. *In re Holocaust Assets Litigation*, Case No. CV96-4849, Certified Award, at 1320 (Claims Resolution Trib. 2005).

57. See Falconer, *supra* note 26, at 416 (suggesting that Austria has only now taken a more serious approach to restitution to acknowledge its complicity in the Holocaust).

58. See *id.* at 418 (arguing that Austria has complied seriously with the 1998 Art Restitution Act and the Washington Conference Principles).

59. See *id.* at 417 (“[T]he mixed-bag that is Austrian restitution . . . epitomizes the problems inherent in nations being left to deal with the issue of Nazi-looted art on their own.”).

60. 663 F. Supp. 2d 232.

61. Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims*, *supra* note 7, at 52. See generally David Wissbroecker, *Six Klimts, a Picasso, and a Schiele: Recent Litigation Attempts to Recover Nazi Stolen Art*, 14 DEPAUL J. ART & ENT. L. 39 (2004) (summarizing the development of the Portrait of Wally case).

62. See Alan Riding, *An Essay; Foot Dragging on the Return of Art Stolen by the Nazis*, N.Y. TIMES (May 18, 2004), <https://www.nytimes.com/2004/05/18/arts/an-essay-foot-dragging-on-the-return-of-art-stolen-by-the-nazis.html> (“Austria was nudged into addressing the problem by the seizure of two Egon Schiele paintings that were sent to a show in New York in 1997.”).

Nazi-looted art to prevent its return to Austria.⁶³ In 1999, after a Court of Appeals ruling that the work could not be seized under New York state law, *Portrait of Wally* was subsequently seized under federal law for the eleven-year duration of the suit.⁶⁴ The Nazis seized two Egon Schiele paintings from Jewish art dealer Lea Bondi Jaray's family in 1939.⁶⁵ Rudolf Leopold acquired *Portrait of Wally* in 1954, though he promised Bondi his assistance in the piece's return; however, the Schiele remained in Leopold's collection.⁶⁶ Bondi passed away in 1969, and her heirs became the face of this drawn out case.⁶⁷ MoMA became involved in the litigation, further prolonging the restitution by filing a series of motions to dismiss on behalf of itself and the Leopold Museum.⁶⁸ In 2009, a New York judge "found that the Leopold's representatives were aware of the provenance issues when the painting was sent to MoMA in 1997,"⁶⁹ and therefore Leopold did not acquire title to the work as a good-faith purchaser. In 2010, the museum finally agreed to pay Bondi's heirs a nineteen to twenty-million-dollar settlement following Rudolf Leopold's death.⁷⁰

ii. *The Woman in Gold*

*Republic of Austria v. Altmann*⁷¹ acquired international fame for reaching the United States Supreme Court (the Supreme Court), but also for its Hollywood adaptation in "The Woman in Gold." Maria Altmann's aunt, Adele Bloch-Bauer, owned seven Klimt paintings, including a commissioned portrait titled *Portrait of Adele Bloch-*

63. See Donald Burris, *From Tragedy to Triumph in the Pursuit of Looted Art: Altmann, Beningson, Portrait of Wally, Von Saher and their Progeny*, 15 J. MARSHALL REV. INTELL. PROP. L. 394, 408-09 (2016).

64. See Wissbroecker, *supra* note 61, at 46 (explaining the District Attorney's subpoena for *Portrait of Wally* was later quashed, but that the United States immediately brought a forfeiture action under the National Stolen Property Act alleging the Leopold knowingly transported stolen property).

65. See Burris, *supra* note 63, at 408; see also Wissbroecker, *supra* note 61, at 44.

66. See Ori Soltes, *Cultural Plunder and Restitution and Human Identity*, 15 J. MARSHALL REV. INTELL. PROP. L. 460, 469 (2016).

67. See Burris, *supra* note 63, at 408.

68. See *id.*

69. *Id.*

70. *Id.* at 409.

71. See generally *Republic of Austria V. Altmann*, 541 U.S. 677 (2004).

Bauer I.⁷² She left the paintings to her husband, Ferdinand, upon her death in 1925, recommending that he donate six of the works to the Belvedere Gallery.⁷³ Following the 1938 Anschluss (German annexation of Austria), Ferdinand Bloch-Bauer fled to Switzerland, and the Nazis seized the paintings from his Vienna residence.⁷⁴ Unaware the Nazis seized his possessions, upon his death, Ferdinand named his surviving nieces and nephews the sole heirs of his estate.⁷⁵

The Beirat reviewed Altmann's claims for her family's Gustav Klimt paintings⁷⁶ but rejected them despite discovering "documentary evidence demonstrating the illegitimacy of the [Belvedere] Gallery's claims of ownership in Adele Bloch-Bauer's will."⁷⁷ Basing its recommendation against the return of the Klimt pieces on her will, the board concluded that, although the Nazis seized the works when they ransacked Ferdinand Bloch-Bauer's home, Adele's request leaving the paintings to the Belvedere meant the gallery legally acquired title.⁷⁸

Subsequently, Altmann pursued her claims in Austrian court, but exorbitant filing fees thwarted any progress.⁷⁹ Then, after filing an additional claim in California, attorneys litigated Altmann's case "against the Austrian government . . . at each level of the American federal courts."⁸⁰ After four years of litigation, the Supreme Court ruled that the Foreign Sovereign Immunities Act applied retroactively thereby justifying Ms. Altmann's claim against the Austrian government in the United States.⁸¹ The parties decided to pursue arbitration following the Supreme Court's ruling, which resulted in a unanimous decision in favor of Ms. Altmann, as the provision in her

72. Donald Burris & E. Randol Schoenberg, *Reflections on Litigating Holocaust Stolen Art Cases*, 38 VAND. J. TRANSNAT'L L. 1041, 1044 (2005).

