

Evelien Campfens (Ed.)

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# Fair and just solutions?

Alternatives to litigation in Nazi-looted art disputes: status quo and new developments

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Fair and Just Solutions?



# FAIR AND JUST SOLUTIONS?

*ALTERNATIVES TO LITIGATION IN NAZI-LOOTED ART  
DISPUTES: STATUS QUO AND NEW DEVELOPMENTS*

EVELIEN CAMPFENS (ED.)

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international publishing

*Published, sold and distributed by Eleven International Publishing*

P.O. Box 85576

2508 CG The Hague

The Netherlands

Tel.: +31 70 33 070 33

Fax: +31 70 33 070 30

e-mail: [sales@budh.nl](mailto:sales@budh.nl)

[www.elevenpub.com](http://www.elevenpub.com)

*Sold and distributed in USA and Canada*

International Specialized Book Services

920 NE 58th Avenue, Suite 300

Portland, OR 97213-3786, USA

Tel.: 1-800-944-6190 (toll-free)

Fax: +1 503 280-8832

[orders@isbs.com](mailto:orders@isbs.com)

[www.isbs.com](http://www.isbs.com)

Eleven International Publishing is an imprint of Boom uitgevers Den Haag.

ISBN 978-94-6236-471-4

ISBN 978-94-6274-210-9 (E-book)

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Printed in The Netherlands

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# FOREWORD

To mark its tenth anniversary on Tuesday 27 November 2012, the Dutch Restitutions Committee staged an international symposium at the Peace Palace in The Hague, the building which is “as mighty and magnificent as the idea of world peace itself”, to quote the words spoken at its opening in 1913. As the seat of the Permanent Court of Arbitration and the International Court of Justice of the United Nations, for over the past one hundred years the Peace Palace has become an icon of peace and justice. With this in mind, one could not have imagined a more suitable place for a symposium on the issue of art treasures looted by the Nazis in the Second World War.

The topic of restitution cannot be considered solely from a legalistic perspective. Restitution cases cannot be regarded outside the context of profound emotions and human drama. A large proportion of the hundreds of thousands of works of art ‘taken’ by the Nazis from the Netherlands, Belgium, France and other European countries came from the homes of Jewish families who had been transported to concentration camps. Many of the owners of this looted art did not survive these camps. A cold reception and a looted home awaited those few who did return. And if, by some miracle, they had survived the camps but their family had been murdered, they had other things on their mind than missing household effects and artworks.

Surviving children are often not exactly sure of what was actually in the home of their parents. But if after many years something has been returned, it signifies much more to the survivors than simply ownership of a precious piece of art. The return of looted art to the rightful heirs means for them a tangible memory of parents or grandparents whom they – in many cases – never or hardly knew. Restitution for them also feels like the fulfilment of a debt of honour. This makes the burden of responsibility of the work of the Restitutions Committee even heavier.

The Restitutions Committee was initially established to advise the government on claims to works in the national art collection. The Committee has since made 130 recommendations, virtually all of which have been adopted. The large majority of these recommendations involve works of art that disappeared into Germany during the occupation and were later restituted by the Allies to the Dutch government. Nowadays the Dutch national collection still contains an ‘heirless art collection’ of approximately 4,000 works of art, which is known as the *Nederlands Kunstbezit-collectie* (Netherlands Art Property Collection), or NK collection for short.

It is not only national governments that are involved in disputes concerning Nazi-looted art, however, but also numerous other parties, such as private owners, foundations and museums. Most of the advisory committees in other countries, which at the occasion of the symposium in the Peace Palace met for the first time, focus mainly on disputes involving state collections. When the Dutch Restitutions Committee was established, the government gave it a second duty: the independent settlement of disputes involving works of art owned by parties other than the government, including works outside national collections, as a neutral third party. The Restitutions Committee fulfils this task by providing binding expert opinions.

To date, 14 cases of this kind have been submitted to the Restitutions Committee. We expect this number to grow considerably in the coming years. In 2009, the Dutch Museums Association and the government took the initiative to carry out a museum survey, focusing on acquisitions made by Dutch museums from 1933 onwards that may have an 'unfair and unjust' Nazi past. On 29 October 2013, the results of this four-year investigation have been published in an online database, in which the available information of at least 139 art works with a problematic provenance can be found.<sup>1</sup>

When I was State Secretary of Health, Welfare and Sport from 2007 to 2009, I held the political responsibility for the care of victims of war. At that time in the policy I implemented, I tried to make clear that the government has an important duty in terms of dealing with debts of honour and shaping special solidarity. This is a task for the government, as is the duty to keep the memory of war alive. In my former position, I experienced at close hand how important it is to deal carefully with the legacy of the Second World War, echoes of which still reverberate in our collective memory to this day. It is about recognising suffering and losses incurred.

As the daughter of a father who was in a Japanese prisoner of war camp as a child, the war was a constant presence in my childhood too. So I also feel personally involved in this subject. Naturally my personal experiences do not determine my policy, but at the same time I do not have to completely erase my personal motivation. I have always tried to strike a balance between distance and involvement. But since involvement is not the same as acceding without question to the wishes of the parties concerned, I am very happy indeed with the independent recommendations of the Restitutions Committee.

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1 'Museale Verwervingen Vanaf 1933' (Nederlandse Museum Vereniging) <[www.musealeverwervingen.nl](http://www.musealeverwervingen.nl)> accessed 17 February 2014.

In this publication, which is the result of the 2012 symposium in the Peace Palace, the contributors will discuss the complex matter of the settlement of disputes involving Nazi-looted art. One of the main questions is whether more international coordination is necessary in developing standards for the realisation of fair and just solutions; not only for governments but also – and especially – for other parties involved or market parties. The Washington Principles of 1998, signed by 44 nations, constitute the guidelines for handling all claims. At that time, national governments played a leading role, but now, more than 15 years later, it is time for other parties to become involved.

Jet Bussemaker  
Minister of Education, Culture and Science



## PREFACE

This book was compiled following *Fair and Just Solutions? Alternatives to Litigation in Nazi-looted Art Disputes: Status Quo and New Developments*, a two-day conference on alternative dispute resolution in the field of Nazi-looted art held at the Peace Palace in The Hague in November 2012. The first day of the conference consisted of a closed meeting of five similar commissions established by national governments to manage independent dispute resolution of claims involving Nazi-looted art. The open discussion and the comparing of mandates and policy frameworks proved helpful for mutual understanding, and to shed light on existing differences. The second day of the conference took the shape of a public symposium for our colleagues from the advisory committees, scholars, experts, representatives of claimants, museums and the art trade, and interested others. Our aim was to provide attendees with a forum for establishing the current state of affairs and sharing their thoughts about the right way to move forward.

The title *Fair and Just Solutions?* is a reference to the norm for the assessment of ownership claims to Nazi-looted art as formulated in the Washington Principles. The question mark is a reference to the (potential) lack of clarity of that norm and the implication of the words that follow it: *recognizing this may vary according to the facts and circumstances surrounding a specific case*. In addition, the question of *how* parties can come to such a fair and just solution is also important. These questions were central to the design of the conference and are also central to this book.

Since November 2012, it has become clear that the questions that formed the guideline for the conference have lost none of their importance. A case with a high level of global coverage such as the Schwabing Art Trove (Gurlitt case) shows that the issues that governments may be faced with are no longer restricted to heirless art or even public collections but extend to private ownership. In a reality in which existing legal frameworks seem able to provide little guidance in ethical dilemmas surrounding restitution issues, the need for alternative frameworks becomes all the more pressing. By publishing this volume, we hope to contribute towards the ongoing international discussion and towards more extensive cooperation in this field.

This book focuses on shared topics of non-governmental claims, with the limitations partly being due to practical considerations such as space and time. This approach will undoubtedly exclude topics which others consider to be important.

We wish to thank our colleagues from the other commissions for supplying information about the situation in their country: Muriel de Bastier, Christoph Bazil, Eva Blimlinger, Mark Caldon and Michael Franz. We are honoured that former US Special Envoy for

Holocaust Issues Douglas Davidson was found willing to contribute a description of the situation in the US.

Rob Polak agreed to collaborate on this volume by reading over the report of the panel discussion he led during the conference and writing an epilogue to the discussion. We are grateful to him and to the participants in the panel discussion, all distinguished representatives of the various parties and experts, for reading over, making corrections and adding to the report of the discussion: Taco Dibbits, Monica Dugot, Rudi Ekkart, Wesley Fisher, Corinne Hershkovitch, Willem Jan Hoogsteder, Lawrence Kaye, Stephen Knerly Jr., Marc Masurovsky, Isabel Pfeiffer-Poensgen and Lucian Simmons.

A significant part of this book consists of papers by leading experts from the academic world: Norman Palmer, Marc-André Renold and Alessandro Chechi, Wouter Veraart and Matthias Weller. We are extremely appreciative that they have taken the time and effort to write down their thoughts and insights on the – far from straightforward – question concerning ‘key elements of fair and just solutions’. The contributions from these authors provide important insights which will be building blocks for the discussion on dispute resolution in this field.

This book also features three interviews with claimants who were found willing to share their personal experiences to further a better understanding of what motivates families when engaging in the restitution procedures, which often take a great deal of time and energy. These are also important building blocks, and we are extremely grateful to Ella Andriesse, Alfred Jacobsen, Bas van Lier and Robert Sturm for their willingness to cooperate.

Many members of staff of the Bureau of the Dutch Restitutions Committee were involved in the creation of this volume. Without the efforts and ideas of Annemarie Marck, deputy-director, this book would not have been as it is. We thank her in the first place. We also specifically wish to mention Icha El Achkar, management-assistant, and her unceasing efforts throughout this project. We thank Marleen Schoonderwoerd and Sophie Starrenburg for all their assistance in the research, proofreading, indexing and editing work. We are grateful to Abacus Translation, Ian Curry-Sumner, Max Denyer-Green and Lynne Richards for the translation and revision work. We also thank Selma Hoedt of Eleven International Publishing for her confidence and patience.

Finally, we wish to acknowledge the financial support of the Dutch Ministry of Education, Culture and Science. We would like to thank Jet Bussemaker, Minister of Education, Culture and Science, and Marjan Hammersma, Director General of Culture and Media, for their commitment and unceasing support.

Evelien Campfens, editor

Willibrord Davids, chairman Dutch Restitutions Committee

## ABBREVIATIONS

AAMD	Association of Art Museum Directors
ADR	Alternative Dispute Resolution
BHG	Bureau Herkomst Gezocht [Origins Unknown Agency]
BrüG	Bundesrückerstattungsgesetz [Federal Restitution Law]
CIVS	Commission pour l'indemnisation des victimes de spoliations intervenues du fait des législations antisémites en vigueur pendant l'Occupation [Commission for the Compensation of Victims of Spoliation resulting from the anti-Semitic legislation in force during the Occupation]
CRA	Commission de Récupération Artistique [Commission for the Recuperation of Works of Art]
DCMS	Department for Culture, Media and Sport
DM	Deutsche Mark
EPCAP	Enemy Property Claims Assessment Panel
ERR	Einsatzstab Reichsleiter Rosenberg für die besetzten Gebiete
EU	European Union
FRG	Federal Republic of Germany
GDR	German Democratic Republic
Hergo	Bureau Herstelbetalingen- en Recuperatiegoederen [Bureau for Restoration Payments and the Restoration of Property]
ICA	International Council on Archives
ICOM	International Council of Museums
ICTY	International Criminal Tribunal for the Former Yugoslavia
JAMS	Judicial Arbitration and Mediation Services
Liro	Lippmann, Rosenthal & Co.
MFAA	Monuments, Fine Arts and Archives
MNR	Musées Nationaux Récupération [the French heirless art collection]
MOMA	Museum of Modern Art of New York

## ABBREVIATIONS

MP	Member of Parliament
NARA	National Archives and Records Administration
NBI	Nederlandse Beheersinstituut [Netherlands Property Administration Institute]
NIOD	Instituut voor Oorlogs-, Holocaust- en Genocidestudies [Institute for War, Holocaust and Genocide Studies]
NK collection	Nederlands Kunstbezit-collectie [Netherlands Art Property collection, the Dutch heirless art collection]
NMDC	National Museum Directors' Conference
NSDAP	Nationalsozialistische Deutsche Arbeiterpartei [National Socialist German Workers' Party]
OBIP	Office des Biens et Intérêts Privés [Office for Private Property and Interests]
PCA	Permanent Court of Arbitration

# 1 INTRODUCTION

*by the editor*

Suppose, a museum discovers a painting by Jan van Goyen, which recent provenance research shows to have left the possession of a Jewish family in Germany in 1935. Such a situation could arise anywhere. The Van Goyen may have been part of a national collection since the post-war period as ‘heirless art’ – such as the Musées Nationaux Récupération (MNR) collection in France or the Nederlands Kunstbezit (NK)-collection in the Netherlands – but equally may have changed hands many times before ending up in the museum. Another possibility is that our Van Goyen belongs to a private collector who gave it on loan to the museum in question. The reader will be able to come up with numerous variations on this theme – the Van Goyen being in a public as well as in a private collection. To cite a well-known case, the work might still be in the possession of the (heir of the) person that acquired it in Nazi Germany. Or perhaps the Van Goyen is not in a museum but is offered for sale at an auction. If a claim is filed for our Van Goyen, there is a good chance – verging on certainty – that the outcome of that claim, and the procedure leading up to it, will vary depending on where our painting has turned up.

In many countries, it would now appear to be generally accepted that museums and other parties must conduct thorough provenance research in cases of this nature. While this (pro-active) duty to research collections is an important development, this book does not deal with research.<sup>1</sup> Our main topic here is the legal framework for ownership claims by the heirs or dispossessed owners. Three related questions run through the book as a recurrent theme:

1. What is the status quo with regard to the ‘fair and just solution’ norm introduced in 1998?
2. What procedures for arriving at a solution are available to parties?
3. How do things stand in terms of international cooperation?

## 1.1 RECENT HISTORY

That claims for the restitution of Nazi-looted art, such as the Van Goyen, should be taken seriously is a conviction undoubtedly shared by us all. This has not always been the case. It became commonplace after the methods and scale of the looting by the Nazi regime

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<sup>1</sup> The following types of research can be identified: proactive research prior to any claim (i), research in the event of a claim (ii) and research in connection with the purchase or sale of artworks (iii).

became widely known towards the end of the last century, and after it was realised that thousands of these works of art were still held in national collections of 'heirless' art – often without the justification of a proper search having been conducted for the original dispossessed owners in the post-war era. The adoption of the Washington Principles in 1998 codified, for the first time in 'our' era, the principle that claims involving Nazi-confiscated art still deserve serious consideration. With regard to ownership issues, the relevant sections of the Washington Principles state:

- If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.
- Nations are encouraged to develop national processes to implement the Washington Principles, particularly as they relate to alternative dispute resolution mechanisms (ADR) for resolving ownership issues.<sup>2</sup>

## 1.2 STEPS REGARDING NATIONAL COLLECTIONS

In the years that followed the adoption of the Washington Principles, some national governments took rigorous steps to investigate their collections of 'heirless' art and adopted measures making it easier for dispossessed owners to put forward claims to works of art in state collections. Normal limitation periods were often set aside under the standards for these claims. In addition to this type of pro-active research into specific – by definition 'suspect' – collections under the direct authority of national states, governments and museum organisations in many countries have taken action and initiated research projects with a view to the identification of Nazi-looted art in museum collections, in many cases at the same time announcing policy rules or guidelines for dealing with claims.<sup>3</sup> In response to the call for alternative dispute resolution mechanisms around the turn of the millennium, several European governments established independent panels to research and advise on claims involving works of art in – mostly – public collections.

Part I of this publication will attempt to give an impression of the existing situation (The Status Quo). In order to provide an overview, Chapter 2 starts with a selection of legal instruments directly or indirectly relevant to Holocaust-related art claims, as sources for inspiration. It looks back at the basic principles underlying the post-war restitution system as envisaged in the Inter-allied Declaration of 1943, as well as giving a rundown of the development of the norm regarding restitution of looted art in general. Whilst these

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2 Attached as Appendix 2. Please refer to Chapter 2 for an overview of the international declarations subsequent to this repeating this 'fair and just' norm.

3 Chapter 3 for such a 'provenance' project by the Dutch Museums Association.

legal instruments may not be directly applicable to present-day claims, they may prove refreshing in the context of a reorientation. Chapter 2 concludes with an overview of contemporary international instruments of ‘soft law’ for Nazi-looted art claims, ranging from the Washington Principles of 1998 to a draft UNESCO Declaration and the Terezín Declaration in 2009.

Chapter 3, by Annemarie Marck and Eelke Muller, takes a historical look at the situation in five countries whose governments decided to establish advisory committees to deal with Second World War-related art claims: Austria, France, the United Kingdom, the Netherlands and Germany. For each of these countries, an overview is given of the historical developments, resulting in the establishment of a national advisory committee, followed by a summary of some discerning characteristics and terms of reference for each committee. The information on the committees was based on information provided by the respective committees. A comparison of the five committees, based on an analysis of their recommendations among other things, remains outside the scope of this volume.

Part 1 also includes an impression of the situation in the United States by Douglas Davidson (Chapter 4). In his contribution, Davidson explains, with reference to the role that the United States has historically played in the development of the norm, what vision the US government has on ownership issues regarding Nazi-looted art. He furthermore discusses the needs and – limited – possibilities for establishing an ADR panel such as those described above in the United States, referring among other matters to the wider possibilities available to the normal judiciary for addressing restitution claims.

### 1.3 AND NOW?

The measures taken by national governments notwithstanding, it is impossible to maintain at present that Nazi-looted art claims are no longer an issue. It is clear that questions regarding the legal status of works of art with a Nazi history remain unresolved, also – and maybe even more so – *outside* the realm of (heirless) art collections under the direct influence of governments. Emotional public debates and long-fought cases testify to this. A case with a high level of global coverage such as the Schwabing Art Trove (Gurlitt Case)<sup>4</sup> shows that the issues are no longer limited to national or public collections but extend to private ownership.

What is the significance of the 1998 instruction to those parties that ‘fair and just solutions’ should be sought which “may vary according to the facts and circumstances surrounding a specific case”, a norm since reiterated in numerous international declarations? This principle implies not only a pro-active stance in terms of research but also the

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<sup>4</sup> For a description, please refer to Section 3.5.

development of criteria for the assessment of claims resulting from that research. Which circumstances are of importance for an outcome, what *is* the just thing to do?

Ownership issues involving Holocaust-related art typically fall under the scope of national property legislation. It might be argued that the outcome of such disputes should indeed be determined, ultimately, by a neutral judge assessing the legal title. However, the existing legal framework in most countries provides little support for a solution as envisaged in the Washington Principles. Limitation periods on the submission of claims and the creation of a valid new title through good-faith purchase in civil law countries<sup>5</sup> are just a few of the legal concepts that stand in the way of a merit-based assessment of these claims. Consequently, a work of art that is ‘tainted’ may remain so despite a good legal title. This could make it impossible for the work to be sold or to go on loan to other countries. In other words, quite apart from the moral aspects, there seems to be a practical need to find solutions to these issues outside the directly applicable law, and not only for works of art in collections under direct authority of national governments.

It was this context that formed the starting point upon which the Washington Principles among others refer to *alternative dispute resolution mechanisms* to settle ownership issues. However, in alternative procedures there will also be a need for clear norms. To cite Matthias Weller, even Hercules would find it far too big a task “to clean the Augean stables of the injustice of Nazi crimes, solely on the basis of the general and totally abstract rule that ‘fair and just solutions should be achieved’”.<sup>6</sup> The following questions need answers:

1. Special status for Holocaust-related art?

The first, rather basic, question is in what sense Holocaust-related art claims differ from other claims involving spoliated art. Is there a fundamental difference, and, if so, what is its essence?

2. What is fair and just?

Given the broad notion and unspecific nature of the term ‘fair and just’, the substance of this criterion is open to any number of different interpretations. What circumstances determine whether and when restitution to (the heirs of) the dispossessed former owner is appropriate or whether a different solution is preferable? This overarching question can be expanded into many sub-questions, with two examples being:

– What is the position of the current possessor?

Can it be said that a fair and just solution depends on the status of the present possessor or on their good faith? For example, claims to state-owned property (in particular the ‘heirless’ art collections) are generally assessed differently from claims to works of art in other collections.

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5 Please refer to Chapter 4, among others, in which Davidson discusses the principle that “a thief cannot pass title (*nemo dat quod non habet*)” under common law in the US, which simplifies legal recourse.

6 Please refer to Weller, Chapter 9.

– What is covered by the term ‘Holocaust-related or Nazi-looted art’?

The Washington Principles refer to ‘confiscated art’, while other instruments use the terms ‘forced’ or ‘coerced sales’. Should this be taken as restrictive, meaning that the term covers only losses by persecuted persons? And what constitutes a forced sale? What if the Van Goyen from our example was sold in Switzerland in 1935 by a Jewish collector from Germany *en route* to a safe haven? Would such a loss also qualify for special treatment under the ‘fair and just’ rule?<sup>7</sup>

3. Neutral factual research

Given the fact that the loss may have occurred 80 years ago under a number of quite different circumstances, factual research is an important part of solving disputes concerning Nazi-looted art. Research might reveal that what at first sight appears to be a voluntary sale was in fact a forced sale, and vice versa. What is the role of independent and neutral research in this regard? And how does one deal with the reality that some facts cannot be determined with certainty?

4. Time limitation

What role should the issue of time play in the assessment of Holocaust-related art claims? This question touches on theoretical aspects<sup>8</sup> as well as more pragmatic matters. How and when should we achieve legal closure, and what conditions should be met before we can draw the line under the subject? Should a limitation period apply, as is normally the case in other ownership claims? And, if so, what might a valid criterion be?<sup>9</sup>

5. How to get there?

As mentioned before, the Washington Principles (no. XI) describe ADR mechanisms as an instrument for resolving ownership issues. Is this also true of disputes involving parties other than governments, or are regular courts the most appropriate venues for these? Besides, is it possible to discern procedural elements that are of key importance for a fair and just solution in ADR procedures? And, given the fact that most of these disputes are international in character, is there a need for more international coordination at this level? At an earlier stage, the idea of setting up a specialised arbitral chamber at the Permanent Court of Arbitration was put forward; what do the experts think now?<sup>10</sup>

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7 Both Palmer and Weller discuss this point in their contributions; please refer to Chapters 7 and 9, and please refer also to Section 2.4.1. Another relevant question, outside the scope of this book, is how governmental claims to works looted by the Nazis from public collections in Eastern countries fit into the discussion that focuses mainly on private (Jewish) property.

8 What is the role of law? Please refer to the contribution by Veraart, Chapter 10.

9 Please refer to the Panel Discussion and the contribution by Polak (Chapters 5 and 6).

10 In a comprehensive publication of the Permanent Court of Arbitration on cultural property disputes it was proposed that the PCA be given a role in dealing with this type of dispute. See Owen Pell, ‘Using Arbitral Tribunals to Resolve Disputes Relating to Holocaust-Looted Art’ in *The International Bureau of the Permanent*

These are recurring questions throughout this book and specifically form the guideline for the discussion with stakeholders set out in Part II. The participants in this discussion, held during the symposium which gave rise to this publication, are representatives from various countries of the parties involved in these disputes: claimants' lawyers, interest organisations, museum representatives, auction houses, art dealers and experts. In alphabetical order Taco Dibbits, Monica Dugot, Rudi Ekkart, Wesley Fisher, Corinne Hershkovitch, Willem Jan Hoogsteder, Lawrence Kaye, Stephen Knerly, Marc Masurovsky, Isabel Pfeiffer-Poensgen and Lucian Simmons give their views on the aforementioned questions by topic (Chapter 5). In his contribution, Rob Polak, who chaired the panel discussions during the conference, looks back on the debate in Chapter 6. He gives his personal views on the questions and makes a thought-provoking suggestion for interpreting the 'fair and just' rule in relation to the time limitation factor.

#### 1.4 BUILDING BLOCKS

Part III (Chapters 7-10) revisits the five aforementioned topics. In this part of the publication, five academics and experts in the field give their views on the development of the norm and how we can do better. Through these contributions, Part III provides important building blocks for the further development of the norm. What follows is an impression of these contributions.

Norman Palmer, keynote speaker at the conference in 2012, uses his contribution to explore a collegiate approach to Holocaust-related claims. He groups his remarks around five principal themes: (1) the modern backdrop against which modern Holocaust-related claims are deliberated; (2) the agonising and often futile nature of court proceedings; (3) the tendency towards extra-curial resolution of art-related disputes; (4) the objective principles by which any self-respecting justice system, curial or non-curial, should measure itself; and (5) the opportunities for international cooperation.

In the first paragraph, he presents a summary of the (fragmented) legal framework for Holocaust-related art claims and mentions two topics that should be considered in connection with the approach to Nazi-looted art claims: firstly, the concept of art mobility (making collections more visible through international loans)<sup>11</sup> and, secondly, the increase in immunity from seizure legislation (under which the recipient body or country involved guarantees that a work will not be subjected to court procedures while on loan to that

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Court of Arbitration (ed), *The Permanent Court of Arbitration/Peace Palace Papers: Resolution of Cultural Property Disputes* (Kluwer Law International 2004). As it turns out, arbitration would not seem to be popular in the field, see Renold and Weller in Chapter 8.

11 Commitment in 167 of the Lisbon Treaty of 2007, calling for non-commercial cultural exchanges; see Palmer, Chapter 7.

country). The resolution of Nazi-looted art disputes is a precondition for trouble-free international loans and as such has a direct bearing on art mobility. As Palmer puts it: “Objects must be made fit to travel and this requires the removal of any blemish on their provenance. Only an imprudent borrowing institution would require less than a clean bill of health”.

In two subsequent paragraphs, he discusses various obstacles to assessing restitution claims by regular judicial process and considers the benefits of ADR. He reminds us of some key concepts in this regard, including that “hard cases make bad law”.

What follows is Palmer’s view on key principles for ‘fair and just solutions’. These include general principles of justice, such as impartiality of the forum, transparency of the procedure, renouncing technicality and giving reasoned decisions that can be used as meaningful precedents. He also discusses a great many substantive points for attention, including:

- (earlier) compensation that may have been received for a work of art by the former possessor;
- the question of a claimant’s (distant) relation to the original owner; and
- the matter of cross-border persecution and the causal link between persecution and loss.

According to Palmer, we should also ask ourselves what the fundamental principle is. Is restitution of all objects taken from victims the only true means of reversing the evils of that era? Or should the fundamental principle be to adapt the remedy to the specific facts of the case, to produce a solution that is fact sensitive and does not commit the error of treating unlike cases alike? With regard to the international aspect, Palmer stresses that it would seem fair and just that claimants should expect broadly similar treatment from different jurisdictions. Palmer concludes by setting out his ideas on international cooperation. The responsibilities that states have taken upon themselves as well as the complexity of the subject matter, mean that cooperation is needed. He does not envisage this as a supranational claims process but rather as a non-governmental body which exists independently of international sanction but affords an independent process to which nations and individuals might refer claims.

The contribution by Marc-André Renold and Alessandro Chechi (Chapter 8) consists of an analysis of international practice and trends, partly based on the results of their ArThemis database of case studies in the field of Art and Law.<sup>12</sup>

In their contribution, they give sample cases and an overview of different forms of dispute settlement available to parties: litigation before national courts or alternative means

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12 Marc-André Renold, ‘ArThemis – How We Got There and Where From Now’ in Marc-André Renold, Alessandro Chechi and Anne Laure Bandle (eds), *Resolving Disputes in Cultural Property* (Schulthess 2012).

of dispute resolution. Their analysis is that while litigation is sometimes an option – more commonly in the United States than in Europe – as a rule alternatives such as negotiation, mediation and conciliation are necessary. They continue by considering various solutions. It turns out that many different and creative solutions can be found in Nazi-looted art cases, varying from restitution, with or without conditions, to ex gratia payments or sale of the art object with a division of the selling price. Other creative solutions include loans and co-ownership of the object.

On the subject of ‘how to get there’ and the question of whether further international cooperation is needed, they argue that it is indeed time for further international cooperation. This should not be by means of an international forum since, in the view of Renold and Chechi, the conditions for such an undertaking have not yet been met. So as things stand, Holocaust-related disputes can only be resolved on a case-by-case basis. However, they do argue in favour of international cooperation with a flexible and non-bureaucratic approach, for example, through the establishment of an international platform for the resolution of Holocaust art restitution claims for sharing knowledge and previous experiences.

In Chapter 9, Matthias Weller addresses the question of whether, from an academic point of view, it is possible to identify key elements, rules of law, to help us answer the question of what constitutes a just and fair solution under the Washington Principles. In this contribution – in which Hercules is staged as the great judicial hero as in Dworkin’s theory of justice – the starting point, from a theoretical point of view, is that achieving just and fair solutions is particularly difficult on the basis of the general and abstract rule that ‘just and fair solutions should be achieved’. He illustrates these difficulties with some examples that demonstrate the inconsistency in outcomes – and inconsistency and unpredictability constitute *injustice*.

He therefore suggests that we start working on a restatement of restitution principles and rules, drawing on the various judgments, awards and recommendations. Until such a time as we have a system that provides adequate guiding principles and rules for directing us towards a solution in each and every case, Weller stresses the importance of procedure. As elements of procedural justice, he names (i) highest possible reputation of decision-makers, (ii) rules enacted by someone other than the decision-maker and (iii) trust of the public in the decision-making system. The fact that the second condition has not yet been met makes the other two conditions all the more important. With regard to the third condition, he stresses that specific rules for the procedure should be put into place. Besides, a precise reasoning of the decision is of crucial importance, in particular given that we do not have sufficiently established principles and rules for a merit-based decision.

Wouter Veraart takes us – in Chapter 10 – back to the question of what the role of a lawyer, the law, can actually be in cases such as this involving extreme injustices and the passage of time. This role of law, says Veraart, should not be overestimated; it is modest.

He argues that the main role of the law in cases involving historic injustices is to develop legal frameworks to enable and encourage parties to find binding solutions on a more voluntary basis in order to avoid ad hoc solutions in every case. He reaches this conclusion by identifying three ways of dealing with past injustices: *forgetting* (through amnesty or statutes of limitation, in a desire to establish order after a period of serious conflict), *remembering* (by trying to redress past wrongs as far as humanly possible, despite the passage of time) and *reconciliation*.

Veraart explains that the concept of reconciliation is of particular importance in the field of Nazi-looted art. Law's principal contribution would seem to consist of offering general legal and ethical guidelines which contain elementary rules and principles of due process and provide an acceptable structure within which parties can operate on an equal level of mutual respect.

## 1.5 IN SUMMARY

In summary, this publication asks what the status quo is of the legal framework for Nazi-looted art claims. What precisely is meant by a 'fair and just solution', given the complications and complexities that characterise most cases of this nature? Who monitors compliance with this norm, and is more international cooperation needed on that level? To this end, Part I (*The Status Quo*) provides – as a background – a selection of legal instruments which could serve as a source of inspiration, an overview of the situation for the five European countries which have established ADR panels and a view from the United States. Part II (*The Parties*) elaborates on the positions of various stakeholders on the five aforementioned sub-questions, while in Part III (*How Can We Do Better?*) experts give their views on the subject matter and make recommendations for the development of the norm in the future.

In addition, at the end of each part of this book, interviews can be found with claimants who, as (great-)grandchildren of Jewish art owners, have been directly confronted with Nazi looting and have gone through a claims procedure to get the artworks in question returned. These experiences may have a bearing on the question as to the essence of the subject matter: what should constitute fair and just solutions and how to find them.



# PART I

## STATUS QUO

Part I gives an overview of the present situation in the field of Nazi-looted art claims and background information for the central questions in this book. Starting in Chapter 2, it looks at a selection of old and new instruments of hard and ‘soft’ law which may serve as inspiration when thinking about how to substantiate the ‘fair and just’ norm. Next, Chapter 3 considers the situation in a number of western European countries which have established similar independent advisory panels to deal with claims involving Nazi-looted art. In chronological order of establishment, these are Austria (3.1), France (3.2), the United Kingdom (3.3), the Netherlands (3.4) and Germany (3.5). The restriction in this chapter to the five countries mentioned is due to practical considerations. Representatives of the advisory panels concerned not only actively participated in the Fair and Just Solutions symposium on 27 November 2012 in The Hague but also met in a closed session prior to the meeting on 26 November 2012 at which they exchanged experiences. To conclude the first part, Chapter 4 features a view from the United States (US) by former US Special Envoy for Holocaust Issues Douglas Davidson who attended both the aforementioned meetings (the first day as an observer).



## 2 SOURCES OF INSPIRATION: OLD AND NEW RULES FOR LOOTED ART

*Evelien Campfens\**

What follows in this chapter is a selection of legal instruments which could serve as a source of inspiration in the quest for ‘fair and just solutions’ for Holocaust-related art claims. This chapter looks back at the development and basic principles underlying the post-war restitution system, based on the Inter-Allied Declaration of 1943, and takes a closer look at elements of national restitution legislation introduced after the War. It also includes a brief discussion of the post-war developments and the codification of norms for the restitution of misappropriated art in international legal instruments. Whilst these norms are not directly applicable to Holocaust-related art claims, they are nonetheless interesting. This overview would not be complete without a list and discussion of contemporary international instruments, so-called ‘soft law’ in the field with which it concludes.

### 2.1 EARLY DEVELOPMENTS OF THE NORM

The obligation to return cultural property looted in war is the counterpart to the prohibition of pillage. Both these norms – the prohibition and the obligation – today have acquired the status of international customary law.<sup>1</sup> The reader needs only to think of the Horses of Saint Mark on Piazza San Marco in Venice or the *ius praedae* norm of Roman law (the right to spoils) to realise that this was not always so.<sup>2</sup> One of the earlier references, cited here as a reminder that restitution of looted cultural property is not just a contemporary concern, is from Hugo Grotius in his *De jure belli ac pacis*:

But things, taken in unjust war, are to be restored, not only by those, who have taken them, but by others also into whose hands they may have by any means

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\* I am indebted to Rob Polak and Norman Palmer for their well thought comments on an earlier version of this chapter and to Annemarie Marck and Sophie Starrenburg for their research for section 2.4.

1 Wojciech Kowalski dates this status of customary international law back to 1815 in, ‘General Observations: Claims for Works of Art and Their Legal Nature’ in The International Bureau of the Permanent Court of Arbitration (ed), *The Permanent Court of Arbitration/Peace Palace Papers: Resolution of Cultural Property Disputes* (Kluwer Law International 2004) 37; Alessandro Chechi, *The Settlement of International Cultural Heritage Disputes* (Oxford University Press 2014) 270.

2 And, taking into account recent looting in, e.g., Syria or Iraq, also that existing norms can be violated.

fallen. For, as the Roman lawyers say, no one can convey to another a greater right than he himself possesses.<sup>3</sup>

Early provisions in peace treaties for the return of looted cultural property<sup>4</sup> eventually led to the codification of this prohibition of looting and the legal protection of (private and state owned) cultural property in the 1907 Hague Convention concerning the Laws and Customs of War on Land.<sup>5</sup> The relevant articles read as follows:

Art. 46: Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.

Art. 47: Pillage is formally forbidden.

Art. 56: The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

The Hague Convention on Land Warfare of 1907 contains no specific provisions for the restitution of looted art objects, only a liability to pay compensation to the country of origin in the event of the norm being breached.<sup>6</sup> However, provisions for the interstate restitution of looted artworks were incorporated in the post-First World War peace treaties that followed. For example, the Treaty of Versailles of 1919 stipulated in Article 245 that the German government must restore to the French government “the trophies, archives, historical souvenirs or works of art carried away from France by the German authorities in the course of the war of 1870-1871 and during this last war.”<sup>7</sup> Interestingly, under article 247 it was also stipulated that the leaves of the triptych of the Mystic Lamb by the Van

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3 Hugo de Groot, *De jure belli ac pacis* (1625). See Part III, Chapter 12, V on the protection of cultural objects during war. On restitution after ‘unjust’ wars, see Chapter 16.

4 Like the 1648 Treaty of Münster – Peace Treaty between the Holy Roman Emperor and the King of France and their Allies after the Thirty Years’ War, signed at Münster in 1648 – and the Congress of Vienna in 1815, in which restitution of artefacts looted during the Napoleonic wars to the location of origin (‘territorial principle’) was agreed. See e.g. Kowalski (n 1) 35-36; Lyndel V. Prott, *Witnesses to History: Documents and Writings on the Return of Cultural Objects* (UNESCO 2009) 2.

5 Convention (IV) respecting the Laws and Customs of War on Land (adopted 18 October 1907, entry into force 26 January 1910) 205 CTS 277. Kowalski (n 1) 37; Kurt Siehr, ‘Legal Aspects of the Mystification and Demystification of Cultural Property’ (2011) 16 *Art Antiquity and Law* 173, 178.

6 Fourth Hague Convention (n 5) art 3; see also Chechi (n 1) 261.

7 Treaty of Versailles (signed 28 June 1919, entry into force 10 January 1920) 225 CTS 188, article 245 and see also art 238 for the general obligation to retribute ‘identifiable’ looted objects.

Eyck brothers, taken by Germany before the wars in what appears to have been a perfectly legal transaction, must be returned to Belgium.<sup>8</sup>

## 2.2 NAZI LOOTING

This ban on the looting of art objects during armed conflict, as codified in the 1907 Hague Convention on Land Warfare, was unable to prevent the vast and systematic plunder and looting of works of art by the Nazis in the countries that they occupied. This looting took many different forms and has been widely documented: destruction and seizure of monuments and public collections, systematic expropriation of property belonging to Jews and other persecuted groups and forced sales – in occupied territories and in Germany itself. The policy differed from country to country, but one of the objectives was to obtain as much ‘suitable’ art as possible to underline the hegemony of the Third Reich. After the War, Alfred Rosenberg, the brain behind the wide-scale looting practices by the so-called Einsatzstab Reichsleiter Rosenberg (EER), was prosecuted and sentenced by the International Military Tribunal in Nuremberg for this systematic looting of cultural objects. Plunder of public or private property constituted a war crime under the Nuremberg Charter.<sup>9</sup> The judgment which found him guilty reveals something of the nature and scope:

Rosenberg is responsible for a system of organised plunder of both public and private property throughout the invaded countries of Europe. Acting under Hitler’s orders of January, 1940, to set up the “Hohe Schule,” he organised and directed the “Einsatzstab Rosenberg,” which plundered museums and libraries, confiscated art treasures and collections and pillaged private houses. His own reports show the extent of the confiscations. In “Action-M” (Moebel), instituted in December, 1941, at Rosenberg’s suggestion, 69,619 Jewish homes were plundered in the West, 38,000 of them in Paris alone, and it took 26,984 railroad cars to transport the confiscated furnishings to Germany. As of 14th July, 1944, more than 21,903 art objects, including famous paintings and museum pieces, had been seized by the Einsatzstab in the West.<sup>10</sup>

8 *ibid* art 247. Cited in John Henry M and Albert E Elsen, *Law, Ethics, and the Visual Arts* (3rd edn, Kluwer Law International 1998) 44. For the turbulent history of the Mystic Lamb, see ‘The Ghent Altarpiece in the context of war, nationalism and nationhood’ by *J Graham*, conference paper, Cambridge ‘Looted Art and Restitution in the Twentieth Century: Europe in transnational and global perspective’, September 2014.

9 Charter of the International Military Tribunal (adopted 8 August 1945) 82 UNTS 279, art 6(b).

10 *Trial of the Major War Criminals Before the International Military Tribunal*, vol 22 (International Military Tribunal 1948) 540, cited in Merryman (n 8) 31.

At the same time in the Eastern territories, the ERR was found to be responsible for the destruction of 427 museums and the confiscation of numerous museum collections.<sup>11</sup>

The fact that under international law an individual, Rosenberg, and not just a state could be held liable for the looting of art and that this was prosecuted as a ‘war crime’ was an important development.<sup>12</sup> It also served to underline that the ban on plunder of cultural objects during armed conflict is firmly anchored in international – humanitarian *and* cultural property – law.

### 2.3 INTER-ALLIED DECLARATION AND RESTITUTION PROGRAMME

Early on in the War, it became clear to the Allied governments that wide-scale looting was taking place in the occupied territories. In response to this on 5 January 1943, they issued the *Inter-Allied Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation or Control* (Inter-Allied or London Declaration).<sup>13</sup> It was a formal warning and announcement by the Allies that looting in occupied territories during the Second World War, including the “stealing and forced purchase of works of art”, would be reversed:<sup>14</sup>

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

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11 Merryman (n 8) 29 cites from Rosenberg’s indictment: “[...] The Germans approached monuments of culture, dear to the Soviet people, with special hatred. They broke up the estate of the poet Pushkin [...] desecrating his grave, and destroying the neighbouring villages and the Svyatogor monastery. They destroyed the estate and museum of Leo Tolstoy [...] and desecrated the grave of the great writer. They destroyed the museum of Tchaikovsky and in Penaty, the museum of the painter Repin and many others [...]”.

12 Principle VI (b) of the “Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal” lists as a war crime ‘plunder of public or private property’. ILC, ‘Report of the International Law Commission on its Second Session, 5 June to 29 July 1950’ UN DOC A/1316 (A/5/12), §95-127.

13 Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation and Control (5 January 1943) 1951 *Tractatenblad van het Koninkrijk der Nederlanden* 39. See also Appendix 1.

14 *ibid.*

The intention in the Declaration to reverse the looting, including transactions apparently legal in form, was confirmed in the post-war treaties of Bretton Woods and Paris.<sup>15</sup> The post-war restitution system was based on the principles as set out in the London Declaration and had some interesting features.

### 2.3.1 *An 'Early Warning System'*

The declaration meant that from January 1943 third-party acquirers had been warned that artworks from the occupied territories were 'tainted' and subsequent acquirers would thus be unable to invoke their good faith at a later date. Implementation measures immediately after the War included measures to seek out and list looted articles, measures to prevent exportation and measures to disseminate lists to art dealers and museums in many countries, as well as to alert the general public.<sup>16</sup> To this end, a general obligation to report dealing of artworks during the war was furthermore proclaimed.

### 2.3.2 *Territoriality*

Restitution would be to nation states and based on the principle of territoriality. Identification of the work as having disappeared from a certain country during the period of occupation would be sufficient for its transfer to that country of origin, regardless of how possession had been lost. That state would be given the works to hold in custody<sup>17</sup> with the intention being for national procedures to be used to return the works to the rightful owner. In the 'Resolution on the subject of Restitution', annex to the Final Act of the Paris Conference on Reparations, it reads:

- [R]estitution should be confined to identifiable goods which [...] were removed with or without payment.
- All necessary facilities under the auspices of the Commanders in Chief of the Occupied Zones shall be given to the Allied States to send expert mis-

15 'United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July 1 to July 22, 1944, Final Act' in *Proceedings and Documents of the United Nations Monetary and Financial Conference* (United States Government Printing Office 1948); see Resolution VI, 939-943. See also the *Final Act of the Paris Conference on Reparations; with annex. Paris, 21st December, 1945* (His Majesty's Stationery Office 1946). See also Kowalski (n 1) 40; Lyndel V Prott, 'The History and Development of Processes for the Recovery of Cultural Heritage' (2008) 13 *Art Antiquity and Law* 175, 177-184.

16 Final Act of the Paris Conference on Reparations (n 15). Chechi (n 1) 262.

17 The text on the 'receipt and agreement for delivery of cultural objects' from the US zone reads: "The said Government hereby agrees [...] as custodians, pending the determination of the lawful owners [...]" ; NARA M1941, *Records Concerning the Central Collecting Points ("Ardelia Hall Collection")*, (OMGUS Headquarters Records 1938-1951).

sions into Germany to search for looted property and to identify, store and remove it to its country of origin.<sup>18</sup>

Some countries, at any rate the Netherlands, not only saw looting during the occupation but also a resurgence in (voluntary) art trading following the crisis in the art market of the 1930s.<sup>19</sup> Such sales qualified for restitution to the country of origin but not for restitution to the sellers.

### 2.3.3 *Interstate Cooperation and Solidarity*

The success of the restitution process was dependent on close cooperation among national governments at the level of tracing, interstate restitution, but also at the level of restitution to the rightful owners. The objective was for national laws to implement the principles set out in the Inter-Allied Declaration, enabling an efficient restitution process. The Inter-Allied Declaration expresses this as follows:

In so far as transfers or dealings are confined in their scope to the territory of a particular country, the procedure of examination and the decision reached regarding their invalidation will fall to be undertaken by the legitimate Government of the country concerned on its return. The Declaration marks, however, the solidarity in this important matter of all the participating Governments [...], and this means that they are mutually pledged to assist one another as may be required and, in conformity with the principles of equity, to examine and if necessary to implement the invalidation of transfers or dealings with property, [...] which may extend across national frontiers and require action by two or more governments.<sup>20</sup>

With hindsight this may have been the weak point. Lyndel Prott illustrates this by citing Ardelia Hall:

Ardelia Hall, from the US State Department, commented already in 1951 that the recovery programme “provides for an appropriate continuation of the cultural restitution programs. For the first time in history, restitution may be expected to continue for as long as works of art known to have been plundered

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18 Final Act of the Paris Conference on Reparations (n 15), Annex 1 (b), (f).

19 A Venema, *Kunsthandel in Nederland 1940–1945* (De Arbeiderspers 1986).

20 London Declaration (n 13), *Note on the Meaning, Scope and Application of the London Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation*, §§5-6.

during a war continue to be rediscovered". No doubt Hall would have been extremely disappointed to see the amount of material which has now been established to have been traded on the international market, with impunity, within relatively short periods of time in cases to which the Inter-Allied Declaration would apply.<sup>21</sup>

#### 2.3.4 *Internal Restitution Based on Humanitarian Law*

The internal restitution process in Germany came under the remit of the four occupying authorities, which issued different restitution laws for this purpose.<sup>22</sup> Strictly speaking, this 'internal' restitution – as it was called – is not covered by the Inter-Allied Declaration or by the traditional law of war, given that it did not concern looting in occupied territories. It was about the systematic deprivation of own nationals of all rights in the context of persecution (genocide).<sup>23</sup> The Allied internal restitution programme was effectively an act of humanitarian intervention by the international community in the domestic activities of a state.<sup>24</sup> Consequently, the initial article of the Restitution Law for the American zone in Germany echoed the definition of crimes against humanity in the London Charter (Nuremberg Tribunal) and the judgments covering genocide:

It shall be the purpose of this Law to effect to the largest extent possible the speedy restitution of identifiable property [...] to persons who were wrongfully deprived of such property within the period from 30 January 1933 to 8 May 1945 for reasons of race, religion, nationality, ideology or political opposition to National Socialism.<sup>25</sup>

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21 Protts cites Ardelia Hall (1951) in Lyndel V Protts, 'Responding to WWII Art Looting' in The International Bureau of the Permanent Court of Arbitration (ed), *The Permanent Court of Arbitration/Peace Palace Papers: Resolution of Cultural Property Disputes* (Kluwer Law International 2004) 118.

22 See also Section 3.5.

23 The term 'persecution' was developed during this period of time; in the Charter of the IMT (n 9), it fell under Article 6(c), covering crimes against humanity, which included "persecution of racial, religious, and cultural groups following the installation of the Nazi regime in 1933".

24 Ana F Vrdoljak, 'Genocide and Restitution: Ensuring Each Group's Contribution to Humanity' (2011) 22 *European Journal of International Law* 17.

25 'Law No. 59 of the Military Government in Germany, US Zone: Restitution of Identifiable Property', in United States Courts of the Allied High Commission for Germany, *Court of Restitution Appeals Reports* (United States Courts of the Allied High Commission for Germany 1951) 499-536. See <[www.law.harvard.edu/library/digital/court-of-restitution-appeals-reports.html](http://www.law.harvard.edu/library/digital/court-of-restitution-appeals-reports.html)> for a digitised version of these reports. In contrast, in post-war restitution laws in occupied countries, this concerns restitution of transactions with 'the enemy', entered into under duress; this echoes the Inter-Allied Declaration; see below.

## 2.4 POST-WAR RESTITUTION LAWS

The Inter-Allied Declaration formed the basis for national restitution laws that were implemented in various countries: in the former occupied territories and also in neutral countries like Switzerland, Sweden and Portugal, where objects had come onto the market. Given the short deadlines for filing claims under these laws (a major point of criticism for many), these regulations have almost invariably lost their meaning for restitution cases in the present day.<sup>26</sup> Elements of these laws can, nevertheless, serve as inspiration. What follows is a general impression of certain aspects based on a few of those laws, with a focus on US Law No. 59.<sup>27</sup>

### 2.4.1 *Scope of Restitution*

The time of the transaction, the location and the parties involved determined whether the loss of possession qualified for avoidance or reversal, and this varied according to country.

The purpose of Law No. 59<sup>28</sup> was to effect to the largest extent possible the speedy restitution of property that was lost by wrongful deprivation “within the period from 30 January 1933 to 8 May 1945 for reasons of race, religion, nationality, ideology or political opposition to National Socialism”.<sup>29</sup> This meant that restitution in Germany was intended for and limited to loss of possession by persons who had been persecuted within the stated period. Consequently, for example, this law did not provide for restitution to German museums which had been robbed of their so-called ‘Degenerate’ art.

The Raubgutbeschluss (Booty Decree)<sup>30</sup> of December 1945 in Switzerland, a neutral country where looted art had come onto the market, applied the criterion that restitution was possible for objects that were located in Switzerland provided the loss of property had taken place between 1 September 1939 and 8 May 1945 in an occupied territory. This was possible if the loss of possession had been suffered *in violation of international law or*

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26 The French Decree of 21 April 1945 can still be invoked in cases where it was materially impossible to act within the deadline set out in the Decree. In this sense, see the *Gentili Decision* Paris Court of Appeal, Chamber 1A, decision of 2 June 1999. See also Norman Palmer, *Museums and the Holocaust* (Institute of Art and Law 2000) 15-16. In the Netherlands, in certain urgent circumstances, Decree E 100 of September 1944 might also still play a role (ex officio applied); see Hof’s-Gravenhage, 16 December 1999, LJN AV1399 (a case concerning the Goudstikker collection where the court was of the opinion such urgent circumstances were *not* present).

27 Law No. 59 (n 25). For this impression grateful use has been made of an article by Robinson from 1951 and an overview by Palmer from 2000. Nehemiah Robinson, ‘War Damage Compensation and Restitution in Foreign Countries’ (1954) 16 *Law and Contemporary Problems* 347; Palmer (n 26) 118-128.

28 Law No. 59 (n 25).

29 *ibid* art 1.

30 Bundesratbeschluss betreffend die Klagen auf Rückgabe in kriegsbesetzten Gebieten weggenommener Vermögenswerte (10 December 1945) 15 *Bundesblatt* 391, also known as the Booty Decree.

through violence, seizure, requisition or other similar actions by military or civilian authorities or the armed forces of an occupying power. So here a limitation is that the loss of possession must have taken place in occupied territory and after September 1939, the outbreak of the War. It would therefore exclude an artwork sold in Switzerland in 1935 by a Jewish owner persecuted in Germany in order to generate money for their escape or for subsistence.

Under the system in the Netherlands, as an example of an occupied country, a distinction was made between confiscation – loss of possession as a result of general racist regulations imposed during the occupation by the Nazis – and other transactions like sales.<sup>31</sup> For the restitution of confiscated possessions, claimants could invoke the fact that the relevant Nazi measures were declared null and void.<sup>32</sup> For restitution of possessions lost as the result of other transactions such as a forced sale, it was possible to invoke the *Besluit Herstel Rechtsverkeer* (Restitution of Legal Rights Decree) of 1944<sup>33</sup>. This law allowed ample discretionary powers, the general rule being that the judge could decide whether, given ‘the special circumstances’, it would be reasonable to void a transaction. A precondition was that the loss occurred *during the occupation* of the Netherlands and the property concerned was either situated in the Netherlands or owned by a Dutch citizen. Consequently, this limited the scope for restitution to loss of possession in the Netherlands during the occupation, i.e. the period between May 1940 and May 1945.

#### 2.4.2 Circumstances of Loss of Possession

An important feature of the Inter-Allied Declaration was the notion that restitution was not only possible in cases of clear confiscation, but also in the event of transactions which appeared to be legal like sales. How was this implemented?

As we saw before, Swiss law applied the criterion that there had to be a case of “*violence, seizure, requisition, or other similar actions by [...] authorities [...] of an occupying power*” or of “*deception or fear*”. Under Dutch law, there also had to be a direct or indirect threat from the enemy. Article 25 of Law E100 contained a presumption that if the loss had been the result of *coercion or threat by the enemy*, a voiding of the transaction would be reasonable.

31 Wouter Veraart, *Ontrechting en rechtsherstel in Nederland en Frankrijk in de jaren van bezetting en wederopbouw* (Sanders Instituut & Kluwer 2005); research note by the author ‘Overzicht van naoorlogse regelingen’ (Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War 2003).

32 And may still be able to do so. See the Dutch ‘Koninklijk Besluit Bezettingsmaatregelen’, 17 September 1944, *Stcrt.* E93 (or KB E93 in short); see also Section 3.4.

33 See the Dutch ‘Besluit Herstel Rechtsverkeer’, 17 September 1944, *Stb.* E100 (or Law No. E100 in short), art 23-25.

Under Law 59, the notion was that any loss of property by a person directly exposed to persecutory measures would qualify for restitution, unless:

- a fair purchase price had been paid, and
- the owner could freely dispose of it,<sup>34</sup> and
- for transactions after 15 September 1935 (the date of the first Nuremberg Laws): that it would also have taken place without National Socialism.

In determining this last condition, aspects such as (i) the owner's own initiative and (ii) a fair purchase price would be taken into account.<sup>35</sup> A possessor carried the onus of proof that he or she had acquired the item through a 'normal transaction', and payment was not sufficient to overcome this burden.<sup>36</sup> So, under Law 59, which still forms the basis of today's policy lines in Germany, it is mainly elements such as a 'fair purchase price' (1), the 1935 watershed (2) and the term 'normal transaction' (3) that are important. Elements such as a 'fair purchase price' and 'own initiative' were also important under the Dutch law. In the following verdict, the court ruled that, even though the criterion of duress had been met, additional circumstances were necessary. The case concerns a sale of shares by a Jewish owner in November 1940 – when measures were to be expected but had not yet been proclaimed:

Whereas [...] the petitioner was brought to this sale by the consideration that measures against Jewish property were to be expected; [...] Whereas, however, where this sale arose entirely at the petitioner's own initiative, reasonableness dictates that this legally binding transaction should be annulled only [in the event of] a great disparity between the purchase price and the value of what was sold [...].<sup>37</sup>

#### 2.4.3 *Good-faith Acquisition and the Consequences for the Dispossessed Owner*

An important feature of the system of the Inter-Allied Declaration is the notion that restitution should be effected in spite of a subsequent good-faith acquisition. Accordingly, most national restitution laws dissociated the right to restitution from a subsequent possessor's good or bad faith. In this sense, for instance, Law No. 59 stated:

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34 Law No. 59 (n 25) art 3.

35 *ibid* art 4.

36 US litigation on the subject: *Kunstsammungen zu Weimar v. Elicofon*, 596 F Supp 829 (EDNY 1981), *aff'd* 678 F 2d (2nd Cir. (NY) 5 May 1982.

37 NOR (Naoorlogse Rechtspraak), NA inv. nr. 262, nr. 578.

Property shall be restored to its former owner or to his successor in interest [...] even though the interests of other persons who had no knowledge of the wrongful taking must be subordinated. Provisions of law for the protection of purchasers of good faith, which would defeat restitution, shall be disregarded except where this Law provides otherwise.<sup>38</sup>

In the Netherlands, this was different. In fact, according to Article 27, the good-faith possessor was only obliged to return the object if it was of significantly greater value to the dispossessed owner than to the new possessor, and only upon payment of the value of the object.<sup>39</sup> However, this Dutch regulation should be seen as an exception amongst the implementation laws,<sup>40</sup> given that the essence of the Inter-Allied Declaration was that the right to restitution of the dispossessed owner was independent of the good faith or otherwise of the subsequent possessor.

#### 2.4.4 *Good Faith (or Due Diligence) and the Position of New Possessors*

Some implementation laws specifically provided for recourse for good-faith possessors against earlier bad-faith sellers. If good faith could be demonstrated, then they would qualify for compensation. This was the system under the Swiss restitution law.<sup>41</sup> If the object was in the hands of a good-faith possessor, this possessor could have recourse against the mala fide seller, and ultimately the Swiss state would compensate this good-faith possessor. Whilst this may sound like an elegant solution, this Swiss law was repealed as early as in 1947. Lyndel Prott connects this exceptionally brief period during which they applied with the potential liability of the Swiss state, which must have been considerable.<sup>42</sup> Sweden implemented a similar recourse for the good-faith possessor against the state.<sup>43</sup>

Bearing in mind the early warning system of the London Declaration, the idea was of course that proving the good faith of new acquirers of looted items would not be easy for transactions *after 1943* (the publication of the Inter-Allied Declaration).<sup>44</sup> The French *Schloss* cases of 1998 and 2001, concerning a Frans Hals painting that was looted in 1943 from the collection of Adolphe Schloss and discovered in 1990 by one of his heirs at the

38 Law No. 59 (n 25) art 1(2).

39 Law No. E100 (n 33) art 27.

40 Robinson (n 27).

41 Swiss Booty Decree (n 30). Under this law and as opposed to regular Swiss law, restitution was the rule notwithstanding a good-faith possessor.

42 Prott (n 15) 181.

43 *ibid.*

44 *ibid* 183: "The principle was established that a warning in advance (in the Declaration of London) puts subsequent purchasers on notice that they would not be considered as *bona fide* transferees of illicitly taken property after that date".

Antique Dealers' Biennale in Paris, are noteworthy in this respect. The French *Cour de Cassation* "introduced what might be considered as a presumption of bad faith against art dealers [i.e. professionals] in particular in cases of acquisition of art where looting is strongly documented".<sup>45</sup> The Frans Hals had been traded several times in the 1960s and 1970s before being acquired at Christie's in 1989 by the art dealer in whose possession it was at the time. In criminal proceedings, the art dealer was sentenced to eight months' imprisonment on the grounds that:

So obvious a gap in its (the painting's) history must necessarily have attracted the attention of a professional as A.M., who is the director of a prestigious gallery and universally acknowledged as an outstanding art expert [...] He is bound to keep himself informed in order to remain at the forefront of his field [...].<sup>46</sup>

In summary, the good faith, or due diligence, of a new possessor had a bearing on their eligibility for compensation. The time at which the purchase took place – before or after the Inter-Allied Declaration of January 1943 – could be an important factor in determining this.

#### 2.4.5 *Double Compensation*

An interesting research topic would be how national restitution laws dealt with financial compensation received. My impression is that, in general, laws sought to prevent double compensation on return of the object to the original owner and to this end included regulations stipulating that a consideration received (or the right to compensation) had to be relinquished. This was at any rate the case in Dutch law, in Law 59 and in the Italian law.<sup>47</sup> On the need to return a compensation received at the time of sale in the event of restitution, the Dutch restoration of rights judge stated after the War:

The purpose of the rationale of art. 27 subsection 5 E 100 is to prevent the recipient of restitution from deriving financial benefit from the restitution. Equally every effort should be made to ensure that the recipient of restitution

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45 Teresa Giovannini, 'The Holocaust and Looted Art' (2002) 7 *Art Antiquity and Law* 263.

46 Haute Cour de Nanterre, Judgment of 6 July 2001, cited in Giovannini (n 45) 273.

47 Law No. 59 (n 25) art 44. In Italian law, see Decreto Legislativo Luogotenenziale No. 252 (5 October 1944) 71 *Gazzetta Ufficiale*, art 4; In the Netherlands, Law E 100 (n 33) art 27 provided that upon restitution the dispossessed owner should always return a compensation received, either to the Dutch State or to a good faith new possessor; see above.

be restored to the status quo ante and not remain burdened with a loss following receipt of the restitution [...].<sup>48</sup>

To conclude, a general impression from Robinson in his 1954 comparison of national laws:

Third parties are also involved in restitution [...]. In practice, a differentiation was often made [...] between property confiscated outright and property transferred under duress against payment, as well as between the various degrees of duress exercised toward the owner, and between the persons who acquired the property in the knowledge of the previous confiscation or the duress in which the owner had found himself and those who did not have this knowledge, or between the first and subsequent acquirers. The problem of fair or unfair price paid by the acquirer was one of the most vexatious of all, as was the good or bad faith of third persons.<sup>49</sup>

#### 2.4.6 Summary of Post-war Restitution System

It is instructive to look back over a number of post-war restitution laws. One interesting aspect is the difference in approach between a law such as US Law 59, under which belonging to a persecuted group made a transaction contestable – in the absence of proof to the contrary – and the approach, for example, in Dutch law, which centred on the causal link between the loss of possession and the *duress exerted by or on behalf of the enemy*. In this context, it should not be forgotten that looting practices differed from country to country and that this is reflected in the various laws.

The restitution laws discussed here were aimed at loss of possession by people persecuted in the period under the Nazi regime (the German law), the period of occupation (the Dutch law) or the period from the breakout of the War in 1939 (the Swiss law). The laws in any case did not provide for restitution of an artwork sold in a place that was not (yet) under Nazi control.

Decisive elements in determining whether a sale can be classified as forced are:

- a fair purchase price (or conversely disparity between value and selling price),
- the time at which the loss of possession took place (before or after 1935, with each country similarly distinguishing stages in the persecution),<sup>50</sup>

48 NOR (Naoorlogse Rechtspraak), NA inv. nr. 263, nr. 1082.

49 Robinson (n 27).

50 For an overview of the Dutch situation, see Floris Kunert and Annemarie Marck, 'The Dutch Art Market 1930–1945 and Dutch Restitution Policy Regarding Art Dealers' in Eva Blimlinger and Monika Mayer (eds),

- own initiative, and
- the person of the other party (f.e. Nazi authority?).

The right to restitution, finally, was in general not dependent on the good faith of the new possessor.<sup>51</sup> However, that good faith, at least the due diligence of the new possessor at the time of sale, did have a bearing on the new possessor's right to compensation. This solution – restitution to the original owner and a compensation for the new possessor depending on their due diligence – is one also opted for in later conventions dealing with cultural property and restitution issues, as I will discuss below.

