

GROSS VIOLATIONS OF HUMAN RIGHTS AND RESTITUTION: LEARNING FROM HOLOCAUST CLAIMS

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INTRODUCTION

In its 2012 *Jurisdictional Immunities of the State* decision, the International Court of Justice (ICJ) found that State practice over the preceding century had negated a finding that a rule existed in customary international law which required “the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole...”¹ Yet, examples of peace agreements and post-war settlements covering reparations for gross violations of human rights exist, with the Allied governments’ response to crimes arising from the Shoah (or Holocaust) and during the Second World War being a leading instance. Indeed, the Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation or Control (1943 *London Declaration*) issued by the Allied governments and the French National Committee, 70 years ago, advising that they would reverse Axis looting of property and sanction return upon the close of the conflict underpinned post-war restitution programmes continues to define related, contemporary efforts.²

This paper seeks to make a modest contribution by recalling the impact of the 1943 London Declaration, the ensuing Allied restitution programme, and its reverberations today and thereby challenge the ICJ’s assessment. This complex history encompasses not only the question of reparations to States for violations of the rules and customs of war but redress for individual victims of gross violations of human rights and fundamental freedoms perpetrated or accelerated under the cloak of armed conflict. This example brings together two strands of Patrick O’Keefe’s work namely, the particular, the response to the re-emergence of the claims of Holocaust survivors and their heirs in post-Cold War Europe; and the general, the private and public international law rules governing restitution of illicitly transferred cultural objects. Each in their own way tests the existing parameters of international law, which, when they intersect, provide a richer understanding of the difficulties and potential for the protection of human rights and cultural property at the international level.

While the post-Second World War restitution programme encompassed property, rights and interests generally and also sanctioned compensation, this chapter considers only those provisions and practices which affected the restitution of cultural (or religious)

- 1 *Jurisdictional Immunities of the State (Germany v. Italy)*, International Court of Justice, Judgment, 3 Feb. 2012, para. 94.
- 2 *Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation or Control*, London, 5 Jan. 1943, (1943 London Declaration) issued by British Foreign Office, Misc. No. I, (1943), Cmd 6418, (1943) 8 *Department of State Bulletin* 21, and reproduced in various publications, including Prott, L.V. *Witnesses to History: Documents and Writings on the Return of Cultural Property* (UNESCO, Paris, 2009) and Kowalski, W.W. *Art Treasures and War: A Study of Restitution of Looted Cultural Property Pursuant to Public International Law*, Schadla-Hall, T. (ed.) (Institute of Art and Law, Leicester, 1998), 93-94, Annex 3.

property specifically in order to highlight three attributes which continue to resonate to date for the effective realisation of this aim: the role of restitution of cultural objects as reparations for violations of international humanitarian law *and* human rights law, the importance of solidarity and co-operation, and harmonisation of private international law and domestic law.

In order to elaborate upon these elements, this paper is divided into three parts. The first part focuses on the 1943 *London Declaration* by examining its negotiating history, core principles and place in contemporary international law. The second part examines the immediate, post-Second World War restitution programmes to effect the aims of the Declaration and illustrates the significant changes undertaken in domestic and private international law in response to emerging public international norms crafted in response to the horrors experienced during the war and Shoah or Holocaust. The third part briefly considers the impact of various instruments adopted following the renewal of these restitution claims after the end of the Cold War and their alignment with the wider discourse on reparations for gross violations of human rights and fundamental freedoms.

By tracing the lasting legacy of the 1943 *London Declaration*, it is argued that while the legal principles formulated to realise the restitution of illicitly transferred property, including cultural and religious objects were path-setting, they are of broader significance. They are an important example of the international community's efforts to render some measure of access to justice and reparations to victims of gross violations of human rights regardless of when those violations were perpetrated and by whom.

1. 1943 LONDON DECLARATION – THE CORE PRINCIPLE

After the First World War the Allied Governments' restitution programme was reactive in character and contained in the post-war peace treaties.³ In contrast, during the Second World War, the Allies had already announced their intent to restore cultural property and laid out the programme's foundational principles. At the height of mounting Axis victories and conscious of the ever-escalating campaign of looting,⁴ the London Declaration, simultaneously published on 5th January 1943 in London and Washington, put the Axis governments and individuals (including those in neutral countries) involved in these acts on notice that they would be held to account and such transfer of property would not be recognised at the close of the conflict.⁵

In its relevant parts, the London Declaration provides:

Accordingly the governments making this declaration and the French National

- 3 See Arts 245-247, *Treaty of Peace between the Allied and Associated Powers and Germany*, (*Treaty of Versailles*), 28 June 1919; Arts 177 and 178, *Treaty of Peace between the Allied and Associated Powers and Hungary* (*Treaty of Trianon*), 4 June 1920; Arts 191-196 and Annex I-VI, *Treaty of Peace between the Allied and Associated Powers and Austria together with Protocol and Declarations*, (*Treaty of St Germain-en-Laye*), 10 Sept. 1919; *Treaty of Peace between Poland, Russia, and the Ukraine* (*Treaty of Riga*), 18 March 1921; and Art. 144 of the *Treaty of Peace with Turkey* (*Treaty of Sèvres*), 10 Aug. 1920, not ratified. See Vrdoljak, A.F. *International Law, Museums and the Return of Cultural Objects* (Cambridge University Press, Cambridge, 2006), chapter 3.
- 4 For details of the Nazi confiscation programme see International Military Tribunal, Nuremberg, Germany, Office of the US Chief of Counsel for the Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression*, (USGPO, Washington DC, 1946, 8 vols), vol. 1, chapter 14, 'The Plunder of Art Treasures'.
- 5 See US Department of State, *Foreign Relations of the United States, Diplomatic Papers, 1943*, vol. 1, General, (USGPO, Washington DC, 1963), 443.

Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged, to persons, including juridical person, resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.⁶

As the full extent of the atrocities of the Nazi regime and other Axis countries came to light, this aim of the Declaration would be extrapolated beyond positivist notions of reparations as arising from State responsibility and paid by a violating State to a victim State, to include violations of human rights perpetrated by States not only against occupied peoples, but also their own nationals during times of war and peace.

By 1907, the international community had criminalised acts against religious and cultural property, and civilian property generally, during armed conflict and belligerent occupation with the Regulations attached to the 1907 *Convention (IV) respecting the Laws and Customs of War on Land* (Hague IV Convention).⁷ These regulations had also explicitly sanctioned prosecution of violators and remedies for victims.⁸ The Nuremberg trials and the restitution scheme flowing from the 1943 London Declaration implemented existing law, which the International Military Tribunal itself found to be customary international law.⁹ However, the most innovative aspect of these developments, and that which aligns it closely with human rights law, was the inclusion of the crimes against humanity count in the indictment of the major war criminals.¹⁰ As explained below, this elaboration of the existing law pursuant to the Marten clause contained in the 1907 Hague IV Convention was mirrored in the post-war restitution programme.¹¹ But, as with the struggles of legal academics to categorise the place of “crimes against humanity” within international law, contemporaneous texts analysing the groundbreaking aspects of the restitution programme also struggled to rationalise it within existing legal frameworks. One contemporary writer noted that: “it [was] difficult to find a legal (as distinct from a political) explanation”,¹² whilst another Swiss jurist reasoned that the explanation lay in a new principle of international law, “a more comprehensive inter-State idea of law and justice”.¹³

6 See note 2.

7 Articles 27 and 56, *Convention (IV) respecting the Laws and Customs of War on Land, and Annex*, The Hague, 18 Oct. 1907.

8 Articles 56 (referring to violations being “subject of legal proceedings”) and 3 (belligerent party in violation shall be liable to pay compensation and liable for the acts of its armed forces), 1907 *Hague IV*.

9 *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946*, (Nuremberg, 42 vols 1947-1949), vol. I, at 253-254; and 41 *AJIL* (1947) 172, at 248-249. The underlying rationale of the Swiss *Bundesratsbeschluss* was that the legal basis for the restitution of property it sanctioned was the infringement of public international law norms: Vásárhelyi, I. *Restitution in International Law*, (Akadémiai Kiadó Budapest, 1964), 118; and ‘Return of Looted Objects of Art to Countries of Origin, Memorandum’ by the State Department Members of SWNCC [State-War-Navy Coordinating Committee], (1947) 16 *Department of State Bulletin* 358. It provided: “The introduction of looted objects of art into this country is contrary to the general policy of the United States and to the commitments of the United States under the Hague Convention of 1907...”.

10 Count Four, Indictment, in note.9, vol. 1, at 11-30.

11 See Seventh preambular recital, 1907 *Hague IV Convention*; Vrdoljak, A.F. ‘Genocide and Restitution: Ensuring Each Group’s Contribution to Humanity’ (2011) 22 *EJIL* 17 at 25.

12 Martin, A. ‘Private Property, Rights, and Interests in the Paris Peace Treaties’ (1947) 24 *BYIL* 273 at 280.

13 Weiss, G. ‘Beutegüter aus besetzten Ländern und die privatrechtliche Stellung des schweizerischen

The 1943 *London Declaration* was the product of delicate negotiations amongst the Allied Governments and aligned States to ensure broad endorsement to strengthen its legal, political and moral weight.¹⁴ Indeed, the emphasis on maximum participation, and time constraints, meant that despite lobbying, the initiative failed to be realised in treaty form.¹⁵ Instead, seeking to “avoid unduly detailed legalistic statements”, it was announced by a Declaration, whose “immediate purpose [was to] cast doubt upon all transfers of property and interests in Axis dominated territories”.¹⁶ As a result of US and British lobbying, the Declaration garnered support at its initial pronouncement and subsequently from countries from every region of the world and legal system.¹⁷

Maximum support was vital for another reason. Delegations, such as Belgium, which had pushed for the initiative and its encapsulation in binding form, were placated by the strength of the Declaration’s statement on the principle of solidarity and co-operation.¹⁸ Indeed, the final text states that: “The governments making this declaration and the French National Committee, solemnly record their solidarity in this matter.”¹⁹ Yet, on its face, the 1943 Declaration provided no further information in respect of the obligations which States would need to enact into domestic law by way of ensuring co-operation nor did it detail any implementation mechanism. Instead, this was elaborated upon in the accompanying explanatory memorandum prepared by the British Foreign Office.²⁰ It reaffirmed that solidarity was important for “all participating governments” and that where transfers or dealings were confined to the territory of one country, the relevant procedure and decision concerning invalidity and return would be the role of the legitimate government. In addition, governments pledged to mutually assist each other where required, “in line

Erwerbers’, 42 (1946) *Schweizerische Juristenzeitung* 265.