73. *Id.*

74. Kreder, *Analysis of the Holocaust Expropriated Art Recovery Act*, *supra* note 1, at 12.

75. *See id.*

76. *See* Falconer, *supra* note 26, at 417-18.

77. Kreder, *Analysis of the Holocaust Expropriated Art Recovery Act*, *supra* note 1, at 11.

78. *See* Falconer, *supra* note 26, at 418.

79. *See* Burris & Schoenberg, *supra* note 72, at 1045 (explaining that under Austrian law, Ms. Altmann's filing fees would have totaled approximately two million dollars).

80. Burris, *supra* note 63, at 408.

81. *Republic of Austria v. Altmann*, 541 U.S. 677, 701-02 (2004).

Aunt's will was merely a request and, more importantly, the works were in fact never donated to the Belvedere but stolen by the Nazis.⁸²

iii. Summer Night at the Beach

In another case involving the Belvedere Gallery, the Austrian government returned the Edvard Munch painting *Summer Night at the Beach* to the heir of Alma Mahler. In 1912, Alma Mahler received the work as a gift from her late husband and composer, Gustav Mahler.⁸³ In 1937, Alma Mahler lent the painting to the Belvedere Gallery; however, while the piece was on loan to the museum, the Anschluss forced Mahler to flee Austria and leave the painting behind.⁸⁴ A relative of Mahler retrieved the work from the Belvedere,⁸⁵ but her "Nazi-step family . . . looted her belongings . . . [a]nd without her permission [re-sold the painting] to the [Belvedere]."⁸⁶

Mahler filed a claim in 1953, and a government commission reviewing the claim initially ruled in favor of the painting's restitution but then reversed its decision relying on the previous sale to the Belvedere.⁸⁷ After Mahler's death, her granddaughter continued to fight for the return of her grandmother's painting and filed another claim in 1999 under the newly-enacted Art Restitution Act.⁸⁸ The Beirat rejected her claim again on the grounds that Alma Mahler's 1953 claim adequately addressed the issue of ownership, though the advisory board admitted it agreed with her "arguments [that the work was sold without her consent] on historical and moral grounds."⁸⁹ In 2006, seven years after the commission rejected Mahler's

82. See generally Burris, *supra* note 63, at 408 (explaining the reasoning behind the arbitration panel's unanimous decision to reconstitute the Klimt piece).

83. Alan Riding, *After 60 Years, Austria Will Return a Munch Work to a Mahler Heir*, N.Y. TIMES (Nov. 9, 2006) [hereinafter Riding, *After 60 Years*], <https://www.nytimes.com/2006/11/09/arts/design/09munc.html>.

84. *Id.*

85. *Id.*

86. Charlotte Higgins, *Music, Art, and Memory: Mahler's Family Fights for Return of Munch Masterpiece*, GUARDIAN (Feb. 10, 2006), <https://www.theguardian.com/uk/2006/feb/11/arts.austria>.

87. See Riding, *After 60 Years*, *supra* note 83 ("It was this sale that the Austrian government cited to justify its refusal to return the work to Alma Mahler.").

88. Higgins, *supra* note 86.

89. *Id.*

granddaughter's claim, the Minister of Culture approved the painting's restitution when Mahler presented new and irrefutable research to the commission.⁹⁰

iv. Five Egon Schiele's Works

Viennese Jew Karl Mayländer owned five Egon Schiele works when he died in a concentration camp during the War.⁹¹ In 1943, the Gestapo confiscated his collection, including the Schiele pieces.⁹² The Leopold Museum acquired the pieces in 1960, where they remained until Mayländer's heiress, Eva Zirkl, sought their return.⁹³ Struggling with the Leopold for the restitution of the five watercolors, Zirkl turned down a monetary settlement and adamantly insisted on the return of her family's works.⁹⁴ However, the Leopold's private ownership allowed it to eschew any restitution obligations under the Art Restitution Act and caused Zirkl to spend twenty years attempting to recover her family's paintings.⁹⁵ The Leopold's private funding also allowed it to disregard a recommendation from the state to return the works in 2010 and negotiate the restitution in accordance with its own terms.⁹⁶ In 2016, the Leopold finally agreed to return two of the Schiele works, but kept the remaining three as part of the agreement.⁹⁷

III. ANALYSIS

Austria is not fulfilling its obligations under Article 13(b) of the

90. Riding, *After 60 Years*, *supra* note 83.

91. Kirsti Knolle, *Austrian Museum Reaches Settlement over Nazi-looted Artwork*, REUTERS (Apr. 7, 2016), <https://www.reuters.com/article/us-austria-art-restitution/austrian-museum-reaches-settlement-over-nazi-looted-artwork-idUSKCN0X42IV>.

92. Marlies Dachler, *Burden of Proof: Restitution Claims May Still Tarnish Austria's Image*, FALTER.AT: THE VIENNA REVIEW (Apr. 2008), <https://www.falter.at/the-vienna-review/0000/burden-of-proof>.