Today, most post-war restitution laws implementing the principles of the Inter-Allied Declaration have ceased to have any direct meaning due to the lapse of time and the relatively short prescription periods which were implemented at a national level, as said before.<sup>52</sup> Nevertheless, the underlying principles are still important.<sup>53</sup> The fact that the objective of the Inter-Allied Declaration, the reversal of the theft, was ultimately not (completely) successful would appear to be less the result of bad laws than of the short period during which they applied.<sup>54</sup> The reality was that the focus of European governments in those years was on restoration of society as a whole, rather than on the restoration of individual property rights. To cite Prott:

[T]he initial determination to see to the return of cultural objects to their pre-War locations, and concrete action to ensure that the principles of return then established would continue to be applied, only lasted a few years.<sup>55</sup>

And in the words of Chechi:

[...] after this initial enthusiasm, States ceased to enforce this principle, thereby leaving the restitution of the spoils of war to the initiatives of the dispossessed owners.<sup>56</sup>

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*Kunst sammeln, Kunst handeln: Beiträge des Internationalen Symposiums in Wien* (Böhlau Verlag 2012); Eelke Muller and Helen Schretlen, *Betwist Bezit* (Waanders Uitgevers 2002) 25-30.

51 The Dutch law appears to be an exception to this rule.

52 In the Netherlands, claims had to be filed before July 1951; Law No. E100 (n 33) art 21(1).

53 Authors that stress this importance are Kowalski (n 1) 42 and Prott (n 21) 123. And note that the UK Spoliation Advisory Panel regularly refers to the declaration in cases.

54 Some provisions, e.g. art 27 in the Dutch E 100 (n 33), however seem very unfair.

55 Prott (n 21) 114.

56 Chechi (n 1) 263.

## 2.5 POST-SECOND WORLD WAR TREATIES DEALING WITH RESTITUTION OF LOOTED ART

Although legal norms established *after* the Second World War will have no direct significance for restitution claims relating to artworks looted prior to their proclamation, they can still serve as inspiration. For example, what is the position of a good-faith new possessor under these treaties, and where do they stand on limitation periods?

### 2.5.1 UNESCO 1954<sup>57</sup>

In the wake of the massive destruction of cultural heritage during the Second World War, the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* was adopted as the first international treaty focusing exclusively on the protection of cultural property during times of armed conflict. It concerns both immovable and movable cultural items and aims, in general terms, at the protection of cultural heritage in times of war or occupation and the prevention of looting.<sup>58</sup> The (1st) Protocol to the Convention – adopted together with the convention – deals with restitution matters and sets up a system for the return of cultural property to the state from which it was wrongfully removed. State parties should take any cultural property looted from the territory of another State party and imported into their territory into custody and, at the close of hostilities, return it to the competent authorities of the territory from which it came. The occupying State is obliged to pay an indemnity to the good-faith holders of cultural property which has to be returned.<sup>59</sup> The convention makes no mention of time limitation for restitution claims.

### 2.5.2 UNESCO 1970<sup>60</sup>

In 1970 another UNESCO convention was adopted, the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property*. This Convention sets out a global norm banning the trade in stolen or illegally exported cultural

57 Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entry into force 7 August 1956) 249 UNTS 216. According to information on the UNESCO website as of August 2014, the number of State Parties to the Convention was 126; 103 to its Protocol.

58 See art 4 of the 1954 UNESCO Convention (n 57) on respect for cultural property: “[...] undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party”.

59 1954 UNESCO Convention (n 57), Additional Protocol, Section 1, §2-4.

60 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entry into force 24 April 1972) 823 UNTS 289.

property and has now become widely accepted.<sup>61</sup> Illicit is also understood to mean the “transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power”.<sup>62</sup> A system for the interstate restitution of misappropriated artefacts is introduced in Article 7(b)(ii) of the Convention. Such restitution requires a request by the State Party of origin, in addition to which the requesting State must pay a “just compensation to an innocent purchaser or to a person who has valid title to that property”. The issue of time limitations for restitution claims was left to the State Parties and was dealt with in the UNIDROIT 1995 Convention, which I will discuss below.<sup>63</sup>

### 2.5.3 UNIDROIT 1995<sup>64</sup>

Aimed at putting into effect the restitution principles of UNESCO 1970 by harmonising the private laws of the Member States with regard to restitution of stolen or illegally exported cultural objects, the *UNIDROIT Convention on Stolen or Illicitly Exported Cultural Objects* was adopted in 1995. It focuses solely on the recovery phase and allows restitution claims by *private* as well as *governmental* claimants to be processed directly through national courts. The norm in this Convention is restitution to the misappropriated owner (state or individual) after illicit export or theft, with the possibility of compensation for possessors who exercised due diligence at acquisition.

The Convention sets standards for limitation periods and due diligence. Article 3 para 3 of the UNIDROIT Convention mentions a period of *three years* after discovery by the former owner of the whereabouts of the object (location and identity of the new possessor) and an absolute time limitation of fifty years after the misappropriation. In the case of public collections or objects from religious institutions, the three years’ discovery rule is set as a standard, with a possibility for Member States to set an absolute limitation period of 75 years or longer after the theft.<sup>65</sup> Furthermore, on the position of the bona fide purchaser, it states that if the standards of due diligence are met by the current possessor, the possessor is entitled to receive payment of a fair and reasonable compensation upon

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61 According to information provided by UNESCO as of 26 August 2014 the Convention entered into force in 127 countries, including the Netherlands, the UK, the USA and Switzerland.

62 1970 UNESCO Convention (n 60) art 11.

63 Lyndel V Prot, ‘Strengths and Weaknesses of the 1970 Convention: An Evaluation 40 Years after its Adoption’ (UNESCO meeting on ‘The fight against the illicit trafficking of cultural objects. The 1970 convention: past and future’, Paris, 15-16 March 2011) <[www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Brussels/pdf/strengths%20and%20weaknesses%20of%20the%201970%20convention.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Brussels/pdf/strengths%20and%20weaknesses%20of%20the%201970%20convention.pdf)> accessed 20 August 2014.

64 UNIDROIT Convention on Stolen or Illicitly Exported Cultural Objects (adopted 24 June 1995, entry into force 1 July 1998) 34 ILM 1322. As of June 2014, according to the UNIDROIT website, it entered into force in 36 states.

65 UNIDROIT Convention (n 64) art 3(3), (4) and (5).

restitution.<sup>66</sup> Factors mentioned in determining the due diligence of the present holder include the character of the parties, the price paid and consultation of any reasonably accessible register of stolen cultural objects.<sup>67</sup>

#### 2.5.4 2014 EU Directive<sup>68</sup>

The European Union Directive of 15 May 2014 “on the return of cultural objects unlawfully removed from the territory of a Member State” provides for the return of cultural objects which are classified as “national treasures possessing artistic, historic or archaeological value” under national legislation. It replaces the earlier Directive of 1993 on the subject. The norm is that cultural objects qualifying as national treasures, which were unlawfully removed from their country of origin after 1 January 1993, shall be returned notwithstanding any later good-faith acquisition.<sup>69</sup> The possessor who exercised due care and attention in acquiring the object shall be entitled to compensation.<sup>70</sup> In determining this, consideration shall be given to the documentation on the object’s provenance, the character of the parties, the price paid, whether the possessor consulted any accessible register of stolen cultural objects and any relevant information which he could have reasonably have obtained, or took any other step which a reasonable person would have taken in the circumstances. This compensation shall be paid by the requesting Member State, without prejudice to the recovering of those amounts from the persons responsible for the unlawful removal of the cultural object in the first place.<sup>71</sup>

With regard to limitation periods, the Directive makes the same distinction as UNIDROIT between a relative limitation period of *three years* and an absolute limitation period; this latter is, however, much shorter in the Directive, namely, *thirty years* after the object was unlawfully removed.<sup>72</sup> Where public collections or objects from religious institutions are concerned, the time limit for claims is set at 75 years with the possibility of an extension.

66 *ibid* art 4(1), i.e. compensation by the claimant. However, Article 4(2) states that “Reasonable efforts shall be made to have the person who transferred the cultural object to the possessor, or any prior transferor, pay the compensation [...]”; Article 4(2)(3) requires that “Payment of compensation to the possessor by the claimant [...] shall be without prejudice to the right of the claimant to recover it from any other person”.

67 *ibid* art 4(4).

68 ‘Directive 2014/60/EU of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast)’ (2014) 159 OJEU L 28; the new provisions of the Directive shall apply from 19 December 2015.

69 *ibid* art 9, 14.

70 *ibid* art 10.

71 *ibid* art 10, 12.

72 *ibid* art 8; in the 1993 system, the relative time limit was one year.

### 2.5.5 Summary: Elements of Conventional Norms

To summarise, broadly speaking the norm that can be distilled from these international conventions is that theft, pillage or looting of cultural property, in times of peace as well as armed conflict, is prohibited. Misappropriated works of art should be returned to the owner, in certain cases in exchange for payment of a fair and reasonable compensation to a good-faith acquirer.<sup>73</sup> The good faith of a new possessor cannot be assumed but is subject to the proven due diligence of the buyer prior to the acquisition.

Whereas under the UNESCO conventions of 1954 and 1970 restitution is an exclusively interstate affair and restitution to non-governmental owners requires intervention by public bodies, the UNIDROIT convention of 1995 grants these (private or public) owners a status of their own through court litigation. Since the EU Directive is focused on 'national treasures', state authorities play a central role here.

Both the UNIDROIT convention and the EU Directive foresee in a relative limitation period of three years after discovery and an absolute limitation period of 75 years for artworks of public collections or objects from religious institutions. The absolute period of thirty years mentioned in the EU Directive seems relatively short in comparison with the other conventions.

## 2.6 RECENT (SOFT-LAW) INSTRUMENTS ON HOLOCAUST-RELATED ART

In the late 1990s, the scale of the looting during the Second World War was back in the spotlight. This resulted in a renewed call for restitution of the artworks that were looted from their Jewish owners. As set out in the introduction to this book, attention initially focused on looted art in national collections of 'heirless art' but quickly spread to other collections, public as well as private. However, the solution to Nazi-looted art claims currently seems to be left largely to the parties involved, without any clear guidelines. This is evident from the following list of international declarations.

### 2.6.1 *Washington Principles 1998*<sup>74</sup>

The foundation of the 'fair and just' norm was laid during an international conference in 1998 in Washington. On that occasion, 44 nation states adopted the *Washington Conference Principles on Nazi-confiscated Art* as non-binding rules. The text of the passage relevant to the handling of claims is as follows:

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<sup>73</sup> So the 1970 UNESCO and UNIDROIT Conventions follow the common law system.

<sup>74</sup> 'Washington Conference Principles on Nazi-Confiscated Art' in JD Bindenagel (ed), *Washington Conference on Holocaust-Era Assets* (State Department 1999) 971-972. See also Appendix 2.

(VIII) If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously *to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.*

(XI) Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms [ADR] for resolving ownership issues.<sup>75</sup>

### 2.6.2 Council of Europe, 1999<sup>76</sup>

Following the adoption of these principles, a resolution was adopted at European level by the Council of Europe in 1999. It stressed the need for legislative changes to enable restitution of Nazi-looted property:

(8.) The Assembly believes that restitution of such looted cultural property to its original owners or their heirs (individuals, institutions or communities) or countries is a significant way of enabling the reconstitution of the place of Jewish culture in Europe itself.

(10.) The Assembly invites the parliaments of all member states to give immediate consideration to ways in which they may be able to facilitate the return of looted Jewish cultural property.

(13.) It may be necessary to facilitate restitution by providing for legislative change with particular regard being paid to:

- i. extending or removing statutory limitation periods;
- ii. removing restrictions on alienability; [...]

(15.) Consideration should also be given to:

- (i) providing guarantees for those returning looted Jewish cultural property against subsequent claims;
- (ii) relaxing or reversing anti-seizure statutes which currently protect from court action works of art on loan;
- (iii) annulling later acquired titles that is, subsequent to the divestment.

(18.) In circumstances where dealers, agents or intermediaries know or suspect a work they have in their possession to be looted, provision should be made in law requiring them to hold on to it and alert the relevant authorities, and every

<sup>75</sup> *ibid* art 8-9.

<sup>76</sup> Parliamentary Assembly of the Council of Europe, 'Resolution 1205 (1999): Looted Jewish cultural property' (Official Gazette of the Council of Europe 1999). See also Appendix 3.

effort should be made to locate and alert the dispossessed owner or his or her heirs.

### 2.6.3 *Vilnius Forum Declaration, 5 October 2000*<sup>77</sup>

The Vilnius International Forum on Holocaust Era Looted Cultural Assets took place in October 2000 in Lithuania under the auspices of the Council of Europe as a follow-up to the Washington Conference of December 1998. On 5 October 2000, the 38 governments present adopted the declaration, which can be read as a ratification of the earlier agreements. A few passages:

1. The Vilnius Forum asks all governments to undertake every reasonable effort to achieve the restitution of cultural assets looted during the Holocaust era to the original owners or their heirs. To this end, it encourages all participating States to take all reasonable measures to implement the Washington Conference Principles on Nazi-Confiscated Art as well as Resolution 1205 of the Parliamentary Assembly of the Council of Europe [...]
2. In order to achieve this, the Vilnius Forum asks governments, museums, the art trade and other relevant agencies to provide all information necessary to such restitution [...]
3. In order further to facilitate the just and fair resolution of the above mentioned issues, the Vilnius Forum asks each government to maintain or establish a central reference and point of inquiry to provide information and help on any query regarding looted cultural assets, archives and claims in each country [...]
5. The Vilnius Forum proposes to governments that periodical international expert meetings are held to exchange views and experiences on the implementation of the Washington Principles, the Resolution 1205 of the Parliamentary Assembly of the Council of Europe and the Vilnius Declaration. These meetings should also serve to address outstanding issues and problems and develop, for governments to consider, possible remedies within the framework of existing national and international structures and instruments [...]

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<sup>77</sup> See Appendix 4.

2.6.4 *European Parliament Resolution and Report, 2003*<sup>78</sup>

At the European level, the European Parliament adopted a resolution on the subject in December 2003, in which (a) Member States are urged to proceed with returning art objects looted in the context of crimes against humanity to the ‘rightful owners’, and (b) the European Commission is called on to launch an investigation into the development of a ‘transparent remedial structure’ for disputes. The resolution emphasises that these measures “should not only contribute to a more consistent and predictable internal market in art works, they should also improve access to justice and respect the rule of law”. Insofar as is known, there has been no follow-up to this call on the European Commission. Below are a few passages which would appear to have lost little of their relevance:

(a) Whereas early moves were made following the end of the Second World War to find and return looted property to its country of origin, (b) whereas a very considerable amount of property has not been recovered by its owners or their successors, (c) whereas litigants have often been confronted with difficult problems due to conflicts of law, varying prescriptive periods and other difficulties, and that this hampers or prevents access to swift and efficient resolution of the interests of all parties affected, (d) whereas this is an important human and legal problem as victims continue to encounter legal and technical problems [...]

4) Calls on the European Commission, [...] to undertake a study by the end of 2004 on:

[...]

- identifying common principles on how ownership or title is established, prescription, standards of proof, rights to export or import property which has been recovered;

- exploring possible dispute resolution mechanisms that avoid lengthy and uncertain judicial procedures and take into account principles of fairness and equity;

- the value of creating a cross-border coordination administrative authority to deal with disputes on title of cultural goods;

5) Calls on the Member States and applicant States to make all necessary efforts to adopt measures to ensure the creation of mechanisms which favour the return of the property referred to in this resolution and to be mindful that the

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78 Willy CEH De Clercq, ‘Report on a legal framework for free movement within the internal market of goods whose ownership is likely to be contested’ (European Parliament 2003). See also Appendix 5, drawn up by the European Parliament’s Committee on Legal Affairs and the Internal Market, passed in a vote of the European Parliament on 17 December 2003 with 487 in favour, 10 against and 16 abstentions.

return of art objects looted as part of crime against humanity to rightful claimants is a matter of general interest for the purposes of Article 1 of Protocol 1 to the European Convention of Human Rights;

The explanatory statement to the resolution calls for a ‘cross-border solution’:

The hearing abundantly showed that the current situation lacks legal certainty, transparency and a coherent approach. This is a cross-border issue calling for a cross-border solution. The main objective of this European Parliament initiative is to propose the development of transparent remedial structures, which should be consistent with applicable principles of European and international law. The European Union should play a leading role in creating a cross-border, coordinating authority that would replace the present system where these disputes are addressed case by case under national law. In order to play this leading role, the European Union should establish a level playing field of provisions addressing the resolution of disputes relating to the identification, ownership and return of looted cultural goods. To this purpose, it is urgent to create a central database and to provide general access to public and private archives. These measures not only contribute to a more consistent and predictable internal market in art works, they also improve access to justice and respect the rule of law. It is ultimately a moral and ethical issue urgently calling for a moral and ethical solution. We need a clear and coherent approach, not only based on rules and legal principles, but also on principles such as equity and morality. This might be done by a coordinating, administrative authority on European level, setting out these common rules. Cross-border problems need cross-border solutions.

#### 2.6.5 *Terezín Declaration on Nazi-confiscated and Looted Art, 2009*<sup>79</sup>

In 2009 an international conference was held in Terezín (Theresienstadt) on various Holocaust-related topics. During this conference, representatives of 47 countries and non-governmental organisations signed a declaration incorporating three provisions on Nazi-looted art. The declaration reiterates the importance of the basic notions of the Washington

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79 Jiří Schneider, Jakub Klepal and Irena Kalhousová (eds), *Holocaust Era Assets: Conference Proceedings, Prague, June 26-30, 2009* (Forum 2000 Foundation). See also Appendix 6. The declaration has, as stated in the declaration, a “legally non-binding nature and consist of moral responsibilities, without prejudice to applicable international law and obligations”.

Principles and calls on governments to ensure that their legal systems or alternative processes facilitate just and fair solutions:

1. We reaffirm our support of the Washington Conference Principles on Nazi-Confiscated Art and we encourage all parties including public and private institutions and individuals to apply them as well,
2. In particular, recognizing that restitution cannot be accomplished without knowledge of potentially looted art and cultural property, we stress the importance for all stakeholders to continue and support intensified systematic provenance research, with due regard to legislation, in both public and private archives, and where relevant to make the results of this research, including ongoing updates, available via the internet, with due regard to privacy rules and regulations. Where it has not already been done, we also recommend the establishment of mechanisms to assist claimants and others in their efforts.

During this conference, the initiative was taken to establish the European Shoah Legacy Institute, a “voluntary forum for all the governmental and non-governmental stakeholders to note and promote developments in the areas covered by the Terezín Declaration”.<sup>80</sup>

#### 2.6.6 *Draft UNESCO Declaration of Principles, 2009*<sup>81</sup>

UNESCO also spent several years preparing a *Draft Declaration of Principles Relating to Cultural Objects Displaced in Connection with the Second World War*. These principles, designed to be non-binding in nature, build on the interstate restitution practice that formed the basis for the system of the Inter-Allied Declaration. Under this system, looted objects – which are broadly defined along the lines of the Inter-Allied Declaration (principle ii) – were to be handed over to the state of origin, after which the authorities of the state of origin were to return the works to the person or organisation from whose ownership they were stolen (principle vi). In addition, the state responsible for the loss of possession would be obliged to provide assistance. In this respect, the approach differs considerably from the non-governmental approach in the other declarations, which focus on the private former owners or their heirs.

<sup>80</sup> ‘Czech-EU Joint Declaration, Prague, June 29, 2009’ in Jiří Schneider, Jakub Klepal and Irena Kalhousová (n 79) 32-33. The ESLI provides a yearly training programme in provenance research.

<sup>81</sup> UNESCO, ‘Draft of the Declaration of Principles Relating to Cultural Objects Displaced in Connection with the Second World War’ (31 July 2009) 35 C/24. See also Appendix 7.

In the end, the Draft Principles were never adopted.<sup>82</sup> The text that was the basis for discussion was the text adopted in 2007 by an intergovernmental committee of experts and is attached as an appendix to this book. Although this form follows the line of the Inter-Allied Declaration and the UNESCO agreements, the question is how these recommendations could be applied in practice given the fact that in many cases dispossessed Jewish owners – their heirs – no longer have ties with the country in which the loss of possession took place.

#### 2.6.7 *ICOM Recommendations, 2001*<sup>83</sup>

To conclude, the policy recommendations in this area from the International Council of Museums (ICOM) of 2001 urge museum professionals to encourage action by their national governments to ensure implementation of the provisions of (the then existing) Washington Conference Principles and the Vilnius Forum Declaration:

Aware that the Nazi regime, in power from 1933 to 1945, orchestrated and enabled during the implementation of the Holocaust, the misappropriation of art and other cultural property through means such as theft, confiscation, coercive transfer, looting and pillage,

Acknowledging that despite efforts following World War II to undertake restitution of misappropriated property, many objects were never returned to their original owners or legal successors,

Concerned that such objects may have subsequently come into the custody of museums,

Recalling ICOM's Recommendations Concerning the Return of Works of Art Belonging to Jewish Owners issued by the Executive Council in December 1998,

Noting that museum professionals, other individuals and organisations have gathered to establish international principles for addressing the problem of misappropriated objects, such as those contained in the Washington Conference Principles on Nazi-Confiscated Art, December 1998, the Vilnius Forum Declaration, October 2000, and the American Association of Museums' Guidelines Concerning the Unlawful Appropriation of Objects during the Nazi Era, April 2001,

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82 The Russian Federation wanted to include a clause on 'restitution in kind' in cases of loss of comparable cultural property. See Appendix 7, Annex IV to the Draft Declaration (n 81).

83 ICOM, Resolution No. 8 (6 July 2001); view online at <<http://archives.icom.museum/spoliation.html#resolution>>, accessed 30 August 2014.

The 20th General Assembly of ICOM, meeting in Barcelona, Spain, on 6 July 2001

Urges all museums to encourage action by their national governments to ensure full implementation of the provisions of such documents, which establish international principles for addressing the problem of misappropriated objects.

Interestingly in the earlier Recommendations of December 1998, ICOM refers to national legislation and ‘clearly established legitimate ownership’ in relation to restitution matters.<sup>84</sup> These statements would appear to be inconsistent given that under national law the dispossessed former owner will often *not* qualify as the ‘legitimate owner’. This is precisely the crux.

#### 2.6.8 *Soft-law Instruments: A Summary*

Sixteen years after their adoption, the Washington Principles seem to have been only marginally clarified. Where the emphasis in the Washington Principles lies on confiscation, in the subsequent resolution this has been explicitly extended to forced sales and sales under duress. Restitution as remedy in the case of Nazi-looted art seems to be emphasised as the primary way of achieving justice. Insofar as the recommendations to governments to proceed with legislative reforms are concerned, as incorporated in several of these declarations, these are characterised by somewhat informal terminology.

The UNESCO proposal refers back to a system of *interstate* restitution but was rejected. The European Parliament resolution also stands out; the report included in the recommendation paints a clear picture of the impediments for claimants and the legal uncertainty for those involved and makes interesting proposals for a practical approach to the subject matter. First, a proposal is made for an investigation into the possibility of a coherent approach, based on principles such as equity and morality, expanded with a recommendation for the possible establishment of a European organisation to deal with disputes on title. This proposal would appear to have lost little of its relevance, even if it was not followed up with action from the European Commission.

### 2.7 CONCLUSION: PROMISING DECLARATIONS VERSUS LEGAL LABYRINTH

In conclusion, a number of legal instruments provide norms as a basis for legal action to redress looting of works of art and restitution of those objects to their rightful owners.

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<sup>84</sup> ICOM, Recommendations concerning the Return of Works of Art Belonging to Jewish Owners (14 January 1999); view online at <<http://archives.icom.museum/worldwar2.html>> accessed 30 August 2014.

However, given the expiration of post-war restitution laws, the non-retroactivity of later conventional norms as well as obstacles under positive law such as limitation periods and the concept of good-faith acquisition in civil law countries, the legal possibilities for bringing restitution claims regarding losses incurred in the Second World War are limited, if not non-existent.

Since the scope and nature of the art plunder came back into the public eye at the end of the last century and the ‘loose ends’ had to be acknowledged, a series of international declarations of intent have been adopted, of which the Washington Conference Declaration was the first. These soft-law instruments urge governments and stakeholders to (i) identify looted art (active provenance research), (ii) publish these data to aid the search by original owners and (iii) return the items – or at least find ‘fair and just’ solutions on the merits.

In a reality where there is often no legal obligation to reconstitute those works of art to the original dispossessed owner, it will prove difficult to find such a fair and just solution on the merits under positive law. That is why some declarations advocate alternative dispute resolution (ADR) to facilitate such fair and just solutions, and others call for national laws to be adapted.<sup>85</sup> Fundamental questions – such as the question of how ownership rights should be regulated retroactively or the question whether the principle applies to all art property – are not elaborated in these declarations.

This leaves the need for more clarity as to what constitutes ‘fair and just’. Often reference is made in this regard to ‘morality’ as opposed to a legal approach. However, this does not help much either: what rules of morality should be the guidelines here? This may be also confusing since morality and law are not opposites.<sup>86</sup> Is it not rules of justice we are looking for, rules that underlie our legal system? The norms from conventional law, as well as from the post-war restitution laws, might serve as sources of inspiration here. These legal instruments follow, as we have seen, more or less the same line. In general terms, the following could be distilled. A dispossessed owner is entitled to restitution of a work of art insofar as possession was lost as a result of a breach of a legal norm (ban on theft, pillage in occupied territories and taking of cultural property in the course of persecution in the context of genocide). This right to restitution is independent of the good faith of a new possessor, although that good faith, or at least the due diligence at purchase, does have a bearing on the new possessor’s right to compensation.

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85 For an example, the ‘California Holocaust Exception’ law of 1 January 2004, lifting statutes of limitation for ‘Holocaust-era artwork’, declared unconstitutional by the US Supreme Court – *Von Saher v Norton Simon Museum of Art at Pasadena*, 79 U.S.L.W. 3727 (U.S. 2011); for another example of (problematic) attempts at legislation, see Corinna Budras, ‘Lex Gurlitt im Bundesrat’ *Frankfurter Allgemeine Zeitung* (Frankfurt, 14 February 2014) <[www.faz.net/aktuell/feuilleton/kunst/der-fall-gurlitt/gesetzesinitiative-zur-raubkunst-lex-gurlitt-im-bundesrat-12802646.html](http://www.faz.net/aktuell/feuilleton/kunst/der-fall-gurlitt/gesetzesinitiative-zur-raubkunst-lex-gurlitt-im-bundesrat-12802646.html)> accessed 26 August 2014.

86 See also Beat Schönenberger, *The Restitution of Cultural Assets* (Eleven International Publishing 2009) 229.

Provenance research performed upon acquisition, the character of the parties concerned and the price paid can all influence the position of the new possessor, as can an early warning system as envisaged by the Inter-Allied Declaration.

The inclusion of relative limitation periods in the UNIDROIT Convention and EU Directive, which only start to run from when the object was discovered, could leave one feeling that it is considered unjust that limitation periods can run against owners who were not in a position to trace their stolen property. On the other hand, it also could place the onus on dispossessed owners to do their best to trace their property. Furthermore, from the inclusion in these instruments of an absolute limitation period of 50 or 75 years after the loss of ownership, as well as the short prescription periods that characterised the post-war restitution laws, one could conclude that the right to return of a misappropriated object will not continue to exist indefinitely.



### 3 NATIONAL PANELS ADVISING ON NAZI-LOOTED ART IN AUSTRIA, FRANCE, THE UNITED KINGDOM, THE NETHERLANDS AND GERMANY

*A Brief Overview*

*Annemarie Marck and Eelke Muller\**

Another task lies in the future. Someday it is hoped that the treasures the Nazis have stolen can be restored to their rightful owners. Research will be needed to make sure of what has been taken, and many difficulties must be overcome before the task can be completed.<sup>1</sup>

During the Second World War, the Nazis seized, stole or purchased art treasures in the occupied nations on an unprecedented scale. After the war, large numbers of these objects were recovered through the Monuments, Fine Arts and Archives programme (MFAA) and were subsequently returned to their countries of origin.<sup>2</sup> This process of recovery was coupled with restitution, the task imposed on national governments to ensure that recovered art was looked after and returned to the rightful owners or their legal heirs. As discussed in Chapter 2, the post-war restitution of items of cultural interest to individuals was usually based on national statutes and regulations promulgated by post-war governments, which implemented the principles of the 1943 Inter-Allied Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation or Control.<sup>3</sup>

In recent decades there has been growing recognition that restoration of rights by the national authorities of the formerly occupied western European countries, including the post-war restitution of items of cultural interest, failed in many respects. The process was

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\* The authors would like to thank Evelien Campfens, Floris Kunert, Sophie Starrenburg and other colleagues from the Restitutions Committee for their most valuable input, research and editing work. Also, the authors owe a debt of gratitude to the advisory committees of Austria, France, the United Kingdom and Germany for their comments to draft texts of this chapter.

1 K Fuguet, *Art in the War Areas of Europe* (National Archives and Records Administration M1944, 1518822, Records of the American Commission of the Protection and Salvage of Artistic and Historical Monuments in War Areas (The Roberts Commission) 1943-1946).

2 RM Edsel, *The Monuments Men: allied Heroes, Nazi thieves and the greatest treasure hunt in history* (Center Street 2009).

3 Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation and Control (5 January 1943) 1951 *Tractatenblad van het Koninkrijk der Nederlanden* 39. See also Appendix 1.

emotionally and financially demanding and beset with bureaucratic hurdles for victims and their heirs. Another point of concern was the hastiness of the art restitution and the unrealistic deadlines set for claimants struggling to cope with the profound disruptions to their lives:

In many countries, avenues for claims were closed in the late nineteen-forties or early nineteen-fifties. Many unclaimed objects were auctioned off with what in France has been termed by an official study as ‘surprising haste’; other objects entered museums and other public institutions.<sup>4</sup>

In countries such as France and the Netherlands, heirless art collections were amassed in the post-war period. They consisted of recovered artworks that for various reasons had never been restituted and were subsequently integrated into state collections.

During the late 1990s the restitution of looted artworks acquired increasingly higher priority on the political agenda.<sup>5</sup> This resulted in agreement about the Washington Principles on Nazi-Confiscated Art and their endorsement by forty-four countries in 1998. Under the Washington Principles, national governments are urged to use non-judicial alternative dispute resolution in attempting to resolve claims to looted art.<sup>6</sup>

The present chapter provides a brief survey of the situation in five Western European countries that have implemented this recommendation by establishing national advisory committees. The countries and committees concerned are Austria (section 3.1), where an advisory board had already been envisioned prior to the signing of the Washington Principles, France (section 3.2), the United Kingdom (section 3.3), the Netherlands (section 3.4) and Germany (section 3.5). In each section a brief overview is provided of the historical developments, resulting in the establishment of a national advisory committee, followed by a short summary of some discerning characteristics of each committee. A detailed comparison of the five committees, based on an analysis of their recommendations among other things, is outside the scope of this volume, but represents an important subject for future academic research.

The restriction to the five countries discussed here results from practical considerations. Representatives of these advisory committees participated in the 27 November 2012 conference *Fair and Just Solutions?* in The Hague and met in a preliminary session on 26 November 2012. During this session, experience with research, procedures and the

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4 Culture, Media and Sport Committee to the House of Commons, *Seventh Report – Cultural Property: Return and Illicit Trade* (House of Commons 2000).

5 For the background to the substantially increased attention for restitution issues, see, among others, C Goschler and Ph. Ther (eds), *Robbery and Restitution: the Conflict over Jewish Property in Europe* (Berghahn Books 2007).

6 Washington Conference Principles on Nazi Confiscated Art in JD Bindenagel (ed), *Washington Conference on Holocaust-Era Assets* (State Department 1999) 971-972, art 11. See also Appendix 2.

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criteria for advising were shared, partly on the basis of cases dealt with by the committees. As preparation for the meeting of 26 November 2012, the various committees completed a questionnaire at the request of the Dutch Restitutions Committee. The responses were used as a source for this chapter.

#### 3.1 AUSTRIA

##### 3.1.1 *Art Looting in Austria during the Nazi Regime*

The confiscation of Jewish art collections formed an integral part of National Socialist policy regarding the Jewish population in Austria after the *Anschluss* (annexation) in March 1938. This policy involved expropriation of property, deprivation of rights and ultimately extermination.<sup>7</sup> After weeks of unregulated plundering and confiscations following the entry of the German troops, the Nazi authorities organised the centralised and systematic seizure of property on the basis of discriminatory statutory provisions.<sup>8</sup> Accordingly, Jews were forced to register their assets and were the subject of excessive taxation, harsh export regulations and confiscations. The ordinances aimed at Jewish property provided, to quote Jonathan Petropoulos, “an almost inescapable legal net which the Nazis used to snare their

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7 G Anderl and A Caruso (eds), *NS-Kunstraub in Österreich und die Folgen* (Studien Verlag 2005); G Anderl, E Blaschitz and S Loitfellner, ‘Die Arierisierung von Mobilien und die Verwaltungsstelle für jüdisches Umzugsgut’ in G Anderl and others (eds), *“Arisierung” von Mobilien* (Oldenbourg Wissenschaftsverlag 2004); G Anderl and others (eds), *... wesentlich mehr Fälle als angenommen. 10 Jahre Kommission für Provenienzforschung*, Schriftenreihe der Kommission für Provenienzforschung, Band 1 (Böhlau Verlag 2009); Art Database of the National Fund (*National Fund of the Republic of Austria for Victims of National Socialism*) <www.kunstrestitution.at> accessed 29 August 2014; T Brückler (ed), *Kunstraub, Kunstbergung und Restitution in Österreich 1938 bis heute* (Böhlau Verlag 1999); C Jabloner and E Blimlinger, ‘The Regulation of the Restitution of Artworks in Austria’ in A Baresel-Brand (ed), *Verantwortung wahrnehmen: NS-Raubkunst – Eine Herausforderung an Museen, Bibliotheken und Archive* (Koordinierungsstelle für Kulturgutverluste Magdeburg 2009), 223-225; C Jabloner and others (eds), *Schlussbericht der Historikerkommission der Republik Österreich: Vermögensentzug während der NS-Zeit sowie Rückstellungen und Entschädigungen seit 1945 in Österreich. Zusammenfassung und Einschätzungen* (Oldenbourg Wissenschaftsverlag 2003); S Lillie, *Was einmal war. Handbuch der enteigneten Kunstsammlungen Wiens* (Czernin Verlag 2003); S Loitfellner, ‘NS-Kunstraub und Restitution in Österreich. Institutionen – Akteure – Nutznießer’ in V Pawlowsky and H Wendelin (eds), *Enteignete Kunst. Raub und Rückgabe – Österreich von 1938 bis heute* (Mandelbaum 2006); V Pawlowsky and H Wendelin (eds), *Die Republik und das NS-Erbe. Raub und Rückgabe – Österreich von 1938 bis heute* (Mandelbaum 2005); V Pawlowsky and H Wendelin (eds), *Enteignete Kunst. Raub und Rückgabe – Österreich von 1938 bis heute*, (Mandelbaum 2006); J Petropoulos, *Art as politics in the Third Reich* (The University of North Carolina Press 1996).

8 N.B.: The most important measures to facilitate confiscations were the 26 April 1938 Ordinance for the Registration of Jewish Property; the 20 November 1938 Ordinance for the Attachment of the Property of the People’s and State’s Enemies (which applied to non-Jewish enemies of the regime) and the 3 December 1938 Ordinance for the Employment of Jewish Property. See Petropoulos (n 7) 84.

victims”.<sup>9</sup> Large quantities of confiscated art were brought to collection points in Vienna, where Hitler’s art agents were able to select what was to be taken to Linz for the planned Führer Museum. Works of art that remained were distributed among Austrian museums or were put on the art market. The auction house Dorotheum was one of the organisations that played an important role in this process, being used by the Gestapo Office for the Disposal of the *Verwaltungsstelle für jüdisches Umzugsgut der Gestapo*, or *Vugesta* (Property of Jewish Emigrants), to sell entire estates.<sup>10</sup> In addition to confiscated artworks, objects also appeared on the market that had belonged to Jewish owners who had been forced to sell their collection, for example, due to export regulations or to pay for their maintenance or their escape from Austria. The lion’s share of the confiscated or forcibly sold Jewish artworks remained in the German Reich as a result of the strict export regulations.

### 3.1.2 *Post-war Restitution Policy*

After the Second World War, many believed it was the responsibility of the German Reich to compensate and retribute for the crimes of the National Socialists. Despite this *Opferthese* (victim theory), the authorities executed a series of statutory provisions after 1945 in order to give effect to the restoration of rights.<sup>11</sup> One of these was the *Nichtigkeitsgesetz* (Nullification Act) of 15 May 1946, in which the most important provision reads:

Entgeltliche und unentgeltliche Rechtsgeschäfte und sonstige Rechtshandlungen während der deutschen Besetzung Österreichs sind null und nichtig, wenn sie im Zuge seiner durch das Deutsche Reich erfolgten politischen oder wirtschaftlichen Durchdringung vorgenommen worden sind, um natürlichen oder juristischen Personen Vermögensschaften oder Vermögensrechte zu entziehen, die ihnen am 13. März 1938 zugestanden sind.<sup>12</sup>

Between 1946 and 1949, seven consecutive implementation acts were adopted, the *Rückstellungsgesetze* (Restitution Acts), which were intended to regulate the return of lost

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<sup>9</sup> *ibid.*

<sup>10</sup> R Holzbauer, ‘Einziehung volks- und staatsfeindlichen Vermögens im Lande Österreich – Die VUGESTA – Die Verwertungsstelle für jüdisches Umzugsgut der Gestapo’ (2000) 1-2 *Spurensuche* 38; SA Lütgenau, A Schröck, S Niederacher, *Zwischen Staat und Wirtschaft. Das Dorotheum im Nationalsozialismus* (Oldenbourg Wissenschaftsverlag 2006).

<sup>11</sup> E Blimlinger, ‘Rückstellungen und Entschädigungen in Österreich 1945 bis 2008. Ein Überblick’ in G Anderl and others (eds), *...wesentlich mehr Fälle als angenommen. 10 Jahre Kommission für Provenienzforschung*, Schriftenreihe der Kommission für Provenienzforschung, Band 1 (Böhlau Verlag 2009) 11-33; Jabloner and Blimlinger (n 7) 225.

<sup>12</sup> Bundesgesetz vom 15. Mai 1946 über die Nichtigklärung von Rechtsgeschäften und sonstigen Rechtshandlungen, die während der deutschen Besetzung Österreichs erfolgt sind. BGBl. 34, No 106/1946, § 1.

assets.<sup>13</sup> Art restitution turned out to be a lengthy and complicated process. One of the problems stemmed from the principle of natural restitution, i.e. the principle that only works of art that were present were returned.<sup>14</sup> Often survivors of the persecution did not have any knowledge of the whereabouts of their former property. Museums showed an unwillingness in helping to clear up what was where.<sup>15</sup> Another complication resulted from the *Ausfuhrverbotsgesetz* (the Export Prohibition Act), first enacted in 1918, that led to many cases in which export permits were provided only in exchange for the ‘donation’ of artworks previously returned.<sup>16</sup> Also problematic was the history of thousands of unclaimed pieces of cultural property, consisting of objects that the Allied forces had found in various repositories and subsequently placed under the management of the Republic of Austria.<sup>17</sup> Starting in 1966, the Austrian authorities collected those objects in a former Carthusian monastery in Mauerbach on the outskirts of Vienna. In order to ensure restitution to the rightful owners, two *Kunst- und Kulturbereinigungsgesetzen* (Art and Cultural Assets Settlement Acts) were adopted in 1969 and 1985.<sup>18</sup> On the basis of the *Mauerbachgesetz* 1995 (Mauerbach Act), the remaining collection of “ehemals herrenlosen Kunst- und Kulturgüter” was transferred to the *Bundesverband der Israelitischen Kultusgemeinden Österreichs* (Federation of Jewish Communities in Austria), for the sale and distribution of the proceeds amongst the destitute victims of persecution and their descendants.<sup>19</sup> In 1996 the collection, of which the provenance had not been thoroughly researched, was sold by Christie’s Auction House in London at what has become known as the *Mauerbach-Auktion*.

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13 For a critical evaluation of the post-war art restitution in Austria and the seven *Rückstellungsgesetzen*, see G Schnabel and M Tatzkow, *Nazi looted art: Handbuch Kunstrestitution weltweit* (Proprietas Verlag 2007).

14 Jabloner and Blimlinger (n 7) 225-226.

15 *ibid* 227; Schnabel en Tatzkow (n 13) 130-131.

16 Bestimmungen des Bundesgesetzes über das Verbot der Ausfuhr von Gegenständen von geschichtlicher, künstlerischer oder kultureller Bedeutung, StGBI. Nr. 90/1918. See also Schnabel en Tatzkow (n 13) 129.

17 K Akinsha, ‘The Mauerbach Scandal’ (2009) *Art News* <[www.artnews.com/2009/02/01/the-mauerbach-scandal/](http://www.artnews.com/2009/02/01/the-mauerbach-scandal/)> accessed 29 August 2014; Blimlinger (n 11) 21-26; A Decker, ‘A legacy of shame’ (1984) 83 *Art News* 54, 55-76; B Kirchmayr, “Es ging mehr um den persönlichen Wert...” Der NS-Kunstraub im Kontext kultureller Auslöschungspolitik’ (2001) 3/4 *eForum zeitGeschichte* <[www.eforum-zeitgeschichte.at/3\\_01a6.html](http://www.eforum-zeitgeschichte.at/3_01a6.html)> accessed 29 August 2014; T Trenkler, ‘Die Schande der Mauerbach-Auktion’ *Der Standard* (30 November 2008) <<http://derstandard.at/1227287453547/Die-Schande-der-Mauerbach-Auktion>> accessed 29 August 2014.

18 Bundesgesetz vom 27. Juni 1969 über die Bereinigung der Eigentumsverhältnisse des im Gewahrsam des Bundesdenkmalamtes befindlichen Kunst- und Kulturgutes, BGBl. 74 No 294/1969; 2. Bundesgesetz vom 13. Dezember 1985 über die Herausgabe und Verwertung ehemals herrenlosen Kunst- und Kulturgutes, das sich im Eigentum des Bundes befindet (2. Kunst- und Kulturgutbereinigungsgesetz), BGBl. 2 No 2/1986.

19 Bundesgesetz, mit dem das 2. Kunst- und Kulturgutbereinigungsgesetz geändert wird, BGBl. 168 No 515/1995.

3.1.3 *Developments since the Second Half of the 1990s*

Austrian museums and public collections amassed large quantities of cultural property from persecuted Jewish and other owners during the Nazi regime. Although restitution took place in the years after 1945 according to the Restitution Acts, many objects remained in the federal collections as ‘donations’, described above, or were never claimed, since the rightful owners did not survive Nazi persecution or they or their families lacked knowledge on the whereabouts of their property. During the second half of the 1990s, public opinion about restitution and compensation for seized property began to change, and the topic was put on the political agenda. The discussion surrounding the Mauerbach collection was influential in this debate, as were the legal steps taken by individual applicants abroad to recover artworks in public collections in Austria. In January 1998, the New York District Attorney seized two paintings from the Leopold Museum Privatstiftung in Vienna, which had been displayed in a large exhibition about the work of Egon Schiele in the Museum of Modern Art in New York. One of these paintings was *Bildnis Wally*, which was claimed as looted art by the heirs of the Jewish art dealer Lea Bondi-Jaray.<sup>20</sup>

The public restitution debate led to the creation of the *Kommission für Provenienzforschung* (Commission for Provenance Research), in February 1998.<sup>21</sup> This Commission was set up to conduct systematic research and to trace artworks with a problematic provenance in the Austrian federal collections. Subsequently, on 4 December 1998, the *Bundesgesetz über die Rückgabe von Kunstgegenständen aus den Österreichischen Bundesmuseen und Sammlungen*, abbreviated to *Kunstrückgabegesetz* (Art Restitution Law), was passed.<sup>22</sup> This 1998 act, amended in 2009, provides the legal basis of the current restitution of art possessed by the state of Austria. On the basis of the Art Restitution Law, Austria appointed a Committee (*Beirat*) on 9 December 1998 within the *Bundesministerium*

20 Anderl and Caruso (eds) (n 7); Blimlinger (n 11) 26; R Contel, G Soldan and A Chechi, ‘Case Portrait of Wally – United States and Estate of Lea Bondi and Leopold Museum’ (*ArThemis*, March 2012) <<https://plone.unige.ch/art-adr/cases-affaires/case-portrait-of-wally-2013-united-states-and-estate-of-lea-bondi-and-leopold-museum>> accessed 29 August 2014; JH Dobrzynskie, ‘The zealous collector – A special report. A singular passion for amassing art, one way or another’ *New York Times* (24 December 1997) <[www.nytimes.com/1997/12/24/arts/zealous-collector-special-report-singular-passion-for-amassing-art-one-way.html](http://www.nytimes.com/1997/12/24/arts/zealous-collector-special-report-singular-passion-for-amassing-art-one-way.html)> accessed 29 August 2014.

21 A Caruso and others, ‘Zur Arbeitspraxis der Kommission für Provenienzforschung’ in G Anderl and others (eds), ... *wesentlich mehr Fälle als angenommen. 10 Jahre Kommission für Provenienzforschung*, Schriftenreihe der Kommission für Provenienzforschung, Band 1 (Böhlau Verlag 2009) 52-69; A Schallmeiner, ‘1998 – die Kommission für Provenienzforschung und der Weg zum Kunstrückgabegesetz’ in G Anderl and others (eds), ... *wesentlich mehr Fälle als angenommen. 10 Jahre Kommission für Provenienzforschung*, Schriftenreihe der Kommission für Provenienzforschung, Band 1 (Böhlau Verlag 2009) 34-47; see the website of the Kommission für Provenienzforschung <[www.provenienzforschung.gv.at/](http://www.provenienzforschung.gv.at/)> (Kommission für Provenienzforschung beim Bundeskanzleramt) accessed 29 August 2014.

22 Bundesgesetz über die Rückgabe von Kunstgegenständen aus den Österreichischen Bundesmuseen und Sammlungen, BGBl. Nr. I 181/1998; Änderung / BGBl. I No 117/2009. See Appendix 8.

für Unterricht und kulturelle Angelegenheiten (Federal Ministry for Education and Cultural Affairs) to advise the minister.<sup>23</sup>

Another important step was the establishment in 1998 of the *Österreichischen Historikerkommission* (Austrian Historical Commission), which until 2003 conducted research into the multifaceted issue of confiscation of assets during the Nazi regime and post-war compensation and restitution.<sup>24</sup> In addition, on the basis of the 2001 Washington Agreement, the government offered victims of persecution or their legal heirs a final opportunity to claim financial compensation for the loss and damage suffered in Austria during the Nazi regime.<sup>25</sup> The 2001 *Entschädigungsfondsgesetz* (General Settlement Fund Law) created an *Allgemeiner Entschädigungsfonds für Opfer des Nationalsozialismus* (General Settlement Fund for Victims of National Socialism), to which claims could be submitted until 28 May 2003.<sup>26</sup> This law also provided for Jewish organisations to claim movable publicly owned property, especially cultural or religious items.<sup>27</sup>

A restitution case that attracted international attention was the dispute that arose around the famous *Portrait of Adele Bloch-Bauer I* and several other Klimt masterpieces from the confiscated art collection of the wealthy sugar magnate Ferdinand Bloch.<sup>28</sup> After unsuccessful attempts to recover these paintings, his niece, Maria Altmann, brought suit in the United States against the Republic of Austria and the Austrian National Gallery. Eventually the parties involved agreed to end the litigation and submit the case to arbitration in Austria. In 2006 the arbitration panel ruled that Austria was obliged to return the Klimt paintings.

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23 Jabloner and Blimlinger (n 7) 230-231; Schallmeiner (n 21) 46-47. For the recommendations of the *Beirat* and the *Restitution Reports*, see the website of the Kommission für Provenienzforschung (n 21).

24 Jabloner and others (n 7). See also the website of the Austrian Historical Commission, <[www.historikerkommission.gv.at](http://www.historikerkommission.gv.at)> accessed 29 August 2014.

25 Abkommen zwischen der Österreichischen Bundesregierung und der Regierung der Vereinigten Staaten von Amerika zur Regelung von Fragen der Entschädigung und Restitution für Opfer des Nationalsozialismus samt Anhängen BGBl. III No 121/2001.

26 Bundesgesetz über die Einrichtung eines Allgemeinen Entschädigungsfonds für Opfer des Nationalsozialismus und über Restitutionsmaßnahmen (Entschädigungsfondsgesetz) sowie zur Änderung des Allgemeinen Sozialversicherungsgesetzes und des Opferfürsorgegesetzes, BGBl. I No 12/2001. See also the website of the Nationalfonds der Republik Österreich für Opfer des Nationalsozialismus <<http://de.nationalfonds.org>> accessed 29 August 2014.

27 Entschädigungsfondsgesetz (n 26) §28(2).

28 A Chechi, AL Bandle and M-A Renold, 'Six Klimt Paintings - Maria Altmann and Austria' (*ArThemis*, March 2012) <<https://plone.unige.ch/art-adr/cases-affaires/6-klimt-paintings-2013-maria-altmann-and-austria>> accessed 29 August 2014.

3.1.4 *The 1998 Art Restitution Law (Kunstrückgabegesetz) and the Committee (Beirat)*

The possibility to submit claims concerning Nazi-looted property on the basis of post-war restitution laws ceased, generally speaking, on 31 December 1955 and under specific circumstances on 31 July 1956.<sup>29</sup> The time limit for claims on objects from the Mauerbach collections elapsed on 31 September 1986.<sup>30</sup> The regular judicial process in Austria often does not provide a solution with regard to present restitution cases:

[...] claims based on the Austrian Code Civil are not very likely to be successful, as the general limitation period is 30 years and property may be gained by a good faith purchaser.<sup>31</sup>

The 1998 Art Restitution Law provided for new ways to adjudicate looted art claims. This act authorises the federal minister in charge of the respective collections – currently in most cases the *Bundesminister für Kunst und Kultur, öffentlichen Dienst und Verfassung* (Federal Minister of Art and Culture, Public Service and Constitution) – under certain circumstances, to transfer the ownership of property of art objects from the Republic of Austria's federal museums and collections free of charge to the original owners or their legal heirs. The act entails an authorisation and does not provide for a legal or other form of enforceable obligation.<sup>32</sup> In short, the possibility to return an item applies to three categories of art objects listed in §1 of the act:

1. Objects that were originally restituted after the war that subsequently became state property in the course of proceedings related to the export ban, without compensation for the original owners or their legal heirs (see 3.1.2);
2. Objects that became state property that were previously the subject of a legal transaction that comes within the scope of the 1946 Nullification Act (for example, items that were seized during the Nazi regime and acquired by the federal museums and collections through an auction house or an art dealer);

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29 Information provided by the *Beirat* on a questionnaire completed at the request of the Dutch Restitutions Committee (2012). See also Schnabel and Tatzkow (n 13) 128.

30 Kunst- und Kulturbereinigungsgesetz, Bundesgesetz vom 13. Dezember 1985 über die Herausgabe und Verwertung ehemals herrenlosen Kunst- und Kulturgutes, das sich im Eigentum des Bundes befindet; BGBl. No 2/1986.

31 Questionnaire *Beirat* (n 29). See also Schnabel and Tatzkow (n 13) 62-67.

32 1998 Art Restitution Law (n 22), §2(2): '*Durch die Bestimmungen dieses Bundesgesetzes wird keinerlei Anspruch auf Übereignung begründet*'. For a critical evaluation of the act, see AJ Noll, 'Fortschritt und Versäumnis. Kunstrückgabe in Österreich' (2003) 1 *Juridikum* 31, 31-33; Schnabel and Tatzkow (n 13) 132, 137. See also Jabloner and Blimlinger (n 7) 233.

3. Objects that could not be returned after the expiration of a restitution process and became state property as they were regarded as heirless property (“herrenloses Gut”).<sup>33</sup>

The Art Restitution Law grants the Federal Minister of Art and Culture, Public Service and Constitution a mandate to determine the original owners or their legal heirs of the relevant items.<sup>34</sup> When this cannot be determined, the Minister can transfer the art objects concerned to the National Foundation of the Republic of Austria for the Victims of National Socialism (*Nationalfonds der Republik Österreich für Opfer des Nationalsozialismus*) (established in 1995) for sale.<sup>35</sup> The act also states that the 1923 Cultural Heritage Act (*Denkmalschutzgesetz*) and the statutory export prohibition from 1918 would be suspended for a period of twenty-five years with respect to ownership transfers in the context of the Art Restitution Law.<sup>36</sup> This ensures that the recovered items can, in principle, be transported outside the Austrian boundaries. Although the act does not provide for a cut-off date for the authorisation for recovery, it can be implied on the basis of §4 that a period of twenty-five years applies to the enforcement of the statute. The ownership transfers in the context of the Art Restitution Law are freed from all conditions (“von allen Abgaben befreit”); the original owners or their legal heirs receive the property tax free and free of charges or liens.<sup>37</sup> The act does not contain any exemption clauses regarding previously closed cases.

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33 1998 Art Restitution Law (n 22) §1: “Der Bundesminister für Finanzen wird ermächtigt, jene Kunstgegenstände aus den österreichischen Bundesmuseen und Sammlungen, wozu auch die Sammlungen der Bundesmobilenverwaltung zählen, unentgeltlich an die ursprünglichen Eigentümer oder deren Rechtsnachfolger von Todes wegen zu übereignen, welche

1. Gegenstand von Rückstellungen an die ursprünglichen Eigentümer oder deren Rechtsnachfolger von Todes wegen waren und nach dem 8. Mai 1945 im Zuge eines daraus folgenden Verfahrens nach den Bestimmungen des Bundesgesetzes über das Verbot der Ausfuhr von Gegenständen von geschichtlicher, künstlerischer oder kultureller Bedeutung, StGBI. Nr. 90/1918, unentgeltlich in das Eigentum des Bundes übergegangen sind und sich noch im Eigentum des Bundes befinden;
2. zwar rechtmäßig in das Eigentum des Bundes übergegangen sind, jedoch zuvor Gegenstand eines Rechtsgeschäftes gemäß § 1 des Bundesgesetzes vom 15. Mai 1946 über die Nichtigerklärung von Rechtsgeschäften und sonstigen Rechtshandlungen, die während der deutschen Besetzung Österreichs erfolgt sind, in das Eigentum der Republik Österreich gelangt sind, BGBl. Nr. 106/1946, waren und sich noch im Eigentum des Bundes befinden;
3. nach Abschluß von Rückstellungsverfahren nicht an die ursprünglichen Eigentümer oder deren Rechtsnachfolger von Todes wegen zurückgegeben werden konnten, als herrenloses Gut unentgeltlich in das Eigentum des Bundes übergegangen sind und sich noch im Eigentum des Bundes befinden”.

34 *ibid* §2.

35 Bundesgesetz über den Nationalfonds der Republik Österreich für Opfer des Nationalsozialismus, BGBl. 136, No 432/1995. See MR Seidinger, C Fritsch and HM Lessing, ‘Die Tätigkeit des Nationalfonds der Republik Österreich für Opfer des Nationalsozialismus im Rahmen der Kunstrückgabe – Die Kunst-Datenbank des Nationalfonds’ in G Anderl and others (eds), ...wesentlich mehr Fälle als angenommen. 10 Jahre Kommission für Provenienzforschung, Schriftenreihe der Kommission für Provenienzforschung, Band 1 (Böhlau Verlag 2009) 246-252.

36 1998 Art Restitution Law (n 22) §4.

37 *ibid* §5.

The authorisation to return can, therefore, also be applied to art objects that were previously the subject of a rejected claim.

As noted above, the Art Restitution Law provides for the creation of a *Beirat* (Committee) at the Federal Ministry for Education and Cultural Affairs (currently the Federal Minister of Education, Art and Culture, Public Service and Constitution).<sup>38</sup> This body advises the Minister as to whether or not objects are eligible for restitution. Since the 2009 Amendment, the Committee should comprise eight members (five representatives of federal ministries, one representative of the Financial Procurator as an advisor and two experts in the fields of history and art history, respectively). A substitute member is also appointed for each member. The Federal Minister of Art and Culture, Public Service and Constitution appoints the chair and the other members in order to seek, according to the Committee, “an equal balance of historians, art historians and lawyers”.<sup>39</sup> Recommendations are prepared in the presence of at least half of the members and passed by majority vote. The Committee drafts its own protocol for internal working practices, which must be approved by the Minister.<sup>40</sup> When asked in the Dutch Restitutions Committee’s questionnaire about the level of independence from other institutions, including the Federal Government, the Committee replied:

The Committee works as a group of experts independently; as experts they are bound to fulfil their duty according to the professional standards of their field and according to their personal convictions.<sup>41</sup>

The 1998 Art Restitution Law only concerns objects in federal ownership. Various Austrian states (*Bundesländer*) have therefore promulgated their own restitution regulations and provenance research with respect to their own collections.<sup>42</sup> A matter that has caused much debate over the years is the question as to what extent the obligation of research and restitution also applies to the Leopold Museum Privatstiftung.<sup>43</sup> In 2008 the Federal Ministry for Education, Art and Culture, together with the foundation, conducted a systematic provenance research into the collection.<sup>44</sup> A council has also been established to assess the files that resulted from this research.

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38 *ibid* §3.

39 Questionnaire *Beirat* (n 29).

40 1998 Art Restitution Law (n 22) §3(8).

41 Questionnaire *Beirat* (n 29).

42 Blimlinger (n 11) 28-29; Schnabel and Tatzkow (n 13) 138-139.

43 *ibid* 137-138; Jabloner and Blimlinger (n 7) 214-215.

44 Leopold Museum, ‘Provenienzforschung’ <[www.leopoldmuseum.org/de/forschung/provenienzforschung](http://www.leopoldmuseum.org/de/forschung/provenienzforschung)> (Leopold Museum Privatstiftung 2006) accessed 29 August 2014.

3.1.5 *The 2009 Art Restitution Law and the Committee*

Practical experiences after 1998 made it clear that the Art Restitution Law required a number of amendments. This led to the adoption of an amended Art Restitution Law in 2009, which has extended the scope of the legislation in important respects.<sup>45</sup> In accordance with the 1998 act, restitution was restricted to works of art (“Kunstgegenstände”), whereas under the new wording, the phrase “and other moveable cultural property” (“und sonstiges bewegliches Kulturgut”) was inserted.<sup>46</sup> Another important extension deals with the time and place of the property deprivation suffered. The 1998 Art Restitution Law referred to “legal transactions and other acts during the German occupation of Austria” (“Rechtsgeschäfte und sonstige Rechtshandlungen während der deutschen Besetzung Österreichs”).<sup>47</sup> The new act also offered scope for the restitution of objects that had been removed from the ownership of the original owner between 30 January 1933 and 8 May 1945 in the territory of the German Reich outside the territory of the present-day Republic of Austria (“zwischen dem 30. Jänner 1933 und dem 8. Mai 1945 in einem Herrschaftsgebiet des Deutschen Reiches außerhalb des Gebietes der heutigen Republik Österreich”).<sup>48</sup> The amendments closely matched the Committee’s existing practice. The letter of the law had no longer been followed in various recommendations prior to the 2009 Art Restitution Law, and instead, the Committee choose a more extensive interpretation.<sup>49</sup> Besides the content-related revisions, the 2009 act also provided for a number of organisational changes. The Committee no longer comprised seven but eight members.<sup>50</sup> The appointment term was also extended from one to three years.<sup>51</sup>

3.1.6 *Assessment Framework and Procedures*

The 1998 Art Restitution Law (as amended in 2009) forms the basis for the assessment of cases by the Committee. The act makes reference to the 1946 Nullification Act, which states that all legal transactions caused by the Nazi occupation are void. In interpreting this act, the Committee adheres to the post-war *Rückstellungskommissionen* (Restitutions Committees) with respect to the starting point that in particular all transactions by persecuted people like Jews are to be considered void.<sup>52</sup> The recommendations drafted deal

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45 2009 Art Restitution Law (n 22).

46 *ibid* §1(1).

47 1998 Art Restitution Law (n 22) §12; 1946 Nullification Act, § 1.

48 2009 Art Restitution Law (n 22) §1(1)2a.

49 Jabloner en Blimlinger (n 7) 235.

50 2009 Art Restitution Law (n 22) §3(2) and §3(3).

51 *ibid* §3(5).

52 Questionnaire *Beirat* (n 29).

exclusively with objects in federal possession: “The Art Restitution Law applies only to moveable cultural objects that are owned by the federal state”.<sup>53</sup>

As stated in the 2009 Art Restitution Law, the Committee’s opinions are based on the reports of the *Kommission für Provenienzforschung* (Commission for Provenance Research) of the Federal Ministry for Education, Art and Culture.<sup>54</sup> According to the Committee:

There is ... no need for any kind of application; the Committee decides on the outcome of the investigations of the Commission for Provenance Research which are done *ex officio* and presented to the Committee in a dossier.<sup>55</sup>

This working method and the in-house expertise of the Committee’s members are usually sufficient, but on the basis of the Art Restitution Law, the Committee can also hire “Sachverständige und geeignete Auskunftspersonen” (“experts and appropriate respondents”).<sup>56</sup> If there is any kind of information provided by the families of the former owners, it will be taken into account.<sup>57</sup> Hearings do not form part of the standard Committee procedure.

The Committee can only advise the accountable Minister about whether or not the objects should be restituted: “There are no ‘compromising’ solutions, like financial compensations”.<sup>58</sup> The advice of the Committee has been followed by the Minister in all recommendations since 1998. The Art Restitution Law does not provide for the possibility to appeal the recommendations or the decisions.

### 3.1.7 *Results and Publications*

The Committee meets approximately five to six times a year. In most cases the Committee comes to its decision in one session.<sup>59</sup> In general, the Committee’s procedures need less than three months. By 2014, the Committee had issued more than 300 opinions. In most cases it advised the Minister not to reconstitute the objects concerned, and in the other cases, it recommended that this should indeed be done.

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53 *ibid.*

54 2009 Art Restitution Law (n 22) §3(4); see also §4a.

55 Questionnaire *Beirat* (n 29).

56 1998 Art Restitution Law (n 22) §3(4).