- 14 The *travaux préparatoires* highlight the lengths to which Britain and the United States went to ensure agreement of the Soviet Union and China and the inclusion of Latin American States: US Department of State, note 5 at 444-447.
- 15 In respect of Belgium’s support of this point, see US Department of State, *Foreign Relations of the United States, Diplomatic Papers, 1942*, vol. 1: General, (USGPO, Washington DC, 1960), 78 (US Ambassador Winant to Secretary of State Hull, 29 Sept. and revised 30 Sept. 1942); and Kurtz, M.J. ‘The End of the War and the Occupation of Germany 1944-52. Laws and Conventions enacted to counter German appropriations: The Allied Control Council’ in Simpson, E. (ed.), *The Spoils of War: World War II and Its Aftermath: The Loss, Reappearance and Recovery of Cultural Property*, (Abrams, New York, 1997), 112-113. In respect of Australia’s support, see *ibid.*, 85, US Ambassador Winant to Secretary of State Hull, 1 Dec. 1942. The lack of intention to create a binding agreement is reinforced by the extract from contemporary Polish Foreign Ministry documents in Kowalski, note 2 at 41, fn. 12, quoting a British Foreign Office representative: “it should be pointed out that this Declaration did not itself constitute a formal and binding treaty.”
- 16 US Ambassador to London Winant on 25 July 1942, note 15, at 74. See also telegram from US Secretary of State Hull to Ambassador Winant in the United Kingdom dated 25 Aug. 1942, note 15, at 72-79.
- 17 The participating and consenting States listed in the preambular paragraph of the Declaration issued on 5 Jan. 1943 included the Union of South Africa, United States of America, Australia, Belgium, Canada, China, the Czechoslovak Republic, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, Greece, India, Luxembourg, the Netherlands, Norway, Poland, Yugoslavia and the French National Committee: US Department of State, note 5 at 446-447.
- 18 US Department of State, note 15, at 78 (US Ambassador Winant to Secretary of State Hull, 29 Sept. and revised 30 Sept. 1942).
- 19 See note 2.
- 20 British Cmd 6418, Misc. No. 1(1943). Following protestations from the United States indicating that it did not consider itself bound by the explanatory memorandum, the United Kingdom emphasised that it was intended as guidance for the Press: see telegram from Chargé Matthews in the United Kingdom to the Secretary of State dated 12 March 1943, in US Department of State, note 5 at 448; and Kurtz, note 15 at 113.

with the dictates of equity” to evaluate and, if required, to invalidate transfers or dealings with property and related rights which extended across national boundaries and engaged more than one State. In addition, the participating States agreed to follow similar policies “without derogation to their national sovereignty and having regard to the differences prevailing” in different countries.²¹ Therefore, the obligation was not simply that of the violating State being required to make right an internationally wrongful act, but rather an obligation that extended to members of the international community generally to ensure that this aim was achieved.

This interpretation was further strengthened by the inclusion of neutral States. Works of so-called “degenerate” art removed from German public and confiscated private Jewish collections had been sold at public auctions in neutral countries on the eve of the outbreak of the war.²² As confiscations from occupied territories accelerated with Axis victories, so did the flow of this property into neutral territory, and the urgency of the need for a formal, unified statement by the Allied Governments in response.²³ From the first draft, the 1943 London Declaration covered property located in neutral territories. This part of the announcement was subject to much deliberation. It was at the behest of the United States that the original draft which was addressed to “neutral governments” was amended to become in its final draft: “a formal warning to all concerned, and in particular to persons in neutral countries ...”.²⁴ Earlier restitution efforts had encompassed only “defeated” countries and those that had breached the laws and customs of war.²⁵ By putting the nationals of neutral States on notice that profiteering from such illegal acts would not be tolerated, the Declaration extended the then existing norms of international law beyond the territorial boundaries of the former belligerents and occupiers.²⁶

This interpretation was reinforced when former Axis States which had subsequently been plundered by Germany or its allies were included as potential claimants. Vásárhelyi argued that this extension of the application and enforcement of international law beyond the victorious powers underlined the programme’s aim as “see[ing] that the violated international law [was] restored”.²⁷

This sweeping application of the obligations arising under the 1943 *London Declaration* was combined with an expansive interpretation of the nature and scale of the violations which were to be reversed by the post-war restitution programme. The Declaration was reaffirmed and gradually elaborated upon through various post-war pronouncements and instruments covering restitution including: (1) specialist instruments such as the Resolution on the Subject of Restitution attached to the *Final Act of the Conference on Reparations*

21 US Department of State, note 15 at 85 (US Ambassador Winant to Secretary of State Hull, 1 Dec. 1942).

22 The most infamous example being the auction held at the Grand Hotel National, Lucerne on 30 June 1939: see Nicholas, L. *The Rape of Europa: The Fate of Europe’s Treasures in the Third Reich and the Second World War* (Papermac, London, 1995) 3.

23 US Department of State, note 5, at 443.

24 US Secretary of State Hull to US Ambassador Winant in the United Kingdom 22 July 1942; and reply of Ambassador Winant 25 July 1942, note 15, at 74; and US Ambassador Winant to the Secretary of State 29 Sept. 1942, US Department of State, note 15, at 72-79. Original draft text of the declaration annexed to telegram from Secretary of State Hull to Ambassador Winant dated 22 July 1942.

25 Kowalski, note 2, at 40.

26 Contemporary jurists argued that while neutral States had not been covered by the 1907 *Hague IV Regulations*, the 1943 *London Declaration* had at the very least rendered them in violation of international law norms if they failed to take reasonable measures to ensure that their nationals did not facilitate these prohibitions against property: Vásárhelyi, note 9, at 79; and Martin, note 12, at 279.

27 Vásárhelyi, note 9, at 86.

(1945 Paris Resolution),²⁸ and the 1946 Definition of ‘Restitution’ covering the entire German territory adopted by the Allied Control Council for Germany (1946 Definition);²⁹ (2) domestic laws, with related enforcement regimes, introduced by each of the Occupying Powers into their sector of military-occupied Germany (and Austria),³⁰ and, upon the close of the occupation, the *Convention on the Settlement of Matters arising from the War and Occupation and Protocol on the Termination of the Occupation Regime*,³¹ (3) dedicated provisions in the Paris Peace Treaties of 1947 with Italy, Romania, Bulgaria, Hungary and Finland prepared on the basis of provisions enacted in occupied Germany;³² and (4) domestic laws adopted by neutral States such as Switzerland and Sweden.³³ In effect, all restitution claims were to be interpreted in the light of the *London Declaration* and unconstrained by the strictures of domestic law.

- 28 Final Act and Annex of the Paris Conference on Reparations, Paris, 9 Nov. to 21 Dec. 1945, Annex 1: Resolution on Subject of Restitution, in Howard, J. *The Paris Agreement on Reparations from Germany*, (Washington, 1946), 19 (not unanimous, in support Albania, Belgium, Czechoslovakia, Denmark, France, Greece, India, Luxembourg, the Netherlands and Yugoslavia); and Kowalski, note 2, Annex 4, 95-105. The Resolution stipulates that: “The question of the restitution of property removed by the Germans from the Allied countries must be examined in all cases in the light of the United Nations Declaration of the 5th January, 1943”.
- 29 Paragraph 1 of the Definition of the Term ‘Restitution’, 22 Jan. 1946, Press Handout No. 151, PR Branch, C.C.G. (BE), Berlin, reproduced in Kowalski, note 2, Annex 5, 106: “The question of restitution of property removed by the Germans from Allied countries must be examined, in light of the declaration of 5 January 1943”.
- 30 The British and US Zones had comparable but different legislation (which in each case was referred to as Military Government Law No. 59): Military Government for Germany, US Area of Control, Law No. 59: Restitution of Identifiable Property, *Military Government Gazette* [Germany US Zone, Issue G] No. 10, Nov. 1947, (1948) 42 *AJIL* (supp.) 11; and Control Commission for Germany, B.E. Law No. 59: Restitution of Identifiable Property to Victims of Nazi Oppression, *Military Government Gazette*, [British Zone of Control], no. 28. See Cohn, E.J. ‘A Novel Chapter in the Relations between Common Law and Civil Law’, (1955) 4 *ICLQ* 492; and Wengler W., ‘Conflict of Laws Problems Relating to Restitution of Property in Germany’ (1962) 11 *ICLQ* 1131. The Allied Kommandatura in Western Berlin had issued an ordinance which was a near replicate of the British Law No. 59: Order of Allied Kommandatura Berlin, BK/O/49/180, 26 July 1949: Restitution of Identifiable Property to Victims of Nazi Oppression. DAHD MFA z.10, w.32, vol. 284, p. 46. The French Zone had Ordonnance 120 which was modelled on similar domestic legislation in France: Allemagne, Gouvernement Militaire de la Zone Française d’occupation, Ordonnance No. 120 du 10 Novembre 1947 relative à la restitution des biens ayant fait l’objet de spoliation, *Journal officiel du Commandement en Chef française en Allemagne*, no. 179, 17 juin 1949. No uniform agreement governing all four zones of military occupied Germany was reached on the principles governing restitution. For a detailed background concerning unsuccessful Allied efforts to create a unified restitution initiative: see Kurtz, note 15, at 112; and Ferencz, B. ‘Book Review: Reparations’, 23 *AJCL* (1975) 374 at 375. The laws concerning restitution applied in occupied Austria were identical to those adopted in Germany: see Vásárhelyi, note 9 at 156.
- 31 *Convention on the Settlement of Matters arising out of the War and Occupation*, 26 May 1952, as amended by Schedule IV of the *Protocol on the Termination of the Occupation Régime in the Federal Republic of Germany*, 23 Oct. 1954.
- 32 *Peace Treaty with Italy*, 10 Feb. 1947, referring to the 1943 London Declaration in Art. 75; *Peace Treaty with Romania*, 10 Feb. 1947, referring to the 1943 London Declaration in Art. 23; *Peace Treaty with Bulgaria*, 10 Feb. 1947, referring to the 1943 London Declaration in Art. 22; *Peace Treaty with Hungary*, 10 Feb. 1947, referring to the 1943 London Declaration in Art. 24. See Martin, note 12; Fitzmaurice, C.G. ‘The Juridical Clauses of the Peace Treaties’ (1948-II) 81 *RCADI* 327; Vásárhelyi, note 9 at 83ff; and Bentwich, N. ‘International Aspects of Restitution and Compensation for Victims of the Nazis’ (1955-1956) 32 *BYIL* 204.
- 33 *Decree of Swiss Federal Council decree (Bundesratsbeschluss)* of 10 Dec. 1945 (following the agreement concluded by Switzerland with England, the United States and France (Currie Protocol)), and Swedish law of 29 June 1945. See also Martin, note 12, at 279; and Palmer, N. *Museums and the Holocaust: Law, Principles and Practice* (Institute of Art and Law, Leicester, 2000) 118.