93. Knolle, *supra* note 91.

94. *Id.*

95. Danny Lewis, *In "Solomonic Solution," Museum Returns Two Nazi-Looted Artworks to 95-Year-Old Descendant*, SMITHSONIAN MAG.: SMARTNEWS (Apr. 8, 2016), <https://www.smithsonianmag.com/smart-news/vienna-museum-returns-two-works-of-art-stolen-nazis-180958705/>.

96. *Id.*

97. Knolle, *supra* note 91.

1970 UNESCO Convention⁹⁸ to ensure earliest possible restitution by excluding private institutions from the purview of the Art Restitution Act. When challenging private institutions, claimants endure a lengthier restitution process compared to that of public museums. Moreover, without these claims subject to official review under the Art Restitution Act, few practical alternatives remain for claimants seeking restitution from private institutions; the process is more challenging and claims with similar legal issues are less likely to be successful because private museums and collections retain complete discretion to determine whether restitution will occur.

A. BY NOT APPLYING TO PRIVATE INSTITUTIONS, AUSTRIA'S ART RESTITUTION ACT DOES NOT ENSURE FACILITATION OF THE EARLIEST POSSIBLE RESTITUTION

Article 13(b) of the 1970 UNESCO Convention requires parties to the convention “to ensure that their competent services co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner.”⁹⁹ Therefore, the Convention binds Austria through international law to facilitate the earliest possible restitution of Nazi-looted works that remain in the nation's public and private collections. Of course, total restitution is not feasible, as many works are simply lost forever or lack owners to claim them.¹⁰⁰ Still, the Art Restitution Act does not appear to facilitate the earliest possible restitution of several misappropriated works due to its limited scope fixated on public institutions.¹⁰¹

Section 1(1) of Austria's Art Restitution Act directs the state “to return free of charge to their original owners or their legal heirs, and those art objects and other moveable cultural assets from Austrian

98. See UNESCO Convention art. 13(b), *supra* note 9 (providing that member states must facilitate “the earliest possible restitution of illicitly exported cultural property to its rightful owner”).

99. *Id.*

100. See Kreder, *Analysis of the Holocaust Expropriated Art Recovery Act*, *supra* note 1, at 8 (claiming that the number of stolen works still missing is unquantifiable).

101. See Demarsin, *supra* note 16, at 174 (“The 1998 Art Restitution Act . . . regulate[s] the conditions and procedure for the return of Nazi era looted artwork from public collections of the Republic of Austria.”); see also Foulkes, *supra* note 32, at 313 (stating that the law's limitations create problems when claims are brought concerning paintings in the Leopold Museum given its private ownership).

federal museums and collections.”¹⁰² The “objects liable to restitution” under Section 1(1) are solely those which “became the property of the State” as a result of very particular circumstances during the War and “that remain State property.”¹⁰³ Moreover, the Beirat established by the act makes recommendations “on determining the persons to whom the objects indicated in Section 1 are to be transferred.”¹⁰⁴ Consequently, the board only reviews “those art objects and other moveable cultural assets from Austrian federal museums and collections,”¹⁰⁵ and does not “make its recommendations on the basis of reports by the Commission for Provenance Research of the Federal Ministry of Education, Art and Culture” or “consult other experts and suitable persons to provide information”¹⁰⁶ for claims regarding works in private museums and collections.

i. Restitution from Private Institutions Occurs Slower than Restitution from Public Institutions

The number of years it takes for restitution to occur from private institutions lends support to Austria’s violation of its obligations under Article 13(b) of the 1970 UNESCO Convention by not ensuring the earliest possible restitution for artwork in private institutions. With few exceptions, a restitution case regarding works in public institutions can take between one and six years, while cases concerning private institutions can take anywhere between eleven and twenty years, if restitution occurs at all.

The language of the Art Restitution Act explicitly applies to public institutions, but remains silent on restitution of works in private institutions.¹⁰⁷ Accordingly, government-owned museums must follow the law, quickening the restitution process.¹⁰⁸ For instance, shortly after the implementation of the Art Restitution Act in 1998, the Joanneum Museum, a public institution, disclosed that “it held about

102. FEDERAL ACT ON THE RESTITUTION OF WORKS OF ART, *supra* note 17, § 1(1).

103. *Id.* § 1(1)(1).

104. *Id.* § 3(1).

105. *Id.* § 1(1).

106. *Id.* § 3(4).

107. *Id.* § 1(1).

108. *See id.*

seventy works of art it believe[d] were looted by Nazis.”¹⁰⁹ The museum subsequently identified approximately half of the owners of the looted works within the year and published photos of the remaining pieces online to notify potential owners or heirs.¹¹⁰ Similarly, one year after Austria passed the Art Restitution Act, the government returned a collection of over 200 looted works to the Rothschild family.¹¹¹ Although Ms. Altmann’s restitution journey included many moments of tribulation, she reclaimed her family’s Gustav Klimt works from the government-owned Belvedere Gallery after six years, a relatively short period of time given her initial setbacks in Austria, subsequent appeals in U.S. courts, and final arbitration in Austria.¹¹² Mahler and her heiress filed numerous claims after the War, which the state rejected on technicalities before restitution ultimately occurred. However, upon reconsideration by the Beirat, the Austrian Federal Minister of Education, Art, and Culture (Federal Minister) ultimately decided in favor of restitution from the public Belvedere Gallery shortly thereafter in light of irrefutable evidence that the Nazis seized the work.¹¹³

On the contrary, private collections have no duty to adhere to the Art Restitution Act.¹¹⁴ Without a binding obligation to retribute Nazi-looted art with questionable provenance to rightful owners, restitution has typically been accomplished as a result of either best practices or, more commonly, public pressure.¹¹⁵ While changes in the international

109. Falconer, *supra* note 26, at 418.

110. *Id.*; see also Lewis, *supra* note 95 (stating that Austria enacted the Art Restitution Act in 1998 as a result of the widespread Nazi art theft during the War and subsequently returned thousands of works to their original owners or heirs).