57 Questionnaire *Beirat* (n 29).

58 *ibid.*

59 *ibid.*

3 NATIONAL PANELS ADVISING ON NAZI-LOOTED ART IN AUSTRIA, FRANCE, THE UNITED KINGDOM, THE NETHERLANDS AND GERMANY

The Committee's opinions are published on the Internet.<sup>60</sup> The Federal Minister of Education, Art and Culture furthermore publishes an annual report to the National Council, which is also published online.<sup>61</sup>

3.2 FRANCE

3.2.1 *Art Looting in France during the Nazi Regime*

The Third French Republic came to an end soon after German forces advanced into France in May and June 1940. French territory was divided into an area controlled by the German military in the northwest, and an unoccupied southeastern area, where the collaborating Vichy regime under the French Marshal Philippe Pétain was able to establish *l'État français* – the French State. The large-scale deprivation of the Jewish community's rights took place by means of the systematic implementation of anti-Jewish measures both in the occupied part of France and in the vassal state of Vichy.<sup>62</sup>

The looting of art and items of cultural interest was done primarily by means of confiscation. Initially this took place under the authority of the military regime, supervised by the German Embassy in Paris,<sup>63</sup> but after the autumn of 1940, the *Einsatzstab Reichsleiter Rosenberg für die besetzten Gebiete* (Reichsleiter Rosenberg Task Force or ERR) became the main instrument of German confiscation policy.<sup>64</sup> The ERR, an organisation led by the NSDAP ideologue Alfred Rosenberg, was personally authorised by Hitler to 'secure' and transfer valuable works of art to Germany.<sup>65</sup> Hermann Göring authorised the use of

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60 See the website of the Kommission for Provenienzforschung (n 21).

61 *ibid.*

62 W Veraart, *Ontrechting en rechtsherstel in Nederland en Frankrijk in de jaren van bezetting en wederopbouw* (Kluwer 2005) 277; for a short overview of some anti-Jewish measures, see L Anglade, 'Art, law and the Holocaust: the French situation' 4 *Art Antiquity and Law* 301-303.

63 S Rudolph, *Restitution von Kunstwerken aus jüdischem Besitz: dingliche Herausgabeansprüche nach deutschem Recht* (De Gruyter 2007) 51; LH Nicholas, *The rape of Europa: the fate of Europe's treasures in the Third Reich and the Second World War* (Vintage Books 1995) 120; I Le Masne de Chermont and D Schulmann, *Le pillage de l'art en France pendant l'occupation et la situation des 2000 oeuvres confiées aux musées nationaux* (La documentation française 2000) 15-16; J-P Le Ridant, 'Entre indemnisation et restitution: une approche française aux cas par cas' in A Baresel-Brand (ed), *Verantwortung wahrnehmen: NS-Raubkunst, eine Herausforderung an Museen, Bibliotheken und Archive Symposium, veranstaltet von der Stiftung Preussischer Kulturbesitz und der Koordinierungsstelle für Kulturgutverluste, Berlin, 11 und 12 Dezember 2008* (Koordinierungsstelle für Kulturgutverluste Magdeburg 2009) 485.

64 Le Ridant (n 63) 485; Schnabel and Tatzkow (n 13) 76; for more information on the ERR in France, see Petropoulos (n 7) 127-139 and Nicholas (n 63) 125-140.

65 See Hitler's Order of 17 September 1940, as cited in Rudolph (n 63) 51-52; see also Petropoulos (n 7) 130 and Nicholas (n 63) 125.

Luftwaffe trains and staff for transportation.<sup>66</sup> Between 1940 and 1944, over two hundred art collections, including world famous ones belonging to French-Jewish collectors and art dealers, were confiscated by the ERR.<sup>67</sup> In addition, the most valuable cultural property that was confiscated after 1942 by the *Dienststelle Westen* (Western Agency) under the *Möbel Aktion* (Operation Furniture) programme – the emptying of the houses abandoned by Jews – and by the *Devisenschutz-Kommando* (Foreign Exchange Protection Commando), which was charged with emptying safe deposit boxes, was handed over to the ERR, which subsequently arranged for the transport of these goods to Germany.<sup>68</sup>

The collected artworks were brought together in the Jeu de Paume museum run by the Germans in the Tuileries Gardens. It was here that art historians worked tirelessly to inventory all the works prior to the decision being made as to their destination.<sup>69</sup> The prime choice goods were destined for the collection of the planned Führer Museum in Linz. Hermann Göring, who visited the Jeu de Paume many times, was able to expand his collection using works of art that had slightly less allure. The remaining pieces were, for example, divided amongst German and French museums, offered for sale on the art market or exchanged for other interesting acquisitions for the Third Reich.<sup>70</sup>

The Nazis were able to acquire valuable artworks for the Third Reich, not only by confiscating them, but also through purchase – be it voluntary or involuntary – on the thriving art market and through organised barter transactions.<sup>71</sup> In all over 100,000 artworks and books were transported from France to Germany.<sup>72</sup>

### 3.2.2 *Post-war Restoration of Rights*

After the war the French regarded a properly functioning restitution and compensation policy to be a step towards returning to the rule of law in the French Republic rather than an element in the restoration of economic relations.<sup>73</sup> For this reason restitution case law was incorporated into the regular judicial system. The judiciary had to decide about restitution claims on the basis of clear-cut rules that left little scope for latitude in individual

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66 H Feliciano, *The lost Museum: the Nazi conspiracy to steal the World's greatest Works of Art* (T Bent and H Feliciano trs, Basic Books 1997) 38.

67 Le Masne de Chermont and Schulmann (n 63) 16.

68 Le Ridant (n 63) 485; Le Masne de Chermont and Schulmann (n 63) 16; A Wiewiorka and F Azoulay, *Le pillage des appartements et leur indemnisation* (La documentation française 2000) 12-15; Nicholas (n 63) 137-139.

69 Nicholas (n 63) 126-134.

70 *ibid* 131-32 and 136.

71 Le Ridant (n 63) 485; Nicholas (n 63) 153-169.

72 Le Ridant (n 63) 485.

73 Veraart (n 62) 376.

cases.<sup>74</sup> The Inter-Allied Declaration<sup>75</sup> laid down the basis for French restitution legislation. On 12 November 1943 the French Committee for National Liberation enacted this international declaration of principles into national legislation.<sup>76</sup> This was followed by the promulgation of a series of statutory provisions that gave further shape to restitution law. An important regulation in this context was promulgated on 21 April 1945.<sup>77</sup> In it a distinction was made between, on the one hand, transactions that had occurred against the will of the original owner, for example, through action by an administrator appointed by the Germans after the pronouncement of deprivation of rights, and, on the other, sales by the original owner himself.<sup>78</sup> In the first category, one departed from the rebuttable presumption of bad faith by the purchaser, in which case the contract was null and void *ab initio* and thus necessitating annulment. In the second category, the original owner had to prove that the transaction had occurred under duress arising from the circumstances, and consequently, the court could annul the contract at the request of the injured party.<sup>79</sup> In his dissertation about the French right to legal recovery in comparison with the Dutch system, the Dutch lawyer Wouter Veraart concludes that the possibility of good faith on the part of the acquirer did not prevent restitution, regardless of the ‘compulsory’ or ‘voluntary’ nature of the transaction. The French restitution legislature had opted a priori to side with the original owner.<sup>80</sup>

### 3.2.3 Commission de Récupération Artistique (*Artwork Recuperation Committee or CRA*)

The responsibility for the post-war procedure for recuperating and restituting all the property that had disappeared during the war was placed in the hands of the *Office des Biens et Intérêts Privés* (Office for Private Property and Interests, or OBIP). This Office was a department of the Ministry of Foreign Affairs established after the end of the First World War. However, the identification, recuperation and restitution of cultural property looted during the Nazi regime required such specialised research that the French authorities introduced additional general restitution of rights, measures that specifically addressed

74 Veraart (n 62) 375.

75 Inter-Allied Declaration (n 3).

76 Schnabel and Tatzkow (n 13) 140; Le Masne de Chermont and Schulmann (n 63) 28.

77 Ordonnance No. 45-770 du 21 avril 1945 portant deuxième application de l'ordonnance du 12 novembre 1943 sur la nullité des actes de spoliation accomplis par l'ennemi ou sous son contrôle et édictant la restitution aux victimes de ces actes de leurs biens qui ont fait l'objet d'actes de disposition (1945); see online at <[www.culture.gouv.fr/documentation/mnr/TJ/TJ-1945-04-21.pdf](http://www.culture.gouv.fr/documentation/mnr/TJ/TJ-1945-04-21.pdf)> accessed 29 August 2014.

78 W Veraart, 'Contrasting Legal Concepts of Restitution in France and the Netherlands' in W Veraart and L Winkel (eds), *The Post-war Restitution of Property Rights in Europe: Comparative Perspectives* (Scientia Verlag 2011) 29-30; Veraart (n 62) 421-422.

79 Veraart (n 62) 421-422; Le Masne de Chermont and Schulmann (n 63) 27.

80 Veraart (n 62) 534. See also section 2.4 of this book.

cultural property. The Minister of Culture subsequently established the *Commission de Récupération Artistique* (Artwork Recuperation Committee or CRA) on 24 November 1944.<sup>81</sup> This organisation, which was active from 1944 until 1949, was tasked with tracking down cultural property lost during the war, bringing it back to France and returning it to the rightful owners or their heirs. Among other things, the CRA collected information to this end from dispossessed owners of works of art and furthermore cooperated together with Allied forces and the equivalent foreign institutions.

In its work the CRA could also use a number of valuable sources that had been collected in secret during the war by Rose Valland, a member of the CRA who had worked at Jeu de Paume as an *attachée de conservation*. In this position Valland witnessed the operations of the ERR from close by and had meticulously recorded from which collections the works of art had been taken, as well as the destination of the cultural property that left France.<sup>82</sup> Thanks in part to Valland's information, after the war the CRA was able to track down over 63,000 items of looted French cultural property from Germany, Austria and the former occupied territories.<sup>83</sup> Approximately 45,000 of these items were returned to their rightful owners in the first five years after the war.<sup>84</sup>

The CRA furthermore compiled a list of cultural property that was removed from France during the war on the basis of claims to missing works of art by dispossessed French owners. This list was published between 1947 and 1949 as a part of the general *Répertoire des biens spoliés* (List of looted property) and distributed to museums, galleries and art traders, especially in France, Germany and Austria.<sup>85</sup>

The CRA was abolished on 30 September 1949.<sup>86</sup> The current cases were transferred to the OBIP on 1 January 1950. The OBIP was assisted in resolving current and future restitution cases by the *Direction des Musées de France*, among others.<sup>87</sup>

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81 N Palmer, *Museums and the Holocaust: Law, Principles and Practice* (Institute of Art and Law 2000) 121; Schnabel and Tatzkow (n 13) 140.

82 Nicholas (n 63) 134-136.

83 Le Masne de Chermont and Schulmann (n 63) 28; E Polack and P Dagen, *Les Carnets de Rose Valland: Le Pillage des Collections Privées d'Oeuvres d'Art en France durant la Seconde Guerre Mondiale* (Fage Éditions 2011).

84 Le Ridant (n 63) 486.

85 Site Rose Valland, 'Le Répertoire des Biens Spoliés' (Ministère de la Culture et de la Communication 2009) <[www.culture.gouv.fr/documentation/mnr/MnR-rbs.htm](http://www.culture.gouv.fr/documentation/mnr/MnR-rbs.htm)> accessed 29 August 2014.

86 Décret No. 49-1344 du 30 septembre 1949 relatif à la fin des opérations de la commission de récupération artistique (1949) JO, 02-10-1949; see online at <[www.culture.gouv.fr/documentation/mnr/dec3049.htm](http://www.culture.gouv.fr/documentation/mnr/dec3049.htm)>, accessed 29 August 2014.

87 *ibid* art 2.

### 3.2.4 Musées Nationaux Récupération (MNR)

When the CRA was abolished, thousands of the pieces of cultural property which had been returned to France but had not yet been returned to their rightful owners were sold by the *Administration des Domaines* (an office responsible for administering state properties) between 1950 and 1953. Pieces of art with the greatest art historical value and works that were of particular interest to regional museums, for example, were excluded from these sales. The items in this excepted category, approximately 2,100 in number, were selected by a *commission de choix*. This collection of artworks became known as the *Musées Nationaux Récupération* (MNR). It was put under the management of the *Direction des Musées de France* and was divided among national and provincial museums. The museums were instructed to register the MNR objects in a special inventory, which was made available to owners of looted property. The paintings in the museum collections would furthermore be labelled ‘MNR’.<sup>88</sup>

### 3.2.5 Developments during the 1990s

The last French case files relating to Nazi-looted art were closed midway through the 1960s.<sup>89</sup> Although the problem still occurred thereafter, albeit in a very restricted fashion, the issue disappeared from the general public’s radar. Eventually the archives of the CRA were transferred to the archives and documentation department of the Ministry of Foreign Affairs in 1991.<sup>90</sup>

Some years later, renewed interest developed in the subject of Nazi-looted art.<sup>91</sup> The book *Le Musée disparu: Enquête sur le pillage des œuvres d’art françaises* written by journalist Hector Feliciano played an important role. The publication of this investigation in 1995 led to stirrings in the media, especially when this work was taken together with an earlier publication entitled *The Rape of Europa* by Lynn Nicholas.<sup>92</sup> The headline in the newspaper *Le Monde* was “Les musées détiennent 1,995 oeuvres d’art volées aux juifs pendant l’Occupation” (“Museums hold back 1,995 artworks stolen from Jews during the occupation”). The paper also interviewed Feliciano, who asserted that the French museums were slow in answering questions.<sup>93</sup>

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88 Le Masne de Chermont and Schulmann (n 63) 37.

89 *ibid.*

90 F Cachin, ‘Spoils of War’, *New York Review of Books* (New York 5 February 1998) <[www.nybooks.com/articles/archives/1998/feb/05/spoils-of-war/](http://www.nybooks.com/articles/archives/1998/feb/05/spoils-of-war/)> accessed 29 August 2014.

91 Le Masne de Chermont and Schulmann (n 63).

92 *ibid.* See also Feliciano (n 66) and Nicholas (n 63).

93 Site Rose Valland, ‘New approaches of art looting from the 1990s till today’ (Ministère de la Culture et de la Communication) <[www.culture.gouv.fr/documentation/mnr/AH/en-nlles.htm](http://www.culture.gouv.fr/documentation/mnr/AH/en-nlles.htm)> accessed 29 August 2014.

Investigations into art looted from France were once again commenced during the 1990s as a consequence of the increased interest in Nazi plundered property both domestically and abroad. In this context there was an exhibition of MNR works in the spring of 1997 in more than 120 museums, including the Louvre. The results of provenance research into individual MNR works were furthermore published in an Internet database so that interested parties could investigate for themselves and to provide relevant information about the pieces. The research into the MNR collection is still ongoing. In March 2013 the French government set up a working group which is trying to trace heirs of the original owners of individual MNR works.<sup>94</sup>

### 3.2.6 *Mission Mattéoli*

The investigation into looted art was given an added boost by the French government on 25 March 1997 when it established the *Mission d'étude sur la spoliation des Juifs de France de 1940 à 1944*.<sup>95</sup> This fact-finding committee, also known as the *Mission Mattéoli* after its chair, the former resistance fighter Jean Mattéoli, was assigned the task of conducting in-depth research into how French Jews lost their movable and immovable property between 1940 and 1944 as a result of measures taken in both the occupied part of France and Vichy to deprive them of their rights. An evaluation of post-war restoration of rights also took place in this light.<sup>96</sup>

The fate of the looted artworks was one of the areas of specific interest for the *Mission Mattéoli*, in addition, for example, to the plundering of bank accounts and the Aryianisation of businesses.<sup>97</sup> It was decided that appointing extra researchers would support the existing investigations.<sup>98</sup> The MNR collection was systematically investigated between November 1998 and June 2000.<sup>99</sup> The direct result of this investigation was that 200 pieces of art were unmistakably deemed to have been looted, for example, through confiscation by the ERR. The other pieces, numbering approximately 1,800, appeared predominantly to have been traded during the war on the French art market.<sup>100</sup> The results of the investigation into the individual pieces of art were added to the Internet database of MNR works and furthermore published on paper in 2004.<sup>101</sup>

94 C Blommelaer, 'Spoliation: des tableaux retrouvent leur maître' *Le Figaro* (Paris 24 January 2014).

95 Anglade (n 62) 306.

96 Ministère de la Culture et de la Communication (n 93).

97 Le Ridant (n 63) 486.

98 Le Masne de Chermont and Schulmann (n 63).

99 Ministère de la Culture et de la Communication (n 93).

100 *ibid.*

101 Site Rose Valland, 'Musées Nationaux Récupération' (Ministère de la Culture et de la Communication) <[www.culture.gouv.fr/documentation/mnr/pres.htm](http://www.culture.gouv.fr/documentation/mnr/pres.htm)> accessed 29 August 2014.

3 NATIONAL PANELS ADVISING ON NAZI-LOOTED ART IN AUSTRIA, FRANCE, THE UNITED KINGDOM, THE NETHERLANDS AND GERMANY

The *Mission Mattéoli* published the conclusions of its investigations in 2000. The results were given in ten publications, including a summary, seven reports, an anthology of official texts and a research guide.<sup>102</sup> The report concerning Nazi-looted art reached the important conclusion that although substantial efforts had been made after the war to return cultural property to the rightful owners, this task had not been completed.<sup>103</sup>

In its summary report, the *Mission Mattéoli* formulated nineteen recommendations for the French government. The recommendations regarding looted art were mainly concerned with the exhibition of plundered pieces, the publication of research results and the stimulation of international cooperation.<sup>104</sup>

### 3.2.7 CIVS

During the final phase of Mission Mattéoli's investigations, the French government decided to appoint an independent body to determine appropriate compensation for the victims of looting during the Second World War. This *Commission pour l'indemnisation des victimes de spoliations intervenues du fait des législations antisémites en vigueur pendant l'Occupation* (Commission for the Compensation of Victims of Spoliation Resulting from the Anti-Semitic Legislation in Force during the Occupation, or CIVS) was established by decree on 10 September 1999.<sup>105</sup> According to article 1 of the decree, the CIVS is responsible for advising the Prime Minister about individual requests for compensation for the damage caused as a result of anti-Semitic legislation promulgated during the occupation of France by occupying forces and by the Vichy regime. The CIVS was tasked with investigating these claims and "de proposer les mesures de réparation, de restitution ou d'indemnisation appropriées".<sup>106</sup>

The Deliberate College of the CIVS comprises ten members. There are two judges of the French *Cour de Cassation* (Court of Cassation), one of whom is also the Chair, two members of the *Conseil d'Etat* (Council of State), two members of the *Cour des Comptes* (Court of Auditors), two university professors and two "*personnalités qualifiées*": qualified individuals who are usually connected to the Jewish community in France. The Prime

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102 Site Rose Valland, 'La mission Mattéoli' (Ministère de la Culture et de la Communication) <[www.culture.gouv.fr/documentation/mnr/MnR-matteoli.htm](http://www.culture.gouv.fr/documentation/mnr/MnR-matteoli.htm)> accessed 29 August 2014.

103 Information provided by the CIVS on a questionnaire completed at the request of the Dutch Restitutions Committee (2012).

104 Ministère de la Culture et de la Communication (n 93).

105 Décret No.99-778 du 10 septembre 1999 instituant une commission pour l'indemnisation des victimes de spoliations intervenues du fait des législations antisémites en vigueur pendant l'Occupation (1999). N.B. The decree has been amended numerous times since 1999. See online at <[www.legifrance.gouv.fr/affich-Texte.do?cidTexte=LEGITEXT000005628500&dateTexte=20081229](http://www.legifrance.gouv.fr/affich-Texte.do?cidTexte=LEGITEXT000005628500&dateTexte=20081229)> accessed 29 August 2014. See Appendix 9.

106 Le Ridant (n 63) 486-487.

Minister appoints the members for a term of three years. Besides members of the Commission, the CIVS has a director, a principal rapporteur, about sixteen rapporteurs and thirty employees.<sup>107</sup>

The work of the CIVS is not limited to the assessment of claims with respect to Nazi-looted art, whether for compensation or not. It also extends to all plundered property which resulted from anti-Semitic legislation in France between 1940 and 1944.<sup>108</sup> There are no time limits for submitting a claim nor has a ceiling been imposed by the French government to the budget available for paying compensation.<sup>109</sup>

### 3.2.8 *Procedures, Investigations and Assessment Framework*

Only natural persons or their heirs may submit a claim to the CIVS. Legal entities may not submit claims.<sup>110</sup> The nationality of the claimants is irrelevant. The only relevant question is whether the loss of possession occurred in France.<sup>111</sup> Some cases are given priority. This concerns claims that have been submitted by direct victims, by persons who are seriously ill or older than 75 or by persons who find themselves in serious financial difficulty.<sup>112</sup> During the procedure, claimants can be represented by a lawyer, and they can represent other heirs.<sup>113</sup> In the event that there are different claims concerning the same loss of possession, for example, claims from different members of the same family, all the claims are combined by the CIVS into one file.<sup>114</sup>

After the claim has been submitted, the claimants receive a form in which they can authorise the CIVS to investigate on their behalf. A questionnaire accompanies the authorisation form. The CIVS wants to use the questionnaires to inventory all the information the claimants have. The procedure commences after both forms, together with any appendices or attachments, have been returned. The CIVS then conducts research in national and foreign archives, in part on the basis of the information provided by the claimants.<sup>115</sup> An important question in such research is whether the loss of possession did indeed occur as a result of anti-Semitic legislation, rather than on the basis of general

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107 Questionnaire CIVS (n 103). See also CIVS, 'Collège délibérant' (République française – Premier Ministre – CIVS 2007) <[www.civs.gouv.fr/article40.html](http://www.civs.gouv.fr/article40.html)> accessed 29 August 2014; CIVS, 'Organigramme' (République française – Premier Ministre – CIVS 2007) <[www.civs.gouv.fr/article40.html](http://www.civs.gouv.fr/article40.html)> accessed 29 August 2014.

108 N.B. Advice on compensation for emotional damage does not belong to the CIVS's tasks.

109 Questionnaire CIVS (n 103).

110 *ibid.*

111 *ibid.*

112 CIVS, 'Services – Control and Investigation Network' (République française – Premier Ministre – CIVS 2007) <[www.civs.gouv.fr/article399.html](http://www.civs.gouv.fr/article399.html)> accessed 29 August 2014.

113 Questionnaire CIVS (n 103).

114 CIVS, 'Questions/Answers – Can a Brother and Sister file separate claims?' (République française – Premier Ministre – CIVS 2007) <[www.civs.gouv.fr/article635.html](http://www.civs.gouv.fr/article635.html)> accessed 29 August 2014.

115 République française – Premier Ministre – CIVS 2007 (n 112).

wartime conditions, for example, as the result of bombing. Another area of attention in the investigation is the prevention of double compensation, which can be the case when compensation has already been paid in France or Germany since the war or when an object has already been returned since the war.<sup>116</sup> The CIVS also conducts research into other possible loss of possession, which might not even be known to the claimants.<sup>117</sup> In order to conduct these investigations, the CIVS research teams work in France and Germany, and they cooperate closely with various national and international archives and institutions.<sup>118</sup>

The documents discovered during archival research are handed over to a rapporteur – a magistrate who deals with the case further. In many cases the rapporteur conducts interviews with the claimants. The CIVS website states that the aim of the interviews is threefold. Firstly, during the interviews, time is given to the claimants to describe the personal story behind the claim. Secondly, the interviews are a way to:

[...] enlighten claimants about what happened to their family during the Occupation by sharing with them the documents retrieved from the archives relating to their next-of-kin, about which they had no knowledge until then. For many, these documents make up the only traces of a painful past, which they are once again called upon to face. They attach as much importance to these documents as to the compensation they await.<sup>119</sup>

Finally, the rapporteur can gain insight into the composition of the family and the inheritance situation during the interview with the claimants.<sup>120</sup>

Frequently further research needs to be conducted as a result of the interviews. As soon as this research has been completed and all relevant details in a case have been collected, the rapporteur informs the claimants, after which they have the opportunity to comment on the report. The rapporteur amends the report using this information and produces a report containing a proposal for the advice to be issued by the CIVS, which in almost all cases results in the payment of compensation.<sup>121</sup> The report is reviewed by the principal

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116 CIVS, 'Services – CIVS Search Team in the National Archives' (République française – Premier Ministre – CIVS 2007) <[www.civs.gouv.fr/article401.html](http://www.civs.gouv.fr/article401.html)> accessed 29 August 2014; CIVS, 'Services – Berlin Search Team' (République française – Premier Ministre – CIVS 2007) <[www.civs.gouv.fr/article400.html](http://www.civs.gouv.fr/article400.html)> accessed 29 August 2014; CIVS, 'Services – CIVS Search Team in the Paris Archives' (République française – Premier Ministre – CIVS 2007) <[www.civs.gouv.fr/article402.html](http://www.civs.gouv.fr/article402.html)> accessed 29 August 2014.

117 CIVS, *Activity Report for the Commission presented to the Prime Minister* (pursuant to Article 9-1 of Decree No.°99-778 of September 10, 1999, as amended) (Paris 20 November 2001).

118 République française – Premier Ministre – CIVS 2007 (n 112).

119 CIVS, 'Services – Rapporteurs' Bureau' (République française – Premier Ministre – CIVS 2007) <[www.civs.gouv.fr/article403.html](http://www.civs.gouv.fr/article403.html)> accessed 29 August 2014.

120 *ibid.*

121 République française – Premier Ministre – CIVS 2007 (n 117).

rapporteur, after which is decided whether the case will be handled in a session in which only the Chair of the CIVS is present, a session with three members of the Commission, or a plenary session at which at least six members must be present.<sup>122</sup> The rapporteur is also present during the meeting in which the report is discussed, for example, to answer questions. If desired, the claimants or their representatives may also attend the meeting.

During the meeting a recommendation about the claim is drafted that either leads to compensation, rejection or, in a few cases, restitution. The Commission advises on grounds of reasonableness and fairness. A great deal of importance is attached to the statements made by the claimants.<sup>123</sup> If no sources have been found during the research that provide a decisive answer about a particular question, the Commission decides on the basis of information supplied by the claimants. If the facts and circumstances concerning the loss of possession are unclear, the compensation proposed is generally limited. If, on the other hand, there is clear evidence of looting, substantial compensation can be proposed, or in a few cases – when circumstances allow – actual restitution is recommended.

### 3.2.9 *Results*

Most of the recommendations made by the CIVS have related to compensation. Up to the end of April 2014, advice to reconstitute objects was restricted to a few pieces of art that were from the MNR collection.<sup>124</sup> CIVS advice is non-binding, unlike the decision of the Prime Minister that follows a recommendation. The advice of the CIVS is virtually always accepted, and the claimants are informed shortly thereafter.<sup>125</sup> The recommendations of the CIVS are not published because of strict privacy rules.

The CIVS has dealt with 28,662 cases between the start of its work in 1999 and 30 April 2014. Of these cases, 3,197 involved the looting of personal cultural property. Artworks were involved in 270 cases. Restitution of objects from the MNR collection (a total of ten MNR artworks) was recommended in four of these cases.

A CIVS procedure usually takes approximately one to three years, depending on the complexity of the case. A case can often result in multiple recommendations. By 30 April 2014 the Commission had produced a total of 33,564 recommendations. The total amount of compensation awarded is EUR 490,197,314.<sup>126</sup>

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122 Questionnaire CIVS (n 103); République française – Premier Ministre – CIVS 2007 (n 112).

123 Questionnaire CIVS (n 103).

124 CIVS, 'Questions/Answers: What limits does the CIVS impose in terms of research involving works of art?' (République française – Premier Ministre – CIVS 2008) <[www.civs.gouv.fr/article592.html](http://www.civs.gouv.fr/article592.html)> accessed 29 August 2014.

125 Questionnaire CIVS (n 103).

126 Information provided by the CIVS (email correspondence 23 May 2014).

### 3.2.10 Conclusion

After the Commission has delivered its advice, each and every claimant can in principle request the Commission for a reassessment. Claimants are furthermore allowed to appeal the decision to the administrative court.<sup>127</sup>

A reassessment of the case by the CIVS needs to satisfy a number of conditions. For example, new documents or new facts need to have surfaced, or a substantive mistake in the advice needs to have been, such as a calculation error. When a person requests a portion of the compensation without having been involved in the procedure, or when a request for reassessment of a case has been submitted, the majority of cases can be resolved quickly by the Chair of the CIVS.<sup>128</sup>

The CIVS cannot give an opinion about claims related to artworks in private collections. If a looted piece of art is present in a private museum, in an art dealer's stock or in a private collection, in principle the victims or their heirs are able to file a claim with a normal court.<sup>129</sup>

## 3.3 UNITED KINGDOM

### 3.3.1 *Developments since the Second Half of the 1990s*

In contrast to the German-occupied areas of Europe, the United Kingdom did not suffer from systematic and large-scale art looting during the Nazi era. After the War, looted art objects in public collections requiring restitution policy to be developed were not perceived as an issue in the United Kingdom. In the 1990s increasing attention was given to this area of work. These years saw a revival of awareness of the implications of spoliation and a growing concern about the fact that imported items with a problematic provenance ended up in UK museums and galleries over the course of time.<sup>130</sup>

One of the measures taken was the establishment of a Spoliation Working Group of the National Museum Directors' Conference (NMDC) in June 1998.<sup>131</sup> This working group developed a *Statement of Principles and Proposed Actions* for the members of the NMDC in which it argued for a "UK wide survey of objects which institutions currently believe

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127 *ibid.*

128 *ibid.*

129 *ibid.*

130 See on the post-war responses to spoliation and the revival of concern and research in the 1990s: Culture, Media and Sport Committee to the House of Commons, *Seventh Report – Cultural Property: Return and Illicit Trade* (House of Commons 2000).

131 *Spoliation of works of art during the Holocaust and World War II period* (National Museum Directors' Council).

might have been wrongfully taken during the Holocaust and World War II period".<sup>132</sup> The statement was finalised and adopted by the NMDC in November 1998. An independent advisory council under the chairmanship of Sir David Neuberger was established to oversee the implementation of its recommendations. In April 1999, the Museums & Galleries Commission issued a similar statement for non-national museums, libraries and archives in the United Kingdom.<sup>133</sup> Since 1998, awareness of this issue has increased and UK institutions, in the main, have made a determined effort to examine their collections for items with an unsound provenance. Research reports and lists of works with "incomplete provenance during the period 1933-1945" have been made available on a government-funded website, *Cultural Property Advice*.<sup>134</sup> The website includes a searchable database where potential claimants and others can search for works in which they have an interest.<sup>135</sup>

Those seeking to recover Nazi-looted art can attempt to do so through the UK courts, but it is unlikely that such an attempt would succeed. The Spoliation Advisory Panel (the SAP) stated in its response to the questionnaire of the Dutch Restitutions Committee:

It is highly likely that such claims would be time-barred, though not necessarily so. The general rule in English law is that a claim for conversion of property must be brought within 6 years of the wrongful act (although there are limited exceptions based on theft, fraud, concealment and mistake). However, the applicable law is generally that of the country where the property was situated at the time it changed hands (not necessarily English law).<sup>136</sup>

In February 2000, the UK government established the SAP in order to provide an alternative process to litigation through the UK courts for resolving claims for looted art in public UK collections.<sup>137</sup> Initially under the chairmanship of Sir David Hirst, the Panel's remit is

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132 *UK Museums' Provenance Research for the Period 1933-1945: Statement of Principles and Proposed Actions* (National Museum Directors' Council).

133 Currently the Museums, Libraries and Archives Council.

134 *Spoliation of works of art during the Holocaust and World War II period. Progress report on UK Museums' provenance research for the period 1933-1945* (Cultural Property Advice) <[www.culturalpropertyadvice.gov.uk/spoliation\\_reports](http://www.culturalpropertyadvice.gov.uk/spoliation_reports)> accessed 29 August 2014.

135 *Search Spoliations* (Cultural Property Advice) <[www.culturalpropertyadvice.gov.uk/search\\_spoliations](http://www.culturalpropertyadvice.gov.uk/search_spoliations)> accessed 29 August 2014.

136 Information provided by the SAP on a questionnaire completed at the request of the Dutch Restitutions Committee (2012).

137 T Oost, *In an Effort to Do Justice? Restitution Policies and the Washington Principles* (Centre of Art, Law and Policy, University of Amsterdam 2012) 197-206; Palmer (n 81) 27, 29, 106, 114; *ibid*, 'Spoliation and Holocaust-related cultural objects. Legal and ethical models for the resolution of claims' (2007) 12/1 *Art Antiquity and Law* 1-15; Schnabel and Tatzkow (n 13) 172-175, 428-434; C Woodhead, 'Nazi Era spoliation: establishing procedural and substantive principles' (2013) 18/2 *Art Antiquity and Law* 167-192; C Woodhead, 'Redressing historic wrongs, returning objects to their rightful owners or laundering tainted objects? 21st century UK remedies for Nazi Era injustices?' (2014) 21/2 *International Journal of Cultural Property*, 113-142.

to consider claims from anyone who lost possession of a cultural object that is currently held in a national museum collection or in another UK museum or gallery established for the public benefit where possession was lost during the Nazi era.<sup>138</sup> The SAP's strength is that whereas the legal claim is often disallowed, it is able to consider the moral arguments of the claim. The Panel is sponsored by the Department for Culture, Media and Sport.

### 3.3.2 *Legislative Change and the Spoliation Advisory Panel*

When the SAP was established, national museums were restricted by their governing legislation from removing items from their collections. The Culture, Media and Sport Committee of the House of Commons wrote in its report of June 2000:

[...] there are significant legal barriers to restitution by national bodies, most of which are established by statute. Trustees are only permitted to dispose of objects in very narrowly defined circumstances, none of which would permit return in the likely circumstances of a case considered by the Spoliation Advisory Panel.<sup>139</sup>

The Committee called for the responsible ministers to draft suitable legislation for these categories of cultural property. In December 2003 the Committee once again ensured that the topic was placed on the agenda. However, the government felt it was "disproportionate to seek to legislate" and indicated that the SAP had not yet utilised the competence it had to call the Secretary of State's attention to the need for legislation.<sup>140</sup>

In March 2005 the SAP's third report brought about change. This case concerned a claim to the Beneventan Missal, a twelfth-century manuscript, then in the possession of the British Library and which had been looted in the 1943-1944 period from the Italian city of Benevento. The SAP supported restitution of the Missal, but this was not possible under the British Library's governing statute. The SAP's advice to the Secretary of State was:

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138 Account of Minister Alan Howarth, Department of Culture, Media and Sport (DCMS), House of Commons, 17 February 2000, column 628W.

139 Culture, Media and Sport Committee (n 1) section 190.

140 P Ward, *Holocaust (Return of Cultural Objects) Bill: Committee stage report / Bill No 111* (House of Commons Library Research Paper 09/59, 23 June 2009) 4.

[...] that legislation should be introduced to amend the British Museum Act 1963, the British Library Act 1972, and the Museums and Galleries Act 1992 so as to permit restitution of objects in this particular category.<sup>141</sup>

Statutory impediments to restitution also played a role in a restitution claim on behalf of the heirs of Arthur Feldmann to four drawings, then in the possession of the British Museum. The right of the British Museum to return the four drawings was tested in the High Court, with the court ruling against return. The claimants subsequently petitioned to obtain an *ex gratia* payment in lieu of restitution, which they were ultimately granted in April 2006 on the basis of the fifth SAP report.<sup>142</sup>

In July 2006 the UK government initiated a public consultation in order to resolve the issue.<sup>143</sup> The turning point came in 2009, when Andrew Dismore MP introduced a Private Member's Bill in the House of Commons which would allow national museums in the United Kingdom to restitute items following a recommendation by the SAP and where Ministers agree. The Holocaust (Return of Cultural Objects) Act 2009 (the Act), which came about as a result of this Bill, became law in the United Kingdom on 13 January 2010.<sup>144</sup> It was "An Act to confer power to return certain cultural objects on grounds relating to events occurring during the Nazi era". The term 'Nazi era' referred to the period from 1 January 1933 to 31 December 1945 inclusive. The Act authorised seventeen Boards of Directors and Trustees of National Collections in the United Kingdom to transfer objects from their collections, subject to two conditions, namely, that "the Advisory Panel has recommended the transfer" and that "the Secretary of State has approved the Advisory Panel's recommendation". An extra stipulation was imposed for the collections of the Scottish Board of Directors that the approval of the Secretary of State needed to have the consent of the Scottish Ministers. The Act includes a clause which states that it "expires at the end of the period of 10 years beginning with the day on which it is passed".

The Act also gave the Secretary of State the power to appoint an advisory Panel to assess claims. The SAP was reconstituted on 12 April 2010 from a non-departmental public body to "a group of expert advisers, to be convened as a Panel from time to time".<sup>145</sup> Sir Donnell Deeny was appointed chair in early 2012, following the death of Sir David Hirst. Otherwise,

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141 Sir David Hirst, *Report of the Spoliation Advisory Panel in Respect of a 12th Century Manuscript now in the Possession of the British Library* (Spoliation Advisory Panel 2005).

142 Sir David Hirst, *Report of the Spoliation Advisory Panel in Respect of Four Drawings now in the Possession of the British Museum* (Spoliation Advisory Panel 2006).

143 *Restitution of Objects Spoliated in the Nazi-Era: A Consultation Document* (Department for Culture, Media and Sport 2006); *Summary of the Responses to the Consultation Paper: Restitution of Objects Spoliated in the Nazi-Era* (Department for Culture, Media and Sport 2007).

144 Holocaust (Return of Cultural Objects) Act 2009 <[www.legislation.gov.uk/ukpga/2009/16/contents](http://www.legislation.gov.uk/ukpga/2009/16/contents)> accessed 12 September 2014. See Appendix 13.

145 Spoliation Advisory Panel, Constitution and Terms of Reference. See Appendix 10.

the composition of the SAP remained unchanged, although a new legal member was appointed in 2013. The Secretary of State for Culture, Media and Sport appoints the SAP, and its Secretary is a civil servant from the department. The Secretary does not take part in the decision-making process. The SAP's members are drawn from the areas of law, ethics, European history, art and museums.

In the questionnaire completed at the request of the Dutch Restitutions Committee, the SAP stated that the Panel provides independent advice to claimants, institutions and the Secretary of State: "It does not represent any of the above groups but its members are drawn from a wide variety of fields including the art trade and museums".<sup>146</sup> The first chair was a retired judge and the present chair is a serving judge: "both therefore are and have been independent of the art trade, museums and government". Special attention is paid to the consideration of conflict of interests. Should this occur, the member in question no longer participates in the discussion.<sup>147</sup>

### 3.3.3 *Assessment Framework and Procedures*

An explanation of the advisory role of the SAP can be found in its Constitution and Terms of Reference. According to this document, the Panel's remit is:

[...] to consider claims from anyone (or from any one or more of their heirs), who lost possession of a cultural object ('the object') during the Nazi era (1933 -1945), where such an object is now in the possession of a UK national collection or in the possession of another UK museum or gallery established for the public benefit ('the institution').<sup>148</sup>

The SAP can also offer advice about objects in private collections but only with the joint agreement of the claimant and the current owner.<sup>149</sup>

The SAP advises the claimant and the institution how the claim should be dealt with and can also recommend that the Secretary of State adopts measures in relation to that claim or in relation to "general issues raised by the claim".<sup>150</sup> If the advice is to return an object from a national collection, then the approval of the Secretary of State is required in order to achieve this outcome. The recommendations of the Panel are not legally binding.

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146 Questionnaire SAP (n 136).

147 *ibid.*

148 Constitution and Terms of Reference (n 16) art 1.

149 *ibid* art 6.

150 *ibid* art 6 and art 7.

The main aim of the SAP's assessment of the cases is to achieve a solution which is "fair and just both to the claimant and to the institution".<sup>151</sup> The SAP offers an alternative to litigation and includes references to non-legal obligations in its considerations, such as "the moral strength of the claimant's case" and "whether any moral obligation rests on the institution".<sup>152</sup>

The SAP bases its duty to give weight to moral considerations on the terms of two international instruments. In the Inter-Allied Declaration of 1943, to which all the Allies subscribed, the governments making the Declaration reserved their rights "to declare invalid any transfers of, or dealings with, properties situated within the territories under enemy control which belonged to persons resident in such territories".<sup>153</sup> This warning applied regardless of "whether such transfers or dealings took the form of looting or plunder, or of transactions apparently legal in form, even where they purport to be voluntarily effected". The Declaration was never embodied by Statute into English law, but it gives the Panel guidance on the underlying principle.<sup>154</sup> According to the SAP, this was echoed in December 1998 in the Declaration of Principles issued by the Washington Conference on Holocaust-Era Assets, in which the need to find a "just and fair solution" was emphasised.<sup>155</sup>

Furthermore, the SAP attaches importance in its advisory role to the post-war restitution principle that emanated from British Military Law No. 59 (see section 3.5.2), namely, that:

[...] it shall be presumed in favour of a claimant that a transaction entered into between January 1933 and May 1945 which involves any transfer or relinquishment of property during a period of persecution by any person who was directly exposed to persecutory measures on racial grounds shall be presumed to constitute an act of confiscation.<sup>156</sup>

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151 *ibid* art 14.

152 *ibid* art 9.

153 Sir David Hirst, *Report of the Spoliation Advisory Panel in Respect of a Painting now in the Possession of Glasgow City Council* (Spoliation Advisory Panel 2004), consideration 9; Sir David Hirst, *Report of the Spoliation Advisory Panel in Respect of Four Drawings now in the Possession of the British Museum* (Spoliation Advisory Panel 2006), consideration 32; Sir David Hirst, *Report of the Spoliation Advisory Panel in Respect of a 12th Century Manuscript now in the Possession of the British Library* (Spoliation Advisory Panel 2005), consideration 57.

154 Sir David Hirst, *Report of the Spoliation Advisory Panel in Respect of Four Drawings Now in the Possession of the British Museum* (Spoliation Advisory Panel 2006), consideration 33; Sir David Hirst, *Report of the Spoliation Advisory Panel in Respect of a 12th Century Manuscript now in the Possession of the British Library* (Spoliation Advisory Panel 2005), consideration 58.

155 *ibid*.

156 Sir David Hirst, *Report of the Spoliation Advisory Panel in Respect of a Painting now in the Possession of Glasgow City Council* (Spoliation Advisory Panel 2004), consideration 8.

This presumption can be rebutted according to British Military Law No. 59 by “showing that the transferor was paid a fair purchase price, provided the transferor was not denied the free right of disposal of the purchase price on inter alia racial grounds”.<sup>157</sup>

Elements that play a role in the assessment of claims are mentioned in Article 15 of the Constitution and Terms of Reference. In order to achieve a fair and just solution, the SAP will among other things do the following:

[...]

(c) examine and determine the circumstances in which the claimant was deprived of the object, whether by theft, forced sale, sale at an undervalue, or otherwise;

(d) evaluate, on the balance of probability, the validity of the claimant’s original title to the object, recognising the difficulties of proving such title after the destruction of the Second World War and the Holocaust and the duration of the period which has elapsed since the claimant lost possession of the object;

(e) give due weight to the moral strength of the claimant’s case;

(f) evaluate, on the balance of probability, the validity of the institution’s title to the object;

(g) consider whether any moral obligation rests on the institution taking into account in particular the circumstances of its acquisition of the object, and its knowledge at that juncture of the object’s provenance;

[...].<sup>158</sup>

The Panel finds facts on the basis of the balance of probabilities. If the claim is upheld, various advisory opinions are possible. The SAP can make the following recommendations according to its Constitution and Terms of Reference:

16. If the Panel upholds the claim in principle, it may recommend either:

(a) the return of the object to the claimant, or

(b) the payment of compensation to the claimant, the amount being in the discretion of the Panel having regard to all relevant circumstances including the current market value, but not tied to that current market value, or an ex gratia payment to the claimant, or

(c) an ex gratia payment to the claimant, or

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157 *ibid.*

158 Constitution and Terms of Reference (n 16).

(d) the display alongside the object of an account of its history and provenance during and since the Nazi era, with special reference to the claimant's interest therein; and

(e) that negotiations should be conducted with the successful claimant in order to implement such a recommendation as expeditiously as possible.<sup>159</sup>

The practicalities involved in bringing a claim before the SAP are covered by its Rules of Procedure.<sup>160</sup> This document specifies the administrative procedures and the requirements for making and responding to a claim. It also indicates the ways the Panel can dispose of a case, either on the basis of written material furnished by the parties or at an oral hearing. Thus far, cases have been dealt with primarily on the basis of the parties' written submissions: "With the agreement of the Chairman, claimants may also request an oral hearing but these are rare".<sup>161</sup>

Research is conducted, or instructions for research are issued if and when the need arises and only on an incidental basis.<sup>162</sup> Outside expertise and advice has been used in the past on several occasions:

The Panel has consulted a number of outside experts including the national archives, auction houses, art experts and academic institutions. Government lawyers provide the legal advice to the Panel. Two members of the panel are leading lawyers.<sup>163</sup>

The time required to consider a claim varies from case to case, but is usually six to eight months.<sup>164</sup> SAP recommendations are included in and supported by a report that is presented to the claimant, the institution and the Secretary of State. So far, the UK government has accepted every recommendation.<sup>165</sup>

Parties wishing to solve their dispute by means of mediation are able to approach the SAP, but "it does not employ formal mediation procedures as may be used elsewhere to arrive at a decision".<sup>166</sup>

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159 *ibid.*

160 Spoliation Advisory Panel, Rules of Procedure <<http://webarchive.nationalarchives.gov.uk/20121204113822/http://www.culture.gov.uk/images/publications/SAPRulesofProcedure09.pdf>> accessed 10 September 2014.

See Woodhead (n 119) 174.

161 Questionnaire SAP (n 136).

162 *ibid.*

163 *ibid.*

164 *ibid.*

165 *ibid.*

166 *ibid.*

### 3 NATIONAL PANELS ADVISING ON NAZI-LOOTED ART IN AUSTRIA, FRANCE, THE UNITED KINGDOM, THE NETHERLANDS AND GERMANY

#### 3.3.4 Results and Publication

As of August 2014, the SAP has considered fifteen claims. The full reports are published and presented to the UK parliament and are accessible on the website of the Department for Culture, Media and Sport (DCMS).<sup>167</sup>

### 3.4 THE NETHERLANDS

#### 3.4.1 Art Looting in the Netherlands during the Nazi Regime

On 10 May 1940 German troops invaded the Netherlands and overwhelmed the Dutch army. The Nazis established a civil occupying administration under the leadership of Arthur Seyss-Inquart, in which a large part of the existing Dutch administrative structure remained intact.<sup>168</sup> Little seemed to have changed during the first few months of the occupation. Initially the Germans even suggested that there was no 'Jewish question' in the Netherlands.<sup>169</sup> In order to win over the Dutch population, the Nazis refrained from large-scale confiscations of artworks from private collections or museums. Unlike the situation in Austria, where anti-Jewish measures that had already been implemented in Germany were taken immediately after the *Anschluss* (annexation) in 1938, the anti-Jewish policy was furthermore introduced incrementally throughout the occupied Netherlands. The Jewish population in the Netherlands became increasingly isolated and dispossessed of their property as a series of regulations was gradually promulgated.

Some of the enormous number of pieces of art that were taken to Germany during the occupation were acquired by means of purchase, be it voluntary or involuntary.<sup>170</sup> Prior to the German invasion, the Dutch art market had been in the doldrums, resulting in the widespread availability of attractive works in the art trade and in private collections. This situation provided ample opportunities for Adolf Hitler's and Hermann Göring's art buyers, German museum directors as well as ordinary (German) art dealers. The looting institution *Dienststelle Mühlmann* also operated under the Seyss-Inquart administration. It served as an intelligence service inventorying art present in the Netherlands and actively confiscated artworks itself or purchased it for the Nazi elite. The influx of German buyers

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167 Gov. UK, 'Department for Culture, Media and Sport' (Government Digital Service) <[www.gov.uk/government/organisations/department-for-culture-media-sport](http://www.gov.uk/government/organisations/department-for-culture-media-sport)> accessed 10 September 2014.

168 P Romijn, *Snel, streng en rechtvaardig. De afrekening met "foute" Nederlanders* (2nd edn, Olympus 2002) 31.

169 B Moore, *Slachtoffers en overlevenden. De nazi-vervolging van de joden in Nederland* (Bert Bakker 1998) 69.  
170 G Aalders, *Roof. De ontvreemding van joods bezit tijdens de Tweede Wereldoorlog* (Sdu Uitgevers 1999); Nicholas (n 63); Petropoulos (n 7) 139-144; A Venema, *Kunsthandel in Nederland 1940-1945* (De Arbeiderspers 1986).

created internal rivalry in an attempt to discover and acquire the most desirable pieces, thus causing sharp price escalation during the occupation.<sup>171</sup>

Art exports to Germany also included Jewish property that came into German hands as a result of anti-Jewish measures. Systematic registration of Jews commenced on 10 January 1941. Jewish businesses were placed under German management during the months that followed. Art collections and trading stock were auctioned or sold privately. On 8 August 1941 and 21 May 1942, the occupier forced Jews to transfer their monetary assets and their other valuable possessions, respectively, to the looting institution set up for the purpose *Lippmann, Rosenthal & Co.* ('Liro'), in Sarphatistraat in Amsterdam. Individuals were stripped of their property, including their jewellery and artworks. When the mass deportations commenced in 1942, empty Jewish houses were searched and the contents confiscated. Part of this haul was transferred to Germany under the *Möbel Aktion* programme. Valuable property, including art, was taken to Liro and subsequently found its way onto the art market in the Netherlands and Germany.

#### 3.4.2 *Post-war Restitutions Policy*

It became known relatively early on in the Second World War that the Nazis were shipping large quantities of valuable property, including art treasures, from the occupied territories to Germany.<sup>172</sup> The Dutch government in exile in London attempted to prevent this economic plundering and enacted emergency laws, which forbade all transactions with the enemy and pre-emptively declared all such transactions null and void.<sup>173</sup> It also signed the Inter-Allied Declaration on 5 January 1943.<sup>174</sup>

After the liberation, the *Raad voor het Rechtsherstel* (Council for the Restoration of Rights) was established in August 1945 and charged with the task of restoring the pre-war legal order as far as possible.<sup>175</sup> They were granted the authority to intervene in legal rela-

171 F. Kunert and A. Marck, 'The Dutch Art Market 1930-1945 and Dutch Restitution Policy Regarding Art Dealers' in E. Blimlinger and M. Mayer (eds), *Kunst sammeln, Kunst handeln: Beiträge des Internationalen Symposiums in Wien* (Böhlau Verlag 2012).

172 The information in this section and the following section is based on the Restitutions Committee's Annual Report 2002.

173 Besluit Rechtsverkeer in Oorlogstijd (7 juni 1940) A6 *Staatsblad*.

174 Inter-Allied Declaration (n 3). N.B.: In July 1944 this intention was repeated in Resolution VI of the Enemy Assets and Looted Property, at the Final Act of the Agreement of Bretton Woods, 40 *Tractatenblad van het Koninkrijk der Nederlanden* (1977).

175 G Aalders, *Berooid. De beroofde joden en het Nederlandse restitutiebeleid sinds 1945* (Boom 2001); JH Beekhuis, 'Beschouwingen over het Rechtsherstel' (1946) 8 *Nederlands Juristenblad*; JCE van den Brandhof, *De besluitwetgeving van de kabinetten De Geer en Gerbrandy* (Kluwer 1986); WCL Van der Grinten, *Rechtsherstel en beheer* (Samsom 1946); JW Kersten, *Theorie en praktijk van het naoorlogse rechtsherstel* (Ministry of Finance 1999); L de Jong, *Het Koninkrijk der Nederlanden in de Tweede Wereldoorlog* 12 <[www.niod.knaw.nl](http://www.niod.knaw.nl)>

tionships under civil law, including property transactions, the general rule being that a judge could decide whether, given “the special circumstances”, it would be reasonable to void a transaction.<sup>176</sup> Emergency legislation enacted in London formed the basis for the restitution of property.<sup>177</sup> The Council comprised a legal department, to which claims could be submitted until 1 July 1951. It also heard appeals against decisions by restoration of rights bodies.

In 1945, the government established the *Stichting Nederlands Kunstbezit*, or SNK (Netherlands Art Property Foundation).<sup>178</sup> Initially, the SNK focused primarily on the recovery of art collections, fuelled by concern regarding the large losses of items of cultural interest incurred by the Netherlands. Many works of art eventually found their way back to the country after the war as a result of the foundation’s work. Alongside these recovery tasks, the SNK was charged with the restitution of cultural goods to their previous owners or their heirs, under the supervision of the *Nederlandse Beheersinstituut* or NBI (Netherlands Property Administration Institute). In 1949 and 1950 the SNK organised three exhibitions of recovered items in order to provide individuals with the opportunity to retrieve their works of art. In addition, the SNK actively traced former owners, especially after 1948. Some of the property not returned was auctioned, with the proceeds going to the State.

After the SNK was embroiled in scandals, the tasks of the foundation were transferred to the *Bureau Herstelbetalingen- en Recuperatiegoederen*, or *Hergo* (Bureau for Restoration Payments and the Restoration of Property) in the Ministry of Finance in 1950. This agency was abolished in the 1950s after the deadline for submitting claims for restitution lapsed. The difficult period of art restitution appeared to have ended. The recovered works of art that remained in the custody of the State are currently known as the *Nederlands Kunstbezit-collectie* or *NK-collectie* (Netherlands Art Property Collection, or NK collection).<sup>179</sup> This collection is part of the Dutch National Art Collection and is administered by the *Rijksdienst voor het Cultureel Erfgoed* or RCE (Cultural Heritage Agency) of the Ministry of Education, Culture and Science. The NK collection, which nowadays contains over 3,800 items, consists of paintings, drawings, prints, ceramics, silver, furniture, carpets, tapestries and other

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nl/download> accessed 29 August 2014; *Tweede Wereldoorlog: Roof en rechtsherstel. Eindrapport van de Contactgroep Tegoeden WOII*. Commissie-Van Kemenade (Amsterdam 2000); Veraart (n 62). See also Chapter 2 of this book.

176 Besluit Herstel Rechtsverkeer (17 September 1944) E100 *Staatsblad*, art 23. See for art 23 also chapter 2.4 of this volume.

177 *ibid*.

178 Aalders (n 170); E Muller and H Schretlen, *Betwist Bezit: De Stichting Nederlands Kunstbezit en de teruggave van roofoorkunst na 1945* (Waanders 2002). This research was conducted at the instigation of the Ekkart Committee (see section 3.4.3 of this chapter).

179 For a database of the NK collection, see <www.herkomstgezocht.nl> accessed 29 August 2014. See also Rijksdienst Beeldende Kunst (Netherlands Office for Fine Arts), *Old master paintings. An illustrated summary catalogue* (Waanders Uitgevers 1992).

special items. Some objects are in museums and government institutions in the Netherlands and abroad, while others are in storage.<sup>180</sup>

### 3.4.3 *Restitutions Policy since 1997*

At the end of the 1990s, the restitution of possessions looted during the Second World War, including works of art, once again became of interest nationally and internationally. The Dutch government established various committees charged with examining the looting that took place during the Second World War, as well as the recovery of stolen property thereafter.<sup>181</sup> The Netherlands Museums Association furthermore conducted a two-stage investigation into the provenance of works of art in Dutch museum collections: “Museum Acquisitions 1940-1948” (from 1998-1999) and “Museum Acquisitions from 1933 onwards” (from 2009-2013).<sup>182</sup>

On 21 March 2000 the Dutch government issued a general response to the published results of the research into the looting and post-war restoration of rights procedures.<sup>183</sup> In this reaction the government stated that as much as possible had been done after the Second World War to attempt to restore everybody’s rights and that this goal had been achieved to a reasonable degree. Nevertheless, the government felt it necessary to recognise that according to current standards, the restoration of rights could and should have been executed with greater understanding. Some of the procedures used were considered to be overly formal, bureaucratic and harsh. In some cases they were even contrary to the rules in force at that time.

The *Commissie Herkomst Gezocht* (Origins Unknown Advisory Committee), which is usually called the *Commissie Ekkart* (Ekkart Committee) after its chairman Rudi Ekkart, played an important role in the early history of the Dutch Restitutions Committee. Between 1997 and 2004 the *Bureau Herkomst Gezocht*, or BHG (Origins Unknown Agency), conducted research into all the items in the NK collection under the supervision of the Ekkart Committee.<sup>184</sup> During the same period the government announced a restitutions policy based on recommendations of the Ekkart Committee, which were published on 26 April

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180 *ibid.*

181 The *Commissie Van Kemenade* (Contact Group for Second World War Funds); the *Commissie Scholten* (Financial Funds); the *Commissie Kordes* (Liro archives); the *Commissie Van Galen* (Indian Funds) and the *Commissie Ekkart* (Artworks).

182 Museale Verwervingen vanaf 1933, ‘Over het Onderzoek’ <[www.musealeverwervingen.nl/36/over-het-onderzoek/](http://www.musealeverwervingen.nl/36/over-het-onderzoek/)> (Nederlandse Museumvereniging 2013) accessed 29 August 2014.

183 ‘Brief aan Tweede Kamer betreffende het algemene regeringsstandpunt inzake Tegoeden Tweede Wereldoorlog’ (21 March 2000) (Letter to the Lower House regarding the general governmental position concerning Second World War funds); see online at <<https://zoek.officielebekendmakingen.nl/kst-25839-13.html>> accessed 29 August 2014.

184 Origins Unknown, ‘Introduction’ (Ministry of Education, Culture and Science) <[www.herkomstgezocht.nl/eng/index.html](http://www.herkomstgezocht.nl/eng/index.html)> accessed 29 August 2014.

2001, 28 January 2003 and 14 December 2004.<sup>185</sup> The essence of these recommendations was to call for a more generous restitution policy. Two key elements are a reversal of the burden of proof, so as to assume the involuntary nature of a loss of possession by a Jewish private owner during the Nazi period, and relaxed standards of proof for ownership.<sup>186</sup> Furthermore, a differentiation was made between privately owned works of art and those that were part of the trading stock of an art dealer. The basic difference between sales by a private collector and those by an art dealer was laid down in the premise of the art trade recommendations of the Ekkart Committee that the “*art trade’s objective is to sell its trading stock so that the majority of the transactions, even at the Jewish art dealers, were principally carried out in the normal way*”.<sup>187</sup>

#### 3.4.4 Establishment of Restitutions Committee in 2001

Generally speaking, litigation in the Netherlands does not offer realistic possibilities for an assessment of a dispute about Nazi-looted art on its merits. As discussed in Chapter 2 of this volume, Dutch post-war restoration of rights legislation has ceased to have a direct meaning today. The possibility of claiming ownership under Dutch restoration of rights law lapsed relatively early, in 1951, leaving many possible claims unsettled.<sup>188</sup> The more general provisions in Dutch civil law contained in the Dutch Civil Code furthermore provide for relatively short periods of prescription, as well as a new ownership title for a person who acquires property in good faith.

As an alternative way of settling disputes concerning Nazi-looted art, the Dutch government decided in 2001 to establish an independent advisory committee that would investigate and assess claims. According to the government, this suited a more policy-related approach to the issue of restitution rather than a strictly legal one. The Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War, or Restitutions Committee, was consequently established by a decree dated 16 November 2001.<sup>189</sup>

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185 For an overview of Dutch government policy on restitution applications concerning items in the National Art Collection and links to digital versions of relevant documents, see Restitutions Committee, ‘Policy framework regarding the National Art Collection’ (Restitutions Committee) <[www.restitutiecommissie.nl/en/policy\\_framework\\_regarding\\_the\\_national\\_art\\_collection.html](http://www.restitutiecommissie.nl/en/policy_framework_regarding_the_national_art_collection.html)> accessed 29 August 2014.

186 Ekkart Committee, *Recommendations Ekkart Committee* (26 April 2001). See online at <[www.herkomstgezocht.nl/eng/rapportage/content.html#aanbevelingen2%20en](http://www.herkomstgezocht.nl/eng/rapportage/content.html#aanbevelingen2%20en)> accessed 29 August 2014.

187 Ekkart Committee, *Recommendations for the restitution of artworks of art dealers* (28 January 2003). See online at <[www.herkomstgezocht.nl/eng/rapportage/content.html#aanbevelingen2%20en](http://www.herkomstgezocht.nl/eng/rapportage/content.html#aanbevelingen2%20en)> accessed 29 August 2014.

188 Law E100 (n 176) art 21.

189 Decree Establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War (16 November 2001). See Appendix 11.

The Minister for Education, Culture and Science is competent to appoint the seven members of the Committee, each time for a period of three years. According to the Establishing Decree, both the chair and the vice-chair must have a master's degree in law. Also, at least one member of the Committee is required to be an expert on history relating to the Second World War, and one member must be an art history and museology expert. The Establishing Decree also provides for a research bureau ('secretariat'), which comprises a number of specialised researchers and lawyers, who are tasked with doing research and preparing reports, recommendations and opinions.<sup>190</sup>

#### 3.4.5 *Two Tasks*

Today, works of art lost by their original owners as a consequence of the Nazi regime may be in public or private hands. They can be found in the National Art Collection, the collection of the Dutch State, or form part of the collection of a provincial or local authority, a foundation or a private individual. A claim on such a work of art can be submitted to the Restitutions Committee for investigation and an opinion or recommendation. Following the Establishing Decree, which has been amended in 2012, the Restitutions Committee has been assigned two tasks:

1. To advise the Minister on decisions to be taken concerning claims for the restitution of artefacts of which the original owners involuntarily lost possession owing to circumstances directly related to the Nazi regime and which [i.e. the items] are currently in the possession of the State of the Netherlands.
2. To issue an opinion on disputes concerning the restitution of items of cultural value between the original owner who, owing to circumstances directly related to the Nazi regime, involuntarily lost possession of such an item, or the owner's heirs, and the current possessor which is *not* the State of the Netherlands.

#### 3.4.6 *National Art Collection*

When it was established in 2001, the Restitutions Committee's primary task was to advise the Minister of Culture, Education and Science about the return of claimed works of art in the Dutch National Art Collection, which includes the NK collection. Until now, the majority of the cases that the Restitutions Committee has handled concern art objects that are part of the NK collection.

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190 *ibid.* For more information, see the annual reports of the Restitutions Committee at <[www.restitutiecommissie.nl/en/publications.html](http://www.restitutiecommissie.nl/en/publications.html)> accessed 29 August 2014.

