

ADVISORY COMMISSION

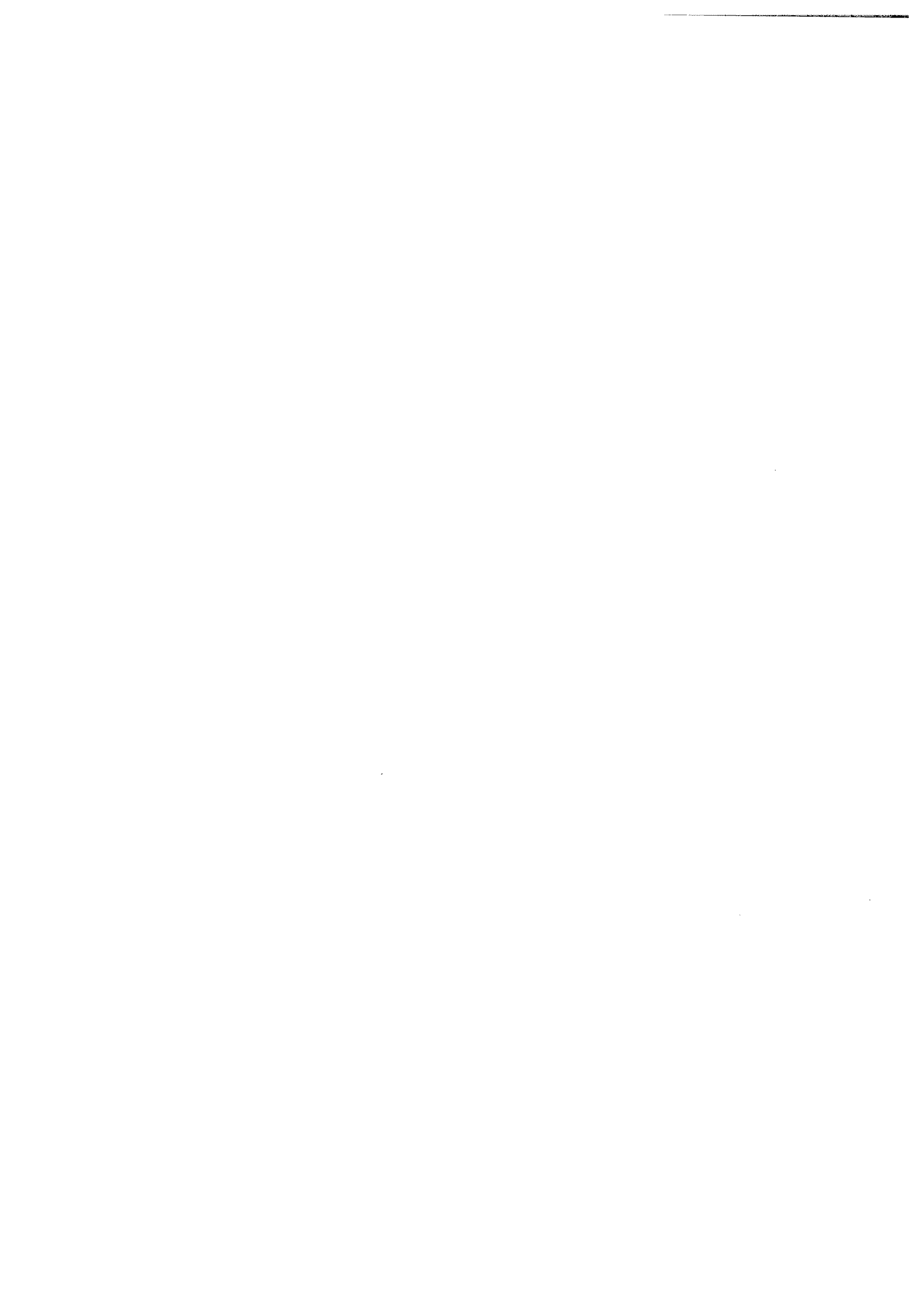
REPORT

Request for restitution

**Portrait of L. Adler
by O. Kokoschka**

Museum of Fine Arts, Ghent

8 June 2011



CONTENTS

Part I:	(Art-)historical provenance research	p. 3
Part II:	Legal analysis	p. 35
Part III:	Summary, Assessment and Recommendation	p. 53

Part I: (Art-)historical provenance research

1. Restitution request by way of introduction

On 12 January 2009 (letter dated 6 May 2008¹) the Ghent Museum of Fine Arts received an email from the German law firm Cramer von Clausbruch, Steinmeier & Cramer, established in Berlin and Dresden, asking for the restitution of the painting 'Portrait of Ludwig Adler' by Oskar Kokoschka. The law firm acts on behalf of the descendants of the heirs of one of the former owners, Victor von Klemperer.²

In her first, concise letter, lawyer Sabine Rudolph stated that the family von Klemperer had been the victim of the Nazi persecution in Germany, that the painting had been sold in the period 1937-1938 and that according to her, in application of the legislation of the Allied Councils in after-war Germany and on the basis of principles 7 and 8 of the Washington Conference Principles on Nazi-Confiscated Art, the transaction should be considered as a forced sale. The law firm asked the museum for "assistance in returning the painting to the heirs of Dr. Victor von Klemperer".³ Attached to the letter was a copy of the catalogue of the Oskar Kokoschka exhibition in Vienna (May-June 1937) where the painting had been displayed, V. von Klemperer being mentioned as the owner.⁴

Following a request for additional information by the Ghent Museum of Fine Arts⁵, Mr. R. Hoozee, curator of the Ghent museum, received a second letter from Mrs. S. Rudolph on 26 February 2009, with an overview of the heirs V. von Klemperer, copies of powers of attorney and brief historical comments on the circumstances in which the sale of the painting had taken place, as well as facts relating to the emigration by the family V. von Klemperer from Dresden to Rhodesia.⁶

The request for restitution received considerable attention in the Flemish media. Television channels and newspapers appeared to have been informed of the restitution claim. In the newspaper *De Morgen*, Mrs. S. Rudolph gave an extensive account and interpretation of the available historical facts.⁷ This information was more extensive than the information in the first and the second letter addressed to the Ghent Museum of Fine Arts.

¹ Whether the letter was sent out late or dated erroneously has not been established. After verifying with the city services of Ghent and the Ghent Museum of Fine Arts, no traces were found of the receipt of any letter (or e-mail), registered or not, dated 6 May 2008. The Commission dates the restitution request by the email of 12 January 2009.

² Letter from S. Rudolph to R. Hoozee, Dresden, 26 February 2009, as well as the genealogy of the family von Klemperer in annex.

³ Email/Letter from Dr. S. Rudolph to R. Hoozee, Dresden, 12 January 2009.

⁴ Email/Letter from Dr. S. Rudolph to R. Hoozee, Dresden, 12 January 2009.

⁵ Letter from R. Hoozee to S. Rudolph, Ghent, 3 February 2009.

⁶ Letter from Ms S. Rudolph to R. Hoozee, Dresden, 26 February 2009.

⁷ E. Rinckhout, "Jewish heirs claim Kokoschka back. Ghent Museum of Fine Arts in danger of losing a masterpiece 'Portrait of Ludwig Adler' ('Joodse erfgenamen eisen Kokoschka terug. Museum voor Schone Kunsten in Gent dreigt topstuk 'Portret van Ludwig Adler' te verliezen)", in *De Morgen*, 29 January 2009, p.

Shortly after the media attention, the former Flemish Minister of Culture, Youth, Sports and Brussels, Mr. B. Anciaux, received a parliamentary question from a member of parliament Mr. S. Gatz about the ownership of works of art in the Flemish collections, and more particularly about the painting *'Portrait of Ludwig Adler'* by O. Kokoschka in possession of the Ghent Museum of Fine Arts.⁸ The answer was published on 20 February 2009 and dealt more in depth with the acquisition of the art work by the City of Ghent, the good faith of the Ghent Museum of Fine Arts, the research and restitution policy of the federal authorities (the federal departments of the Prime Minister, Foreign Affairs and Science Policy) and the international developments with regard to restitution policies and the Second World War.⁹

After receiving the first letter of 12 January 2009, the deputy mayor for Culture of the City of Ghent first consulted with experts on the method by which this restitution case would best be handled. In a collegial decision of 11 February 2010, the mayor and deputy mayors of the City of Ghent decided to set up an independent ad hoc advisory commission under the chairmanship of Mr. L. Buysse (referred to as the Commission). The Commission's task is to study the restitution request in an in-depth and objective manner and to deliver a recommendation to the City council.¹⁰ The Commission is composed of experts from the Flemish and federal authorities, the museum community and the art trade, and counts among its members lawyers and legal experts as well as historians and art-historians. The advisory body decided to explore two research areas, namely the art-historical and historical aspects of the painting's provenance and the restitution request on the one hand, and the legal framework, the current legislation and international agreements on the other hand, and these findings form the basis of a detailed report and recommendation. The Commission – the "Kokoschka commission" – was given one year to accomplish its task, and the founding meeting was held on 15 March 2010.

Irrespective of this particular claim, it must be clarified that after the Second World War, Belgium followed a national and international restitution and compensation policy,

19; T. Dams, "Jewish heirs claim a Ghent masterpiece" (*'Joodse erfgenamen eisen Gents topstuk terug'*), in: *De Standaard*, 29 January 2009, p. 33; T.P., "Art works looted during the war are big business. Ghent Museum of Fine Arts in danger of losing a painting removed by Nazis to Jewish heir" (*'Geplunderde kunstwerken uit oorlog zijn big business. Gents Museum voor Schone Kunsten dreigt door nazi's onvreemd schilderij te verliezen aan Joodse erfgenaam'*), in: *De Tijd*, 29 January 2009, p. 28; E. Bracke, "Tug-of-war on a Kokoschka. Museum of Fine Arts in danger of losing an absolute masterpiece" (*'Touwtrekken om een Kokoschka. Museum voor Schone Kunsten dreigt een absoluut topwerk kwijt te spelen'*), in: *De Morgen*, 31 January 2009, p. 25.

⁸ Parliamentary question from a member of the Flemish Parliament, Sven Gatz, on the ownership of works of art in Flemish collections, Flemish Parliament, 4 February 2009.

⁹ Bert Anciaux, Flemish Minister of Culture, Youth, Sports and Brussels, Answer to the parliamentary question no. 125 of 20 February 2009 from Sven Gatz.

¹⁰ Collegial decision 'Establishment of an external ad-hoc advisory commission with regard to the claim for the restitution of a painting of Kokoschka, from the collections of the Museum of Fine Arts' (*'Oprichting van een externe ad-hoc-commissie van advies inzake de eis tot teruggave van een schilderij van Kokoschka, uit de collectie van het Museum voor Schone Kunsten'*), Ghent, 11 February 2010.

based on the restitution policies of the Western Allies. Belgium consented to the principles on Nazi-confiscated art of the 1998 Washington Conference on Holocaust-Era Assets and the Terezin Declaration on Holocaust Era Assets and Related Issues (2009). Two federal commissions of the federal department of the Prime Minister - the Study Commission into the Fate of the Belgian Jewish Community's assets, which were plundered or surrendered or abandoned during the war 1940-1945 (1997-2000) and the Commission of the indemnification for the Belgian Jewish community's assets, which were plundered, surrendered or abandoned during the war 1940-1945 (2001-2007)¹¹ - were engaged in the examination and compensation of financial assets, commercial activities and material goods. Both commissions were active under the chairmanship of Mr. L. Buysse. The search for spoilt cultural assets of former Jewish possession was one of the areas examined by these commissions. It was the federal department of Science Policy that carried out the investigation for and the restitution of cultural assets formerly in Jewish possession.

The restitution request of the painting however falls outside the strict research scope of the abovementioned Belgian commissions: before, during and after the Second World War, the painting was in Germany, later West-Germany, and came to Belgium only in 1987 when it was bought by the Ghent Museum of Fine Arts. During this period (before, during and after the Second World War), there was absolutely no connection between the family V. von Klemperer and Belgium, neither in respect of residence or domicile, nor in any commercial or cultural level.

In its (art-)historical research, and particularly its provenance research, the Commission followed as guidance the official directives and recommendations of the German Federal Republic, laid down in the *Handreichung zur Umsetzung der "Erklärung der Bundesregierung der Länder und der kommunalen Spitzenverbände zur Auffindung und zur Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes, insbesondere aus jüdischem Besitz" vom Dezember 1999*" which outlines among other things the research steps.¹²

2. 'Portrait of Ludwig Adler' by Oskar Kokoschka

2.1. Identification of the painting 'Portrait of Ludwig Adler'

The Austrian artist Oskar Kokoschka (Pöchlarn, 1886 – Montreux, 1980) enjoys international fame as one of the leading expressionist artists (painter, draughtsman and author) of the first half of the 20th century. He was until 1914 mostly active as an artist in Vienna. His first contacts with Germany date from 1910 when he left for Berlin, influenced

¹¹ The final reports of both commission can be consulted on: www.combuysse.fgov.be

¹² *Der Beauftragte der Bundesregierung für Kultur und Medien, Handreichung zur Umsetzung der "Erklärung der Bundesregierung der Länder und der kommunalen Spitzenverbände zur Auffindung und zur Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes, insbesondere aus jüdischem Besitz" vom Dezember 1999* , Februar 2001, überarbeitet im November 2007. These directives can also be consulted on the official German website: www.lostart.de

by the art dealer Herwarth Walden. In 1915 he registered as a volunteer with the Austro-Hungarian army and was sent to Galicia and Ukraine. After recovering from injuries, he was engaged in military service in Slovenia from 1916 onwards. In the meantime he stayed in Vienna and Berlin and tried to obtain a teaching assignment in Dresden.¹³ He came out of the First World War wounded and depressed, and was eventually offered by the German Ministry of Internal Affairs a teaching position at the *Kunstakademie* in Dresden, an assignment he would interrupt regularly. In 1923 he asked a two-year exemption from his teaching position, and travelled to Berlin where from 1924 onwards he came under contract of the Paul Cassirer gallery. In 1925, 48 of his paintings as well as his works on paper were shown at a large retrospective of his art works at the Arnold gallery in Dresden.¹⁴ After this exhibition he stayed in Dresden only sporadically and a new attempt to obtain a teaching position at the Dresden academy failed. The board of professors decided "*da es aussichtslos erscheint, von Kokoschka eine bindende Zusage zu erhalten*" ("that it is impossible to obtain a binding commitment from Kokoschka").¹⁵ Subsequently, the artist lived mainly in European cities (London, Paris, Prague, Monte Carlo, Vienna, et al.) as well as in North Africa where he produced many city views and landscapes that formed the core of his artistic production of the 1920s. During the Second World War he stayed in Great-Britain.¹⁶

The '*Portrait of Ludwig Adler*' is part of a large series of portraits, painted 'thickly' in a nervous style, that Kokoschka produced before the First World War. They depict prominent figures of the artistic, literary and scientific circles of Vienna.

Ludwig Adler (Vienna, 1879 – New Milford, 1958) studied at the faculty of medicine of the university of Vienna, where he graduated as doctor in medicine ("*Heilkunde*") in 1900. He worked at the General Hospital of Vienna and the *Pathologisch-Anatomischen Institut* of the university of Vienna. He specialised in gynaecology and in 1919 he became professor and head of the department of gynaecology of the Wilheminen hospital of the Austrian capital. After being dismissed following the *Anschluss* of Austria with Germany in 1938, the family Adler left for the United States of America.¹⁷ Nothing is known about his contacts with Oskar Kokoschka, nor were any elements found pointing at possible contacts between the family V. von Klemperer and Ludwig Adler before, during or after the Second World War.

The painting, initially known as '*Lesender Herr*' is dated 1913. It is almost certain that it was commissioned by Dr. Ludwig Adler himself, and it remained in the Adler

¹³ J. Winkler and K. Erling, *Oskar Kokoschka. Die Gemälde 1906-1929*, Salzburg, Verlag Galerie Welz, 1995, p. 206; K. Holz, *Oskar Kokoschka*, in: exhibition catalogue *New Worlds. German and Austrian Art. 1890-1940*, New York, Neue Galerie, 16.11.2001-18.02.2002, p. 104-112.

¹⁴ J. Winkler and K. Erling, cited footnote no. 13, p. 207.

¹⁵ J. Winkler and K. Erling, cited footnote no. 13, p. 208.

¹⁶ J. Winkler and K. Erling, cited footnote no. 13, p. 208-209.

¹⁷ J. Bauer-Merinsky, *Die Auswirkungen der Annexion Österreichs durch das Deutsche Reich auf die medizinische Fakultät der Universität Wien im Jahre 1938. Biographien entlassener Professoren und Dozenten*, Vienna, 1980, p. 3-4.

family's possession until 1931-1932.¹⁸ Oskar Kokoschka portrayed him only once. No details are known of the purchase and the commissioning of the portrait, which leads to presume that "artist and model were not familiar with one another".¹⁹ The painting was exhibited for the first time in 1925, during the above mentioned retrospective of Kokoschka's oeuvre at the Arnold gallery in Dresden.²⁰

2.2. Provenance

Thanks to the art-historical research for the *catalogue raisonné* of Kokoschka's painting oeuvre, conducted by Mr. Johann Winkler en Mrs. Katharina Erling, the 'Portrait of Ludwig Adler' has a detailed and precise provenance.²¹ This information was already available to the Marlborough Fine Art Ltd gallery of London, when it sold the painting to the Ghent Museum of Fine Arts in 1987.²²

A chronological overview of the former owners:

- 1913 - 1914: painted for Dr. Ludwig Adler;
- 1931 - 1932: *Kunsthandlung Kühl* in Dresden²³;
- 1932 - 1938: Victor von Klemperer collection, Dresden;
- 1938: sold to Herbert E. Kurz, Chemnitz; later inherited by his son Herbert Kurz, Wolframs-Eschenbach;
- 1968: Annemarie Hanka, Munich;
- 1970: Peter Griebert gallery, Munich;
- 1971: Folkwang Museum, Essen;
- 1978 - 1980: Galerie Hans Strelow, Düsseldorf; Ben Heller, New York; Jeffrey H. Loria, New York; Saul P. Steinberg, New York (in the Christie's New York auction of 18 May 1981. Included in the catalogue as lot number 23 and accompanied by a full-page picture, the painting was referred to as "*Lesender Herr*", the same title the painting carried during the first retrospective in 1925 at the Arnold gallery in Dresden.²⁴ Already at the Viennese exhibition of May-June 1937 was the identity of the portrayed disclosed: 'Professor Dr. Adler'.²⁵);

¹⁸ See footnote no. 23.

¹⁹ Exhibition catalogue *Oskar Kokoschka*, Ghent, Museum of Fine Arts, 17.09.1987-08.11.1987; Liège, Salle Saint-Georges, 14.11.1987-31.12.1987, p. 204.

²⁰ J. Winkler and K. Erling, cited footnote no. 13, p. 57-58.

²¹ J. Winkler and K. Erling, cited footnote no. 13, p. 57-58.

²² Letter from G. Lloyd, Marlborough Fine Art Ltd. to R. Hoozee, Director Museum of Fine Arts, London, 19 October 1987.

²³ The pre-war archive of the Dresden art dealer Heinrich Kühl was destroyed during the Allied bombardments of February 1945. The Kühl und Kühn gallery, i.e. the business collaboration between Heinrich Kühl and Anneliese Kühn lasted only one year, from 1924 to 1925. E-mails from S.-Th. Schmidt-Kühl to F. Leen, Dresden, 28 November 2010 and 2 December 2010.

²⁴ Part of the acquisition records of the Ghent Museum of Fine Arts. Auction catalogue *The Saul P. Steinberg Collection Part I. Important Modern Paintings and Sculpture*, New York, Christie's, 18 May 1981.

²⁵ Exhibition catalogue *Kokoschka Ausstellung*, Vienna, *Österreichischen Museum für Kunst und Industrie*, May-June 1937, p. 11.

- 1981: Marlborough Fine Art Ltd., London;
- 1987: exhibition of the painting in Ghent and the acquisition by the Ghent Museum of Fine Arts.