111. Carol Vogel, *Austrian Rothschilds Decide to Sell; Sotheby’s in London Will Auction \$40 Million in Art Seized by Nazis*, N.Y. TIMES, (Apr. 10, 1999), <https://www.nytimes.com/1999/04/10/arts/austrian-rothschilds-decide-sell-sotheby-s-london-will-auction-40-million-art.html>; see also Falconer, *supra* note 26, at 417 (noting Austria’s restitution of 200 works from the Belvedere Gallery and the Kunsthistorische to the Rothschild family after passing its Art Restitution Act in 1998).

112. See generally Burris & Schoenberg, *supra* note 72, at 1044 (describing the various stages of Altmann’s litigation attempts spanning eleven years between the Austrian and U.S. court systems).

113. Higgins, *supra* note 86.

114. Foulkes, *supra* note 32, at 315 (“[T]here is no private right of action created through which heirs can claim title to privately owned paintings.”).

115. See *The 1998 Art Restitution Act and its 2009 Amendment*, *supra* note 42

legal atmosphere in the past two decades stressed restitution and transparency,¹¹⁶ collectors and museums remain adverse to letting go of masterpieces in their collections, as many works are symbols of a nation's identity or extremely valuable.¹¹⁷

Austria enacted its Art Restitution Act at the outset of *Portrait of Wally*, but the law's inapplicability to the Leopold allowed the museum to engage in an eleven-year legal battle with Ms. Bondi and her heirs in the United States over the Egon Schiele work.¹¹⁸ *Portrait of Wally* bears similarity to Altmann's case in that she presented the Beirat with "documentary evidence demonstrating the illegitimacy of the Gallery's claims of ownership,"¹¹⁹ and Bondi's heirs presented evidence demonstrating that Leopold lacked confidence in the provenance of *Portrait of Wally* because he previously communicated with Bondi regarding the stolen work's return.¹²⁰ Even under Austrian law, Leopold could not gain title to the Schiele. Altmann's case

(stating that, in response to public pressure, the Leopold Museum agreed to publish its provenance information online, despite its private ownership); see also Jennifer Kreder, *Fighting Corruption of the Historical Record: Nazi-Looted Art Litigation*, 61 KAN. L. REV. 75, 90-91 (2012) [hereinafter Kreder, *Fighting Corruption of the Historical Record*] ("Some museums have put forth a good faith effort to conduct and publicize provenance research . . . other museums hide behind the expense of performing provenance research as an excuse not to do it.").

116. See *Prague Holocaust Era Assets Conference: Terezin Declaration*, *supra* note 15 ("The process of such restitution or compensation should be expeditious, simple, accessible, transparent, and neither burdensome nor costly to the individual claimant."); see also *Washington Conference Principles on Nazi-Confiscated Art*, *supra* note 14.

117. See Kreder, *Fighting Corruption of the Historical Record*, *supra* note 115, at 85 (describing the Austrian people's lamentation over the return of the *Portrait of Adele Bloch-Bauer I*, the "Austrian Mona Lisa," to Maria Altmann). *But see* Falconer, *supra* note 26, at 418-19 (applauding Austrian museums for appearing more committed to the identification and return of looted art than American museums).

118. Wissbroecker, *supra* note 61, at 46.

119. Kreder, *Analysis of the Holocaust Expropriated Art Recovery Act*, *supra* note 1, at 11.

120. See *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 263 (S.D.N.Y. 2009) (holding that Leopold could not establish ownership because he failed to investigate the work's provenance and had reason to doubt its ownership); see also Soltes, *supra* note 66, at 469 (noting that Bondi's heirs claimed they could prove that Leopold and Bondi communicated about the stolen portrait and Leopold purchased the work with knowledge of its tainted provenance).

yielded the same result after the arbitration panel ruled in favor of restitution under Austrian inheritance law; yet Altmann received her works in five years' less time. Moreover, had the Beirat correctly accepted her claim under the Art Restitution Act, the Belvedere likely would have quickly returned the works, given the strong evidence of Ms. Altmann's ownership.¹²¹ In the same vein, had the Act applied to the Leopold Museum, the evidence offered by Bondi's heirs regarding Leopold's knowledge of the work's stained provenance would have prompted timely restitution under Austrian law.¹²² The Act also remained in effect for the majority of the years Zirkl spent hoping to see her restitution claim come to fruition.¹²³ However, given that "the law's scope is limited to public institutions . . . Zirkl [fought] to recover the five paintings from the privately owned Leopold Museum for almost [twenty] years."¹²⁴

These cases demonstrate that timely restitution is rare with respect to works in private collections not subject to restitution under the Art Restitution Act. The Austrian government restituted hundreds of works from state museums just after passing the Act in 1998. Within a year, the Rothschild family regained possession of over 200 pieces looted by the Nazis.¹²⁵ Ms. Altmann recovered her family's Klimt paintings within six years, and the Federal Minister approved Mahler's claim upon the Beirat's reconsideration.¹²⁶ Conversely, the Leopold Museum battled Bondi in court in the United States for eleven years to retain possession of the *Portrait of Wally*. Moreover, the Leopold restituted only two of five works to Zirkl after twenty years. Given

121. Cf. Higgins, *supra* note 86 (noting the Austrian Federal Minister's timely restitution of Mahler's painting upon receipt of irrefutable evidence of ownership).