Claims regarding the National Art Collection are automatically referred for advice to the Committee by the Minister. When advising the Minister in these cases, the Committee's decision has the status of a recommendation and is, therefore, non-binding in nature. Nevertheless, the Dutch government has declared that the Minister will only test 'marginally' whether the Committee has given its recommendation within its mandate, as laid down in the Establishing Decree. Consequently, until now the Minister has accepted all the Committee's recommendations, albeit that in one case a somewhat different reasoning was followed.<sup>191</sup>

Until 19 July 2012, claims to all items from the National Art Collection were evaluated by the guidelines specified in the generous restitution policy, which was based on the Ekkart Committee's recommendations to the government, referred to in section 3.4.3. These guidelines nowadays still constitute the assessment framework for claims to works of art from the NK collection, while claims to items from other parts of the National Art Collection are judged in a similar way to other cases, which is according to principles of reasonableness and fairness, as elaborated upon in section 3.4.7. The Dutch State Secretary of Education, Culture and Science announced in 2012 that from 30 June 2015 onwards all claims to items from the National Art Collection, including the NK collection, will be dealt with according to the principles of reasonableness and fairness. As a result, there will be one policy for all works of art, whether they are in the NK collection or any other collection.

When announcing this decision, the State Secretary expressed the expectation that the number of claims to works of art in the NK collection will gradually dry up, as a result of which the future NK policy will in due course most probably only concern a few incidental claims. In this regard the State Secretary made the following comment about possible claims to NK works after 30 June 2015:

Needless to say, the Restitutions Committee can take the specific provenance of works of art into account during the substantive assessment of a claim. This means that considerable weight will be given to the fact that a particular item comes from the NK collection. It goes without saying that there is also scope to permit a subtle approach, for example, for the descendants of persecuted groups in the population, when it comes to the burden of proof of ownership and involuntary loss of possession. Substantive aspects such as these, which are also part of the current Netherlands Art Property Collection (NK) policy, remain important. But the degree to which these aspects are applied depends

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191 See the decision by the State Secretary for Culture, Education and Science with regard to the Goudstikker case (RC 1.15) <[www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2006/02/06/informatie-over-het-verzoek-tot-teruggave-goudstikker-collectie.html](http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2006/02/06/informatie-over-het-verzoek-tot-teruggave-goudstikker-collectie.html)> accessed 29 August 2014.

on the specific cases that are being addressed. I am willing to leave these considerations, as they relate to specific cases, to the Restitutions Committee.<sup>192</sup>

The Dutch government has not set a deadline for submitting claims to artworks from the National Art Collection, since it takes the view that “termination of the possibility of submitting claims cannot be considered until there is international consensus about it that replaces the Washington Principles”.<sup>193</sup>

Although a formal appeal in National Art cases is not possible, it is possible to submit a request for a revised recommendation if and when new facts emerge that, had they been known earlier, could have resulted in a different recommendation. Moreover, a reopening of the case is also permitted if procedural errors that harmed the applicant’s fundamental interests come to light.

### 3.4.7 *Other Collections: Binding Expert Opinion*

The second task described in the Establishing Decree of the Restitutions Committee is to advise about disputes between the heirs (or the legal successors) of the original owners of an art object and current owners *other* than the Dutch State.<sup>194</sup> The current owners can be private individuals, foundations or provincial or municipal government institutions.<sup>195</sup> With the attribution of this second task to the committee, the Dutch government wanted to give other parties in restitution cases the possibility to access the committee as well. To give effect to this second task, the committee drew up regulations based on Article 4, paragraph 2 of the Establishing Decree, outlining the procedure for such cases.<sup>196</sup> In these regulations the option for a binding expert opinion procedure is provided for the parties who turn to the Committee on a voluntarily basis.

The starting point for submitting a case for a binding opinion is that the parties decide, after consultation, to call upon the Committee. An important feature is the voluntary character of the process. The parties agree beforehand that they will accept the opinion given by the committee as binding. After the formalities have been taken care of, the parties

192 Letter of the Secretary of State for Education, Culture and Science to the Lower House, 22 June 2012 <<https://zoek.officielebekendmakingen.nl/kst-25839-41.html>> accessed 29 August 2014.

193 *ibid.*

194 This section is based on: E Campfens, ‘Alternative Dispute Resolution in Restitution Claims and the *Binding Expert Opinion* Procedure of the Dutch Restitutions Committee’ in V Vadi and HEGS Schneider (eds), *Art, Cultural Heritage and the Market: Ethical and Legal Issues* (Springer Verlag 2014) 61-91.

195 In the Netherlands, many museums have collections that are of a diverse legal status. Establishing Decree (n 189), art 2(4-5). See also the explanatory notes to the Decree.

196 Establishing Decree (n 189) art 4(2) of the Establishing Decree states that “The Committee may draw up regulations concerning further working methods”. It did so in its ‘*Regulations for opinion procedure under article 2, paragraph 2, and article 4, paragraph 2 of the Decree Establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War*’ (the Regulations).

are given the opportunity to explain their positions. To this end, they receive questions that are important to help ascertain the facts and focus on the elements listed in Article 3 of the Regulations, cited below. The relevant information received from the parties, as well as the results of additional research carried out by the committee's research bureau during the investigation phase – if the committee deems this necessary – is summarised and cited in an overview of the facts. This draft report is sent to both parties for comment. After the Committee has received the parties' responses to the overview of the facts, it decides whether further investigation, a hearing or consultation between the parties or others is desirable before issuing its binding opinion. In summary, the distinguishing element of the procedure, which sets it apart from regular legal procedures, is the active role the Committee takes in collecting information. Since the parties can comment on and respond to the research report and thus do not have to engage directly in a debate with opposing parties, the procedure has a non-adversarial character.

In accordance with the Establishing Decree, the Committee is guided by 'principles of reasonableness and fairness' in delivering binding opinions.<sup>197</sup> This is an open norm in which the committee is free to balance the interests of former and current possessors – the latter of whom must almost invariably according to Dutch civil law be seen as the legitimate owner.<sup>198</sup> An overview of the considerations that the Committee may take into account is given in article 3 of the regulations:

#### Article 3

The Committee gives its opinion on the basis of reasonableness and fairness, in regard to which the Committee may, in the course of its considerations, in any event include:

- a. internationally and nationally accepted principles such as the Washington Principles and the government's policy guidelines concerning the restitution of looted art in so far as they are correspondingly applicable;
- b. the circumstances in which possession of the work was lost;
- c. the extent to which the applicant has made efforts to recover the work;
- d. the circumstances in which the owner acquired the work and the research that he/she did prior to acquiring it;
- e. the importance of the work to the applicant;
- f. the importance of the work to the owner;
- g. the interest of the general public.<sup>199</sup>

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197 Establishing Decree (n 189) art 2(4-5).

198 By means of prescription or limitation periods or third-party good faith acquisition.

199 The Regulations (n 196) art 3.

As to the possible solutions or outcomes, Article 11 of the Regulations provides for all kinds of solutions depending on what the committee deems fit, so the committee is not limited to the attribution of ownership rights, as in National Art Collection cases:

- a. The work is returned to the applicant;
- b. The work is returned by way of a set consideration from the applicant to the owner;
- c. The work is returned to the applicant subject of further provisions;
- d. Settlement of a set consideration by the owner to the applicant, while the work remains in the owner's possession;
- e. The work be exhibited, stating its provenance and the part played by the (heirs of the) original owner;
- f. The application for restitution is denied, subject to further provisions, where applicable.<sup>200</sup>

#### 3.4.8 *Results and Publication*

As of 1 November 2014, 151 cases regarding Nazi-looted art had been submitted to the committee, 129 cases have been decided (in total 130 recommendations), 6 cases were withdrawn and 16 cases are still pending. The average time required for a decision varies highly per case and is dependent on factors such as complexity, procedural delays and nature of any required research. The recommendations are published online and in the yearly reports.<sup>201</sup>

As mentioned in section 3.4.3, from 2009 to 2013, Dutch museums investigated – once more – the provenance of objects in their collections.<sup>202</sup> Several new claims arising from the results of this research are pending, and more are expected.

### 3.5 GERMANY

#### 3.5.1 *Art Looting in Germany during the Nazi Regime*

The National Socialists came to power in Germany on 30 January 1933. This was the start of the systematic exclusion and destruction of the Jewish part of the population and the

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<sup>200</sup> *ibid* art 11.

<sup>201</sup> Restitutions Committee, 'Recommendations/Opinions' <[www.restitutiecommissie.nl/en/recommendations\\_opinions.html](http://www.restitutiecommissie.nl/en/recommendations_opinions.html)> (Restitutions Committee 2014) accessed 29 August 2014.

<sup>202</sup> Museale Verwervingen vanaf 1933, 'Objecten' <[www.musealeverwervingen.nl/46/objecten/](http://www.musealeverwervingen.nl/46/objecten/)> (Nederlandse Museumvereniging 2013) accessed 29 August 2014.

process of the deprivation of their property. The financial persecution of Jews included disqualification from professions, obligatory registration of their possessions, Aryanisation of their businesses, *Reichsfluchtsteuer* (taxation when fleeing the country), *Judenvermögensabgabe* (high taxes on their registered assets) and ultimately the confiscation of their property.<sup>203</sup>

During the early years of the Nazi regime, many Jewish art owners had already been compelled to sell their art as a result of anti-Jewish measures, for example, if they needed money to live on, because they had been disqualified from their profession, or to obtain funds to enable them to flee Germany.<sup>204</sup> Consequently, countless Jewish private owners and art dealers sold their art collections during the 1930s, for example, at *Judenauktionen* by the Berlin auctioneers Paul Graupe, Max Perl and Rudolph Lepke, or elsewhere in Germany and even across the border in Switzerland.<sup>205</sup>

The systematic dispossession of Jews by the Nazi regime was facilitated by a regulation of 26 April 1938, on the grounds of which Jews were obliged to declare to the authorities their assets, including art, which they held both domestically and abroad.<sup>206</sup> This registration was followed in late 1938 and early 1939 by a series of measures that included prohibiting Jews from buying artworks or selling them privately, impeding the transport of Jewish-owned art to foreign countries, and obliging them to surrender valuable possessions – including works of art – to the authorities under penalty of a fine.<sup>207</sup> The dispossession process culminated in the German Reich's appropriation of the possessions of Jews who had fled or had been deported to other countries and as a result of that had lost their nationality on the grounds of the *Reichsbürgergesetz* (Reich Citizenship Law), after which their assets reverted to the Reich.<sup>208</sup>

As was the case in Austria and the occupied areas, the masterpieces from the art collections confiscated in the German *Altreich* (Nazi Germany territories before 1938) were reserved for the Führer Museum to be established in Linz.<sup>209</sup> Items with less allure were

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203 K Stengel (ed), *Vor der Vernichtung. Die staatliche Enteignung der Juden im Nationalsozialismus* (Campus Verlag 2007); Ch Kuller, 'Die Bürokratie des Raubes und ihre Folgen' in I Bertz and M Dormmann (eds), *Raub und Restitution: Kulturgut aus jüdischem Besitz von 1933 bis heute* (Wallstein 2008).

204 Rudolph (n 63) 12.

205 Rudolph (n 63) 26-27; A Heuss, 'Der Kunsthandel im Deutschen Reich' in I Bertz and M Dormmann (eds), *Raub und Restitution: Kulturgut aus jüdischem Besitz von 1933 bis heute* (Wallstein 2008); A Heuss, 'Die Reichskulturkammer und die Steuerung des Kunsthandels im Dritten Reich' (1998) 3 *Sediment: Mitteilungen zur Geschichte des Kunsthandels* 49, 51.

206 Rudolph (n 63) 32-33; Petropoulos (n 7) 92-94; H Safrian, 'Kein Recht auf Eigentum: Zur Genese antijüdischer Gesetze im Frühjahr 1938 im Spannungsfeld von Peripherie und Zentrum' in K Stengel (ed), *Vor der Vernichtung: Die staatliche Enteignung der Juden im Nationalsozialismus* (Campus 2007).

207 Rudolph (n 63) 34.

208 Rudolph (n 63) 36-37

209 Nicholas (n 63) 44. For more information on the Führer Museum, see HCLöhr, *Das Braune Haus der Kunst: Hitler und der "Sonderauftrag Linz". Visionen, Verbrechen, Verluste* (Akademie Verlag 2005); HC Löhr, *Hitlers Linz, Der „Heimatgau des Führers“* (Links Verlag 2013); B Schwarz, *Hitlers Museum: Die Fotoalben*

destined for other Nazi officials, to be shared out among museums, sold by *Finanzämter* (tax offices) or sold at auction by designated auction houses.<sup>210</sup> As a result, the German art market was overwhelmed during the Nazi regime by a flood of paintings, drawings, prints, sculptures and books from seized collections of Jewish owners.

### 3.5.2 *Post-war Restitution Policy*

After the war the Allies divided Germany and Berlin into four occupation zones, each governed by a military administration (American, British, French and Russian). The Western Allies set up special collecting points for works of art found in Germany and other countries.<sup>211</sup> Besides returning art that came from formerly occupied areas (*äussere Restitution*),<sup>212</sup> the Western Allies were also faced with the difficult task of supervising the restitution of artworks to victims or their heirs in Germany (*innere Restitution*).<sup>213</sup> With regard to this 'internal restitution', the Western Allies were unable to agree on a unified restitution law for the occupied zones, as a result of which four statutes dealing with restitution were enacted.<sup>214</sup> In 1947 the Americans enacted Military Government Law 59 for the restoration of rights in the American zone (see also section 2.4 of this volume).<sup>215</sup> In the French zone a framework for the restitution was created in 1947 with *Ordonnance* 120, which was based on similar legislation passed in France.<sup>216</sup> A modified version of the American Military Government Law 59 was enacted in the British sector in 1949, carrying the same name as its American equivalent. In West Berlin the Allies enacted legislation

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„Gemäldegalerie Linz“: *Dokumente zum „Führermuseum“* (Böhlau Verlag 2004); B Schwarz, *Geniewahn: Hitler und die Kunst* (Böhlau Verlag 2009); K Iselt, *Sonderbeauftragter des Führers. Der Kunsthistoriker und Museumsmann Hermann Voss (1884-1969)* (Böhlau Verlag 2010). See also Deutsches Historisches Museum, 'Datenbank "Sammlung des Sonderauftrages Linz"' (Deutsches Historisches Museum 2008) <[www.dhm.de/datenbank/linzdb/](http://www.dhm.de/datenbank/linzdb/)> accessed 29 August 2014.

210 Rudolph (n 63) 38-41.

211 Schnabel and Tatzkow (n 13) 101; Edsel (n 2).

212 See section 2.3 of this volume.

213 T Armbruster, *Rückerstattung der Nazi-Beute, die Suche, Bergung und Restitution von Kulturgütern durch die westlichen Alliierten nach dem Zweiten Weltkrieg* (De Gruyter 2007).

214 Schnabel and Tatzkow (n 13) 103.

215 C Goschler, 'Jewish property and the politics of restitution in Germany after 1945' in M Dean, C Goschler and Ph Ther (eds), *Robbery and restitution: the conflict over Jewish property in Europe* (Berghahn Books 2007) 117-119; United States Courts of the Allied High Commission for Germany, Court of Restitution Appeals Reports (United States Courts of the Allied High Commission for Germany 1951) 499-536 <[www.law.harvard.edu/library/digital/court-of-restitution-appeals-reports.html](http://www.law.harvard.edu/library/digital/court-of-restitution-appeals-reports.html)> accessed 29 August 2014.

216 See section 3.2.2.

3 NATIONAL PANELS ADVISING ON NAZI-LOOTED ART IN AUSTRIA, FRANCE, THE UNITED KINGDOM, THE NETHERLANDS AND GERMANY

which was similar to the British Military Government Law 59.<sup>217</sup> No restitution law was promulgated in the Soviet zone.<sup>218</sup>

Procedures for internal restitution in the Western Allied zones and West Berlin were based on similar principles. Claims had to be filed before a fixed deadline and were handled by agencies (*Wiedergutmachungsämtern*) created for mediating the claims. If a settlement had not been reached, the claim was referred to a German judge. Decisions were appealed first to German appellate courts, after which a dissatisfied party could appeal to an allied or international Court of Appeal.<sup>219</sup>

### 3.5.3 *The Bundesrückerstattungsgesetz (BRüG)*

The treaties under which the Federal Republic of Germany (FRG), or West Germany, from 1949 onwards gradually gained its sovereignty contained a provision to the effect that the FRG undertook to continue the restitution policy initiated by the Western Allies. A further provision stipulated that the laws enacted by the Allies would remain valid until all the cases arising on the grounds of the laws concerned had been dealt with. The restitution policy was made more flexible as a result of the influence of negotiations between West Germany and both the Claims Conference and Israel.<sup>220</sup>

Under American pressure the restitution of *feststellbare Vermögen* (ascertainable assets) was largely completed by around 1957.<sup>221</sup> Where property could not be restituted to the owners, for example, because it had disappeared, damage claims were submitted. After the new German state regained its sovereignty in 1955, plans were made to deal with these claims and to provide for financial compensation, with an upper limit for each claimant. New legislation was drafted for this purpose, and the *Bundesrückerstattungsgesetz* (Federal Restitution Law, hereinafter referred to as BRüG) came into force in 1957. Besides providing for the handling of old claims, the BRüG also contained new stipulations that permitted claims to be submitted for loss of possession that had occurred outside the borders of West Germany. For such a claim to succeed, it was necessary to present a plausible case that the stolen property had been taken to Germany. Thanks to this extension, the 'furniture

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217 EJ Cohn, 'The Board of Review: A Novel Chapter in the Relations between Common Law and Civil Law' (1955) 4 *International and Comparative Law Quarterly* 492, 493-494; C Goschler, 'German Compensation to Jewish Nazi Victims after 1945' in JM Diefendorf (ed), *Lessons and Legacies VI: New Currents in Holocaust Research* (Northwestern University Press 2004) 381.

218 Schnabel and Tatzkow (n 13) 104.

219 BB Ferencz, 'Review of Walter Schwartz, Rückerstattung Nach Den Gesetzen Der Alliierten Mächte' (1974) 23 *American Journal of Comparative Law* 374; Schnabel and Tatzkow (n 13) 104.

220 See Kapitel V in: J Lillteicher, *Die Rückerstattung jüdischen Eigentums in Westdeutschland nach dem Zweiten Weltkrieg. Eine Studie über Verfolgungserfahrung, Rechtsstaatlichkeit und Vergangenheitspolitik 1945-1971* (Dissertation Universität Freiburg 2002) <[www.freidok.uni-freiburg.de/volltexte/2183/pdf/Dis\\_Lillteicher\\_Rueckerstattung.pdf](http://www.freidok.uni-freiburg.de/volltexte/2183/pdf/Dis_Lillteicher_Rueckerstattung.pdf)> accessed 29 August 2014; Goschler (n 215) 122-126.

221 *ibid* 121-122.

operation' in Western Europe (plundering of Jewish homes) and the theft of deportees' possessions also came within the scope of West Germany's restitution policy.<sup>222</sup>

Figures compiled in 1986 by the government of the FRG show that the implementation of the restitution policy under the Allied rules and later under the BRüG represented an overall sum of 3.9 billion DM.<sup>223</sup> Altogether 1.2 million cases were dealt with – 500,000 under the Allied rules and 700,000 under the BRüG.<sup>224</sup>

#### 3.5.4 East Germany

The German Democratic Republic (GDR), or East Germany, was established in 1949. Since restitution of private property conflicted with the basic principles of the socialist policies of the GDR and its priority for reparations for the Soviet Union, post-war restitution of private property was virtually non-existent in East Germany. Foreign claimants trying to recover looted assets from East Germany were officially ignored by the authorities of the GDR.<sup>225</sup>

During the 1970s and 1980s the government of the GDR made several attempts to tackle the unresolved problem of restitution claims. To this end, East Germany negotiated time and again with the Claims Conference and the World Jewish Congress, but these endeavours did not lead to a settlement of the restitution issue.<sup>226</sup> During the German reunification process in 1990, a new series of negotiations between the FRG, the GDR and the Claims Conference was instigated. This resulted in the promulgation of the *Gesetz zur Regelung offener Vermögensfragen* (Law for the Settlement of Open Property Questions). Constantin Goschler, specialist in the field of German restitution and compensation policy, summarises this law as follows:

This law, which was primarily devoted to property questions related to the history of the GDR, also decided the settlement of Jewish restitution claims referring to the Nazi era. With respect to the latter, the Federal Government revised this law in 1992 to adapt it to the standards of the Allied restitution laws, which meant giving priority to restitution over indemnification. Since

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222 J Lillteicher, 'West Germany and the restitution of Jewish property in Europe' in M Dean, C Goschler and Ph Ther (eds), *Robbery and restitution: the conflict over Jewish property in Europe* (Berghahn Books 2007) 105.

223 *ibid* 99.

224 *ibid* 102.

225 Goschler (n 217) 383.

226 *ibid* 384.

then, restitution of Jewish property in the territory of the former GDR has been effectively enforced and has led to generally satisfying results.<sup>227</sup>

### 3.5.5 *Developments since the 1990s in Germany*

The Federal Republic of Germany was one of the countries to endorse the Washington Principles drawn up in 1998.<sup>228</sup> In accordance with them, Germany declared it was prepared to track down items of cultural value that had been lost as a consequence of the Nazi regime and to take the necessary steps to arrive at a fair and just solution in disputes about restitution. The intention of the German Federal Government, the Federal States (*Bundesländer*) and the national associations of local authorities to implement the Washington Principles was formally set down on 14 December 1999 in the joint declaration *Gemeinsame Erklärung der Bundesregierung, der Länder und der kommunalen Spitzenverbände zur Auffindung und zur Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes, insbesondere aus jüdischem Besitz*, or the *Gemeinsame Erklärung* for short.<sup>229</sup>

In the *Gemeinsame Erklärung*, which relates to museums, public archives and libraries, the parties involved declare that they will use their best efforts to identify items of cultural value, the possession of which was lost as a result of circumstances related to the Nazi regime, and return them to the former owners or their heirs. The institutions concerned are advised to reach agreements with claimants through consultation and negotiation about the nature and process of restitution or about compensation. Although the *Gemeinsame Erklärung* relates solely to public institutions, private art owners are requested to endorse the underlying principles and the declared policy as well: “Private-law organizations and private individuals are requested to likewise endorse the stipulated principles and methods” (“Privatrechtlich organisierte Einrichtungen und Privatpersonen werden aufgefordert, sich den niedergelegten Grundsätzen und Verfahrensweisen gleichfalls anzuschließen”).<sup>230</sup> On the initiative of the *Beauftragte der Bundesregierung für Kultur und Medien* (Federal Government Commissioner for Cultural Affairs and the Media), who is responsible for the culture and media policy of the Federal Republic of Germany, a *Handreichung* (a 100-page manual) was published to facilitate implementation of the underlying principles referred to in the declaration. It is a document that uses guidelines,

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227 *ibid* 400.

228 Washington Conference Principles on Nazi-Confiscated Art (3 December 1998). See Appendix 2.

229 Lost Art, ‘Gemeinsame Erklärung’ (Koordinierungsstelle Magdeburg 2014) <[www.lostart.de](http://www.lostart.de)>

<[Webs/DE/Koordinierungsstelle/GemeinsameErklaerung.html](http://Webs/DE/Koordinierungsstelle/GemeinsameErklaerung.html)> accessed 29 August 2014; see also <[www.lostart.de/Webs/EN/Koordinierungsstelle/Grundlagen.html](http://www.lostart.de/Webs/EN/Koordinierungsstelle/Grundlagen.html)> accessed 29 August 2014.

230 *ibid*.

checklists and instructions to provide a practical helping hand when implementing the Washington Principles and the *Gemeinsame Erklärung*.<sup>231</sup>

The declaration includes the initiative to set up an Internet portal which registers items of cultural value and other objects, possession of which is suspected of having been lost as a consequence of the Nazi regime. The management of this website, [www.lostart.de](http://www.lostart.de), was assigned to the *Koordinierungsstelle für Kulturgutverluste* in Magdeburg (now *Koordinierungsstelle Magdeburg*), which was established jointly by the Federal Government and the states in 1994. The different German institutions that conduct provenance research are requested to forward the results of their work to the *Koordinierungsstelle*.<sup>232</sup>

### 3.5.6 Beratende Kommission (*Advisory Committee*)

In 2003 the Federal Government, with agreement from the Federal States (*Bundesländer*) and the national associations of local authorities, set up an advisory committee for an indefinite period – the *Beratende Kommission im Zusammenhang mit der Rückgabe NS-verfolgungsbedingt entzogener Kulturgüter, insbesondere aus jüdischem Besitz*, or the *Beratende Kommission*.<sup>233</sup> This committee consists of eight experts from a range of disciplines such as history, art history, philosophy and law. Its members are appointed by the *Beauftragte der Bundesregierung für Kultur und Medien* with agreement from the German states and the national associations of local authorities. The committee is chaired by the former president of the *Bundesverfassungsgericht* (Federal Constitutional Court), Jutta Limbach. The committee met for the first time on 14 July 2003.<sup>234</sup>

The *Beratende Kommission's* primary task is to mediate in disputes between the current owners of items of cultural value, for example, museums, and former owners or their heirs.<sup>235</sup> In 2003 Christina Weiss, the *Beauftragte der Bundesregierung für Kultur und Medien*, told the media that it was first and foremost about “legally difficult individual cases that may be solved by moral and ethical maxims rather than by legal steps” (“rechtlich schwierige Einzelfälle, die sich eher durch moralische und ethische Kategorien als durch juristische Schritte lösen lassen”).<sup>236</sup> No deadline was specified for submitting a claim.

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231 Lost Art, ‘Handreichung’ (Koordinierungsstelle Magdeburg 2014) <[www.lostart.de/Webs/DE/Service/Downloads/Index.html](http://www.lostart.de/Webs/DE/Service/Downloads/Index.html)> accessed 29 August 2014.

232 *ibid.*

233 Absprache zwischen Bund, Ländern und kommunalen Spitzenverbänden zur Einsetzung einer Beratenden Kommission im Zusammenhang mit der Rückgabe NS-verfolgungsbedingt entzogenen Kulturguts, insbesondere aus jüdischem Besitz (12 December 2002). See Appendix 12.

234 Lost Art, ‘Beratende Kommission’ (Koordinierungsstelle Magdeburg 2014) <[www.lostart.de/Webs/EN/Kommission/Index.html](http://www.lostart.de/Webs/EN/Kommission/Index.html)> accessed 29 August 2014.

235 *ibid.*

236 *Zeit*, 10 July 2003, as quoted in Rudolph (n 63) 6.

A request for advice can be laid before the committee provided that at least one party is a public institution and all the parties involved approve. In such a case the committee can give advice about how the dispute can be resolved. There is scope for solutions other than restitution or compensation. During the procedure the parties provide the documentation and research results needed. They can also explain their positions during a committee hearing. The committee issues its advice on the grounds of the information that has been collected. The *Koordinierungsstelle Magdeburg* referred to above gives the committee secretarial support, prepares sittings and acts as a focal point for applicants.<sup>237</sup>

Through its advice, the *Beratende Kommission* seeks to find a fair and just solution in accordance with the Washington Principles and the *Gemeinsame Erklärung*. The *Gemeinsame Erklärung* and the *Handreichung* form the committee's assessment framework. The *Beratende Kommission*'s advice is not binding. Since 2003 the *Beratende Kommission* has issued nine recommendations, in which a range of solutions was put forward, for example, restitution of works of art, the payment of compensation money and the recommendation to leave works of art in a museum while describing the collection and the life of the original owner in a catalogue.<sup>238</sup> All recommendations of the *Beratende Kommission* are published as press releases by the German *Bundespresseamt* (Federal Press Office) and on the website *lostart.de*.

### 3.5.7 Since November 2013: The Gurlitt Discovery and Recent Developments

On 3 November 2013 the German magazine *Focus* broke the news there had been a spectacular discovery in a flat in the Schwabing district of Munich in the spring of 2011. There were over a thousand works of art in the home of the elderly son of Hildebrand Gurlitt, an art dealer who during the Nazi regime was appointed by the authorities to dispose of seized so-called *entartete Kunst* (degenerate art) abroad. The items found consisted of *entartete* works and also other artworks. Some of the degenerate art discovered was thought to have been lost. Other works were not known to exist until they were found in the flat.

This Schwabinger Kunstfund (Schwabing art trove) was sequestered in the spring of 2012. It was assumed from the start that the objects would include looted art. The massive national and international attention focused on this subject in the months thereafter resulted on 11 November 2013 in the establishment of a temporary working group of experts (Schwabinger Kunstfund taskforce), which was charged with clarifying the provenance of some 590 individual artworks from the Gurlitt collection with unclear origins.

On 25 February 2014 the Federal Government announced that the scale of the investigation into looted art will be increased. The available budget will be made substantially

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<sup>237</sup> *Koordinierungsstelle Magdeburg* (n 234).

<sup>238</sup> For the recommendations of the *Beratende Kommission*, see *Koordinierungsstelle Magdeburg* (n 234).

greater to this end and it is the intention to establish a Deutsches Zentrum Kulturgutverluste (German Lost Art Foundation). This foundation will be located in Magdeburg, where the Koordinierungsstelle Magdeburg, the Arbeitsstelle für Provenienzforschung (Bureau for Provenance Research), the temporary Schwabinger Kunstfund taskforce and the Forschungsstelle 'Entartete Kunst' (Degenerate Art Research Department) of the Freie Universität Berlin (Free University of Berlin) will be together in one centre. This new centre's purpose is to support public bodies in inventorying looted art in their collections and also to assist private collectors and museums wanting to do the same thing by providing independent provenance researchers. The centre will also take care of documentation and communication and provide a central internet portal linked to digitized archive collections related to looted art.

### 3.6 CONCLUSION

In November 2012 the restitution committees of Austria, France, the United Kingdom, Germany and the Netherlands met in the Peace Palace in The Hague for a discussion "with awareness of our similarities and respect for our differences".<sup>239</sup> The five committees were set up by their respective governments to advise in restitution cases linked to the widespread and large-scale crimes of the Nazi regime and their impact up to the present day. After the war there was restoration of rights in the Western European countries that had been subjugated by the Nazi regime, but during the second half of the 1990s it became clear that this process had failed in many respects. The outcry in society about it focussed, among other things, on the imperfect post-war restitution of looted art to its Jewish owners and their heirs. This public debate resulted in the establishment of committees of inquiry to clarify in which respects post-war restoration of rights had fallen short, for example, in regard to items of cultural value. Through the creation of restitutions committees, the governments concerned also provided an alternative to going to court, which often has little chance in the case of claims related to the Nazi regime.

Besides the similarities between the committees, there are also conspicuous differences with regard to mandate and working methods. These arise, among other things, from differences in the historical situation between one country and another. The nature of looting methods during the Nazi era and the specifics of the post-war restitutions policy in each country have resulted in specific problems that call for bespoke solutions. An example can be found in Austria, where many artworks restituted after the war ended up in the federal collections because the rightful owners felt obliged after the war to relinquish this art after its return in connection with Austria's strict art export laws. The creation of the Dutch

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<sup>239</sup> Words taken from the opening speech of Willibrord Davids, chair of the Dutch Restitutions Committee (26 November 2012).

NK and the French MNR collections of heirless art is another instance. And then there is the special position of the United Kingdom, which, in contrast to the German-occupied countries, did not suffer from large-scale art looting during the Second World War. A profound comparative study of the five committees falls outside the scope of this book, and reference has to be made to the information that the different committees themselves provide.

One of the many points that emerged during the meeting in the Peace Palace was the complexity and the moral weight of the considerations when assessing cases. This was expressed, for example, by the following observation of the Spoliation Advisory Panel: “The Panel is confronted not infrequently with competing interests of merit. On the one hand are the heirs, whether descendants or otherwise, of the victims of Nazi oppression. On the other hand may be completely blameless institutions which have acquired and cared for a work of art without any fault on their part. Whose claim should prevail?”<sup>240</sup>

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240 Questionnaire SAP (n 136).



## 4 JUST AND FAIR SOLUTIONS

*A View from the United States*

*Douglas Davidson*

### 4.1 THE ORIGIN OF THE TERMS 'JUST AND FAIR'

When it comes to discussions of Nazi-looted art, the words 'just and fair' often seem like Siamese twins. They appear, in fact, to be well-nigh inseparable. But why is that? It could be because this pairing is yet another gift that we ever-generous Americans – or, to be more just and fair, we inheritors of Anglo-Saxon traditions – have bequeathed to the world.

Consider, for instance, the following. In an essay in *The Atlantic Monthly* in 2009 called 'Fair's Fair',<sup>1</sup> an economist named Bart Wilson wrote:

If you're anything like most Americans, you probably hear or speak that word many times a day. 'It's not fair!' screams the petulant child. 'That's a fair price,' claims the smooth salesman. 'I'm trying to be fair,' sighs your boss. The magical mystery of fairness is that everyone knows what people are saying when they claim that something is (or isn't) fair – and yet agreement on fairness itself often eludes us.<sup>2</sup>

Mr. Wilson went on to say:

Did you know that fair is one-to-one untranslatable into any other language – that it is distinctly Anglo in origin? And a relatively new word at that? (Late 18<sup>th</sup> century, actually – the industrial revolution apparently also vastly enhanced our capacity to complain.) But the twisted history of 'fair' is even more interesting than that. For the original antonym of fair is not, as most modern Americans would probably expect, unfair. If you want to understand the roots of fairness, look not to ethicists, but to baseball, which still uses the original dichotomy. If a ball is hit outside the bounds of fair play, it's not unfair – it's foul. That's an important clue. As Columbia law professor George Fletcher had

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1 Bart Wilson, 'Fair's Fair' *The Atlantic* (Washington, DC, 25 January 2009) <[www.theatlantic.com/business/archive/2009/01/fairs-fair/112/](http://www.theatlantic.com/business/archive/2009/01/fairs-fair/112/)> accessed 12 February 2014.

2 *ibid.*

noted in his 1996 book *Basic Concepts of Legal Thought*, the Anglo-American notion of fairness is firmly rooted in the rules of a game.

[...] Let me be clear: I am not claiming that Anglophones are the only fair people on the planet. It's just that fair doesn't have an exact equivalent in any other language. Other languages either directly import the English word, as in the German exclamation, 'Das ist nicht fair!', or fail altogether to have a comparable word, as is the case for French.

German speakers might note that they frequently also use the word 'gerecht' in addition to fair; French speakers might say that they have not one but two words for it: 'juste' and 'équitable'. True enough. However, depending upon context, 'gerecht' is also translatable into English as 'just' or 'equitable'. That's a three-to-one translation, not one-to-one, and probably one reason why the Germans directly import the English word. And while 'équitable' is often translated as 'fair', it can also be rendered as 'equitable', and similarly, 'juste' can be translated into English as 'just'. These languages may have the sense of fairness, but we have a word for it that they do not.<sup>3</sup>

In many languages, in other words, 'just' and 'fair' are virtually synonymous. In English, for some reason, they are not. Indeed, as Mr. Wilson points out, parents and teachers often encounter children, outraged by some decision their elders have made, complaining, 'It's not fair!' One almost never hears them say, 'It's not just!' Clearly there is some distinction between the two terms, at least in English. But what exactly is it? And why does this matter in Nazi-looted art cases? Both of these are difficult questions to answer, but nevertheless, given the theme and title of this book, it is important that we try.

The primary definition of the word 'fair' in most English dictionaries is actually 'of pleasing appearance'. It derives from the Old English word *fæger*, which meant 'beautiful, lovely, pleasant'. Linguists quibble about how far back in time the alternate or secondary meaning of 'fair' as, to quote the Oxford English Dictionary, 'equitably, honestly, impartially, justly; according to rule'<sup>4</sup> goes – some cite such a usage as first appearing a thousand years ago – but they seem generally to agree that it has long had some connection, as Mr. Wilson notes above, to following the rules of a game, i.e., 'according to rule'. These rules surely had to be pleasing to participants in order to seem 'fair' as well.

The word 'just,' by contrast, comes into English by way of French and Latin. Its original sense seems to have been 'righteous in the eyes of God; upright, equitable, impartial'. In Latin, the word *iustus* means 'just, right, equitable, fair, lawful, proper' and derives from

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3 *ibid.*

4 'fair, adj. and n.1' (OED Online, OUP December 2013) <[www.oed.com/view/Entry/67704?rskey=OImyEv&result=2&isAdvanced=false](http://www.oed.com/view/Entry/67704?rskey=OImyEv&result=2&isAdvanced=false)> accessed 12 February 2014.

the Latin noun *ius*, which can mean ‘legal right’ and ‘law’. Latin, of course, also has another word for law – *lex* – from which the English word ‘legal’ ultimately derives. The difference between the two is not always clear to us non-native speakers of Latin, but it is quite often explained this way: ‘*lex*’ refers to something specific (a law) and ‘*ius*’ to something general (justice, in or outside the law). There is probably a good reason why the Romans regarded *Iustitia* (Justice) as a goddess, whereas they did not seem to reserve the same religious devotion to a cult of *Lex*. The distinction between the two would probably serve us well in this particular issue, for it seems that a ‘just and fair solution’ in matters involving Nazi-looted art may not be a strictly or narrowly legal one. Let us now explore this notion in more depth, beginning with a kind of potted history of plundered art.

#### 4.2 A HISTORY OF THE PROTECTION OF ARTWORKS DURING WARTIME

Not long after the end of the Second World War, *The New Yorker* magazine ran a series of articles by its Paris correspondent, Janet Flanner. These later appeared as an essay in a book called *Men & Monuments* under the title ‘The Beautiful Spoils.’<sup>5</sup> The essay begins this way:

For several thousand years, the looting of art by the victors from the vanquished has been the most civilized sideline of war. From time immemorial, war has given to the conqueror the privilege of plundering whatever art treasures have not been demolished. This last European war [...] produced history’s greatest, most delicate military traffic problem: the portage of the transferable loot, of which the art-hungry Nazis assembled thousands of tons and myriad trainloads of the classic, from bronze Apollos to stone saints, and of the cozy, from gold Empire soup tureens to a portrait of Mme de Pompadour in her boudoir. The physical act of carting pillaged beauty off to the homeland is older than the hills of Rome, which are peopled with marble mythology stolen from the temples of Athens. But the [Nazis] did something new this time; they looted art on an ideological basis – almost all of the victims were French, Dutch, Austrian and Belgian Jews, and Poles and Russians of any faith. The fact that the Nazis considered the looting of art a protection of art was also a novel touch.<sup>6</sup>

As Ms Flanner notes, throughout history plunder has tended to remain with the plunderer. The Athenian military man, gentleman farmer and historian, Xenophon, put it this way in his *Cyropaedeia* (7.5.73):

<sup>5</sup> Janet Flanner, *Men and Monuments* (DaCapo, reprinted 2009).

<sup>6</sup> *ibid* 220.

And let not one of you think that in having these things he has what does not belong to him; for it is a law established for all time among all men that when a city is taken in war, the persons and the property of the inhabitants thereof belong to the captors. It will, therefore, be no injustice for you to keep what you have, but if you let them keep anything, it will be only out of generosity that you do not take it away.<sup>7</sup>

Over time, however, attitudes about injustice and humanity in wartime began to change. Diplomats assembled at the Congress of Vienna, for instance, forced the French to return art they had plundered during the Napoleonic wars. Although this was not often repeated afterwards, it nevertheless seems to have set some kind of precedent, for attention increasingly began to focus on the need for the vanquished to return what they had taken when they were the victors.

The United States (US) government's commitment to returning 'the beautiful spoils' to those from whom they were taken dates back to our Civil War. It began with the development of the Lieber Code, which was formally titled 'Instructions for the Government of Armies in the Field'.<sup>8</sup> As the International Committee of the Red Cross notes:

The 'Lieber Instructions' represent the first attempt to codify the laws of war. They were prepared during the American Civil War by Francis Lieber, then a professor of Columbia College in New York, revised by a board of officers and promulgated by President Lincoln. Although they were binding only on the forces of the United States, they correspond to a great extent to the laws and customs of war existing at that time. The 'Lieber Instructions' strongly influenced the further codification of the laws of war and the adoption of similar regulations by other states. They formed the origin of the project of an international convention on the laws of war presented to the Brussels Conference in 1874 and stimulated the adoption of the Hague Conventions on land warfare of 1899 and 1907.<sup>9</sup>

Article 36 of these Instructions states:

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7 Xenophon, *Xenophon in Seven Volumes*, vols 5 & 6 (Walter Miller tr, Harvard University Press 1914).

8 United States War Department, *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*, series III, vol 3 (Cornell University Library 1899) 148-164.

9 International Committee for the Red Cross, 'Instructions for the Government of Armies of the United States in the Field (Lieber Code). 24 April 1863' (ICRC, 2012) <[www.icrc.org/ihl/INTRO/110?OpenDocument](http://www.icrc.org/ihl/INTRO/110?OpenDocument)> accessed 8 August 2014.

If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.<sup>10</sup>

#### 4.3 ART PLUNDER DURING THE SECOND WORLD WAR

It is perhaps an irony of history that Francis Lieber was born Franz Lieber in Berlin. Eighty years or so after he promulgated his Code, the Supreme Allied Commander in Europe, General Dwight Eisenhower, who was leading the fight in the West to defeat the Berlin-based Nazi regime, also established measures to facilitate the eventual return of looted art and historical objects.<sup>11</sup> These were in accord with the *Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation and Control*, which is better known as the ‘London Declaration’ of 5 January 1943.<sup>12</sup> This declaration reserved the Allies’ rights to “declare invalid” any property transfers in the Axis and occupied territories, even those “apparently legal in form, even when they purport to be voluntarily effected”.

The US continued this policy after the war by issuing Military Government Law Number 59,<sup>13</sup> which it applied to property restitution in its zone of occupation in Germany. US military commanders also insisted that collections that had once belonged to German museums should come back to those museums. (This was not the first time, nor would it be the last, that actions by American government officials would upset the directors of American museums.) Accordingly, the US returned to Germany works of art that had been shipped to the US for ‘safekeeping’. The US Army’s Monuments, Fine Arts and Archives program (MFAA) – better known now as the Monuments Men – also returned thousands of works of art to other countries of origin.

<sup>10</sup> United States War Department (n 8) 152.

<sup>11</sup> Greg Bradsher and Sylvia Naylor, ‘General Dwight D. Eisenhower and the Protection of Cultural Property’ (*National Archives*, 10 February 2014) <<http://blogs.archives.gov/TextMessage/2014/02/10/general-dwight-d-eisenhower-and-the-protection-of-cultural-property/>> accessed 8 August 2014.

Eisenhower memorandum to “All Commanders” on “Historical Monuments” of 29 December 1943.

<sup>12</sup> ‘Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation and Control’, (1943) 1 *Foreign Relations* 443. See also Appendix 1.

<sup>13</sup> United States Courts of the Allied High Commission for Germany, *Court of Restitution Appeals Reports* (United States Courts of the Allied High Commission for Germany 1951) 499-536. See <[www.law.harvard.edu/library/digital/court-of-restitution-appeals-reports.html](http://www.law.harvard.edu/library/digital/court-of-restitution-appeals-reports.html)>.

This policy continued beyond the immediate post-war period. In August 1951 and October 1954, the *Bulletin* of the US Department of State published notices that reiterated the American government's continued commitment to pursuing the restitution of art taken by the Nazis.<sup>14</sup> These notices made it clear that *all* transfers of such art in Nazi-dominated Europe, including so-called forced or coerced transfers, were suspect, and that defenses, such as a buyer's claimed ignorance of a forced transfer, should not prevent restitution. The Department of State also circulated a letter to universities, museums, libraries, art dealers, and booksellers explaining the government's policy on the restitution of cultural objects, including works of art, and requesting assistance in identifying potentially looted items. According to a recent article by the American lawyer Raymond Dowd:

In the years following World War II [...] the U.S. State Department aggressively pursued stolen artworks in the United States, recovering almost 4,000 works and sending warning to all museums, art dealers and colleges not to acquire such artworks with undocumented provenance.<sup>15</sup>

#### 4.4 THE WASHINGTON CONFERENCE AND BEYOND

But while this policy has never changed, the initial zeal to carry it out seems to have ebbed over time. It took almost fifty years before scholars and writers began to turn their attention once again to this issue in earnest. Books like Lynn Nicholas's *Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War*,<sup>16</sup> when published in 1994, brought the Nazi plunder of art once again to public attention. In the same decade, class action lawsuits began to be filed in American courts of law against Swiss banks, European insurance companies, and German and Austrian industries for their failures to make claimants or their heirs good for what they had stolen from them or done to them during the Holocaust. Perhaps as a result, at the very end of 1998, the US Department of State and the US Holocaust Memorial Museum jointly convened an international conference in Washington to discuss what they called 'Holocaust-era assets'.

This was no small event. Forty-four countries and a number of non-governmental organizations participated in this conference. Its published proceedings amount to 1,146

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14 Ardelia R. Hall, 'The Recovery of Cultural Objects Dispersed During World War II' (1951) 25 Department of State Bulletin 337; Ardelia R. Hall, 'Return of Historic Objects to Countries of Origin' (1954) 31 Department of State Bulletin 493; 'Final Act of London Conference' (1954) 31 Department of State Bulletin 515.

15 Raymond J. Dowd, 'Nazi Looted Art and Cocaine: When Museum Directors Take It, Call the Cops' 14 Rutgers J. L. & Religion 529, 529.

16 Lynn H. Nicholas, *The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War* (first published 1984, Vintage Books 1995).

pages.<sup>17</sup> One-hundred-fifty or so pages of this volume alone are devoted to ‘Nazi-confiscated art issues’. But it is not until you come to page 971, in the Appendices, that you find a short document called the *Washington Conference Principles on Nazi-Confiscated Art*.<sup>18</sup> Among other things, these principles state that where owners of such art or their heirs can be identified, “steps should be taken expeditiously to achieve a just and fair solution”.<sup>19</sup> The eleventh and final principle also “encouraged” nations to “develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues”.<sup>20</sup>

Since then, it has regularly been said that these principles revolutionized the art market. Here, for instance, is how one prominent participant in that conference described the effect of these principles years later:

At the Washington Conference we obtained a consensus from 44 countries on a voluntary set of *Principles on Nazi-Confiscated Art*, which profoundly changed the world of art. The guidelines have important moral authority. They called on museums, galleries, and auction houses to cooperate in tracing looted art through stringent research into the provenance of their collections. Leeway was to be given to accepting claims. An international effort was to be made to publish information about provenance research. A system of alternative dispute resolution was to be considered to prevent art claims from turning into protracted legal battles. Since none of these principles was legally binding, one may legitimately ask whether anything has really changed. The answer is unequivocally yes.

Major auction houses conduct thorough research on artworks that they bring to market, museums examine the provenance of any prospective purchases carefully; and private collectors consider the prior history of paintings they have under consideration [...] And hundreds of artworks have been returned to their rightful owners.<sup>21</sup>

In October 2000 Lithuania’s capital city, Vilnius, played host to an International Forum on Holocaust Era Looted Cultural Assets. It served as a follow-up to the Washington Conference. Although the official representation was somewhat smaller – thirty-eight

17 J.D. Bindenagel (ed), *Washington Conference on Holocaust-Era Assets, November 30-December 3, 1998: Proceedings* (Department of State 1999).

18 *ibid* 971-972.

19 *ibid* 972.

20 *ibid*.

21 Stuart E. Eizenstat, ‘Plenary Speeches’ in Jiří Schneider, Jakub Klepal and Irena Kalhousová (eds), *Holocaust Era Assets Conference Proceedings, Prague, June 26-30, 2009* (Forum 2000 Foundation 2009) 72-73.

countries were present – this conference, too, produced a declaration that, among other things, said this:

Recognizing the Nazi effort to exterminate the Jewish people, including the effort to eradicate the Jewish cultural heritage, the Vilnius Forum recognizes the urgent need to work on ways to achieve a just and fair solution to the issue of Nazi-looted art and cultural property where owners, or heirs of former Jewish owners, individuals or legal persons, cannot be identified; recognizes that there is no universal model for this issue; and recognizes the previous Jewish ownership of such cultural assets.<sup>22</sup>

Such a statement perhaps suggests that, while the art market was now revolutionized, not all problems connected to achieving just and fair solutions to art confiscated by the Nazis had yet been solved.

At roughly the same time as the Vilnius Forum was taking place, a lawsuit was being filed an ocean and a continent away that would have a profound effect in the US on views of exactly what such a just and fair solution might be. In 2000, proceedings in a case called *Altmann v. Republic of Austria* began in a federal district court in California.<sup>23</sup> Maria Altmann had fled from Austria in the 1930s and taken up residence in Los Angeles. She became an American citizen in 1945. In 1999, she petitioned Austria's Art Restitution Advisory Board to review her claim for five paintings by Gustav Klimt that had once belonged to her family but were now in Austria's National Gallery. The board rejected her petition on the grounds that the paintings had been donated to the museum.<sup>24</sup> She then sought to resolve the matter through private arbitration, but was unsuccessful. When she attempted to resort to legal remedies, she found that to pursue her claim further in an Austrian court of law under its Art Restitution Act would have required her to pay a one percent filing fee, which would have amounted to \$1.8 million. (It was later reduced to between \$135,000 and \$150,000, which was still prohibitive.) Madame Altmann decided to file suit in a federal court district court in central California instead.

Four years later, the case found its way to the US Supreme Court, which affirmed the district court's rejection of Austria's motion to dismiss.<sup>25</sup> The district court's decision has been described by one expert as 'monumental.'<sup>26</sup> Although the US government sided with

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22 Patrick J. O'Keefe, 'Vilnius International Forum on Holocaust-Era Looted Culture Assets, Vilnius, Lithuania (October 3-5, 2000)' (2001) 10 *International Journal for Cultural Property* 127, 133.

23 *Maria V. Altmann v Republic of Austria*, 142 F. Supp. 2d 1187 (CD Cal. 2001).

24 Michael J. Bazylar, *Holocaust Justice: The Battle for Restitution in America's Courts* (New York University Press 2003) 246.

25 *Republic of Austria et al v Maria V. Altmann*, 541 US 677 (2004).

26 Michael J. Bazylar and Roger P. Alford, 'Introduction' in Michael J. Bazylar and Roger P. Alford (eds), *Holocaust Restitution: Perspectives on the Litigation and Its Legacy* (New York University Press, 2006) 11.

Austria in this matter, the Supreme Court nevertheless denied the Austrian Gallery the protections of foreign sovereign immunity and ordered the case to go to trial – the first time such a thing had happened in US courts with art stolen by the Nazis. Austria then agreed to settle this dispute through arbitration in Vienna. In 2006, the arbitral court found in favor of Madame Altmann.<sup>27</sup>

This decision, however monumental it may have been, did not immediately trigger further formal international discussions of this issue. Prompted by litigation in American courts, Austria, France, and Germany had concluded agreements with the US in 2000 and 2001 that prompted them to pay compensation for damages and for losses incurred in the Holocaust, but these agreements did not cover art or cultural property. It was not until nine years after the Vilnius Forum that another international conference on Holocaust-era assets took place, this time in the Czech Republic. Since the previous four conferences had occurred within about four years of one another, this might suggest that some wind had gone out of the sails of the movement to review such matters at international gatherings. If so, Prague Conference did its best to fill those sails again.

That conference's final document, the Terezín Declaration,<sup>28</sup> has been called the most comprehensive final document of the most ambitious of the five post-war conferences on Holocaust-era assets.<sup>29</sup> Whether this claim is entirely true or not is perhaps debatable. Nevertheless, it is indisputable that the Terezín Declaration both reaffirmed the Washington Principles and added to them. In particular, it stated:

We urge all stakeholders to ensure that their legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and fairly based on the facts and merits of the claims and all the relevant documents submitted by the parties. Governments should consider all legal issues when applying various legal provisions that may impede the restitution of art and cultural property, in order to achieve just and fair solutions, as well as alternate dispute resolution, where appropriate under law.<sup>30</sup>

Like the Washington Principles, the Terezín Declaration lays out guidelines and 'best practices' that ought to guide deliberations over the restitution of art plundered by the

27 *Maria V. Altmann and others v Republic of Austria* (6 May 2006) <<http://bslaw.com/altmann/Zuckerandl/Decisions/decision.pdf>> accessed 14 February 2014.

28 'Terezín Declaration' in Jiří Schneider, Jakub Klepal and Irena Kalhousová (eds), *Holocaust Era Assets Conference Proceedings, Prague, June 26-30, 2009* (Forum 2000 Foundation 2009) 16-31. See also Appendix 6.

29 Stuart Eizenstat in testimony before the Committee on Security and Cooperation in Europe in a hearing entitled 'Holocaust Era Assets – After the Prague Conference,' 25 May 2010.

30 Schneider, Klepal and Kalhousová (n 28) 24.

National Socialist regime or its collaborators, whatever a country's legal system and traditions may be. Their intent is surely to coax the parties to a particular dispute to seek to determine the facts of the matter and to avoid resorting to legal arguments grounded in procedural issues if they possibly can.

#### 4.5 THE AMERICAN APPROACH TOWARDS NAZI-LOOTED ART

The US government's approach to Holocaust-related disputes of all kinds has long been to favor dialogue and negotiation over litigation.<sup>31</sup> This principle finds its echo in the encouragement in the Washington Principles of the establishment of national processes for alternate dispute resolution mechanisms.<sup>32</sup> In the wake of the Washington Conference, a number of nations in Europe – not least the Kingdom of the Netherlands – took this encouragement to heart. They established their own national processes, generally in the form of advisory commissions or committees, to review claims for the return of art. They could do this in part because much of the art in question was held in national collections. Thus, for them, it was and is mainly an administrative, rather than a legal, matter to deal with claims for looted art. Unfortunately, the US has so far been unable to follow this lead. This is principally because it lacks the essential element that is at the core – the ability of European Nazi-looted art commissions to function. The Federal US Government has no Ministry of Culture or its equivalent with the authority to order the implementation of the recommendations of such a national process even for those few museums of art that fall under its direct purview.

The American government has, however, found other alternatives to litigation to return art confiscated by the Nazis to claimants both at home and abroad. In recent years, for instance, federal government customs authorities and law enforcement officials have returned porcelain to Germany, paintings to Poland, and a sixteenth-century Hebrew Bible to the Jewish community of Vienna. They benefit from a provision in American law not common in continental European legal systems – the idea that a stolen good is always just that. Unlike in civil law systems, in the US good faith purchasers cannot wait years and then know that their hold on what turns out to be a stolen good is secure. As American lawyers like to say, *'Nemo dat quod non habet'* ('No one gives what he does not have') or, more colloquially, 'A thief can't pass good title.'

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31 The Washington and Terezín Declarations, for one. See also page 18 of Brief of the United States as Amicus Curiae in the Supreme Court of the United States on a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit: *Marie von Saher, Petitioner v Norton Simon Museum of Art at Pasadena et al.*

32 Bindenagel (n 17) 972.

To Americans, at least, this seems only right, for it does not seem fair that someone could hang on to a stolen good. This feeling for fair play in matters of possession applies to Nazi-looted art as much as to anything else. But fair play also requires protections from unfair practices – from fouls, if one is a fan of sports metaphors. This is presumably why procedural defenses like statutes of limitations and laches exist. Sometimes, it may seem that when museums and others successfully resort to such procedural litigation defenses to retain artworks that others claim have been stolen, what is fair may not seem just – and vice versa. This is surely why the sense of fair play implicit in the Washington Principles and the Terezín Declaration leads to their demands that such cases be decided “on the facts and merits of the claims”.

In the US, litigation over Nazi-confiscated art is often protracted and costly. Whatever the result, it can leave a bitter taste in many mouths. It can sometimes even call to mind Mr. Bumble’s statement in Charles Dickens great novel *Oliver Twist*: “If the law supposes that, the law is a ass – a idiot.”<sup>33</sup> (To be sure, Mr. Bumble was referring to the legal supposition that his wife was acting under his direction, which is not quite the same thing.) But, while such protracted and costly cases are also highly visible, they are not necessarily the norm. Even though the US lacks a formal alternate dispute resolution mechanism, many more Nazi-looted art claims, according to the author Michael Bazzyler, “have settled without resorting to litigation than through lawsuits”.<sup>34</sup>

All this would seem to lead inevitably to the conclusion that there is no single or simple way to define a ‘just and fair’ solution for cases of Nazi-confiscated art. Still, to paraphrase a former Justice of our Supreme Court, Potter Stewart, in commenting on a purported case of obscenity, you may not always be able to define such a solution, but you know it when you see it.<sup>35</sup> For, as Justice Stewart also once said, ‘Fairness is what justice really is.’

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33 Charles Dickens, *Oliver Twist or the Parish Boy's Progress* (first published 1651, Project Gutenberg 2008) 1150-1151.

34 Michael J. Bazzyler, *Holocaust Justice: The Battle for Restitution in America's Courts* (New York University Press 2003) 249.

35 *Jacobellis v Ohio* 378 U.S. 184 (1964).



# “ULTIMATELY, THE APPLICANT NEEDS TO FEEL THAT JUSTICE HAS BEEN DONE”

*An Interview with Alfred Jacobsen*

*Annemarie Marck and Marleen Schoonderwoerd*

In 2004, the Dutch government published an overview of Nazi-looted art from the Netherlands Art Property collection (NK collection). On this list were fifteen artworks that during the Second World War might have been in the possession of the art gallery owned by Mozes Mogrobi, who was Jewish. This publication was the reason why Alfred Jacobsen and his three sisters, all of them grandchildren of Mozes Mogrobi, submitted an application to the Dutch Minister of Education, Culture and Science for the restitution of these objects. The Minister put the application before the Restitutions Committee.

In this interview, Alfred Jacobsen looks back at the procedure used by the Restitutions Committee and explains to what extent he found it fair and just.

## *The Mogrobi Case*

Mozes Mogrobi was married to Zilia Jacobi who, like Mozes, was Jewish. They had two children, Alfred and Sonja. Since 1 May 1921, Mogrobi was the sole owner of an art and antiques gallery in Amsterdam. At an unknown moment during the Second World War, this gallery was placed under seal as a result of anti-Jewish measures taken by the German occupying forces. The couple went into hiding, but were arrested in July 1944 and deported to Poland. Mozes Mogrobi was murdered in Auschwitz in September 1944. His son Alfred Mogrobi suffered the same fate in December 1944 in Buchenwald concentration camp in Germany. Zilia Mogrobi-Jacobi and her daughter Sonja Mogrobi survived the war. After the Netherlands was liberated, Zilia Mogrobi-Jacobi continued to run her husband's business until the gallery closed down on 1 October 1956.

Works of art from the Mogrobi gallery's trading stock were sold during the period of 1941–1944. Most of the claimed works were acquired during this time by German buyers. The remaining trading stock was ultimately confiscated by the occupying forces and sold at auction on 25 July 1944.

After an investigation, in 2007 the Restitutions Committee advised the Minister to return thirteen artworks to the heirs of Mozes Mogrobi and Zilia Mogrobi-Jacobi. The Minister accepted this advice.

## RESTITUTION

*"I had read about restitution now and again, also about cases in other countries. Among other things I am interested in art in museums that other countries are asking to have back. The questions that occupy me are what is just and fair and how far back should you go? A tricky issue. As far as our claim is concerned, a few years ago I read in the papers that the Restitutions Committee had been set up. I do not remember whether I wrote to the Dutch government or whether I called to register as an interested party. In any event, at some point I was approached by the Ministry. We received a report stating that artworks in the Dutch national art collection had been part of the trading stock of my grandfather's gallery. That report made us aware for the first time that these works existed. If the Dutch government had not come up with a list, we would never have known about them. This is because there is no trading stock inventory that we know about and also as far as I know my grandmother, who survived the war, never drew up a list of what was missing after the liberation. She was probably not able to do so because only my grandfather, who was murdered in Auschwitz during the war, would have known what had been in the shop. Similarly my sisters and I, their grandchildren, could not have known anything. At home every now and then, we did talk about things that had been stolen from my grandfather's gallery, but we did not know which items were involved. So we were pleasantly surprised a few years ago that artworks were still being found in the national art collection. At the time, we did not hesitate for a minute about whether or not to initiate a restitution procedure. My sisters and I were in full agreement that we should do it.*

## TRUST

*Right from the beginning of the procedure, we had the feeling that our claim was being treated very seriously. The fact that the State Secretary for Education, Culture and Science had personally instituted the Restitutions Committee created confidence. The names of the committee members and their backgrounds were not an issue as far as I was concerned. I immediately had the impression that everything was dealt with thoroughly and professionally. You could see that, for instance, from the correspondence we conducted about our procedure. Everything was handled properly. Nothing was farmed out to some external outfit or other. It was the same story with the investigation.*

## SERIOUS RESEARCH

*The recommendations that the Restitutions Committee issues are based on a great deal of research. The Committee’s research bureau gets to the bottom of everything. We received an investigation report relating to our claim, from which it emerged that a great deal of archival research had been conducted. And probably what we saw was only the tip of the iceberg. There must also have been correspondence with people and archives about which we, as a family, know nothing. This makes a much better impression on applicants, such as ourselves, rather than receiving a letter with the announcement, ‘These are your things. Where do you want us to deliver them?’ In such a case I would probably have had a lot of questions. But in fact after the report, I had none.*

*As a result of the in-depth investigation, however, the procedure took much longer than I had expected. At the same time our claim was for quite a few objects and initially many things were unclear. In any event, the works in the national collection were found. And I think it is really good that the government took the trouble to try and rectify things.*

*I personally learned a great deal from the investigation report. It contained facts about my family and my grandfather’s gallery that I never knew. I did know my parents had gone into hiding during the war, for example, but I was not well informed about my grandparents’ circumstances in the Netherlands at that time. My grandmother lived until the early 1970’s, but I barely talked to her about the war. She survived Auschwitz and came back, but she preferred not to speak about that period in her life.*

*Yet the Committee’s research has not made me want to study archives myself. One reason is a lack of time, but I am also deterred somewhat because in this sort of research you unearth things that can be very confrontational. For me personally this is the other side of the coin when it comes to investigating.*

## PROCEDURE AS A MEANS OF JUSTICE

*A good procedure in restitution cases is a means of ensuring that justice is done, but it is not an end in itself. It is important to meet the requirements of due care, but ultimately it is about whether the applicant feels that justice has been done. What I mean by that is even if there is no restitution, he or she accepts the situation. For example, we submitted a restitution application for a work of art about which I immediately wondered: is this right, could this really have been in my grandfather’s shop? It was a nineteenth-century Constant Meunier sculpture,*

*which according to information in an archive document might have been part of my grandfather's gallery's stock. While my grandfather traded in pretty much everything, I thought this object was completely out of place in his collection, which was focused primarily on antiques. And this also proved to be the case after the Restitutions Committee's research bureau had looked into it. It emerged that the sculpture had been part of another Amsterdam gallery's trading stock. I was the applicant but I agreed completely with this conclusion, particularly because the research was so well documented and presented. That is why I believe investigation has to be a significant part of a restitution procedure. In my view, it is logical to carry out comprehensive research at the outset in order to avoid errors and give people the feeling that care is being taken with the subject matter. This is the way to prevent repeating previous mistakes, for instance returning a work of art to the wrong applicant. So in my opinion the procedure and the investigation need to be extremely thorough.*

*All in all my sisters and I are very satisfied. Not just about how the procedure was executed, but also with what was ultimately returned. We had not expected anything, but at the end of the day quite a lot of objects were handed back. For me, it is not just about the objects, though, it is about the trouble, care and energy it took to do the right thing.*

## RESTITUTION OR COMPENSATION

*I think it is better to return objects than to pay compensation. If you start paying money instead of restitution, there is almost bound to be disagreement because you have to wrangle with the restituting party about the market value of the works. So in my view restitution is the best way. If the restituting party wants to have the items in question, it, he or she can always buy them back. That happens quite often at the moment. I read a number of times that museums bought back works of art they had returned. In our family there were no disagreements about what we should do with the restituted objects. My sisters and I sold all the returned items except for one. We had no tie with them. Our family still has things that came from my grandfather's business, but my sisters and I had them around us as we grew up, so we feel differently about them because there is a link. So, I have only good things to say about our case”.*

*“ULTIMATELY, THE APPLICANT NEEDS TO FEEL THAT JUSTICE HAS BEEN DONE”*

**Photo I Kunsthandel Mozes Mogrobi, Spiegelgracht 11 in Amsterdam, around 1943  
(third house on the right)**





## PART II

# DISCUSSION STAKEHOLDERS ON FAIR AND JUST

Under the Washington Principles, ‘fair and just’ solutions are the norm for Holocaust-related art claims, with these solutions varying “according to the facts and circumstances surrounding a specific case”. But what is meant by a ‘fair and just solution’? And what are these circumstances that can influence the outcome? In the panel session held at the symposium *Fair and Just Solutions? Alternatives to Litigation in Nazi-looted Art Disputes: Status Quo and New Developments*, stakeholders and experts gave their opinions and expressed their wishes with respect to the various subtopics concerning fair and just solutions. These subtopics are as follows:

- a. the special status of Nazi-looted art,
- b. the concept of fair and just,
- c. factual research,
- d. time limitation, and
- e. the importance of international cooperation.