The detailed provenance, which was moreover foolproof and free from ambiguity, was already known upon the acquisition of the painting by the Ghent Museum of Fine Arts in 1987. There were - and are - no gaps in time or possession in the full chain of the painting's owners. In 75 years time, the *'Portrait of Ludwig Adler'* changed ownership 13 times: 11 private owners, among which prominent Jewish, North-American collectors, and two museums. Through the international art trade, the painting travelled to about five to six countries: in between 1914 and 1931/32 the painting was in Austria; between 1932 and 1978 in Germany, after the Second World War in West-Germany; from 1978 to 1981 in the United States of America, more particularly in New York, and between 1981 and 1987 in London, Great-Britain, where it was in possession of Marlborough Fine Art Ltd. The gallery gave the *'Portrait of Ludwig Adler'* on loan for Europalia Austria exhibitions in Belgium. The painting's purchase invoice dates from 19 October 1987 and the settlement of the acquisition took place in 1988.

The painting was purchased for 18 million old Belgian francs, financed thereto by the City of Ghent, the Flemish Community, the National Lottery and the non-profit association Friends of the Ghent Museum of Fine Arts.

The research did not reveal any new elements - documents or publication references - that change the detailed provenance as it was known in 1987. It also clarified that from the 1960s onwards, the painting had consistently led a 'public' life through exhibitions and public auctions, and that it had been in a prominent German museum collection, the Folkwang museum in Essen and been exhibited there from 1971 to 1978.²⁶ The Commission did not find any leads or indications that the provenance of the *'Portrait of Ludwig Adler'* would ever have been considered problematic along the multiple transactions to which the painting had been subject.

3. Historical background

At the time of the transaction of O. Kokoschka's *'Portrait of Ludwig Adler'* Germany was undergoing three developments: first, the enactment of anti-semitic measures and laws in Nazi Germany; secondly, the National Socialist degenerate art policy; and thirdly - in consequence of the previous two - the onset of National Socialist art looting. The following paragraphs will briefly describe these developments and comment on the events that form the historical background to the sale of the *'Portrait of Ludwig Adler'* in 1937-1938.

3.1. Anti-semitism in National Socialist Germany

²⁶ See also section 6, p. 27.

Although European history has always known phases of hostility and aggression towards the Jewish community, anti-semitism reached a historic and tragic low under National Socialism in Germany.

Hitler obsessively founded the theory of the supremacy of the Aryan race, according to which Jews were considered the main culprits for the Judeo-plutocratic-bolshevist world dominance and for everything that had gone wrong in Germany and with its population. From 1933, laws excluding the Jewish population from German society started to emerge, the most significant among them being the Law for the Re-establishment of the Professional Civil Service (*Berufsbeamtenengesetz*) of 7 April 1933. At this stage Jews were banned from the civil service, the cultural and agricultural sectors²⁷, resulting in a steady Jewish emigration from 1933 onwards.²⁸ The Minister of Economic Affairs H. Schacht (1877 - 1970), who came to office in 1934, convinced the National Socialist leaders and party functionaries of the importance for Germany of Jewish business and warned them for possible unfavourable international reactions and boycott actions.²⁹

The Nuremberg racial laws of 15 September 1935, proclaimed by Hitler at the annual party congress, codified the racial myth of the 'purity of the German blood' in Germany. From this emerged the definition of German citizenship (*Reichsbürgergesetz* of 15 September 1935, *Verordnung zum Reichsbürgergesetz* of 14 November 1935) and the prohibition of marriage between Jewish and Aryan Germans (*Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre* of 15 September 1935). One month later, two other laws, directed not against the Jews but other population groups, such as gypsies, negro's and their 'bastards', were enacted as well.³⁰

The anti-semitic Nazi campaign was implemented in 1938: on 26 April 1938, Jews were subjected to mandatory registration of their belongings (*Verordnung über die Anmeldung des Vermögens von Juden*, specified on 21 February 1939); on 14 June 1938, the third decree (with regard to German citizenship) was enacted in respect of the description of Jewish undertakings; on 6 July 1938 a law banning Jews from the provision of commercial services (such as credit advice and real estate) was passed. The decree excluding the Jews from practising law and medicine was published on 30 November 1938. The deathblow for Jewish economic activity came after 12 November 1938, after the *Reichskristallnacht*. H. Göring, who was responsible for the four-year plan, undertook initiatives that wholly excluded the German Jews from economic and financial activities. Only from that time onwards were the abovementioned laws and decrees fully applied.³¹

²⁷ S. Friedländer, *Nazi Germany and the Jews. Part 1: the years of prosecution. 1933-1939 (Nazi-Duitsland en de joden. Deel 1: de jaren van vervolging. 1933-1939)*, Utrecht, Het Spectrum, 1998, p. 44 and 50-51.

²⁸ S. Friedländer, cited footnote no. 27, p. 83.

²⁹ S. Friedländer, cited footnote no. 27, p. 91-92.

³⁰ S. Friedländer, cited footnote no. 27, p. 183.

³¹ S. Friedländer, cited footnote no. 27, p. 298-299.

Prior to the *Reichskristallnacht* - the November pogroms of 9 and 10 November 1938 - exceptions were still made for certain Jews, e.g. veterans from the First World War, and the interpretation and implementation of these laws and decrees was left to local Nazi party functionaries and the local community.³² After 1933, the fate of German Jews had depended on their personal social and financial status. The aggression displayed during the *Reichskristallnacht* pogrom caused more than 100 casualties, hundreds of suicides, 25,000 arrests and destroyed 7,500 business premises and nearly 200 synagogues.³³ The 'Aryanisation' and confiscation of possessions was inspired by the experiences in Austria after the *Anschluss*.³⁴ The law of 12 November 1938 compelled Jews to sell their undertakings and valuables, such as jewels and art objects.³⁵ With this law, art works in Jewish private possession came up for discussion in Germany for the first time. In Munich this action was led by *Gauleiter* Wagner himself: he ordered the directors of the state museums to take into custody art works belonging to Jews. It was the Gestapo that carried out the seizures. In the presence of the owners or their agents, inventories of the cultural objects were drawn up.³⁶ In one of her publications, Mrs. S. Rudolph herself emphasised the decisive impact of the *Reichskristallnacht* on National Socialist art looting in Germany: "*Die Phase der zwangsweisen Entziehung von Kunstwerken aus jüdischen Sammlungen würde tatsächlich durch das Novemberpogrom eingeleitet*" ("It was indeed the November pogrom that induced the phase of compulsive looting of art works from Jewish collections").³⁷

After the *Reichskristallnacht*, the Jews were excluded and pushed into complete isolation in Germany, leading up to the dramatic events of the Holocaust during the Second World War. During wartime new laws were passed. Only with the *Reichsbürgergesetz* of 25 November 1941 the assets of Jews residing abroad fell to the *Deutsche Reich*.

3.2. Degenerate art in Nazi Germany

National Socialism aggressively opposed every modern art expression, both against the artists themselves and against the art works acquired by German museums. A long list of visual artists (G. Grosz, W. Kandinsky, K. Schwitters, H. Campendonk, et al.) and writers (Mann family, B. Brecht, A. Seghers, A. Döblin, et al.) left Germany or opted for 'inward migration' (O. Dix, K. Köllwitz, et al.). Oskar Kokoschka would not return to Germany from 1933 until after the Second World War.

³² S. Friedländer, cited footnote no. 27, p. 30-31.

³³ S. Friedländer, cited footnote no. 27, p. 318; G. Ally and S. Heim, *Architects of Annihilation. Auschwitz and the Logic of Destruction*, London, Phoenix, 2003, p. 10.

³⁴ S. Friedländer, cited footnote no. 27, p. 280-287; G. Ally and S. Heim, cited footnote no. 33, p. 16-27.

³⁵ S. Friedländer, cited footnote no. 27, p. 328.

³⁶ S. Friedländer, cited footnote no. 27, p. 328.

³⁷ S. Rudolph, *Die Entziehung von Kunstwerken aus jüdischen Sammlungen und ihre Restitution*, in: exhibition catalogue *Von Monet bis Mondrian. Meisterwerke der Moderne aus Dresdner Privatsammlungen der ersten Hälfte des 20. Jahrhunderts*, Dresden, Gallery Neue Meister, 16.09.2006-14.01.2007, p. 139.

The large-scale action culminated into the removal of all modern art works from German public museums. A total of around 15,997 art works were seized. The cities of Dresden and Chemnitz, too, where V. von Klemperer and H. E. Kurz respectively lived, were hit by these Nazi confiscations.

No less than 940 art works were removed from the Dresden public collections (365 from the *Kupferstichkabinett*, 27 from the *Skulpturensammlung*, 17 from the *Staatliche Akademie für Kunstgewerbe*, 150 from the *Staatliche Gemäldegalerie* and 381 from the *Stadtmuseum*). In Chemnitz, 641 art works were taken from the city collections: 275 from the *Kunsthütte* and 366 from the *Städtliche Kunstsammlungen*.³⁸ Both cities were among those hit hardest by Nazi art spoliation. In Dresden, Hans Posse was temporarily moved out of office as *Direktor* of the Dresden *Gemäldegalerie*, and Friedrich Schreiber-Wiegand was dismissed as director of the city collections of Chemnitz.³⁹ They were held accountable for the acquisition of these art works. Both cities were also the stage for degenerate art manifestations held before the inauguration of the large-scale *Entartete Kunst* exhibition in Munich of 19 July 1937, where a selection of the confiscated art works was put on display. Already in May-June 1933, the exhibition '*Kunst, die nicht aus unserer Seele kam*' ('Art that did not come from our soul') was opened in Chemnitz, and in September-October 1933, an exhibition '*Entartete Kunst*' was held in Dresden. Both exhibitions showed paintings by Kokoschka.⁴⁰ From all German museums, a total of 417 paintings and works on paper by Oskar Kokoschka were removed, making him among the worst 'victimised' artists.⁴¹ These art works would end up with local and foreign art dealers. The auction at the Fischer gallery in Luzern on 30 June 1939 became most famous, when three Belgian museums of fine arts (Brussels, Antwerp and Liège) together acquired fifteen paintings, two of them being by Oskar Kokoschka.⁴²

In Germany, Jewish and non-Jewish private owners did not experience any direct interference or confiscations during this pre-war period of National Socialist degenerate art policies. These confiscations from 'public' property and the exhibitions of the same name had an impact on the market of modern art works by 'degenerate' artists as Oskar Kokoschka, on the level of sales and purchases. Current scientific publications do not give a consistent image of declining or low sales prices.⁴³ The acquisition of degenerate art works like the '*Portrait of Ludwig Adler*', that opposed directly the official National Socialist art policy, can be hardly qualified as an expression of Nazi sympathy or conviction.

³⁸ P. Rave, *Kunstdiktatur im Dritten Reich*, Hamburg, Verlag Gebr. Mann, 1949, p. 91.

³⁹ P. Rave, cited footnote no. 38, p. 92.

⁴⁰ S. Barron, *Degenerate Art. The Fate of the Avant-Garde in Nazi Germany*, New York, Harry N. Abrams Inc. Publishers, 1991, p. 99-103.

⁴¹ P. Rave, cited footnote no. 38, p. 87.

⁴² S. Barron, cited footnote no. 40, p. 147-169.

⁴³ S. Barron, cited footnote no. 40, p. 135-146; G. Jeuthe, *Die Wertschätzung der deutschen Kunst. Zur Preisentwicklung der Werke von Max Liebermann und Emil Nolde*, in: M. Steinkamp et U. Haug, *Werke und Werte. Über das Handeln und Sammeln von Kunst im Nationalsozialismus*, Berlin, Schriften der Forschungsstelle "Entartete Kunst". Band V, Akademie Verlag, 2010, p. 3-17.

3.3. Start of National Socialist art looting

The large-scale National Socialist art looting during the Second World War in the occupied territories and the art spoliation in among others Poland, Ukraine, France and The Netherlands, became notorious. As has been mentioned, the German public cultural institutions were the first to undergo a 'cleansing' of modernist art expression, however the looting of - particularly Jewish - private collections first occurred in Vienna, not in Germany.

The economically driven solution to the Jewish Question was first applied in Austria. Writer Saul Friedländer described it as follows: "*The persecution of the Jews in Austria, and particularly in Vienna, preceded the persecution in the Reich. Jews were publicly humiliated with a rudeness and sadism of the kind never seen before in Germany; expropriations were better organised and forced emigration proceeded faster. The Austrians – (...) – seemed more eager for hard action against the Jews than the inhabitants of what would now be called the Altreich [Germany]*".⁴⁴

The first time that the National Socialist looting of art works from Jewish possession was carried out overtly was in Austria, after the *Anschluss* in March 1938. On 26 April 1938 a decree on the registration of Jewish property was enacted in Vienna. A series of laws and decrees 'facilitated' confiscations in Austria: among others the Ordinance for the Expropriation of the People's and State's Enemies ('*Verordnung über die Entziehung volks- und staatsfeindlichen Vermögens*') of 18 November 1938 and the Ordinance for the Use of Jewish Property ('*Verordnung über den Einsatz des jüdischen Vermögens*') of 3 December 1938. Even though the laws and decrees were valid throughout Germany, the aggressive conduct of the Gestapo and the *Sicherheitsdienst* made the difference in Vienna. These police services were first deployed in relation to art objects in Vienna. In January 1939 Heinrich Himmler reported to the *Reichskanzlei* that 60 to 70 million *Reichsmarken* in art works had been confiscated in Vienna. In June 1939 Hitler paid a personal visit to the depositories of art works from Jewish holdings in Vienna, as the prominent collection of Baron Louis de Rothschild. The Nazis also engaged the services of art dealer Karl Haberstock and, from 1939 on, of Hans Posse. After the successful confiscations in Austria, Hitler's dream about a *Führermuseum* in Linz grew. Several figures such as Arthur Seyss-Inquart and Kajetan Mühlmann, who were involved in the art looting in the occupied countries like Poland and The Netherlands, operated ruthlessly in Vienna.⁴⁵ The German

⁴⁴ S. Friedländer, cited footnote no. 27, p. 280-281. Authors G. Ally and S. Heim described the developments in Vienna as follows: "*That approach pioneered in Vienna was viewed – and subsequently adopted – as a model for other occupied countries is evident not least from the careers of the men who first developed the concept*". G. Ally and S. Heim, cited footnote no. 33, p. 23.

⁴⁵ J. Petropoulos, *Art as politics in the Third Reich*, Chapel Hill and London, The University of North Carolina Press, 1996, p. 83-92; L. H. Nicholas, *The Rape of Europa*, London, Macmillan, 1994, p. 38-49.

historian Birgit Schwarz euphemistically described the beginning of Nazi art looting as „Österreich als Modell der Kunstbeschaffung“ ("Austria as a model for art acquisition").⁴⁶

4. Family Victor von Klemperer: history and collections

4.1. Victor von Klemperer: summary of family history

The founder of the family von Klemperer's banking business was Gustav Klemperer Edler von Klemenau (Prague, 1852 - Dresden, 1926). After he started working at a private bank, he became shareholder of the Robert Thode & Co bank in Dresden. In 1890 he became a board member ("Vorstandsmitglied") and executive officer of the Dresdner Bank. Before the First World War he became one of the bank's leading figures.⁴⁷ In 1920 he was raised to the Austro-Hungarian peerage, and acted as Consul General of the United States of America.⁴⁸

Victor von Klemperer (Dresden, 1876 – Bulawayo (Rhodesia), 1943) studied law at the universities of Freiburg and Berlin and obtained a doctor's degree.⁴⁹ In 1899 he joined the Dresdner Bank of Hamburg. One year later he left for the United States where he would gain experience at Bankhause Ladenburg, Thalmann & Co, Kessler & Co et al. and learn about the American business world.⁵⁰ On 1 January 1904, V. von Klemperer started working at the Dresdner Bank in Berlin, as private secretary of the secret council Eugen Gutmann.⁵¹ In 1909 he was seconded to the Leipzig bank affiliate to take charge of the bank's development and reorganisation.⁵² At the end of 1913 he returned to Dresden where he would follow in his father's footsteps at the Dresdner bank in 1914.⁵³ He would also become Vice Consul of Austria-Hungary. In May 1914, the V. von Klemperer family moved to a new residential villa on the Tiergartenstrasse 64 in Dresden.⁵⁴ As his father, V. von Klemperer was a member and chairman of the supervisory boards ("Aufsichtsratsvorsitzender") of about 50 undertakings located in Saxony, mainly operating

⁴⁶ B. Schwarz, *Sonderauftrag Linz und „Führermuseum“*, in: *Raub und Restitution. Kulturgut aus jüdischem Besitz von 1933 bis heute*, Berlin, Wallstein Verlag/Jüdisches Museum Berlin, 2008, p. 127.

⁴⁷ A. Graul, *Gustav und Victor von Klemperer. Eine biographische Skizze*, Dresden, Eugen-Gutmann-Gesellschaft, 2004, p. 11, 28-29; A. Loesch, *Das Schicksal der Porzellansammlung Gustav von Klemperers*, in: *Beiträge ... öffentlicher Einrichtungen der Bundesrepublik Deutschland zum Umgang mit Kulturgütern aus ehemaligen jüdischen Besitz. Band 1. Veröffentlichungen der Koordinierungsstelle für Kulturgutverluste*, Magdeburg, 2001, p. 57.

⁴⁸ V. von Klemperer, *Memoires*, Margate, June 1938 (with additions on 04/08/1938, 14/09/1939, 15/09/1941 and 23/06/1942), p. 10 and 39. (Leo Baeck Institute, New York, LE 559/1). See also *Sammler Biographien. Gustav von Klemperer*, in: H. Biedermann (Ed.), et al., *Von Monet bis Mondrian*, cited footnote no. 37, p. 281-282.

⁴⁹ V. von Klemperer, cited footnote no. 48, p. 20.

⁵⁰ V. von Klemperer, cited footnote no. 48, p. 22-30.

⁵¹ V. von Klemperer, cited footnote no. 48, p. 28.

⁵² A. Graul, cited footnote no. 47, p. 45-46; V. von Klemperer, cited footnote no. 48, p. 35-38.

⁵³ A. Graul, cited footnote no. 47, p. 45-46; V. von Klemperer, cited footnote no. 48, p. 38-39.

⁵⁴ V. von Klemperer, cited footnote no. 48, p. 42.

in the textile and industrial mechanical engineering sectors.⁵⁵ During the First World War he fought as a reserve officer with the Austro-Hungarian army in Eastern Europe and - given his Austrian nationality - at the Italian front. He would be decorated for his military services repeatedly.⁵⁶

In 1907 Victor von Klemperer married Sophie ("Fifi") Reichenheim (1887 – 1976). They had four children: Sophie-Charlotte Klemperer (1909 - 2004), Peter-Ralph von Klemperer (1910 - 2000), Gustav-Victor von Klemperer (1915 - 1997) and Elisabeth-Dorothea Klemperer (1918 - 1977).

After the National Socialists took over the power, V. von Klemperer was gradually removed from the financial world. In his memoirs he mentioned the difficult relationship with Mr. Reimer, his fellow executive officer at the Dresdner Bank, who was from then in charge of the "Aryanisation" of the Saxon economic and commercial community.⁵⁷ Due to the economic crisis of the late 1920s, the consequences of Germany's First World War compensation obligations, and a shortage of capital, the Dresdner Bank ceased to be a private bank from 1931 onwards. Historian Dieter Ziegler clarified that "*die Reichsregierung sah sich deshalb gezwungen, 300 Mio. RM Vorzugsaktien der Dresdner Bank zu zeichnen, die damit angesichts eines Grundkapitals von nur 100 Mio. RM aufhörte, eine private Bank zu sein*" ("the Reich government therefore saw no other way but to subscribe to 300 million preference shares of the Dresdner Bank, making the bank that disposed of only a core capital of 100 million [Reichsmarken] to lose its private character").⁵⁸ Due to the Law for the Re-establishment of the Professional Civil Service ('*Berufsbeamtengesetz*') of 7 April 1933 among others, the Jewish workforce was halved and the number of employees brought down from 111 to 57.⁵⁹ Victor von Klemperer remained in function, but was obliged to retire on 1 July 1934 on account of his Jewish origin, after thirty years of service.⁶⁰ By means of a severance grant, his wages were paid out until 1 July 1935. He lost his main direct income in 1938, and from June of that year he was prohibited from serving on any industry boards.⁶¹ By then, Mr. and Mrs. von Klemperer had relocated to Rhodesia, where they stayed with one of Mr. von Klemperer's brothers.

In his memoirs, V. von Klemperer reflected gradually on the financial situation of his family during the 1920s and 1930s - the times when economic recession hit Germany hard. After the death of his father in 1926, who had built the family fortune, he wrote that "*der geliebte Vater, zwar prachtvolle Sachen - wie die Porzellansammlung - aber wenig*

⁵⁵ A. Loesch, cited footnote no. 47, p. 60; A. Graul, cited footnote no. 47, p. 152; V. von Klemperer, cited footnote no. 48, p. 41.