It is clear from its *travaux préparatoires* that the *London Declaration* was not realised in treaty form because of the need for urgency coupled with possible difficulties in its effective transposition into the diverse, domestic legal regimes of the participant States and not because of disagreement about its core principles.³⁴ Nonetheless, its subsequent replication and transposition into various multilateral agreements and domestic laws enacted in defeated, neutral and Allied countries immediately after the Second World War and the revival of Holocaust-era claims in the late twentieth century, translated it into a legally binding obligation.³⁵ Also, the 1943 *London Declaration* was referred to in the *travaux* of two multilateral agreements covering movable heritage during wartime and belligerent occupation, the *Convention for the Protection of Cultural Property in the Event of Armed Conflict* (1954 Hague Convention),³⁶ and in peacetime, the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (1970 UNESCO Convention).³⁷

These developments would support an assertion that the general principle contained in the *London Declaration* – an obligation to return property removed by force or duress during armed conflict or belligerent occupation – reflects customary international law.³⁸

Post Second World War Restitution Programme

After the close of hostilities, drawing on the limited experience of similar efforts following the First World War,³⁹ a programme of restitution was instituted by the Allied military governments in their respective sectors of Germany and pursuant to the 1947 Paris Peace Treaties with other Axis countries. In this second part, covering the putting

- 34 To achieve this end a Committee of Jurists was to be appointed to examine existing legislation within the participating States to assess whether it was adequate to realise the aims of the Declaration. Their efforts were confounded prior to commencing when Poland included in its report territory under USSR occupation. In response to the protestations of the Soviet Union, the work of the Committee was never started: US Department of State, note 5, at 451ff.
- 35 See Palmer, note 33, at 115-167; Bindenagel, J.D. (ed.), *Washington Conference on Holocaust-Era Assets, Proceedings*, at <www.state.gov> (viewed 21 Aug. 2001), Delegation Statements, 145-440; and The Central Registry of Information on Looted Cultural Property 1933-1945, Information by Country, at <<http://www.lootedart.com/infobycountry>> (viewed 12 Aug. 2012). In respect of references to the 1943 Declaration: see Washington Conference Principles on Nazi-Confiscated Art, Dec. 1998, <<http://www.state.gov/p/eur/rt/hlcst/122038.htm>> (viewed on 10 Aug. 2012); and Presidential Advisory Commission on Holocaust Assets, Executive Summary and Staff Report, Chapter V, at <<http://pcha.gov/PlunderRestitution.html/html/StaffChapter5.html>> (viewed on 21 Aug. 2001); and the UK Spoliation Advisory Panel has referenced (and reproduced) in its reports the 1943 London Declaration on Holocaust-era claims: see for example Report of the Spoliation Advisory Panel in respect of a painting now in the possession of the Tate Gallery HC-111 (2001), at <<http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/images/publications/galleriesspoliation.pdf>> (viewed on 11 Aug. 2012); and Report of the Spoliation Advisory Panel in Respect of three Drawings now in the Possession of the Courtauld Institute of Art HC 200 (2007) <<http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/images/publications/SixthReportSAPHC200.pdf>> (viewed on 11 Aug. 2012), which refer to the 'moral' authority of the Declaration.
- 36 14 May 1954; Berlia, G. 'Report on the International Protection of Cultural Property by Penal Measures in the Event of Armed Conflict', 8 March 1950 UNESCO Doc.5C/PRG/6, Annex I, at 10.
- 37 14 Nov. 1970; UNESCO, 'Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property: Replies to Draft Convention' UNESCO Doc.SHC/MD/3. See also Res. 3.428 adopted by the General Conference of UNESCO at its 18th session in UNESCO, Committee of Experts to Study the Question of the Restitution of Works of Art, 23 March 1976, UNESCO Doc.SHC-76/CONF.615/3, Annex 1.
- 38 Vászárhelyi made a similar assessment in 1965, see note 9, at 80, 83 and 114.
- 39 See Vrdoljak, note 11 at 19.

into practice in the immediate post-war period of the principle contained in the 1943 *London Declaration*, two elements pertinent to the present discussion are emphasised:

- the extension and elaboration of the legal framework effecting external restitution (between States) concerning violations of the laws of war to cover internal restitution (within defeated States) as redress for individual victims of gross violations of human rights perpetrated before and during the war; and
- the obligation of solidarity and co-operation resulting in a transformation of long-held principles in domestic legal systems and private international law rules governing the transfer of property which were modified to effectively realise emerging norms of public international law in the sphere of international humanitarian and human rights law.⁴⁰

To highlight the interrelation between these two elements, this Part explores four aspects of the immediate post-war Allied restitution programmes, namely, elaboration of what constituted an illicit taking or transfer, criteria for what property could be claimed, explaining the principle of solidarity by fleshing out the obligation to co-operate, and mechanisms for ensuring access to justice for claimants.

“Open looting or plunder, or of transactions apparently legal in form”

The 1943 *London Declaration* provided that the Allied warning applied “whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected”. The evolving definition as to which transfers or dealings with property would be covered by the post-war restitution programme reveals its revolutionary nature. Its coverage included not only external restitution arising from the violation of the laws and customs of war but internal restitution within defeated States for acts committed against their own nationals and extended to encompass neutral States. The differing nature of these developments within the constellation of public international law principles was reflected in the distinct criteria outlined for determining the legality or otherwise of the transaction in question and suspension or modification of long standing rules in private international law and domestic law.

For external restitution, arising in respect of violation of the public international law prohibition against looting and destruction of cultural and religious property, and civilian property generally during armed conflict and belligerent occupation, the claimant State was required only to establish that the property was removed from its territory. It was a strict State-to-State claim; hence, its grounding in the principle of territoriality. The claimant State was not required to show that the property was owned by one of its nationals. The purpose of restitution was not restoration of the right of ownership of individuals but the reversal of an internationally wrongful act which had been aimed at depleting the economic resources of the victim State.⁴¹

The initial requirement to prove that the property was removed from occupied territory by

40 It is clear that any public international law norm affecting property, rights and interests will require the harmonisation of private international law rules and domestic legal norms: see, for example, the 1970 *UNESCO Convention* and *UNDROIT Convention on Stolen or Illegally Exported Cultural Objects*, 24 June 1995, .

41 Vásárhelyi, note 9 at 87; and Martin, note 12 at 277.

force was gradually loosened to acknowledge the complex nature of Nazi confiscations.⁴² The US Military Government for Germany sanctioned a wide interpretation of “force” which included duress with physical force, actual or threatened, theft, requisition, public sale following confiscation, involuntary acceptance of payment and removal of objects upon withdrawal of belligerent occupation.⁴³ Difficulties in establishing this requirement led to the adoption of regulations which required the possessor of the property to prove that it was not acquired by force or duress by showing that it was obtained via a “normal commercial transaction”.⁴⁴

Furthermore, the usual burden of proof was shifted. The possessor of the property bore the onus of proving that it was acquired by regular means.⁴⁵ The only pertinent transaction was the one which located the cultural object in the occupier’s territory. All documentation validating the possessor’s title completed in occupied territory was disregarded and payment was not sufficient to overcome this burden. The wider commercial relationship existing between the seller and the buyer before and during the occupation was subject to scrutiny. In effect, the location of the claimed property outside of the original occupied territory and on that of a defeated or neutral State raised a rebuttable presumption that it was wrongfully removed. This approach was adopted not only by the military governments of occupied Germany, but was included in the 1947 Paris Peace Treaties and the domestic laws introduced by neutral States.⁴⁶

This presumption in favour of the claimant, and shift in the usual burden of proof, effectively removed the protection afforded to the *bona fide* purchaser in private international law and numerous domestic legal systems.⁴⁷ This development was implicit in the London Declaration’s warning specifically to individuals in neutral territory and was accordingly reflected in the legislation introduced by the military governments in Germany. Further, the 1947 Paris Peace Treaties provided that restitution was to be made “irrespective of any subsequent transactions by which the holder of any such property ha[d] secured possession”.⁴⁸ Martin noted that this provision was the most radical distinction between the 1919 Paris Peace Treaties and the 1947 treaties.⁴⁹ While the 1919 treaties also pointed to the suspension of the protection for the *bona fide* purchaser, the relevant provisions required the subject States to enact legislation to give it effect in domestic law.⁵⁰ None of them did this in practice. By contrast, the 1947 treaties themselves suspended the operation of the pertinent domestic laws. This development extended beyond external

42 1945 Paris Resolution, para. (a).

43 Office of Military Government for Germany, US Military Government Regulations, Title 19: Restitution, Berlin, 1946, MGR 19-100(2a); Office of Military Government, US Property Division Reparation and Restitution Branch, Memorandum on Restitution as Affected by Reparations, Force and the German Minimum Economy, 15 Oct. 1946; Office of Military Government, US Property Division, Reparation and Restitution Branch, Memorandum on Procedure of Restitution, 23 June 1948. See Kowalski, note 2, at 52-54; and Vásárhelyi, note 9, at 105-8.

44 Office of Military Government for Germany, US Property Division, Reparation and Restitution Branch, *Memorandum on procedure of restitution*, 23 June 1948, ANR, reproduced in Vásárhelyi, note 9 at 106.

45 1945 Paris Resolution, para. (e).

46 See Art. I, *Swiss Decree*; Art. 75(7) *Peace Treaty with Italy*; Art. 24(8), *Peace Treaty with Hungary*; Art. 23(8) *Peace Treaty with Roumania*; and Art. 22(8) *Peace Treaty with Bulgaria*, under which the claimant must also prove ownership.

47 See Wengler, note 30, at 1133.

48 Article 75(2) *Peace Treaty with Italy*; Art. 24(2), *Peace Treaty with Hungary*; Art. 23(2) *Peace Treaty with Romania*; and Art. 22(2) *Peace Treaty with Bulgaria*.

49 Martin, note 12, at 278.

50 See Art. 241 *Treaty of Versailles*; Art. 187 *Treaty of St Germain*; and Art. 171 *Treaty of Trianon*.

restitution and covered claims for internal restitution.⁵¹ While some neutral States long resisted the application of the London Declaration principle to their territories because of its conflict with domestic protection afforded to the *bona fide* purchaser, they did eventually yield with the introduction of laws which also provided some recourse for the *bona fide* purchaser against the State.⁵² In recognition of its obligation pursuant to domestic rather than international law to the *bona fide* purchaser, Swiss law allowed them to counter claim against their predecessor until it reached a *mala fide* acquirer who was insolvent or not resident in Switzerland and then the State would indemnify; and where the Swiss possessor had paid a purchase price to the claimant, he or she was entitled to reimbursement of that payment.⁵³

The effective articulation and implementation of internal restitution, that is, the return of property confiscated by defeated States from their own nationals was a development which remains of deep relevance to human rights law. There had been intense deliberation concerning the inclusion of crimes against humanity which covered such acts beyond the space and time limits of armed conflict and belligerent occupation. Similarly, there was fervent lobbying and negotiation to ensure that the 1943 *London Declaration* and its ensuing restitution programme were similarly unconstrained.⁵⁴ Bentwich observed in 1955:

The exceptional legislation about restitution to German victims of the Nazis in form provides a civil remedy within German municipal law for wrongful acts of a former Government in matters which normally are exclusively matters of domestic jurisdiction, and therefore outside the purview of international law. The acts of the Nazi Government in its treatment of its own subjects were so shocking in their violation of the elementary principles of justice and humanity that their redress called for some form of the international action. Today international law is seeking to bring such acts effectively within its jurisdiction by the development of a Charter or Bill of human rights... [I]t is a conspicuous example of international action to remedy wrongs caused by the failure of a Government to observe minimum *international* standards for the treatment of human beings.⁵⁵

Whilst there had been a limited, earlier example of internal restitution following the First World War,⁵⁶ the post-Second World War restitution programme was viewed as part of

51 Bentwich, note 32, at 207.

52 In response to the resistance of domestic Swiss jurists to the introduction of these provisions, Weiss observed, in Vásárhelyi, note 9, at 121:

Wäre nicht wenigstens die Londoner Erklärung vom Jahre 1943, jene Erklärung der 18 alliierten Regierungen, Anlass gewesen, die notwendig erscheinende Gesetzesänderung vorzunehmen, oder zum mindesten anzukündigen? “Was not the London Declaration of 1943 of the 18 Allied governments at least a reason to undertake the of the evidently essential amendments. or at the very least to announce them?”).