122. See *id.* (discussing the removal of the painting in question from Mahler's possession, and the "historical and moral grounds" upon which Mahler based her arguments for restitution).

123. See Lewis, *supra* note 95 (discussing the passage of the Act in 1998 and how it remained in effect during the 20-year legal battle).

124. *Id.*

125. See generally Eileen Kinsella, *MFA Boston Acquires What's Left of Legendary Rothschild Collection*, ART NET NEWS (Feb. 24, 2015), <https://news.artnet.com/exhibitions/mfa-boston-acquires-whats-left-of-legendary-rothschild-collection-265924> (describing the restitution of 250 works to the Rothschild family just after the enactment of Austria's restitution act).

126. Higgins, *supra* note 86; Riding, *After 60 Years*, *supra* note 83.

that problematic works remain in private collections¹²⁷ and the exhibited length of time it takes to accomplish restitution from them, in not including private institutions within the scope of the Art Restitution Act, Austria violates its obligations under Article 13(b) of the 1970 UNESCO Convention because it does not “c-operate in facilitating the earliest possible restitution”¹²⁸ of certain Nazi-looted works in private museums and collections.

ii. Claimants Seeking Restitution from Private Institutions Face Undesirable and Often Unsuccessful Alternatives

Restitution appeared more feasible once Austria passed the Art Restitution Act, as it created “an extrajudicial procedure”¹²⁹ to review claims for works in government museums in the form of the Beirat, or advisory board. Thus, restitution claims for works in public institutions are not primarily handled in a court of law, and claimants typically utilize the Austrian courts as a last resort.¹³⁰ The recommendations of the Beirat are nonbinding, and the final decision to return an object is ultimately made by the Federal Minister.¹³¹

127. See Christa Roodt, *State Courts or ADR in Nazi-Era Art Disputes: A Choice “More Apparent than Real?”*, 14 CARDOZO J. CONFLICT RESOL. 421, 422 (2013) (“Today, significant numbers of artwork are in the hands of public institutions and museums (state-owned and private) in the United States and in Europe.”); see also Kreder, *Fighting Corruption of the Historical Record*, *supra* note 115, at 89 (explaining that art insiders around the world were aware of the Nazi spoliation of Jewish art and sought to curate private collections from many looted pieces). See generally Jessica Grimes, *Forgotten Prisoners of War: Returning Nazi-Looted Art by Relaxing the National Stolen Property Act*, 15 ROGER WILLIAMS U. L. REV. 521, 525 (2010) (detailing the passage of looted art from Jewish collections to either state institutions or highly-ranked Nazi officers, with “degenerate” art prepared for sale abroad to private collectors).

128. UNESCO Convention art. 13(b), *supra* note 9.

129. Jane Kallir, *Austrian Restitution Policy: Where Are We, and How Did We Get Here?*, GALERIE ST. ETIENNE (Oct. 1, 2015), <http://gseart.com/gse-blog/2015/10/01/austrian-restitution-policy/>.

130. See Falconer, *supra* note 26, at 418 (describing how Maria Altmann turned to Austrian courts only after the Commission rejected her initial claim); see also Zahava Moerdler, Note, *Restituting Justice: Applying the Holocaust Restitution Process to Subsequent Genocides and Human Rights Violations*, 40 FORDHAM INT’L L.J. 131, 134 (“Altmann’s case is typical in that her struggles with the Austrian government were futile and she was forced to pursue litigation to instigate a settlement.”).

131. Demarsin, *supra* note 16, at 174-75.

However, since the board is “empowered to make findings as to the provenance of an artwork and to make legal assessment as to whom [it] belongs,”¹³² the Federal Minister adheres to the Beirat’s recommendations when making restitution determinations.¹³³ Conversely, claims for works in private institutions are not reviewed by the Beirat.¹³⁴ This lack of official review leaves claimants with challenging alternatives that delay restitution: utilizing the Austrian court system, filing suit in another country, or negotiating restitution on the museum’s terms.

Bringing claims in Austrian court creates unique obstacles not present under the Art Restitution Act. In Austria, claimants encounter enormous filing fees, particularly when seeking restitution of a high-value work of art.¹³⁵ Upon the Beirat’s initial rejection of Altmann’s claims under the Art Restitution Act, the works’ colossal value prevented her from filing claims in Austrian court.¹³⁶ Similarly, without the benefit of bringing claims under the Art Restitution Act, claimants battling private institutions who chose to forego negotiations with the museum or cannot file claims in another country must subject themselves to these steep filing fees.

Moreover, claimants face initial disadvantages in recovering works¹³⁷ from the government and private owners because “a good-

132. Foulkes, *supra* note 32, at 315.

133. Demarsin, *supra* note 16, at 174 (“[H]istorically all ministerial decisions concurred with the Beirat’s recommendations.”). See generally Burris, *supra* note 63, at 425-26 (describing the creation and operation of the Austrian Beirat Commission); *Austrian Panel Rules Against Return of Klimt Frieze to Jewish Collector’s Heirs*, GUARDIAN (Mar. 16, 2015), <https://www.theguardian.com/artanddesign/2015/mar/06/austrian-panel-rules-against-restitution-klimt-masterpiece-jewish-heirs> (describing the Advisory Board’s discretionary decision, backed by the Federal Ministry, to recommend against the return of a Gustav Klimt frieze).