⁵⁶ V. von Klemperer, cited footnote no. 48, p. 42-50.

⁵⁷ V. von Klemperer, cited footnote no. 48, p. 38.

⁵⁸ D. Ziegler, *Die Verdrängung der Juden aus der Dresdner Bank*, in: *Vierteljahrshefte für Zeitgeschichte* 47, München-Oldenbourg, 1999, p. 190-191.

⁵⁹ D. Ziegler, cited footnote no. 58, p. 202.

⁶⁰ D. Ziegler, cited footnote no. 58, p. 213.

⁶¹ A. Graul, cited footnote no. 47, p. 140, etc.; V. von Klemperer, cited footnote no. 48, p. 55; e-mail/letter from S. Rudolph to R. Hoozee, Dresden, 12 January 2009, p. 2.

realisierbare Werte, wie Effekten hinterlassen hatte sodass unsere Mutter ihren Haushalt bald wesentlich einschränkte, denn die kleine Pension, die die Bank aussetzte, nützte nicht viel ("aside from the marvellous objects - such as the china collection - my beloved father did not leave many sellable assets, like securities for instance, forcing our mother to considerably reduce her household expenditures, the small pension paid by the bank did not help us much").⁶² In his memoirs von Klemperer also elaborated on the bank's difficult reconstruction in the 1920s, revealing that "*mein Vermögen bis auf die Grundstücke eingebüsst, kann [ich] aber mit Stolz sagen, dass die Bank keinen Pfennig an mir verloren hat, sondern mein Konto samt Zinsen von mir völlig liquidiert werden konnte und auch die Brüder, die mir dabei geholfen haben, nicht nur ihr Geld und die Zinsen wiedererhalten haben, sondern auch an den von mir übernommen Effekten viel Geld verdienen konnten*" ("while my capital including the grounds has gone to waste, I can proudly say that the bank hasn't lost a penny on me. On the contrary, I have been able to settle my account including interests all by myself, and also my fellow colleagues who helped me doing this, did not only get their money back with interest but were moreover able to make a lot of money on the securities I took over from them"). The family credo was "*Sparen, Abbau der Schulden*" ("To save and diminish the debts").⁶³ V. von Klemperer hereby referred to the grounds he bought in the 1920s, around the villa.

In 1938 Mr. and Mrs. von Klemperer intended to travel to South Africa and continue to Rhodesia from there. Von Klemperer's younger brother Ralph-Leopold (1884 - 1956) had already emigrated to Rhodesia on 1 June 1937.⁶⁴ The various publications give different departure dates of the couple von Klemperer-Reichenheim. Lawyer S. Rudolph herself mentioned three different dates: February⁶⁵, spring⁶⁶ and summer 1938.⁶⁷ According to A. Loesch, their departure was induced by the *Reichskristallnacht* pogrom (9-10 November 1938).⁶⁸ Relying on V. von Klemperer's unedited memoirs, A. Graul mentioned that Victor and Sophie von Klemperer visited his brother Ralph in Margate, Natal (South Africa) in June 1938. V. von Klemperer wrote and dated his memoirs in Margate that same month. In his memoirs, he wrote that "*wir aller Voraussicht nach am 12. April mit der „Windhuk“ würden ausreisen können*" ("we will most likely be able to leave with the "Windhuk" on 12 April").⁶⁹ Taking into account that the couple von Klemperer's journey on a luxury liner

⁶² V. von Klemperer, cited footnote no. 48, p. 52-53.

⁶³ V. von Klemperer, cited footnote no. 48, p. 53-54.

⁶⁴ V. von Klemperer, cited footnote no. 48, p. 1; M. Dorrman, *Die Sammlungen der Familie von Klemperer. Von Büchern und Porzellanen*, in: *Raub und Restitution. Kulturgut aus jüdischem Besitz von 1933 bis heute*, Berlin, Wallstein Verlag/Jüdisches Museum Berlin, 2008, p.150.

⁶⁵ S. Rudolph, *Restitution von Kunstwerken aus jüdischem Besitz. Dingliche Herausgabeansprüche nach deutschem Recht* (doctoral dissertation), Berlin, De Gruyter Recht, 2007, p. 41.

⁶⁶ Letter from S. Rudolph to R. Hoozee, Dresden, 26 February 2009.

⁶⁷ Email/Letter from S. Rudolph to the Ghent Museum of Fine Arts, Dresden, 12 January 2009; S. Rudolph, *Von Nazis enteignet, bis heute in Russland. Victor von Klemperers Inkunabelsammlung*, in: *Osteuropa. Kunst im Konflikt. Kriegsfolgen und Kooperationsfelder in Europa*, no. 56, Berlin, January-February 2006, p. 142-143.

⁶⁸ A. Loesch, cited footnote no. 47, p. 60.

⁶⁹ V. von Klemperer, cited footnote no. 48, p. 1.

must have taken several weeks, the date of their departure to South Africa must be situated in the second half of April – early May 1938.

Initially, Victor and Sophie ('Fifi') von Klemperer intended to return to Europe on 12 October 1938. The ship *Ubena* would take them to Genoa and Hamburg, via Durban over Lorenzo Marques. Eventually they decided that "*Fifi reist nach Deutschland, liquidiert unser Haus Tiergartenstrasse*" ("Fifi travels to Germany, 'liquidates' our house on the Tiergartenstrasse").⁷⁰ "House" is to be understood as comprising the furniture. Victor von Klemperer was staying in the port town of Lorenzo Marques, Mozambique, awaiting a positive response to his immigration request for South Africa.⁷¹ His wife Sophie returned to Europe by herself, where her son Gustav-Victor was awaiting her in Genoa. According to V. von Klemperer, it was in Milan that she realised how serious the situation was. In Zurich, her friends and her daughter Elisabeth-Dorothea ('Thea') discouraged her from travelling to Germany. On 18 November, one week after the November pogroms in Germany, she left London for South Africa and she arrived back in Bulawayo on 9 December 1938.⁷² Like his brother, V. von Klemperer set up his own business with his wife and his son. On 23 June 1942, he noted that "*wir haben aber mit vereinten Kräften in den letzten 2 Monaten unser Leben verdient und mehr wollen wir nicht*" ("with our combined efforts, we have supported ourselves over the last two months, and it is all we need"). He was happy that all of his family members were safe and mentioned that "*Trostlos sind die Berichte über Freunde und Verwandte in Deutschland*" ("the news on our friends and family members in Germany is disconsolate").⁷³ Fortunately no one of the V. von Klemperer family (and family in law) was detained or deported. During the wartime, the family members stayed in Australia, Rhodesia, Persia and Switzerland.

4.2. Family Victor von Klemperer: art collections

Victor von Klemperer's art collections consisted to a lesser extent of modern art. Primarily, he collected incunables and, upholding the family tradition, conserved the Meissen china collection he had inherited from his father. He knew the Dresden museum community and the contemporary art in Germany, presumably through his activities as bank director and his commercial activities at the Dresdner bank. He was appointed treasurer of the *Dresdner Museumsverein* and was involved with the acquisitions of Hans Posse (1879 - 1942) for the local *Gemäldegalerie*.⁷⁴ H. Posse was previously dismissed as museum director on account of his degenerate art purchases in Dresden. However, he was reinstated director of the *Gemäldegalerie* after a personal intervention by A. Hitler. In 1939 H. Posse was appointed as representative ("*Beauftragter*") of the *Sonderauftrag Linz*, the *Führer's* vast museum project in Linz, as the culmination of the National Socialist cultural

⁷⁰ V. von Klemperer, cited footnote no. 48, p. 56.

⁷¹ V. von Klemperer, cited footnote no. 48, p. 57; A. Graul, cited footnote no. 47, p. 142.

⁷² Letter from S. Rudolph to R. Hoozee, Dresden, 26 February 2009.

⁷³ V. von Klemperer, cited footnote no. 48, p. 63.

⁷⁴ H. Biedermann, *Kokoschka in Dresdner Privatsammlungen*, in: *Kokoschka und Dresden*, Dresden, Staatliche Kunstsammlungen, 29.9-4.12.1996, p. 83.

policy and art looting.⁷⁵ The local *Gauleiter*, M. Mutschmann, blamed H. Posse for having acquired degenerate art works (by O. Dix, P. Klee, W. Kandinsky, M. Liebermann, O. Kokoschka, et al.) for the *Gemäldegalerie* in the 1920s.⁷⁶ Posse had been involved, for instance, in the acquisition of the painting *'Die Heiden'* (*'The Pagans'*) by O. Kokoschka in 1920.⁷⁷ V. von Klemperer became acquainted with O. Kokoschka and his work, presumably through H. Posse and the Dresden museum community. The two men were not however in close contact and V. von Klemperer's memoirs did not mention H. Posse neither.

4.2.1. Meissen china collection

V. von Klemperer's passion for Meissen china was passed on by his father Gustav Klemperer Edler von Klemenau, who started his own collection around 1890, the time he entered the Dresdner Bank. Respecting his parents' passion, V. von Klemperer noted that "*fanden auch immer mehr Freude an dem Sammeln von Meissner Porzellan. Hermann Ball erst ein kleiner später ein grosser Antiquitätenhändler brachte ihnen fast täglich irgendetwas, Porzellan, Möbel und Kunstgegenstände. Sie kauften mit rührender Freude und bald war jeder Raum des Hauses ein kleines Museum*" ("they found consistently more joy in collecting Meissen china. Hermann Ball, who turned from a small into an important antique dealer, brought them something every day, china, furniture, art objects. They collected with an endearing pleasure, and soon every room of the house had turned into a little museum").⁷⁸ In the 1920s the china collection became so extensive and important that it gained fame and had a reputation outside Dresden. After the First World War, and in accordance with the German *Verordnung über die Ausfuhr von Kunstwerken* of 11 December 1919, the *Reichministerium des Innern* included the "Meissen collection G. von Klemperer" (five figure groups in particular) in the list of collections that could not to leave Germany. In 1926 Gustav Klemperer Edler von Klemenau engaged the art historian Ludwig Georg Schnorr von Carolsfeld (1877 - 1945) to describe and draw up an inventory of the collection. Respecting his father's wish, Victor von Klemperer published the *catalogue raisonné* of the collection in 1927. The catalogue, printed in 150 copies, is still considered an authoritative work on the origins and history of Meissen china.⁷⁹ In 1926 the collection comprised 834 items from the period 1710-1775, most of them dated between 1735 and 1750. They mainly depict figures and groups, such as harlequins, mountain creatures and animals, as well as cups and tableware elements, dating from the time the *Porzellan-Manufaktur* Meissen was founded.⁸⁰

⁷⁵ L. H. Nicholas, cited footnote no. 48, p. 44-49; J. Petropoulos (1996), cited footnote no. 48, p. 89-94; J. Petropoulos, *The Faustian Bargain. The Art World in Nazi Germany*, London, Allen Lane-The Penguin Press, 2000, p. 52-55.

⁷⁶ J. Petropoulos (2000), cited footnote no. 75, p. 52.

⁷⁷ S. Barron, cited footnote no. 40, p. 288-289.

⁷⁸ V. von Klemperer, cited footnote no. 48, p. 37.

⁷⁹ A. Loesch, cited footnote no. 47, p. 57-58.

⁸⁰ A. Loesch, cited footnote no. 47, p. 58-59; M. Dorrman, cited footnote no. 64, p.149.

On 22 December 1938, one month after the November pogroms, Fritz Fichtner (1890 - 1969), director of the Dresden Museum of Decorative Arts, was officially commissioned to go ahead and take into custody (*'Sicherstellung'*) the von Klemperer Meissen collection. The collection had already been transported to the Dresdner Zwinger in early December 1938, brought in safety as a conservation measure against Allied bombardments. In January 1939, discussions were held with the *Ministerium für Volksbildung* and the Dresden museums with a view to assign the china collection and the incunables to the state of Sachsen.⁸¹ The minutes of these meetings stated that *"dass Klemperer seinen Steuerpflichten zum grossten Teil nachgekommen sei"* ("von Klemperer had largely fulfilled his tax duties").⁸² According to the 11th regulation of the *Reichsbürgergesetz* of 25 November 1941, V. von Klemperer's art collection (the Meissen China and the incunables) belonged to the German Reich (*"dem Deutschen Reich"*).⁸³ Eventually, H. Posse, an acquaintance of V. von Klemperer, would write a letter on 28 November 1942 to A. Hitler's secretary Martin Bormann, to ask for the final destination of the von Klemperer Meissen collection. On 4 January 1943 it was announced that *"der Führer hat entschieden, dass die Sammlungen dem Land Sachsen unentgeltlich übertragen werden sollen"* ("the Führer has decided that the collections are to be handed over to the state of Saxony free of charge").⁸⁴ Mrs. S. Rudolph gives a detailed account of the negotiations and discussions that took place after the confiscation, from the end of 1938 to 1943, with the *Ministerium für Volksbildung*, the *Reichskammer der bildenden Künste*, the *Reichswirtschaftsministerium*, the *Reichsinnenministerium* and the *Reichsfinanzamt*, at which occasion *inter alia* purchase prices of V. von Klemperer's Meissen china and incunables collections were published.⁸⁵ In November 1943 the china collection was transferred to the castle of Rammenau in 25 cases. For fear of the advancing Soviet troops, the art collections were evacuated to the West. In the night of 13-14 February 1945, the date of the Allied air bombardments on Dresden, von Klemperer's collection was located in a truck parked nearby the *Schlosshof* - the royal palace, loaded with cases of Meissen china. After the liberation of Germany, the von Klemperer collection was retrieved heavily damaged: most of the Meissen art objects had caught traces of fire or were shattered.⁸⁶

4.2.2. Collection of incunables and first prints

If collecting Meissen china was his father's passion, Victor von Klemperer engaged in collecting incunables and first prints of classic German and French authors from the 18th century. Following his father's example, V. von Klemperer published a catalogue of the 500 most important incunables of his collection.⁸⁷ V. von Klemperer described in his memoirs how he developed an interest in books during his childhood years: *"ich sammelte*

⁸¹ A. Loesch, cited footnote no. 47, p. 60-61.

⁸² A. Loesch, cited footnote no. 47, p. 61.

⁸³ A. Loesch, cited footnote no. 47, p. 62.

⁸⁴ A. Loesch, cited footnote no. 47, p. 62-63.

⁸⁵ S. Rudolph (2006), cited footnote no. 67, p. 143-150; S. Rudolph (2007), cited footnote no. 65, p. 43-47.

⁸⁶ M. Dorrman, cited footnote no. 64, p. 152.

⁸⁷ A. Loesch, cited footnote no. 47, p. 60; M. Dorrman, cited footnote no. 64, p. 149.

Briefmarken, Steine, Pflanzen, aber nicht mit Leidenschaft, dagegen entstand schon in der Schulzeit meine Liebe zu Büchern. Ich lass unendlich viel und sammelte eine kleine Bibliothek, die den Grundstock meiner heutigen Büchersammlung bildet ("I collected stamps, stones, plants, but my great passion for books started during my school years. I read endlessly and assembled a small library, that formed the basis of my current book collection").⁸⁸ His predilection for antiquarian books stems from his Berlin period: "*Dies ist bedeutungsvoll für mich geworden, denn die Leute verstanden es in ihren Auslagen [Buchladen von Breslauer und Meyer] nicht nur Neuerscheinungen auszustellen, sondern auch schöne, klassische Bücher. Jedes Mal, wenn ich das Haus verliess oder betrat, blieb ich vor dem Schaufenster der Firma stehn, bis ich einen schönen, illustrierten Molière erwarb. Bald folgte Racine und schliesslich erwarb ich fast jede Woche ein gutes Buch und hatte Freude daran, es zu studieren*" ("It has become significant to me that people understood that behind the windows [of the bookstores von Breslauer and Meyer] not only new publications were displayed but also beautiful classic books. Every time I left or entered the house, I stopped in front of the bookshop window, until I bought a beautiful illuminated Molière. Shortly afterwards followed a Racine, and eventually I would buy almost every week a good book and enjoyed studying it").⁸⁹

Concurrently with the looting of the china collection, the von Klemperer library was relocated in the *Sächsische Landesbibliothek* in December 1938. The library consisted of 3825 volumes, from which a selection of 2469 books was made. The remaining books stayed in the hands of the Gestapo. As already mentioned, the von Klemperer collections were assigned to Saxony on 4 January 1943. In 1943 the library was transferred to Taubenheim (Gröditz). The von Klemperer incunables (of approximately 450 books) and manuscripts collection fell in the hands of a Russian Trophy commission and were transferred to the USSR in 1946.⁹⁰

4.2.3. Modern art collection

Victor von Klemperer owned 3 paintings by O. Kokoschka: '*Augustus bridge with steamboat*' (*Augustusbrücke mit Dampfboot*) (1923), '*London, Richmond Terrace*' (1926) and '*Portrait of Ludwig Adler*' (1913). The first painting was acquired at the Dresden Arnold gallery in 1925 and put on display during the artist's retrospective exhibition that same year. The second one was acquired in 1926 from the inheritance of the Paul Cassirer gallery, and the '*Portrait of Ludwig Adler*' around 1931-1932 through the Dresden art dealer Kühl. In a written statement from von Klemperer's son Gustav-Victor to Mrs. Heike Biedermann in 1996, he mentioned that Oskar Kokoschka was befriended with the von Klemperers and visited them in their villa in the Tiergartenstrasse.⁹¹ This period is almost with certainty to be situated in the first half of the 1920s, when O. Kokoschka lived and was

⁸⁸ V. von Klemperer, cited footnote no. 48, p. 10.

⁸⁹ V. von Klemperer, cited footnote no. 48, p. 29.

⁹⁰ S. Rudolph (2006), cited footnote no. 67, p. 150-153; M. Dorrman, cited footnote no. 64, p. 153.

⁹¹ H. Biedermann, cited footnote no. 74, p. 83.

artistically active in Dresden. However, Kokoschka's autobiography and correspondence do not refer to the von Klemperer family. Victor von Klemperer's memoirs do not make any mention of Oskar Kokoschka either.⁹²

V. von Klemperer also owned the painting *'Kohlfeld im Wannseegarten nach Westen'* by German impressionist painter Max Liebermann (1847 - 1935). With regard to this painting's discovery, Mrs. S. Rudolph stated that *"ein Mitglied der Familie zufällig beim Surfen im Internet gefunden und sich an eine Fotografie aus dem Familienbesitz erinnert, die eben dieses Bild in der Villa zeigt"* ("a family member accidentally discovered it when surfing on the internet and remembered a family photograph that shows the painting in the villa").⁹³ Following this discovery a (media) dispute with auction house Villa Grisebach from Berlin emerged.⁹⁴

The list of lost art works on the German website of the *Koordinierungsstelle* also mentions a printed portrait by expressionist artist Otto Dix (1891 - 1969) carrying the title *'Bildnis Klemperer'*.⁹⁵ Victor von Klemperer described in his memoirs only one contemporary art work in his collection, namely *'The bust of Sophie von Klemperer'* by the American sculptor Katharine Thayer Hobson-Kraus (1889 - 1982). She stayed with the family in Dresden for a while.⁹⁶

Contemporary works of art were clearly less represented in Victor von Klemperer's art collections. His main interest was focused on the Meissen china and book collections. The inventory list made during the confiscation in December 1938 referred to, *inter alia*, 836 Meissen art objects, 549 incunables, 510 valuable books, 136 valuable pieces of furniture, 56 important historical glasses, 33 tapestries, 13 manuscripts and 7 sculptures. This list contained only four paintings (*"vier Gemälde"*) and without reference to an artist or a title.⁹⁷ According to a written statement from von Klemperer's son Gustav-Victor to Mrs. Heike Biedermann in 1991, *'Augustus bridge with steamboat'* (1923), was looted from the villa in the course of the National Socialist confiscation. Mrs. H. Biedermann mentioned that *"In den 1940 von Sachverständigen erstellten Verzeichnissen von der Sammlung Klemperer taucht das Bild nicht mehr auf"* ("the painting does not feature in the collection's inventory list compiled by the expert in 1940").⁹⁸ The Commission did not retrieve any list or publication mentioning the painting or that it would have been restituted to the von Klemperer family. This O. Kokoschka painting does not figure on the list of missing and lost art works in the official German database of the *Koordinierungsstelle* either. The two other

⁹² O. Kokoschka, *Mein Leben*, München, Bruckmann, 1971; O. Kokoschka, *Briefe I. 1905-1919*, Düsseldorf, 1984; O. Kokoschka, *Letters 1905 - 1976*, London, Thames and Hudson Ltd., 1992.