53 Vásárhelyi, note 9 at 121. Likewise under the Swedish Act, a *bona fide* acquirer was not required to claim against his predecessor but could claim full compensation against the Swedish Government following restitution

54 Vrdoljak, note 11, at 22ff. The armistice treaties with Italy, Bulgaria, Hungary and Romania did not contain specific provisions for internal restitution but they required those States to repeal discriminatory legislation. Only the subsequent peace treaties with Hungary (Art. 27(1)) and Romania (Art. 25(1)) sanctioned internal restitution because of the delay in reversing offending domestic laws; in Italy, Bulgaria and Finland this was achieved by way of domestic law. These covered the period from 1939 onwards: Martin, note 12, at 288.

55 Bentwich, note 32, at 205. See Ferencz, note 30, at 374. Cf. Wengler, note 30, at 1148.

56 Vrdoljak, note 11, at 21.

a new international legal order, in which gross violations of human rights would not be ignored. Indeed, the settlement arrangement with Germany finalising the occupation in 1954 provided continued international supervision of the restitution and compensation programme even after the return of German sovereignty.⁵⁷

The definition of illicit transfer which created the legal basis for these restitution claims reflected the public international law norms which were violated. The post-war restitution programme created the legal basis for the restitution of cultural objects confiscated from individuals within German territory since 1933. The claims were made by individuals or non-State entities rather than States. Not coincidentally, the wording of these provisions reflected the definition of crimes against humanity in the London Charter of the International Military Tribunal 1945 and the judgments covering genocide, both in its definition of victim groups and the relevant time period. For example, the US Zone, Law No. 59 - Restitution of Identifiable Property provided for “speedy restitution of identifiable [tangible and intangible] property” which had been removed from its owner during the Nazi regime from 1933 to 1945 because of “race, religion, nationality, ideology or political opposition to National Socialism”.⁵⁸

The notion of “force as required by the 1943 *London Declaration* was accordingly adopted and encompassed transactions “even when they purported to be voluntary in effect”.⁵⁹ A presumption was made in favour of the claimant, that any transaction during the relevant period constituted confiscation, if he or she was directly persecuted on the basis of these grounds, or belonged to a group of persons who, because of these grounds, “was to be eliminated in its entirety from the cultural and economic life of Germany by measures taken by the State ...”.⁶⁰ Property was presumed to be confiscated where a person had lost possession of it because of a transfer *contra bonos mores*, through threats or duress, or through an unlawful taking or any other tort, through confiscation due to a governmental act, or confiscation as the result of measures taken by the Nazi regime or affiliate organisations, provided the acts were caused by or constituted measures of persecution because of race, religion, nationality, ideology or political opposition to National Socialism.⁶¹ A possessor bore the onus of proof that he or she acquired the object through a “normal transaction”, and payment was not sufficient to overcome this burden.⁶²

Restitution was sanctioned even where the transactions were “apparently legal in form” under the *lex loci*.⁶³ Allied governments recognised that confiscation of property was integral to the systematic persecution of these groups and that domestic laws had facilitated and legitimised these acts.⁶⁴ Law No. 59 set down that it was not permissible

57 *Convention on the Settlement of Matters*, note 31.

58 Article 1, Law No. 59.

59 London Declaration, Preamble.

60 Article 3(1), Part 2, Law No. 59. Whilst most claims were brought by those of the Jewish faith or origin, this was not exclusively the case. Restitution claims were brought by Masonic Lodges (*Lodge “Hermann zum Lande der Berge”* Board of Review BOR/52/348, decision part 20, p.107) and the Catholic Church (*Catholic Congregation of Rhumspringe*, BOR/51/99, decisions part 8, at 4) and trade unions (*Deutschnationale Handlungsgehilfenverband*, BOR/52/308 decisions part 17, at 70, and BOR/52/449 decision part 21, at 160). See Cohn, note 30 at 499 and 500.

61 Article 2(3) and (4), Part II, Law No. 59.

62 US Military Government for Germany, Military Government Regulation Title 18: Monuments, Fine Arts and Archives, in Kowalski, note 2, at Annex 10, 153. See *Kunstsammlungen Zu Weimar v. Elicofon* 536 F.Supp.813 (E.D.N.Y. 24 Aug. 1978) aff’d 678 F.2d 1150 (2nd Cir.(NY) 5 May 1982).

63 See note 2.

64 For details of Nazi decrees and orders authorising confiscation of property: see *Court of*

“to plead that an act was not wrongful or *contra bonos mores* because it conformed with a prevailing ideology concerning discrimination against individuals belonging to particular groups”.⁶⁵

“Property, rights and interests of any description whatsoever”

For all violations of public international law norms concerning cultural and religious property, and civilian property generally, primacy was given to restitution. To this end, the claimant bore the onus of proving that the item being claimed was identical to that removed from its territory by force or duress. Under the 1945 Paris Resolution, restitution was confined to identifiable objects that existed prior to occupation and were removed with or without payment, or were produced during occupation and removed by force.⁶⁶ Law No. 59 covering internal restitution was titled ‘Restitution of Identifiable Property’ and the basic principle noted that it was aimed at the “speedy restitution of identifiable property (tangible and intangible property and aggregates of tangible and intangible property)”.⁶⁷ Likewise, the 1947 Paris Peace Treaties provided that “the burden of identifying the property and of proving ownership shall rest on the claimant government”.⁶⁸

In respect of restitution claims for objects which could not be identified, these claims fell within the general reparations claim of the relevant State. Only objects of “artistic, historical, scientific (excluding equipment of an industrial character), educational, or religious character” and monetary gold – could be replaced by equivalents.⁶⁹ Likewise, the 1947 Peace Treaties provided for restitution-in-kind where actual restitution was not possible, and individual artistic, historical or archaeological objects of the same kind and approximate value were available, with the State bound to make the restitution being required to acquire the objects.⁷⁰

Restitution-in-kind was effectively limited to State-to-State claims arising from violation of the special protection afforded to cultural and religious property under the 1907 Hague

Restitution Appeals Reports, vol. V (1955), annex D: Discriminatory Legislation under National Socialism, 633-690 at <<http://www.harvard.edu/library/digital/court-of-restitution-appeal>> (viewed 24 March 2012); and International Military Tribunal, Nuremberg, Germany, Office of the US Chief of Counsel for the Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression*, (Washington DC, 1946, 8 vols), vol. 1, chap. 14, The Plunder of Art Treasures; and Lemkin, R. *Axis Rule in Occupied Europe. Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace, Washington DC, 1944), 36-49.

65 Article 2(2), Part II, Law No. 59.

66 1945 Paris Resolution, note 29, Annex 1, para. (b). See also Definition of the term ‘Restitution’, note 29, para. 2.

67 Article 1(1), Law No. 59.

68 See for example, Art. 24(8), *Peace Treaty with Hungary*.

69 1945 Paris Resolution, Annex 1, para. (d). See 1946 Definition, para. 3; Directive regulating the Procedural Details of Restitution-in-kind pronounced by the Allied Control Authority, 25 Feb. 1947, Doc.CORC/M/46/34, and Kowalski, note 2, at 73; Allied Control Authority, Memorandum: Restitution Objects of a Unique Character, April 1947, in Kowalski, note 2, Annex 6, 107; and MGR 18-106, 110 and 445.3 in Kowalski, note 2, at 50. In respect of internal restitution, “substitution in lieu of restitution” was heavily circumscribed: Art. 26, Law No. 59. In respect of monetary gold see Art. 75(8), *Peace Treaty with Italy* which rendered Italy responsible for replacement of gold wrongfully removed by Italy but also that removed wrongfully to Italian territory, thereby attracting responsibility for harbouring the gold alone. Martin notes, note 12, at 277, that this “proposition is a bold one, but it fits well into that general trend of modern peace-making technique which seeks to widen the joint responsibility of co-belligerents.”

70 Article 75(9), *Peace Treaty with Italy*; Art. 24(3), *Peace Treaty with Hungary*; and Art. 22(3), *Peace Treaty with Bulgaria*. See Martin, note 12, at 277; Hollander, B. *The International Law of Art for Lawyers, Collectors and Artists*, (London, 1959) 43-45.

IV Regulations. It was reminiscent of provisions contained in the post-First World War peace agreements.⁷¹ Nonetheless, two restrictions to this exception were imposed. First, equivalents could be sought only for objects of the same kind, that is, belonging to the cultural heritage of the claimant State. Second, the obligation was to be adhered to only if an object of equivalent value could be found in the territory of the State subject to the claim. Yet, reluctance to the application of restitution-in-kind remained even in this limited form. The US Military Government for Germany declined to apply restitution-in-kind within its zone, declaring it could not condone an extensive replacement programme if it “could only be accomplished at the expense of . . . the cultural heritage of the German people”,⁷² adding that it was US policy to “respect [the] artistic and historic property of all nations”.⁷³ The purpose of these provisions was the rehabilitation of the cultural heritage of the claimant State and not punishment of the violating State. Allied Powers such as the United States were fearful of being seen to condone the use of cultural property as a form of reparation.

While it is clear that the primary objective of the Allied Powers, and subsequently the United Nations, was the restitution of identifiable objects, compensation was available where the item had been identified and restitution was not possible.⁷⁴ Indeed, as noted earlier, the 1907 Hague IV Regulations sanction the compensation for violations and reflect principles of State responsibility.⁷⁵ Under external restitution schemes, once the compensation (or other forms of reparations) were rendered to the claimant State, the obligation was completed. That State determined its distribution pursuant to its domestic laws. States could provide domestic remedies for individual victims of these international violations, as occurred under Swiss Law and pursuant to internal restitution procedures sanctioned by the military governments for Germany. These latter compensation claims covered personal harm (physical and psychological), deprivation of liberty, property damage and economic loss, and could be brought by persons who had been persecuted because of their political convictions, race, religion, ideology or nationality, “in disregard of human rights”.⁷⁶ Unlike identifiable property, the compensation claims were not regulated by Allied legislation and their enforcement procedure was ‘more complicated and more protracted’.⁷⁷

“Governments. . . making this Declaration solemnly record their solidarity in this matter”

As noted above, the 1943 *London Declaration* explicitly set down the solidarity of the participating States in relation to the realisation of its aim. Following the end of the war,

71 See Art. 247, *Treaty of Versailles*.

72 Directive of the Commander-in-Chief, US Forces of Occupation, regarding the Military Government of Germany, JCS 1779, 11 July 1947, (1947) 17 *Department of State Bulletin* 190. See Resolution of the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas, 20 June 1946, (1951) 11 CAJ 34.