134. See discussion *infra* Part II.B.iii (highlighting that the Beirat Commission may only review those artworks and cultural property objects subject to restitution under Section 1(1) of the Art Restitution Act, which includes only property of the state).

135. See Burris & Schoenberg, *supra* note 72, at 1045 (explaining that Austrian law requires filing fees to be proportionate with the amount in controversy).

136. See *id.* (noting that Ms. Altmann failed to pursue her claims in Austrian court because the amount in controversy equaled the sum value of the works, totaling approximately two million dollars).

137. Kreder, *Analysis of the Holocaust Expropriated Art Recovery Act*, *supra* note

faith purchaser gets good title to stolen property after a prescribed period of uncontested possession.”¹³⁸ Thus, if a museum or collector acquires a work with the honest belief it is not stolen, it will likely prevail against the claimant seeking restitution.¹³⁹ However, if the purchaser has reason to doubt the lawfulness of his or her possession, title cannot be acquired.¹⁴⁰ Additionally, many claimants pursuing restitution in Austrian courts discover their claims are time-barred.¹⁴¹ Here, claimants challenging public museums benefit from the Art Restitution Act because, although the “law did not create a private right of action, [it] provide[s] that stolen artworks should be returned regardless of limitations periods.”¹⁴²

Consequently, claimants often prefer to bring claims in the United

1, at 8 (stating that even heirs presenting research demonstrating an artwork was stolen during the War face significant obstacles reclaiming their property); *see also In Re Holocaust Assets Litigation*, Case No. CV96-4849, 44 I.L.M. 1307, *supra* note 56, at 1307 (arguing the legal structure of the complicated Austrian restitution laws caused Holocaust victims and their heirs seeking restitution to suffer serious consequences). *See generally* Grimes, *supra* note 127, at 526 (providing that Nazi theft made it difficult for claimants to recover their stolen works due to complex and unfavorable international laws, statutes of limitations, and national confidentiality regulations).

138. Kallir, *supra* note 129; *see also* ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB] [CIVIL CODE] § 367(1), <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40070091/NOR40070091.html> (Austria) (“The claim of title against the rightful and honest owner of a movable object shall be dismissed if he proves that he has acquired the property for consideration in public auction, by a contractor in the ordinary course of his business, or by someone who had been entrusted by the previous owner. In these cases, the rightful and honest owner acquires the property.”).

139. ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB] [CIVIL CODE] § 368(1) (“The owner is honest, if he neither knows nor has to suspect that the thing does not belong to the seller.”); *see also* *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 263 (S.D.N.Y. 2009) (“Under the Austrian law, ‘a possessor of property may acquire title to that property if the possession is based on legal title (purchase or exchange) and extends throughout the statutory period accompanied by the possessor’s belief that the possession is lawful.’”).

140. *Portrait of Wally*, 663 F. Supp. 2d at 263.

141. *See* Kallir, *supra* note 129; *see also* Kreder, *Analysis of the Holocaust Expropriated Art Recovery Act*, *supra* note 1, at 9 (stating that, under civil law, title to stolen property typically passes to the possessor after about thirty years).

142. Burris & Schoenberg, *supra* note 72, at 1046; *see also* Demarsin, *supra* note 16, at 177, 180 (maintaining that, without the alternative dispute resolution forums to review claims on the merits, all Holocaust restitution claims brought in civil law countries would effectively be dismissed in court).

States,¹⁴³ as many states follow the common law rule that one cannot acquire good title to stolen property; whether the purchaser believes he or she purchased a work in good faith is irrelevant.¹⁴⁴ However, filing claims in the United States is not a simpler alternative.¹⁴⁵ Bondi only litigated in U.S. court after the New York District Attorney seized the work under the National Stolen Property Act, and Altmann challenged Austria in the Supreme Court of the United States to uphold her claim under the Foreign Sovereign Immunities Act, a rare result for plaintiffs in restitution cases.¹⁴⁶

Restitution remains a cumbersome process, even when the claims pertain to works in state museums included in the purview of the Art Restitution Act.¹⁴⁷ By not obligating private collections to adhere to

143. See Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims*, *supra* note 7, at 44 (noting that many claimants also filed claims in the United States after the opening of government and museum archives revealed Austria's insufficient post-war restitution efforts).

144. Compare Weissman, *supra* note 52, at 698 ("European law is also 'much more protective of the innocent buyer and . . . a good-[faith] purchaser may acquire title to stolen goods.'"), with Kline, *supra* note 6, at 440 ("The dominant U.S. rule . . . is that title does not pass with the theft; if something is stolen, it remains stolen forever"). See also Jason Barnes, Note, *Holocaust Expropriated Art Recovery (HEAR) Act of 2016: A Federal Reform to State Statutes of Limitations for Art Restitution Claims*, 56 COLUM. J. TRANSNAT'L L. 593 (2018) (maintaining that the recently enacted Holocaust Expropriated Art Recovery (HEAR) Act removes procedural barriers for claimants but bars purchasers from utilizing the good-faith defense in the United States). *But see* Demarsin, *supra* note 16, at 180 (arguing that the restitution commissions are more conducive to restitution than U.S. courts, where claims are often dismissed based upon commonly-asserted technical defenses). See generally Susan Brabenec, *The Art of Determining "Stolen Property:" United States v. Portrait of Wally, a Painting by Egon Schiele, 105 F. Supp. 2d 288 (S.D.N.Y. 2000)*, 69 U. CIN. L. REV. 1369, 1395 (2001) (noting the differences between common law and civil law countries regarding whether a thief can pass good title to a good-faith purchaser).