⁹³ U. Baier, *Museen. Neuer Streit in Köln und Berlin um Raubkunst*, in: Weltonline, 18 April 2008, p. 2. (website: www.welt.de/kultur/article1914100)

⁹⁴ See section 5 with regard to the dispute.

⁹⁵ See the official German databank "Lost Art" of the *Koordinierungsstelle* in Magdeburg on the website: www.lostart.de

⁹⁶ V. von Klemperer, cited footnote no. 48, p. 34.

⁹⁷ A. Loesch, cited footnote no. 47, p. 62.

⁹⁸ H. Biedermann, cited footnote no. 74, p. 83, footnote no. 29.

O. Kokoschka paintings, among which the *'Portrait of Ludwig Adler'*, were no longer in the Victor von Klemperer collection when seized by the National Socialists.

Only after the November pogroms of 9 and 10 November 1938 were V. von Klemperer's collections confiscated by the National Socialists and transported to museums in Dresden and other depositories.⁹⁹ At that point, the *'Portrait of Ludwig Adler'* was no longer in the villa on the Tiergartenstrasse. Erich Goslar, von Klemperer's *chargé d'affaires*, attended the discussions between the Nazis about the fate of the von Klemperer collections and was involved in the consultations with the German authorities. There is no indication that the Nazis made any reference to the "degenerate" Kokoschka paintings in the von Klemperer collection. Nor did the Nazis make any attempt to trace or get in touch with the purchaser, H. E. Kurz.

5. The *'Portrait of Ludwig Adler'* in Victor von Klemperer's collection

The reason remains unknown why and under which financial conditions the gynaecologist Ludwig Adler sold his own portrait in 1931-1932. Oskar Kokoschka enjoyed fame as an artist in Central Europe. It is not obvious for a portrayed person to sell his own portrait. Whether it was the financial crisis of the late 1920s – early 1930s that had induced the sale, or Ludwig Adler's altered living conditions (e.g. debts or new financial priorities), or whether it were his changing artistic taste that had been decisive, has not been established. Neither Mrs. S. Rudolph nor the von Klemperer heirs offered any information about the price or details of the acquisition of the *'Portrait of Ludwig Adler'* by Victor von Klemperer. The sale was handled by *Kunsthandlung Kühl*, a Dresden antique dealer.

After the acquisition, Victor von Klemperer gave the painting on loan only once. Both paintings, the *'London, Richmond Terrace'* and the *'Portrait of Ludwig Adler'* were displayed at the retrospective exhibition of Kokoschka, organised under difficult circumstances by Carl Moll, at the *Österreichischen Museum für Kunst und Industrie* in Vienna, May-June 1937.¹⁰⁰ The exhibition was prolonged for one month, until 31 July 1937.¹⁰¹ It is unclear why V. von Klemperer did not give his third Kokoschka painting on loan too. The Viennese exhibition opened shortly before the degenerate art exhibition in Munich which was held from July 1937 and was a forebode of the vast National Socialist art confiscations from German museums. As director of the *Gemäldegalerie*, H. Posse - who would later get involved in National Socialist art looting - sent three Oskar Kokoschka paintings to the Viennese exhibition. By way of precaution he suggested to omit any reference to the *Gemäldegalerie* in the catalogue and include only the city 'Dresden'. Two other German museums (Hamburg and Berlin) took the same approach, in order to protect the Kokoschka paintings from threatening Nazi confiscation.¹⁰² V. von Klemperer's two

⁹⁹ M. Dormann, cited footnote no. 64, p.150.

¹⁰⁰ Exhibition catalogue *Kokoschka Ausstellung*, Vienna, cited footnote no. 25, p. 7 and 11.

¹⁰¹ G. Sultano and P. Werkner, *Oskar Kokoschka: Kunst und Politik 1937-1950*, Wien/Köln/Weimar, Böhlau Verlag, 2003, p. 67.

¹⁰² G. Sultano and P. Werkner, cited footnote no. 101, p. 44-46.

paintings were not depicted in the Viennese catalogue. They were displayed on the ground floor, *Säulenhof*, as no. 18, *Terrasse im Richmond Park* and on the first floor, *Saal Gemälde 1907-1914*, as no. 7, *Bildnis (Professor Dr. Adler)*.¹⁰³ Both paintings were accompanied by a reference to Dr. Victor von Klemperer as the owner.

Before the exhibition opening, V. von Klemperer advised the museum that the two paintings would be transported to Vienna with the firm Hans Müller, and inquired whether "*für die Bilder Interessenten sind und welche Gebote auf diese gemacht werden*" ("if there are persons interested in the paintings and which bids were made").¹⁰⁴ Did he misperceive it as a sales exhibition or was he subtly trying to inquire about potential buyers for both paintings? On 30 April he received a clear response, stating that this was not a sales exhibition, but "*Sollten aber Ihre Bilder in dem in Ihren Brief gemeinten Sinn Interesse finden, so sind wir selbstverständlich bereit, an uns gerichtete Anfragen an Sie weiter zu leiten*" ("if certain people were to show interest in your paintings, as set out in your letter, we will naturally transmit to you any requests addressed to us").¹⁰⁵ After the exhibition, on 2 September 1937, V. von Klemperer was informed that both paintings had been returned in box Kl. 345 to his address in Dresden with transport firm E. Bäuml the day before. Did V. von Klemperer find a buyer, or was the painting already sold, so that he wanted his paintings returned immediately? Was he disappointed about the fact that no buyer had presented himself in Vienna? Or did he fear National Socialist actions in Vienna? Hans Müller carried out the transport as "express freight" ("*Eilgut*").¹⁰⁶ It is remarkable that while the National Socialist art confiscations were taking place in German museums, two Kokoschka paintings from the von Klemperer collection crossed the border between Germany and Austria twice in six months time without any interference or National Socialist intervention. The Kokoschka exhibition had worse consequences for the four German museums (the *National-Galerie* in Berlin, the *Kunsthalle* in Hamburg, the *Gemäldegalerie* in Dresden and the *Bayerischen Staatsgemäldesammlungen* in München) that participated in the Viennese exhibition and had loaned art works.¹⁰⁷ Most of these paintings were confiscated in the autumn of that year as degenerate art works.

By mid-September 1937, both the Oskar Kokoschka paintings were returned to V. von Klemperer in Dresden. The '*Portrait of Ludwig Adler*' was most probably sold between mid-September 1937, after the return of the painting from the Viennese exhibition, and April 1938, before the von Klemperers journeyed to Rhodesia.

Mrs. S. Rudolph briefly informed on the biography of the buyer, Herbert E. Kurz. She clarified to the newspaper *De Morgen* that he owned a flag factory in Chemnitz, 60 km from Dresden, and that he was a collector of modern art. Among others he owned several

¹⁰³ Exhibition catalogue *Oskar Kokoschka*, Vienna, cited footnote no. 25, p. 7 and 11.

¹⁰⁴ Letter from V. von Klemperer to S. Troll, Dresden, 23 April 1937. (Archive MAK, Vienna)

¹⁰⁵ Letter from S. Troll to V. von Klemperer, Vienna, 30 April 1937. (Archive MAK, Vienna)

¹⁰⁶ Letter from I.A., Österreichischen Museum für Kunst und Industrie to V. von Klemperer, Vienna, 2 September 1937. (Archive MAK, Vienna)

¹⁰⁷ G. Sultano and P. Werkner, cited footnote no. 101, p. 42-46.

works by Norwegian expressionist artist Edvard Munch (1863 - 1944). She also mentioned that he acquired art works from Jewish collectors in the 1930s.¹⁰⁸

The Commission then contacted his son Dr. Herbert Kurz, who was mentioned in the article in *De Morgen*, to obtain information on the acquisition of the Kokoschka painting and his father's collection.¹⁰⁹ On 17 July 2010 Dr. H. Kurz replied to the Commission in writing, stating that his father Herbert E. Kurz (1892 – 1967) already collected expressionist art in the 1920s, a passion he would cherish till the end of his life. According to his son, he owned three paintings by August Macke (1887 - 1914) and two paintings by Max Beckmann (1884 – 1950) in 1934. Given the 44-year age difference between father and son, Dr. H. Kurz's mother passed this information on to him verbally. She visited art dealers together with her husband in 1931, the year they married, and was "*sehr beeindruckt mit welcher sicheren Kennerschaft er Kunstwerke erwarb*" ("very impressed by the convincing connoisseurship with which he acquired works of art"). Dr. H. Kurz also mentioned that after the Second World War his father brought his collection from Chemnitz to the American Zone and that he continued collecting works by German contemporary artists such as Ernst Nay (1902 – 1968), Emil Schumacher (1912 – 1999) and Karl-Otto Götz (1914 – 2001) after the war, although he regularly had to sell art works in order to sustain himself. As H. E. Kurz and his family fled what would later become the G.D.R. to the American Zone in 1948, they did not take with them any family archives or accounting records and therefore he had no records of the purchases made in the 1920s-1930s. He did not have additional information or documentation on the acquisition of the '*Portrait of Ludwig Adler*' by O. Kokoschka.¹¹⁰

Dr. H. Kurz finally explained that lawyer S. Rudolph had requested him to restitute one of the paintings of his collection: "*Deren Anwältin Frau Dr. Rudolph, hat von mir die Restitution eines Gemäldes verlangt. Meine Feststellungsklage, darauf, dass ich der rechtmässige Eigentümer bin, habe ich aber gewonnen*" ("Their lawyer, Mrs. Dr. Rudolph, requested me to restitute a painting. I commenced a legal action to establish my rightful ownership, which I won").¹¹¹ In her letter of 26 February 2009 Mrs. S. Rudolph referred to "*a long-running legal dispute between us regarding the rights for a painting by Emil Nolde from the art collection of the Jewish lawyer Dr. Fritz Salo Glaser who also lived in Dresden*".¹¹² The Commission contacted Dr. H. Kurz again concerning this legal dispute, whereupon he forwarded a copy of the court judgment to the Commission.¹¹³

From this present report can be deduced that the '*Portrait of L. Adler*' never was part of the confiscation and the looting by the National Socialists, as was the Meissen china collection and the incunables collection of V. von Klemperer. Neither Mrs. S. Rudolph nor

¹⁰⁸ E. Bracke, cited footnote no. 7, p. 25.

¹⁰⁹ Letter from L. Buysse to H. Kurz, Gent, 13 July 2010.

¹¹⁰ Letter from H. Kurz to L. Buysse, Starnberg, 17 July 2010.

¹¹¹ Letter from H. Kurz to L. Buysse, Starnberg, 17 July 2010.

¹¹² Letter from Dr S. Rudolph to R. Hoozee, Dresden, 26 February 2009, p. 5.

¹¹³ Letter from L. Buysse to H. Kurz, Ghent, 29 December 2010; letter from H. Kurz to L. Buysse, Starnberg, 23 January 2011. For the judgement and the legal consequences, see part II: The legal analysis, p. 51.

the V. von Klemperer heirs provided any additional information on the sale of the 'Portrait of Ludwig Adler', which would point to the forced nature of the sale. Generally two elements suggest a National Socialist forced sale: an unduly low sale or purchase price on the one hand, and the pressure exercised by the National Socialists involved in the purchase on the other hand. Mrs. S. Rudolph and Dr. H. Kurz could not specify the transaction value of the Kokoschka painting. In a letter dated July 1938 - the period in which the transaction between V. von Klemperer and H.E. Kurz took place - to the organiser of the Viennese exhibition, Carl Moll, O. Kokoschka himself elaborated on the prices of his oeuvre at that time: "*Im Reich sind mein Bilder bereits alle saisirt, und weil ich hohe Preise habe! aus Devisengründen, nicht wegen moralischer Hemmungen noch nicht zerstört, in Wien hat man amtlicherseits am 5.5.1938 in der Reisnerstrasse 40 amtlicherseits durch die Gestapo Abtlg. II ein altes Porträt erstmalig, als Novum zerschnitten*" ("Already every single one of my paintings has been seized in the Reich. They haven't been destroyed yet; although not on moral grounds but for currency reasons, because they attain high sale prices. In Vienna, Reisner street no. 40, for the first time, as a novelty, an old portrait was torn to pieces *ex officio* by the Gestapo Section II on 5 May 1938").¹¹⁴ The artist Kokoschka himself pointed to the harsh and dauntless methods used in Vienna or to the Nazi confiscations from public collections in Germany that according to him, had no impact on the prices of his work in Germany at the time.

None of the cited publications on the V. von Klemperer collections reveals the paintings by O. Kokoschka. The buyer, Herbert E. Kurz, does not feature either in any of the scientific articles or vast literature on National Socialist looting before and during the Second World War, nor does he figure on the extensive list of '*Beteiligte Privatpersonen und Körperschaften am NS-Kulturgutraub*' ('Private persons and services involved in the National Socialist looting of cultural property') or the list of the '*Dienststellen und Verantwortliche des systematischen und organisierten NS-Kulturgutraubes*' ('Services and persons responsible for the systematic and organised National Socialist looting of cultural property') on the website and database of the *Koordinierungsstelle*, the official German authority situated in Magdeburg.¹¹⁵ Admittedly he acquired [the painting] in his private capacity of art lover and was not active as a representative of any authority exercising pressure in the name of government.

However, the Commission discovered a statement by von Klemperer's son Gustav-Victor in a letter from 1996 with regard to the reason for the sale of the 'Portrait of Ludwig Adler'. Relying on a written statement addressed to the author of the article "*Dresdner Privatsammlungen*" in the catalogue "*Kokoschka und Dresden*"¹¹⁶, Mrs. Heike Biederman wrote that "*das Bildnis des Gynakologen Dr. Adler verkaufte Klemperer 1938, da es seine Frau nicht mochte*" ("von Klemperer sold the 'Portrait of the gynaecologist Dr. Adler' in 1938 because his wife did not like the painting").¹¹⁷ Von Klemperer's son was even more

¹¹⁴ G. Sultano and P. Werkner, cited footnote no. 101, p. 51-52.

¹¹⁵ www.lostart.de section of the website: *Provenienzrecherche/NS-Raubkunst*.

¹¹⁶ H. Biedermann, cited footnote no. 74, p. 80-84.

¹¹⁷ H. Biedermann, cited footnote no. 74, p. 84, footnote 31.

explicit in his letter. Sophie ("Fifi") von Klemperer must not have appreciated the portrait by Kokoschka very much, as the letter mentions that she "hasste" (hated) the painting. In his statement the son did not mention any direct National Socialist intervention either: "*das Bild verschwand bald wieder*" ("the painting would soon disappear again").¹¹⁸ The buyer's name was neither referred to in the letter nor in the article.

The absence of any Nazi intervention is confirmed by the fact that the second painting 'London, Richmond terrace' from V. von Klemperer's collection, shown at the Viennese exhibition, was transferred to Switzerland in that period by his son-in-law Peter Gysin. The latter lived there with his wife Elisabeth-Dorothea ('Thea'), V. von Klemperer's daughter: "*Dem Schwiegersohn, Dr. Hanspeter Gysin, gelang es, das Bild in die Schweiz zu bringen. Bis zu seinem Tod im Jahre 1986 befand es sich in seinem Besitz. Danach gelangte es über den Kunsthandel in Privatbesitz in Grossbritannien*" ("Son-in-law Dr. Hanspeter Gysin succeeded in bringing the painting to Switzerland, where it would remain in his possession until his death in 1986. Via the art trade it would subsequently come in private hands in Great Britain").¹¹⁹ V. von Klemperer explained himself that it was still possible at that time to bring possessions such as art works in safety. On 14 September 1939 he noted in this memoirs that his son Peter-Ralph had successfully emigrated with his possessions to Switzerland: "*In Zürich sah Fifi noch unserer Sohn Peter, es war ihm geglückt mit all seinen Sachen nach dem P[r]ogrom Deutschland zu verlassen*" ("Fifi met our son in Zurich. He had succeeded in leaving Germany with all his belongings after the Reichskristallnacht").¹²⁰ Even though Mrs. Biedermann's article was published in 1996 on the basis of a written family testimony, this was understandably not referred to in the restitution request by the Dresden lawyer. The article was not included in the bibliography of the database of the *Koordinierungsstelle* relating to V. von Klemperer. The 1996 article also indicated where the painting was located at that time: "*Seit 1987 befindet es sich im Museum für Schöne Künste in Gent*" ("Since 1987 it is in the Museum of Fine Arts in Ghent").¹²¹

6. Post-war efforts by the family von Klemperer with regard to their art collections and the painting 'Portrait of Ludwig Adler' by O. Kokoschka

After the Second World War Germany and Austria were split in four zones (the American, the British, the Russian and the French zones) and governed by the Allied

¹¹⁸ Email from Mrs. H. Biedermann to Frederik Leen, Dresden, 27 August 2010, with the citation of the mentioned letter of Gustav-Victor von Klemperer of 22 February 1996 to H. Biedermann: "*Oskar Kokoschka war ein Freund meiner Eltern und hat uns mehrere Male besucht. Für einige Zeit hatten meine Eltern auch ein weiteres Bild im Speisezimmer hängen, wenn ich mich recht erinnere, das Porträt eines Herrn Adler. Aber meine Mutter haßte das Bild und es verschwand bald wieder*" („Oskar Kokoschka was a friend of my parents and visited us several times. For some time also another painting hung in the dining-room, if I remember it well, the portrait of a certain mister Adler. However my mother hated the painting and it disappeared soon afterwards again.“).

¹¹⁹ H. Biedermann, cited footnote no. 74, p. 84, footnote 30.

¹²⁰ V. von Klemperer, cited footnote no. 48, p. 58.

¹²¹ H. Biedermann, cited footnote no. 74, p. 84, footnote 31.

Councils that were in charge of the local political and social-economic administration as well as the de-Nazification and restitution policy vis-à-vis the occupied countries and the victims of Nazism. During the Cold War, this led to a division of Germany in West Germany on the one hand and the G.D.R. on the other hand, that would each pursue their own separate political and social policies influenced by the United States of America and the U.S.S.R. respectively. This antithesis would also manifest itself in their respective policies on restitution of cultural property from public and private ownership. The Russian Zone adopted a policy of global compensation for the enormous cultural and art losses suffered on their territories. The Western Allied zones conducted a restitution and compensation policy on the basis of individual losses.

As mentioned before, Herbert E. Kurz had transferred his art collection to the American Zone, where his son would inherit part of the collection including the Kokoschka painting.

On 28 November 1947, commissioned by the South African military mission in Berlin, Erich Goslar, *chargé d'affaires* of the family von Klemperer, addressed "*die Landesregierung Sachsen, um Kenntnis über den Verbleib der Sammlung Klemperer zu erlangen*" ("the government of Saxony to learn about the whereabouts of the von Klemperer collection").¹²² The objective was to find out where the incunables and Meissen china collections were stored. Almost simultaneously, Victor von Klemperer's brother Herbert (1878 - 1951) wrote in 1948 from New York to the director of the Schloss Moritzburg to find out where the von Klemperer collections were kept.¹²³ The fund B 323, '*Treuhandverwaltung von Kulturgut bei der Oberfinanzdirektion München*', the largest archive fund of records of the Western Allies in the *Bundesarchiv* relating to the post-war identification and restitution policy, mentions the incunables collection but not O. Kokoschka's '*Portrait of Ludwig Adler*'.

From the 1950s-1960s onwards, victims of the racial persecution could file a restitution or compensation claim in West Germany. The *Bundesamt für zentrale Dienste und offene Vermögensfragen* confirmed that the family von Klemperer did not file a post-war application in the framework of the Federal Restitution Law ('*Bundesrückerstattungsgesetz*' or "*BRüG*" of 9 July 1959). After the reunification of West and East Germany, the von Klemperer's descendants filed a request in the framework of the *Sondervermögensgesetzgebung* of 1990, with regard to real estate in Dresden. In the post-war period, the family V. von Klemperer never registered O. Kokoschka's '*Portrait of Ludwig Adler*' with the (West) German authorities as having been looted or lost under National Socialism.¹²⁴

¹²² A. Loesch, cited footnote no. 47, p. 65.

¹²³ A. Loesch, cited footnote no. 47, p. 65-66.

¹²⁴ Letters from Ms Fr. Kube, *Bundesamt für zentrale Dienste und offene Vermögensfragen* to the Commission, Berlin, 20 December 2010 and 21 January 2011.