73 Anon., ‘US Seeks to Replace Cultural Property Displaced during World War II’ (1951) 25(635) *Department of State Bulletin* 345.

74 1945 Paris Resolution, Annex I, para. (c); and 1946 Definition, para. 2.

75 Vászrhelyi, note 2, Chap. 10.

76 Article 1, Chap. Four – Compensation for the Victims of Nazi Persecution, *Convention on Settlement of Matters*, note 31.

77 Bentwich, note 51, at 214. After 1952, the Federal Government of Germany and the Western Powers agreed to ‘issue a comprehensive law of compensation which shall apply to the whole territory of the Federal Government’ in a form no less favourable than the existing legislation in force, that is, being applied in the US Zone: Article 2(b), Chap. Four – Compensation for the Victims of Nazi Persecution, *Convention on Settlement of Matters*.

the parameters of this obligation to co-operate were extrapolated to include identification and disclosure, and blockage of transfers and conservation, and extended to apply to defeated and neutral States.⁷⁸

Under the obligation to identify and disclose, legal persons within occupied Germany were required to report the possession, administration or control of such property, on threat of criminal penalty (including death) for failing to do so.⁷⁹ This obligation to report applied likewise to internal restitution, that is, to any property “taken by or taken from a persecuted person, any property which he knows or should know under the circumstances” was confiscated, presumed to be confiscated or transferred under force or duress.⁸⁰ Axis States under the 1947 Paris Peace Treaties were required to return looted property held in any territory, including any third country, by persons subject to their jurisdiction; such States were therefore required to compel such persons to identify and disclose possession of looted property.⁸¹ This extraterritorial element surpassed similar obligations in the 1919 Paris Peace Treaties.⁸² Neutral States were required to circulate inventories of looted objects, search for such objects within their territories, prevent their export, and oblige their citizens to report the location of any listed object.⁸³

The obligation to freeze transactions and conserve objects acknowledged the adverse impact which Nazi policies, aimed at dislocating and destroying cultural objects, archives and their owners, had on the ability of potential claimants to identify removed property.⁸⁴ In respect of internal restitution, relevant authorities were required to give due recognition to difficulties faced by claimants, especially when production of evidence was thwarted through “the loss of documents, the death or unavailability of witnesses, the residence abroad of the claimant or similar circumstances”.⁸⁵ Military governments

- 78 Article 75(3) and (4) *Peace Treaty with Italy*; Art. 24(4) and (5), *Peace Treaty with Hungary*; Art. 23(4) and (5) *Peace Treaty with Romania*; and Art. 22(4) and (5) *Peace Treaty with Bulgaria* provided that signatories would: “co-operate with the United Nations in, and shall provide at its own expense all necessary facilities for, the search for and restitution of property liable to restitution”.
- 79 1945 Paris Resolution, Annex, para. (g); MGR 19-504. Military Government for Germany, US Zone. in Vásárhelyi, note 2, at 111; and Arts 1 and 3, Law No. 52 Blocking and Control of Property, *Military Government Gazette*, [Germany, US Zone, Issue A], 1 June 1946, 24. See Kowalski, note 2, Annex 7, 108-109 (reproduces the British Zone Law).
- 80 Article 73, Law No.59.
- 81 Article 75(5) *Peace Treaty with Italy*; Art. 2(6), *Peace Treaty with Hungary*; Art. 23(6) *Peace Treaty with Romania*; and Art. 22(6) *Peace Treaty with Bulgaria*.
- 82 Article 238 *Treaty of Versailles*; Art. 148 *Treaty of St Germain*; and Art. 168 *Treaty of Trianon*. See Martin, note 12, at 276 and 279.
- 83 See Art. 6(2), Final Act of the 1944 Bretton Wood Conference, in US Department of State (ed.), *United Nations Monetary and Financial Conference, Bretton Woods, Final Act and Related Documents, New Hampshire, July 1-July 22, 1944*, (Washington DC, 1944). See also Final Act of the Inter-American Conference on Problems of War and Peace, Mexico City, Mexico, 21 Feb.-8 March 1945, US Department of State, pub. 2497, resolution 19; and Final Act of the Paris Conference on Reparations, Paris, 21 Dec. 1945, (London, 1946) (Misc. No. 1 (1946)), Unanimous Resolution on German Assets in Neutral Countries; and Statement of Policy with Respect to the Control of Looted Articles, Paris, 8 July 1946, in Hall, A.R. ‘The Recovery of Cultural Objects Dispersed During World War II’ (1951) 25(635) *Department of State Bulletin* 339 at 340, Annex I; Currie Protocol; and Swiss Decree. These laws were so far-reaching in terms of State responsibility it was suggested they represented a new principle of international law: Kowalski, note 2 at 62-64; Robinson, ‘Reparations and Restitution in International Law’, (1949) 1 *Jewish YbIL* 186 at 199 and 203; Vásárhelyi, note 9, at 115-17; and Martin, note 12 at 280.
- 84 1945 Paris Resolution, Annex, para. (b); 1946 Definition, point 2; and US regulations, MGR 18-106, 110, 445.3. See Vásárhelyi, note 9, at 101; and Kowalski, note 2, at 50-51.
- 85 Article 49, Part VIII, Law No. 59.

for Germany simultaneously pronounced regulations blocking transactions of cultural objects to assist in the location and identification of all looted objects.⁸⁶ Until these surveys were completed, persons protecting or controlling art collections were required to preserve and supervise objects remaining in their possession and to notify the appropriate German authorities of certain objects. A freeze was imposed on the transfer of cultural objects in order that a systematic survey could be conducted in Germany: during this time holding institutions or persons in possession of such material were obliged to preserve and safeguard them whilst gathering relevant information on them.⁸⁷ Dealers in art and antiquities were required to obtain a licence in order to trade, and to maintain a register of all transactions above a certain value.⁸⁸ Museums and galleries would be opened to the public only after their collection had been surveyed and cleared and records inspected to ensure that they did not contain information concerning Nazi looting.⁸⁹

This component of the obligation to co-operate also applied to neutral States.⁹⁰ Neutral States were invited to instruct their customs authorities to prohibit the export of items contained on lists prepared by liberated countries and to report suspicious items to local authorities and experts and, if doubt remained, to the three Western Allied Governments.⁹¹ Art dealers, museum authorities and specialised people in neutral States were under an obligation equivalent to that imposed on customs authorities, and awareness among the general public of the need to report suspicious cases to authorities was to be raised through the press and other publicity.⁹² To facilitate this task, claimant countries such as France and Belgium prepared registers of objects to be examined and circulated by both defeated States and neutral States.⁹³ Similarly, the Paris Peace Treaties required that objects be returned in “good order” and that the defeated States “bear all costs in [the relevant State] relating to labour, materials and transport”.⁹⁴ Importantly, reaffirming the obligation contained in the 1907 Hague IV Regulations, the military governments for Germany also extended this obligation to preservation of German cultural property.⁹⁵

The obligation to co-operate, from the outset, applied to those States which had participated in the 1943 *London Declaration*. Importantly, some States, for example the United States, made it clear that the recovery programme applied to cultural property on its own territory which had been removed by its own nationals or others from occupied territory. The return home of Allied troops after the Second World War brought with it the recognition that they may have “enemy” property, including cultural objects, in their possession. In 1945, US Government advised of its intent to “return to rightful owners any looted objects should they appear in this country”.⁹⁶ This was reiterated in the January

86 MGR 18-400 to 401.6. Military Government for Germany, US Zone. Law No. 52 Blocking and Control of Property, *Military Government Gazette*, [Germany, US Zone, Issue A], 1 June 1946, 24. See Kowalski, note 2, Annex 7, 108-109 (reproduces the British Zone Law).

87 Articles 1, 2 and 3, Law No. 52.

88 Article 2 Law No. 52 and MRG 18-401.7 and 8, 440.

89 MRG 18-301.

90 Article 6(2), Final Act of the 1944 Bretton Wood Conference. See Robinson, note 84 at 203.

91 Statement of Policy with Respect to the Control of Looted Articles, Paris, 8 July 1946, Hall, n.83.

92 See note 83.

93 See note 83.

94 Article 24(2) and (6), *Peace Treaty with Hungary*.

95 MGR 18-111, provided: “To protect and preserve Government owned cultural materials and works of art and the content of museums, libraries and archives pending transfer of custody and responsibility for administration thereof to responsible German agencies.” See also Part 2: Protection and Preservation of Cultural Structures, in Kowalski, note 2, at 154-155.

96 Hall, note 83, at 339.

1947 ‘Return of Looted Objects of Art to Countries of Origin’ policy of the State-War-Navy Coordinating Committee which provided that it was “the responsibility and desire of this [US] Government to return to their countries of origin those cultural objects which have been wrongfully taken and brought to the United States during and after the war” and its intent to prosecute offenders under the National Stolen Property Act.⁹⁷ This was addressed to museums, libraries, fine arts departments of universities, art and antiquities dealers, auction houses and booksellers who were required to notify and surrender to the State Department any such objects. Once surrendered, looted objects would then be delivered into the custody of the relevant diplomatic mission in Washington DC or where it involved Germany, Austria, Japan or Korea, transferred to the relevant US Military Government in the country of origin. Hall noted that once such objects were identified and recovered the restitution procedure followed was that of the US Military Government Regulations Title 18.⁹⁸ It would be released by the State Department to the authorised representative of the claimant State whose government would be responsible for the return of the object to the individual owner.

CLAIMANTS AND ACCESS TO JUSTICE

The post-war restitution programme covered procedural matters for the effective implementation of 1943 *London Declaration*’s core principle. These developments covering standing, time limits and access to judicial adjudication of claims was as path-breaking as the substantive provisions detailed above. Again private international law rules and domestic law principles were suspended or modified to ensure compliance with the aims of public international law norms.

The restitution claims mounted pursuant to the *London Declaration* and related instruments arose from a violation of public international law norms. Accordingly, following positivist notions of State responsibility, standing to enforce these norms and to seek reparations for any derelictions lay with States. For this reason, external restitution, provided under the law introduced by the military governments of Germany and the 1947 Paris Peace agreements, was governed by the principle of territoriality.⁹⁹ Under these provisions, legal proceedings were completed with the handing over of the object to the relevant authority of the claimant State.¹⁰⁰ That State and its domestic laws governed the fate of the returned objects and related compensation.¹⁰¹ By contrast, restitution schemes legislated in neutral States permitted individuals or juridical persons to bring a claim

97 Return of Looted Objects of Art to Countries of Origin, in Hall, note 83. In a 1947 Circular to Museums, Art and Antique Dealers and Auction Houses from the Commission, Annex B (1947) 16 *Department of State Bulletin* 358, stated that: “It is, of course, obvious that no clear title can be passed on objects that have been looted from public or private collections abroad.” A further circular was distributed by the US Department of State in 1950 to American universities, museums, libraries, art dealers, and booksellers, in Hall, note 84, Appendix 2, at 340, which provided the responsibility to return such items is “shared by American institutions and American citizens”.