145. See Foulkes, *supra* note 32, at 315 (explaining that claimants must wait to litigate in the American courts until a work arrives in the country as part of an auction or exhibition).

146. See Moerdler, *supra* note 130, at 134 (considering the outcome of Altmann's case atypical, since the Supreme Court of the United States hears few Holocaust restitution cases, and the Court never previously ruled in favor of a plaintiff in such cases).

147. See, e.g., Higgins, *supra* note 86 (noting that Mahler's heirs spent roughly sixty years in and out of Austrian courts trying to retrieve *Summer Night at the Beach* from the Belvedere Gallery, a public museum). See generally Moerdler, *supra* note 130, at 134-35 ("Most Holocaust restitution lawsuits began because local

the Art Restitution Act, Austria further elongates the restitution process because private institutions control all decisions and negotiations concerning restitution from their collections.¹⁴⁸

The Beirat Commission holds abundant influence in determining whether restitution of works in public institutions will occur, but the discretion to grant or deny restitution ultimately lies with the Federal Minister.¹⁴⁹ Unlike the review of restitution claims for works in public collections where the decision to retribute a piece occurs at multiple levels by impartial parties,¹⁵⁰ when a claim is brought against a private collection, the museum remains the sole determiner of restitution.¹⁵¹ The *Mäylander* case lends further support. In 2010, the state examined Zirkl's claim and recommended the painting's return.¹⁵² Still, the Leopold could legally "ignore the commission's ruling and negotiate the terms of the restitution deal because of its private funding."¹⁵³ Consequently, Zirkl only regained possession of two of her family's paintings after an additional six years of negotiations with the Leopold.¹⁵⁴ Had the scope of Austria's Art Restitution Act included the Leopold, the museum would have been obligated to return all five works under the Beirat's recommendations to the Federal Ministry, akin to the Belvedere Gallery's restitution of Mahler's painting upon further review.¹⁵⁵

governments were unwilling or unable to provide the support or restitution survivors needed and deserved.”).

148. Thomas Trenkler, *Lex Leopold is Possible*, DER STANDARD (Nov. 26, 2008, 1:43 PM), <https://derstandard.at/1227287154341/Lex-Leopold-ist-moeglich> (noting that even if a work with a problematic history emerges, the Leopold Museum, a private foundation, is not obligated to return the work).

149. See Demarsin, *supra* note 16, at 174 (explaining the Federal Minister of Education, Art, and Culture's authority to decide for or against restitution of works in public museums).

150. See *generally id.* at 174-75 (detailing the multi-step review process for restitution claims under the Art Restitution Act).

151. See Trenkler, *supra* note 148 (stating that the only way a work can be restituted from the Leopold Museum is if its eight-member executive board makes a unanimous decision to return the artwork).

152. Lewis, *supra* note 95.

153. *Id.*

154. *Id.*

155. See Riding, *After 60 Years*, *supra* note 83; see also Barbara Petsch, "Clearly Stolen Art!", JEWISH NEWS FROM AUSTRIA (March 11, 2008), <http://www.jewishnews.at/jewish-news-from-austria-2008/>.

Absent any kind of mandated and impartial review of restitution claims under the Art Restitution Act, Austria gives private institutions power to present an unyielding front against the return of Nazi-looted works of art when negotiating restitution deals.¹⁵⁶ Filing claims in Austrian court is a challenging feat in itself, but, as the law stands, claimants facing private collections have few alternatives, none more feasible than bringing a claim under the Art Restitution Act. Thus, Austria is in violation of its obligations under Article 13(b) of the 1970 UNESCO Convention because it does not ensure the “earliest possible restitution”¹⁵⁷ of those works of art in private collections.

IV. RECOMMENDATIONS

A. INCLUDING PRIVATE INSTITUTIONS

Over seventy years have passed since the Nazis' demise, yet countless works continue to hang on the walls of museums and private collections throughout the world.¹⁵⁸ While numerous Nazi-looted pieces fell into the hands of nations' governments and eventually public museums, it is well-settled that the remaining works went to private collectors.¹⁵⁹ From the incredible volume of art illicitly transported through clandestine means before, during, and after the War, there is no doubt that the collections of private institutions contain works with controversial histories.¹⁶⁰

Thus, by further amending its Art Restitution Act to include private institutions and collections, Austria can take steps to ensure that works with questionable provenance will be, at the very least, subject to mandatory publication of its status as potentially looted art. Moreover, since the Art Restitution Act established a board to make legal findings and recommendations on each claim, the board acts on behalf of the

156. See, e.g., Lewis, *supra* note 95 (chronicling Eva Zirkel's twenty-year-long negotiation with the Leopold Museum that did not result in complete restitution).

157. UNESCO Convention art. 13(b), *supra* note 9.

158. Falconer, *supra* note 26, at 425.

159. Grimes, *supra* note 127, at 525; see also Kreder, *Analysis of the Holocaust Expropriated Art Recovery Act*, *supra* note 1, at 7 (“Public institutions like the Basel Museum in Switzerland and private modern art connoisseurs sought to buy the ‘degenerate art’ the Nazis purged from the German museums.”).