In 1953 the *Sächsische Landesbibliothek* wished to hand over the 295 remaining books of the V. Von Klemperer library to his widow Sophie von Klemperer, who was then residing in London. Under the *Verordnung über die Verwaltung und den Schutz ausländischen Eigentums in der D.D.R.* of 6 September 1951, the books were prohibited to leave the country.¹²⁵ In the end these books were restituted to the family von Klemperer in October 1990, and auctioned at Sotheby's in the following years. To date the most valuable incunables are kept in the Russian State library in Moscow. Since 2001 discussions are being held with the Russian government, yet without results.¹²⁶

After the *Wende* of 1989 the V. von Klemperer heirs also initiated negotiations with Mr. Werner Schmidt, the then director of the *Gemäldegalerie* in Dresden. In the summer of 1990 it was decided to handle "*der erste grosse Fall der Rückgabe jüdischen Eigentums aus einem Museum der D.D.R.*" ("the first important case of Jewish restitution by a G.D.R. museum").¹²⁷ From the china collection 86 items remained, 23 of which were returned to the family von Klemperer on 25 January 1991. Given the concurrent "*Ansprüche der elf Erben*" ("claims from the eleven heirs"), these items were sold at Christie's in London on 30 September 1991. The 63 remaining Meissen objects were donated to the Dresden museums.

In 2008 a remainder of the von Klemperer Meissen china collection was discovered in the depository of the china and ceramics department of the *Staatliche Museen* of Dresden, consisted of fragments and heavily damaged objects that were retrieved in 1951 amid the ruins of the royal palace in Dresden. These objects were restituted to the von Klemperer heirs who subsequently put them up for auction in 38 lots at Bonham's Fine European Ceramics in London on 8 December 2010. The auction generated £ 546,492. After the sale, von Klemperer's grandson Victor stated that "*as a result of this sale, I am totally at peace with his part of the family's history*".¹²⁸

Again in 2008, the television ARD program *Kontraste*, broadcasted on 10 April, triggered a media controversy about the sale of the Max Liebermann painting *Kohlfeld im Wannseegarten nach Westen* (1917) by the auction house Villa Grisebach in Berlin. The painting had been auctioned on 25 November 2005. The auction catalogue arguably provided an incomplete provenance of Liebermann's painting, containing a time gap from 1917 to 1956. Villa Grisebach clarified that the painting came from the inheritance of Paul Cassirer and that at that time nothing pointed to former Jewish property. The auction house added that the painting had been displayed in several exhibitions, *inter alia* in the *Hamburger Kunsthalle* in 2004 and subsequently in the *Alten Nationalgalerie* in Berlin, and

¹²⁵ M. Dorrman, cited footnote no. 64, p. 152-153.

¹²⁶ M. Dorrman, cited footnote no. 64, p. 156.

¹²⁷ A. Loesch, cited footnote no. 47, p. 67.

¹²⁸ *A rich story in fragments*, in: *The Economist*, London, 11 December 2010 (www.economist.com/blogs/prospero/2010/12/gustav_von_klemperers_porcelain); E. de Waal, *From the ashes: The von Klemperer collection of Meissen was the finest in private hands. Until the Nazis stole it*, London, 6 January 2011 (www.bonhams.com/bonhamsmagazine); A. Crane, *Bidders fight for broken Meissen*, in: *Antiques Trade Gazette*, 8 January 2011, p. 8-11.

that none of the heirs had presented themselves at the time.¹²⁹ On its website the auction house published an official statement on this case (*Statement zu Restitutionsansprüchen an das Gemälde von Max Liebermann 'Kohlfeld im Wannseegarten nach Westen' (1917), verkauft in der Auktion am 25. November 2005*).¹³⁰ Mr. B. Schultz stated that the seller had acquired the painting at Sotheby's in Munich in 1988, and that in 2005 all available sources, as the international database the Art Loss Register, had been consulted, yet nowhere a reference to the family von Klemperer was found. The heirs told the press: "*Die Enkel des Dresdner Bankiers Klemperer wollen das Gemälde von Liebermann übrigens gar nicht unbedingt zu Geld machen. Sie wollen es unter Umständen sogar verschenken*" ("The descendants of Dresden banker [von] Klemperer do not wish in any event to sell the Liebermann painting. They even contemplate to give it as a gift under certain conditions").¹³¹ The Commission contacted the auction house Villa Grisebach, which confirmed that the dispute had not been taken to court.

Kokoschka's '*Portrait of Ludwig Adler*' is not mentioned in any of the available documents and publications of the post-war period or on the V. von Klemperer collections. They do not contain any indication that the '*Portrait of Ludwig Adler*' was registered as missing, lost or looted in National Socialist Germany. In the 1990s, the painting was not reported in any of the well-known databases on lost art works such as the Art Loss Register, established in 1991, or as the website "Lost Art" of the *Koordinierungsstelle*, launched in 1994. Only after 2004, after the Washington Conference (1998) and almost certainly after all of V. von Klemperer's children were deceased, the *Portrait of Ludwig Adler*' was posted on the database of the *Koordinierungsstelle*, Lost Art. The article in *De Morgen* mentioned that in 2004 one of the grandsons had contacted a law firm.¹³² However, only in 2009 was the restitution request submitted to the Ghent Museum of Fine Arts, notwithstanding the fact that according to the abovementioned article on Dresden private collections - a publication to which von Klemperer's son Gustav-Victor had lent his cooperation - it was already known in 1996 where the painting was located.

7. Acquisition of O. Kokoschka's '*Portrait of Ludwig Adler*' by the Ghent Museum of Fine Arts

From the research conducted by the Commission, it appears that the Ghent Museum of Fine Arts has exercised the necessary due diligence in the acquisition of the '*Portrait of Ludwig Adler*' by O. Kokoschka. In the course of the negotiations preceding the acquisition, the painting's provenance was duly and fully investigated. The Commission was able to study the complete files of the painting's acquisition on 14 May 2010.

¹²⁹ U. Baier, *Museen. Neuer Streit in Köln und Berlin um Raubkunst*, in: *Weltonline*, 18 April 2008, p. 2. (website: www.welt.de/kultur/article1914100)

¹³⁰ B. Schultz, *Statement zu Restitutionsansprüchen an das Gemälde von Max Liebermann 'Kohlfeld im Wannseegarten nach Westen' (1917), verkauft in der Auktion am 25. November 2005* (www.villa-grisebach.de/de/presse/pressemeldungen/in-eigener-sache/statement).

¹³¹ T. Timm, *Die Angst der Händler vor der Wahrheit*, 27 April 2008, p. 3. (www.zeit.de/2008/18/Gemaelde)

¹³² E. Bracke, cited footnote no. 7, p. 25.

The Ghent Museum of Fine Arts acquired the Kokoschka painting in 1987 from the reputable gallery Marlborough Fine Art Ltd. in London. The latter had presented an adequate provenance that corresponded entirely to the generally known provenance as well as an accurate overview of the exhibitions the painting had featured in.

It also appears from the acquisition file that Robert Hoozee, director of the Ghent museum, had asked Marlborough Gallery Fine Art Ltd on 19 October 1987 to provide “the full provenance of the ‘Ludwig Adler’ painting”.¹³³ The gallery submitted the full provenance on 26 October 1987. Dr. R. Hoozee joined the provenance report - included in subsection 2.2 of the present report – with the file he submitted to the City of Ghent for purchase.¹³⁴ The motivation and purchase reasons included the international importance of the artist Oskar Kokoschka and the quality of his artistic work, as well as the full list of former owners including L. Adler, V. von Klemperer and H. E. Kurz.¹³⁵

Mr. R. Hoozee equally contacted his German colleague Mr. P. Vogt, director of the Folkwang Museum in Essen, to learn about the German museum’s reasons for selling the painting.¹³⁶ Prof. Dr. P. Vogt briefly replied that: “Das Bild von Oskar Kokoschka hat sich von 1971 bis 1976 im Besitz des Museum Folkwang befunden. Es wurde mit in Tausch gegeben, als sich die Gelegenheit bot, ein weitaus bedeutenderes Portrait von Kokoschka zu erwerben: das berühmte ‘Doppelportrait mit Alma Mahler’” (“the painting of Oskar Kokoschka has been in possession of the Folkwang Museum from 1971 to 1976. It was offered in exchange when the occasion presented itself to acquire a Kokoschka portrait of much greater significance: the famous ‘Doppelportrait mit Alma Mahler’ (‘Double Portrait Kokoschka and Alma Mahler’)”).¹³⁷ The double portrait of Oskar Kokoschka and Alma Mahler - composer Gustav Mahler’s widow with whom Kokoschka had a passionate love affair prior to the First World War - is among his most famous paintings from that period and is in the Folkwang Museum collection in Essen.¹³⁸

The council of the City of Ghent unanimously approved the acquisition of the ‘Portrait of Ludwig Adler’ at its council meeting of 18 January 1988.¹³⁹ In 1988 the purchase price was settled with gallery Marlborough Fine Art Ltd. Aktiengesellschaft. None of the documents in the acquisition file mention any National Socialist intervention to which the painting would have been subject in the 1930s.

¹³³ Letter from Gilbert Lloyd to Robert Hoozee, London, 19 October 1987. (Acquisition file MSK 1988 B)

¹³⁴ Letter from Marlborough Fine Art Ltd. to Robert Hoozee, Vaduz, 26 October 1987. (Acquisition file MSK 1988 B)

¹³⁵ R. Hoozee, Oskar Kokoschka. Portrait of Ludwig Adler 1914, 1987. (Acquisition file MSK 1988 B)

¹³⁶ Letter from Robert Hoozee to Paul Vogt, Gent, 15 October 1987. (Acquisition file MSK 1988 B)

¹³⁷ Letter from Paul Vogt to Robert Hoozee, Essen, 29 October 1987. (Acquisition file MSK 1988 B) The Double portrait has the inventory number G 416 of the Folkwang Museum in Essen. (www.museum-folkwang.de)

¹³⁸ O. Hilmes, *Alma Mahler-Werfel. De biografie*, Amsterdam/Antwerp, Uitgeverij de Arbeiderspers, 2007, p. 118-154.

¹³⁹ Excerpt of the approval by the city council in its session of 18 January 1988, Service of cultural affairs. The acquisition of art works for the urban cultural institutions, January 1988. (Acquisition file MSK 1988 B)

The 'Portrait of Ludwig Adler' went on leading a 'busy' life. Before and after the acquisition by the Ghent museum it was continuously exhibited in the Museum's proper museum rooms or given on loan to reputable museums or cultural institutions in Belgium and abroad. The Kokoschka painting was always reproduced in the accompanying catalogues. The museum never received any reactions pointing to a National Socialist intervention or looting. See below for a complete and chronological overview of the national and international exhibitions since 1968 where the painting was shown:

- 1968: *Duits expressionisme*, Ghent, Museum of Fine Arts, 13 September - 3 November 1968; Charleroi, Palais des Beaux-Arts, 9 November - 8 December 1968;
- 1981: *Oskar Kokoschka (1886-1980). Memorial Exhibition*, London, Marlborough Fine Art, 26 June - 31 July 1981;
- 1983: *Master of the 19th - 20th centuries*, New York, Marlborough Gallery, 7 May - 11 June 1983;
- 1985: *Traum und Wirklichkeit. Wien 1870-1930*, Vienna, Kunsthistorisches Museum in Vienna, 28 March - 6 October 1985;
- 1986-1987: *The Foundation Veranneman invites Marlborough*, Kruishoutem, Foundation Veranneman, 29 November 1986 - 31 January 1987;
- 1987: *Oskar Kokoschka. Europalia '87 Österreich*, Ghent, MSK, 17 September - 8 November 1987; Liège, Salle Saint-Georges, 14 November - 31 December 1987;
- 1988: *Oskar Kokoschka. 1886-1980*, Barcelona, Museu Picasso, 9 February - 10 April 1988;
- 1989: *Open Mind. Gesloten Circuits*, Ghent, The Museum of Contemporary Art, 1 April - 1 June 1989;
- 1993: *Cyclic Identity*, Hong Kong, Arts centre, 1993;
- 1995: *Klimt. Kokoschka. Schiele. Un sueno vienés (1898-1918)*, Madrid, Fundación Juan March, 7 February - 21 May 1995;
- 1998-1999: *L'Expressionnisme en Autriche. De Schiele et Kokoschka aux années 20*, Ixelles, Musée d'Ixelles, 18 June - 13 September 1998; Klagenfurt, Stadtgalerie, 16 October 1998 - 10 January 1999;
- 2004-2005: *D'Ensor à Magritte dans les collections du Musée de Gand*, Lodève, Musée de Lodève. Hôtel du Cardinal de Fleury, 19 November 2004 - 27 February 2005;
- 2005: *The Collection of the Museum of Fine Arts Ghent*, Kagawa, Takamatsu Museum of Art, 15 April - 29 May 2005; Setagay, Art Museum, 11 June - 4 September 2005; Iwaki, Iwaki City Art Museum, 10 September - 23 October 2005; Saitama, The Museum of Modern Art, 29 October - 25 December 2005;
- 2008: *Träumender Knabe - Enfant Terrible*, Vienna, Österreichische Galerie Belvedere, 24 January - 12 May 2008.

Even before the current restitution claim by the descendants of the von Klemperer heirs, the Ghent museum has always respected the provenance and the issue of art looting during the Second World War when acquiring works of art.

The Ghent museum willingly cooperated with the *Studiecommissie betreffende het lot van de bezittingen van de leden van de joodse gemeenschap van België, geplunderd of*

achtergelaten tijdens de oorlog 1940-1945 (Study Commission into the Fate of the Belgian Jewish Community's assets, which were plundered or surrendered or abandoned during the war 1940-1945), throughout its research. This commission investigated in the period 1997 – 2000 among other things art works and cultural assets formerly from Jewish possession that might be held by the most important Belgian museums. The investigation focused on the period 1940 - 1954. The Ghent Museum of Fine Arts participated in the surveys and granted full access to its acquisition inventory list, its depository lists, its acquisition files including correspondence and gave access to the art works. This commission's findings on the Ghent museum's acquisitions were published in its final report.¹⁴⁰

For the acquisition of the bust '*Girl's head*' ('*Meisjeshoofd*') by German sculptor Wilhelm Lehmbruck (1881 – 1919) in 2002, the Ghent Museum of Fine Arts consulted, as a precautionary measure, the *Art Loss Register* (for stolen art works)¹⁴¹ as well as the official German database for lost cultural property, *Lost Art*¹⁴². The website of *Lost Art* includes art works from German public and private holdings that disappeared during World War II. These electronic databases were started in 1991 and 1994 respectively. The *Lost Art*-database contains art works and objects that disappeared during the Second World War in relation to Germany. At an initial stage it focused on art works transferred to Eastern Europe; after the Washington Conference in 1998 and the *Handreichung* of 1999, most attention was given to lost art works and cultural property from Jewish possessions. The Ghent museum conducted the provenance research of the bust of W. Lehmbruck in consultation with the federal Science Policy Ministry.

Neither upon the acquisition of Oskar Kokoschka's '*Portrait of Ludwig Adler*' nor of important works such as the bust '*Girl's head*' by Wilhelm Lehmbruck did the Commission come across any element that constituted a breach of the internationally accepted museum guidelines or made the Ghent museum's *modus operandi* questionable, or that pointed to hidden information or an inadequate provenance research. In respect of the Kokoschka painting in particular, all prevailing rules with regard to provenance research, financial transactions and administrative practice were duly complied with.

8. Conclusions of the (art-) historical research

The identity of the '*Portrait of Ludwig Adler*' by O. Kokoschka is clear. In the period between 1931/1932 and 1937/1938 Victor von Klemperer was in possession of the painting. The detailed and accurate chain of former owners was generally known at the time the Ghent museum acquired the painting. Victor von Klemperer and his family were victims of the anti-semitic measures ordered by the German National Socialist regime. After

¹⁴⁰ Final report of the Study Commission into the Fate of the Belgian Jewish Community's assets, which were plundered or surrendered or abandoned during the war 1940-1945, Brussels, Federal Public Service of the Prime Minister, July 2001, p. 236-254, annexes, p. 242-261. The Ghent Museum of Fine Arts is included on p. 259-260 of the annexes. The final reports can be consulted at: www.combuysse.fgov.be

¹⁴¹ www.artloss.com

¹⁴² www.lostart.de

losing his position at the Dresdner Bank and the financial implications hereof, the family von Klemperer emigrated to Rhodesia, leaving behind their most valuable movable possessions and personal belongings. Among these were their precious art collections: the Meissen china collection and the famous collection of incunables collection and 18th century first prints. The National Socialist confiscation of both collections and their eventual destiny were materialized only after November 1938 and more specifically in the period 1941-1943 during the Second World War. Fortunately no members of the von Klemperer family were detained or deported. During the war years the family members stayed in Rhodesia, Australia, Persia and Switzerland.

The Commission did not find any indication of a special relationship between the von Klemperer family and the artist Oskar Kokoschka. Kokoschka met Victor von Klemperer when he was holding a teaching position at the Academy of Dresden. In the first half of the 1920s V. von Klemperer was also involved in the financing of the acquisitions by the *Gemäldegalerie* in Dresden. The *'Portrait of Ludwig Adler'* was one of the three Kokoschka paintings which von Klemperer owned. The reason why the original owner Dr. Ludwig Adler sold his own portrait is not established. If the reason lay in financial aspects or due to an evolving personal appreciation, could not be discovered. According to a statement by von Klemperer's son Gustav-Victor, one of the Kokoschka paintings his father possessed was looted from their villa during the confiscation of the Meissen china and the incunables. The second Kokoschka painting *'London, Richmond Terrace'* was transferred to Switzerland by von Klemperer's son-in-law in 1938 and stayed in the family's possession until 1986. Although the von Klemperer family was targeted by the anti-semitic measures in Germany, the *'Portrait of Ludwig Adler'* was sold prior to the *Reichskristallnacht* pogroms to H. E. Kurz, a collector with a lifelong interest in German expressionist artists of the 20th century. By that time, von Klemperer and his wife journeyed to Rhodesia. H. E. Kurz was not involved in the National Socialist art looting.

The Commission's research did find a couple of new elements pertaining to the sale transaction of the painting between Victor von Klemperer and Herbert E. Kurz in the period 1937-1938. Neither the heirs von Klemperer nor the lawyer S. Rudolph provided any information suggesting the forced nature of the sale or the transaction itself, such as the relation to the sale and the acquisition price, the purchaser's possible involvement in the National Socialist regime or any pressure exercised. None of the documents or publications associate the painting with any National Socialist intervention or interest. One must consider all this against the background of the National Socialist degenerate art policy, aiming at eliminating every expression of modern art as also the paintings and works on paper by Oskar Kokoschka that were removed from the German museums and cultural institutions. Kokoschka was one of the most 'victimised' of all visual artists. The confiscation of Jewish cultural property was initiated after the *Reichskristallnacht* of 9 and 10 November 1938 after the actions that were implemented in Vienna after the *Anschluss*.

Victor von Klemperer gave two Kokoschka paintings on loan for the Viennese retrospective exhibition from May to July 1937. He indicated to the organisers that he wished to sell both paintings. He was informed that the Viennese exhibition was not a

purchasing exhibition. The museum promised to transmit any information about interested parties who would present themselves. The painting was sent back to Dresden without any complexities, without intervention by customs authorities or National Socialist organisations. Yet the painting was sent back at a time when the National Socialist degenerate art policy was in full operations. The only assessment of the possession of the painting and the reason for the von Klemperer couple to sell the painting was made by son Gustav-Victor, in a letter he wrote in 1996 – one year before his death - to one of the authors of *Kokoschka in Dresdner Privatsammlungen*, a catalogue on private art collections in Dresden in the 1930s. He explained that his mother, spouse of Victor von Klemperer, did not like ("nicht mochte") the 'Portrait of Ludwig Adler'. Gustav-Victor stated in his letter that she hated ("hasste") the painting. Understandably, the author of the catalogue article Mrs. H. Biedermann did not mention these exact terms. That same article from 1996 also revealed that the painting was located in the Ghent Museum of Fine Arts.