98 Hall note 83, at 339 detailing the return of objects removed from private and public collections to Germany, Italy, Poland, United Kingdom and France.

99 1943 *London Declaration*; 1946 Definition, point 2; and Office of the Military Government for Germany, US Military Government Regulations, Title 18: Monuments, Fine Arts and Archives (MGR 18) MGR 18-106, and 110, in Kowalski, note 2, Annex 10, 153-160.

100 MGR 18-101, 106, 110 and 445.3.

101 Exceptionally, during 1947 and 1948, the United States returned looted property only to the owners and not the countries of origin (Soviet zone) when the owners had fled the country for religious, racial or ideological reasons: Kurtz, note 15, at p. 116.

against the present possessor of the property.¹⁰² These actions arose from the enforcement of public international law, and were not transformed into private international law claims or domestic claims.¹⁰³

Standing, in respect of internal restitution, was also granted by the military governments for Germany and 1947 Paris Peace Treaties to individuals (or their representatives).¹⁰⁴ Consequently, these provisions required property confiscated in these circumstances to be returned to its previous owner or his or her legal heir, or successor organisations, representing missing or deceased persons.¹⁰⁵ Contrary to international law practice, a successor organisation, and not the State, could be appointed by the military governments of Germany as “heir” to the entire estate of any persecuted person.¹⁰⁶ Jewish organisations argued strenuously against the retention of heirless property by States which had persecuted or continued to persecute minorities.¹⁰⁷ As Bentwich explained:

[I]t would be shocking to let the ordinary law of escheat to the State apply in the case of heirless property or *bona vacantia*, which had belonged to victims of Nazi persecution whose families had been destroyed so that there was no heir.¹⁰⁸

Under the 1947 Paris Peace Treaties with Hungary and Romania, the successor organisation was required to use the property to provide “relief and rehabilitation of surviving members of such groups, organisations and communities” in the relevant State.¹⁰⁹ The successor organisations were bestowed “special” rights by way of standing to make such restitution claims on behalf of the estates of persecuted persons, and were not subject to property tax.¹¹⁰

The restitutions envisioned by the 1943 *London Declaration* differ from the processes provided by the military governments of Germany, neutral States and 1947 Peace Treaties and restitution claims under private law in that they are subject to no time limits for claims.¹¹¹ Hall noted that: “For the first time in history, restitution may be expected to continue for as long as works of art known to have been plundered during the war continued to be rediscovered.”¹¹² The US State Department assumed responsibility for the post-war recovery of cultural objects that was looted and found its way to the United States.¹¹³ No

102 Martin argued that as there was no express waiver in the 1947 Paris Peace Treaties, there was no reason why they too did not permit claims by individuals: note 12, at 279.

103 See Martin, note 12, at 282 and Vásárhelyi, note 9, at 118.

104 Article 10, Law No. 59; and Art. 25(1), *Peace Treaty with Romania*; and Art. 27(1) *Peace Treaty with Hungary*.

105 See Arts 7 to 13, Part III, Law No. 59. See *Convention on the Settlement of Matters*, note 31, and Bentwich, note 51, at 207 and 211; Kowalski, note 2, at 59-60.

106 Article 10, Law No. 59; and Art. 25(1), *Peace Treaty with Romania*; and Art. 27(1) *Peace Treaty with Hungary*.

107 95 per cent of the heirless property was Jewish: Kurtz, M. *Nazi Contraband: American Policy on the Return of European Cultural Treasures, 1945-1955*, (Garland, New York, 1985), 198 and 208.

108 Bentwich, note 51 at 207.

109 Article 25(2), *Peace Treaty with Romania*; and Art. 27(2) *Peace Treaty with Hungary*.

110 Articles 11 and 17(b), Law No. 59. Even after the end of the military occupation, the Federal Government of Germany was required to provide immunity to Allied successor organisations and trust corporations in the Western sectors from Federal taxation and any tax or levy imposed to meet the charges arising from the war or reparations or restitution to the United Nations: Art.5, *Convention on the Settlement of Matters*, note 31.

111 See Hall, note 83; Prott, L.V. Principles for the Resolution of Disputes Concerning Cultural Heritage Displaced during the Second World War, in Simpson (ed.), note 15, at 225; and Kowalski, note 2, at 57.

112 Hall, note 83, at 339.

113 See Hall, A.R. ‘Return of Looted Objects of Art to Countries of Origin’ (1947) 16(399)

time limit was attached to these restitution programmes.¹¹⁴

The restitution processes established under the three Western military governments for Germany, the 1947 Paris Peace Treaties, and neutral States provided for judicial adjudication of claims, through international or mixed courts. The implementation procedures established in the Western zones and sectors of Berlin by the US, British and French Military Governments for Germany created agencies to mediate internal restitution claims.¹¹⁵ If this process failed to achieve a settlement it was then heard within the German court system and by appellate bodies made up of Allied judges and later a mixed court following the end of the occupation and restoration of German sovereignty.¹¹⁶ During the military occupation, these appellate bodies had the power to issue an advisory opinion on legal principles which were binding on German courts and “to review all decisions and orders made under this Law, and nullify, amend, suspend, or otherwise modify them”.¹¹⁷ This resulted in common law judges sitting on the British Zone’s Board of Review and the US Court of Restitution Appeals making determinations on German civil law.¹¹⁸ These were a rare early instance of an international or mixed tribunal having jurisdiction over domestic courts.

Under the relevant Swiss Law, claims brought against the possessor (who may have also been a private individual) by either a private individual or by a State representing a private individual, were not to be brought before the civil law courts. As noted above, this Law itself acknowledged that the claims were triggered by a breach of public international law. Accordingly, the Law provided that such claims were within the exclusive jurisdiction of the special chamber of the *Schweizerisches Bundesgericht* which enacted special procedural rules for a period of two years. After this period, claims were to be pursued as

- Department of State Bulletin*, 358; Hall, A.R. ‘The US Program for the Return of Historic Objects to Countries of Origin’, 1944-54 (1954) 31(797) *Department of State Bulletin* 493.
- 114 Even in private law, recent US case law involving the restitution of cultural objects removed during the Nazi regime or during the US military occupation of Germany takes a generous approach toward time limits: see *Kunstsammlungen zu Weimar v. Elicofon*, 536 F Supp. 829 (EDNY 1981), affd 678 F 2d 1150 (2nd Cir. 1982); (1973) 12 *ILM* 1163, (1981) 20 *ILM* 112, (1982) 21 *ILM* 773; *Menzel v. List*, 267 NYS 2d 804 (S. Ct 1966) modified 279 NYS 2d 608 (App. Div. 1967) revd 24 NY 2d 91 (1969); *DeWeerth v. Baldinger*, 836 F 2d 103 (2nd Cir. 1987); and *Republic of Austria v. Altmann*, 372 F 3d 1246 (9th Cir. 2003); 539 *US* 987 (2004), 124 *S. Ct.* 46
- 115 Ferencz, note 30 at 375: noting that the programme was completed in five years with approximately 95 per cent of the cases settled without going to court.
- 116 See for example in respect of the US Zone: Law No. 59, Part X; and at the end of the occupation, Annex to Chapter 3, Charter of the Supreme Restitution Court, Convention on Settlement of Matters. The 1952 Western Powers’ settlement with Germany provided for the establishment of a Supreme Restitution Court as the successor to the appellate bodies in their respective three zones. It did not create a single court for West Germany but three divisions (referred to as ‘Senates’) reflecting the prior British Board of Review, the US Court of Restitution Appeals, and French Zone’s Higher Court of Restitution. It was an international court. The membership of the Court was more diverse than had been the case with its predecessors. For example, the Supreme Restitution Court Third Division which had taken over from its US predecessor was composed of two US, two German and one ‘neutral’ judge, with the neutral appointed President. In respect of external restitution, the 1952 settlement provided for the establishment of an Arbitral Commission, similar in composition to the Supreme Restitution Court, which heard individual and State claims. Not only was the composition of the Commission international, it applied international law including the provisions of the Convention on Settlement of Matters arising from the War and Occupation, applicable legislation, general principles of law and justice and equity: Bentwich, note 51 at 215.
- 117 See Bentwich, note 51 at 209.
- 118 See generally, Cohn, note 30 and Wengler, note 30.

civil claims in the Civil Law courts using the usual civil procedure.¹¹⁹

Under the 1947 Paris Peace Treaties such restitution claims would be referred to a Conciliation Commission.¹²⁰ These Commissions had two phases. In the first three months from the date that it was seized of the matter, the Commission, composed of equal members of the US Government and former Axis Government, engaged in conciliation. If conciliation was not successful in this period, either party could request that a “third member” from a third State be selected by mutual agreement. If they failed to agree on the selection, it would be made by the UN Secretary-General. The determination of this “mixed tribunal” would be made by a majority vote and would “be accepted by the parties as definitive and binding”. While the treaties were unclear on their face as to the Commission’s exclusive competence, it was assumed that they did not intend to preserve the concurrent jurisdiction of domestic courts.¹²¹

These and related domestic avenues for the resolution of restitution claims, both external and internal, continued in the coming decades but with successful returns being finalised at a much reduced rate the post-war processes were permitted to lapse.¹²² The Cold War divisions, which had manifested themselves in the immediate post-war period with the failure of the Allied Powers to agree on a common restitution programme for occupied Germany, also had a significant retarding influence.¹²³

REVISITING RESTITUTION CLAIMS AFTER 1989: THE RELEVANCE OF A HUMAN RIGHTS FRAMEWORK

The late 1980s and early 1990s coincided with several factors which precipitated a reappraisal of the international efforts to return cultural property confiscated during the Shoah and the Second World War. Two factors in particular facilitated these critical assessments: the end of the Cold War witnessed an opening up of archives and the re-evaluation of long-accepted histories in Central and Eastern Europe,¹²⁴ and Second World War anniversaries coincided in the Western Europe and North America with landmark publications by historians and investigative journalists who documented and analysed the Allied restitution programme and its non-completion.¹²⁵ These events successfully raised awareness within the international community, States and civil society of the need to revisit and fulfil the original aims set down by the associated nations in the 1943 London Declaration and expanded upon in subsequent legislative instruments.

As in 1942, there was a realisation and acknowledgement by governments that any initiative for the restitution of Holocaust-era and Second World-War property could be

119 Vászrhelyi, note 9 at 118.

120 Article 83 *Peace Treaty with Italy*; Article 35, *Peace Treaty with Hungary*; Art. 32 *Peace Treaty with Romania*; and Art. 31 *Peace Treaty with Bulgaria*.