Chapter 5 provides a rendition of the discussion at the conference. In Chapter 6, Rob Polak, who chaired the panel discussion at the conference, looks back on what he describes as a “fruitful discussion”. In his epilogue, he takes a closer look at some of the main points from the discussion, adding comments and introducing some thought-provoking new ideas on the issue of limitation periods for claims involving Nazi-looted art.



## 5 PANEL DISCUSSION

*Edited by Floris Kunert and Evelien Campfens*

In the panel session held at the symposium *Fair and Just Solutions? Alternatives to Litigation in Nazi-looted Art Disputes: Status Quo and New Developments* in 2012, stakeholders and experts gave their opinions and expressed their wishes with respect to the various subtopics concerning fair and just solutions.

The first session (5.1) explored the question of whether Nazi-looted art claims differ from other claims involving spoliated art. If there is a fundamental difference, what is its essence? And can the standard for Nazi-looted art claims also be useful for other claims involving spoliated art? Next (5.2) the panel explored the concept of ‘fair and just’. What circumstances are key to a ‘fair and just’ decision? Can it, for example, be said that this is dependent on the status of the current possessor, with a distinction being made between public institutions and private individuals? Or does it depend on the *good faith* of the current possessor, irrespective of their formal status? Another important factor (5.3) in solving disputes concerning looted art is agreement on the facts of a case. Factual research might reveal that what at first sight appears to be a voluntary sale was actually a forced sale, or vice versa. Therefore, the third topic explored was the need for independent and impartial investigation of the facts and whether or not this can be left to the parties. The next subtopic (5.4) considered was ‘how long this should go on’: should a limitation period apply for claims involving Nazi-looted art, as is normally the case in other claims to ownership? And, if so, what might be a valid criterion? Given the fact that many disputes involving Nazi-looted art are international in character, the fifth and last subtopic (5.5) explored was the need for more international coordination and cooperation.

The text of this chapter provides a rendition of the discussion at the conference and is based on the spoken discussion, supplemented by answers from questionnaires that participants were asked to fill out before the symposium. The resulting text was then sent to the panel members, who were given a free hand to adapt their sections. After a final editing round, the final version of the text was sent to the speakers for their approval. As a result of this process, the text below differs in places from the spoken word.

## PARTICIPANTS

What follows hereunder are the names, alphabetically listed, of those who took part in the panel session and the organisation they were representing:

### *Chair*

- Rob Polak (art and law expert, former partner at De Brauw Blackstone Westbroek, the Netherlands)

### *Panel members*

- Taco Dibbits (*Director of Collections, Rijksmuseum Amsterdam, the Netherlands*)
- Monica Dugot (*International Director of Restitution and Senior Vice President, Christie's, New York, US*)
- Rudi Ekkart (*Director of the Netherlands Institute for Art History; former head of the Origins Unknown Agency, Chair of the Committee supervising the investigation of Dutch Museum Acquisitions from 1933 onwards*)
- Wesley A. Fisher (*Director of Research, Conference on Jewish Material Claims Against Germany, New York, USA*)
- Corinne Hershkovitch (*Partner at Borghese Associés, Paris, France*)
- Willem Jan Hoogsteder (*Hoogsteder & Hoogsteder Art Dealers in Old Master Paintings, The Hague, the Netherlands*)
- Lawrence Kaye (*Partner at Herrick, Feinstein LLP; Co-Chair Art Law Group, New York, USA*)
- Stephen J. Knerly, Jr. (*Partner at Hahn Loeser & Parks LLP; Co-Chair Non-Profit Institutions Practice Group, Cleveland, USA*)
- Marc Masurovsky (*Cofounder/Director of Research at the Holocaust Art Restitution Project, Washington DC, USA*)
- Isabel Pfeiffer-Poensgen (*Secretary General of the Kulturstiftung der Länder, Berlin, Germany*)
- Lucian Simmons (*Senior Vice President; Worldwide Head, Provenance and Restitution Department, Sotheby's, New York, USA*)

### 5.1 THE SPECIAL STATUS OF NAZI-LOOTED ART

The first topic for discussion was the question whether Nazi-looted art deserves a special status compared to other spoliated art and, more specifically, whether there is a distinction that is relevant from a legal perspective. Is there a fundamental difference between disputes regarding Nazi-looted art and disputes regarding other spoliated art? If so, what is the basis for this distinction? Kaye, Simmons, Masurovsky, Dibbits, Pfeiffer-Poensgen and Fisher contributed to this debate.

Kaye opened the discussion by noting that many people make a distinction between art spoliated by the Nazi regime and other spoliated art. He said that Nazi-looted art is generally treated as a special category requiring special rules. The first reason for this is that many consider looting by the Nazis as having resulted in the greatest displacement of art in human history. The second reason lies in the fact that this looting was not only an act of war but an integral part of a policy to eradicate the Jews, to destroy them as a people and strip them of their humanity. Next, Kaye focused on the distinction between Nazi-spoliated art and other forms of art looting from a *legal* perspective. He said that the legal basis for claims to Nazi-spoliated art can be traced back to the 1943 *Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation or Control* (also known as the London Declaration), in which the Allies agreed that all acts of dispossession by the Nazis would be nullified. This declaration went beyond simple looting and included any and all transfers made by the Nazi regime – even those purportedly legally undertaken by the Nazi government, such as forced sales. Kaye also explained that as early as 1951, Ardelia Hall, who was active in the US State Department after the war, had stated that works of art lost through Nazi depredations in European countries – acts which had so shocked the civilised world – would never be saleable. Kaye said that while other heinous crimes have been committed throughout history, ‘the looting by the most evil thieves in history’ has a special place in the minds of most people in this field.

Simmons agreed that there is a difference between art spoliated as a result of the Nazi regime and other forms of spoliated art, not only because of the underlying genocide, but also because of the scale of the looting and the number of works of art that were displaced. Nazi looting is one of the fields that Sotheby’s concentrates on in its provenance research, in order to avoid exposing buyers, sellers or shareholders to potential criticism or legal action. Nazi era provenance is therefore looked at seriously, but other issues are also considered when screening artworks prior to sale. Simmons mentioned the potential for claims arising from Castro’s displacement of works of art in Cuba in the 1960s, works of art illegally excavated from archaeological sites and protected wildlife species. With regard to the Second World War, Simmons observed that art looted by the Nazis is just one of areas considered by the restitution team at Sotheby’s. The company also looks at works of art displaced by other parties during the conflict, such as members of the United States (US)

Forces or the Soviet Army. In this context Simmons qualified looting by the Nazis as a subcategory within a larger field.

Masurovsky then gave his perspective on the issue. He considers the looting of art by the Nazis first and foremost as a crime: the crime of plunder, committed in the context of an ideological war against Jews and other minorities. Referring back to the question of whether disputes concerning Nazi-looted art deserve a special status, Masurovsky said that he found it difficult to give an unequivocal opinion. Disputes concerning Nazi-looted art do deserve a special status because the seizures, misappropriations and illegal transfers of objects such as paintings, musical instruments and library contents took place in an environment shaped by National Socialist policies aimed at eliminating the Jews. However, the Nazis were not the only ones who committed this crime during the war: looting took place in at least 15 countries, including France, Italy, Romania, Bulgaria and Hungary. It paid off because most of the perpetrators were never brought to justice. Despite international agreements and declarations condemning the acts, plunder remains largely unpunished, although Masurovsky acknowledged that in the last ten years (and partly as a result of the present government commissions) there has finally been an attempt to address the problem, limited though this response may be. The reason for his earlier hesitation in giving an unequivocal answer to the question was that the international community has tried to downplay the importance of other acts of plunder. Although there is a unique aspect to what happened to Jewish-owned property, it should not be forgotten that plunder is plunder, regardless of who the victim is. According to Masurovsky, genocide stands out as the most heinous crime faced by human societies, and claims arising from genocide, ethnocide and other instances of mass slaughter resulting in significant displacement of cultural and other property should be treated on an equal and comparable basis. Moreover, and in a more general sense, where acts of plunder have been committed by invading and occupying military forces, recourse should not be limited to compensation for war damage, but restitution claims should also be possible.

Polak then asked Dibbits if, in his capacity as director of collections at the Amsterdam Rijksmuseum, he viewed conflicts concerning Nazi-looted art as being different from those involving other forms of stolen or spoliated art. Dibbits said that he would prefer not to treat Nazi-looted art as a 'subcategory' of spoliated art but as a separate category in its own right. As the Rijksmuseum is a public institution and part of a wider society, it has to take account of the emotions of different groups within that society. This means that the emotional aspect of art restitution is very important, especially the communal emotions regarding the subject. Dibbits said that as the victims of Nazi looting have a very specific and different emotion in regard to that atrocity compared to other groups, he would like to treat it as a separate category; this does not make it more or less important than other forms of art looting, but places it in a separate category nonetheless.

Polak summarised the preceding discussion by stating that while some people view Nazi looting as a special category, others are more hesitant. He asked whether any of the other panel members would like to add to the discussion.

Fisher observed that Nazi looting was not just plunder but plunder in the midst of genocide; in other words, it was stealing while also killing the original owners. Reflecting on Masurovsky's statements about the number of countries involved, he observed that the issue of Nazi looting affected far more countries than those actually present at the conference. Fisher stressed that in his opinion, when talking about international cooperation, the perspective should be widened not only to the east and the south but also across the ocean.

Pfeiffer-Poensgen added that in Germany, Nazi looting is never discussed as a subcategory. It is considered a unique part of German history, so the matter does not arise.

Kaye noted that there have been three international forums addressing the need to rise above our own national jurisprudence. Referring back to earlier comments by Simmons, Kaye noted that one example mentioned was that of American servicemen stealing property after the war. In the USA, such cases are litigated under ordinary procedures. Kaye observed that looting and other forms of dispossession by the Nazis were so integral a part of overall Nazi policy that even after all these years they require a special set of rules. Various nations are reviewing and amending their jurisprudence pursuant to the principles of the Washington Conference and, more recently, the Prague Conference. Kaye noted that this approach sets Nazi looting apart from other terrible crimes.

Masurovsky added a final remark emphasising the importance of language. The Washington Principles do not adequately reflect the actual crimes, which not only involved looting but also many other kinds of misappropriation. On this point Polak noted that the Washington Principles only mention Nazi-confiscated art: an even narrower concept.

A member of the audience asked the panel members whether it would be 'fair and just' to make a distinction between 'general circumstances of war' and 'circumstances related to persecution by the Nazis' in relation to restitution. Fisher answered that many people suffered in a variety of contexts during the Second World War. In his opinion the main question is where the priority should lie in terms of public policy. He reminded the audience that earlier in the discussion he had made the point that Nazi looting is different, because it is theft in the context of genocide. Most people who had things taken from them during the Second World War but not in the context of genocide were not in the same position as people who were persecuted, as at least they had a fighting chance. Fisher said that he realised that while his statement was cruel, it was nevertheless true. Polak concluded that the distinction between victims of general circumstances of war and victims of Nazi genocide was a relevant one. Fisher confirmed this.

## 5.2 THE CONCEPT OF 'FAIR AND JUST'

The second topic for discussion was an exploration of the elements crucial to a 'fair and just' solution. What circumstances are key to a 'fair and just' decision? Can it be said that this depends on the status of the current possessor? Hoogsteder, Hershkovitch, Fisher, Pfeiffer-Poensgen, Simmons, Dugot, Kaye, Ekkart and Masurovsky all contributed to the discussion.

Polak introduced this topic by observing that there appears to be a consensus that, in applying special norms, regardless of what they are, a distinction can be made between art that has ended up in the possession of a government after the war (such as 'heirless' art collections like the *Nederlands Kunstbezit-collectie* (NK collection), where a government is aware that it is not the owner) and art that has ended up in the possession of others. Polak asked Hoogsteder for his views on whether it is relevant to make a further distinction between art held by private owners and art in museums. Hoogsteder confirmed that he believes this is a relevant distinction. He explained that he often represents private individuals who are in possession of an artwork they bought in good faith and, according to Dutch civil law, are the legitimate owners. They may, for example, have bought the disputed picture at a Dutch government auction or may have acquired the work in the 1970s. According to Hoogsteder, the original owner, who may well have a valid claim, should go back to those who were responsible for taking the work of art in the first place. If they are deceased or cannot be traced, then the original owner should approach the German state or other relevant official body. He emphasised that it is unfair to target someone who happens to have bought a work of art and expect them to take the blame and shame for what happened to the work previously.

Hershkovitch said that in her opinion conflicts concerning Nazi-looted art are a special case. It is indeed very often the case that the current owners bought the disputed items in good faith. She believes that many of the problems we are facing today are caused by the fact that so much time has elapsed since the end of the Second World War. Because restitution was not handled properly directly after the war, we now need to revisit this issue 60 or 70 years on and try and reconstruct everything that happened. And if we want to handle the issue of restitution of Nazi-looted art properly, said Hershkovitch, we should not try to differentiate between governmental institutions, private owners and museums. Precisely because this is such a specific area, everybody should be treated the same. Whilst the current owner or owners might find this approach very difficult to accept, we have to try and find a solution to this problem. Hershkovitch suggested that dealers, auctioneers and the art market in general might be able to set up a warranty or something similar. She did add, however, that much in the art market has already changed precisely because of the issue of restitution claims to Nazi-looted art. Provenance is a very important issue

nowadays, much more so than it used to be. Although individuals may find it difficult to accept having to hand over their property, society as a whole will benefit from this.

Fisher commented that some of the problems affecting individuals apply equally to museums: they, too, may have purchased artworks in good faith. Referring back to the earlier comments by Hershkovitch and Dibbits, Fisher stated that the issue of Holocaust-related art claims cannot be reduced to a matter between individuals as it is ultimately an issue for society as a whole. Will society be able to handle the worst theft in history in the most documented genocide in history, or will we limit ourselves to dealing with elements around the edges? As restitution issues concern society as a whole, it would be preferable if the commissions and other bodies could make this clear to the population as a whole so that there is understanding when an individual owner receives a claim. Fisher added that this does not mean that such an individual owner should not be compensated on restitution of the object, nor that circumstances besides the original looting should not be taken into account in reaching a fair and just solution. However, he emphasised that the attitude of society as a whole needs to change so that restitution of Nazi-looted art is the norm.

Pfeiffer-Poensgen said she believes the answer to which elements are key to achieving a fair and just solution depends strongly on the specific circumstances of each individual case. She explained that in Germany there is the 'common declaration' for handling issues concerning objects in public hands, which makes it very clear what needs to be done if there is any doubt about a work of art in a public collection. However, the declaration contains no clear rule that individual owners should do the same. Pfeiffer repeated that with individual owners, you have to look very carefully at the circumstances of each specific case, for example, the period in which the disputed artwork was bought.

Polak summarised the discussion to date by saying that application of the good-faith test can have different outcomes depending on the circumstances and that an acquisition made five years ago may be treated differently from an acquisition made 20 or 30 years ago. He stipulated that if a purchaser today failed to conduct any provenance research, it would be difficult to consider them as acting in good faith. Hoogsteder agreed, but referred back to Hershkovitch's earlier comment that private owners 'have to understand'. He emphasised that private owners who receive a claim do understand that atrocities happened during the Second World War, but it is not reasonable to expect such owners to assume guilt for injustices inflicted on a previous owner by somebody else. He fully agreed that if a stolen picture is claimed by the rightful owner or owners, the claimant or claimants should be compensated for the damage they have suffered, but noted that it is unfair for the person who by chance happens to have bought the picture to be required to pay.

Polak then asked the members of the panel who they thought should pay the compensation. Hoogsteder answered that all the governments involved could set up an international fund out of which claimants could receive *ex gratia* payments. In his view, this would offer a much better solution for two reasons: firstly because there would be an international

platform that people could turn to and secondly because it would offer an incentive for everybody to cooperate, including private individuals and the art market. People would no longer be at risk of having their property taken from them, and claimants would be compensated by those responsible for the original crime. Polak summarised the argument: the risk of buying art with an 'incorrect provenance' should be borne by society at large. Hoogsteder agreed with this summary and added that the situation would be different where purchasers had acted in bad faith.

Simmons believed that there was a clear distinction between works of art in public ownership and those in private collections, given that private collectors – unlike public museums – are generally not bound by public policy considerations. Simmons explained that when Sotheby's discovers that a consigned artwork may have been looted during the period 1933-1945 and never returned, then the current owner will be notified. When discussing a potential resolution with a present-day owner, more than the strictly legal position will be taken into account. Many owners will want to resolve a problematic provenance because they feel it is the ethical thing to do regardless of their position under the law. Simmons added that there is also an issue of marketability: a painting with a serious blot on its provenance because it was stolen and never returned may have a diminished market value. Reaching a settlement may therefore have less to do with the legal position than enabling a painting to fetch its full market price.

Polak asked whether this means that the market basically forces parties to reach a solution. Simmons said that this was true to an extent. He explained that achieving a fair and just solution often involves a compromise between the present private owner and the heirs of the family or the institution that lost the painting. Such a resolution can take many forms. Simmons has dealt with cases in which paintings were simply returned, but other options include selling the painting and sharing the proceeds in an agreed split, or making a joint donation to a museum.

Dugot agreed with Simmons that a fair and just solution can take various forms. It may involve the physical restitution of the object in question – a 'restitution in kind' – or a different settlement that includes the acknowledgment of the original theft or loss. She noted that Christie's deals with the same issues and had for many years been taking an approach similar to that described by Simmons and had been establishing best practice for the market in doing so. Dugot then referred back to the question as to whether there should be different standards for private owners and museums. She stated that certain aspects should be consistent with universal standards, such as whether the museum or private owner acted in good faith, and in defining what is meant by a forced sale, theft or confiscation. But depending on the situation case-by-case, different solutions can be found to resolve a claim and it is possible to be very creative. Financial incentives could be offered to good-faith owners faced with a claim, to encourage and enable solutions. Good-faith

purchasers who relinquish their property could be given tax breaks which might encourage those otherwise unwilling to participate in the restitution process.

Polak noted that this proposal was similar to the fund that Hoogsteder mentioned earlier. Dugot agreed, but stated that the difference lies in the fact that Hoogsteder was advocating a direct payment to the claimant, while her proposal involves restitution of the object to the claimant and compensation to the present owner for any loss incurred.

Echoing Dugot's statements, Hoogsteder stressed how important it is to offer incentives to private owners to come forward instead of threatening them. He said that some of the claimants or their representatives he had come across were very aggressive, and he was dismayed that claims are often accompanied with threats of negative publicity and expensive court cases. He observed that the ferociousness with which claims against private owners are pursued contributes to the resistance of current owners to come forward and cooperate on restitution efforts. Noting that private owners are sometimes pressured into giving away their art or selling it below market value, Hoogsteder pointed out how ironic it is that this could be seen as a forced sale.

Kaye said that he generally agreed with Dugot and believed that the key elements to achieving a fair and just solution were to look at the original wrongdoing and to apply the resolution fairly. Kaye noted that the Restitutions Committee, under the Ekkart guidelines, has done extraordinary work, but observed that its work has been mostly limited to objects in the NK collection recovered after the war. He noted that when the private sector, individual collectors, dealers, private museums and other sectors are considered, the cases handled by the committee represent only a very small fraction of the vast amount looted during the war. According to Kaye, the same standards should be applied across the board to both private and public holders. In the second instance, the individual circumstances can be considered to see if some of the remedies can be modified to fit the circumstances. Kaye then focused on the problem of the notable differences between the legal systems in Europe and the USA. Whereas European systems recognise good-faith acquisitions to varying degrees, in the USA it is impossible to get good title to stolen property, regardless of whether you acted in good faith. Kaye maintains that if an attempt is to be made to find a fair and just solution, the notion of 'good faith' as the only distinguishing factor has to be eliminated so that the original crime can also be considered.

Ekkart agreed that in reaching a fair and just solution, the original theft must be considered but stressed that the present situation must also be examined closely. He said that the Dutch NK collection has a completely different status from other artworks and emphasised that there is a huge variation among individual museum acquisitions, and among works of art in private collections. He acknowledged the importance of good faith at acquisition. Thanks to the focus on restitution issues, everybody should by now be aware of the need to gather provenance information. That said, Ekkart also warned that even the most diligent research does not completely eliminate the risk of buying something in good

faith that afterwards turns out to have been looted. He stressed that many works of art still have unsolvable gaps in their provenance, and the limits of historical reconstruction mean that there will always be surprises.

Masurovsky said that the notion of 'fair and just' was not created by claimants or Holocaust survivors but seemed designed essentially to protect the interests of current possessors such as museums and collectors. He believes that seeking a compromise creates an inequitable approach to the resolution of historical claims. Referring back to the point about the good-faith purchasing of artworks, Masurovsky declared himself cynical about that possibility. He does not understand how anyone can buy a work of art post-1945 and not realise it could be linked to a conflict that cost 50 to 60 million lives. Ever since the Nazi era, there have been dealers, merchants, museum directors and civil servants who all knew what happened and yet closed their eyes to it.

Polak summarised Masurovsky's position: anyone buying an art object after 1945 that was clearly made before 1933 is not acting in good faith if they fail to conduct research which results in conclusive provenance information.

Dugot explained that while it is the case that in the USA it is impossible to legally acquire stolen goods even for good-faith purchasers, she disagreed with Masurovsky in that she believes there are individuals who have no knowledge of the art world or the art market, who acquired art at a reputable gallery – for example, in the 1960s or 1970s – and who have ended up with problematic property. These were therefore purchasers in good faith who had no knowledge of the problematic history of the object they acquired.

In response to a member of the audience, who said that it would be ludicrous to have society pay for somebody else's failure to do their job in terms of provenance research, Hoogsteder noted that this means that the risk of a claim is directly linked to the quality of the provenance research or the diligence of the art dealer concerned. He emphasised that in his opinion it is unfair and unjust to present somebody with a claim 20 or 30 years after they purchased a work of art. Moreover, it is adding insult to injury to assume that they or the relevant art dealer failed to do their job properly at the time. He asked why there should not be a higher body, representing society as a whole, such as the United Nations, to compensate victims and offer compensation for the atrocities committed.

Responding to Hoogsteder's comments, Hershkovitch stated that the art market has not been particularly 'clean' for a long time, although there has been some progress recently. Provenance is an important issue today, but for many years this was not the case. She insisted that provenance research should be very important for both dealers and the art market.

Fisher added that while his organisation is providing money to help create an infrastructure to assist with provenance research, such as the digitisation of archives and publishing of guidelines, a lack of access to some archives throughout the different countries still presents a major practical problem.

Pfeiffer responded to the discussion on responsibilities by saying that if she was the owner of a painting bought 30 years ago and was to find out it had been looted, she would no longer be happy to have that painting, knowing the story behind it. She assumed this would be the case for most people. She also emphasised that provenance research has been an important topic in the past 10 years. It is mandatory for German museums to obtain a conclusive provenance from any art dealer or auction house they buy from. If this provenance cannot be provided, museums should refrain from buying the work. She added that private individuals could demand the same. Pfeiffer believes it is essential to make proper arrangements with the seller at the time of acquisition; if something subsequently surfaces that was not known at the time, then a settlement can be reached with this seller. She also believes that it is very important for auction houses to work on settlements. She thus believes there are many ways for private individuals to take responsibility.

### 5.3 **FACTUAL RESEARCH**

The third topic for discussion was factual research. Is independent factual research the key to reaching a fair and just solution? If so, what exactly is needed in this regard, and can it be left to 'the market'? Masurovsky, Knerly, Ekkart, Dugot, Dibbits, Fisher, Hershkovitch and Kaye all contributed.

The second Washington Principle states: "Relevant records and archives should be open and accessible to researchers in accordance with the guidelines of the International Council on Archives". The third Principle states: "Resources and personnel should be made available to facilitate the identification of all art that has been confiscated by the Nazis and not subsequently restituted".

Polak opened the discussion on this point by asking Masurovsky whether he believes the principles have been implemented properly. Masurovsky said he felt that they have not but that nevertheless some progress has been made. Although the Washington Principles are laudable on the subject of research and archival access, it has taken a long time to actually implement them. The critical questions are who should fund the research and what organisation should create a proper infrastructure for the exchange of information. Although many aids are available, there is still no proper mechanism in place to coordinate research in this field. He therefore invited the museum community to explore whether they can reach agreement on an overarching system of collaboration with researchers and historians, in an attempt to find ways of delving deeper into the questions and making the results available to everybody. In Masurovsky's opinion it is nice to have documents available, but proper research is needed in order to disclose all the information. Without researchers, many of the solutions to disputes concerning Nazi-looted art would never have been achieved.

However, underlying this question are assumptions about what proper research is. Masurovsky voiced his concern about the lack of generally accepted definitions of ‘independent’, ‘factual’ and even ‘research’. He explained that every institution takes a different approach to provenance research. At this point in time there seems to be no accepted standard that enables it to be stated clearly and unequivocally whether provenance research was conducted properly or inadequately. He argued that clear standards should be drawn up and established for all provenance research procedures at the international level. It can be argued that provenance research can be construed in scientific and empirical terms, which means it can be measured and evaluated based on objective and replicable criteria.

Knerly referred to an often-overlooked clause in the Washington Principles, which specifies that access to archives must be “in accordance with the guidelines of the International Council on Archives”. He pointed out that the International Council on Archives (ICA) Code of Ethics states that archivists should respect both access and privacy and act within the boundaries of relevant legislation. Knerly explained that in practice this means that archives and documents are not accessible to all researchers in all countries at the same time. This is a huge stumbling block to getting to the actual facts. He argued that the Washington Principles should be redrafted to state that although access to archives might not be in accordance with the principles of the ICA, this is justified by a higher principle.

Knerly also noted that where archives are only accessible to one party, whoever has access must cooperate to ensure they are available to all parties. This should be a *transparent* process aimed at getting to the facts. Polak asked whether this means that if a museum opens up its archives and conducts its own research, it should also make all that research available to claimants. Knerly answered that in the case of a claim against a museum, the facts known to the museum are generally also available to the claimant.

Knerly then referred back to Masurovsky’s earlier point about the nature of provenance research and said that in his opinion this was a critically important element. He explained that there are basically three types of research conducted by (American) museums. The first is internal research. This stems from the commitment of museums to conduct research on their own collections, so that they are able to publish objects that have a gap in their provenance between 1933 and 1945. The works involved need not necessarily have been spoliated; the research may only be due to the fact that the works of art have a gap in their known provenance. He noted that the Nazi-Era Provenance Internet Portal run by the American Alliance of Museums lists almost 29,000 works, with more being posted every day. A practical problem, however, is that it is very difficult to find qualified researchers who are able to work in different disciplines. The USA was never a repository for Nazi-spoliated art, so relevant information has to come from archives all over Europe. The second type of research occurs when a claim is made and a museum is involved in the process of doing research on its own collection in response to a specific claim as to a specific work. The third type of research is conducted whenever museums buy objects. In this case they

have to conduct provenance research so that they can assure themselves that there is no issue in terms of Nazi-looted art. All these types of research require qualified, experienced researchers, and the lack of such researchers, at least in the USA, is a major impediment.

Polak then invited Ekkart to provide a Dutch perspective. In the Netherlands, research is basically government sponsored in so far as it relates to the State collection. Ekkart agreed that the lack of experienced people to conduct provenance research poses a major problem, also in the Netherlands. He pointed out that Dutch museums are currently researching their collections and seeking to coordinate their results under the guidance of the Dutch Museum Organisation. The results are expected towards the end of 2013. Ekkart noted that even though the museums involved were given instructions, there have been huge differences in their interpretation of what they need to do and therefore in the results they have submitted. These differences are often directly related to the quality and experience of the researchers available.

Another point Ekkart made was that we have to accept that there will always be gaps in the provenance of artworks. There are still many paintings whose first mention in the provenance is, for example, that the work was auctioned in 1975, or that it was mentioned in the catalogue of an art dealer who is no longer active and has no known archives. Ekkart observed that the larger auction catalogues only describe a minority of works of art with a complete provenance for the period 1933 to 1945. While this is an immense problem, quite a lot of information can be found. The fortunate thing in the Netherlands was that the government was willing to fund research for the NK collection. Thanks to this more than 10 researchers were able to research the provenance of objects in the NK collection during the 1990s.

Polak asked Ekkart whether current museum research is funded by the government. He answered that the present research effort is primarily funded by the museums themselves and conducted by museum registrars, sometimes with the help of people working on a temporary basis. The effort is coordinated by a central office, funded by the government and consisting of a few researchers who support the museums in their research. Ekkart summarised the situation in the Netherlands by saying that it is a joint venture. He added that private individuals looking for provenance information are now able to find out more because of all the documentation gathered by the NK researchers. In fact the *Bureau Herkomst Gezocht* or BHG (Origins Unknown Agency) now spends most of its time answering questions from individuals looking for information about works of art lost by their families.

Polak then asked Dugot for her views. Dugot stressed how crucial proper research was to finding solutions to disputes concerning Nazi-looted art, given that the specific facts and merits of each case need to be considered, as set out in the Washington Principles and Terezín Declaration. Although such research requires a certain expertise, it is a skill that can be learned. She referred in this context to the training programme offered by the

European Shoah Legacy Institute and stressed how important training is to provenance researchers, individuals, museum staff, auction houses and collectors. Speaking from her own experience, Dugot has found that a lot of research tends to be reactive and is often conducted by various institutions and bodies only in response to a specific claim. Secondly, even before the 1998 Washington Conference, there was talk of centralising all available information. The principle question is, of course, how this should be done. There should be a central research body, an umbrella organisation, where research is done and where all known information is accessible and available, so that when museums, collectors and claimants are dealing with issues, there is a central accessible, available source to go to and information can be retrieved quickly and efficiently. Dugot pointed out that while it is a good thing that new information is being published all the time, it is often presented in a very fragmented way. She expressed the hope that with technological advances the situation will improve to such a degree that it will become possible to harness the international effort and draw together the threads of this vast, fragmented body of information. She expressed optimism that funding could be arranged for such a venture and suggested that this might be realised through a partnership between the government, the private and the public sector. Many individuals would be very interested in this issue, and she suggested that everybody should think of creative ways of funding such an enterprise.

Another issue highlighted by Dugot was that the focus often seems to be on the bigger cases involving expensive artworks, 'the Klimts and the Schieles'. Dugot pointed out that such cases are only the tip of the iceberg, while the day-to-day dealings at Christie's, for example, often involve smaller objects which, while they may not be as valuable in monetary terms, are just as important but much more difficult to research. This is because they have not been catalogued as thoroughly or exhibited as much, and the information about them can be inconclusive. According to Dugot, as it stands it is also sometimes difficult for heirs and potential claimants to pursue claims thoroughly as they may not have the money to pay the experts for the necessary research, and lawyers may not be interested or have the means or the support of their firm to take on 'smaller' cases.

To help all involved, Dugot thinks that a more international and global approach is needed, in terms of both sharing expertise and agreeing consistent definitions and parameters, for example, defining a forced sale, and so on. However, it would be difficult to compel claimants and current possessors of disputed works of art to participate in claims resolution without major engagement at a government and legislative level.

Dibbitts emphasised in this context that museums are under financial pressure, while research efforts and centralising the available information cost a lot of money. Taking the Rijksmuseum as an example, he said that it has identified and is now researching 110,000 objects in its collection since 1933 which have a certain monetary value and can be identified individually. He explained that this number excludes the library and includes only part of the print collection. Research, especially when involving such a large number of objects,

can be extremely costly. The Rijksmuseum is currently employing a team of people to conduct this research. Dibbits expressed the opinion that when an object is bought, the responsibility lies with both the buyer and the seller. However, a museum is a public organisation, serving the public and with a public responsibility. According to Dibbits this responsibility evidently includes researching the provenance of items in its collection.

Fisher said that it is worth noting that a considerable amount of work is actually being done in this field, even though he does not think it is always fully effective. He mentioned the creation of the International Research Portal for Records Related to Nazi-Era Cultural Property, involving the participation of the National Archives and Records Administration (NARA) of the USA, the Commission for Looted Art in Europe, the Conference on Jewish Material Claims Against Germany (Claims Conference), the Bundesarchiv in Germany, the Institute for War, Holocaust and Genocide Studies (NIOD) in the Netherlands, the Archives of the French Ministry of Foreign and European Affairs, the National Archives of the UK and a variety of other archives. He thinks these efforts have not been fully effective for the same reason that many other efforts have not been fully successful: mainly because there is no clear and permanent international body that regulates them. Fisher noted that the European Shoah Legacy Institute, which Monica Dugot mentioned earlier, is the organisation that is supposed to handle the follow-up to the Terezín Declaration, involving cooperation by 47 governments and a number of non-governmental organisations. According to Fisher, while this works, it does so very slowly and creakily, and the question is how to keep this effort going and make it function properly. As to funding, Fisher noted that while Jewish foundations are generally happy to fund projects that *assist* in provenance research, such as establishing infrastructure, they are reluctant to fund projects that actually *do* the provenance research. The reason for this is very simple: ultimately, ethically, it is the responsibility of museums and the owners. They should do the actual research since they should know about problematic items in their possession.

Polak asked if there were any members of the panel who disagreed with the statement that research, and provenance research in particular, is not something that can be dealt with by the private sector alone and that some sort of government involvement is required.

In response, Masurovsky highlighted the importance of independence in this regard. He stated that it is fundamental that there is a system that is fully protected, exhaustive and impartial, which is not subject to any pressure from any party, where every possible document can be examined and where the outcome is impartial, such as can be expected from any scholar, historian or fact-finding commission that owes no political allegiance. Masurovsky said if such a system involving both public and private interests could be created, that would be fine, but he emphasised the need to guarantee impartiality and independence.

Hershkovitch observed that all information on provenance relating to the time before, during and after the war is important in helping to find the best resolution to a dispute

and added that one of the most important things is to keep the information in the available databases up-to-date. She pointed out that a lot of artworks have already been returned to their former owners, but that this fact is often not known or centrally registered. Hershkovitch expressed her surprise that nobody had mentioned this issue before and suggested that this information could be maintained by the market itself. Polak said this was more a matter of registration than research. Hershkovitch replied that having access to up-to-date information on earlier restitutions is essential to conducting proper research. She stated that it is particularly a problem in France and expressed her frustration with regard to a public database held by the Ministry of Foreign Affairs, which is not kept up-to-date.

Kaye stated that he would like to add a brief comment, as someone who is not a researcher, but who operates in the so-called ‘trenches’ of litigation. He had observed a disconnect between the comments of people involved in more academic aspects of the field, such as research, and those involved in litigating cases. He said the goal of an international global research effort, accessible by everybody, is to be applauded. He explained that in many cases museums will only start conducting research when they are faced with a claim, and while thousands of objects are mentioned on the (USA) Nazi-Era Provenance Internet Portal, these represent only a small percentage of the objects in museums that have a gap in their provenance between 1933 and 1945. Furthermore, he explained that it is only the actual objects that are put on the portal, not all the research conducted around the objects. According to Kaye, it can be very difficult to gain access to the actual research, even when an object has been identified. Referring back to Knerly’s comments, Kaye then pointed out that there are several types of research. There is a whole body of research being developed aimed specifically at refuting or supporting a claim. This means people are retained by a possessor, such as a museum or a holder, and their job is not to perform impartial research, but to find arguments to refute the claim. Kaye stressed that it was very important to heed this and that the field must distinguish between goal-focused research and what is being discussed at this symposium. He added that such goal-focused research is extremely prevalent and poses a significant problem when assessing disputes on their merits.

#### 5.4 LIMITATION PERIODS

The fourth topic was limitation periods. How long should these be? Is a limitation period part of a ‘fair and just’ solution or a hindrance to it? Ekkart, Hershkovitch, Kaye, Hoogsteder, Dibbits, Fisher, Simmons, Pfeiffer-Poensgen, Dugot and Masurovsky contributed.

Polak introduced the topic and noted that as a student of law in Amsterdam, he was taught that limitation periods are part of the concept of reasonableness and fairness, which implies that there is a certain fairness in having a time limit. Polak asked Ekkart to comment.

Ekkart said he also believed that there should be a limitation period for cases involving Nazi-looted art, in spite of the horrors committed during the war. Ekkart explained that this is chiefly because the ‘time distance’ between the original victims and the present-day claimants is already significant and will only become greater for potential future claimants. He said that he felt unable to suggest a definite cut-off date for claims but emphasised that setting a time limit should be dependent on one key point: ‘we first have to do our work’. In many countries, this work has started – he referred to efforts by museums and other collections, who are attempting to reconstruct provenance information on works of art, and to the permanent involvement of auctioneers and the art trade. Ekkart maintains that performing this work and making the results available to the public are preconditions to any discussion about imposing time limits.

Polak then asked Ekkart who he thought should do this work first: the government, museums or could it also be other institutions? Ekkart answered that he believes that all public and private holders of works of art are responsible. Polak said he could not imagine that a family who have inherited a painting that is now hanging in their home will conduct any research unless a claim is brought. Ekkart replied that he knows of private collectors who are actually spending money to have research conducted on their collection, and he thought this was a wise move on their part.

Hershkovitch added on the subject that there should be time limits, but given that art thefts during the Nazi period are a specific case, a special norm should apply, albeit only for a certain period of time.

Kaye commented that the answer to this question goes back to the start of the panel session, when the members discussed whether cases involving Holocaust restitution should be treated differently from other types of historical looting. In this respect, it is relevant to examine the Prague Conference of 2009, which resulted in the Terezín Declaration. The Declaration states that all the participants should review their national laws and amend them “to enable Holocaust claims to be decided on their merits”. Kaye noted that it is clear from the workshop materials that recourse to technical defences, such as the statute of limitations, should be avoided when trying to solve a dispute concerning Nazi-looted art. Referring back to a remark made in the course of this conference, stressing the need for consistency in the norms applied, Kaye said that he was not aware of any other topic which was treated as *inconsistently* in different countries, or in the different states of the USA, as the statute of limitations. As a litigator in the USA, he had been pleased when Ambassador Eizenstat, head of the US delegation to Prague, stated his concerns about the tendency for possessors of Nazi-looted art to hide behind statutes of limitations in order to impede otherwise meritorious claims for recovery. He had hoped that the US government would

then try to implement its own measures, but this has not happened, and defendants in court actions are still relying heavily on various statutes of limitations and other technical defences based on the lapse of time. As a result, very few Holocaust claims in the USA reach the stage at which they are judged on their merits. Polak asked if this means that the USA is not practising what it preaches. Kaye answered that it is a complicated matter, because in the USA, statutes of limitations are traditionally a prerogative of the individual states. At the same time Federal judges have ruled that state attempts to legislate statutes of limitations to assist Holocaust plaintiffs are unconstitutional because only the Federal government should involve itself in such matters. Kaye concluded that the present position in the USA is unclear and expressed hope that one day it will be clearer.

Hoogsteder noted that the question about time limits is linked to the previous question regarding the need for research. He pointed to the changing norms, stating that even if all the research possible today were to be conducted, it would still be difficult to foresee future claims. From this perspective, a limitation period would make sense. Hoogsteder noted that there is a tendency for claims to be brought regarding situations that happened further and further in the past; to illustrate, he said that a colleague recently had a picture confiscated by the French government which had gone missing from a museum in 1820. Hoogsteder stressed that in view of the changing norms, which creates uncertainty and an unclear situation for everybody involved, there should at least be a reliable guideline.

Dibbits also referred back to the first panel session, returning to his point about how important collective emotion is. He highlighted this as a relevant factor in deciding how far back claims should be allowed to go. According to Dibbits, the collective emotion about the Holocaust is still very much alive, and it is impossible to determine at this time if this emotion will ever cease. Polak commented that this approach implies that there will be indefinite insecurity in the art market, and it all relies on emotions. Dibbits explained that he is thinking in particular of the collective attitude within society. He confirmed that this means we are dealing with an insecure situation: it is impossible to predict when the collective emotion may fade and society may no longer see it as its duty to resolve these claims. However, at some point, the need for a time limit might be reconsidered.

Fisher noted that the topic of time limits is closely related to the previous panel topics. In reply to Ekkart's comments, Fisher stated that the problem is that, both historically and currently, there is no complete information available as to what was taken. As a consequence, claimants generally do not know what their families lost. Under these circumstances in which 'the work is not done yet', Fisher believes that it is unreasonable to talk about deadlines. He noted that even though in the Netherlands extensive and efficient research is being conducted on the NK collection and museum collections, the secrecy of the art trade, privacy laws and the fact that not all relevant archives are open for research mean that new cases will still surface in the future. These cases will need to be dealt with and

resolved. Fisher stated that in general, the idea that there can be some kind of cut-off point is unreasonable.

Simmons observed that the question whether limitation periods are part of, or conversely hinder, a 'fair and just' solution conflates two different concepts. The question links the legal concept of the limitation of actions with the moral and ethical ideal of finding a fair and just solution to a historic claim. Simmons argued that there should be no limit to the amount of time lapsed before a moral or ethical claim in respect of Nazi confiscation can be brought. In contrast, the law deals with legal claims, which are subject to legal prescription and limitation periods. Simmons stated that he would certainly not amend the black letter law on the limitation of actions, but that 'soft law', such as ethical codes for museums and the private art market, need not be limited in time. He further noted that the passage of time since the displacement of an artwork is one of the factors that should be taken into account in finding a fair and just solution, along with the known facts and the moral position of the parties in dispute.

Pfeiffer-Poensgen referred back to Hoogsteder's comments about the tendency for claims to reach further and further back in time. Hoogsteder explained that his remarks were not directed at Holocaust-related claims, but dealt with the broader field of restitution claims in general. Pfeiffer noted that under German law, there are limitation periods imposed to achieve what she called 'legal peace'. She stated that the topic being discussed today, however, is different, especially from a German perspective. This is the approach of the German Federal government and personally she agrees with this approach. The difficulties of conducting research, the need to work through hundreds of archives and the effort involved in attempting to discover the facts indicate that there should not be any time limits.

Dugot agreed with Pfeiffer-Poensgen. Referring back to Simmons' comments, she said that putting time limits on bona fide Nazi era restitution claims could be difficult. While soft law is very important and while many may act morally and ethically, in a number of circumstances, 'fair and just' solutions may not be achieved without the possibility of legal action. Dugot emphasised the important message that no one should be allowed to benefit from theft related to genocide of a population and pointed out that in any event an object will not realise its commercial potential if there is a taint on or cloud over its title. This message is of critical importance for future generations too. She added also that it is unfair to penalise individuals on either side, who lack the necessary expertise, support and funds, for failing to conduct an adequate level of research to trace an item or investigate the provenance of a work. New information and new research is constantly becoming available and which might alter the status of a work. In addition, the significant and professional resources required to track developments are likely to be beyond the means of many. In light of this, Dugot stressed the importance of transparent research, accessibility to information and dialogue.

Masurovsky stated that crimes against humanity and crimes of plunder should never be subject to time limits, adding that it is the international art market that has to adapt to the messiness of history, not the other way around. He believes that it is the responsibility of governments and nations to take the initiative as they are essentially responsible for past crimes. He noted that the commissions that have been set up are an attempt in this direction, but that far-reaching debate on the issue is needed. Referring back to what Fisher said earlier, Masurovsky noted that all the countries that were subject to either occupation or control, as well as those who perpetrated and benefited from these activities, have to be brought into the debate. He proposed working towards realising international political solutions as soon as possible, warning that if we fail to do so, the next act of plunder will go unpunished.

#### 5.5 INTERNATIONAL CO-OPERATION?

The fifth topic was whether there is a need for a supranational solution. How can we achieve all this? Do we need international cooperation or an independent international panel or other organisation? If so, what should the basic tasks of such an organisation be? Should they be limited to independent research, or should it also be able to give binding advice, conduct mediation or give clearance? Fisher, Knerly, Pfeiffer-Poensgen, Dugot, Masurovsky, Hershkovitch and Kaye all contributed to the discussion.

Polak summarised the preceding discussion and stated that several speakers had argued in favour of a more uniform international approach to Holocaust-related restitution issues. He posed the question of whether there should be an international organisation to take decisions or make recommendations if all parties concerned voluntarily submit a case to it. Polak then invited Fisher to comment.

Fisher stated that it should be possible to achieve international cooperation on deciding about the research necessary to gather information and determine the facts. He pointed out that there is some movement towards this, referring to the European Shoah Legacy Institute and the international portals already mentioned, as well as the international training programmes and indeed the current symposium. He said this movement could, with a certain amount of political will, develop into a full-scale international association of provenance researchers and workers. The much more difficult question is how to resolve disputes, according to Fisher. While it would certainly be possible to create an international entity to resolve disputes, such entities in fact already exist in the form of mediation. If both parties agree to go to mediation, there is no problem; the problem arises when the parties do not agree: then it is unclear what needs to be done. Fisher said he was doubtful whether international law should be the next step because that might be too hard to agree on.

Knerly echoed Fisher's comments, but took a slightly different angle. He said that one of the things to have come out of this conference is the crucial importance of the passage of time, particularly for people who have claims and who seek restitution. Knerly referred back to Davidson, who earlier in the day had explained the difficulties involved in establishing a US art commission. Knerly pointed out the difficulties that would arise in trying to establish an international court with powers to bind people when they did not voluntarily submit to its jurisdiction. Knerly argued that spending a considerable amount of time and human, intellectual and government resources on trying to create a tribunal to hear the relatively few cases that are going to be litigated, for the few people unwilling to reach agreement, is a questionable use of resources when time is passing for both survivors and claimants.

Pfeiffer said that she was usually critical of international organisations as she associates them with laborious procedures and huge bureaucracies. She stated that both the research network and the database mentioned earlier are very important and stressed that they need to be much better organised than they are now. In particular, coordination of research efforts should be more international, because the whole issue is an international one. Access to information and archives should also be provided internationally. According to Pfeiffer, the next step should be to enable research to be carried out at an international level.

Hershkovitch agreed with the previous speakers, but warned that, realistically, the only way to force people to settle or at least make a proper effort to resolve a claim is to have an international court in place. She admitted that this might be both difficult to establish and very expensive, but insisted that the best option was to have recourse to an international court or at least an international body with binding powers. Polak said this was an idealistic perspective and asked Hershkovitch about the feasibility of establishing such a body. Hershkovitch replied that it is possible to imagine a general international body, not only for looted art, but for all issues related to restitution. Polak inquired about the necessity of establishing a specific art tribunal. Hershkovitch emphasised that art has a very special position within society and that, once established, an international court dedicated to the problem of restitution of art could be very effective.

Dugot felt that focusing on international research and centralising all the information currently available is the most useful step that can be taken at the moment. She emphasised the importance, as a step towards resolving disputes concerning Nazi-spoliated art, of also establishing internationally agreed definitions of the concepts. As things stand, there is no common framework defining exactly what 'looted art' is. Dugot said that while general guidelines have been established, particularly through conferences such as the 1998 Washington Conference and the 2009 Prague Conference, the interpretation or implementation of these principles remains (and may differ) at an individual, institutional, national or international level. To illustrate, she noted the lack of consensus on the definition of a 'forced sale' or 'sale under duress'.

Dugot argued that this lack of consensus means that the guidelines that do exist are constantly being reinterpreted when applied in the context of a particular claim. Dugot observed that just as there are few generally accepted international standards for hearing and resolving claims, there should also be an international agreement setting out the basic requirements for bringing a claim. She explained that currently there is no clearly established threshold to enable a claim to be made, adding that this has caused a lot of confusion and disagreement. She argued that international agreement on defining these concepts would go a long way towards achieving fair and just solutions. She added that greater advantage could also be taken of existing mediation bodies and services, such as the alternative dispute resolution offered by Judicial Arbitration and Mediation Services (JAMS) and the International Council of Museums (ICOM).

Dugot pointed out that it is now almost 75 years since the beginning of the Second World War. This means that a lot of Holocaust survivors are no longer alive, and it is critical not only that something is done, but that it is done quickly. The issue of Holocaust-related claims has been on the agenda since 1998 and nowadays we do have the means, tools and hopefully the will, experience and expertise to move forward responsibly and for the benefit of all.

Polak asked if that meant that Dugot was making a case for more international law or soft law rather than the establishment of an international institution. Dugot replied that she primarily advocates the addition of *definitions* to the existing declarations of Washington, Vilnius and Terezín in order to clarify questions such as the meaning of a forced sale and to establish uniform standards for making and handling claims. She explained that Christie's works to resolve restitution claims and, as part of these efforts, made public the company's internal guidelines on handling claims in 2009. These guidelines do not define precisely what a forced sale or sale under duress is, but set out how Christie's will share information between the relevant parties so that as much information as possible is in the open, enabling informed decisions to be taken. In essence this creates a framework for discussion and makes it clear that Christie's role is as a *conduit* for dialogue between the parties. She added that international agreements establishing a basis for bringing a claim, and containing clear definitions, could provide a much-needed reference point for such efforts. It could also create greater international uniformity on how to handle these issues.

Knerly said that establishing international cooperation in research efforts and creating common definitions and standards could be of immense benefit in helping to resolve cases. He noted that, at least as far as museums are concerned, various countries have shown that they do want to do the right thing. Referring to what Masurovsky said earlier about the need to establish research standards, Knerly pointed out there are already many examples of professional standards; in the USA, for example, there are standards for appraisers. He felt that it should not be very difficult or time-consuming to draft standards detailing how research should be carried out. He then referred back to the issue of defini-

tions and noted that even a statement about forced sales would be much more difficult to formulate than many people realise, as would be defining the meaning of “lost as a consequence of Nazi persecution”. Knerly stressed that it was crucial to establish consensus on the causal link between persecution and loss. According to him, trying to establish that link in individual cases is much more useful than attempting to establish an international court.

In response to a question from the audience, suggesting general standards for museums in the USA, Knerly answered that he primarily advocated the establishment of general standards for researchers. He said that the USA is a difficult landscape and differs from Europe due to the private nature of its institutions and the fact that each case is decided on its own merits. But he does not agree that the situation in the USA is as bleak as was suggested earlier. Twenty-seven American museums have voluntarily restituted more than 30 objects without litigation. Knerly also stated that he does not necessarily agree with earlier comments regarding the statutes of limitation. He pointed out that there are cases that are not meritorious, but are nevertheless pursued, and noted that there has to be a way of dealing with these. He agreed that these are all tough issues, but that discussing them and attempting to solve them form an important part of the work carried out by the organisation he represents, the Association of Art Museum Directors (AAMD).

Masurovsky pointed out that when it comes to international cooperation and future cases of plunder, there is always International Criminal Law. Initially the International Criminal Tribunal for the Former Yugoslavia (ICTY) adopted a timid approach to the crimes in Bosnia, but if members of international criminal courts were to get together and make the charge of plunder more substantive, this could be used to deal with these issues in the future. However, we cannot understand the true nature of the thefts that occurred until all the information is made available. The challenge to all attending, and this is particularly relevant for state museums and other institutions, is to release inventories listing everything that is in their stock, said Masurovsky. He noted that accessibility of the inventories is a prerequisite to finding out what was stolen. It is imperative that museums find a way of achieving this. Masurovsky emphasised that we are not talking state secrets, but basic information, such as names of people and places, historical information that anyone could find in the archives, but doing so would take years, so: ‘Why don’t you just simply release it?’

Kaye commented that art restitution has developed since the 1990s. With regard to an international forum, Kaye thought this was a good idea in theory, but doubted the feasibility of establishing such a forum in the near future. In the USA, judges in the same court cannot even agree on the meaning of terms such as a forced sale or sale under duress. He was also sceptical as to the possibility of reaching agreement on international norms, particularly because so much of the art concerned is in private hands. He noted that he had been involved in the International Institute for the Unification of Private Law (UNIDROIT)

Convention, but that the convention has not been implemented satisfactorily. In summary, he said that the situation is very difficult and should be dealt with country by country, state by state, and that, ultimately, more progress has to be made.

## 6 A FRUITFUL DISCUSSION

*Rob Polak*

Looking back on the panel discussion which I had the honour to chair, it strikes me that a great deal was said, perhaps even more than I realised at the time. Below, I would like to highlight the points that I think can be taken from the discussion. I will also raise a few additional questions which did not come up during the afternoon, either because the discussion took a different turn or due to time constraints.

### 6.1 THE SPECIAL STATUS OF NAZI-LOOTED ART

There was little argument that Nazi-looted art, be it art that was stolen or robbed or art that changed hands in a forced sale, requires special treatment from a legal perspective. Even so, it makes sense to keep asking ourselves just what the justification is for this special treatment. Law is by definition designed to correct injustice; why does this type of injustice need special law?

The decisive factor that sets Nazi-looted art apart from other spoliated art would appear to be the context of genocide. It was stealing while also killing the original owners, said Fisher. The looting of art in the Nazi era was not a series of incidents but an integral part of overall Nazi policy, as Kaye put it. Moreover, at the time these crimes were committed no effective legal remedies were available; indeed, many of these crimes were not crimes under the prevailing legal order of the day. This means that the legal remedies available to the victims must be tailored to this special situation. It is worth noting that the panel members made no distinction between art that was stolen or robbed on the one hand and art that was sold through a forced sale on the other, even though the ‘source document’ for the special policies – the Washington Principles of 1998 – employs the concept of ‘Nazi-confiscated art’, which would seem to be narrow.

Should the special policies also be applied to heirs of the victims who had not yet been born during the Nazi era? Are they ‘victims’ in the same sense as members of their family who were directly affected by the Nazi policies during their lifetime? These questions were not discussed but could easily form the topic of another conference. As I will discuss later on, these questions are also relevant in the context of time limitation.

## 6.2 THE NORM FOR 'FAIR AND JUST SOLUTION'

There was considerable disagreement as to what a fair and just solution of claims should entail. Some argued that restitution should be the norm, but others, such as Hoogsteder, pointed to the legitimate interests of good-faith purchasers. It was also noted that the position of good-faith purchasers varies from country to country and is stronger in continental Europe than in the United Kingdom or the United States. Several speakers found the distinction between public possessors – such as states and museums – and private possessors to be relevant in this context. The so-called heirless collections, such as the Dutch NK collection, form a special group within the public collections and may require their own rules to achieve fair and just solutions.

Simmons noted that public possessors are bound by policy considerations while private possessors are not. It became clear that the desire to resolve claims is not merely a legal or ethical requirement but also a requirement of the art market, in particular at the high end. Masurovsky noted that the notion 'fair and just' appears to have been designed to foster compromise.

Several speakers argued that governments should contribute funding in order to find satisfactory resolutions, for example by creating a fund to cover payments to claimants (where they claim in vain from a good-faith possessor), or by tax incentives for restitution efforts.

Even allowing for some form of protection for good-faith purchasers, it is hard to arrive at uniform standards for establishing the presence of good faith. The panel members agreed that the provenance research conducted by a purchaser is important to determining whether they acted in good faith. This has always been a requirement under many laws, but the extent of its application has varied. The practice of conducting thorough provenance research in cases where there may be a Nazi stain is something that has come about in the last 20 years or so. Some panel members argued that it is unfair to hold a lack of provenance research against a possessor who acquired the work more than 20 years ago. This shows clearly that while the requirement to conduct provenance research is not new, the way it is applied has developed over time.

Masurovsky advocated a stringent standard according to which anyone who has bought an object after 1945 that was produced before 1933 did not act in good faith if they did not conduct research resulting in conclusive provenance information to exclude the possibility of the object having been looted by or involuntarily lost to the Nazis. I find this norm too stringent, because in many cases even the best research will not result in conclusive provenance information, as was also noted by Ekkart. This would lead to such objects becoming virtually 'frozen' (i.e. unsaleable), meaning they would have to stay where they are now, regardless of where that may be. Is this 'fair and just'?

### 6.3 FACTUAL RESEARCH

The members of the panel were in agreement about the importance of factual research, not only to find support for or against claims or to fulfil any good-faith purchaser requirements but also from a more general policy perspective. However, the ideal of internationally accessible, fully open archives, researched by an adequate number of highly qualified, independent and impartial researchers, is not a reality. There are several stumbling blocks on the road to this ideal. First and foremost, there is insufficient funding for independent research. Most research is conducted on behalf of a party seeking support for or against a claim and is therefore not independent. This type of goal-oriented research is unlikely to be the most effective in terms of producing a complete result. Secondly, and related to the first point, there are not enough qualified independent researchers. Thirdly, there are no internationally accepted standards for distinguishing adequate from inadequate provenance research. Finally, access to archives may be impeded by legal constraints, such as privacy laws.

It would appear that the market is unable to resolve all these issues, because market efforts tend to focus on the provenance of important and valuable art works, thus overlooking that of lesser works. This would suggest that some form of government involvement is needed, both with regard to funding and to lifting the legal impediments to access. Dugot suggested some type of private-public partnership.

In the current circumstances, it is no easy matter to convince governments of the need to fund historically oriented projects, but there may be some light in the darkness. Fisher mentioned the International Research Portal for Records Related to Nazi-Era Cultural Property, which is the result of international cooperation, and also the European Shoah Legacy Institute, established by the Czech Republic following the Terezín Declaration. Also there are research projects in Austria, Belgium, France, Germany, the Netherlands, Switzerland and the United States, which are funded either by the government or by associations of museums.

### 6.4 TIME LIMITATION

It struck me that all members approached this issue with a degree of caution and without making sweeping generalisations. No one argued that time limitation is simply a fact of life, even in Nazi-looted art matters. Some argued against any form of time limitation, but most favoured some form of time limitation, albeit a very lenient one.

We first have to do our work, said Ekkart, meaning that only once current possessors – be they governments, museums or private collectors – have made a thorough attempt to reconstruct provenance and have shared the results with the public, should a term be

set within which claims must be made. But will this work ever be complete? As had already become clear during the discussion about provenance research, this is questionable, and consequently, in practice, Ekkart's approach means that in some cases no time limits will ever be set. Both Kaye and Fisher appeared to favour this result, as it would enable all Nazi-looted art claims to be judged on their merits. Dibbits also appeared to favour this result, at least until such time as society no longer sees it as its duty to resolve these claims, as he put it. Hershkovitch saw a need for time limitation but argued in favour of special rules.

I find it hard to accept that a certain category of claims should not be made subject to any form of time limitation. Such a special treatment of claims should in my view be limited in one or more respects. Perhaps only claims held by direct victims of looting by the Nazi regime should be treated in such an exceptional manner. By 'direct victims' I mean people who lived during the Nazi era and who were the victim of looting, either as owners or, in the case of companies, beneficial owners. If they survived, they are the only direct victims; if they perished during the Nazi era, their spouses and children are direct victims. It is acceptable that no time limitation rules be invoked against this group of direct victims. In view of the close involvement of first-degree descendants in the lives of the direct victims, there is good reason to accept that no time limitation rules should be invoked against these first-degree descendants either. However, claimants who are not direct victims or first-degree descendants must accept that time limitation rules, be it normal ones or more lenient ones, can be invoked against them.

This system would both respect the primary victims of the crimes that are at issue here (and their first-degree descendants) and create legal certainty for future generations. Evidently this system can be adjusted so as to allow only for special treatment of direct victims as defined here and not for their first-degree descendants, making the circle of people who could currently benefit from this system very small. I would prefer not to see such a stringent solution, but it does fit the basic idea that the greater the extent to which a certain group is personally affected by the looting, the more special the rules are, and that there comes a point in time where no special rules apply to anyone anymore.

## 6.5 HOW TO GET THERE?

Is it possible to make general recommendations for improving the restitution practice and making it more 'fair and just'? There appeared to be a consensus that international cooperation on provenance research and the establishment of common standards and concepts would benefit all involved. But where to start? The existing initiatives have apparently failed to create the momentum wanted by the participants in this discussion.

There was no consensus on whether it would be worth establishing an international dispute resolution mechanism. Knerly had his doubts about the amount of time and capital

needed for such a venture as measured against the relatively small number of cases that are likely to be submitted. Hershkovitch countered by proposing a specialised art restitution tribunal with a wider scope, not restricted to Nazi-looted art. Pfeiffer-Poensgen, however, had concerns about the bureaucracy that may result from yet another international organisation.