After Germany's liberation, the von Klemperer heirs took steps to seek restitution of their china and antiquarian book collections. They contacted the Allied Councils as well as the West-German [agency] set up under the BRÜG-legislation that provided for physical compensation to the victims of racial persecution during the 1930s-1940s. The 'Portrait of Ludwig Adler' was not declared as lost or looted cultural property to either of these [agencies]. Nor was the painting mentioned in the restitution proceedings, after the reunification of Germany, with the Dresden museum after the restitution of the V. von Klemperer Meissen collection. Only after 2004 was the 'Portrait of Ludwig Adler' put on the official database of the *Koordinierungsstelle* of Germany, as a cultural asset lost in Germany during the National Socialist regime.

After the war, H. E. Kurz transported the 'Portrait of Ludwig Adler' to the American Zone that would be a part of West Germany from 1949 onwards. The von Klemperer heirs did not take any action against Herbert E. Kurz or his son Herbert Kurz, who inherited the painting and sold it in the late 1960s. In the after-war period the painting changed ten times from owner and travelled to Germany, the United States, Great Britain and finally, Belgium. In this period it remained a long time in West Germany and the United States, more specifically in New York, where some of the von Klemperer heirs resided or were engaged in business. In the 1970s, North American Jewish art collectors, who are very sensitive to this issue, bought and sold the painting without reservations. In these post-war times the painting's provenance was generally known. From the 1970s onwards it led a public life, being on display in numerous international exhibitions.

The Ghent Museum of Fine Arts acquired the painting in 1987 as an enrichment of its own art collection, which focuses on Flemish and international expressionism of the first half of the 20th century. All the provenance data were known and the purchase price was in line with the established sale prices of the international art market at the time. For security purposes the conservator verified the motivation of the Folkwang Museum in Essen for de-accessioning the painting in 1976. The Folkwang Museum informed the curator that it had been given the opportunity to acquire Kokoschka's 'Double Portrait Kokoschka and Alma Mahler' instead. Following the acquisition of the 'Portrait of Ludwig Adler' it was frequently

exhibited in Belgium and abroad. In the second half of the 1990s the Museum of Fine Arts loyally cooperated with the federal investigation by the Study Commission on Jewish Assets, putting its inventory list at the latter's disposal and granting full access to its archives and art collection. Given the acquisition date of 1987 the painting fell outside the Study Commission's research scope. Its findings were integrated in its final report of 2001, presented by the federal department of the Prime Minister. Since the Washington Conference (1998) the Ghent Museum of Fine Arts has always taken due account of the issue of cultural assets and the Second World War. At every important acquisition of an international art work, such as the bust *'Girl's head'* by German sculptor Lehmbrock in 2002, the museum investigated its provenance. The Commission did not find any element about the acquisition of the *'Portrait of Ludwig Adler'*, whether in respect of its financing, provenance or administration, that doubted the good faith of the Ghent Museum of Fine Arts.

As conclusion of the (art-)historical research it can be stated that the painting *'Portrait of Ludwig Adler'* permanently led a public life and was never considered problematic or associated with the National Socialist art looting prior to 2004 – not even prior to the restitution request on 12 January 2009. Although the family V. von Klemperer fell victim to the anti-semitic measures in National Socialist Germany and their Meissen china and incunables collections were confiscated, the *'Portrait of Ludwig Adler'* was no longer in the family von Klemperer's possession by that time. The painting is never mentioned in the available documents pertaining to the looting of V. von Klemperer's possessions, which included a family testimony and family memories, articles about his collections and publications relating to National Socialist art looting. The only reference appeared in an article on private collections of Kokoschka art in Dresden, explaining the sale of the *'Portrait of Ludwig Adler'* on the basis of a family testimony, on account of a negative appreciation and the lack of interest of V. von Klemperer's wife in the painting. Consequently, as von Klemperer's son Gustav-Victor put it concisely, the painting disappeared soon afterwards again (*"das Bild verschwand bald wieder"*).

Part II: Legal analysis

In this part of the report the sale of the painting will successively be examined in the light of Belgian binding law and of grounds of equity.

1. Examination in the light of provisions of Belgian national and international law

1.1. The Belgian laws relating to international cases

The Belgian Private International Law Code of 16 July 2004 (PILC) holds that matters relating to goods are governed by the law of the place where the asset is located.(*)

Art. 87. – Law applicable to rights in rem

“§ 1. The rights in rem in respect of an asset are governed by the law of the State on the territory of which the asset is located when they are invoked.

The acquisition and loss of these rights is governed by the law of the State on the territory of which the assets are located when the actions or facts that are invoked as basis of the acquisition or the loss occur. [...]”

The same law also contains a special provision on revindication in cases where a revindicated good was stolen.

Art. 92. – Law applicable to stolen goods

“The revindication of a stolen good is governed, at the choice of the original owner, by the law of the State on the territory on which the good was located upon its disappearance or by the law of the State on the territory of which the good is located at the time of revindication.

Nevertheless, if the law of the State on the territory of which the good was located upon its disappearance does not grant any protection to the possessor in good faith, the latter may invoke the protection that is attributed to him by the law of the State on the territory of which the property is located at the time of revindication.”

[(*) Translation in English by C. Clijmans and P. Torremans, *Yearbook of Private International Law*, Vol. VIII (Munich, Sellier Publisher, 2006), p. 319.

Article 92 has entered into immediate effect from October 2004 (Art. 127 PILC). In cases where this provision is to be applied, the revindicating party is given the choice to apply either Belgian law or German law. In the present case, however, the requesting

parties cannot invoke this option. (In any event, application of German law would not have put them in a better position¹⁴³).

The preparatory works of the Belgian Private International Law Code state that the law of the place where the object was originally situated determines what qualifies as "theft". According to the historical research the Kokoschka painting was sold by Victor von Klemperer in Dresden, and according to lawyer S. Rudolph this took place in the period 1937-1938.

The analysis of the legal situation in Germany after the Second World War shows the emergence of legislation that enabled the retroactive nullification of a number of sale transactions. The Commission examined whether these provisions applied, which depends on the place where the Kokoschka painting was located at the time the legislation was enacted. If the painting was located in the American Zone at the end of 1947 - at that time the American military government decreed rules with retroactive effect - or if it was brought there before the expiring date for revindication under that special regulation, i.e. the end of 1948 at the latest, the sale was not to be legally qualified as "theft" - not even if it concerned a forced sale. Hence in no way did the Kokoschka painting become a "stolen" painting by virtue of the Allied legislation. That legislation did not confer such classification even though it did establish a presumption of nullity for certain transactions. In her doctoral thesis Mrs. S. Rudolph wrote that practices of confiscation and expropriation from Jews in Nazi Germany very clearly differed from what constitutes "theft".¹⁴⁴

If the painting was located in the Russian Zone in the post-war period, it resorted under the law of what would later be the G.D.R. and the sale was not to be qualified retroactively as "theft" either.

For these reasons the Commission is of the opinion that under art. 92 PILC, German law of goods is not applicable to the question of revindication.¹⁴⁵

1.2. The acquisition of title by the City of Ghent under Belgian (substantive) law

The national law of the place where the asset is located at the time when the actions were undertaken necessary to acquire title, determines whether ownership is acquired (Article 87 PILC, cited).

¹⁴³ Paragraphs 929, 932 and 935 of the German Civil Code ("*Bürgerliches Gesetzbuch*").

¹⁴⁴ S. Rudolph, cited footnote no. 65, p. 144.

¹⁴⁵ Should one nevertheless want to look at German law in this context, the law (Art. 92) of 2004 holds that the protection of the third party *bona fide* acquirer is not to be determined under the laws of 1938 but under the current laws of the country of the original location. If German law "does not grant any protection" Belgian law will jump in to protect the MSK as good faith possessor [cf. Art. 92 PILC].

The law of goods of the country where the asset is located also determines the rights, if any, of the original owner and the protection of the *bona fide* possessor.

In October 1987 the Ghent Museum made an agreement with art gallery Marlborough to acquire the painting for a determined price (the purchase invoice dates from 19 October 1987; the settlement happened in 1988). From the factual research it can be gathered that at the time of the conclusion of the sale the painting was located and exhibited in Ghent. Therefore Belgian law governs the acquisition of title that according to our law of goods took place *vis-à-vis* third parties when the agreement was concluded. The Ghent museum purchased with good title from the reputable art gallery Marlborough Fine Arts Ltd. London. The gallery submitted a list of successive owners, based on in-depth provenance research. It presented a full and detailed list of former owners, going back to the portrayed doctor Ludwig Adler, who had commissioned the painting himself. The gallery joined an overview of the exhibitions and generally known bibliographical references.

At the end of 1987 the Ghent museum undertook its own investigation of the ownership question. It inquired with the German Folkwang museum in Essen as to the latter's previous title – given the reference to this museum on the back of the painting – and the transfer of the art work. The museum director stated that the transaction had taken the form of an exchange agreement. These facts were confirmed upon verification by the Commission.

Belgian law of goods grants direct ownership title to the purchaser who acted in good faith upon the acquisition (Art. 2279 Civil Code).¹⁴⁶ Good faith is presumed and has been substantiated extensively above. The purchase has been subject to the required authorisation procedures and was duly documented with the legal instruments evidencing the agreement concluded with the owner as well as the invoice. The purchase price amounted to 18 million old Belgian francs. Under Belgian law the City of Ghent – being the rightful owner of the Kokoschka painting – is in the solid position of indisputable owner since 1987, and the claim for restitution in ownership must fail.

To offer complete information, the following must be added: if theft or involuntary loss on the part of the "original" owner or along the chain of owners were to be invoked, on the basis of Art. 2279, 2nd section Civil Code, the short acquisitive limitation period of three years applies. The period starts to run from the act of theft or loss and *in casu* would have lapsed long before 2009.¹⁴⁷ That is how the *bona fide* purchaser is protected. In such cases the revindicating owner would have to pay a compensation according to Art. 2280 Civil Code. These rules apply to cases of involuntary loss and revindication where the current possessor acquired the asset – a work of art in the present case – from a legitimate

¹⁴⁶ R. Dekkers and E. Dirix, *Handboek burgerlijk recht*. II, Antwerp, Intersentia, 2005, p. 90-99 and 551.

¹⁴⁷ This provision of Art. 2279 C.C. nevertheless allows to take into account any kind of involuntary loss in this context – hence the qualification as "theft" does not need to be proven here.

dealer in the goods concerned, namely works of art, and the sale to the current possessor could therefore not give rise to suspicion.¹⁴⁸

1.3. Can the nullity of the sale agreement of 1938 be established under former German law?

The Commission offers additional legal information about the question last raised - whether the chain of prior sales of the painting is not affected by any cause of nullity. A long time has passed since the Second World War and the Kokoschka painting has been subject to various successive transfers. Acquisitive prescription serves to clearly establish possessors' rights with the passing of many years.

If the sale dating from 1937-1938 by the Jewish owner in Nazi Germany could be declared invalid today, the descendants of the spouses Victor von Klemperer might arguably still attempt to claim ownership from whoever took possession of the painting without good title. Due to the long course of time this assumption is problematic. After the Second World War art works were mostly re-sold, so there was a third acquirer. In such a subsequent phase, upon acquisition by a third party in good faith, the issue of prescription comes on top of the burden of proof. One could assert that there was no such thing as a valid acquisition of goods formerly belonging to Jews and that prescription did not run against anybody. After all, if the third acquirer knew or should have known the art work's provenance and was on notice of laws declaring previous transactions null and void, this could possibly be an acquisition *a non domino* and without good faith being established. In such a case, prescription in favour of the acquirer would cease to run. But this only applied to certain religious objects or objects identifying the previous owner and against parties who ought to know the laws in respect of such goods.

¹⁴⁸ Such compensation amounts to the original purchase price (see R. Dekkers and E. Dirix, cited footnote no. 147, p. 100 and 102). In case of revindication Ghent would have recourse against the gallery from which it acquired the painting (Art. 2279, 2nd section C.C.). We do not need to go any further; but nevertheless, in a hypothetical situation where no good faith on the part of the Ghent Museum could be established at the time of acquisition (which is clearly not the case), or where no good title from the predecessor in title was passed on upon acquisition, the long acquisitive limitation period of 30 years would apply. To calculate such long limitation period one may count back to the period during which a previous owner also had possession under a previous system governed by the local law of the place where the painting was situated. Such a "sub-period" is to be assessed under the foreign legal system of the countries where the painting was located throughout that period if the limitation period could legally start and/or keep running there. The Marlborough gallery from London overtly possessed the painting as an owner and in good faith in the United Kingdom - after the exchange by the German museum, as confirmed upon verification by the City of Ghent. Counting back from the time the request was addressed to the City of Ghent, in 2009, for this hypothesis (which does not apply *in casu*) one must go back to 1979 and conclude here too (see subsection I.2.2. of this report) that an adequate legal ownership title arose. Also in this case *ex absurdo* the family cannot legally revindicate from the previous owner.

During a limited period of time after the Second World War but before the division of the country, German legislation contained a specific provision enabling the nullification of transactions concluded after 1933, when the National Socialists came into power.

1.4. The post-war German law that could eventually cease the extinctive prescription

In 1937-1938 the painting was in Dresden, Germany. The "original" sale by Victor von Klemperer was governed by German law. Could this sale be declared null and void for being contrary to accepted principles of morality or human rights?

The then prevailing local rules of civil law can be of some value for this matter¹⁴⁹, although the numerous special Nazi laws on (the confiscation of) Jewish possessions do not have the character of applicable "laws" that are acceptable under natural law. Belgium must ignore these racial laws as being invalid, even if they were proclaimed by a regime that *de facto* held power over the country.

During the Second World War, on 5 January 1943, the Allies published a forceful declaration (Declaration against Acts of Dispossession committed in territories under Enemy Occupation or Control, known as the "London Declaration"). This Declaration announced that legal remedies would follow.¹⁵⁰

After May 1945 the Allies divided Germany in four zones and governed these with their respective military regulations. We take into account the military legislation of the American Allied forces in the zone of central and south-west Germany and that of the Soviet Zone in eastern Germany. These would be followed by the legislation of the later constituted Federal Republic of Germany, in effect from 23 May 1949, and the legislation of the G.D.R. proclaimed on 7 October 1949. In this inquiry into the past, even the

¹⁴⁹ Under the concepts of German law relating to contracting in violation of the accepted principles of morality and under the provisions on "usury", in order to apply nullity, there had to be a "*Missverhältnis*" in the purchase price of more than double the amount and the seller had to have a subjective feeling of being in an emergency situation or even a strong temporary fear that his situation would deteriorate, such that he would contract under duress. Furthermore, the usurer had to be conscious of the fact that he would gain the benefit and that he could exploit that fear. (S. Rudolph, cited footnote no. 65, p. 148-149, 152).

¹⁵⁰ Their declaration had implications in public international law: they would declare invalid seizures as well as forced ownership transfers. The London Declaration (1943) provided for a duty to restitute goods that had been removed from foreign occupied territories by the Occupier and applied to transactions concluded before the date of its promulgation. The Declaration pierced the apparent legitimacy that the decrees of the German Reich could grant to acquirers of confiscated or spoliated goods. See S. Rudolph, cited footnote no. 65, p. 55 et seq., p. 65 and p. 228. Lawyer Rudolph is of the opinion that the restitution obligation in respect of ownership acquired after April 1943 or removed by violence or force falls under public international law, referring to the general *opinio juris* from 1945 onwards. (S. Rudolph, cited footnote no. 65, p. 65) But according to the Commission such an obligation does not fall under the generally known international customary law.

application of rules with unusually far-reaching retroactive effect is accepted as legitimate in the search for possible legal remedies to the benefit of the affected Jewish citizens of Germany.

It is essential to know where the Kokoschka painting was located between early November 1947, i.e. the time when the relevant provisions of the American *Allied Council* entered into force, and the end of 1948, i.e. the time-limit for those who had been expropriated to exercise their right to complain. The requesting party should establish the *situs* of the painting.

1.5. Rules applicable to goods situated in the post-war American-occupied zone

Herbert E. Kurz was the purchaser of the art work. Since the 1920s he had been a passionate collector of German expressionist artists and he resided in Meerane, Sachsen. The Commission learned that he fled the Soviet Zone in 1948.¹⁵¹ He settled in Wolfsram-Eschenbach (south-west of Nürnberg) in the American Zone where he presumably had the painting concerned in his personal possession. If the painting was there, according to the Commission it fell under Military Government Law No. 59, notwithstanding the fact that it was in Dresden in 1938.¹⁵² (Subsequently the painting came in the possession of the first next owner in Munich, Federal Republic of Germany.)

The Law no. 59 ordered the restitution from 1 November 1947 of goods that had been expropriated or appropriated to the prejudice of Jewish citizens among others. With a remarkably strong retroactive effect in time, this law determined the rights of both former Jewish owners and recent acquirers, irrespective of whether they acted in good or bad faith. The Commission investigated the Law's rules on the conclusion of sale and purchase agreements.¹⁵³

In respect of the disposal of Jewish property from 1933 onwards, this military law introduced a (rebuttable) presumption that the transaction had been concluded under duress. It was assumed that such a sale agreement violated the accepted principles of morality and equalled expropriation. That presumption was rebuttable (the buyer bearing the burden of proof) and did not apply, firstly if an adequate sale or market price had been paid, secondly if the purchaser had contracted to safeguard the interests of its Jewish so-

¹⁵¹ See the judgement of the Landgericht Dresden of 16 April 2010 in the case Dr. Herbert Kurz vs. Ute Glaser (Aktenzeichen 10 O 1929/09 – not published, but known by Dr. S. Rudolph).

¹⁵² See Law no. 59 (Law on Restitution of Identifiable Property) for the American Zone – source: see the *Military Government Gazette, Germany, U.S. Area of Control, Issue G, 10 November 1947* and see <http://pds.lib.harvard.edu/pds/view/6347670?n=515&imagesize=1200&jp2Res=.25&printThumbnails=no>. See also Law no. 59 for the British Zone, with a slightly different content and regulation BK/O(49)180 of the Allied Council in Berlin; Law no. 70 for the French-occupied Zone – quoted by S. Rudolph, cited footnote no. 65, p. 70 et seq., and see there p. 75 on the location of art works in the American Zone at the end of 1947.

¹⁵³ Not the measures in case the goods had been confiscated by the German authority.

citizens or thirdly if it could be proven that the sale would have taken place irrespective of the National Socialist regime.¹⁵⁴ An adequate sale price was defined as the amount a buyer was willing to pay and the seller was willing to accept. The scope of this military law has been subject to critical review, particularly with regard to sales in auction houses (which were private undertakings under Nazism too). It has been concluded that at least with regard to the first buyer who had acquired the art work e.g. from a discriminated or persecuted person having sold under the Nazi regime, no ownership could have been transferred with retroactive effect and no acquisitive prescription could run - not even in favour of a *bona fide* possessor, except under the abovementioned exceptions. The law ordered the return, even if the purchasers themselves had no notice of the injustice done.¹⁵⁵

The procedural provisions of Law no. 59 limited its application in time, as restitution claims had to be filed with the Allied authorities by 31 December 1948 at the latest. A sale concluded prior to that date would have been held invalid because of the restitution obligation. Nor could ownership title have been acquired through prescription. Once such a request was filed, the protection granted to the goods in question was to last until the end of the procedure.¹⁵⁶ Further, a factual matter, that ought to have been proven by the requesting party, is whether the family von Klemperer had submitted a request or claim for restitution. That way the Kokoschka painting could have been reclaimed in ownership by Victor von Klemperer's wife and other heirs. He died in 1943 in Bulawayo, then South-Rhodesia. Law No. 59 granted them the opportunity to file a request until the end of 1948; in that case the purchaser Herbert E. Kurz would have had the chance to produce evidence that the sale was normal. The family did not undertake such action, however, and consequently the route of that special transitional law – and the possibility of a positive assessment – was shut off. Subsequently, the painting turned up in the German market and its title remained undisputed for a long while. This is how the limitation periods lapsed, as set out above. Yet this is also how no moral rights were claimed on the basis of the presumption of a sale under duress, as a result of which these rights too, if they existed at all, expired.

For the more general legal conclusions with regard to the descendants of the von Klemperer family and their official complaints in respect of goods other than the Oskar Kokoschka painting (the china and incunables collections, and later the shares and the land), reference is made to subsection II.3 of this report. It is not excluded that the von Klemperer family was legally conditioned by a reasoning according to the rules that were in effect after 1945 in the zone where Dresden was situated, although they were apparently familiar with the procedures available to them. In the Soviet Zone, this issue was approached from a different perspective. There the wish to seek certain war compensations

¹⁵⁴ S. Rudolph, cited footnote no. 65, p. 158-160.