121 Martin, note 12, at 299.

122 ‘Report on a legal framework for free movement within the internal market of goods whose ownership is likely to be contested’, prepared by the Committee on Legal Affairs and the Internal Market, European Parliament, passed by the European Parliament on 17 Dec. 2003 (487-10-16), FINAL A5-0408/2003.

123 See le Masne de Chermont I. & Sigal-Klagsbald L. *Looking for Owners: French Policy for provenance research, restitution, and custody of art stolen in France during World War Two*, (RMN, Paris, 2008), 23-41; and Simpson (ed.), note 12, at 142-213.

124 See Akinsha K. & Kozlov G. ‘Discovery of the Secret Repositories’, in Simpson (ed.), note 30, at 162.

125 See Nicholas, note 22; Feliciano, H. *The Lost Museum: The Nazi Conspiracy to Steal the World’s Greatest Works of Art* (Basic Books, New York, 1997).

effected only through solidarity and co-operation. Accordingly, a number of non-binding declarations by international conferences and multilateral organisations were adopted including the 1998 *Washington Conference Principles*,¹²⁶ Resolution 1205 (1999) of the Council of Europe,¹²⁷ 2000 *Vilnius Forum Declaration*,¹²⁸ 2003 De Clerq Report,¹²⁹ 2009 *Terezin Declaration*,¹³⁰ 2009 draft *UNESCO Declaration of Principles relating to Cultural Objects Displaced in Connection with the Second World War*¹³¹ and 2010 Prague Guidelines and Best Practices on Immovable Property.¹³² With the exception of the UNESCO draft Principles on displacement of cultural property during armed conflict, these instruments address the restitution of property removed during the Shoah. Like the post-war restitution programme, these initiatives recognise and encourage national governments and institutions to implement these principles in national laws and policies. However, there is an appreciable distinction between the approaches of the US initiatives and those which were European led. The *Washington Conference Principles*, which all EU Member States adopted, reflect many of the strategies implemented during the post-war restitution programme and focus on practical measures to facilitate restitution claims. By contrast, the later European declarations are broader and holistic in their outlook. In addition to affirming and elaborating upon the practical measures espoused by the *Washington Declaration*, they outline principles and policies which go beyond individual claims to the rehabilitation of victim communities and reconciliation of the wider society. This is reflective of an acknowledgement of the broader significance for Europe of these claims and the circumstances which gave rise to them and of its history and identity.¹³³

Within the European context, the revival of Holocaust-era and Second World-War restitution claims has run parallel with the restitution claims of persons subject to Communist nationalisation. As Ferencz observed, often people were “twice dispossess[ed]” in Central and Eastern Europe, first through the confiscation by the Nazi regime or other Axis States, then through the ineffective implementation of restitution in regions still harbouring anti-Semitism, and finally, through the nationalisation of private

- 126 *Washington Conference Principles on Nazi-Confiscated Art* adopted on 3 Dec. 1998, by the Washington DC Conference on Holocaust Era Assets (at which 44 countries were presented), at < <http://www.state.gov/eur/rt/hlcst/122038.htm>>.
- 127 *Resolution 1205(1999) on Looted Jewish Cultural Property*, adopted on 5 Nov. 1999, by the Parliamentary Assembly of the Council of Europe (representing 41 states), *Official Gazette of the Council of Europe*, Nov. 1999.
- 128 Declaration of the Vilnius Forum on Holocaust Era Looted Cultural Assets, Council of Europe, 5 Oct. 2000 (representing 38 governments).
- 129 Report on a legal framework for free movement within the internal market of goods whose ownership is likely to be contested, prepared by the Committee on Legal Affairs and the Internal Market, European Parliament, passed by the European Parliament on 17 Dec. 2003 (487-10-16), FINAL A5-0408/2003.
- 130 *Declaration of the Holocaust Era Assets Conference*, Terezin, 26-30 June 2009 under the auspices of the EU and Czech Presidency on 30 June 2009 (46 governments participating), at < <http://www.eu2009.cz/en/news-and-documents/news/terezin-declaration-26304/>>.
- 131 Declaration of Principles Relating to Cultural Objects Displaced in Connection with the Second World War, 35th session of the General Conference of UNESCO in Oct. 2009 adopted resolution 41 which took note of the draft Declaration, UNESCO Doc.181 EX/33.
- 132 Guidelines and Best Practices for the Restitution and Compensation of Immovable (Real) Property Confiscated or Otherwise Wrongfully Seized by the Nazis, Fascists, and Their Collaborators during the Holocaust (Shoah) Era between 1933-1945 including the period of World War II, adopted in Prague 9 June 2010, by 43 States, at <http://www.shoahlegacy.org/sites/default/files/documents/guidelines_and_best_practices_for_the_restitution_and_compensation_of_immovable_property_09062010.pdf>.
- 133 See generally Vilnius Declaration; De Clerq Report, note 123; Terezin Declaration.

property by Communist regimes.¹³⁴ Contemporary efforts to reverse these processes have aligned with human rights law and transitional justice discourse.¹³⁵ Also, with the benefit of the human rights instruments which have been adopted and of those specialised courts and tribunals established since the end of the Second World War, individual claimants are increasingly framing their actions within international human rights law.¹³⁶

This third Part seeks to place the principles reaffirmed and developed since the 1990s in respect of Holocaust era restitution claims in the context of public international law principles adopted during the same period by the international community concerning reparations for serious violations of human rights.¹³⁷ The obligations of States in respect of gross violations of human rights or serious violations of international humanitarian law can be divided into three core principles: the right to know, the right to justice and the right to reparations and non-recurrence.¹³⁸

The inalienable, collective right of every people to know the truth concerning “past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations; to the perpetration of those crimes”, is essential to preventing revisionism, denial and recurrence of human rights abuses.¹³⁹ The duty to remember is concomitant with the right to know. There is a duty to preserve collective knowledge of the history of oppression which forms part of a people’s heritage and the communal memory of this past from extinction.¹⁴⁰ This obligation is reflected in the 2009 EU *Terezin Declaration*,¹⁴¹ and the subsequent establishment of European Shoah Legacy Institute.¹⁴² The right to truth also has an individual dimension. Victims and their families have an imprescriptible right to know the circumstances of the violation and the fate of victims.¹⁴³ The two primary modes achieving collective and individual rights are: commissions of inquiry and preservation of and access to archives. Both preservation of and accessibility to relevant archives are essential to the right to know and the duty to remember.¹⁴⁴ Records of past human rights violations are integral to maintaining the collective memory and must not be destroyed, removed, hidden or

134 Ferencz, note 30 at 375.

135 See O’Donnell, T. ‘The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of Medusa?’ (2011) 22 *EJIL* 49.

136 See Lyons, C.A. ‘Door into the Dark: Doing Justice to History in the Courts of the European Union’, *EUI Working Paper Law* 2008/11.

137 Including the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Updated Principles to Combat Impunity), 8 Feb. 2005, UN Doc.E/CN.4/2005/102/Add.1; and Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines on Reparations), GA Res.60/147 of 16 Dec. 2005, UN Doc.A/Res/60/147.

138 See Updated Principles to Combat Impunity, UN Doc.E/CN.4/2005/102/Add.1; 1993 Vienna Declaration and Programme of Action, UN Doc.A/CONF.157/23, Part II, para. 91.

139 Updated Principles to Combat Impunity, Principle 2.

140 Updated Principles to Combat Impunity, Principle 3.

141 Terezin Declaration, particularly section ‘Education, Remembrance, Research and Memorial Sites’. See also the Written Declaration of 7 July 2000 on remembrance of the Holocaust, OJ C 121, 24.4.2001, 503; *Declaration of the Stockholm International Forum on the Holocaust on Education, Remembrance and Research* of 28 Jan. 2000, at <www.sweden.gov.se/content/1/c6/06/66/96/52af23bc.pdf>; European Parliament Resolution 18 of 27 Jan. 2005 on remembrance of the Holocaust, anti-semitism and racism.

142 See European Shoah Legacy Institute, at <<http://www.shoahlegacy.org/>>.

143 Updated Principles to Combat Impunity, Principle 4. See *Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), 4 Nov. 1950, Art. 3.

144 Updated Principles to Combat Impunity, Principles 14 to 18.

tampered with. The obligation extends to third States which are expected to co-operate and restore archives. In addition, access must be granted to, among others, victims and their families, to enable them to realise their rights to remedies and reparations, as well as to persons engaged in historical research. As noted above, the preservation and provision of access to such records and archives were acknowledged and promoted by the post-war restitution scheme. The recent declarations covering Holocaust-era assets similarly reiterate this obligation.¹⁴⁵

Pursuant to the right to justice, States should take “prompt, thorough, independent and impartial” investigations of breaches of human rights and international humanitarian law and perpetrators should be charged, tried and appropriately punished.¹⁴⁶ The right to justice overlaps with the victim’s right to equal and effective access to judicial remedy.¹⁴⁷ To render effective access to justice for victims, States are required to disseminate information through public and private avenues about the remedies available for gross violations of human rights law or serious violations of humanitarian law, to provide proper assistance to victims seeking access to remedies, to render available all appropriate legal and diplomatic modes to facilitate exercise of this right, to minimise the impact of proceedings on victims through the provisions of counselling, to give advice about the court proceedings, their processes and outcomes, to modify rules of procedure and evidence, to minimise inconvenience to victims and their families, and to permit non-governmental organisations to institute and participate in proceedings on behalf of victims.¹⁴⁸ States must not adhere to rules which foster impunity, including statutes of limitations, amnesties and immunities which may thwart victims’ right to reparations.¹⁴⁹ The efforts of the Allied Powers to address these issues at the close of the Second World War, through the work of the Nuremberg trials and subsequent restitution programmes, were outlined above. Contemporary Holocaust-era declarations likewise confirm and elaborate upon these elements of the right to justice including the standing of representative (or successor) organisations.¹⁵⁰

The right to justice is tied to the right of victims (and their families and dependants) to reparations and non-recurrence. States have a duty to provide victims of violations

- 145 Washington Principles, Principles 2 and 3; ICOM Recommendation concerning the Return of Works of Art Belonging to Jewish Owners adopted by the Executive Council of the International Council of Museums (ICOM), 14 Jan. 1999, principle 2; Resolution 1205, para. 11; Vilnius Forum Declaration, paras 2 and 3; Terezin Declaration, para. 4, Nazi-Confiscated and Looted Art, para. 2, Judaica and Jewish Cultural Property, paras 1 (Identification) and 3 (Preservation), and section entitled Archival Materials. In respect of commissions of inquiry see Washington Principles, Principle 10; De Clerq Report, note 123, under heading ‘Assessment of Possible EP Initiatives’; Prague Guidelines and Best Practices, para. (e).
- 146 Updated Principles to Combat Impunity, Principle 19.
- 147 2005 Basic Principles and Guidelines on Reparations, paras 12-14.
- 148 Basic Principles and Guidelines on Reparations, paras.12-13; and Updated Principles to Combat Impunity, Principle 33.
- 149 Updated Principles to Combat Impunity, Principles 22 to 24. See also Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 Nov. 1968, GA res. 2391 (XXIII), annex, 23 UN GAOR Supp. (No. 18) at 40, UN Doc.A/7218 (1968).
- 150 Washington Principles, generally and in particular, Principles 8, 9 and 11; Resolution 1205, paras 11, 13, 14, 15, 16, 17 and 18; Vilnius Forum Declaration, paras 4, 5 and 6; and Terezin Declaration, para. 3, Immovable (Real) Property, para. 2, Nazi-Confiscated and Looted Art, para. 3, Judaica and Jewish Cultural Property, entitled Archival Materials; De Clerq Report, note 123, under headings ‘Need for EU Action on a European Legal Problem’ and ‘Assessment of Possible EP Initiatives’; and Prague Guidelines and Best Practices, paras (d), (f), and (i) (noting that the last provision appears to provide protection for good faith ‘occupants’ of the restituted real property).