160. See Burris, *supra* note 63, at 401 (estimating that the Nazis confiscated at least 650,000 works by seizure or forced sale).

Federal Ministry of Education, Art, and Culture in making restitution determinations.¹⁶¹ So, by incorporating private institutions into the scope of the Art Restitution Act, the Beirat must review and consider claims brought against private institutions for restitution, providing claimants with increased chances of successful and timely restitution.

Extending the law to encompass works in the possession of private institutions would suggest that Austria is conforming to its obligations under Article 13 of the 1970 UNESCO Convention by actively facilitating the earliest possible restitution of all works of art potentially misappropriated by the Nazis and making restitution a more feasible option for claimants.

B. MAKING PRIVATE INSTITUTIONS RECEIVING GOVERNMENT FUNDS PUBLIC

The concern among Austrian officials is that amending the Art Restitution Act to include private institutions would be an unconstitutional governmental overstep on the rights of private institutions.¹⁶² Nevertheless, some Austrian legal scholars have argued that the application to the Leopold Museum would not interfere with the private foundation's constitutional rights.¹⁶³ While the Leopold is privately owned, the underlying argument is that it receives the majority of its funding from the Austrian government.¹⁶⁴ The Austrian federal government provided roughly 159-million Euros of public funds for the museum's construction, and the Ministry of Culture subsidizes it.¹⁶⁵

So, alternatively, if Austria determines that private collections should not be included within the scope of the Art Restitution Act for constitutional reasons, which is to be determined with time, the state

161. FEDERAL ACT ON THE RESTITUTION OF WORKS OF ART, *supra* note 17, § 3(1).

162. Edith Palmer, *Austria: Restitution of Nazi-Looted Art*, LIB. OF CONGRESS (Dec. 2, 2009), <http://www.loc.gov/law/foreign-news/article/austria-restitution-of-nazi-looted-art/> (“[T]he Act was not extended to restitution claims against private parties because it is not clear whether such a broadening of the Act would be constitutional.”).

163. Trenkler, *supra* note 148.

164. *Id.*

165. *Id.*

should consider subjecting the Leopold Museum to the Art Restitution Act,¹⁶⁶ as the museum is not truly acting in the capacity of a private institution.

C. AN EXCEPTION TO THE GOOD-FAITH PURCHASER LAWS

Holocaust restitution claims almost always present courts with the issue of choice of law, and whose law ultimately applies is often outcome determinative.¹⁶⁷ U.S. law favors claimants, as it precludes purchasers from acquiring ownership “if a thief is in her chain of title.”¹⁶⁸ Conversely, Austrian law favors the good-faith purchaser.¹⁶⁹ Thus, even if Austria’s Art Restitution Act applied to private collections, Austria’s other laws often implicated in restitution cases undermine the effect of the Act and Austria’s ability to adequately ensure restitution or permit actions for recovery.¹⁷⁰ To avoid such a conflict between its own laws, and to align the Art Restitution Act with Article 13(b) of the 1970 UNESCO Convention, amendment is necessary. An exception to its good-faith acquisition laws, derived from U.S. law, would not only wholly benefit claimants seeking to bring claims in Austria, but would curtail the Art Restitution Advisory Board from precluding restitution based on legal technicalities other than the statute of limitations in making its recommendations. This exception would aid in the establishment of a restitution process that yields a greater likelihood of success for rightful owners to regain their works of art.

166. See generally *The 1998 Art Restitution Act and its 2009 Amendment*, *supra* note 42 (describing the Jewish community’s continual push for the Leopold Museum to be bound by the Art Restitution Act).

167. Kreder, *Analysis of the Holocaust Expropriated Art Recovery Act*, *supra* note 1, at 8 (“If the court applies a European nation’s law, the claimant’s chance of success is generally less than when U.S. law applies.”).

168. *Id.* at 9.

169. See, e.g., ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB] [CIVIL CODE] §§ 367-68, <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40070091/NOR40070091.html> (Austria) (protecting the buyer who purchases a work absent any knowledge or suspicion that the item does not belong to the seller).

170. See generally Kallir, *supra* note 129 (arguing that Austria’s Art Restitution Act is ineffective, since Austrian prescription law essentially time bars most claims).

V. CONCLUSION

Austria is in violation of its obligations under Article 13(b) of the 1970 UNESCO Convention,¹⁷¹ which requires its members to ensure earliest possible restitution.¹⁷² By excluding private institutions from its Art Restitution Act, Austria prolongs the restitution process for works in private collections compared to those in public museums.¹⁷³ Additionally, the limited scope of the law does not provide an impartial review of restitution claims against private institutions, leaving claimants with few feasible alternatives.¹⁷⁴ Since ratifying the convention in 2015,¹⁷⁵ Austria not only has a duty to conform to the obligations of the treaty, but it owes an even greater duty to Holocaust victims and their heirs to reconstitute what remains of their families' memories, for "[t]he restitution of this art, the 'highest achievement of a civilization' might bring about a long-delayed symbolic victory for the victims of the Holocaust."¹⁷⁶

171. UNESCO Convention art. 13(b), *supra* note 9.

172. *Id.*

173. See discussion *supra* Part III.A.i.

174. See discussion *supra* Part III.A.ii.

175. UNESCO Convention art. 13(b), *supra* note 9.

176. Falconer, *supra* note 26, at 396.