¹⁵⁵ S. Rudolph, cited footnote no. 65, p. 248-249 and 251; the writer examines the period until 1999 to indicate how third acquirers were warned at different times and thus it was not easy for them to prove their good faith in Germany. (p. 226-229).

¹⁵⁶ S. Rudolph, cited footnote no. 65, p. 252.

prevailed, but if it came to revindicating their private property, citizens were treated remarkably less well.¹⁵⁷

After the constitution of the Federal Republic of Germany in 1949, the common law rules of paragraphs 929-935 BGB again governed the law of goods.¹⁵⁸ On the basis of private international law, this only applies to transactions that took place when the painting was still in the Federal Republic of Germany. In section II.2 of this report, the Commission has made a legal analysis of the ownership acquisition with regard to the final acquisition by the museum of the City of Ghent under the application of Belgian law.

2. The framework for a voluntary assessment on the basis of considerations of equity

2.1. Reference by the City of Ghent to the Washington Declaration

In its collegial decision of 11 February 2010 the City of Ghent referred to the Washington Declaration. The Commission has carefully considered the moral principles, more specifically the question whether financial compensation or – as the case may be – restitution on grounds of equity would be proper. This Declaration indeed formulated, apart from strictly legal rules, a number of moral principles which may raise questions with regard to the transfer in ownership of a painting by a Jewish family in the period 1937-1938.

2.2. The Washington Declaration and subsequent initiatives

¹⁵⁷ For the people who resided in the east of the country and the goods that were located where in 1949 the D.D.R. would be established, the situation remained adverse. In the Soviet-occupied zone no laws providing for the restitution of goods expropriated or lost under the Nazi regime have been introduced. The first arrangement of compensation and restitution that entered into force in what was then the D.D.R, was the German property law of 29 September 1990. A few days later the area was included in united Germany by virtue of the Unification Treaty (S. Rudolph, cited footnote no. 65, p. 102 and p. 260-265). The Commission points out that the Kokoschka painting was already in the Ghent museum by that time. Besides, in the property legislation from 1990 there was effectively scope for the protection of ownership acquired in good faith - unlike in the period right after the war.

¹⁵⁸ The Kammergericht of Berlin decided on 29 October 1946 that according to the common understanding in Germany there was a clear collective threat against Jewish citizens only since the *Reichskristallnacht*, the Jewish pogrom from 8 to 10 November 1938 (S. Rudolph, cited footnote no. 65, p. 231 – seeks to situate this a lot earlier). In West Germany after the war, it has been accepted in court decisions according to common law, that legal discrimination of Jewish citizens was in breach of natural law because it was based on racial laws. Legal transactions, such as confiscations, effected by the then *authorities* in reliance on *Reichsverordnungen*, were affected by absolute nullity.

The international Washington Conference formulated a number of rules on “lost assets”, which comprise various types of valuables and possessions that were taken from the Jews or dispossessed from Jewish families across Europe under the National Socialist rule, such as real estate, financial assets, life insurances, commercial stocks and other goods, among which also cultural property, like “stolen” or spoliated works of art.

The Principles on Nazi-Confiscated Art adopted at this conference gave expression to the agreement reached among the participating countries on a number of non-binding moral principles that would underlie the investigation and the restitution, as the case may be, of art works confiscated by the Nazis. To attain this goal the archives must be made accessible. When a certain art work is found to have been transferred or confiscated in the Nazi-era and not subsequently restituted, a just and fair solution must be sought, taking into account the facts and circumstances surrounding each specific case, which does not automatically imply restitution.

According to principles 4, 8 and 11, consideration should be given to gaps in the provenance in the light of the passage of time and the circumstances of the Holocaust era.

These rules, which derive their strength from generally accepted moral principles relating to the repair of the injustice done during the persecution of the Jews, were not given legally binding effect in Belgium or in any of the other countries involved. The Washington Declaration moreover acknowledges that each country must follow the rules within the context of their own laws.

In the follow-up to the Washington Conference we find initiatives such as the Vilnius Forum Declaration of 5 October 2000. More recent is the Terezin Declaration of 30 June 2009.¹⁵⁹ The latter clarifies that the Washington principles on Nazi-confiscated art, whereby governments assumed a moral duty, also apply to forced sales and sales under duress. According to the Commission, the third principle of the Terezin Declaration relating to these instances does not add anything new to the principles of 1998.¹⁶⁰

This specification of the Principles’ scope of application does not change anything to the underlying principle of moral duty to examine every case according to its own merits, in the light of the particular circumstances, and to pursue a just and fair solution.

In 1999 the Washington Conference Principles on Nazi-Confiscated Art were also followed up by the Council of Europe: the Parliamentary Assembly adopted Resolution 1205 (1999) on spoilt Jewish Cultural Property. This resolution is more specific, even though it merely offers recommendations to the legislative bodies of the Member States: paragraph 12 states that bodies in receipt of government funds which find themselves holding Jewish cultural property should return it. Paragraph 13 holds it may be necessary to

¹⁵⁹ A conference in Terezin, Czech Republic, organised with European support.

¹⁶⁰ Belgium’s ratification of or consent to this declaration of principles is not entirely clear; once again we conclude that no binding rules have resulted.

provide for legislative change to extend or remove statutory limitation periods and paragraph 14 even founds such protection of private property on human rights. Paragraph 15 of the Resolution seeks to consider the annulment of later acquired titles on such objects.¹⁶¹ As such the Resolution is not a legally binding instrument.

2.3. The consequence of the Washington Declaration: consideration on grounds of equity after a thorough investigation into the factual circumstances of the sale

In the first part of the legal analysis of this Commission report, it was established that strictly legally speaking the City of Ghent with its Museum of Fine Arts is the rightful owner of Kokoschka's *'Portrait of the Physician Ludwig Adler'*.

In this second part of the [legal] analysis, the facts that were described in detail in the historical part will be considered in the light of the principles used to possibly establish a suspicious sale from the 1930s in Germany.

Under the Principles of the Washington Declaration, voluntary restitution or compensation come into play only after the concrete facts clearly indicate that there is reason to believe they are, i.e. after establishing a confiscation, looting or a sale under duress. The declarations of principles seek firstly to take due account of the facts when concluding to a case of forced sale. They further insist at not invoking the application of the legal provisions on acquisitive prescription in favour of *bona fide* possessors. Nor should the normal rules on the burden of proof apply and finally public museums are asked to strive for an equitable solution together with the prejudiced parties.

The basic premise of a factual investigation aimed at establishing the moral rights of the original Jewish owner, is that every case is to be examined according to its own merits.

2.4. The general framework of the factual research

The Washington Declaration may imply that the current possessor voluntarily waives the acquisitive prescription on moral grounds, and that – for this purpose - a review far back in time is made. In that case, the review of the past concerns the government act of confiscation or the fairness of the first transaction or sale by a Jewish owner. Government confiscation in Nazi Germany was always invalid given its origin in racial laws and measures that should not be respected by a state governed by the rule of law. If the Jewish citizen's sale was obviously invalid or if it was accomplished under unlawful duress, then the moral question of restitution rises - but only under that premise. But even if the first transaction was invalid or voidable on account of duress, extinctive prescription may have run causing the Jewish owner yet to lose his ownership if the original owners did not

¹⁶¹ With regard to international loans of art objects, the Resolution asks to relax or reverse anti-seizure statutes which currently protect art loans from court action.

protest or act to safeguard their rights. If they did not invoke an illicit infringement of their right, not only their rights expired but they also essentially waived their moral right to the return of their lost art works.

In its investigation into a possible voluntary restitution, the Commission wishes to point out beforehand that the consecutive predecessors in title - *in casu* the Marlborough gallery in the first place - are not involved in such an equitable solution. If restitution were to be considered on such a basis, at the most an appeal might be made to the predecessors in title so that they too would voluntarily acknowledge and honour their moral duties. Considering that the first predecessor in title was a private party, the questions stemming from the Washington Declaration are strictly speaking not directly addressed to it.

The Commission has been sensitive to encouragements to go beyond the legal rules where Jewish families had lost their property under duress. Therefore it investigated the particular circumstances of the sale of the '*Portrait of Ludwig Adler*' by the von Klemperer family, with due consideration of the Washington Declaration or Principles.

It is hard to accept that every sale under the National Socialist regime would automatically be considered an involuntary transaction and therefore be declared null and void. After all, this could lead to a wave of trivial and undocumented or unfounded restitution claims. Accepting such an automatism would moreover disrupt the balance between the parties involved to such an extent that it would create an injustice vis-à-vis the *bona fide* possessors of the when overgeneralising disputed assets.¹⁶² The latter indeed risk to face an insurmountable burden of proof the presumption of the transaction's unlawfulness. If one were to push to the extreme the distinction between private individuals who do not have to retribute¹⁶³ and public authorities who do, this would be perceived as an additional injustice.

Taken into account this general framework, the Commission has assumed to the extent reasonably possible the historical research task - which falls to the requesting party - as the latter failed to bring the facts forward.

2.5. The comparison with common criteria and practices

¹⁶² J. Anglim Kreder, *The new battleground of museum ethics and Holocaust-claims: technicalities trumping justice or responsible stewardship for the public trust*, *Oregon Law Review* volume 88, 2009, p. 84.

¹⁶³ See in the United States, quite recently, the case of actrice Elisabeth Taylor (*Ortiz v/ Taylor*, 487 F.3rd 734 – 9th Circuit 2007) who was allowed to keep a Van Gogh painting because the limitation period had expired. She bought the painting in 1963 from Sotheby's in London, who in turn had acquired it from the heirs of a Jewish private individual who had purchased the painting in the 1930s from the Jewish Mrs. Mauthner who moved from Germany to South Africa in 1939. A restitution request was only submitted in 2003, after it had been publicly known for years that Mrs. Taylor possessed this painting and gave it on loan for exhibitions. The time limits of the post-war American Military Law no. 59 were of course verified; no suspicious transaction was deemed established - after which the prescription could run. B. Demarsin reports: "The third time is not always a charm: The troublesome legacy of a Dutch art dealer. The limitation and act of state defenses in looted art cases", *Cardozo Arts and Entertainment Law Journal*, vol. 28 (2010), p. 275-276.

Abroad, World War II related restitution files are treated strictly by the legal rules; the automatism with which all sales concluded in a certain area within a certain period of time can be declared null and void on account of a presumed existence of illegitimate duress is rejected. Consequently, the burden of proof still rests on the party reclaiming his property. In its "Terms of reference", the British Spoliation Advisory Panel states clearly that the facts, legal aspects and moral value of a restitution claim/request must be weighed appropriately.¹⁶⁴

Nor is the abovementioned automatism up for consideration in the advisory practice of the German *Beratende Kommission für die Rückgabe NS-verfolgungsbedingt entzogener Kulturgüter*. Every case is treated on its own merits.¹⁶⁵ German case law appears to share this view as to the burden of proof. In a very recent judgement of the *Landgericht Dresden* of 16 April 2010, the court decided that the party invoking that the painting in question had been the subject of a forced sale had not succeeded in presenting sufficient substantive evidence to support its claim. This judgement concerned a related case: lawyer Sabine Rudolph acted against the son of Herbert E. Kurz - who had purchased the discussed Kokoschka painting from Victor von Klemperer at the time. She sought to reclaim from him a painting by E. Nolde that his father had also purchased from a Jewish collector in 1937.¹⁶⁶ Thereupon Dr. H. Kurz went to court with a view to establishing his ownership title. The valid ownership title of the son was confirmed by the court, notwithstanding the fact that he did not dispose of his father's records given that the latter had fled for the West in 1948 - before Eastern Germany completely closed down its borders - with part of his art collection yet without documentary evidence.¹⁶⁷ The Dresden court conferred the burden of proof to the party claiming the painting. In the court's opinion it had *in casu* not succeeded in proving that the original owner had not lost his property. It had failed to bring clarity on the exact time of the acquisition of ownership by Mr. Herbert E. Kurz. Thus in this similar case the court did not wish to accept that the sale took place in a suspect period; it did not wish to apply a presumption of duress in respect of the transaction of the father of the current owner, for the latter was the *bona fide* possessor and the limitation period had expired.

¹⁶⁴ U.K., *Report of the Spoliation Advisory Panel in respect of eight drawings now in the possession of the Samuel Courtauld Trust*, London, The Stationery Office, 24 June 2009, p. 10.

¹⁶⁵ See the judgements of the *Beratende Kommission für die Rückgabe NS-verfolgungsbedingte entzogener Kulturgüter* of 12 January 2005, 25 January 2007, 12 June 2008 and 27 January 2009 on www.lostart.de. A well-known restitution case in Germany revolved around the painting "Berlin street scene" by Ernst Ludwig Kirchner that was exhibited at the *Brückemuseum* in Berlin until July 2006. The Berlin Senate restituted this painting in 2006 to the heirs of Alfred Hess, an entrepreneur and collector who sold the work in 1936. Here the Berlin Senate relied on moral grounds and argued among other things that it was unclear whether the family had actually received the sale price. The decision to retribute was heavily criticised by *inter alia* the Ernst Ludwig Kirchner Archive in Bern which claimed that the sale in 1936 was legitimate. (See www.dw-world.de/dw/article/0,,2140203,00.html and G. Schnabel and M. Tatzkow, *The Story of Street Scene. Restitution of Nazi Looted Art. Case and Controversy*, Berlin, Proprietas-report, 2008.

¹⁶⁶ The dispute concerned a painting by Emil Nolde that was given on loan to a museum by Dr. H. Kurz and exhibited in Dresden.

¹⁶⁷ *Landesgericht Dresden* 16 April 2010.

In relation to this general presumption, finally, reference can be made to a case study by professor Jennifer Anglim Kreder who is specialised in American restitution cases. She has drawn up a discussion text concerning a bill on the treatment of WWII – related restitution cases. In section 9 of her draft, she assumes a rebuttable presumption which can only be endorsed in so far as the claimant:

- either *prima facie* shows that certain goods belonging to him have been the subject of a forcible expropriation;
- or shows that after 1945 a claim on these goods was acknowledged by a competent authority. Only under these conditions would the burden of proof shift to the current *bona fide* possessor of the goods concerned (Section 10 of the draft).¹⁶⁸

2.6. Different types of forced sale

The large-scale National Socialist looting of Jewish property took place in different forms. It is certain that a lot of cultural property was looted in the strict meaning of the term. However, the National Socialist regime generally – especially in the period before the Second World War – tried hard to give its looting activities an appearance of lawfulness. The regime used traditional civil law-transactions such as a common sale to effect ownership transfers. Specific laws enabling confiscation were enacted as well. Special laws were adopted restricting the rights of Jewish fellow-citizens, reducing their opportunities on the job market to zero and curtailing their right to personal property. They hereby created a framework within which pressure was exercised and which facilitated the inducement of Jews to sell their goods.¹⁶⁹ Together with the climate of suppression of the Jewish population in Germany, these laws formed sufficient constitutive elements to justify the inclusion that a sale of possessions occurred under duress in many instances. It is accepted that such duress was present when the required decisive threat existed and the persons involved experienced an immediate and substantial fear for their wellbeing or for their personal belongings.¹⁷⁰

It is documented that a large amount of forced sales did in effect occur. This does not exclude that voluntary sales took place as well.¹⁷¹

The Allied Forces/Allied Councils detected different looting methods. Already before the liberation of Germany they had deemed it necessary to reserve the right to consider illegal and therefore inexistent the *prima facie* legitimate transactions entered into by the Nazi regime, its leaders and collaborators.¹⁷² After the war this principle was implemented by the laws of the different Western Allied authorities.¹⁷³

¹⁶⁸ J. Anglim Kreder, cited footnote no. 163, p. 90.

¹⁶⁹ See point 3.1 of the Commission's (art-)historical research.

¹⁷⁰ L. Cornelis, *Algemene theorie van de verbintenissen*, Antwerp, Intersentia, 2000, p. 64 et seq.

¹⁷¹ J. Anglim Kreder, cited footnote no. 163, p. 49.

¹⁷² See the London Declaration.

¹⁷³ E.g. the abovementioned U.S. Military Law no. 59.

On the basis of existing case law, a number of types of forced sale can be distinguished.

A first type of forced sale of which the National Socialists availed themselves was the use of forced auctions. In this case the authorities forced owners to put their goods up for auction. A typical example of this working method was the forced sale in 1937 of the assets of Mr. Max Stern, a gallery owner in Düsseldorf. Stern was obliged to sell his assets via an art dealer approved by the Nazis. The sale was effected via an auction in Cologne and the proceeds of the sale were paid into his account; in that same year Mr. Stern fled Germany and his assets were frozen. He would never get hold of the proceeds. A court in the United States assimilated this transaction to theft. For this reason it ordered the restitution to the heirs of a painting that was sold at that auction in Cologne.¹⁷⁴ However not every public sale that took place can be considered a forced auction. In its Report of 24 June 2009 the British Spoliation Advisory Panel concluded that the auctions in 1933 where Mr. Kurt Glaser sold most part of his collections cannot automatically be considered forced. The British Advisory Panel was of the opinion that the Nazi persecution definitely influenced the sale by Kurt Glaser, yet found that other motives also played a role and therefore "mixed motives" were underlying the sale. The fact that he had a certain scope of liberty to transfer important works of art abroad and that he could still enjoy his pension at the time of the auction, were also elements that were taken into consideration.¹⁷⁵

Another or second method employed by the National Socialists was the "Aryanisation". Here the regime forced a Jewish owner to sell his assets to a legally recognised Aryan, or his goods were seized and assigned to someone of the Aryan race.¹⁷⁶ Also cases where a Jew transferred his own assets to an Aryan solely to escape dispossession by the authorities, fall in this class. Even the lawfulness of a gift by a Jewish husband to his Aryan spouse has been later questioned for this reason.¹⁷⁷

A third type of forced sale is the sale to persons holding a dominant position within the Nazi regime. Not only leading figures of the Nazi regime are concerned but also those who were able to exercise pressure on Jewish victims on account of their position. An example of such pressure coming from a pro-Nazi is the case of the painting 'Wally' by Egon Schiele in New York. This work belonged to Lea Bondi, art dealer in Vienna. In 1938 she sold her gallery to Friedrich Welz, a man who would later become one of the most important actors in the art trade in the Nazi occupied territories. The painting named 'Wally' was originally not part of the gallery's stock but was in Mrs. Bondi's private possession. After the *Anschluss* of Austria with Germany and under pressure by Welz, the

¹⁷⁴ Judgement of the Rhodes Island District Court of 27 December 2007 Case 1:06-cv-00211-ML-LDA.

¹⁷⁵ The owner had written to an artist that he wished to start a new life after the death of his wife, that he had fallen in love again and that he had sold all his possessions, among which his art works.

¹⁷⁶ J. Anglim Kreder, cited footnote no. 163, p. 39.

¹⁷⁷ J. Anglim Kreder, cited footnote no. 163, p. 65.

Schiele painting was as yet transferred to him as part of the sale of Mrs. Bondi's art gallery. The New York court qualified this transaction as an obvious example of a forced sale.¹⁷⁸

Of course, apart from these specific stereotypes, there are other possible types of forced sale or private sale that can only be explained by the seller's fear for his wellbeing or an even worse outcome for his personal possessions.

The factual circumstances of each individual case must always be considered. The burden of proof thereof always rests, as mentioned, with the requesting party wishing to obtain a declaration that a sale was concluded under duress. The sale price received for an art work is an important element in the assessment. A sale price far below normal market value is a very strong indication of a forced sale.¹⁷⁹ In this connection the Commission did not find any conclusive information on any extreme downfall of the prices for German expressionist artists in 1938.

3. The assessment of the sale on the basis of considerations of equity¹⁸⁰

3.1. The conclusion of the sale appears not to be suspicious

The claiming lawyer Mrs. Rudolph who acts on behalf of the children of the heirs, has not presented any legal argument that allows to conclude to a duty of restitution on the part of the Ghent museum. In any event, she has presented few factual elements which can serve as evidence that the art work ought to be restituted to the grandchildren – outside the sphere of legal obligations – on higher moral grounds. She did not submit evidence that Victor von Klemperer had sold the *'Portrait of Dr. Adler'* under duress.

Due to the lack of factual information, the Commission started its own historical research. The report outlined above, successively deals with the circumstances in which the sale took place and the actions the family undertook after the war to obtain restitution of its property. The facts speak for themselves.

The Commission investigated and expressly took into consideration the elements that are significant in the spirit of the Washington Declaration and the Terezin Declaration.