of international human rights law and international humanitarian law with reparations (the substantive element) and the ability to pursue redress (the procedural element).¹⁵¹ In respect of the latter component, the post-war restitution programme provides avenues of redress through administrative and ultimately judicial review; by contrast, the present-day Holocaust-era declarations emphasise alternative dispute resolution mechanisms.¹⁵² The right to remedies for victims incorporates: equal and effective access to justice, adequate, effective and prompt reparations for harm sustained, and access to relevant information concerning violations and reparation mechanisms.¹⁵³ Victims should have access to “readily available, prompt and effective” remedies through criminal, civil, administrative or disciplinary proceedings, including those available at the international and regional levels.¹⁵⁴ These mechanisms should be accessible on an individual and collective basis. States must provide victims with “adequate, effective and prompt” reparation proportional to the gravity of the violation and harm sustained by them.¹⁵⁵ Reparations cover restitution, compensation, rehabilitation, satisfaction and guarantees for non-repetition. Restitution is the primary mode of reparation and is designed to restore the victim to the position he or she was in prior to the violation and includes restoration of property. This is reflective of the practice of the international community following the Second World War and reaffirmed in current Holocaust-era declarations.¹⁵⁶

Where restitution is not possible or adequate, victims may be entitled to restitution-in-kind or compensation where such loss is economically assessable. As summarised above, this principle was recognised in respect of cultural property following the Second World War and has received support in the Holocaust-era declarations adopted in the last decade.¹⁵⁷ This head of reparations includes moral damage as well as costs for legal, medical, psychological and social services.¹⁵⁸ Similarly, rehabilitation aims to restore the dignity and reputation of victims and includes provision of medical and psychological care and social services.¹⁵⁹ This form of reparation was incorporated in post-war internal

- 151 Updated Principles to Combat Impunity, Principle 31. See *Universal Declaration of Human Rights* (UDHR), 10 Dec. 1948, Art. 8; *International Covenant on Civil and Political Rights* (ICCPR), 16 Dec. 1966 Art. 2; *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD), 21 Dec. 1965, Art. 6; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (Protocol I to Geneva Conventions), 8 June 1977 Art. 91; *Statute of the International Criminal Court* (Rome Statute), 17 July 1998, Arts. 68 and 75. See generally Shelton, D. *Remedies in International Human Rights Law*, (2nd edn, Oxford University Press, Oxford, 2005).
- 152 Washington Principles, generally and in particular, Principle 11; Resolution 1205, paras 11, 13, 14, 15, 16, 17 and 18; Terezin Declaration, Nazi-Confiscated and Looted Art, para. 3.
- 153 Basic Principles and Guidelines on Reparations, para. 11.
- 154 Updated Principles to Combat Impunity, Principle 32 (subject to the restrictions on prescription outlined in Principle 23).
- 155 Updated Principles to Combat Impunity, para. 15.
- 156 Washington Principles generally; Resolution 1205, para. 9; Vilnius Forum Declaration, para. 1; Terezin Declaration, para. 2; Prague Guidelines and Best Practices, generally recognises the right to restitution and compensation; and UNESCO Principles generally.
- 157 Resolution 1205, para. 12 (compensation); *Terezin Declaration*, compensation only mentioned in respect of immovable property; UNESCO Principles, amendments to which no consensus was reached and therefore not included in the consolidated draft were proposed by Russia and Poland for the recognition of restitution-in-kind within the Principle IX reaffirming the prohibition use of cultural property as war reparations; Prague Guidelines and Best Practices, para. (h) covering restitution in kind and compensation.
- 158 Basic Principles and Guidelines on Reparations, para. 20.
- 159 Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, *Final Report*, 2 July 1993, UN Doc.E/CN.4/Sub.2/1993/8, p. 57.

restitution programmes, and successor organisations were permitted to deploy proceeds and transfer heirless assets for this purpose. This aim has been reaffirmed in the current Holocaust-era declarations.¹⁶⁰

The remaining two remedies – satisfaction and guarantees of non-repetition – encompass redress not only for the individual victims but are structured to facilitate societal efforts to remember, resist revisionism and prevent future gross violations of human rights norms or serious violations of humanitarian law. For society at large and the process of reconciliation, satisfaction should include inclusion of an accurate account of past violations in the public domain, especially in educational materials, commemorations of victims and memorial days.¹⁶¹ The current Holocaust-era declarations are differentiated from their post-war predecessors because of their recognition of the significance of this form of reparation.¹⁶²

The guarantee of non-repetition has the capacity to have the most far-reaching impact and can include promoting and implementing mechanisms for preventing, monitoring and resolving social conflicts, and institutional reforms and measures necessary to “ensure respect for the rule of law, foster and sustain a culture of respect for human rights, and restore or establish public trust in government institutions”.¹⁶³ The 1947 Paris Peace Treaties had required the relevant former Axis countries to repeal discriminatory legislation, to provide effective protection for human rights, in addition to the provisions of the restitution programmes detailed above.¹⁶⁴ Contemporary Holocaust-era declarations explicitly acknowledge the importance of these processes for effective human rights protection and likewise call for the domestic and multilateral legislative reform needed to realise this aim.¹⁶⁵

CONCLUSION

By the mid-1950s, the experiences of the post-Second World-War restitution programme served to define the parameters of public international law obligations concerning cultural and religious property, and civilian property generally, during armed conflict and belligerent occupation.¹⁶⁶ Much of it was reflected in the 1954 *Protocol for the Protection of Cultural Property in the Event of Armed Conflict*.¹⁶⁷ Like post-war external restitution it is limited to

160 Terezin Declaration, paras 1 and 5, Sections headed The Welfare of Holocaust (Shoah) Survivors and other Victims of Nazi Persecution, and Immovable (Real) Property, para. 3; and Prague Guidelines and Best Practices, para. (j).

161 Basic Principles and Guidelines on Reparations, para. 22.

162 Terezin Declaration, para. 4, and section ‘Education, Remembrance, Research and Memorial Sites’. See also the Written Declaration of 7 July 2000 on remembrance of the Holocaust, OJ C 121, 24.4.2001, 503; *Declaration of the Stockholm International Forum on the Holocaust on Education, Remembrance and Research* of 28 January 2000, at <www.sweden.gov.se/content/1/c6/06/66/96/52af23bc.pdf>; *European Parliament Resolution 18 of 27 January 2005 on remembrance of the Holocaust, anti-semitism and racism, n.123m*; and marking of 27 Jan. as Holocaust Memorial Day by European States.

163 Updated Principles on Combat Impunity, Principles 35 to 38; and Basic Principles and Guidelines on Reparations, para. 23.

164 Article 4, *Peace Treaty with Italy*; Art. 2, *Peace Treaty with Hungary*; Art. 3 *Peace Treaty with Romania*; and Art.2 *Peace Treaty with Bulgaria*.

165 Resolution 1205, para. 11; Tezerin Declaration, para.3; and De Clerq Report, note 123.

166 Berlia, note 30 at 9-11.

167 14 May 1954. The initial inclusion of a draft provision covering restitution in the convention proper proved highly contentious and was consequently relegated to an optional protocol to placate certain States who it was feared would not otherwise sign the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 14 May 1954: see *Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict — The Hague*,

State claimants. And it is applicable only to High Contracting Parties.¹⁶⁸

It has been argued that the 1943 *London Declaration* and its core principle concerning the restitution of property (including cultural and religious property) removed contrary to international humanitarian law, even if that removal was apparently legal on its face, forms part of customary international law. It encompasses the principle of solidarity which obliges parties to the conflict and third parties alike to co-operate.¹⁶⁹ It requires the subordination or suspension of private international norms and domestic law principles which impede its effective implementation. Importantly, the post-war restitution programmes also extended the application of this principle beyond the strictures of armed conflict and belligerent occupation to cover internal restitution concerning serious violations of human rights generally.

When reviewing the work of the post-war restitution programmes in 1955, Bentwich observed:

It is a solacing reflection that, while a vast apparatus of the trials of war criminals by international and Allied Courts has, to a great extent, been whittled down by amnesties induced by political considerations, the comprehensive measures of restitution, compensation, and indemnities for the victims of Nazi oppression have proceeded steadily for ten years from the end of the war.¹⁷⁰

Yet, today, the reverse is true in respect to the international community's response to contemporary conflicts. The last decades have witnessed the establishment of a plethora of international or internationalised criminal tribunals, including the International Criminal Court, and increasing efforts to prosecute serious violations of international humanitarian law and gross violations of international human rights law. Yet, while many of these courts are empowered to award reparations to victims including restitution of property, they have to date failed to do so.¹⁷¹ The response of the United Nations to the Second World War and the Shoah highlighted their appreciation that to ensure an international legal order based on the protection of human rights and the rule of law entails not only prosecution of violators of public international law norms but effective access to justice and remedies for their victims, States and individuals alike.

1954. *Records of the Conference*, (1961), paras 1645-90 and 1750-56; O'Keefe, R. *The Protection of Cultural Property in Armed Conflict* (Cambridge University Press, Cambridge, 2006), 19-201; O'Keefe, P.J. 'The First Protocol of the Hague Convention Fifty Years On', (2004) 9 *Art Antiquity and Law* 99 at 113; and Prot, L.V. 'The Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention) 1954', in Briat, M. & Freedberg, J.A. (eds), *Legal Aspects of International Trade in Art*, (Kluwer Law International, The Hague, 1996), 163-73.

168 There were 102 High Contracting Parties as at May 2012, at <<http://www.unesco.org/eri/la/convention.asp?KO=15391&language=E>>.

169 SC Res. 661 of 6 Aug. 1990; and SC Res. 1483 of 22 May 2003, para. 7 concerning Iraq provided for the safekeeping and restitution of cultural heritage removed from that country which bound all UN Member States. This led to the passage of domestic laws stricter than the international obligations contained in the Protocol by countries not parties to these instruments. See, for example, Iraq (United Nations Sanctions) Order 2003 (UK), which shifted the burden of proof from the prosecution to the defendant who is required to prove that he or she "did not know and had no reason to suppose" that the object was removed illegally from Iraq after the relevant dates. 8(2) and (3).

170 Bentwich, note 32 at 217.

171 Vrdoljak, note 11 at 42.