Unless an international treaty were to be created, which would appear quite unlikely, an international dispute resolution mechanism would rely on voluntary submission by the parties involved. This raises the question whether existing national and international arbitration law might not suffice. International arbitration provides for a flexible procedural approach, the involvement of specialised arbitrators and experts, and enjoys wide international recognition under the New York Convention. It would appear, however, that the kind of solutions sought after in the cases at hand are perhaps not the ones put forward by the formal dispute resolution mechanism of international arbitration. Moreover, the costs involved are high, meaning that it is likely that only high-value disputes will ever be submitted to international arbitration. The mediation initiatives mentioned by Dugot, the International Council of Museums (ICOM) and Judicial Arbitration and Mediation Services (JAMS), may have a more realistic chance of some success.

## 6.6 CONCLUSION

This was a fruitful discussion. As was to be expected, not all the questions were answered and there was no consensus on how to resolve all the problems. But some questions were answered and the discussion raised new questions. One cannot ask for more in this context.



# “WE WANT TO HONOUR THE MEMORY OF OUR GREAT-GRANDPARENTS”

*An Interview with Ella Andriesse and Robert Sturm*

*Annemarie Marck and Marleen Schoonderwoerd*

In 2008, the Restitutions Committee received two claims concerning the same Persian medallion carpet in the Netherlands Art Property collection (NK collection). They were submitted by the family of Samuel van den Bergh and the family of Daniel Wolf. After investigating the claim, the Committee came to the conclusion that the carpet should be returned to both families on a fifty-fifty basis.

In this interview, Ella Andriesse and Robert Sturm, two great-grandchildren of Samuel van den Bergh, talk about the Restitutions Committee’s procedure, during which they acted jointly with the Wolf family. They also describe their experience with claims to artworks that are not in public collections these days. The question of what is fair and just in such cases deserves special attention.

## *The Van den Bergh/Wolf Case*

Samuel van den Bergh was an industrialist and a founder of Unilever, and Daniel Wolf, who came from the same village, was also a successful businessman. Both were of Jewish descent. They lived in Wassenaar in mansions, Van den Bergh in De Wiltzangk and Wolf in Groot Haesebroek, which both housed large collections of art and antique. During the war, the German occupying forces requisitioned these grand houses, after which the household contents were seized, combined and shipped to Germany. At the end of war, the area where Van den Bergh’s and Wolf’s goods were being kept was subjected to extensive plundering, first by the German population and later by Russian, British and Canadian troops. To this day most of the works are missing.

The claimed carpet was returned to the Netherlands in March 1947. In so far as is known, no application for its restitution was submitted after the war. At that time the families were probably not aware that it had been recovered.

While it was established during the investigation in 2008 that the Persian carpet came from one of the two sets of confiscated household effects, it proved to be no longer possible to find out which it originated from. In this special case the Restitutions Committee took the view that the carpet should be returned to both families on a fifty-fifty basis. This was in line with the joint action of the families during the procedure. While the claim was still

being considered, both families let it be known that upon the return of the carpet they would jointly seek a destination for it or the proceeds from its sale.

Looking back at the Restitutions Committee's procedure, Ella Andriess and Robert Sturm are still pleased that they decided five years ago to submit a claim to a Persian medallion carpet in the NK collection. "The claimed carpet was returned to the two families, the family of Daniel Wolf and the family of Samuel van den Bergh, our great-grandfather, after a thorough investigation", recalls Andriess. "This was because the Restitutions Committee had concluded that the carpet came from the possessions of one of these two families, but it was no longer possible to establish which". Sturm explains: "Daniel Wolf and Samuel van den Bergh both lived in Wassenaar. During the war their homes were requisitioned by the occupying forces. The contents of both residences were seized and combined. Both sets of belongings were transported to Germany as one consignment".

#### LATE REACTION BY THE GOVERNMENT

*The German authorities kept accurate records of what they took from Samuel van den Bergh's house, as can be seen from a forty-page inventory that Andriess and Sturm found during research in the records. Sturm shows that the Germans noted what was confiscated 'down to the last teaspoon'. The inventory includes 2 Perser Teppiche (2 Persian carpets), but such descriptions are not specific enough to enable identification of individual items, such as the Persian carpet in the NK collection in this case. Sturm points out that the Restitutions Committee was also unable to determine whether the claimed carpet came from Daniel Wolf's mansion or Samuel van den Bergh's. Andriess contends that in this regard the passage of time is also a factor: "We think it is regrettable that it took fifty years before the government showed interest in this subject". "The major problem is that during the fifty to seventy years since the war, a generation who knew the objects has died", Sturm says, "my mother survived the concentration camps. She would have known more about the carpet because she was often in her grandparents' home and was very close to them. She knew the things that were stolen later on; she was much nearer to them". Sturm remembers how, after the war, his mother and uncle tried to retrieve the lost art. "My mother was surprised that she had heard nothing after the war about the works of art that had disappeared. At a certain point she started investigating and she tried to unearth information about the collection", he recalls.*

*While searching through a number of archives, Andriess and Sturm came across the declaration forms filled in by their family after the war, which is how they*

reported to the authorities which artworks they had lost during the war. Andriess and Sturm had to conclude on the basis of this research that the authorities had done little with these declaration forms. Sturm tells how his uncle at the time also ran into obstacles during his quest for lost works. “This man was the Van den Bergh family’s representative”, explains Andriess. “During the post-war years he had to do his absolute best to demonstrate at every turn that certain objects were the property of the family. There was a silver box, for example, that was given to our great-grandfather on the occasion of an anniversary. Samuel van den Bergh’s initials were engraved in the silver, together with the date of the anniversary. The authorities also knew such things, but nevertheless at that time the family had to come up with more proof of ownership. In addition, when it came to restitution, as the applicant you were expected to pay storage charges and also transport costs for the objects stolen from you during the war because they had been in the government’s custody for a number of years. These are things that you still run across in archives. At such times I wonder how things like that are possible”.

## A SECOND CHANCE

Andriess and Sturm are therefore pleased they got ‘a second chance of sorts’ with regard to the Persian carpet. They nevertheless continue to think it is a shame that former generations are no longer here to witness the recent developments. “The objects had more emotional value for them than for us”, says Andriess. “We have no direct tie with the items. Also, as time passes, the family gets bigger and bigger. Let’s assume something’s restituted to you, but there are thirty rightful claimants. What are you going to do? Let the object circulate in the family? This issue plays a less important role for us personally, because what it comes down to in the end is not so much the item, but the restoration of rights and rehabilitation. Our ‘second chance’ means we can rectify something on behalf of the entire family. Even though we are a generation further away from Samuel van den Bergh, we can still contribute to a fair and just solution”.

## FAIR AND JUST

When asked if they felt the procedure relating to the Persian medallion carpet had been fair and just, Andriess and Sturm answer in the affirmative. “Looking back at the carpet procedure, I think that the way the Restitutions Committee

*dealt with the claim and granting it to both families is a good example of a fair and just solution”, explains Andriesse. “While the procedure was still ongoing we decided together with the Wolf family that upon restitution we would search for a worthy destination for the object because obviously you do not cut such a beautiful carpet in half. We also very much appreciated how the Restitutions Committee’s investigation department went to such great lengths to describe all the facts in our case so accurately. We could not find any errors in the investigation report and we thought that everything was extremely well done. That is very satisfactory for us as applicants because it is down in black and white”.*

## INVESTIGATION

*Andriesse and Sturm started their own investigation in 2006 when, after the death of Sturm’s mother, a file was found containing post-war correspondence about lost works of art. “In that file there were letters from our family to the authorities asking what happened to the different paintings and whether more was already known at that time. That file was completely new for us, we did not even know it existed. Our own research started after that discovery”, relates Sturm. Andriesse tells how that moment coincided with an appeal from the Origins Unknown Agency, which was set up by the Dutch Ministry of Education, Culture and Science and was investigating the provenance of everything in the NK collection. “The Origins Unknown Agency appealed to all descendants to contact the agency with more information about unsolved looted art cases. I then did that in the first instance, at the end of 2006. It was extremely pleasant to work with the agency’s staff. We soon got an impression of the documents that were still being kept in the archives of the post-war authorities. These documents formed the basis for us to extend our search again. And the more you hunt, the more fascinating it becomes. We learned things we knew nothing about, first and foremost about the lives of our great-grandparents”, she says. “As a result of the investigation you also start to look at things differently”, continues Sturm. “For example, we still have a relatively large number of family photos, but it was not until we started our investigation that we noticed they had all been taken outdoors. There is not one photograph in our possession showing Samuel van den Bergh’s interior. And that is a pity because photos of the inside of the house would make our quest for lost items substantially easier”.*

## TRACING LOST WORKS OF ART

*The fact that so many family photos have been kept is extraordinary because Samuel van den Bergh's personal records were completely lost. "All files and records were incinerated", says Sturm. "Our great-grandparents also had a large collection of books, for example, including an original Gutenberg Bible, but everything was burned and then thrown in the ditch. My mother saw what had happened shortly afterwards". Despite the absence of Samuel van den Bergh's private records, Andriess and Sturm were able to unearth the current location of certain artworks from their great-grandfather's collection by searching through other archives. "The carpet that the Restitutions Committee issued advice about was in the NK collection", explains Andriess. "That did not just have the advantage that such an object is easier to trace. It is also more straightforward to grant a claim to it for the simple reason that the government made a commitment to comply with international agreements about claims to Nazi-looted art. That situation is very different if a work is privately owned. Yet even in such a case it is still possible, in our experience, to arrive at a solution".*

## COMPROMISE

*Andriess and Sturm recently reached such a solution, when they worked out a compromise about a work of art with two other parties. "It was about a painting that the then owner put up for sale in 2007 at Sotheby's", explains Andriess. "On the back of this painting was the name of a German Jewish family from Berlin. Of course that gave Sotheby's reason to investigate whether there were descendants of this family, and these were indeed found in America. When the painting's seller and the descendants of the German Jewish family concerned were almost on the point of entering into an agreement, we appeared on the scene, because what had emerged? The same painting had been in the possession of our great-grandfather. The only thing we were unable to establish was in what year it became his property. The German Jewish family's descendants always adopted the position that their family had been forced to sell the painting after 1933, after Hitler had come to power in Germany. According to them the work would have been purchased by our great-grandfather in the mid-1930s. We think that this last point is incorrect and we tried to check things out in the Netherlands and other countries, but without success. Archival material from that era often did not survive the war. We think that our great-grandfather bought the painting concerned before the 1930s, but we could not prove it. We therefore continued*

*jointly as co-claimants. Ultimately we were able to settle the matter harmoniously with all parties. Communication about the painting ran into problems now and again. We would hear nothing for a year, say, but the situation was always straightened out in the end. Finally the painting could be put into a sale at Sotheby's by the then owner without any problems. The price that the buyer ultimately paid at the sale was nearly twice as high as the 2007 guide price".* Replying to the question why this was the case, Sturm answers, "If you can ensure there are not any war-related blemishes in a work's provenance, our experience is that the selling price will increase. No one likes to buy a painting if there are still big doubts about it. In that sense it was a good thing for all parties that we took part in finding a solution". Even so, Sturm thinks it is regrettable that Andriess and he were unable to prove that the painting had been purchased by Samuel van den Bergh before the 1930's. "Sadly there comes a time when you have to conclude that we cannot verify it. The next issue is how to get all the interested parties to agree to a compromise that you are satisfied with too". Andriess adds, "The settlement that was ultimately hammered out in this case was fair and just. We also realise that meanwhile a lot of water flowed under the bridge".

#### STALEMATE

*Unfortunately Andriess and Sturm do not have only positive experience with claims to artworks outside public collections. "Meanwhile we have had to conclude that not everyone is receptive to finding a fair and just solution when we get in touch", remarks Andriess. "Some time ago, for example, we traced a Jan Steen that had belonged to our great-grandfather's art collection. This painting is listed on the inventory of objects stolen from his house. We know who has the painting these days, or did have until recently, but we are in a complete stalemate with this party. No matter how often we try to make contact, we receive nothing in response to our request. The party concerned is an art dealer who in the past has submitted restitution claims and who has had works of art returned by the Dutch State. All in all it is a very unsavoury matter for us". Andriess tells how they tracked down the Jan Steen through fairly straightforward research. "Shortly after the war our family's representative reported the loss of a number of confiscated paintings to the authorities. On the declaration form concerned it is stated that in 1926 this Jan Steen was part of a specific Jan Steen exhibition in Leiden. I then went to look for a catalogue of that exhibition in the Netherlands Institute for Art History in The Hague. I had the right catalogue in my hand in no time*

at all. The painting I was searching for was indeed listed in the catalogue, with Samuel van den Bergh as the name of the owner, plus an illustration. This made it crystal clear that everything was correct. On the basis of this information you can dig deeper. In fact you then completely unearth the things that happened to such a work of art over the years. It is incredibly fascinating”. Thanks to their investigation Andriessse and Sturm found out that the painting ended up in the United Kingdom after the war. “The Jan Steen came into the possession of a British art collector, who kept the picture in the family for a long time”, explains Andriessse. “It was stolen from this collector in the 1980s as part of a major art theft. The Steen was then reported to the Art Loss Register, an international database for stolen art. The Art Loss Register sounded the alarm when the Steen appeared again at auctioneers in the UK in 2004. At that time negotiations started between the party wishing to sell the Steen and the robbed British art collector, although I do not know the details”. Andriessse continues, “This all happened in 2004, two years before we even got started with our own investigation. So far as we have been able to find out, the painting was not auctioned in 2004, but was sold privately to the art dealer referred to above and/or a colleague, who then presented the work at TEFAF, the art fair in Maastricht. That was shortly before we discovered that the Steen existed”.

#### SOLUTION?

When asked if they expect to get out of the stalemate soon, Andriessse and Sturm say they also want this case to be concluded with a good solution. “It is all about our best documented painting. The facts have been established one hundred percent. The work was the property of our great-grandfather and was confiscated during the war by the Germans. All the necessary documentation is available and anyone who has done even the minimum amount of homework could see what we have concluded. Meanwhile we have registered the painting with the Art Loss Register and it has consequently become unsalable”. Sturm concludes, “We are in it for the long haul”.

#### RECOGNITION

Andriessse and Sturm are of one mind about the goal of their research. “Our objective is not to recover every stolen work of art. For us it is about recognition of the claim. The most important issue for us is that our great-grandfather’s name

*is put back into the work's provenance. We believe it is unjust that not only was our great-grandparents' home looted, but their link to a particular object that was stolen has also been erased. They were the owners of a painting, but that information is no longer to be found in the provenance. That is very distressing. Seeing to it that his name is associated in any event with a couple of objects – because at the end of the day we have only been able to trace a few items from our great-grandfather's large collection so far – that is what has great emotional value for us. Then some justice will have been done". Sturm nods in agreement. "We want to ensure that history is not rubbed out by simply omitting the name of an owner from an artwork's provenance. You cannot reverse everything, but you still can try to symbolically rectify one or two things".*

## HONOUR

*Another factor playing a role in this process for Andriessse and Sturm is that their great-grandfather Samuel van den Bergh, who died in France during the war, was not able to retrieve his works of art himself after the war. Keeping his memory alive is the most important driver for both Andriessse and Sturm. "A biography of our great-grandfather is currently being written", says Sturm. "That is one of the good things that has come out of our investigation into looted art. It started with a quest for paintings, and in so doing we came across all kinds of other information about our family. Our great-grandfather once wrote a book about his parents for the purpose of telling future generations about them. A few members of the family want to continue this tradition by having his biography written". Following on from this, Andriessse is one of those who have taken the initiative to arrange a special event. "We are busy organizing a big family reunion. The idea is to bring together as many members of our far-flung family as possible in the near future on the occasion of the 150th anniversary of our great-grandfather's birth. Relatives from all over the world have already said they will come. That is the finest result of our research". Andriessse adds that the efforts made with regard to the stolen art collection should also be seen in this light. "We are not so concerned about restitution or financial redress, but about restoration of rights, rehabilitation and keeping alive the memory of Samuel van den Bergh. And if there is reparation for lost works of art, in the sense that the family receives financial compensation, we will spend it on a joint goal, completely in the spirit of our great-grandparents".*

*“WE WANT TO HONOUR THE MEMORY OF OUR GREAT-GRANDPARENTS”*

**Photo II De Wiltzangk in Wassenaar**



**Photo III Sam and Betsy van den Bergh in front of their home De Wiltzangk in Wassenaar**



# PART III

## HOW CAN WE DO BETTER?

Part III (Chapters 7-10) revisits the five topics that were central to the discussion in Part II. The following chapters comprise the views of five academics on the subject matter. They were asked what could, in their view, be considered as key elements of a 'fair and just solution'. Ideally, what criteria should such a solution meet in terms of both substance and procedure?



## 7 THE BEST WE CAN DO?

*Exploring a Collegiate Approach to Holocaust-related Claims*

*Norman Palmer*

### 7.1 INTRODUCTION

#### 7.1.1 *The Best We Can Do*

*The Best We Can Do* was the title of a book published in 1958 by the German-born writer Sybille Bedford.<sup>1</sup> The subject was the trial for murder of Dr John Bodkin Adams, a doctor practising in Eastbourne on the south coast of England. The doctor had gained handsomely from bequests by his female patients and was accused of having unlawfully expedited the death of one of them, a Mrs Alice Morell. The main legal question was whether and under what conditions medical treatment that curtails life but is administered to relieve suffering counts as murder.<sup>2</sup> The doctor was acquitted of murder and lived to the ripe age of 84, enriched by the proceeds of libel actions against publishers who had rashly implied or anticipated his guilt.

The case is far distant from those where Holocaust victims and their descendants seek to recover valuable artistic and historical objects taken from them by violence, duress or other delinquency. Aside from the valuable nature of the articles bequeathed to the doctor – antique furniture, silver, at one point a Rolls Royce motor car – there are few obvious parallels. The main events took place in a genteel English seaside town in the post-war era, far removed in time and place from those Nazi-occupied zones where atrocities were routine.

The trial was a criminal one rather than, for example, a civil claim for restitution.<sup>3</sup> Nor was there significant evidence to suggest that the doctor's patients were terrorised by him

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1 Sybille Bedford, *The Best We Can Do* (Collins 1958).

2 *R v Adams* [1957] Crim L R 365. Another book on the trial, written by the trial judge himself (Mr Justice Devlin) was published under the title *Easing the Passing* (Bodley Head 1985). Some members of the legal profession expressed surprise at a trial judge's authorship of a book about a trial over which he had presided.

3 There are few modern instances where the taking of goods by Nazi agents or their successors has led to criminal conviction. In France, the conviction in July 2001 of Adam Williams on a charge of handling stolen property (Frans Hals' *Portrait of Pastor Tegularius*) gave rise to speculation that one day a museum or other public institution might be the defendant to a criminal charge: see generally Norman Palmer 'The Wages of Sloth' in Ruth Redmond-Cooper and Norman Palmer (eds), *Taking it Personally: the Individual Liability*

or that they made over their goods to escape some adverse consequence threatened by him. Many if not all of them regarded him as a friend and gave to him voluntarily. But certain aspects do invite comparison.

The Eastbourne prosecution exposed a sequence of episodes in which certain elderly, impaired and vulnerable persons, people who found themselves alone, frightened and without independent support in their declining years, disposed of their property to someone whom they saw, wisely or unwisely, as a trusted adviser and friend. The trial was a public proceeding, in which a litany of distressing details about the last days of innocent people came under the public spotlight, and in which the role of the media received critical scrutiny. Severe censure was meted out to certain organs of the press for conduct that could have prejudiced a fair trial.

While there was no direct evidence of active duress or compulsion by the doctor, there were distinct traces of predatory conduct. The prosecution claimed, among other allegations, that he administered excessive doses of addictive drugs to his patients and showed an unprofessional impatience and anxiety about having their wills altered in his favour.<sup>4</sup> Even the journalist Percy Hoskins, whose book *Two Men were Acquitted* was a spirited endorsement of the doctor's innocence, was prepared to admit that the doctor was financially acquisitive.<sup>5</sup> But largely no doubt because the doctor was acquitted and the donors were dead, no claims were pursued in law for the restoration of the bequeathed items.<sup>6</sup>

The Bodkin Adams case carries sinister echoes for those who seek justice for Holocaust victims. We too might ask whether our current provision for Holocaust-related claims is the best we can do. Many would argue, for example, that court proceedings are a poor route to justice for the victims of predation: they are arduous, expensive, unpredictable as to outcome, and open to public gaze. As counsel once remarked to the author, nobody goes to court on convenient facts. Given its criminal nature, there was no expectation that

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of *Museum Personnel* (Institute of Art and Law 2011). Certain of the defendants at Nuremberg were accused of depredations of this nature as well as of other wrongdoing.

4 Doctor Bodkin Adams later pleaded guilty to various offences involving forgery of National Health Service prescriptions, failure to keep a Dangerous Drugs' Register and concealment of dangerous drugs. He was fined £2,400 with some £458 costs.

5 Percy Hoskins, *Two Men Were Acquitted* (Secker & Warburg 1984) 14, 216: "He liked money, but he wasn't desperate for it [...] Maybe he was avaricious but not to the point of murder". Hoskins records that in the eleven years between 1944 and 1955 Dr Bodkin Adams received £21,600 in fourteen bequests from patients whose ages averaged out at around eighty.

6 There is an early exception in regard to the will of a Mrs Whitton, under which Dr Bodkin Adams received £3,000 and was appointed executor. In addition, his cousin Sarah received a legacy of £500 and his mother one of £100. Mrs Whitton died in 1935 at the age of seventy-five. Her family contested the will, but the High Court substantially upheld it, quashing only the codicil relating to the £100 legacy to the doctor's mother. Hoskins (n 5) remarks (at 11) that the doctor never more clearly demonstrated his foolishness than in agreeing to act as executor under a will of a patient granting legacies to both him and his family.

the Eastbourne prosecution would result in a restitution order, but even civil actions that are specifically directed to that end face an uphill challenge.<sup>7</sup>

### 7.1.2 *Learning and Becoming*

The object of this contribution is to interrogate rather than to narrate. It asks two principal questions: (i) are the current modes of resolving Holocaust-related claims the best that we can achieve, and (ii) by what means could those current modes be most effectively improved? I do not purport to give complete answers but rather to broach some criteria by which constructive solutions might be gauged.

We are accustomed in Europe to the existence of special adjudicatory or advisory groups charged with the production of outcomes to claims. These groups vary widely in remit and *modus operandi*. It may be that the existing groups could benefit from a closer regard for one another and that countries which have no such group could learn from countries that have one. Certainly the task, in every country which harbours Holocaust-related art, is one that should be approached with humility. In many cases, a work of art or family heirloom may be all that is left in material terms of a destroyed or decimated family: a bridge back to a world destroyed. A desire to learn and improve is integral to that necessary humility.

My own experience is drawn mainly from my position as expert adviser to the Spoliation Advisory Panel (SAP) and secondarily from my practice as a barrister dealing with claims relating to cultural property. It is upon the work of the Panel and certain impressions gleaned from its hearings that many of my observations are based.

In general, I shall group my remarks around five principal themes which will be explored in the following paragraphs:

- the modern backdrop against which modern Holocaust-related claims are deliberated (2.1),
- the agonising and often futile nature of court proceedings (2.2),
- the tendency towards extra-curial resolution of art-related disputes (2.3),
- the objective principles by which any self-respecting system of justice, curial or non-curial, should measure itself (2.4), and
- the opportunities for international co-operation (2.5).

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<sup>7</sup> As to the convoluted and ambiguous relationship between civil and criminal law in regard to transactions concluded with disadvantaged persons, see *R v Hinks* [2001] 2 A.C. 241 HL; Norman Palmer (ed), *Palmer on Bailment* (3rd edn, Sweet and Maxwell 2009) §35-004, §§35-017-35-019.

## 7.2 EXPLORING THE POTENTIAL FOR IMPROVEMENT

### 7.2.1 *The Modern Backdrop against Which Modern Holocaust-related Claims Are Deliberated*

#### 7.2.1.1 **Lotteries and Forum Shopping**

There is an adventitious quality to the present system of claims resolution. Different nations have different solutions to claims arising from the Holocaust and many have none at all. This means that to a large degree the success of a claim may depend on a mosaic of fortuitous facts, some of them quite detached from the merits of the claim. So much emerges the instant one begins to consider the range of matters that might influence the potency of a claim. Such matters might include:

- where the object is now,
- whether the object qualifies as a cultural object within local jurisdictional rules,
- what remedial machinery exists in the country of location,
- what are the local principles of evidence,
- whether there is a local anti-seizure statute and whether it can be avoided,
- what are the legal bars on restitution by a willing museum, or on exportation from the State of current location,
- what are the consequences in the country of location of prior redress from a delinquent state,
- whether a remedy might be available once the object leaves the jurisdiction,
- whether a remedy is available in another jurisdiction, and
- whether any special provision exists for claims against private as opposed to institutional acquirers and possessors.

Taken by itself, the random nature of this collection of issues appears intuitively unfair. Why should the sole survivor of a Jewish family whose looted artwork is now in a museum in South Africa or Japan stand a different – and possibly inferior – chance of pursuing a claim, compared to an Italian archbishop whose library was raided by Allied troops and who seeks the return of a manuscript from England? Why should a Japanese person whose artwork was confiscated in England and transferred without compensation to a museum under the lawful wartime powers of the custodian of enemy property stand a worse chance of recovering it than a German citizen who was forced under duress to relinquish his artwork in Germany but received compensation from Germany after the War? And why for

that matter should an aboriginal survivor of colonial genocide enjoy only inferior rights of redress to a Jewish or Slavic survivor of twentieth-century genocide?<sup>8</sup>

Of course, one might answer that claimants will normally have the right to sue in the country where the work is ordinarily kept. But we all know that with Holocaust-related claims the prospect of success in a claim at law is almost invariably a mirage. Litigation has had notable success in the USA, but by no means universally, and it has a significant downside: it hardens attitudes, consumes resources, sullies reputations, offers scant comfort to the claimants of low-value items, and in the case of contingency fees can require the successful claimant to sell the reclaimed object the moment it has been recovered in order to pay the lawyer's percentage.

Our experience in England has been of a motley character. Within a decade and a half, we have experienced:

- i. returns compelled by law following litigation before the English court:
  - a. returns and other redress following recommendations of the SAP,
  - b. returns to former enemy countries of objects taken by allied soldiery, and
  - c. voluntary returns by private individuals to museums or other private individuals located abroad.

Among these phenomena, the successful pursuit of property by court action remains exceptional and rare. In the United States (USA), such action is much more common, for reasons that might range from the reduced risk to unsuccessful claimants that they will have to pay the defendant's costs to the absence in the USA of anything corresponding to the SAP: a deficiency that remains part of US government policy.

With such comparisons in mind, it is instructive to stand back from one's own national and professional perspectives and to inquire whether the world situation is satisfactory. Is it acceptable that fewer than half a dozen countries have made special jurisdictional provision for Holocaust related claims? Does even that existing special provision go far enough to do essential justice, for example, in the range of claimants that can avail themselves of the claims panels or in the toolbox of remedies available? In placing our Western European emphasis on special panels, are we neglecting the competing virtues of private mediation or the superior moral and temporal cogency of imperative legislation that cuts to the heart of the matter and mandates return? What is happening in other countries that do not have claims authorities and do they have something to teach such Western European countries as the United Kingdom (UK), the Netherlands and Germany? For example, is legislation mandating return vulnerable to criticism as mere window-dressing, as being insufficiently policed or followed through?

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8 The point was taken by an aboriginal community during the inquiry conducted by the Ministerial Working Group on Human Remains in Museum Collections in London in 2003. See also Appendix 14, Annex B.

Perhaps most importantly, if the existing panels work satisfactorily, should other countries feel any impetus or pressure to adopt similar mechanisms? Is it sufficient to regard the existing panels as affording a model – positive or negative – for other nations, or should there be a global panel incorporating the best features of all existing models? If the latter, how should it be established, how can the reference of claims to it be guaranteed, and how far should its remit extend? Is there a case for saying that all repatriation claims arising before a certain historical point should be covered and not merely those related to the period 1933 to 1945?

### **7.2.1.2 Modern Tendencies Which National Spoliation Policy Might Have to Accommodate**

#### *7.2.1.2.1 Art Mobility*

We live at a time when art mobility is a plangent theme of international cultural policy. Many countries are nowadays committed to its fulfilment. They undertake a responsibility to ensure that their own art circulates among other countries and that the art of other countries is enabled to visit their own country. Of course there is nothing new in the practice of sharing art among nations, but it is only in recent years that a commitment to art mobility has been embodied in international instruments. The leading example is Article 167 of the Treaty on the Functioning of the European Union, the Lisbon Treaty of 2007. Articles 167(1) and (2) provide as follows:

- (1) The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.
- (2) Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:
  - improvement of the knowledge and dissemination of the culture and history of the European peoples,
  - conservation and safeguarding of cultural heritage of European significance,
  - non-commercial cultural exchanges,
  - artistic and literary creation, including in the audiovisual sector.<sup>9</sup>

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<sup>9</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, (2007) 50 Official Journal of the European Union 306.

At first glance, one might expect this policy of mobility to result in a slackening of support for the bringing of claims by dispossessed former owners, subordinating such claims to a strengthening of legal security in favour of current possessors. A collateral policy of deterring claims would seem to be affirmed by the mounting host of statutes conferring immunity from seizure in favour of borrowing institutions under cross-border loans. But such a conclusion would be simplistic. In many countries, the procedure for securing immunity is such as to inhibit a prospective borrowing institution from borrowing an object which has dubious antecedents. Such countries will not confer the statutory immunity upon objects that have an imperfect or controversial provenance. Moreover, there is a case for saying that no object can safely or conscionably travel without the settlement of outstanding Holocaust issues and that institutions which hold such material should take active steps to resolve such open wounds. So much was recognised by the Expert Legal Committee of the Salzburg Global Forum in 2008. Its Fifth Resolution states in resounding terms:

Special attention should be given to the challenges that unlawfully removed cultural objects present to the increased mobility and sharing of cultural objects at large:

- A. Clear and independent ethical provision should be made for the exclusion of illicit cultural material from involvement in the negotiation, conduct and resolution of cross-border loans. Such distinct provision should recognise that loans are different in principle from outright acquisition by sale, gift or exchange and require special treatment, separate from the more general treatment accorded to other forms of museum acquisition.
- B. There should be effective early warning systems to prevent recently looted cultural objects from being loaned or borrowed. Lending and borrowing museums should be pro-active in seeking to identify and isolate such material and should embody strict undertakings, which demand such vigilance and active inquiry from their loan partners, into their loan agreements.
- C. Museums must recognise that the existence and continuation of unresolved repatriation and restitution disputes can, in the absence at least of serious efforts at conciliation, paralyse the circulation and sharing of significant cultural objects. Museums that are seriously committed to the more liberal circulation of cultural material must act positively and resourcefully to resolve or neutralise such disputes and bring such objects into circulation.
- D. Urgent and earnest consideration should be given as to whether there are any justifiable circumstances in which a museum might acceptably acquire outright or receive on loan a tainted cultural object when it knows or has

reason to suppose that the object has been unlawfully removed from another country.<sup>10</sup>

In my view, far from being in conflict, the policies espoused by the Lisbon Treaty and the Washington Principles are complementary and can be reconciled to the advantage of each. Objects must be made fit to travel, and this requires the removal of any blemish on their provenance. Only an imprudent borrowing institution would require less than a clean bill of health.

#### 7.2.1.2.2 *Holocaust-related Claims and Immunity from Seizure*

Many loaned objects now enter the UK on terms that afford to their lenders strong guarantees against their involvement in court proceedings. The main source of such immunity is Part VI of the Tribunals, Courts and Enforcement Act 2007. Where court action is barred by this statute, it might seem natural for a third-party claimant to resort instead to the SAP. The object will, after all, be in the possession of a UK public museum and the Panel is advertised as a service available where no claim lies at law.

The question nonetheless arises as to what should be the approach of the Panel where it is asked to opine on an object that is subject to immunity from seizure. Of course the immunity will extend only to objects on loan from foreign countries, and from lenders who are not ordinarily resident in England. This immediately makes any assumption of jurisdiction by the Panel vulnerable to the withdrawal of the object by the lender. That prospect might itself discourage the Panel from embarking on deliberations that could be peremptorily aborted. Aside from such matters, there seems no reason in principle why the application of anti-seizure should automatically rule out the consideration of the object by the Panel. It might be wise in that event to secure the lender's consent to engage in the process. Such consent might persuade the Panel that if the lender later withdrew from the process, the Panel's deliberations might legitimately continue.

It seems a fair guess that few, if any, of the existing anti-seizure statutes actually prevent a borrowing museum from returning an object to a Holocaust claimant if they consider this the right thing to do. There may be other legal barriers to such returns, but the anti-seizure statute is probably not one. Greater difficulty is likely to come if the museum feels obliged, in spite of its preference for the claimant, to return the object to the lender in response to a threat of legal action. In that event it is likely that the Panel ceases to have jurisdiction even where it has already begun to consider the claim. We have already remarked that it might be appropriate to revisit this issue and to consider whether it should

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10 Salzburg Global Seminar, 'Report Session 453: Achieving the Freer Circulation of Cultural Artifacts. Salzburg, May 9-14, 2008' (Salzburg Global Seminar 2008) <[www.salzburgglobal.org/fileadmin/user\\_upload/Documents/2000-2009/2008/453/SessionReport453.pdf](http://www.salzburgglobal.org/fileadmin/user_upload/Documents/2000-2009/2008/453/SessionReport453.pdf)> accessed 13 August 2014, 14.

suffice to confer jurisdiction that the museum is in possession of the object when the claim is made. Even with jurisdiction established, however, there remains the further question whether the Panel should involve itself in recommending a remedy when the anti-seizure statute blocks any order for possession or restraint. Of course it can be argued the embargo is limited to orders of courts or action by law enforcement authorities, and that the Panel can issue only recommendations, which have no binding effect until they are accepted by the parties and translated into agreement. The question remains whether the enforcement of any such agreement (for example, by a court order for delivery up of the work) is itself debarred by the anti-seizure statute.

### 7.2.2 *The Versatility of Law and the Toxicity of Litigation*

The surge in collections mobility over the past two decades has inspired a corresponding rise in legal innovation. Lawyers and museum officials have begun to evolve new initiatives to ensure that art can move nimbly and securely across state borders. An example is the joint acquisition agreement involving several acquiring museums situated in different countries. In appropriate cases there is no reason why such agreements should not be used as a basis for the settlement of Holocaust-related claims.

The ingenuity of the law has, however, its negative side, particularly in regard to contested claims against museums. Some innovative developments (like the negative declaration or the immunity from seizure statute) are the invention of lawyers acting in the interests of museums. But other innovations which are currently being mooted are hostile to museums and pose a lurking threat: the doctrine of the reasonable hiring charge, the infliction of personal liability on museum employees, the circumvention of immunity from seizure statutes by suing for damages, and the litigation of restitution claims in States other than the State of present location.

Such initiatives are potentially beneficial to claimants, and may cause the pendulum to swing in their favour. But the bringing of a legal claim against a museum remains a hazardous and sometimes almost suicidal enterprise. Even if a claimant can prove original ownership of the chattel claimed, there are numerous potential intervening blocks on recovery: the expiry of limitation periods, the conclusion of good faith transactions in civil law countries that confer fresh title to the good faith purchaser, the restraining hand of export prohibitions, the ‘clam’ effect of anti-disposal laws that inhibit museums from disposing of objects from their collections, and immunity from seizure laws in the country of current location. These law-based defences combine with evidential burdens and contentious presumptions to pose a formidable barrier to claimants.

In countries outside the USA, litigation is less common. In England we have seen the *City of Gotha*<sup>11</sup> claim which, while successful, illustrates many of the fetters and clogs that hamper a claim at law. The successful party was the state of Germany, with all the resources and sense of commitment that one might expect to find in a national litigant. Few potential litigants, least of all private individuals, could match such resources.

### 7.2.2.1 The Fruits and Limits of Litigation

There is a view that, aside from its other follies, to litigate over a cultural object can be to exhaust or frustrate the very purpose of litigating, *viz* to reclaim a family treasure and secure its return to the dispossessed parties. Those who insist that only recovery of the object will answer the needs of justice might reflect on the length of time that many retrieved works remain in the hands of the claimant before being sold to pay legal fees. To know whether the present system works, we would need to know much more about the financing, funding and conduct of Holocaust-related claims than we know at present. These are matters about which some lawyers might prefer to remain ignorant, indifferent or reticent:

- Does litigation work without financial incentive; what alternative incentives (if any) induce claimants to litigate and lawyers to act for them?
- What are the average values of objects claimed (a) in litigation and (b) by other means?
- What research is being dedicated to identifying and running to earth low-value items of high personal significance?
- How many low-value items are claimed in legal proceedings (say under \$100,000)?
- The fee basis in which such claims are brought: flat fee, periodic rate or percentage of value.
- The proportion of such claims that succeed.
- The characteristic terms on which higher-value items are claimed at law.
- The frequency and magnitude of contingency fees.
- The frequency with which contingency fees necessitate an undesired sale of the claimed work once recovered.
- The frequency with which contingency fees contribute to the ingenuity of claims and their resolution.
- The ratio of damages awards to specific restitution.

It might be tempting to imagine that the existence in the UK of the SAP has induced claimants to forsake litigation. The truth is more likely to be that without the Panel there would be no other way of pursuing the object *at law* at all. Indeed, the vagaries of litigation were a principal reason for establishing the Panel as an alternative remedial device. No doubt this is true of claims authorities in other jurisdictions.

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11 *City of Gotha and Federal Republic of Germany v Sotheby's and Cobert Finance S.A.* [1998] 1 WLR 114.

### 7.2.2.2 Justice According to Law?

It would be an optimistic litigant who went into court in search of palm tree justice. The common law has traditionally set its face against the notion that clear and logically deduced rules of law should yield to the demands of fairness in individual cases. This aversion is echoed in the austere warning that ‘hard cases make bad law’. An outcome that is arguably fair to the individual at the expense of principle might be unfair both to the other party and to all those future parties, claimant or respondent, who are entitled to expect clear and decisive precedents to guide their conduct of claims. Among numerous older protestations that to relieve hardship is no part of the judicial mission, one might cite the judgments of Mr Justice Littledale and Mr Justice Park in *Balme v Hutton*:

I think the hardship of a case ought not to form a principle on which the law should act. Society is so formed, that many people fill relations which appear to induce great hardships. If these hardships be of sufficient importance for the legislature to interfere, they will do so.

The hardship [...] can be no argument if the law be clear [...] For, as Lord Ellenborough said in the case of *Stephens v Elwall* (1815) [...] the Court must be governed by the principles of law, and not by the hardship of any particular case [...]<sup>12</sup>

This is not to suggest of course that modern courts do not strive to avoid inequitably austere or burdensome results. The opposite is manifestly if not universally the case. But the risk of distorting principle in the crusade for a fair result is an ever-present concern for judges. It is an inhibition which any claimant confronted by the black letter of the common law will have to address.

### 7.2.3 *Extra-curial Resolution of Art-related Disputes*

#### 7.2.3.1 ‘Wrong Way: Go Back’

In England, there is an endemic judicial dislike of litigation that exceeds in cost the economic value of its subject matter. Judges shy away from indulging those litigants (far from uncommon) who spend excessive resources in order to achieve some meagre prize or other pyrrhic victory. In addition, the authorities responsible for the administration of justice have come to regard the judicial service as a precious resource, to be used sparingly and to be generally reserved for the resolution of serious issues.

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<sup>12</sup> (1833) 9 Bing 471, 507.

A sense of proportion in such matters is now embedded within the UK legal system. It has become one wing of the overriding principle that courts must do justice between the parties. Moreover, the pursuit of proportionality is a duty owed by legal advisers as well as litigants themselves. A successful claimant might therefore fail to recover costs from the losing party where the matter at hand could reasonably and more economically have been referred to alternative dispute resolution (ADR). Some of the leading cases in this field involve works of art. A typical expression of this view can be found in the judgment of Ward LJ in *Tavoulaareas v Lau*:

This litigation fills me with despair [...] The first extraordinary aspect of this bitterly-fought litigation is that the claimant has spent some £60,000 on it to date, the defendants £25,000; £85,000 in all, over a claim worth at most £23,500. Now, litigation must be fun if the parties are prepared to spend that much on a rollercoaster ride to judgment without pausing, either of them, to suggest that mediation would be a more sensible way to resolve their differences. I am sorry to say that the second extraordinary feature of the case is the perfunctory judgment under appeal [...] This is extraordinary litigation and it will be even more extraordinary if it continues any longer than this court. What is now in issue is a question of damage to the paintings that have been recovered, allegedly because they have been splattered with white paint or possibly damaged. Although Mr Marland boldly submitted that that claim might be measured in an amount up to £1,000, I would have thought he is optimistic and, indeed, at one point he seemed inclined to accept that that part of the claim would be abandoned. I do not hold him to the concession, but I remind him of it and observe that it makes eminently good sense to me. [...] What the remainder of the claim is worth I do not know, but since it is perfectly obvious that paintings are in the possession or were in the possession of the defendants' solicitors, I would have thought that there are very easy ways through mediation and a bit of common sense to resolve this matter and hopefully to resolve it quickly and without a further extraordinary waste of money.<sup>13</sup>

Nor are the arguments against court proceedings confined to cases of economic imbalance. Increasingly, the taking of disputes to court is seen as a form of self-destruction in contexts other than the economic. The result is a robust emergent culture of settling civil disputes by means other than court action, such as arbitration, mediation and conciliation. The propensity is reflected in many situations outside those caught by the remit of the SAP. In a recent decision, the Court of Appeal combined a strong rejection of the argument that

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13 *Tavoulaareas v Lau* [2007] EWCA Civ 474.

the matters in dispute were justiciable with a forceful reminder of the competing virtues of mediation.

The costly crudities, the outmoded methods and the unwelcome and often unpredictable outcomes endured in adversarial litigation are to be avoided, if at all possible. Experience teaches that litigation is not always a good way of resolving a dispute [...] [*and is*] [...] not the only way of resolving disputes. The parties here would be well advised to engage in some form of alternative resolution procedure. [...] Voluntary procedures are available through mediators [...] The present litigation has no realistic future in the courts and must be brought to a halt now.<sup>14</sup>

Of course, a dispute does not have to be non-justiciable in order for mediation to become the best method of resolving it. We see the gravitational pull towards out-of-court resolution in family disputes over chattels, where rancour and the escalating pressure that comes from litigation have destroyed many a domestic relationship: mother and son, husband and wife, sibling and sibling. Both within and beyond that sphere, mediation or conciliation can be especially helpful where the parties need to maintain a relationship beyond the dispute. The prospects are probably all the more promising where there is more than one item in dispute, allowing for some form of division.

It is a question whether in England a failure to resort to the SAP should result in adverse consequences to a litigant who proceeds instead directly to court and who expends what might be termed disproportionate resources in pursuing his claim at law. Given the repeated warning by English courts that a successful litigant who could reasonably have been expected to explore ADR might fail to recover the full measure of costs incurred in litigation,<sup>15</sup> there is at least a prospect that a court will view an unreasonable refusal to agree to submit the claim to the Panel as a matter affecting liability for costs. On the other hand, the intransigent party might in theory point to particular features of the Panel (for example, its limited jurisdiction and limited powers of evidential inquiry) as indicating that his or her refusal to invoke the Panel was reasonable.<sup>16</sup>

14 *Mohinder Singh Khaira and Others v Daljit Singh Shergill and Others* [2012] EWCA Civ 983 at paras 78, 79, Lord Justice Mummery, noted by Norman Palmer (2012) 17 *Art Antiquity and Law* 173.

15 See, for example, *Tavoulares v Lau* (above), noted by Melanie Bristow (2008) 13 *Art Antiquity and Law* 99, and other cases discussed by Norman Palmer, 'Waging and Engaging – Reflections on the Mediation of Art and Antiquity Claims' in M-A Renold, A Chechi and AL Bandle (eds.), *Resolving Disputes in Cultural Property. Litigation in Cultural Property – Papers from the International symposium of November 11th 2011 at Geneva*, (Schulthess 2012) 91 et seq. See also now the author's note on the *Khaira* case in (2012) 17 *Art Antiquity and Law* 173.

16 Note also Paragraph 6: "The Panel's proceedings are an alternative to litigation, not a process of litigation. The Panel will therefore take into account non-legal obligations, such as the moral strength of the claimant's case (paragraph 12(e)) and whether any moral obligation rests on the institution (paragraph 12(g))."

A further word needs to be said about the desirability of scaling legal costs to the economic value of the prize at stake. There may be occasions where legal action is morally justified despite the fact that the cost of legal proceedings far exceeds the value of the contested object. The point was made in a paper delivered at Geneva two years ago, and it is as germane to the present subject as to other art-related claims:

Self-indulgent voyages through the legal system are of course to be discouraged. The courts are a limited resource and should not be exploited as a soap box for personal attitudinising or an instrument of vengeance. One must beware however of reducing claims for the restitution of historic or spiritual material to a simple matter of economics. While no litigant should be encouraged to take prodigal action in pursuit of a claim for restitution, certain objects may be so heavily charged with legitimate subjective or personal concerns, peculiar to the individual and divorced from their economic value, that it could be reasonable to pursue them through court action, even though the cost of such action exceeds their economic worth. Obvious candidates for such special consideration are national historical treasures (the 'keys' to a nation's ancient history)<sup>17</sup> and Holocaust-related objects. A similar argument might be made about claims by indigenous peoples to recover ancestral remains or other relics having spiritual force. In many cases court action may be the only way to compel a museum or private possessor to pay serious attention to a claim. Indeed, one English national museum agreed to mediation only after being sued.<sup>18</sup> It would be unfortunate if the low economic value of the material claimed were to be invoked as a ground for denying costs to the successful claimant.<sup>19</sup>

It would be undesirable to implement rules that effectively exclude the claimant of a modest artefact from court, without providing an alternative means of redress. And yet the overriding principle, and the accompanying dissuasion of claimants from pursuing low-value claims in court, may not be the only potential ground on which Holocaust-related claims are discouraged.

Two English statutes now empower certain museums to release certain classes of objects from their collections notwithstanding that the museums have title to the objects and are generally prohibited from relinquishing such objects from their collections. These statutes

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17 *Webb v Ireland and the Attorney General* [1988] IR 353; *Government of the Islamic Republic of Iran v Barakat Galleries Ltd* [2007] EWCA Civ 1374.

18 *Tasmanian Aboriginal Centre v Natural History Museum* (2007) unreported, following *In re An Application by the Tasmanian Aboriginal Centre Inc* [2007] TASSC 5 (9 February 2007).

19 Norman Palmer, 'Waging and Engaging – Reflections on the Mediation of Art and Antiquity Claims', in M-A Renold, A Chechi and AL Bandle (eds), *Resolving Disputes in Cultural Property. Litigation in Cultural Property – Papers from the International symposium of November 11th 2011 at Geneva* (Schulthess 2012) 94.

are the Human Tissue Act 2004 section 47 and the Holocaust (Return of Cultural Objects) Act 2009. The latter of these is of course more significant to our present subject; it is discussed in an Appendix.<sup>20</sup> The present question is whether the vesting of those new optional and discretionary powers in a national museum holding Holocaust-related objects, coupled with the existing machinery for resort to the Panel as an alternative to court proceedings, might now constitute an exhaustive code of the rights of Holocaust-related claimants, and thus extinguish any rights that claimants might formerly have had at law.

The mere assertion of such a result would seem audacious. The UK Government has however advanced a similar argument in a case about human remains in national museum collections. This followed the enactment of the power of relinquishment contained in section 47 of the Human Tissue Act 2004 and the bringing of a claim by the Tasmanian Aboriginal Centre against the Natural History Museum in 2007. In the event, the claim was settled by mediation, and the point did not fall to be resolved.

#### 7.2.4 *Principles of Justice*

##### 7.2.4.1 **Well-known Tenets of Justice**

Having regard to these general trends, it might be constructive to try to isolate certain fundamental tenets which might usefully inform all restitution panels which seek a just and fair solution. Such tenets, if sound, operate as guidance both for existing decision-making bodies and for those states and international organisations that might contemplate forming similar bodies. It will be seen that some of them draw upon well-known legal principles governing the administration of justice.

The tenets or principles upon which such bodies should operate are:

1. A speedy resolution of issues: justice delayed is justice denied.
2. An impartial resolution of issues: *nemo iudex sua causa*.
3. Each side to be heard fairly and equally: *audi alteram partem*.
4. A level playing field, which allows no inside track to privileged disputants, and no advantage to those commanding superior resources.
5. A secure, accessible, neutral and capable forum.
6. A forum that is not only impartial but would reasonably be regarded by fair observers as impartial.
7. Renouncing technicality and approaching claims on their merits.
8. Approaching evidence realistically with regard to such factors as time and trauma.
9. Weighing all relevant factors, excluding all irrelevant factors.

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<sup>20</sup> See Appendix 13, Annex A.

10. Giving reasoned decisions that can be rationally challenged and where appropriate used as meaningful precedents.
11. Treating like cases alike: *in consimili casu consimile debet esse remedium*.
12. Fitting the remedy to the specific case.

I do not propose this set of principles as a *numerus clausus* (*closed list*). Others could undoubtedly supplement it, or condense it, or suggest revisions to the tenets stated. Such additions and revisions are, I submit, best hammered out – evolved and resolved – in the foundry of international debate. If national authorities cannot supply a dispute resolution service that meets the required criteria, private enterprise might do so instead.<sup>21</sup>

#### 7.2.4.2 Procedural and Substantive Justice

It will be noted that the foregoing list is an amalgam of procedural and substantive criteria. There is in fact a significant distinction between the making available of a process for the resolution of Holocaust-related disputes and the due conduct and determination of claims that fall subject to that process. The former function tends to be expressed authoritatively in the Terms of Reference of a panel or committee, while the latter, in England at least, might fall to the individual membership of the body in its day-to-day administration of the process thus constituted. In this respect, opinions may differ, and there will be variant approaches to the correct way to handle claims. While it is impossible to predict and settle in advance the due response to every such question, the following might be proposed as useful subjects for rumination.

##### 7.2.4.2.1 Procedural Justice

###### *Reasoning and precedent*

I would at this point draw particular attention to the tenth of the foregoing tenets: “Giving reasoned decisions that can be rationally challenged and where appropriate used as meaningful precedents”. This appears to me essential to achieving both procedural and substantive fairness.

The eyes of the world are on each nation’s attempts to administer Holocaust justice. Scrutiny of every decision will come from many quarters: not only from claimants, survivors and their families and from the general public, but from scholars and students – people who are adept at detecting inconsistency, flawed logic and the ambivalent fudging of issues.<sup>22</sup> Already we have seen in England the publication of a detailed academic analysis

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21 This might be conducted on a pro bono or not-for-profit basis, or under the auspices of some charitable foundation.

22 These last are people with whose talent for criticism every judge, political scientist, philosopher and legal academic is familiar. There are many such experts on the national panels.

of the work of the national panel which has questioned, for example, why an *ex gratia* sum has been allowed to account for the benefit of public use in one case but not in others where it might conscientiously have been granted.<sup>23</sup>

I believe that the reasoning of decisions and recommendations emerging from advisory and adjudicating bodies should be unsparingly rigorous. Justifications must be capable of withstanding the most searching analysis. Only by that means will it become possible to treat like cases alike and offer coherent guidance to future claims. Anything short of that will bring a system of resolution, however well-meaning and well-resourced, into significant disrepute.

#### *The scope and sway of the panel's jurisdiction*

A question that arises from time to time is whether a national panel should have jurisdiction over confiscations of cultural property arising from internment during the Second World War. The position of internees is particularly sensitive because the deprivations of property inflicted upon them might well have been implemented according to law by authorities established in the very countries that were resisting Nazism. Moreover, one object of such legislation was to prevent valuable property from falling into the hands of the enemy and from thus aiding the enemy war effort: a far cry from the forms and motives of dispossession inflicted under Nazism. It might appear an ambiguous and even pernicious exercise to disavow or unravel such legislation now that the War is over.

On the other hand, the classes of those who stood to lose their property in consequence of legislation relating to enemy property included some enemy aliens (such as German Jews) who had come to England fleeing Nazism. It might appear harsh to persist in detaining the property of such people, especially since the purposes of the wartime legislation have long been fulfilled and the property itself might be returned without significant damage to the national interest. Moreover, legislation similar to that in England was in force in many if not all of the aggressor states and in the states that they occupied. A former allied country in which an item of cultural property now resides following its seizure and confiscation in a former axis country, pursuant to legislation relating to enemy property, might be less keen to disclaim jurisdiction over the object.

In England, a special panel was established in 1999 to deal with such matters: the Enemy Property Claims Assessment Panel (EPCAP). It dealt some 400 cases and distributed over £16 million,<sup>24</sup> but its powers were limited. Among other factors, it could consider only claims brought by enemy aliens who came to the UK to escape persecution. The Panel ceased to sit in regular session in 2004. It is a fine question whether the SAP should now

23 Charlotte Woodhead 'Nazi Era spoliation: establishing procedural and substantive principles' (2013) 18 *Art Antiquity and Law* 167.

24 Enemy Property Claims Assessment Panel, 'Final report about enemy property payments scheme to Secretary of State' (HINF 2004/1986, Enemy Property Claims Assessment Panel 2004).

assume jurisdiction over such claims where they involve cultural objects. The general view of the UK Government is understood to be that the Panel should not pronounce on such claims. In my submission this is a matter that might healthily be revisited, perhaps on an international level.

A wider question concerns those forms of deprivation that are causally related to war conditions but did not materialise in the form of any concrete loss until after 1945. Such a case might arise where ‘degenerate art’, hidden in Germany during the War to avoid destruction by party members, was sequestered shortly after the war by Russian forces occupying East Berlin, or where Jewish survivors returning after the war were murdered and robbed of their treasures by nationals of the country from which they fled. Morally there may be little if anything to distinguish such losses from the pillaging directly inflicted on individuals by Nazi agents during the war.

The permutations are virtually limitless, and it would be fanciful to suppose that there is any single just answer. It might, for example, be ambitious to expect the Panel to pronounce on cases where loss resulted from the acts of looters ransacking a house damaged by bombing, or from unoccupied property whose owner had yet to be demobilised from military service and was absent abroad. The range of factual possibilities suggests however a multiplicity of different results on the present state-by-state system. This heightens the risk that determinations will become fragmented among different countries and will develop the appearance or atmosphere of a public lottery. This in turn fortifies the call for discussion on an international plane.

A further inquiry might be directed to whether the removal of an object from a UK museum by a lender should deprive the Panel of jurisdiction that it has already assumed over that object. At present, as we have seen, the SAP’s jurisdiction depends on the possession of the object by a UK museum, which suggests that once that possession ceases the jurisdiction evaporates. It might fairly be argued that the Panel should have a continuing jurisdiction if a relevant museum was in possession at the time when the Panel took jurisdiction, even though that possession is later vacated.<sup>25</sup> On the other hand, such a prospect might be thought to raise questions about the potential utility (or futility) of any recommendation that the Panel makes once the object has left the museum (particularly if it has also left the country). Such futility might in turn reflect on the general authority of the Panel.

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25 Possession might be lost, for example, by reason of police seizure or withdrawal by the lender. Such a case has occurred in England. The seizure by the police in January 2006 of a reliquary that had been on loan to the Victoria and Albert Museum for the past quarter of a century, and was alleged to have been looted from Poland in 1941, had the effect of depriving the Spoliation Advisory Panel of jurisdiction, in that the relevant museum no longer had possession of the object, as required by the Panel’s Terms of Reference.

*The helping hand or 'lifeline from the bench'*

In cases, particularly, where the claimant is a disadvantaged individual, it can be tempting for members of the determining body to ask questions designed to elucidate the claimant's case or to suggest lines of argument that have not occurred to the claimant. An obvious question might relate to the claimant's intentions concerning any compensation payment already received in respect of the loss. Individual members might also be tempted to engage in a similar exercise with the respondent museum or in any other situation where an advocate appears to have overlooked significant arguments in the client's favour.

While questions aimed at the clarification of argument are generally unobjectionable, advisory or adjudicatory bodies should be wary of appearing to reconstruct one party's case in order to make it stronger, or to otherwise favour one party over another. Generosity to one party might not be 'fair and just' to the other.

In any event no tribunal should found its conclusion on propositions not argued by the successful party without, at least, having given the other party the opportunity to respond to those propositions.

Restraint should be shown as regards the personal volunteering of evidence by individual members, the gratuitous introduction of irrelevant material or the making of comment or inquiry on matters that the parties themselves have not chosen to plead. Pejorative remarks in committee (such as describing a claim as 'a try-on' or the claimant's lawyer as 'a shyster') should of course be scrupulously avoided.

Of course, nothing in the foregoing remarks should be regarded as disapproving the conduct of independent factual research by those panels that are expressly empowered to conduct such a function by virtue of an independent research capability.

*Confidentiality and publication*

There is room for debate as to whether Holocaust-related claims should be immune from media reporting, at least until a conclusion is reached, or whether the press should be admitted to hearings with full reporting rights, irrespective of the wishes of the parties. In England we are familiar with the words of Lord Atkin that "[J]ustice is not a cloistered virtue. She must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men".<sup>26</sup> Two decades earlier a senior Scottish judge cited the words of Jeremy Bentham that "publicity is the very soul of justice".<sup>27</sup> A modern observer reminds us that a public hearing "ensures confidence in the administration of justice and is a form of democratic control [...]".<sup>28</sup>

26 *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322 at 335 per Lord Atkin.

27 *Scott v Scott* [1913] AC 417 at 477 per Lord Dunfermline.

28 Tim Suter, 'Justice: a Cloistered Virtue?' (2011) 161 *New Law Journal* 1696.

Should then the parties to Holocaust-related claims be entitled to anonymity, or should every detail, even the names and nationalities of elderly Holocaust survivors, be brought out into the open in the cause of transparency and a free press? What restraints should be placed on sensationalism and gratuitous intrusion in this context?

Similar concerns can be observed in reports of the SAP. There we read of elderly claimants who request that their identities be withheld and of family members who disagree as to whether a particular claim should be brought. Sensitivity about impecuniosity, past or present, is a recurrent motif. These concerns take their place alongside the harrowing narratives which are the mainspring of each claim: stories of terrorised and starving people who gave up cherished things to gain the rudiments of survival, or of a trumped-up Nazi-inspired tax demand which destroyed the life of an elderly art dealer. The telling of these stories plays a part, perhaps, in satisfying the imperative close to many Holocaust survivors and others, that the evils inflicted during that era should never be forgotten. But the stories themselves can be a cause of anguish.

The question is a difficult one, and there is wide scope for reasonable authorities to differ. It is important to respect the sensitivities and frailties of claimants and to make the determining body as 'user-friendly' as possible. Claimants might justifiably quail at the prospect of public exposure regarding family and other personal matters. Parties to a private mediation are perfectly entitled to agree that both the process and the outcome should be confidential, and ministers have stoutly defended this principle even where the settlement might be thought to 'hush up' discreditable conduct.

At the same time, respect must be paid to the values of transparency and to the need to maintain public confidence in a process that involves matters of great historical and political interest and could result in the redistribution of public property, whether this be taxpayers' money by way of *ex gratia* payment or paintings from public museums.

The challenge of reconciling confidence and transparency is not a novel one, however. It has been successfully met in other English contexts, such as the Reviewing Committee on the Export of Works of Art. All that can be said definitively is that these are matters which require the most careful consideration before instituting any authority designed to deal with Holocaust-related claims, and that they should be kept under review once such a body is established.

#### 7.2.4.2.2 *Questions of Substantive Justice*

##### *Profiting from the claim*

Where a claimant's family has received a sum of money by way of post-war indemnity or reparation that is related to the loss, the question arises as to whether the claims panel should seek in some way to take account of this or whether such payments should be disregarded as *res inter alios acta*. Further, should the panel's policy on this point vary

according to whether it ordains the return of the work (which cannot be adjusted) or the payment of a sum of money (which can be adjusted)?

The weight to be given to prior compensation received by the claimant is of course a more difficult matter where the payment has been awarded by a state other than that in which restitution is now being sought. If the decision-making body is unwilling to ignore such compensation altogether as *res inter alios acta*, the repayment of the sum to the state that awarded it could be the subject of a pre-condition to restitution on the part of the relevant advisory panel. Claimants would be well advised to offer such repayment.

More difficult is the case of the victim of persecution or duress who, though pressurised by human agency or political circumstance into selling the object, nonetheless received a price that was not economically disadvantageous, i.e. depressed by the prevailing political conditions. Some might argue that, where the victim had received an objectively-reasonable market price, restitution should be automatically and universally barred, on grounds that the claimant would otherwise be over-compensated.<sup>29</sup> Others might contend that a forced sale should always be reversed in principle regardless of the consideration received; there can be no fair price where there was no choice as to whether to transact. The argument that the deciding body should ordain the return of the sale proceeds as a condition of relief might also be met by the objection: to whom should these proceeds be returned? To require the sum to be paid to the restoring museum might appear fair where the museum bought the work in good faith, but what is to happen where the museum received the artwork as a gift? If a claimant became obliged to sell the object in order to repay the price originally received, a policy of requiring repayment would seem to frustrate the very principle that compels the return of the work.

#### *Objectors from within a claimant community*

It occasionally happens that the members of a family are not unanimous in wishing to pursue a claim. Where the objector is a senior or otherwise significant family member, or one of a group of dissenters, the resultant division of opinion can cause problems for a determining body.<sup>30</sup> These problems may be especially thorny where the dissenter is prepared to register his or her objection with the determining body.

The dilemma permits of no universal answer but would nonetheless repay careful advance thought. One would be instinctively reluctant to reduce such issues to a headcount or to allow a lone dissenter to frustrate the pursuit of what might otherwise be considered a just and fair solution. On the other hand, it would be at best insensitive to dismiss

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29 The prospects in England do not look good in this regard. The offer by the Glaser claimants in the Rubens *Coronation of the Virgin* claim to repay the relevant post-war compensation to Germany did not induce the SAP to change its recommendation against restitution of the work, even though it had given such compensation as a principal reason for the negative recommendation in the first place.