Obviously in the first place it must be acknowledged that the art work was sold during a period in which it became ever more difficult for the Jewish population to lead a dignified life within Germany and in which the oppression and exclusion of the German Jews increased. For Victor von Klemperer in particular this meant among other things losing his position as executive officer at the Dresdner Bank of which he was shareholder. His

¹⁷⁸ USA v. Wally, US District Court Southern district of New York, 30 September 2009, No. 99-CV-09940. (S.D.N.Y. filed Jul. 29, 2010, Stipulation and order of settlement and discontinuance)

¹⁷⁹ See the cited Report of the British Spoliation Advisory Panel of 24 June 2009.

¹⁸⁰ For the source references of the historical facts, reference is made to the (art-)historical research that constitutes the first part of the present report.

industrial and commercial mandates gradually decreased. It is beyond doubt that this family encountered discrimination. That political situation and their personal situation constitute the circumstances that presumably led the family to consider emigrating out of Germany. During the journey to Rhodesia which was commenced in the spring of 1938, these intentions materialised. Other German Jews found their way to other continents in that early phase of persecution. Victor von Klemperer's brother had already preceded him. The authorities eventually took measures against the family's properties. In the wake of 1940 this family suffered considerable financial loss and Victor von Klemperer's collections of Meissen china, and of incunables and first prints were confiscated.

Even if Victor von Klemperer by the time of the sale of the Kokoschka painting had already suffered an important loss of income, he disposed of earnings from a number of board mandates he had left and he was still entitled to his pension. He lost his final income only while he was already in Rhodesia. Also the further circumstances of his journey to Rhodesia give an indication.¹⁸¹

In all likelihood the family von Klemperer's Kokoschka painting was sold before April 1938. The painting was not consigned for (forced) auction but sold directly by Victor von Klemperer. Nor can the painting be said to have been the subject of Aryanisation. The historical research has not brought anything to light either that leads to conclude or presume that the purchaser from 1938, Herbert E. Kurz, held a dominant position in the National Socialist regime or that he - as a confidant of the rulers - had put pressure on the potential seller in any way. This is moreover not asserted by the claimants either. We were able to learn from the judgement of 16 April 2010 of the Dresden court that Herbert E. Kurz was a passionate art lover who collected paintings by German expressionists already before 1933.

It can be concluded from the preceding that the sale of the painting does not qualify under any of the three types of suspicious transactions.

Neither the sale price of 1938 nor the price which Victor von Klemperer paid himself for the purchase of his Kokoschka, is known. However, the sale price is a very important factual element in the appraisal of the forced nature of the transaction. *De facto* the requesting party did not show that Victor von Klemperer would have been unsatisfied with the sale price obtained, neither were any elements found pointing in that direction.

3.2. The circumstances of the sale

¹⁸¹ The von Klemperer family initially left for a family visit; they intended to return in October 1938. Thereafter it was decided that only Mrs. von Klemperer would return to liquidate all their assets in Germany. They could not proceed with the latter decision either, as the situation of the German Jews had deteriorated considerably after the *Reichskristallnacht*.

A number of other circumstances of the sale are well known. Selling the painting was not a sudden decision. Already in 1937, when giving the portrait on loan to an exhibition on Kokoschka's oeuvre in Vienna in the period May-July 1937, von Klemperer expressed his interest in finding potential buyers. Several months passed between his inquiry about interested buyers on the occasion of this exhibition and the sale that must have taken place in the period between September 1937 and April 1938. Victor von Klemperer had moreover succeeded in bringing the work out of Germany. Yet he let the work return to Dresden. This indicates that the owner did not deem the situation in Germany so threatening that the art work had for its protection to be kept abroad. We found no indication around the time of the sale that Victor von Klemperer was forced to sell the Kokoschka painting. On the contrary, it appears from a statement by Victor's youngest son that the art work would have been sold because his mother absolutely did not like this portrait of Dr. Adler or even had an aversion to it, so that it was to go.

Furthermore we highlight the fate of other assets of the family. Around that same period the family managed to transfer yet another Kokoschka painting abroad (Switzerland). Even after the *Reichskristallnacht* pogrom, Victor's son was able to emigrate to Switzerland with all his belongings. All this points to the fact that in the period preceding November and until the end of 1938, the von Klemperer family had room for manoeuvre in the management of their possessions.

From the generally known circumstances of the sale of the painting by the owner Victor von Klemperer, it cannot be established that we are dealing with a forced sale of the '*Portrait of Dr. Adler*'.

3.3. Acquiescence on the part of the heirs

From the detailed report of the facts set out above, we summarize the elements relating to the efforts undertaken by the von Klemperer family after the Second World War with a view to the restitution of the assets from which they had been unlawfully dispossessed.

We clearly found that the von Klemperer heirs did indeed undertake steps with various authorities to recover the assets that were looted and seized by the Nazis. In 1947 the family's *chargé d'affaires* inquired with the government of Saxony for information on the china and incunables collection. The family's restitution records in the *Bundesarchiv* only refer to the collection of valuable ancient books – the incunables. No action whatsoever was seen to be undertaken with regard to the '*Portrait of Dr. Adler*'. Until the end of the 1990s the painting was not mentioned in the existing databases on lost works of art while for other objects registrations and claims were filed.

All this time the possession of this catalogued art work has been public and the ownership title of the successive owners has not been questioned. In 1996 the painting was included in an article on the private art collections in Dresden. Victor's youngest son

Gustav-Victor von Klemperer was still alive at that time, and he provided collaboration to the publication which mentioned that the painting was kept at the Ghent Museum of Fine Arts. He did not make any request or claim thereto. His children did do so now – with the assistance of an expert adviser.

On the basis of the preceding elements it can be assumed with sufficient certainty that neither the widow von Klemperer nor the children believed that the '*Portrait of Dr. L. Adler*' had been the subject of a forced sale.

Part III: Summary, Assessment and Recommendation

1. Introduction

On 12 January 2009 (letter dated 6 May 2008) the director of the Ghent Museum of Fine Arts received by email a request for the restitution of the painting 'Portrait of Ludwig Adler' by Oskar Kokoschka. The request was submitted by a German law firm acting on the instruction of the descendants of Mr. Victor von Klemperer, a Jewish banker who emigrated from Germany at the end of the 1930s.

Following this request, the Council of the mayor and deputy mayors of the City of Ghent decided on 11 February 2010 to charge an independent ad hoc commission (referred to as the Commission) with the research of the historical facts and legal aspects of the claim and on the basis of their findings to deliver a report and a recommendation to the City council.

The restitution request expressly refers to the Washington Principles on Nazi-confiscated Art, adopted in 1998. The requesting party further states that Victor von Klemperer had sold the painting in 1937/1938, during the troubled period of the Nazi rule in Germany, and that accordingly the sale falls under a (rebuttable) presumption of "forced sale" by virtue of the post-war Allied restitution laws.

In such a case, according to the Washington Principles, it must be aimed "to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding the specific case".

2. Method

The Commission has examined methodically and extensively

against which historical background and under which circumstances Victor von Klemperer sold the painting,

whether the heirs considered the painting confiscated or sold under duress and reported it as such after the war,

which procedure the Ghent Museum of Fine Arts followed when purchasing the painting.

The Commission has held these factual data and circumstances in the light of

the provisions of binding law; and

the non-binding moral principles, voluntarily accepted at various international forums.

3. The historical background and the circumstances of the sale by Victor von Klemperer

The sale of the Kokoschka painting by Victor von Klemperer is indisputably seen to have taken place against the background of the gradually intensifying Nazi persecution of the Jews from 1933 onwards.

Like all Jewish citizens, Victor von Klemperer was banned step by step from German social life and was obliged to retire from the Dresdner Bank in July 1934, resulting in a substantial decrease of his earnings from 1935 onwards. Everything points to the fact that since the fall of 1937, he was seriously considering leaving Germany. The journey he undertook with his wife in April 1938 to Rhodesia, where his youngest brother had settled since June 1937, was as much as a "prospection journey". Eventually he did not return to Germany anymore because the political developments there took a very adverse turn after the *Reichskristallnacht* of November 1938. During that period he lost his final income in Germany.

Victor von Klemperer gave the '*Portrait of Ludwig Adler*' on loan for the retrospective exhibition of Kokoschka in Vienna from May to the end of July 1937. It was sent back to Dresden in September 1937.

The sale to Dr. Herbert E. Kurz took place between September 1937 and April 1938. The requesting party confirms this, so it cannot be asserted that the painting was confiscated – meaning seized by the Nazis – as opposed to the von Klemperer incunables and Meissen china collection. The sale price is not known: neither the requesting party or the purchaser nor the research results offered any specification in this respect. It cannot be substantiated that the painting had decreased in value and sold at a lower price due to the Nazi policy against *Entartete Kunst* – which was in any case not a specifically anti-Jew measure.

Dr. Herbert E. Kurz's name does not feature on the extensive German official list of private individuals and agencies involved in National Socialist art looting and not one element put forward by the requesting party or resulting from the research, indicates that he would have exercised pressure in whatever capacity on Victor von Klemperer.

According to a published statement from 1996 by his eldest son Gustav-Victor von Klemperer, the reason for the sale appears to be connected with the fact that his mother, wife of Victor von Klemperer, did not appreciate the painting at all, which indicates that the latter voluntarily disposed of it. For that matter he had already tried to find a purchaser at

the time of the exhibition in Vienna. In that same period, son-in-law Peter Gysin transferred another Kokoschka painting from the von Klemperer collection, 'London, Richmond Terrace', to Switzerland where it remained in the family's possession until 1986.

4. The post-war efforts by the von Klemperer family

After the Second World War the von Klemperer family had several opportunities to reclaim its possessions that were looted or sold under duress, or to claim compensation for them, as the case may be.

For that manner the family's *chargé d'affaires* approached the Saxon government already on 28 November 1947 to know the depositories of the art collections, and Victor's brother Herbert von Klemperer addressed the director of the *Schloss Moritzburg* in 1948. Their aim was to find out the depository of the incunables and Meissen china collection.

This special attention for the china and book collection was confirmed from 1989 on by the – otherwise successful – negotiations and restitutions with the director of the *Gemäldegalerie* and the *Sächsische Landesbibliothek* in Dresden.

On the other hand, the research undertaken by the Commission and the *Bundesamt für zentrale Dienste und offene Vermögensfragen* which was consulted thereto - the agency established in Berlin that keeps the post-war restitution files - has revealed that the family Victor von Klemperer has at no point shown any interest in works of art such as the 'Portrait of Ludwig Adler'.

Not once was the painting claimed, not even reported or mentioned, neither in the framework of the Allied restitution laws nor in the framework of the "BRüG"-legislation (the *Bundesrückerstattungsgesetz*, the West German restitution law of 19 July 1959). Also, at no time was the purchaser Dr. Herbert E. Kurz approached after the war.

The research in the archives of the *Sondervermögensgesetzgebung* (the complementary restitution law that came about after the reunification of East and West Germany, concerning possessions spoilt under the Nazi regime) led to a similar result. Here the family von Klemperer was only interested in the restitution or compensation of confiscated plots of land ("*Grundstücke*").

The painting definitely did not lead a "hidden life" from the 1970s onwards. It was exhibited on multiple occasions and was displayed in a renowned West German museum. Victor von Klemperer's eldest son, Gustav-Victor, provided his collaboration to the catalogue drawn up in 1996 on private collections in the 1930s in Dresden and the artist Kokoschka. That catalogue mentioned that the painting was located in Ghent. Victor von Klemperer's children, three of whom were still alive at that time, took no action whatsoever.

Finally, the Commission wishes to point out that the '*Portrait of Ludwig Adler*' was registered in the specialist database *Lost Art* of the official German *Koordinierungsstelle* only after 2004, after all the children of Victor von Klemperer had died. As is known, the restitution request reached the Museum of Fine Arts only in January 2009.

5. The acquisition by the Ghent museum

The Commission was given full access to the entire acquisition file and documentation of the Ghent Museum of Fine Arts.

The painting was purchased from a renowned gallery established in London. In October 1987 the director of the Ghent museum applied for the full provenance of the painting. The gallery submitted a conclusive file on the painting's provenance together with an overview of the various exhibitions it had successively featured in.

For the complete record, the director of the museum also contacted his German colleague from the *Museum Folkwang* in Essen and asked for the reason the museum had sold the painting in 1976. From their correspondence it appears that nothing pointed at an uncertain or "suspicious" provenance, linked to the Second World War.

The Commission reaches the conclusion that the museum acted with due care upon the purchase of the '*Portrait of Ludwig Adler*' and strictly followed the internationally accepted ethical museum guidelines. Nothing points to hidden information, erroneous data or an inadequate provenance research.

6. Review in the light of binding law

In the first place the Commission examined which law applies to the question of ownership of the Ghent museum.

According to private international law, laid down in the Belgian law of 16 July 2004, the location of the revindicated asset determines which law applies. The rights *in rem* in respect of an asset are governed by the law of the State on the territory of which the asset is located when they are acquired (Article 87 PILC). Hence Belgian law applies in this case, the painting being located in Ghent at that time.

Only when the revindicated good is a stolen good, the law of the State on the territory of which the good is located upon its disappearance may be invoked. It is quite clear that we are not dealing with a "stolen good" in this case. The requesting party too does not raise any element of "theft" in the transaction between Victor von Klemperer and Dr. Herbert E. Kurz.

Belgian law of goods grants a direct ownership right to the purchaser with title and who acted in good faith upon the acquisition (Article 2279 Civil Code).

For the complete record, the Commission specifies that, if theft or involuntary loss at any time along the successive sales were to be invoked on the basis of the second section of the aforementioned article of the Civil Code, the short acquisitive limitation period of three years would apply. This period starts to run from the act of theft or loss and has expired a long time ago.

Because the restitution request expressly refers to it, the Commission also paid attention to the Allied restitution and reparation laws that were in force in the different occupational zones – except in the Soviet Zone. More specifically, reference is to be made to the American restitution law of 1947 (Law on Restitution of Identifiable Property – Military Law no. 59) since there are sufficient indications that Dr. Herbert E. Kurz brought the painting from the Soviet Zone to the American Zone in the course of that year.

The Allied legislation introduced a presumption of a sale under duress in respect of the transfer of Jewish property from 1933 onwards. This presumption was rebuttable under certain conditions (*inter alia* when the sale price appeared to be at arm's length or when it could be proven that the sale would also have taken place in the absence of pressure from National Socialism). The burden of proof rested on the purchaser.

A sale effected under duress could be nullified with retroactive effect. Acquisitive prescription could not be invoked, however the restitution claim had to be filed with the Allies before 31 December 1948. Here an important restriction in time prevailed.

The research done by the Commission has revealed that neither Victor von Klemperer's wife nor his children filed a restitution claim in accordance with this procedure in respect of any works of art, *a fortiori* the 'Portrait of Ludwig Adler', or even reported the painting.

On the basis of the preceding, the Commission concludes that, from the viewpoint of binding law, the City of Ghent has acquired the position of indisputable owner of the painting.

7. Review in the light of voluntarily accepted non-binding moral obligations

A Declaration endorsed on 3 December 1998 in Washington (containing the "Washington Principles") holds that among the 44 participating States, including Belgium, there is agreement that a number of non-binding principles shall be taken into account when investigating Nazi confiscated Jewish art works.

More specifically, an in-depth provenance research with a view to identifying looted art must be effected and a just and fair solution must be achieved with due regard to the particular circumstances and national legislation.

Later on, the Washington Principles were confirmed and their essence was taken over in Resolution 1205 of 4 November 1999 of the Council of Europe, in the Vilnius Declaration of 5 October 2000 and finally in the Terezin Declaration (Czech Republic) of 30 June 2009.

The latter Declaration also refers, besides to the term "*confiscated*", expressly to the concepts of "forced sales" and "sales under duress". The moral obligations remain voluntary though; they are applied in equity within the framework of the own legislation and are weighed against the particular facts and circumstances.

The Commission has ascertained that the painting was sold, not looted or transferred under National Socialism in Germany. The requesting party does not dispute this.

As the Commission is well aware of the grave injustice done to the Jewish population under Nazi rule, it has examined at its own initiative whether any element can point to a sale under duress, which – if that were the case – would give way to a "just and fair solution" on equitable grounds.

Not every sale by a former Jewish owner during the period of the Nazi regime is necessarily a forced sale. The international practice as it emerged in the handling of World War II related restitution cases is consistent in this respect. The advisory practice of the German *Beratende Kommission für die Rückgabe NS-verfolgungsbedingt entzogener Kulturgüter* also follows the same line.

Here once again it must be pointed out that the different moral obligations endorsed, from the Washington to the Terezin Declaration, invariably provide for an equitable solution with due regard to "*the facts and circumstances*" of the case examined.

The factual research reveals that the sale of the '*Portrait of Ludwig Adler*' did not take place in the context of a forced auction. Nor was the sale a consequence of the "*Aryanisation*" of Victor von Klemperer's possessions, a working method where the Jewish owner was forced to sell his property to an "Aryan". Finally, the purchaser Dr. Herbert E. Kurz did not hold any dominant position within National Socialism, an aspect that could possibly also point to a "forced sale". The requesting party does not assert this either.

The Commission has no knowledge of the price at which Victor von Klemperer sold the painting, *a fortiori* whether the sale price would have been significantly below the normal value. The requesting party did not bring forward any information in this respect either.

No matter which way one approaches this case, not one element points to a forced sale.

On the contrary, the published statement by the son Gustav-Victor in 1996 suggests that the reason for selling this painting in particular is to be situated in the private family sphere, namely because Victor von Klemperer's wife did not appreciate the painting at all. Victor von Klemperer had for that matter already tried to sell the painting during the exhibition in Vienna in 1937.

Until his departure to South Africa, Victor von Klemperer still disposed of a fixed pension allowance and enjoyed earnings from a number of board mandates. His sources of income had indisputably decreased, yet, as his memoirs reveal, had not dried up.

The allegation that Victor von Klemperer had sold the painting in an urgent need of money to emigrate abroad, does not fit in the overall picture of what happened in the period from September 1937 to April 1938. That Victor von Klemperer was thinking in 1937/1938 of leaving Germany appears indeed from this "prospection journey" to South Africa, however he was not then in an urgent need of financial means. His intention was to return after the journey and only at that time leave Germany for good. The *Reichskristallnacht* of November 1938 decided otherwise.

The sale took place against the general background of suppression of the Jewish population in Germany, however there were clearly other and more compelling reasons for selling exactly then the '*Portrait of Ludwig Adler*' after its returning from the exhibition in Vienna.

The Commission concludes that on the basis of the voluntarily endorsed moral principles, there is no identifiable ground to restitute the painting or compensate it in whole or in part in one or the other way.

8. General conclusion and recommendation

The restitution request refers to the Allied restitution laws on the one hand, and to the endorsed non-binding moral obligations on the other hand.

The Commission has reached the conclusion that the *Allied legislation* cannot be invoked here. For it appears from the historical research that the von Klemperer family has failed to secure its rights within the prescribed period of time. They did not formulate any restitution claim in that context.

For this reason, and also on the basis of the examination in the light of the *Belgian law of goods*, the Commission concludes that the City of Ghent is the indisputable owner of the painting since late 1987. The Commission advises the City of Ghent to take a clear and unambiguous stance in this respect.

The examination in the light of the *moral obligations* was effected thoroughly in all its aspects. No direct or indirect duress was established that would have led Victor von Klemperer to sell the painting from a position that was unfavourable to him.

It is obvious that reference should be made to the general climate of the persecution of the Jews from which the von Klemperer family too would not escape and which in the minds of the family gradually made the idea grow to emigrate abroad.

According to the testimony of one of the sons of Victor von Klemperer, the reason why specifically the '*Portrait of Ludwig Adler*' was sold in 1937/1938 must be situated in the private sphere and in the appreciation of the family. Victor von Klemperer had already searched for a purchaser during the exhibition in Vienna shortly preceding the sale.

Also decisive in the assessment, is the conclusion that neither Victor von Klemperer's wife nor his children did ever mention the painting concerned in any post-war restitution or compensation claim of which they could avail themselves, although they had several opportunities to do so. The painting turned up in the German '*Lost Art*'-database only after 2004, when all the children of Victor von Klemperer had already died.

Eventually all the above leads to the following ***recommendation***:

The Commission is of the opinion that the City of Ghent does not have any restitution obligation nor any obligation, in the framework of the Washington or the Terezin Declarations, to offer the requesting party a partial compensation.

Ghent, 8 June 2011,

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