30 And not only in Holocaust-related claims: see the Durack Miller mediation.

such objections out of hand, and objectors might argue that any solution is inherently unfair and unjust when it cuts across the wishes of (for example) the family member closest to the Holocaust victim. Such a person might reasonably wish to avoid revisiting family matters in an adversarial setting or might reasonably prefer to allow the object to remain in its present location, such as a public museum. It is even possible that some members of a family will insist on the return of the object, while others will be content with a commemoration of their story alongside the object in a museum.

#### *The distant relation*

A further highly contentious question is whether there comes a point at which the distance of relationship between the claimant(s) and the original victim(s) is so great that it becomes legitimate for the determining body to conclude that it is no longer appropriate to grant a remedy, regardless of other considerations such as the misconduct of the holding museum or the vileness of the original atrocity. This question has recently arisen in a compound case before the Restitution Committee in the Netherlands and the response of that body has engendered great controversy, on which I do not intend to comment here.

Occasionally, it might be possible to find a justification in the body's Terms of Reference: for example by construing the lack of propinquity between the claimant and the victim as material to the moral strength of the claimant's case. No claim in England has yet been resolved by reference to such a consideration. The matter is in any event contentious because, among other reasons, there is a case for saying that the primary imperative is to right the wrong and that whether or not a particular distant individual receives what might appear to be a windfall is a subordinate consideration, which should neither stand in the way of restitution nor justify the retention by a museum of property by means of which it is unjustly enriched. The gulf is wide and the battle positions are likely to be emotionally charged. Again this is a question that would repay close advance consideration as a matter of abstract principle.

#### **7.2.4.3 Some Further Questions Both Procedural and Substantive**

My experience at the SAP has brought to light certain further questions, which might usefully be considered by all decision-making bodies in this field. Some of these suggest a ready answer, while others require more thought. What follows is merely a sample.

#### *Legal solutions can inform non-legal claims*

One such question is the extent to which legal principles should be recruited to guide or vindicate the solutions to claims that are not founded on law. Can legal principle offer helpful guidance in non-law claims, where the Panel can find no surviving title in the claimant and thus no actionable case at law? The answer to this, it is submitted, is affirm-

ative: legal solutions can inform non-legal claims.<sup>31</sup> An example might be the parallel between the occasional ability of a party, whose chattel has been detained without his consent, to recover a reasonable hiring charge at law, and the award in the Griffier case of a modest sum to represent the benefit of public enjoyment accruing from the presence of the painting in the Tate.<sup>32</sup>

I have suggested elsewhere that law can play a significant role in enlightening a claim even though the claim has no viability at law.<sup>33</sup> It is fair to say, however, that panel members who are not legally trained might sometimes be reluctant to be instructed by legal science, even by way of guideline. Some may find this an inappropriate source of analogy in a non-law process. Others may find that their ‘gut instinct’ pulls in a direction contrary to that indicated by law.

Should advisory panels pronounce on law? That will depend in part on national circumstances, but the SAP has in my view found this power advantageous. The Panel’s ability to state opinions on law increases the value of the process as a one-stop shop and extends to the parties the benefits of advice that it would otherwise be expensive to obtain. That said, it should be noted that many parties do take legal advice in pursuing claims and have legal representation at Panel hearings. Further, the Panel’s Terms of Reference make it clear that “In exercising its functions, while the Panel will consider legal issues relating to the object (see paragraph 12(d) and (f)), it will not be the function of the Panel to determine legal rights, for example as to title”.<sup>34</sup>

#### *Cross-border persecution and duress*

A further question might be whether any claims authority should confine itself to redressing those deprivations that occurred in countries where the relevant persecution or victimisation has been directly exerted. Suppose, for example, that within the space of two days a victimised person handed over one painting as a bribe to leave Nazi-occupied country A and handed over another painting as a bribe to be allowed to settle in neutral country B. Both paintings have ended up in an English museum. Should there be any difference in the Panel’s treatment of the two works? The Panel’s treatment of the Koch case

31 For further discussion on this point, see Norman Palmer, ‘Spoliation and Holocaust-Related Cultural Objects: Legal and Ethical Models for the Resolution of Claims’ (2007) 12 *Art Antiquity and Law* 1.

32 Both in assessing the *ex gratia* sum, and in later recommending that that sum be paid from public funds rather than by the Tate, the Panel took account of the benefit that had accrued to the Tate and the public from having access to the picture over the past forty years. One question is whether this potential resemblance between the latter proposition and the common law doctrine of the reasonable hiring charge should be pushed to the point where a claimant who *recovers* the object should also receive a sum to represent the value of its use over the period during which he was dispossessed of it.

33 Palmer (n 31).

34 Spoliation Advisory Panel, ‘Spoliation Advisory Panel Constitution and Terms of Reference’ (Department for Culture, Media and Sport) <[www.eui.eu/Projects/InternationalArtHeritageLaw/Documents/National-Legislation/UnitedKingdom/sapconstitution09.pdf](http://www.eui.eu/Projects/InternationalArtHeritageLaw/Documents/National-Legislation/UnitedKingdom/sapconstitution09.pdf)> accessed 13 August 2014, §7(a).

suggests that in principle there should be no difference.<sup>35</sup> But different results might follow *on the facts*: for example, because the threat to the victim might be found to have waned once the victim was no longer in the country asserting the threat.

#### 7.2.4.4 Quantum and Recovery of Loss

##### *Emotional suffering*

The emotional bond that might connect a Holocaust victim to a relatively humble chattel might suggest that an element of personal hurt should figure in a claim for damages based on the loss or destruction of the object. It is notable that every Holocaust-related claim in England has related to an existing chattel of which the claimant seeks specific restitution. There has been no claim for compensation or *ex gratia* payment based on the wrongful taking or violation of a chattel that no longer exists. In terms of the SAP this is unsurprising, since the Panel's jurisdiction is limited to cases where the object claimed is currently in the possession of a museum.

Should such a claim be pursued in court, there is no reason in principle why it should not lead to an outcome that reflects in part the claimant's subjective suffering. And if such redress could be awarded where the chattel is destroyed or irretrievably lost, it might also be awarded where the chattel continues to exist but is no longer in the possession of the particular defendant.<sup>36</sup> Such an award might occur where a museum knowingly returns a borrowed work to its lender in open defiance of a legitimate third-party claim by a Holocaust survivor. The museum is liable to the third party in the tort of conversion,<sup>37</sup> but there can of course be no question of specific restitution. Payments might extend both to the market value of the chattel and the emotional suffering inflicted on the true owner in consequence of the chattel being irretrievably lost. A similar result might be justified where the chattel has passed through the hands of successive buyers and re-sellers, all of whom have committed conversion, but none of whom has the current possession of the chattel.

##### *The reasonable hiring charge*

A bailee who, in breach of bailment and in pursuit of his/her own advantage, detains a profit-earning chattel that the bailor normally hires out in the course of business must pay

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35 Donnell Deeny, *Report of the Spoliation Advisory Panel in Respect of Fourteen Clocks and Watches now in the Possession of the British Museum, London* (Spoliation Advisory Panel 2012) <[www.britishmuseum.org/pdf/spoliationreport\\_14clocks\\_2012.pdf](http://www.britishmuseum.org/pdf/spoliationreport_14clocks_2012.pdf)> accessed 13 August 2014.

36 Such a claim could not be brought before the Spoliation Advisory Panel because the Panel's jurisdiction extends only to cultural objects "now in the possession of a UK national collection or in the possession of another UK museum or gallery established for the public benefit" (n 34, §3, emphasis added). It might be appropriate to revisit this issue and to consider whether it should suffice to confer jurisdiction that the museum is in possession of the object when the claim is made.

37 *Marcq v Christie Manson & Woods Ltd* [2004] QB 286.

a reasonable hire charge for the period of the detention.<sup>38</sup> It is arguable that a similar obligation applies where the chattel is of a private character or is, for some other reason, not normally used for profit-earning purposes. It is no defence that the owner would not have used the goods over the relevant period, or that he had substitute goods available for his use during the period of the detention, or that he might not have succeeded in finding a hirer had the goods been returned to him on time, or that the goods have since been returned to the plaintiff, so long as they were under the defendant's control when proceedings commenced. The fact that the detaining bailee has profited from his unauthorised use during the period of detention will not in itself entitle the owner to recover that profit by way of hiring charge, but if the owner suffers some loss that is not met by the rental amount he may recover in respect of this, and in certain cases the gain derived from the breach may be recoverable under other principles.

While there appears to exist no mainstream legal authority concerning a reasonable hiring charge for a work of art or similar chattel, some support for the use of such principles in relation to fine art can be gleaned from a report of the SAP concerning a work on display in a public museum.

In the *Report of the Spoliation Advisory Panel on a Claim relating to a Painting by Jan Griffier the Elder*<sup>39</sup> the SAP found it necessary to quantify the *ex gratia* payment that it should recommend for payment to the descendants of a former owner of the work in question. The work, which had a sufficient association with the Nazi Holocaust to persuade the Panel to recommend a remedy to the descendants of the former owner, had been since 1961 in the collection of the Tate Gallery, from which it could not be legally alienated without legislative change. The Panel emphasised that the claimant's title had long been extinguished and that there was no subsisting legal right to either specific restitution or damages. For that reason the Panel regarded it as inappropriate to recommend the conferment of that category of redress that is identified as 'compensation' in the Panel's Terms of Reference, but did recommend an *ex gratia* payment. The Panel further decided that it was appropriate to recommend payment of that *ex gratia* sum from general public funds rather than from the gallery's own resources.

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38 *Strand Electric and Engineering Co v Brisford Entertainments* [1952] 2 Q.B. 246; *Hillesden Securities Ltd v Ryjak Ltd* [1983] 1 W.L.R. 959; *Gaba Formwork Contractors Pty Ltd v Turner Corp Ltd* (1993) 32 N.S.W.L.R.175 (NSWCA; and see Palmer on Bailment (3<sup>rd</sup> edn 2009) paras 37-01 et seq. Interesting points arise where there is little (if any) reliable evidence as to what the market rental value of a particular chattel would be: see, e.g. *Sinclair v Haynes* [2000] NSWSC 642 (doctrine applied to unlawful detention of a truck specifically modified for horse dentistry); *Nichols Advanced Vehicle Systems Inc v Rees* (No.3) [1988] R.P.C. 71 CA (doctrine could not on the facts be applied to Formula 1 motor-car as no hiring market existed); *Gaba Formwork Contractors Pty Ltd v Turner Corp Ltd* (1993) 32 N.S.W.L.R. 175 (NSWCA).

39 David Hirst, *Report of the Spoliation Advisory Panel in Respect of a Painting now in the Possession of the Tate Gallery* (Spoliation Advisory Panel 2001) <[www.lootedart.com/web\\_images/news/SAP%20Tate%202001.pdf](http://www.lootedart.com/web_images/news/SAP%20Tate%202001.pdf)> accessed 13 August 2014.

In quantifying that amount, the Panel paid primary regard to its current market value, which it broadly assessed at £140,000. That figure was then adjusted to reflect (negatively to the claimants) the expenditure incurred by the Tate in insuring and conserving it and (positively to the claimants) the value to the public of having access to the work over the preceding forty or so years:

[W]e take into account the substantial benefit derived by the Tate and the public from its possession of the work over the past four decades. This benefit would not have been enjoyed had the claimant and his family not been deprived of the work in the circumstances already described.<sup>40</sup>

The global figure that the Panel recommended to the Minister for the Arts (and which the Minister accepted) was £125,000. While the Panel operated with a broad brush, and while this was in no sense a legal case attracting a legal remedy, there are in my opinion clear resonances between the doctrine of the reasonable hiring charge and the inclusion of a sum for public use and benefit in the Griffier case. Precise figures are not available, but it would be impossible to ascribe to the work any figure analogous to rental value that exceeded £10,000 for a forty-year period. On the contrary, the author's recollection is that the Panel favoured no greater figure than £5,000 in respect of this matter.<sup>41</sup> From this, one might conclude (perhaps liberally) that a figure between £125 and £250 per year was considered a fitting sum for public use and enjoyment of the work. It is to be recalled that the party whose enjoyment of the Griffier painting was being valued was the public at large, as compared to a specific individual with a direct and highly personal association with the work and the power to enjoy it exclusively. Even so, one might argue that the greater the number of people enjoying the work, the greater the economic value of the enjoyment.

#### *Effect on title of recovery of full value*

Where a claimant goes to law in a claim based on the wrongful interference with goods and receives from the court damages based on their full value (or accepts a sum by way of out-of-court settlement), the title to the goods generally passes to the defendant when the money is paid.<sup>42</sup> This result, which also followed at common law, can be displaced by agreement. It appears that no such result follows automatically from a ruling by the Panel that the claimant be paid a sum representing the market value of the claimed cultural

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40 Hirst (n 39) §64.

41 The author's recollection is that while expert evidence as to the capital market value of the work was sought in Griffier, no direct evidence was received as of the existence of any rental market, let alone of the rates prevailing in that market. On the other hand, the Panel's membership included several highly experienced museum officials and lawyers, and an economist. That part of the exercise was conducted on an informed but substantially impressionistic basis.

42 Torts (Interference with Goods) Act 1977 section 5.

object, even where the sum is recommended by way of compensation rather than *ex gratia* payment. This is because (at least in most cases) there will be no legal claim. Acceptance of the SAP's ruling may constitute an estoppel against the claimant but in general the effect of such a settlement will depend on the terms of the agreement. It would be interesting to examine the agreements made between claimants and respondent museums in this regard.<sup>43</sup>

Some of these ideas may appear fanciful. To the extent that they relate to proceedings in court, they also turn on the precarious premise that the claimant retains the title to sue. In many instances that will not be the position because the limitation period will have expired. It may be that in time a court will find ways of mitigating the effect of time bars on Holocaust-related claims, though that prospect is uncertain.

#### 7.2.4.5 Architecting a New Structure

Any new panel, whether national or international, private or public, will have to confront some difficult questions. What follows is merely a sample.

##### 7.2.4.5.1 *Is There a Fundamental Principle? What Should It Be?*

One contentious issue is likely to be that of starting principle. Should museums and governments operate from a single (even if rebuttable) premise in Holocaust-related cases? If so, what should that premise be? Candidates for this presumptive tenet might be:

- i. the restitution 'in principle' of all objects taken from victimised subjects during the defined era, as the only true means of reversing the evils of that era, or
- ii. the upholding and preserving of museum collections to the fullest extent that is conscientiously possible, or
- iii. the adaptation of the remedy awarded to the specific facts of the case to ensure, in the terms of the Washington Principles (1998), the attainment of a 'just and fair' solution, i.e. one that is fact-sensitive and does not, by imposing a 'one-size-fits-all' solution, commit the error of treating unlike cases alike.

These are merely a sample. As in other contexts there is no candidate with a monopoly of support. The most controversial principle may be the second. The author has however heard a version of this espoused by a German museum director. The British Museum's policy on the return of human remains states:

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43 Cf the Sachs decision in Germany: Federal Court of Justice Judgment of 16 March 2012 V ZR 279/10, according to which the Restitution Decree for the Land of Berlin does not exclude a claim for restitution according to § 985 BGB, if the confiscated asset went missing after the war and the owner became aware of its whereabouts only after the expiry of the deadline for the registration of a restitution claim. See the very careful article by Nina Neuhaus, 'Claim for the Return of the Sachs Poster Collection' (2012) 18 *Art Antiquity and Law* 17.

While the Human Tissue Act 2004 gave the Trustees of the British Museum the power to deaccession human remains, the Trustees generally presume that the Museum's collection should remain intact.<sup>44</sup>

#### 7.2.4.5.2 *Reaching out Cross Borders: The International Aspect of National Determinations*

At least one national panel has paid regard to determinations reached in other jurisdictions when conducting its own deliberations. The SAP, for example, has consulted the reasoning and conclusions of the Dutch Restitution Committee in two cases: Koenigs in 2007<sup>45</sup> and Glaser in 2009.<sup>46</sup> In the first case it reached a similar conclusion to the Restitution Committee, while in the second the outcome differed from that determined by the Restitution Committee (albeit on variant facts and governing principles).

It would seem fair and just that claimants should expect broadly similar treatment from different jurisdictions. The question therefore arises as to whether there might be other respects in which the process of resolving Holocaust-related claims might be internationalised. What follows is a brief account of some international initiatives that might be ripe for general adaptation in this field.

#### 7.2.4.5.3 *Treatment of Panel Proceedings as a Form of Mediation: The Logical Conclusion*

A question which might usefully receive consideration by all EU states offering out-of-court resolution of Holocaust-related claim is whether (and on what conditions) the recommendations made by national advisory panels should be enforceable under the EU Mediation Directive once the parties have agreed to adopt them. The question of enforcement against a recalcitrant party has not arisen in the UK, largely because institutions have followed the recommendations of the Panel.<sup>47</sup> Even so, it might appear strange if the

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44 British Museum, 'The British Museum policy on human remains' (British Museum) <[www.britishmuseum.org/PDF/HumanRemains.pdf](http://www.britishmuseum.org/PDF/HumanRemains.pdf)> accessed 13 August 2014.

45 David Hirst, *Report of the Spoliation Advisory Panel in Respect of three Rubens Paintings now in the Possession of the Courtauld Institute of Art, London* (Spoliation Advisory Panel 2007) <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/250407/0063.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/250407/0063.pdf)> accessed 13 August 2014; Dutch Restitutions Committee, 'Advice concerning the application for restitution of the Koenigs collection' (RC 1.6, Dutch Restitutions Committee 2003) <[www.restitutiecommissie.nl/en/system/files/Advice%20Koenigs%20collection.pdf](http://www.restitutiecommissie.nl/en/system/files/Advice%20Koenigs%20collection.pdf)>; Dutch Restitutions Committee, 'Recommendation in the case of Koenigs' (RC 4.123, Dutch Restitutions Committee 2013) <[www.restitutiecommissie.nl/en/recommendations/recommendation\\_rc\\_4123.html](http://www.restitutiecommissie.nl/en/recommendations/recommendation_rc_4123.html)> accessed 13 August 2014.

46 David Hirst, *Report of the Spoliation Advisory Panel in respect of eight Drawings now in the Possession of the Samuel Courtauld Trust* (Spoliation Advisory Panel 2009) <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/248231/0757.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248231/0757.pdf)>; Dutch Restitutions Committee, 'Recommendation regarding Glaser' (RC 1.99, Dutch Restitutions Committee 2010) <[www.restitutiecommissie.nl/en/recommendations/recommendation\\_199.html](http://www.restitutiecommissie.nl/en/recommendations/recommendation_199.html)>.

47 The sole exception is the Burrell claim where the institution's legal advisers did not accept that the City of Glasgow had the legal power to return the object in question. In the event the parties reached a financial settlement.

parties' reciprocal acceptance of a recommendation by the Panel were not to benefit from the enforcement machinery available to settlements that derive from conventional mediation. At present however this prospect appears to be a mere speck on the horizon.

#### 7.2.4.5.4 *Requiring Alternative Forms of Redress*

It is in theory possible for a state to accompany its enactment of anti-seizure legislation with the provision of alternative means of resolving a Holocaust-related claim. Such auxiliary resort might be offered by the borrowing state in the shape of an international adjudicatory body (if one existed) or through an adjudicatory body in the country from which the object has travelled and in which it normally resides. A third possibility, an adjudicatory body in the borrowing state itself, would seem to have little value to lenders if it involves the continued presence of the work in the borrowing state until the claim is resolved, and little value to claimants if the power to adjudicate operates after the work has been returned to its lender.

Interestingly, the existence of a spoliation panel in the lender state has on at least one occasion been cited as justification for the acceptance of an immunised loan in the borrower state. The question arose on the occasion of a loan from France to Israel. As Goldstein pungently observes:

The exhibit of stolen artworks from France highlights the moral and constitutional issues raised by Israel's new law. Although this 'collection' of paintings was effectively hidden by the French Government for more than 60 years, the Israeli Minister of Justice was authorized to issue an order preventing claims by victims or their heirs in Israeli courts unless their claims were made immediately. The Minister then promptly issued the order notwithstanding that he was on notice from the lender itself, i.e., the French Government, and also the title of the exhibition, that the property was stolen. His finding that 'adequate' judicial or, actually, '*quasi-judicial*' remedies were available to claimants in France was, presumably, 'tongue-in-cheek' and cynical at best. If an Israeli citizen (Holocaust victim, no less) cannot seek justice from an Israeli court, how could a very slow, non-binding extra-legal procedure mandated in France be 'adequate'? Access to an impartial judiciary for a fair hearing and decision is a fundamental right of any citizen of a democracy generally guaranteed by international treaty and constitution alike.<sup>48</sup> Anything less is, by definition, inadequate. Did the Minister consider why the French Government is unwilling to resolve, either in Israeli or French courts, ownership claims by Holocaust

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48 Probably in Israel also. See Shoshana Berman, 'Protection of Cultural Objects on Loan – The Israeli Perspective' (2007) 13 *Art Antiquity and Law* 129.

victims and heirs to artworks that the French Government admits, indeed asserts, were stolen during the War?

If you think that recourse to a French mediation system involving an adversary claim against the French Government and its museums is an adequate substitute for justice administered by the Israeli judiciary, think about the cost, the complexity, the delay, the language barrier and the distance facing a Holocaust victim who has no choice but to accept the French offer of 'alternative' justice. You might take into account the fact that French commission is winding up its affairs and may no longer be accepting new claims. Consider also that France will not restitute art bought in the open French market by German dealers and collectors (like Hermann Göring) during the war even though the sales were 'forced' by official Nazi action or threats of arrest although other countries in which such acts occurred (e.g., Germany and The Netherlands) have set aside such sales.<sup>49</sup>

#### 7.2.4.5.5 *Up-stream Redress*

An internationally derived solution might be of value in enabling museums to recover up-stream from their own suppliers the money they have paid for a work that they must now disgorge and even to leapfrog over their immediate supplier to some ulterior party who remains extant, solvent and accessible to litigation. It may also help in enabling claimants to proceed directly against an intervening party rather than merely against the current possessor (for example, where the work has declined in value and the intervening party has been unjustly enriched by a profit of the sale that vastly exceeds the current value). Another possibility is that international treatment might enable the pursuit of up-stream or consequential claims when redress is visited on a museum in one country which has directly or indirectly acquired it in good faith from a supplier in another country.

#### 7.2.4.5.6 *To Return to the Matter of Costs...*

The fact that some Holocaust-related objects are of minor economic value but substantial personal importance suggests a need to reappraise certain conventional attitudes in the management of claims. Of course, one cannot tell how many minor-value objects are extant and identifiable, and concern about such items may prove to be disproportionate to the power of public or private agencies to do anything about them, or indeed to the cost of such action if it were in theory viable. But to an extent it may be the very flaws of the existing treatment that make such identification so difficult. Despite the tremendous

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49 Charles Goldstein, 'Protection of Cultural Objects on Loan: the Israeli Perspective' (2008) 13 *Art Antiquity and Law* 361; online version at <[www.commartrecovery.org/sites/default/files/THE\\_ISRAELI\\_PERSPECTIVE\\_AUGUST\\_2008.pdf](http://www.commartrecovery.org/sites/default/files/THE_ISRAELI_PERSPECTIVE_AUGUST_2008.pdf)>, accessed 13 August 2014.

economies and other advantages extended to claimants by the existence of the SAP, the existing regime patently favours those who claim high-value objects. We have seen virtually no instances of claims to items of intense subjective value and high sentimental worth, or indeed of low economic value. Aside from the Rothberger porcelain award of €18,000 (for a single item), the lowest-value claim appears to have been for the Burrell-donated painting *Pate de Jambon*, and the valuation of this plummeted only after its attribution to Chardin had been discredited. While family emblematic status has occasionally been attributed to work claimed outside the SAP (for example, the Von Kalckreuth *Childhood icon*), the conscious ascription of iconic status remains rare. An exception to this being the Van Lier recommendation by the Dutch Restitutions Committee.<sup>50</sup>

One looks in vain for assertions of such iconic status (and for claims for money payments to reflect personal distress at deprivation) in submissions before the SAP. No doubt this is in part because a claim can be brought before the Panel only where the institution is in possession of the claimed work, and in those circumstances, claimants are likely to demand the physical redelivery of the work itself. But there seems no reason in principle why a claim for compensation or an *ex gratia* payment to relieve personal distress might not be combined with a claim for specific restitution, or indeed advanced as an alternative.

This atmosphere of disadvantage to the small-scale victim may be reflected in other corners of our legal system. We have seen that there is an ingrained and justified judicial impatience with litigation that costs more than the value of its subject matter. A sense of proportion in such matters is part of the overriding principle that courts must do justice between the parties. A successful claimant might therefore fail to recover costs from the losing party where the matter at hand could reasonably and more economically have been referred to ADR.

To an extent, the reply to these questions might depend on the form and function of whatever ADR process is devised to mitigate the defects of litigation. The range of choice is potentially wide. The claims body adopted for this purpose might act as:

- i. a mediator, bringing the parties to agreement,
- ii. an adjudicator, imposing an *ex cathedra* determination, as with arbitration,
- iii. another form of neutral third-party facilitator.

An example falling within this third, innominate category is the SAP. This imposes no judgment or award on the parties and does not lead them to agreement, but instead makes recommendations to the Minister for the Arts and the parties. All three of the entities

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50 Case number RC 1.87, see <[www.restitutiecommissie.nl/adviezen/advies\\_187.html](http://www.restitutiecommissie.nl/adviezen/advies_187.html)>.

Dutch Restitutions Committee, 'Recommendation regarding Van Lier' (Dutch Restitutions Committee 2009) <[www.restitutiecommissie.nl/en/recommendations/recommendation\\_187.html](http://www.restitutiecommissie.nl/en/recommendations/recommendation_187.html)> accessed 13 August 2014.

involved – claimant, respondent institution and Minister – are at liberty to adopt or reject such recommendations. It is for others to say whether this is a successful model or not.

#### 7.2.5 *Opportunities for International Cooperation: Private Initiatives*

It would in my judgment be optimistic to expect a significant body of sovereign states to unite by treaty in creating some supra-national claims process, designed either to supplant or supplement existing national bodies, or to act as the determining body for claimants in countries that have no current national process. Even if the need for such a body were accepted in principle, agreement on detail would seem almost impossible. More practical might be the formation of a privately-constituted body which exists independently of international sanction but affords an independent process to which nations and individuals might refer claims. The availability of this process, together with its proven objectivity and independence, might provide a solution for those states which lack either the resources or the political impetus to establish a claims resolution process on their own soil. Drawing on contemporary experience of ADR models in general, and of Holocaust claims panels in particular, the architects of the new body might offer a variety of approaches to claims: arbitration, mediation and conciliation, expert neutral appraisal, binding expert opinion, or the straightforward process of recommendation and moral assessment that lies at the heart of the English regime in this field. Research services might also form part of the overall function. States that are inclined to subscribe to this extra-territorial process might commit themselves by statute or formal agreement to the exclusive reference of claims to that body or might alternatively choose to refer claims on an *ad hoc* basis. For reasons of trust and transparency, it might be advisable for the body to be run on non-profit principles, perhaps under the auspices of a charitable foundation.

### 7.3 CONCLUSION

All those nations that have acceded to the Terezín Declaration of 30 June 2009 have already accepted a responsibility to monitor and adjust their laws and their dispute resolution mechanisms in this field. Article 3 of the Declaration says:

- Keeping in mind the Washington Principles [...] we urge all stakeholders to
- ensure that their legal systems or alternative processes [...] facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and

- make certain that claims to recover such art are resolved expeditiously, and based on the facts and merits of the claims [...]<sup>51</sup>

The simple language of the Declaration belies the complexity of the task which its adherents are urged to address. No less complex are the questions raised in this contribution about the reach and method of such endeavours. They affect all nations and would indeed, to my mind, be better resolved through co-operation or at least conversation at the international level. The European Parliament has said: “This is a cross-border issue calling for a cross-border solution”.<sup>52</sup> But some two thousand years earlier, the Rabbi Tarphon issued a summons that is no less apposite:

The day is short and the work is great [...] You are not required to complete the work, but neither are you free to desist from it.<sup>53</sup>

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51 See also the Declaration of the Vilnius Forum of 5 October 2000 (Appendix 4), which enjoins *inter alia*: that Governments are to undertake every reasonable effort to achieve restitution of cultural assets looted during the Nazi era and the implement the Washington Principles (Art 1); that Governments, museums, the art trade and other relevant agencies are to provide all information necessary to such restitution (Art 2); that each government is to maintain or establish a central reference and point of inquiry to provide information (Art 3); that subscribers accept that there is an urgent need to extend justice and fairness to unidentified former owners and descendants, though there is no universal model for this issue (Art 4); and that Governments are to take part in periodical international expert meetings to exchange views and experiences on the implementation of the Washington Principles and successor instruments, to identify problems and to explore possible remedies within the framework of existing national and international structures and instruments (Art 5). For the Terezín Declaration, see Appendix 6.

52 Willy CEH de Clercq, ‘Report on a legal framework for free movement within the internal market of goods whose ownership is likely to be contested’ (2002/2114(INI), Committee on Legal Affairs and the International Market of the European Parliament 2003) <[www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-2003-0408+0+DOC+PDF+V0//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-2003-0408+0+DOC+PDF+V0//EN)> accessed 13 August 2014.

53 Stephen Weil, ‘The American Legal Response to the Problem of Holocaust Art’ (1999) 4 *Art Antiquity and Law* 285.



# 8 JUST AND FAIR SOLUTIONS: AN ANALYSIS OF INTERNATIONAL PRACTICE AND TRENDS

*Marc-André Renold and Alessandro Chechi*

## 8.1 INTRODUCTION

In 1998, with the adoption of the Washington Conference Principles on Nazi-Confiscated Art, 44 states formally embraced the idea that Holocaust-related claims relating to art should be settled on the merits of each case rather than on the basis of technical legal arguments.<sup>1</sup> Today, some commentators point out that in a certain number of cases museums have not been following their own guidelines (which urge them to be forthcoming with provenance information that could help people trace the history of a contested work of art) and have defeated claimants in the courthouse.<sup>2</sup> Other institutions holding contested art have taken preventive action in order to ‘quiet title’ against possible restitution claims. This is illustrated by the claims made by Martha Nathan’s heirs against the Detroit Institute of Arts and the Toledo Museum of Art, which were respectively in possession of the paintings *Les Bêcheurs* by Van Gogh and *Tahiti Street Scene* by Gauguin.<sup>3</sup> After a two-and-a-half year in-depth joint research, the two museums filed legal claims in their respective jurisdictions seeking declaratory court decisions that they were holding the paintings as rightful owners.<sup>4</sup> The New York Museum of Modern Art (MOMA) and the Solomon R. Guggenheim Foundation have also resorted to the same strategy with regard to two Picassos, *Le Moulin de la Galette* and *Boy Leading a Horse*. In 2007, they brought an action before the District Court of the Southern District of New York seeking a declaratory judgment that Julius Schoeps – a great-nephew of the German Jewish banker and art col-

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1 According to Washington Principle 8: ‘If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case’. See also Appendix 2.

2 P Cohen, ‘Museums Faulted on Restitution of Nazi-Looted Art’ *The New York Times* (New York, 30 June 2013) <[www.nytimes.com/2013/07/01/arts/design/museums-faulted-on-efforts-to-return-art-looted-by-nazis.html](http://www.nytimes.com/2013/07/01/arts/design/museums-faulted-on-efforts-to-return-art-looted-by-nazis.html)> accessed 11 June 2014.

3 *The Detroit Institute of Arts v Claude George Ullin et al* (ED MI 2007) and *The Toledo Museum of Art v Claude George Ullin et al*, 477 F.Supp. 2d 802 (ND OH 2006).

4 Eventually no declaratory judgment of ownership was granted to either museum. ‘Nathan Heirs Drop Claims on Paintings in Toledo and Detroit Museums’ (The Detroit Institute of Arts/Toledo Museum of Art 10 May 2007) <[www.toledomuseum.org/wordpress/wp-content/uploads/Nathan\\_Heirs.pdf](http://www.toledomuseum.org/wordpress/wp-content/uploads/Nathan_Heirs.pdf)> accessed 11 June 2014.

lector Paul von Mendelssohn-Bartholdy – had no claim to the requested paintings because these were not sold under Nazi duress.<sup>5</sup>

This chapter will take stock of these and other developments in order to offer an analysis of the different dispute settlement means available to claimants – litigation before national courts and/or alternative means of dispute resolution (ADR), such as negotiation, mediation, conciliation and arbitration. In addition, the variety of solutions which can be achieved in Nazi-looted art cases through the existing judicial and non-judicial methods of dispute resolution will be considered. This analysis will permit to delineate our understanding of the notion of ‘just and fair solution’ and to examine its potential implications for the future.

## 8.2 METHODS OF DISPUTE SETTLEMENT

### 8.2.1 *Litigation in Domestic Courts*

The initiation of legal proceedings before domestic courts remains the main avenue for the resolution of Holocaust-related art cases. A certain number of reasons can guide a claimant to select court litigation.<sup>6</sup>

First, litigation can be selected for the adjudication of claims in respect to Nazi era art because it terminates with a definitive court determination that can be enforced through the ordinary judicial machinery.<sup>7</sup> Domestic courts have enforcement and sanctioning powers that are non-existent or weak in supranational legal systems and ADR means. Second, litigants may be unwilling to enter into a dialogue with their counterparts. Third, recourse to litigation may exert pressure on the defendant. The initiation of legal proceedings may lead the requested party to abandon an overly legalistic approach and to agree on a negotiated solution. This is proven by the fact that many lawsuits concerning cultural heritage have not been pursued further as the parties have reached an out-of-court settlement.

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5 A Feuer, ‘A Lawsuit Will Determine the Fate of 2 Picassos’ *The New York Times* (New York, 18 December 2007) <[www.nytimes.com/2007/12/18/nyregion/18picasso.html](http://www.nytimes.com/2007/12/18/nyregion/18picasso.html)> accessed 11 June 2014.

6 On this issue, see A Chechi, ‘The Role of Domestic Courts in Resolving Restitution Cases: Unveiling Judicial Strategies for Culture-Sensitive Settlements’ in M-A Renold, A Chechi and AL Bandle (eds), *Resolving Disputes in Cultural Property* (Schulthess 2012) 147-173.

7 The case of the Franz Hals portrait of *Pastor Adrianus Tegolarius* provides a good example. The painting was part of the famous French Schloss collection which was looted by the Nazis in 1943, mainly on behalf of Marshall Goering. The Frans Hals painting was sold in 1989 to Williams, a New York dealer, who was eventually considered guilty of handling stolen property and condemned to a deferred sentence of eight months’ imprisonment. *Demartini v Williams, Tribunal de Grande Instance de Nanterre* (6 July 2001, unpublished).

However, litigation remains a matter of last resort. Individuals, as much as States, go before courts when extra-judicial methods have failed or are not available. The likely worsening of relations, the uncertainty of the outcome and of the expenses involved, as well as the possible embarrassment an adverse ruling could represent, are all considerations that may deter potential claimants from starting a lawsuit before a court. But litigation presents further flaws that can dissuade from bringing an action.

Access to the court system is the first problem. Although several constitutions guarantee the right to bring a claim for the protection of individual rights and legitimate interests, legal action is not always available. For instance, courts may dismiss restitution claims on grounds of lack of jurisdiction on the basis of, *inter alia*, sovereign immunity.<sup>8</sup> In addition, lawsuits may be barred by the expiry of limitation periods.<sup>9</sup> A further barrier to litigation is represented by the burden of having to establish title. The claimant must show that he has a superior right of possession on the object in order to prevail over the alleged good faith possessor. This evidentiary burden could be a huge deterrent for many people – especially non-professional owners – with otherwise valid claims. In the case of Holocaust-related disputes, the problem of proving ownership is obvious. Since more than half a century has passed since the Second World War, evidence is now lost or extremely difficult to collect: many Nazi victims have passed away while those who are still alive, or their descendants, may have no documentation.<sup>10</sup> The enforcement of judgments can also be a

8 An interesting example is provided by the case *Andrew Orkin v The Swiss Confederation and Others*, 09 Civ 10013 (LAK) 770 F.Supp. 2d 612, U.S. Dist Lexis 4357 (2011), U.S. Lexis 24507 (S.D. N.Y. 2011), U.S. App. Lexis 20639 (2011). Andrew Orkin sued the Swiss Confederation, the Oskar Reinhart Foundation and the Oskar Reinhart Collection in the United States in order to recover possession of the drawing *View of Les Saintes-Maries-de-la-Mer*. Orkin alleged that his great-grandmother, Margarethe Mauthner, sold the painting under duress during the Nazi era. The action was dismissed for lack of subject matter jurisdiction on the ground that a court of law can affirm jurisdiction only when the initial taking of an object was committed by a State or a person or entity acting on a State's behalf.

9 All legal systems subject the starting of proceedings to certain time limits which may start from the time of the theft, from the discovery of the location of the object or of the identity of the holder. See Ruth Redmond-Cooper, 'Limitation of Actions in Art and Antiquity Claims' (2000) 5 *Art Antiquity and Law* 185.

10 All these issues are interconnected as illustrated by two cases relating to the same claimant. In May 2009, a District Court in Massachusetts ruled that the Museum of Fine Arts Boston was entitled to retain ownership of the Kokoschka painting *Two Nudes (Lovers)* (*Museum of Fine Arts, Boston v Seger-Thomschitz* 08-10097-RWZ (D.M.A. 2009)). The ruling came in a lawsuit filed by the Museum in 2008 in response to a request for restitution of the painting made by Claudia Seger-Thomschitz. She claimed to be the sole heir of the Reichel family, one amongst the huge number of Jewish families persecuted by the Nazis during the Second World War, and that the Kokoschka's painting was sold under duress in 1939 by Oskar Reichel. In its 2008 filing, the Museum asserted its rightful ownership of the painting based on exhaustive provenance research that the 1939 transaction was valid. Judge Zobel ruled in favour of the Museum, holding that no claim to the painting could be made by Claudia Seger-Thomschitz on the grounds that she waited too long to bring a claim after learning she might have rights to property. 'Massachusetts Judge Rules in favor of Museum of Fine Arts, Boston Regarding Ownership of Kokoschka Painting, Two Nudes (Lovers)' (Museum of Fine Arts Boston 29 May 2009) <[www.mfa.org/news/press-releases/05-29-2009](http://www.mfa.org/news/press-releases/05-29-2009)> accessed 15 August 2013. In July 2009, Claudia Seger-Thomschitz' further claim to a different Kokoschka painting, *Portrait of a Youth*, was dismissed by a court of Louisiana. The court held that the defendant, Sarah Blodgett Dunbar, was the

major drawback. After the issuance of the final decision, the winning party may have to proceed to have the judgment recognised and enforced in a foreign jurisdiction. In addition, resorting to litigation entails considerable economic and human expenses. Litigants may not only suffer the loss of time, but also the burden of paying the legal costs of lengthy proceedings as a consequence of the intricate issues of fact and law involved in transnational cases.<sup>11</sup> Finally, litigation may cause antagonism between the parties and victims. Indeed, courts of law are not equipped to achieve win-win solutions. Rigid adherence to legalistic one-sided stances often hardens into inflexible positions.

### 8.2.2 ADR Methods

The above shortcomings strengthen the appeal of ADR methods such as negotiation, mediation, conciliation and – to a certain extent – arbitration. In effect, a majority of the disputes concerning looted art objects which arose in the past four decades has been settled out of court.<sup>12</sup> In what follows these different options will be considered.

Negotiation is the means more frequently used for the settlement of disputes over the restitution of cultural objects. This is a voluntary, non-binding mechanism that allows the parties to retain control over the process without the intermediation of any neutral third party. As such, it allows like-minded disputants to create win-win solutions, where creative and mutually satisfactory outcomes are envisaged<sup>13</sup> and existing legal obstacles are set aside.<sup>14</sup>

Various instances demonstrate that negotiation has been extensively used with regard to Holocaust-related art.<sup>15</sup> One of the most representative examples is the dispute over Egon Schiele's *Portrait of Wally*.<sup>16</sup> This painting was loaned in 1997 by the Leopold Museum

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rightful owner since she possessed the painting for more than 10 years and therefore owned it by prescription under Louisiana law.

- 11 N Palmer, 'Statutory, Forensic and Ethical Initiatives in the Recovery of Stolen Art and Antiquities' in N Palmer (ed), *The Recovery of Stolen Art* (Kluwer 1998) 1-31, 18-19.
- 12 According to Bazylar, only ten Holocaust-related suits were filed in US courts in the period 1945-1995: MJ Bazylar, 'Nuremberg in America: Litigating the Holocaust in United States Courts' (2000) 34 *University of Richmond Law Review* 1, 165. See also LJ Borodkin, 'The Economics of Antiquities Looting and a Proposed Legal Alternative' (1995) 95 *Columbia Law Review* 377, 403; and CC Coggins, 'A Licit International Traffic in Ancient Art: Let There Be Light!' (1995) 4 *International Journal of Cultural Property* 61, 75.
- 13 I Fellrath Gazzini, *Cultural Property Disputes: The Role of Arbitration in Resolving Non-Contractual Disputes* (Transnational Publishers 2004) 62.
- 14 M Cornu and M-A Renold, 'Le Renouveau des Restitutions de Biens Culturels: les Modes Alternatifs de Règlement des Litiges' (2009) *Journal du Droit International* 493, 517.
- 15 See the examples listed in the database *ArThemis* (available at <www.unige.ch/art-adr>). *ArThemis* was set up in 2011 by the Art-Law Centre of the University of Geneva.
- 16 *United States v Portrait of Wally*, 105 F Supp 2d 288 (S.D. N.Y. 2000), U.S. Dist. LEXIS 18713 No. 99-CV-9940 2000 WL 1890403 (SD NY 28 Dec. 2000), U.S. Dist. LEXIS 6445 (S.D. N.Y. 2002), 663 F.Supp. 2d 232

of Vienna to the MOMA of New York, together with *Dead City*, also by Schiele. The descendants of Lea Bondi Jaray, from which *Portrait of Wally* was illegally taken in 1939, demanded restitution. The MOMA refused, citing its contractual obligation with the Leopold Foundation, and in January 1998 the Manhattan District Attorney subpoenaed both paintings on the grounds that they would be evidence in a criminal investigation as they had been stolen by the Nazis. The New York Court of Appeals voided the subpoena, finding that New York law prohibited the seizure of artworks, even in criminal cases, on the basis of the principle of sovereign immunity. Immediately after the ruling, *Dead City* was returned to Austria, while the Manhattan District Attorney filed a criminal case for *Portrait of Wally* arguing that it had been illegally imported into the USA. Following a 2002 judgment of the Manhattan District Court, litigation reached an 8-year stalemate over the determination as to whether the Leopold Foundation would have to forfeit title to the painting. The case was eventually settled through negotiations in July 2010. The salient terms of the agreement are as follows: (i) the Leopold Museum pays the Estate US \$19 million, (ii) the Estate releases its claim to the painting, (iii) the US government dismisses the civil forfeiture action and (iv) the Leopold Museum permanently displays signage next to the painting that sets forth its true provenance.<sup>17</sup>

When the antagonism between the parties impedes direct negotiations, mediation becomes essential to assist litigants in de-escalating contentiousness. In effect, mediation is the intervention of a neutral third party in a dispute with the limited purpose of assisting the litigants to reach a mutually satisfactory agreement, in a flexible, expeditious, confidential, and less costly manner. The International Council of Museums (ICOM) launched in 2011 the Art and Cultural Heritage Mediation Program, in collaboration with the Arbitration and Mediation Center of the World Intellectual Property Organisation (WIPO) Organisation (WIPO).<sup>18</sup> This resource offers to countries, individuals, institutions and the world's museum community another tool for the resolution of disputes revolving around, e.g. the origin, custodianship and ownership of materials looted by the Nazis.<sup>19</sup>

There are not many publicised mediations relating to Holocaust claims due, *inter alia*, to the confidentiality that mediation guarantees to the parties. In a recent case, however, the litigants resorted to mediation following a court order. This lawsuit was filed in 2010

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(S.D. N.Y. 2009). For the details of the case, see HN Spiegler, 'What the Lady Has Wrought: the Ramifications of the Portrait of Wally Case' (2010) 7 Art & Advocacy, The Art Law Newsletter of Herrick, Feinstein LLP 1.

- 17 'The United States of America, the Estate of Lea Bondi Jaray and the Leopold Museum Settle the Long-Standing Case Involving "Portrait of Wally" by Egon Schiele' (Art Law Group of Herrick, Feinstein LLP 20 July 2010) <[www.herrick.com/sitecontent.cfm?pageID=21&itemID=584](http://www.herrick.com/sitecontent.cfm?pageID=21&itemID=584)> accessed 10 September 2013.
- 18 See 'ICOM and WIPO to Join Forces in Cultural Heritage and Museum Fields' (ICOM 3 May 2011) <<http://icom.museum/press-releases/press-release/article/icom-and-wipo-to-join-forces-in-cultural-heritage-and-museum-fields>> accessed 15 September 2013.
- 19 S Theurich, 'Designing Tailored Alternative Dispute Resolution in Intellectual Property: The Experience of WIPO' in J De Werra (ed), *Resolution of Intellectual Property Disputes* (Schulthess 2010) 175-193.

by the Western Prelacy of the Armenian Apostolic Church against the J. Paul Getty Museum to recover some pages of a medieval manuscript, the Zeyt'un Gospel. The Armenian Church claims that these pages were stolen during the Armenian Genocide. In 2011, a Los Angeles court ordered that the parties spend four months in mediation to try to resolve the dispute.<sup>20</sup> On 3 August 2012, the parties filed a stipulation to inform the court that they were making progress and needed more time to mediate.<sup>21</sup>

Conciliation involves an independent commission or an individual acting as a third party. They do not have political authority over the parties, but they normally benefit from the confidence of the disputants. The task of the conciliator is to investigate the dispute and propose a solution to the parties. Hence, conciliation combines the basic features of mediation and inquiry. This implies a more in-depth study of the dispute as compared to mediation, combined with the independence of the third party as it is found in judicial adjudication, but aiming for amicable settlement in a non-binding manner instead of producing a binding finding. The final report, in fact, can be accepted or rejected.

With respect to Holocaust claims, States have set up non-judicial bodies to resolve these types of disputes. Established since the eruption of the restitution movement at the end of the 1990s, these institutions provide a scheme of resolution that to some extent resembles conciliation. The Spoliation Advisory Panel (SAP) in the United Kingdom (UK) is one such body.<sup>22</sup> This was formed in 2000 by the Minister for the Arts to consider claims from people or their descendants who lost possession of cultural objects during the period 1933-1945 which are now held in national collections. Although its powers are advisory, the Panel has been entrusted with the duty of evaluating the legal and moral aspects of disputes, such as the conduct, the circumstances of the acquisition and the degree of scrupulousness shown by cultural institutions in the acquisition. The SAP's Constitution and Terms of Reference suggest forms of relief for resolving restitution claims alternative to restitution. These include *ex gratia* payments and the enactment of legislation to amend the powers and duties of national museums. Moreover, as the Panel is not bound by the

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20 M Boehm, 'The Getty Museum is in a Legal Fight over Armenian Bible Pages', *Los Angeles Times* (Los Angeles, 4 November 2011) <<http://articles.latimes.com/2011/nov/04/entertainment/la-et-armenian-bible-20111104>> accessed 11 June 2014.

21 In October 2012, the Los Angeles County Superior Court agreed to follow a joint stipulation filed by the Getty Museum and the Western Prelacy of the Armenian Apostolic Church by ordering a suspension of the case pending the outcome of *Cassirer v Thyssen-Bornemisza Collection Foundation*, which focuses on the same statute of limitations relied on by the Armenian Church. R A St. Hilaire, 'Cassirer Case Stays the Dispute Between the Getty and Armenian Church over the Zeyt'un Gospel Pages' (*Cultural Heritage Lawyer Rick St. Hilaire*, 25 October 2012) <[http://culturalheritagelawyer.blogspot.ch/2012\\_10\\_01\\_archive.html](http://culturalheritagelawyer.blogspot.ch/2012_10_01_archive.html)> accessed 15 September 2013.

22 The others are the *Kommission für Provenienzforschung* (Austria), the *Commission pour l'indemnisation des victimes de spoliations* (France), the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War (the Netherlands) (hereinafter 'Dutch Restitutions Committee') and the *Beratende Kommission* (Germany).

legal rules of evidence, it can consider facts that a court of law might not be able to access. It follows that the Panel offer a level of flexibility that cannot be achieved through litigation. It must be underlined, however, that the panel makes no attempt to explore with the parties themselves the reaching of any agreement. The pronouncements of the panel are delivered *ex cathedra* and are ‘non-negotiable’.<sup>23</sup>

Arbitration is one of the principal non-forensic methods of settling international disputes very often used in the fields of international trade and investments. The parties to a dispute can settle their controversy by arbitration if they rely on an arbitration clause contained in a general undertaking (such as a treaty or a contract) or by stipulating a specific submission agreement (*compromis*). Notwithstanding the form that it can take, the primary benefit of arbitration resides in the parties’ power to shape the process to fit their needs. Disputants can agree, *inter alia*, on the selection of one or more arbitrators, the applicable law and the rules of evidence to be applied.<sup>24</sup> Litigants can also include clauses which allow arbitrators to decide according to ‘equity’, ‘good conscience’ as well as principles other than those embodied in the rules of the selected system of law.

In light of the above considerations, arbitration could be considered as a suitable technique to facilitate the settlement of Holocaust-related art disputes. However, to our knowledge, only one Holocaust-related case has been settled through arbitration thus far. This involved six paintings by Gustav Klimt, which were confiscated by the Nazis in 1938 from Ferdinand Bloch-Bauer, the Jewish uncle of the claimant, Maria Altmann. In 1998, Maria Altmann brought suit in the United States against the Republic of Austria and the Austrian National Gallery.<sup>25</sup> However, the case was not resolved with a judicial decision. The parties reached an agreement to end the litigation and submit the dispute to arbitration in Austria. Pursuant to the agreement, the panel of three Austrian arbitrators applied Austrian substantive and procedural law. With an award rendered in January 2006,<sup>26</sup> the arbitration panel ruled that Austria was obliged to return five Klimt masterpieces to Maria Altmann, as the sole descendent of Ferdinand Bloch-Bauer.

In light of the foregoing analysis, there are grounds to affirm that ADR methods provide the necessary flexibility for handling Nazi era art claims and facilitating consensual, mutually satisfactory settlements.<sup>27</sup> This is so also because these techniques are available at any time, either together with, or as a part of, other processes. For instance, negotiations often run parallel to lawsuits.

23 N Palmer, ‘The Spoliation Advisory Panel and Holocaust-Related Cultural Objects’ in M Weller, N Kemle and T Dreier (eds), *Raub – Beute – Diebstahl* (Nomos 2013) 119-140, 121.

24 N Palmer, *Art Loans* (Kluwer Law International and International Bar Association 1997) 373.

25 *Maria Altmann v Republic of Austria*, 142 F. Supp. 2d 1187 (C.D. CA 2001), *aff’d*, 317 F. 3d 954 (CA9 Cir. 2002), *as amended*, 327 F. 3d 1246 (2003), 541 U.S. 677 (2004).

26 With a second award of May 2006, the panel ruled that the sixth painting (*Amalie Zuckermandl*) had not been confiscated by the Nazis and could thus remain in Austria.

27 N Palmer, *Museums and the Holocaust: Law Principles and Practice* (Institute of Art and Law 2000) 107.

Nevertheless, it must be acknowledged that ADR methods are characterised by some important shortcomings. The first is the voluntary essence of ADR mechanisms. Indeed, outside the realm of contractual disputes, litigants may be reluctant to resort to negotiation, mediation or arbitration in the absence of significant incentives.<sup>28</sup> It can often be the case that a party has no interest in going into arbitration as long as they cannot be brought in via litigation. They would rather ignore the claim or rely on their rights under the general law of possession and ownership. This problem is illustrated by the *Altmann Case*, where the Republic of Austria rejected the initial proposal of Maria Altmann to submit the dispute to arbitration. The same holds true as regards negotiation and mediation. Another aspect of this problem is that negotiation and mediation do not guarantee that a final accord is achieved and subsequently enforced given the lack of a mechanism by which parties can be compelled to honour the settlement. An illustration of this problem is the case of the painting *Dedham from Langham* by John Constable. The *Musée des Beaux-Arts* of the city *La Chaux-de-Fonds* in Switzerland received this painting through a donation in 1986. In 2006, city authorities were contacted by Mr Alain Monteagle as the representative of the heirs of John and Anna Jaffé, who claimed the restitution of the painting on the grounds that it had been the object of a forced sale by the Nazis in Nice in 1942. After a careful examination of the case on the basis of the information provided by the claimants, the city authorities refused restitution. Although they recognised that the painting had been unlawfully taken by the Nazis and acknowledged the importance of the ideals underlying the 1998 Washington Principles, they decided that the restitution claim was to be rejected on legal grounds. The city maintained that the success of a claim for restitution by the applicants relied primarily on evidence of bad faith. Yet, in the absence of such a demonstration, the city had become the owner of the painting by acquisitive prescription in 1991, which is after five years after the 1986 donation, pursuant to Article 728(1) of the Swiss Civil Code.

Another drawback is that ADR methods are not always less costly and less time-consuming than litigation. This is certainly true as far as negotiation is concerned. Instead, this benefit is not always attainable by resorting to arbitration. The whole arbitration process, including the recognition and enforcement of the award, is not always expeditious. In part, these explain the marked contrast between the rarity of arbitrated settlements and the abundance of negotiated agreements.

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28 Gazzini (n 13) 124-125.

### 8.3 TOWARDS 'FAIR AND JUST' SOLUTIONS

Domestic courts dealing with Holocaust-related claims may have to apply procedural and substantive norms that might frustrate the legitimate claims of the victims of Nazi persecution or their heirs. As such, litigation may generate antagonisms and deepen sorrow. By way of contrast, ADR are attractive methods to facilitate consensual and mutually satisfactory settlements. Therefore, it is not surprising that the non-binding statements adopted to guide the resolution of claims over cultural objects misappropriated during the Second World War advocate the use of such methods. For instance, the principles adopted on the occasion of the Washington Conference on Holocaust-Era Assets impose upon States a moral commitment to assist the return of stolen artworks to their original owners.<sup>29</sup> In particular, whereas Principles 8 and 9 affirm that “steps should be taken expeditiously to achieve a just and fair solution”, Principle 11 establishes that “Nations are encouraged to develop [...] alternative dispute resolution mechanisms for resolving ownership issues”.

Consequently, the question arises as to the meaning of the notion of ‘just and fair solution’. In our opinion, the Washington Principles identify clearly the most important procedural and substantial conditions that should be taken into account to achieve such ‘just and fair’ solutions. First, Holocaust-related disputes should be dealt with ‘*expeditiously*’ and ‘*impartially*’ by an accessible body with a ‘*balanced membership*’ of experts. Second, such a body should deal with disputes by setting aside statutory time limitations and taking into account the specific facts and circumstances surrounding it. This appraisal should permit to verify, *inter alia*, whether there is sufficient evidence as to the provenance of the requested object – and thus about its confiscation by the Nazis – at the time of the acquisition by the requested possessor, and whether pre-War owners and their heirs have diligently attempted to find and identify their possessions.

In sum, our argument is that restitution requests are legitimate and should not be rejected provided (1) that there is evidence that the requested object was confiscated by the Nazis (either through theft, confiscation or coerced sale), (2) that the requesting party has shown a sufficient degree of scrupulousness in tracing and recovering such property and (3) that it is irrespective of whether the object leaves a public exhibition to return in private hands.

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29 On the initiative of the United States, the conference took place in December 1998 in order to find a general solution to the problem of the cultural assets looted by the Nazis (Appendix 2). See also Resolution No. 1205 (1999) on Looted Jewish Cultural Property of the Council of Europe Parliamentary Assembly (Appendix 3); the Vilnius Declaration issued as a result of the International Forum on Holocaust Era Looted Cultural Assets of 2000 (Appendix 4); Resolution A5-0408/2003 of 17 December 2003 of the Legal Affairs and Internal Market Committee of the European Parliament (Appendix 5); and the Terezín Declaration on Holocaust Era Assets and Related Issues adopted at the Holocaust Era Assets Conference convened under the auspices of the European Union and of the Czech Presidency in 2009 (Appendix 6).

Against this background, the present section offers a catalogue of some of the ‘fair and just solutions’ that both litigation and ADR methods – notwithstanding their respective advantages and drawbacks – can permit to achieve in Holocaust-related art cases. In other words, this survey will permit to show, first, how and to what extent litigants can benefit from the flexibility and creativity of ADR means and, second, that even domestic courts can render culture-sound verdicts.

The following categorisation, it should be noted, is non-exhaustive:

1. *Outright restitution*. This option appears to be the simplest and occurs when the claimant convinces the other party of the need for a restitution of the cultural object in question or when the return is recommended or ordered by a third-party authority.<sup>30</sup> A typical case is the restitution of the five Klimt paintings ordered by the arbitral tribunal in Austria in the *Altmann* Case. Another example occurred in Switzerland in 2000 and concerned the painting *Nähsschule – Arbeitssaal im Amsterdamer Waisenhaus* by Max Lieberman. This artwork belonged to Max Silberberg, a Jewish art collector. In 1934, he was forced to sell it due to the financial pressure under the growing persecution of Jews at the prelude to the Second World War. In 1992, the painting was bequeathed to the Art Museum in Chur. As a result, Gerta Silberberg-Bartnitzki, daughter-in-law and sole heir of Max Silberberg, demanded restitution demonstrating that the painting was sold under Nazi duress. After careful consideration of available evidence, the Art Museum in Chur agreed to relinquish the artwork in 2000.<sup>31</sup>
2. *Restitution with subsequent repurchase*. This scenario is exemplified by the case of the painting *Madonna and Child in a Landscape* by Lucas Cranach the Elder.<sup>32</sup> This artwork was donated to the North Carolina Museum of Art in 1964. In 1999, the Museum received a letter from the Commission for Art Recovery of the World Jewish Congress detailing evidence that the painting had been confiscated by the Nazis from the Viennese collector Philipp von Gomperz. It also indicated the names of the claimants: two elderly Austrian sisters – Marianne and Cornelia Hainisch. The Museum investigated the provenance of the Cranach in order to verify the Nazi connection. Subsequently, the museum returned the painting and did so without forcing the heirs to prove their claim in court. Gomperz’s heirs did not even have to hire a lawyer. They were so contented with the museum’s response that they agreed to sell the painting back to the museum

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30 Sometimes the restitution can be subject to conditions, which resembles the case of donations with obligations or conditions attached.

31 AL Bandle, R Contel, M-A Renold, ‘Nähsschule – Max Silberberg Heirs and Bündner Kunstmuseum Chur’ (*ArThemis – Art-Law Centre University of Geneva* March 2012) <<https://plone.unige.ch/art-adr/cases-affaires/nahschule-2013-max-silberberg-heirs-and-bundner-kunstmuseum-chur>> accessed 11 June 2014.

32 A Chechi, R Contel, M-A Renold, ‘Madonna and Child in a Landscape – Philipp von Gomperz Heirs and North Carolina Museum of Art’ (*ArThemis – Art-Law Centre University of Geneva* January 2012) <<https://plone.unige.ch/art-adr/cases-affaires/madonna-and-child-in-a-landscape-2013-north-carolina-museum>> accessed 11 June 2014.

at a substantially below market price, reflecting a sort of partial donation because ‘the public should know that the heirs of Philipp Gomperz appreciate the sense of justice shown by the [museum’s] decision to reconstitute the painting’.<sup>33</sup>

3. *Compensation.* In this respect, apart from the *Portrait of Wally* case outlined above, one must refer to the UK SAP. The recommendations that this Panel is empowered to make include the restitution of an object, compensation or an *ex gratia* payment. The Advisory Panel has construed ‘compensation’ as the redress granted to a claimant with an enduring legal right to the object and ‘*ex gratia* payment’ as the redress applicable where there is no such legal right.<sup>34</sup> The first case in which the Panel awarded an *ex gratia* payment was decided in 2001. This concerned the painting *View of Hampton Court Palace* by Jan Griffier the Elder held by the Tate Gallery. The resolution was acceptable to the claimants and to the Tate Gallery.<sup>35</sup> Another case decided by the SAP concerned the painting *Pâté de Jambon* by Jean-Baptiste-Siméon Chardin. This painting was the object of a forced sale in 1936. The owners, the Jewish shareholders of an art gallery, were forced to sell the artwork to meet an unfair Nazi tax demand. The painting ended up in the collection of the Glasgow City Council. The heirs of the Jewish shareholders approached the Council in 2001 demanding restitution or compensation. By mutual consent, the parties referred the case to the Panel which recommended restitution. However, the case was resolved in a different way – the families accepted £10,000 from the Council for the painting to remain in Glasgow.<sup>36</sup>
4. *Sale to a third party.* This solution entails that the parties agree to sell on the market the actual claimed work of art in order to divide the proceeds of the sale. This case can be illustrated by referring to a decision of another national body, the Dutch Restitutions Committee. In 1935, Nazi authorities took the painting *Road to Calvary* by Brunswijker Monogrammist from Jakob and Rosa Oppenheimer. The painting resurfaced in 2006 when a Dutch citizen brought it to Sotheby’s determined to sell it. Having finally discovered the location of the painting thanks to Sotheby’s tipoff,<sup>37</sup> the Oppenheimers did not ask for the painting’s restitution. Instead, they demanded a proportion of the prospected sale proceeds, the amount of which was, however, disputed. Therefore, the parties submitted a joint request to the Dutch Minister for Education, Culture and

33 E Yellin, ‘North Carolina Art Museum Says It Will Return Painting Tied to Nazi Theft’, *The New York Times* (New York, 6 February 2000) <[www.nytimes.com/2000/02/06/us/north-carolina-art-museum-says-it-will-return-painting-tied-to-nazi-theft.html](http://www.nytimes.com/2000/02/06/us/north-carolina-art-museum-says-it-will-return-painting-tied-to-nazi-theft.html)> accessed 11 June 2014.

34 Palmer (n 23) 119-140.

35 *ibid* 130.

36 C Renold, AL Bandle, R Contel, M-A Renold, ‘Pâté de Jambon – Anonymous German Heirs and Glasgow City Council’ (*ArThemis – Art-Law Centre University of Geneva* March 2012) <<https://plone.unige.ch/art-adr/cases-affaires/pate-de-jambon-2013-anonymous-german-heirs-and-glasgow-city-council>> accessed 11 June 2014.

37 The Oppenheimer heirs had previously inscribed the painting in two public registers of looted art: the Art Loss Register and the Lost Art Register.

Science to have the dispute settled by the Restitutions Committee. In May 2010, the Committee issued its binding advice according to which the heirs shall be entitled to a one-third share of the sale proceeds.<sup>38</sup>

5. *Loan*. Long-term or temporary loans are a common option in this field. When no simple or conditional restitution can be envisaged, the parties may agree to the loan of cultural objects either to a third party or to the claimant.<sup>39</sup> The case of the painting *Blumengarten (Utenwarf)* by Emil Nolde is illustrative. This painting was stolen in 1939 by the Nazis, together with other assets, from Otto Nathan and Bertha Deutsch. The painting was acquired by the Moderna Museet of Stockholm in 1967. But the heirs were informed of its location from the Nolde Foundation in Seebüll only in the late 1970s. In spite of this, the Deutsch family addressed a restitution request to the Museum only at the beginning of the 2000s. Noticeably, in their letter they referred to the Washington Principles. The Museum in turn referred the claim to the Swedish Government. In return, this action “assigned Moderna Museet with the task of coming to a settlement with the heirs, in line with the Washington Conference”.<sup>40</sup> The parties reached a settlement in 2009.<sup>41</sup> The agreement is interesting in that it provides for the sale of the painting to an undisclosed third party, which then would lend it to the Museum. The loan was limited to five years, at which time the Museum would receive on loan from the same collector another Expressionist painting for another five-year term.<sup>42</sup>
6. *Co-ownership or co-possession*. In legal proceedings concerning the Degas painting *Landscape with Smokestacks*, which was looted by the Nazis and subsequently purchased by a US collector, the parties eventually agreed to the following arrangement: the collector gave half of the painting to the Art Institute of Chicago and the other half to the descendants of the family from which it had been looted, with an option for the museum

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38 Dutch Restitutions Committee, ‘Binding Advice Concerning the Dispute over the Painting *Road to Calvary*’ (3 May 2010) <[www.restitutiecommissie.nl/en/recommendations/recommendation\\_395.html](http://www.restitutiecommissie.nl/en/recommendations/recommendation_395.html)> accessed 21 September 2013.

39 For example, in the UK museums are debarred by law from disposing of artefacts belonging to their collection. Thus, the restitution of looted property would require an amendment to the law, which could be a lengthy process.

40 ‘Emil Nolde’ (Moderna Museet) <[www.modernamuseet.se/en/Moderna-Museet/PressRoom/Press-releases/Stockholm1/Press-Release-in-re-settlement-Blumengarten/Emil-Nolde](http://www.modernamuseet.se/en/Moderna-Museet/PressRoom/Press-releases/Stockholm1/Press-Release-in-re-settlement-Blumengarten/Emil-Nolde)> accessed 11 September 2013.

41 Negotiations were difficult as the parties could not agree on a solution which would bring an end to the dispute. The heirs suggested several compromises, including an offer to pay the Museum’s purchase price from 1962, or 75% of its actual market value (which was about EUR 3 million), in exchange for restitution. The Museum in turn proposed to transfer the ownership title to the heirs, provided the painting remains in the museum for a long-term loan, or to sell it and split the received amount. T Eriksson, ‘Nittve Keeps Painting Worth Millions’ *Fokus* (Stockholm, 13 March 2009) <[www.comartrecovery.org/sites/default/files/Nittve.pdf](http://www.comartrecovery.org/sites/default/files/Nittve.pdf)> accessed 15 September 2013.

42 AL Bandle, R Contel and M-A Renold, ‘Blumengarten – Deutsch Heirs and Moderna Museet Stockholm’ (*ArThemis – Art-Law Centre University of Geneva* June 2012) <<https://plone.unige.ch/art-adr/cases-affaires/blumengarten-2013-deutsch-heirs-and-moderna-museet-stockholm>> accessed 11 June 2014.

to purchase the second half of the painting by paying half of the painting's value based on a valuation agreed by both parties. These were the terms of an out-of-court settlement reached by the parties in August 1998.<sup>43</sup>

Another interesting example relating to co-ownership can be found in The Hague. For historical reasons, the painting *The Marriage of Tobias and Sarah* by Jan Steen (also known as *The Wedding Night of Tobias and Sarah*) was co-owned by both the city of The Hague and by the descendant of Mr Goudstikker, Mrs Von Saher. Very recently this co-ownership was dissolved by a binding opinion of the Dutch Restitutions Committee.<sup>44</sup> In the end Mrs Von Saher sold her part to the city of The Hague for a non-disclosed price, probably based on the figures that were given by the commission in its binding opinion.

These examples show that sometimes imaginative solutions can be found with respect to the actual ownership status of the work of art at stake.

#### 8.4 CONCLUSIONS

There have been discussions for some time about the need to set up a specific body for the resolution of international disputes relating to Nazi-looted art. In 2003, for instance, the Permanent Court of Arbitration (PCA) convened a Seminar on the 'Resolution of Cultural Property Disputes'.<sup>45</sup> On this occasion, some specialists, such as Owen Pell, advocated the establishment of a specialised arbitral chamber at the PCA.<sup>46</sup> In the following years, others argued in favour of the establishment of an international tribunal.<sup>47</sup> However, the conditions for this and other institutional undertakings have not yet been met.<sup>48</sup> This means that

43 M Cornu and M-A Renold, 'New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution' (2010) *International Journal of Cultural Property* 1, 21-22.

44 Restitutions Committee, 'Binding Advice Concerning the Dispute over *The Marriage of Tobias and Sarah* by Jan Steen' (6 October 2008) <[www.restitutiecommissie.nl/en/recommendations/recommendation\\_393.html](http://www.restitutiecommissie.nl/en/recommendations/recommendation_393.html)> accessed 23 September 2013.

45 International Bureau of the Permanent Court of Arbitration (ed), *Resolution of Cultural Property Disputes* (Kluwer Law International 2004).

46 O Pell, 'Using Arbitral Tribunals to Resolve Disputes Relating to Holocaust-Looted Art' in International Bureau of the Permanent Court of Arbitration (ed), *Resolution of Cultural Property Disputes* (Kluwer Law International 2004) 309, 317. See also BW Daly, 'The Potential for Arbitration of Cultural Property Disputes: Recent Developments at the Permanent Court of Arbitration' (2005) 4 *The Law and Practice of International Courts and Tribunals* 261.

47 J Anglim Kreder, 'Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes: Creation of an International Tribunal' (2008) 13 *Art Antiquity and Law* 243; and R Keim, 'Filling the Gap Between Morality and Jurisprudence: The Use of Binding Arbitration to Resolve Claims of Restitution Regarding Nazi-Stolen Art' (2002-2003) 3 *Pepperdine Dispute Resolution Law Journal* 295.

48 For a general overview, see A Chechi, 'Evaluating the Establishment of an International Cultural Heritage Court' (2013) 18 *Art Antiquity and Law* 31.

today Holocaust-related disputes can only find their outcome on a case-by-case basis through the various dispute resolution processes discussed above.

Because of the drawbacks of such different mechanisms, it might seem advisable to suggest a flexible and non-bureaucratic approach to the matter. In our view, under these conditions, one should perhaps consider the setting up of an *international platform for the resolution of Holocaust art restitution claims*. What we have in mind is not a new international court, not a new arbitral institution, not a new national or international commission, but an informal structure whose goal it would be to help Holocaust victims or their descendants to communicate, to exchange and to deal with their restitution requests in light of the experience of others. Such an international platform would take stock on the rich experience of the national commissions established so far in France, the Netherlands, the UK, Austria and Germany, as well as of the specialised bodies created by Jewish organisations, such as the Commission for Art Recovery and the Commission for Looted Art in Europe.

In a slightly different context and from a more specific cultural heritage perspective, such a platform has been suggested by the Geneva Declaration passed on 11 February 2011 at the conclusion of an international Symposium on cultural heritage restitution issues. The Declaration states that:

A « platform » for the resolution of conflicts should be set up in order to encourage the arbitration, mediation, conciliation or negotiation, assisted or not, between the parties to conflicts relating to claims for the return or restitution of cultural property;

The basis of such a platform should be as broad as possible, enabling decision makers to solve conflicts relating to such claims, taking into consideration all parameters relating to the particular case at hand;

Such a platform should cooperate actively with the international organisations and institutions, specialised or not, which deal with the resolution of conflicts in this field and have already set up similar structures.<sup>49</sup>

We believe such a proposal could be of use in the field of Holocaust-art restitution claims.

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49 The complete text of the Geneva Declaration can be found at: <[www.unige.ch/communication/archives/2011/patrimoine-declaration-geneve/Geneva-Declaration20110211.pdf](http://www.unige.ch/communication/archives/2011/patrimoine-declaration-geneve/Geneva-Declaration20110211.pdf)> accessed 4 September 2014.

## 9 KEY ELEMENTS OF JUST AND FAIR SOLUTIONS

*The Case for a Restatement of Restitution Principles*

Matthias Weller

### 9.1 INTRODUCTION

We all know Hercules – the amazingly strong hero of ancient Greece. We also know Hercules as the great judicial hero of Ronald Dworkin’s *Law’s Empire*<sup>1</sup> – a contribution to legal theory that has become one of the most powerful theories of jurisprudence in modern times. It is a theory about how judges should decide cases. This theory takes law as the expression of justice and fairness because the theory supposes that law grounds on certain principles of justice and fairness. And if a judge wants to achieve a just and fair solution in a particular case, he or she must, firstly, identify these principles by interpreting the law and, secondly, must apply the law in light of these principles to a new case. Thereby the judge produces decisions which are consistent with the underlying principles of justice and fairness, and are coherent with previous decisions.

Dworkin acknowledges that the judge’s task of interpretation and the identification of the principles of justice that underlie the law, and the interaction of the results of this task in cases of conflict, is a Herculean task as the judge needs to take into account a great variety of aspects of a rule of law and previously decided cases in order to have the full picture. But suppose we could convince Hercules to become a judge and proceed as Dworkin suggests, then Hercules, and unfortunately only Hercules, would be able to achieve a truly just and fair solution in each and every case, including extremely hard cases.

I am not so sure about what would have been Dworkin’s view<sup>2</sup> on the Washington Principles in that respect. Washington Principle No. 8 requires steps “to achieve a just and fair solution”.<sup>3</sup> There is no more guidance on the question of what constitutes a just and fair solution. There are no rules of law. There are no principles of substantive justice and

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1 Ronald Dworkin, *Law’s Empire* (Harvard University Press 1986).

2 Dworkin died on 14 February 2013.

3 The Washington Conference on Holocaust Era Assets, Washington, DC, 3 December 1998 <[www.state.gov/p/eur/rt/hlcst/122038.htm](http://www.state.gov/p/eur/rt/hlcst/122038.htm)> accessed 7 January 2014; Washington Conference Principles on Nazi-Confiscated Art; Principle No. 8 reads in full text: “If the pre-war owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case”. See also Appendix 2.

fairness agreed upon by the Signatory States of the Washington Principles. How should a judge, or a restitution commission or panel, then get to the principles of justice and fairness that enable them to achieve a just and fair solution in a particular case? Currently, the only way seems to be that these judges, commissions and panels themselves develop plausible principles of justice and fairness. However, this task is too big even for Hercules. Hercules would need to be supersized in order to enable him to clean the Augean stables of the injustice of Nazi crimes, solely on the basis of the general and totally abstract rule that “just and fair solutions should be achieved”.

Therefore, the starting point is, from a theoretical point of view in jurisprudence, that achieving just and fair solutions is particularly difficult under the Washington Principles.

## 9.2 ELEMENTS OF SUBSTANTIVE JUSTICE AND FAIRNESS

Let me illustrate these difficulties with some examples. Of course, I cannot deliver the full picture within a few lines – obviously and perhaps more obviously than other persons, I am not Hercules! I can only focus on very few selected elements or questions of justice that appear to be of particular interest for further discussion at the moment. Let me start with elements of substantive justice in the first part of my paper, and in the second part I will address elements of procedural justice.

### 9.2.1 *Restitution or Compensation?*

A first element of substantive justice and fairness is the question whether restitution or compensation should be granted. The difficulties of achieving just and fair solutions on this question may be illustrated by the following hypothetical case:

A persecuted person in Germany, for example a leading member of the Communist Party, was the heir of an art dealer and collector who had died prior to 1933. The heir had declared to family, friends and colleagues many times before and after 1933 that they wanted to sell the inherited works of art in order to finance the political resistance against the Nazi regime. However, due to political persecution by the Nazi regime the paintings and many other assets were lost. One of these paintings is now in a public museum. Should the painting be restituted or should this loss be compensated by money?

If we look at the German *Handreichung*, the Guidelines or ‘Manual’, issued by the Commissioner to the German Federal Government for Culture and Media for resolving disputes

over Nazi-looted art in implementation of the Washington Principles,<sup>4</sup> the answer is quite clear. The Guidelines seek to build on the old post-war legislation of the Allied Forces on the indemnification of victims of persecution. The painting would have been restituted under Military Law No. 59,<sup>5</sup> and therefore it should be restituted by the Museum today. In addition, it is a principle of justice and fairness under general German law that restitution, if it is technically possible, has always a priority over compensation. As a matter of principle, compensation is only considered the second best solution; but this is a principle that other legal orders do not follow to the same extent. And if we look at the true interests of the persecuted person in our case, is this interest not about money rather than about art? Therefore, would it not be an even better service for justice to grant compensation, and if so, what should the amount of this compensation be – market value at the time of the loss? Including compound interest? Market value today? There are no guiding principles of justice on all of these issues from the Washington Principles. Hercules would now have to assess previous decisions by commissions and bodies on that issue, if there are (already) any, as well as the guiding principles of the leading legal orders as a comparative measure – a more than Herculean task indeed.

### 9.2.2 *Quality of the Causal Link between Persecution and Loss?*

Another question of justice would be the following: How does the quality of the causal link between persecution and loss affect the solution of a particular case?

Let us assume that a Jewish family suffers from persecution but is able to transfer some assets, including a painting, to third states outside the range of power of the Nazi regime, perhaps to Switzerland or England. The Jewish family follows shortly afterwards. The family is now safe but has no income or other assets, and therefore the painting is put up for auction and receives a market price at Luzern or London. Today, the painting is in a museum. What is a just and fair solution in this case?

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4 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 19 vom Februar 2001, überarbeitet im November 2007' (Otterbach Medien KG GmbH & Co, May 2013) <[www.lostart.de/Content/09\\_Service/DE/Downloads/Handreichung.pdf?\\_\\_blob=publicationFile](http://www.lostart.de/Content/09_Service/DE/Downloads/Handreichung.pdf?__blob=publicationFile)> accessed 7 January 2014.

5 'United States – Military Government, United States Area of Control, Germany: Law No. 59: Restitution of Identifiable Property' (1948) 42 American Journal of International Law 11.

This is not a hypothetical case. The UK Spoliation Advisory Panel's (SAP) recommendation of March 2012 had to deal with such a case.<sup>6</sup> The German Advisory Commission had to deal with a comparable case in its first recommendation of January 2005.<sup>7</sup> Comparing the two recommendations, two quite different solutions emerge.

The UK SAP had to decide in respect to 14 clocks and watches now in the possession of the British Museum. The Panel held that the sale was a forced sale in the sense that Nazi persecution caused the sale. Nonetheless, the Panel considered "that the sale is at the lower end of any scale of gravity for such sales. It is very different from those cases where valuable paintings were sold, for example, in occupied Belgium to pay for food".<sup>8</sup> Therefore, the Panel held that the claim was, despite the impact of the Nazi era on the claimant's circumstances, insufficient to justify restitution or even an *ex gratia* payment. Rather, the Panel recommended the display alongside the objects of their history and provenance with special reference to the claimant's interest therein.

The German Advisory Commission had to decide the case of Julius Freund. Julius Freund had transferred the paintings in question to Switzerland in 1933 and had emigrated to London in 1939, where he died in 1941. In 1942, his family put the paintings in Luzern up for auction in order to have money to live. The German Advisory Commission recommended the restitution of the paintings to the heirs.

Unlike the UK SAP, the German Advisory Commission did not give any reason for its recommendation. We can only speculate that the underlying substantive principle of justice could be that any causal link between Nazi persecution and a sale suffices to recommend restitution – at least if the conditions for restitution under Military Law No. 59 would have been fulfilled because the Guidelines of how to deal with claims seek to continue the principles of the old post-war legislation by the Allied Forces. According to Military Law No. 59, the conditions for restitution were only the following: (1) persecution and (2) transfer of property in a sale. If these conditions were met, there would be a presumption of a forced sale. This presumption could be rebutted by showing (a) that the vendor received a fair market price, (b) that he could freely dispose of the proceeds and, (c) in case of sales after 15 September 1935 which is the date of entering into force of the Nuremberg laws,

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6 D Deeny, *Report of the Spoliation Advisory Panel in Respect of Fourteen Clocks and Watches Now in the Possession of the British Museum*, London (The Stationary Office 2012) <[www.gov.uk/government/publications/report-of-the-spoliation-advisory-panel-in-respect-of-fourteen-clocks-and-watches-now-in-the-possession-of-the-british-museum-london](http://www.gov.uk/government/publications/report-of-the-spoliation-advisory-panel-in-respect-of-fourteen-clocks-and-watches-now-in-the-possession-of-the-british-museum-london)> accessed 2 December 2013.

7 'Rückgabe NS-verfolgungsbedingt Entzogener Kulturgüter, Insbesondere aus Jüdischem Besitz – Erste Empfehlung der Beratenden Kommission' (Presse- und Informationsamt der Bundesregierung 12 January 2005) <[www.lostart.de/Content/02\\_Aktuelles/2005/05-01-12-Erste-Empfehlung-der-Beratenden-Kommission-DL.pdf;jsessionid=CA8D511FCA91BF298D8DBDC105962809.m1?\\_\\_blob=publicationFile](http://www.lostart.de/Content/02_Aktuelles/2005/05-01-12-Erste-Empfehlung-der-Beratenden-Kommission-DL.pdf;jsessionid=CA8D511FCA91BF298D8DBDC105962809.m1?__blob=publicationFile)> accessed 2 December 2013.

8 D Deeny (n 6) 7-8.

that the sale would have taken place without the Nazi regime in power.<sup>9</sup> One may now argue that the death of the family's sole breadwinner usually brings any family into difficulties. On the other hand, usually a family emigrating in order to escape from persecution loses its opportunities to make money and also loses many of its assets on the way out which might be the principal reason for the difficulties.

The recommendation by the German Advisory Commission does not reveal any facts on that point nor does it tell us whether these considerations were or were not taken, or should or should not be taken into account. Nor does the recommendation explain why the principles of justice laid down in Military Law No. 59 should apply to sales outside Germany in safe states. And this recommendation is inconsistent with the recommendation given by the UK SAP. The SAP recommended the display of the history; the German Advisory Commission recommended restitution. A greater distance between the two recommendations is hardly imaginable. Inconsistency, however, is injustice.

### 9.2.3 *No Double Compensation?*

Let me finish the first part of my paper with the following example – another real case, the case of the Jewish dentist, Hans Sachs. This case resulted in the second recommendation by the German Advisory Commission in January 2007.<sup>10</sup>

Hans Sachs collected theatre posters. His huge collection was taken from him by the Gestapo. Sachs and his family were able to escape from Germany and he believed that the collection was destroyed. However, after the war he discovered the existence of his collection and started proceedings for compensation under the post-war legislation of the Allied Forces. In a settlement of 1961, Sachs received a high amount of compensation – DM 225.000 – for the loss of his collection. In a letter to a friend, Sachs declared that the compensation was “utterly respectable” and approved of by several experts. After 1970, parts of the collection reappeared in a museum in the former German Democratic Republic (GDR). Today these parts of the collection are in the German Historical Museum in Berlin. Hans Sachs's son Peter raised a claim for recovery. Should the posters be returned to him?

9 For further analysis of the impact of these provisions on the Guidelines and its application in another hard case, see M Weller, ‘The Return of Ernst Ludwig Kirchner's Berliner Straßenszene – A Case Study’ (2007) 12 *Art Antiquity and Law* 65.

10 ‘Zweite Empfehlung der Beratenden Kommission für die Rückgabe NS-verfolgungsbedingt Entzogener Kulturgüter’ (Presse- und Informationsamt der Bundesregierung 25 January 2007) <[www.lostart.de/Content/02\\_Aktuelles/2007/07-01-25-Zweite-Empfehlung-der-Beratenden-Kommission-DL.pdf?\\_\\_blob=publicationFile](http://www.lostart.de/Content/02_Aktuelles/2007/07-01-25-Zweite-Empfehlung-der-Beratenden-Kommission-DL.pdf?__blob=publicationFile)> accessed 2 December 2013.

The German Advisory Commission held that “in light of the express declaration by the collector the Commission recommends that the posters remain at the Museum”. The German Advisory Commission thus relied on the rather unique situation that the former owner expressly declared that he was content with the compensation that he had received even though restitution is – theoretically – possible. It would have been far more interesting to know the Commission’s general view on the effect of post-war settlements regarding compensation in respect to claims for restitution. Unfortunately, we do not receive any guidance as to what should be the principle of justice on this issue. It is common ground that double compensation would be unjust. But how should we deal with early post-war compensation and today’s claim for restitution?

Perhaps you will be puzzled to hear that after the Commission had turned down his application, Hans Sachs’s son Peter successfully sued in the German courts for restitution. The German Federal Court of Justice (*Bundesgerichtshof*) held, by judgment of 16 March 2012, that Peter Sachs had, as heir to Hans Sachs, a claim against the Museum for restitution based on ownership.<sup>11</sup> We should take notice of the surprise that the applicable property law that was meant to be overridden by the Washington Principles for being not sufficiently just produced the more favourable results to the claimant than the free-floating justice under the Washington Principles.

#### 9.2.4 Conclusion

Achieving just and fair solutions freely floating in the universe of abstract justice and fairness is an extremely difficult task, far more difficult than the Herculean task of achieving just and fair decisions within the empire of law. In order to help Hercules in the future to better deal with difficult cases, we should start working on a restatement of restitution principles and rules to be derived from the various judgments, awards and recommendations. These decisions have currently become quite numerous and provide for sufficient substance to restate guiding principles and rules.

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11 German Federal Court of Justice, judgment of 16 March 2012, docket no V ZR 279/10, *Neue Juristische Wochenschrift* (NJW) 2012, 1796. For an in-depth analysis, see, e.g. M Weller, ‘Die Plakatsammlung Hans Sachs – Zur Ausschlusswirkung des Alliierten Rückerstattungsrechts Heute’ in M Weller, RA Nicolai Kemle and T Dreier (eds), *Raub – Beute – Diebstahl* (Nomos Verlag 2013) 91 *et seq.*, arguing, *inter alia*, that the time limits for filing restitution claims under the post-war restitution legislation do not preclude today claims under general German property law.

### 9.3 ELEMENTS OF PROCEDURAL JUSTICE

The more we are away from Dworkin's ideal of a differentiated system of law providing at least Hercules with sufficient guiding principles and rules for each and every case, the more important procedure becomes.

In his seminal text *Legitimacy by Procedure*, Niklas Luhmann, the leading German legal sociologist, identifies the sociological function of procedure.<sup>12</sup> This function is to achieve legitimacy. Legitimacy means from a purely sociological point of view that a decision is accepted by the majority of the public to an extent that critiques decide to remain silent so that there is no longer a dispute. Of course silence will only occur if the content of the decision remains within a certain margin of plausibility. In our context, the margin of plausibility is untypically large because as I showed in the first part of my paper, we do not yet have sufficiently established and settled principles of substantive justice.

How should we deal with this situation in terms of procedure? According to Luhmann, there are three key elements that generally enable a procedure to achieve legitimacy: (1) the decision-making body should consist of persons of the highest possible reputation, (2) the decision should ground on rules that were enacted by someone else than the decision-maker and (3) society should obtain the possibility to develop a generalised trust in the decision-making system.

If we agree for a moment on these standards, let me measure by these standards the procedures we have put in place for achieving just and fair solutions.

#### 9.3.1 *Highest Possible Reputation of Decision-making Persons*

The first element – the decision-making persons should be of the highest possible reputation – appears to be perfectly implemented in all of the restitution committees and bodies. It is my impression that the reputation of the decision-making persons is so strong that it is even acceptable not to have additional 'judges' appointed by the parties.<sup>13</sup> However, at least in Germany, it is a controversial issue as to whether each party should be entitled to appoint one member of the German Advisory Commission. Until now, the prevailing view is that the Commission should consist of fully neutral members rather than moving towards a more adversarial setting.

<sup>12</sup> N Luhmann, *Legitimation durch Verfahren* (Suhrkamp Verlag GmbH 1969).

<sup>13</sup> In Germany, for example, the Advisory Commission currently consists of the following members: former president of the Federal Republic of Germany, Dr. Richard von Weizsäcker; former president of the German Federal Parliament, Professor Dr. Rita Süßmuth; former president of the Federal Constitutional Court, Professor Dr. Jutta Limbach; lawyer, Dr. Hans Otto Bräutigam; legal philosopher, Professor Dr. Dietmar von der Pfordten; historian, Professor Dr. Reinhard Rürup; art historian, Professor Dr. Wolf Tegethoff; and philosopher, Professor Dr. Ursula Wolf.

### 9.3.2 *Rules Enacted by Someone Else Than the Decision-Maker*

In the first part of this paper, I have shown that we do not (yet) have sufficient substantive principles and rules for consistent and predictable decision-making for restitution under the Washington Principles. Obviously, if there is no support for the legitimacy of the decision from rules and principles of substantive justice, the other two elements of procedural justice become even more important.

### 9.3.3 *Trust of the Public in the Decision-making System*

What makes the public trust the decision-making system? There are certainly numerous elements that contribute to the growing trust of the public. I select a few of them:

### 9.3.4 *Procedural Rules*

First of all, precise rules for the procedure should be put into place. For example, the Dutch Restitutions Commission as well as the SAP operates on the basis of a set of procedural rules.<sup>14</sup> The German Advisory Commission does not have any published rules of procedure. This is a deficiency in the German procedure. There is only a text, a kind of press release, with certain basic information for claimants.<sup>15</sup> *Inter alia*, the claimant is informed that the German Advisory Commission will only make recommendations if both parties so request. No party is able to submit its case to the German Advisory Commission unilaterally. The consequence is that there is an extremely low number of recommendations – only six until today. The low number of recommendations hinders the development of principles and rules for justice and fairness by a growing body of case law. In my view this should be changed. The German Advisory Commission should accept unilateral requests for recommendations as, for example, the Dutch Restitutions Commission and the UK SAP do.

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14 'Spoliation Advisory Panel – Constitution and Terms of Reference' (Department for Culture, Media and Sport) <[www.eui.eu/Projects/InternationalArtHeritageLaw/Documents/NationalLegislation/UnitedKingdom/sapconstitution09.pdf](http://www.eui.eu/Projects/InternationalArtHeritageLaw/Documents/NationalLegislation/UnitedKingdom/sapconstitution09.pdf)> accessed 12 June 2014; 'Spoliation Advisory Panel – Rules of Procedure' (Department for Culture, Media and Sport) <[www.eui.eu/Projects/InternationalArtHeritageLaw/Documents/NationalLegislation/UnitedKingdom/saprulesprocedure09.pdf](http://www.eui.eu/Projects/InternationalArtHeritageLaw/Documents/NationalLegislation/UnitedKingdom/saprulesprocedure09.pdf)> accessed 12 June 2014; 'Spoliation Advisory Panel – Functions and Procedures of the Secretariat and Legal Advisers' (Department for Culture, Media and Sport) <[www.lootedart.com/web\\_images/news/SAPFunctionsandProceduresSecretariatLA07.pdf](http://www.lootedart.com/web_images/news/SAPFunctionsandProceduresSecretariatLA07.pdf)> accessed 12 June 2014; 'Regulations for Opinion Procedure under Article 2, Paragraph 2 and Article 4, Paragraph 2 of the Decree Establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War' (Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War 3 March 2014) <[www.restitutiecommissie.nl/en/system/files/Reglement%20art2lid2-2014ENG-logo.pdf](http://www.restitutiecommissie.nl/en/system/files/Reglement%20art2lid2-2014ENG-logo.pdf)> accessed 12 June 2014.

15 'Beratende Kommission' (*Lost Art*) <[www.lostart.de/Webs/DE/Kommission/Index.html](http://www.lostart.de/Webs/DE/Kommission/Index.html)> accessed 2 December 2013.

### 9.3.5 Reasoning

More importantly, a precise reasoning of the decision is of absolutely crucial importance, in particular as we do not have sufficiently established principles and rules for the decision on the merits. Without thorough reasoning, no *ratio decidendi* will become visible, no case law will emerge and no rendering of justice will be perceived by the public, even though the decision as such might be a perfect service to justice.

Let me once more compare the recommendations of the SAP and the German Advisory Commission on the question I raised in the first part of my paper about the quality of the causal link between persecution and loss. This time, however, I compare these two recommendations not on their merits, but from a procedural perspective. The UK SAP thoroughly assessed the facts, including uncertainties, revealed its estimation of probability in respect of these uncertainties and then thoroughly reasoned its recommendation. This recommendation comprises 13 pages of reasoning – in my view perfect work. Both Dworkin and Luhmann presumably would also have been impressed.

The German Advisory Commission did not publish its recommendation but only a press release about the recommendation, comprising of more or less one page – just one page for facts and reasoning. I think that this is clearly insufficient. Dworkin and Luhmann would have been irritated about this incomprehensible aspect of the German practice. There should be thoroughly reasoned recommendations also in Germany.

## 9.4 CONCLUSIONS

1. From the perspective of legal theory and jurisprudence, achieving a just and fair solution without any rules and principles of justice and fairness is extremely difficult. Given these difficulties, the restitution commissions and panels do great work.
2. However, in order to better deal with difficult cases and particularly in order to avoid inconsistencies, we should start working on a restatement of restitution principles and rules.
3. As long as we do not yet have such a restatement of restitution principles and rules, procedure is even more important. In terms of procedure the German practice needs to be improved.



## 10 BETWEEN JUSTICE AND LEGAL CLOSURE

### *Looted Art Claims and the Passage of Time*

*Wouter Veraart*

#### 10.1 INTRODUCTION

This contribution discusses a framework for assessing the opportunities for fair and just solutions in the cases of looted art. From a legal philosophical perspective, the underlying question is specified in the following way: if we understand the legal order as a collection of judicial and semi-judicial bodies, and regulations and practices at national and transnational levels, what role can this legal order play in achieving fair and just solutions? What possible contribution could the law (in this broad definition) offer? First of all, we should certainly not overestimate the law's ability to offer perfect solutions in looted art cases. The contribution of law may be important, but is by necessity modest and limited. Secondly, it will be argued that the law's most valuable contribution varies according to the broader context of the cases of hand.

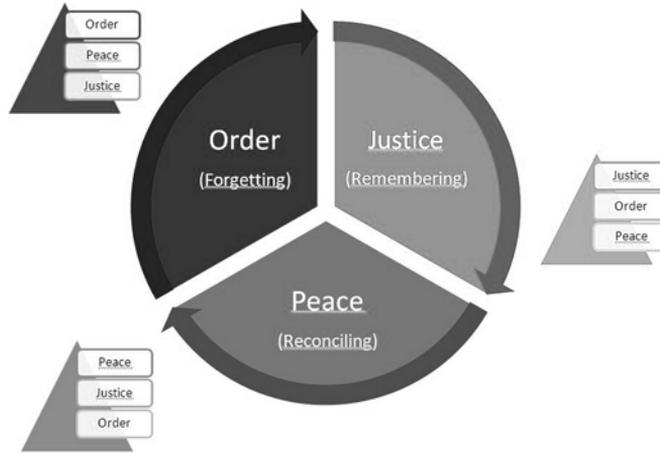
#### 10.2 THE WHEEL OF RESTORATION

In the following paper, it will be argued that there are three basic ways of dealing with past injustice.<sup>1</sup> First of all, one can try to forget the past, that is, to ignore or to repress what has happened in a desire to establish order after a period of serious conflict. Secondly, one can endeavour to remember the injustice of the past and commit ourselves to (corrective) justice by trying to restore past wrongs as far as humanly possible. And lastly, one could take a more reconciliatory attitude in a quest for enduring peace. In that case one tries to deal with the past in order to overcome it; one tries to achieve a just peace with an eye to a common future. These three attitudes are very human and reflect the vicissitudes of everyday life. However, phenomena such as forgetting, remembering and reconciling not only play a role at a mundane and individual level, but also figure prominently at a collective ('official' or state-) level in post-conflict contexts.

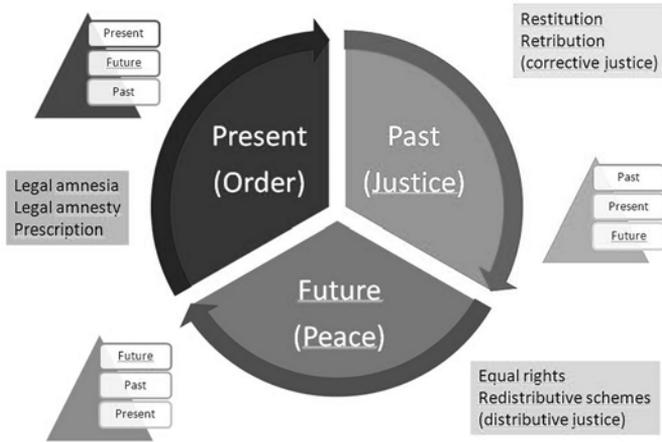
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1 In this contribution, I limit myself to instances of injustice which can be defined as extreme injustice, in which specific categories of people are deliberately deprived of their rights (property right and other rights) in an attempt to exclude them from their status of legal persons by hampering or invalidating their capacity to take part in legal, political and economic life.

**Photo IV The Wheel of Restoration: objectives**



The model as laid out in ‘The Wheel of Restoration’ (see Figure IV) presupposes that at this macro or collective level – as exemplified in the official discourse of political or legal authorities – one of these attitudes always dominates over the other two. In their collective outlook, all three have their own ‘taboos’, strengths and weaknesses. They operate as paradigms tied to specific historic eras and to specific social, political and economic circumstances and, as such, are relatively difficult to influence. Moreover, each has its specific relationship with the past, present and future. In a context of collective forgetting, for example, there is a clear focus on the present, while the connection to the injustice of the past is somehow suspended. An era marked by public remembering, on the other hand, is preoccupied by the past and generally aspires to correct past wrongs, preferably by punishing the perpetrators (retribution) and by undoing (if possible) the wrongs committed. In such a backward-looking approach, restitution is the preferred way to do justice to former owners (or heirs) who have been deprived of their property rights in a circumstance of extreme injustice. Lastly, in a context of reconciliation, the dominant time frame is the future. In a context of reconciliation, restoration of the status quo ante is not the primary goal. The injustice of the past will usually be addressed in a way that helps lay the foundation for a common future, in which the past injustice can be overcome. In this future-oriented approach, redistribution rather than restitution of property rights is seen as more appropriate (although a restitution process may also form an integral part of this). There is no need, in such a process of redistribution, to stick rigidly to the past as other factors relating both to the present and the future can also be brought into play (see Figure V).

**Photo V The Wheel of Restoration: time frames**

The Wheel of Restoration is a dynamic model. It does not value one paradigm over the other. Being a cyclical model, it does not offer a preferred starting point or a specific toolbox or roadmap for dealing with the past as in theories of ‘transitional justice’.<sup>2</sup> Considering that each paradigmatic frame has serious limitations, it does, however, value movement over stagnation; from its tendency to move ‘clockwise’, the Wheel derives its normative force. By moving clockwise, the model presupposes a pattern in the sequence of paradigm shifts. The basic idea is that the next phase in the sequence will be dominated by objective and time frame which have been held in low esteem – by being ‘arrested’ or ‘ostracised’ – in the preceding phase (see below and Figures IV and V).

While all objectives (order, justice, peace) and time frames (present, past, future) are constitutive for a well-functioning political society, the model departs from the assumption that, when dealing with a heritage of extreme injustice, authorities will not be able to foster all three objectives and time frames simultaneously. By necessity they need to ‘prioritise’ between forgetting, remembering and reconciling; between order, justice and peace; and between present, past and future, respectively. Political leaders will need to adopt measures which will be ‘informed by’ and ‘adjusted to’ the historical, political, economic and social circumstances of the concrete situation.

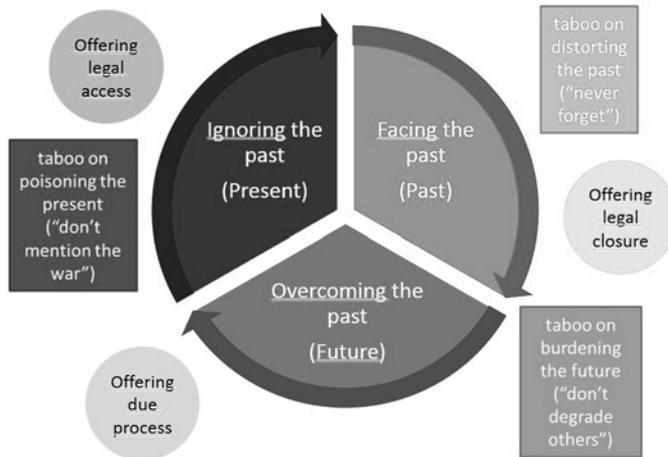
In adopting a specific paradigm when dealing with (a certain kind of) past injustice, political societies tend to create their own (legal) interdicts and prohibitions. Borrowing from the work of anthropologists as E. Durkheim, the model understands these prohibitions

<sup>2</sup> See, for example, RG Teitel, *Transitional Justice* (Oxford University Press 2000). Teitel advocates a liberal rule of law approach to dilemmas when dealing with the unjust past. Clearly adopting a ‘justice’ perspective, Teitel tends to prefer remembering above forgetting and reconciliation.

or taboos as a “mechanism by which society maintains itself in existence by establishing certain fundamental social values”.<sup>3</sup> More precisely, prohibitions related to the Wheel of Restoration are understood as mechanisms through which society’s relation to the past is organised (see Figure VI).

Thus, the Wheel of Restoration assumes that a political society cannot relate to its violent past without resorting to certain prohibitions or taboos. Each paradigm is constituted by a symbolic ‘arrest’ of its basic weakness in the form of a prohibition, often reinforced by legal means. Interestingly, within each paradigm the perceived threat is coming from a different time frame. These matters will now be briefly discussed, starting with the paradigm around ‘forgetting’. In the last part of this chapter, the model will be applied to current dilemma’s surrounding looted art cases when confronted with the passage of time.

**Photo VI The Wheel of Restoration: prohibitions**



**10.3 DEFUSING THE EVIL PAST: THE PARADIGM OF LEGAL FORGETTING**

In a context of public forgetting, the peaceful order in the present can only be maintained by ‘arresting’ the threat coming from the past. The basic fear that the violence and hatred of the past will reignite and destroy the peaceful order of the present is averted by the (legal) prohibition to publicly restart quarrels over past events. This core idea that establishing order after warlike conflicts is impossible without the instalment of certain elements of public and legal forgetting is still widespread and deeply ingrained in world history and in the history of Europe. A classic example is the Edict of Nantes of 1598 which ended a

3 AR Radcliffe-Brown, *Taboo: the Frazer Lecture 1939* (Cambridge University Press 1939).

bloody religious civil war in France by imposing, in its very first article, a collective duty to publicly behave as if the horrific past events did not occur. And within the Treaty of the Peace of Westphalia in 1648, the stipulation was made that ‘perpetual oblivion and amnesty’ (*perpetua oblivio et amnestia*) should ‘bury’ acts committed in the Thirty Years’ War and constitute the foundation for (enduring) peace.<sup>4</sup> At a theoretical level, the same idea is captured in the following statement from Kant in *Die Metaphysik der Sitten* (1797): “Daß mit dem Friedensschlusse auch die Amnestie verbunden sei, *liegt schon im Begriffe desselben*”.<sup>5</sup> Kant seems to state that ‘sealing’ peace (*Friedensschluss* in German, *Schluss* literally meaning ‘ending’ or ‘closure’) cannot be conceived without legally ‘sealing off’ past injustice. To put it differently, the peaceful order in the present is founded within the inherently oblivious moment of *sealing peace* (*Friedensschluss*).

The *idée fixe* that a peaceful (legal and political) order cannot maintain itself without the instalment of elements of legal forgetting can also be illustrated by the way rules on prescription and statutes of limitation are generally justified. As John Stuart Mill already pointed out in *The Principles of Political Economy*, after a considerable lapse of time, there may be various reasons to let bygones be bygones:

It may seem hard that a claim, originally just, should be defeated by mere lapse of time; but there is a time after which (even looking at the individual case, and without regard to the general effect on the security of possessors), the balance of hardship turns the other way. With the injustices of men, as with the convulsions and disasters of nature, the longer they remain unrepaired, the greater become the obstacles to repairing them, arising from the aftergrowths which would have to be torn up or broken through.<sup>6</sup>

4 H Weinrich, *Lethe, Kunst und Kritik des Vergessens* (Beck 1997) 217; WJ Veraart, ‘Forgetting, Remembering, Forgiving, and the Mundane Legal Order’ in B van Stokkom, N Doorn and PJM van Tongeren (eds), *Public Forgiveness in Post-Conflict Contexts* (Intersentia 2012) 65-89, 66-67; C Meier, *Das Gebot zu Vergessen und die Unabweisbarkeit des Erinnerens: Von Öffentlichen Umgang mit Schlimmer Vergangenheit* (Siedler Verlag 2010) 40-44, 44: “[...] Nach Kriegen, Bürgerkriegen und Revolutionen ist in der Geschichte bis 1918 und zum Teil darüber hinaus [...] ziemlich regelmässig beschlossen worden, das Geschehene zu vergessen”. For more examples and legal details, see J Fisch, *Krieg und Frieden im Friedensvertrag: eine Universalgeschichtliche Studie über Grundlagen und Formelemente des Friedensschlusses* (Klett-Cotta 1979).

5 I Kant, *Die Metaphysik der Sitten* (1797) in Kant, AA VI, *Die Religion innerhalb der Grenzen der bloßen Vernunft*, 349, §58, <<http://korpora.org/kant/aa06/349.html>> accessed 3 September 2014. In a similar vein, see Renan’s ‘Qu’est-ce qu’une nation’ in E Renan (ed), *Discours et Conférences* (Calmann Lévy 1887) 284-285: “L’oubli, et je dirai même l’erreur historique, sont un facteur essentiel de la création d’une nation [...]”

6 JS Mill, *The Collected Works of John Stuart Mill, Volume II – The Principles of Political Economy with Some of Their Applications to Social Philosophy* (Books I-II) (JM Robson (ed), first published 1848, Routledge and Kegan Paul 1965) 218. The fragment is also quoted in J Elster, *Closing the Books. Transitional Justice in Historical Perspective* (Cambridge University Press 2004) 172.

In more recent times, the legal philosopher Jeremy Waldron has refined this argument. In Waldron's opinion, the passage of time, on the condition of being accompanied by serious changes of circumstances, will gradually diminish the force and (material) value of legal claims related to historic injustice and will make it increasingly difficult to assess them. By changes of circumstances, Waldron mainly refers to factors such as changes in the distribution of scarce resources or in the number of inhabitants. A commitment to restitution of property rights may create new forms of injustice, by upsetting current distributions of property, provided these distributions are not completely unjust.<sup>7</sup> Like Mill's 'aftergrowths', Waldron's changes of circumstances ultimately produce a "supersession of historic injustice".

The idea that changing 'realities on the ground' *should* cause a 'defeat' of a just claim (Mill) or a 'supersession' of past injustice (Waldron) seems to rest on the presupposition that legal forgetting is somehow the *only* means by which a peaceful order can ward off potential harm resulting from (endless) demands and claims related to past injustice. In order to make this argument work, Mill and Waldron understand claims arising from past injustice as being exclusively aimed at *restitutio in integrum*, a restoration, as far as possible, of the *status quo ante*, the situation before the unjust acts occurred.<sup>8</sup>

The 'taboo' on publicly or legally revisiting the evil of the past has its obvious weaknesses. It prevents justice (in whatever form) to be done and blocks any possibility to offer recognition to victims. Political and legal attempts to ignore or defuse the unjust past cause a perpetuation of victimhood across generations. As a consequence, taking public responsibility for the injustice of the past will be indefinitely postponed.

Nevertheless, examples from recent decades demonstrate that judicial and semi-judicial institutions are capable of providing recourse for those opposing the idea of forgetting. Courts are incidentally prepared to lift or avoid time barriers and other obstacles in order to create a place in which at least certain categories of cases can be heard, and at least some claimants can tell their stories before an independent court or commission.<sup>9</sup> These judg-

7 J Waldron, 'Redressing Historic Injustice' (2002) 1 *The University of Toronto Law Journal* 135, 143-144; see also J Waldron, 'Superseding Historic Injustice' (1992) 1 *Ethics* 4, 19-20; T Cowen, 'How Far Back Should We Go? Why Restitution Should Be Small' in J Elster (ed), *Retribution and Reparation in the Transition to Democracy* (Cambridge University Press 2006) 17-32. See for a similar opinion related to Nazi-looted art, Sir N Rosenthal, 'The Time Has Come for a Statute of Limitations' *The Art Newspaper* (London, 11 December 2008) <[www.theartnewspaper.com/articles/The-time-has-come-for-a-statute-of-limitations/16627](http://www.theartnewspaper.com/articles/The-time-has-come-for-a-statute-of-limitations/16627)>, accessed 3 December 2013; for criticism of Sir Rosenthal's opinion, see JA Kreder, 'The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?' (2009) 88 *Oregon Law Review* 37, 42-46.

8 For criticism of Waldron's supersession thesis on this and other points, see D Sanderson, 'Against Supersession' (2011) 24 *Canadian Journal of Law and Jurisprudence* 155, 181-182; J Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustice* (Polity Press 2002) 122-129.

9 In 1992, the Australian land mark decision in the *Mabo* Case has set an important precedent in the field of historic injustice with regard to indigenous land rights. See *Mabo v Queensland* (No. 2) (1992) 175 CLR 1. For a discussion of the wide significance of the judgment in *Mabo*, see D Celermajer, *The Sins of the Nation*

ments have the potential of causing a breakthrough in the way the past is (refused to be) perceived by state officials and other local, national or transnational authorities. They may even (among other factors) ‘trigger’ a paradigm change in which the legal-political framework based on ‘forgetting’ is shifted towards ‘remembering’.

#### 10.4 UNDOING THE UNJUST PAST: THE PARADIGM OF LEGAL REMEMBERING<sup>10</sup>

In the post-Second World War period, the remembrance of Auschwitz as a symbol of the greatest evil has slowly but surely replaced the duty to forget of earlier times.<sup>11</sup> The Edict of Nantes largely buried the possibility of litigation for past wrongdoings under the legal duty to forget events of the past<sup>12</sup> – a controversial approach with serious shortcomings. However, political and legal authorities who make remembrance into a guiding principle when dealing with an unjust past need to confront other problems. Being called on ‘not to forget’ past injustices but instead to keep them alive and be constantly seeking to enforce claims arising from them, including those of previous generations, can potentially result in court decisions being subject to review time and time again, because such decisions can never be sufficiently just. This is a matter of principle: earthly forms of justice (court rulings and legal settlements, for example) are incapable of ‘truly’ undoing the imprescriptible and irreparable acts of injustice committed in the twentieth century.<sup>13</sup> The legal possibilities to achieve corrective justice, by punishing the perpetrators in proportion to their indescribable crimes (‘retribution’) or by returning assets and estates to those who have been brutally deprived of them by legal or other means (‘restitution in kind’), are for obvious reasons rather limited. In other words, for those demanding the highest form of justice, earthly forms of justice (with their periods of limitation and limited opportunities for appeal and the fact that those taking the decisions are human beings) can constitute more of a hin-

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and *the Ritual of Apologies* (Cambridge University Press 2009) 148-155. For just one (German) example in the field of Holocaust era looted art, in which time barriers have been avoided, see the Federal German Court ruling in *Peter Sachs v Stiftung Deutsches Historisches Museum*, BGH (16 March 2012) V ZR 279/10. For a discussion of the Sachs case, see C Roodt, ‘State Courts or ADR In Nazi-Era Art Disputes: A Choice “More Apparent Than Real”?’ (2012-2013) 14 *Cardozo Journal of Conflict Resolution* 421, 448-450.

<sup>10</sup> This section is based on Veraart (n 4) 68-70, 72-73.

<sup>11</sup> Meier (n 4) 54-80; Veraart (n 4) 68-70; T Maissen, *Verweigerte Erinnerung. Nachrichtenlose Vermögen und Schweizer Weltkriegsdebatte 1989-2004* (Verlag Neue Zürcher Zeitung 2005) 57-96; W Veraart and L Winkel, ‘An Introduction to Dilemmas of Post-War Restitution in Europe’ in W Veraart and L Winkel (eds), *The Post-war Restitution of Property Rights in Europe: Comparative Perspectives* (Scientia Verlag 2011) 1.

<sup>12</sup> However, it is important to note that even the Edict of Nantes left room for adjudication in which the bloody conflicts of the civil war could be taken into account. See DC Margolf, ‘Adjudicating Memory: Law and Religious Difference in Early Seventeenth Century France’ (1996) 27 *The Sixteenth Century Journal* 399.

<sup>13</sup> See V Jankélévitch, *L’imprescriptible. Pardonner? Dans l’honneur et la dignité* (Édition du Seuil 1986); for an interesting discussion of Jankélévitch’s position, see J Derrida, *Pardonner: L’impardonnable et l’imprescriptible* (Éditions Galilée 2012).

drance than the start of a solution. And that means having to come to terms with the paradox that claimants sometimes continue demanding justice within the existing systems of law, but at the same time reject the binding force of the court decisions and settlements that those systems produce.<sup>14</sup>

In a context of legal and political readiness to face the injustice of the past, it is important that legal institutions are prepared to offer legal closure by enabling parties to settle their disputes in a legally binding and timely fashion. Legal practitioners need to clearly acknowledge that legal solutions cannot be perfect from a viewpoint of perfect justice – and can never be the final word – but nevertheless deserve acceptance and respect from the public and the parties involved.

In a way the urge to ‘never forget’ and to ‘undo’ as much as possible the injustice committed in the past is the mirror image of legal forgetting, with its tendency to ignore *any* claim, irrespective of its historical content. In both situations, legal institutions could play a role that is both moderating and courageous. In the first place, in a context of forgetting, by showing that, in legal life, the past is never dead, despite all political and legal efforts to keep the past in the past. And secondly, in a context of remembering, by demonstrating that in the face of extreme injustice, legal answers can neither be perfect or the final word, nor endlessly contested or deferred.<sup>15</sup>

By offering legal closure in a time of remembering, legal and semi-legal institutions are hinting at alternative ways of dealing with past injustice. If it is true that legal judgements can never completely ‘correct’ or ‘undo’ the consequences of historic injustice and can always be viewed as compromises between the present situation and the past (between the possible in the here and now and the desirable in a perfect world), these decisions strike a (perhaps reluctantly) conciliatory tone. And this reference to ‘conciliation’ may trigger a political society to look at the injustice of the past in a different, more reconciliatory way.

## 10.5 TRANSCENDING THE UNJUST PAST: THE PARADIGM OF RECONCILIATION

Within a paradigm of reconciliation, the main objective of political and legal authorities with regard to the unjust past is to achieve a just peace. Its aspiration to justice is therefore somehow mediated by its quest for enduring peace (see *supra*, Figure IV). In this regard, the concept of justice is broadened towards political or distributive justice, holistically

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14 See, in a similar vein, A Garapon, *Peut-on Réparer l’Histoire? Colonisation, Esclavage, Shoah* (Odile Jacob 2008) 255-262.

15 In the Netherlands, the Dutch Restitutions Committee has sometimes been criticised for infringing on the ‘finality’ of post-war settlements and legal judgments, as part of its flexible restitution policy. See Veraart and Winkel (n 11) 5-6; K Lubina, *Contested Cultural Property: the Return of Nazi Spoliated Art and Human Remains from Public Collections* (Maastricht University 2009) 299-330.

embracing ideas of political fairness and just distributions.<sup>16</sup> The law's objective to achieve corrective justice – by restoring the victim, as much as possible, in the *status quo ante*, by offering restitution in kind or alternative compensation – is not abandoned but mitigated. It is no longer conceived in isolation, as an end itself, but rather as embedded in a bigger picture, not only past- but also future-oriented as part of a common project of transition towards a society which (ideally) offers equal rights and opportunities for all (see Figure V). Speaking in terms of Aristotle's famous distinction between corrective and distributive justice, one could argue that, in a context of reconciliation, the backward-looking aspirations of corrective justice are constantly mixed with and affected by future-oriented considerations which help lay down the (constitutional) basis for a just society.<sup>17</sup>

When the chief objective is not corrective justice (as in the paradigm of remembering) but the achievement of a just peace, the aim of corrective justice is sometimes sacrificed in favour of considerations of justice in a broader, political sense, such as guaranteeing equal rights for all and implementing the rule of law. The well-known statement of the East-German human rights activist Bärbel Bohley, commenting in the early 1990s on the disappointing ways in which the injustices of the German Democratic Republic (GDR) had been dealt with after Germany's reunification, is telling: '*Wir wollten Gerechtigkeit und bekamen den Rechtsstaat*' ('We wanted justice, but we got the rule of law'). 'Living well is the best revenge – if one can', a saying which has been used in connection to transitional justice processes in a number of countries in the 1990s, appears to contain a similar observation.<sup>18</sup>

When compared with the narrower, primarily backward-looking approach connected to legal remembering and restoration of the *status quo ante*, a politics of reconciliation almost always comes with a loss. In the first place, it entails an emotional loss, in the sense that a legal-political 'choice for' reconciliation may impose itself on individual members of a given society who may not be ready or willing to reconcile with their former enemies,<sup>19</sup> and in the second place, because people may not be prepared to relinquish (part of) their

16 See for an example of a broad conception of justice in the service of reconciliation D Philpott, *Just and Unjust Peace: an Ethic of Political Reconciliation* (Oxford University Press 2012) 48-73, and, in a similar vein, J Spinner-Halev, 'From Historical to Enduring Injustice' (2007) 35 *Political Theory* 574.

17 On the Aristotelian distinction between corrective and distributive justice, see A Beever, *Forgotten Justice: The Forms of Justice in the History of Legal and Political Theory* (Oxford University Press 2013); I England, *Corrective and Distributive Justice: From Aristotle to Modern Times* (Oxford University Press 2009); EJ Weinrib, *The Idea of Private Law* (Harvard University Press 1995) 56-83.

18 CJ Roederer, "'Living Well Is The Best Revenge" – If One Can: an Invitation to the Creation Of Justice off the Beaten Path' (1999) 15 *South African Journal on Human Rights* 75.

19 For a criticism on exactly this point of Archbishop Desmond Tutu's motto 'No Future without Forgiveness' and the functioning of the South African Truth and Reconciliation Commission, see T Brudholm, *Resentment's Virtue: Jean Améry and the Refusal to Forgive* (Temple University Press 2008). For a reply to Brudholm, see Philpott (n 16) 252-254; Veraart (n 4) 79-85. See also M Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press 1998) 9-24.

just claims in relation to past injustice. However, when legal forgetting, as exemplified in statutory limitations, is the alternative option, the paradigm of reconciliation suddenly becomes more attractive. The point is that reconciliation is potentially always possible, notwithstanding the passage of (much) time or substantial changes of circumstances. That is, as has been indicated, because a reconciliatory procedure allows for a much more flexible approach with regard to historic injustice, in which factors related to the present and the future can easily be brought into play. The fear behind the paradigm of legal forgetting, that the undoing of past injustice would revert, with the potential of destroying, the current peaceful order of society, is not convincing if the alternative is an approach which can be characterised precisely by its sensitivity to factual circumstances, not only of the historical past, but also of the present and future.

This is also the reason why a reconciliatory framework has offered itself as a viable option in the field of looted art claims. As has been explained in the introduction of this volume, national panels and committees have so far only partially dealt with claims for the restitution of Nazi-looted art. Claims relating to works of art that were not part of national collections usually fall outside the committees' scope and, in a number of cases, remain unsettled. It is doubtful whether these claims can still be resolved within national legal systems.<sup>20</sup>

So what could a 'fair and just' solution, as referred to in the Washington Principles of 1998, actually mean in these and other similar cases? With regard to looted art claims, a more reconciliatory approach is suggested as promising, as stated in different studies<sup>21</sup> and in section 11 of the Washington Principles: "Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues".<sup>22</sup> This encouragement can be broadly explained as an invitation to citizens, public and private organisations to deal with 'Nazi-confiscated art' on a more voluntary basis, by looking for national or transnational forms of alternative dispute resolution (ADR). The ones as engaged in by the Dutch Restitutions Committee in their so-called binding opinions, regarding objects currently

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20 For the complex situation in the USA, where litigation in state courts is still popular, see C Roodt, 'State Courts or ADR in Nazi-Era Art Disputes' (2013) 14 *Cardozo Journal of Conflict Resolution* 421, 425. As Roodt points out at 425, when both routes are possible and appealing, problems of finality could easily arise: "Each form of dispute resolution has its own attractive features, but how it interacts is equally vital. The freedom of a litigant to exit an alternative dispute resolution process, when litigation seems to offer more seems highly relevant. Parallel processes will raise an issue of finality".

21 See, for example, J Mullery, 'Fulfilling the Washington Principles: A Proposal for Arbitration Panels To Resolve Holocaust-Era Art Claims' (2009-2010) 11 *Cardozo Journal of Conflict Resolution* 643; KA Falconer, 'When Honor Will Not Suffice: the Need for A Legally Binding International Agreement Regarding Ownership of Nazi-Looted Art' (2000) 21 *University of Pennsylvania Journal of International Economic Law* 383; T O'Donnell, 'The Restitution of Holocaust Looted Art and Transitional Justice: the Perfect Storm or the Raft of the Medusa?' (2011) 22 *European Journal of International Law* 49.

22 See Appendix 2.

belonging to a collection of a municipal body, an association or a private individual, may be considered as best practices.<sup>23</sup>

Guided by a much more flexible, future-oriented approach, it may be possible to find creative solutions to the satisfaction of all parties involved, some examples of which have been mentioned in Marc-André Renold's contribution. Reconciliation as an answer to an unjust past has its own problems and dark side. For economic or other reasons, current owners who acquired artworks in good faith may be 'forced' into 'voluntary' transfers by powerful, aggressive claimants. Claimants may be disappointed when powerful current owners, notwithstanding long talks, ultimately do not take them seriously. For this reason, from a perspective of voluntary ADR in a context of reconciliation, the law's principal contribution in a framework of reconciliation consists in offering general legal and ethical guidelines (both nationally and internationally) that contain elementary rules and principles of due process and that provide an acceptable structure in which parties can operate on an equal level of mutual respect. For this reason, I agree with Matthias Weller that, specifically in the context of reconciliation, more research into key elements of procedural justice could be particularly helpful. By offering due process, the law's contribution may consist in overtaking part of the heavy burden a process based on reconciliation imposes on all involved and prepare them for the possibility of a 'letting go'.

## 10.6 CONCLUSION

In this conceptual contribution, I have endeavoured to explain that law's primary mission in looted art cases varies over time, and from place to place, depending on the dominant paradigm constraining the ways in which the unjust past is addressed. Although the role law has to play is modest, it is nevertheless very important. By offering legal access, legal closure and due process at the right moments and at the right places (see Figure VI), the law's answer to the extreme injustice of the past always involves managing time and keeping 'the Wheel of Restoration' in motion by perpetually moving between the interests of order, justice and peace, thus keeping open our relationships with the past, the present and the future.

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23 'Introduction to Binding Opinion' (Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War). <[www.restitutiecommissie.nl/en/introduction\\_to\\_binding\\_opinion.html](http://www.restitutiecommissie.nl/en/introduction_to_binding_opinion.html)> accessed 18 February 2014.



# “A JOYFUL WINDFALL”

*An Interview with Bas van Lier*

*Annemarie Marck and Marleen Schoonderwoerd*

Bas van Lier is the biographer of his grandfather Carel van Lier, a Jewish art dealer who died in 1945. In 2007 Bas van Lier, his father and two aunts submitted an application to the Dutch Ministry of Education, Culture and Science for the restitution of eight ethnographic objects from the Netherlands Art Property Collection (NK Collection). The Minister put the claim to seven items before the Restitutions Committee for advice. One object was not included in the request for advice because it has been missing since 1990.

In this interview, Bas van Lier looks back at the procedure used by the Restitutions Committee. An interview about the importance of investigation, an object’s emotional and historical value, and the question of what justice means.

## *The Van Lier Case*

The Jewish art dealer Carel van Lier established the one-man business Kunstzaal Van Lier in Amsterdam on 1 September 1927. He concentrated on modern paintings and also specialized in ethnographic objects from Africa, Asia and Oceania. During the Second World War Van Lier, whose wife was not Jewish, was protected to some extent from anti-Jewish measures. Nevertheless his gallery was put under administration on 8 July 1942, after which he could no longer actively trade in art. His daughter, the oldest of his three children, lived in the Kunstzaal’s premises during the rest of the war and tried to run the business as best she could. In 1943 Van Lier was arrested and deported because of his involvement with the resistance movement. He died from exhaustion and starvation in the Außenlager Mühlenberg near Hanover in March 1945. His gallery was sold in 1949 and finally closed its doors in 1956.

On 11 April 1941 Carel van Lier sold sixty-one ethnographic objects to the Städtisches Völkermuseum in Frankfurt am Main. Eighteen of these works – the rest were lost – were returned to the Netherlands after the war and put into the Netherlands Art Property collection. In 2007 Bas van Lier, Carel van Lier’s grandson, found eight of these items in a database. He then submitted a restitution claim, which was put before the Restitutions Committee. The Committee recommended rejection of the claim, with the exception of one object – an ivory hunting horn.

## INVESTIGATION ON THE INTERNET

*“Some years ago I found an article on the internet about Nazi-looted art in Frankfurt am Main. The article’s author, an archivist or historian, had conducted an extensive investigation into what happened in that German city during the war. To my utter amazement I came across my grandfather’s name in that article. It emerged that in 1941 sixty-one ethnographic objects in my grandfather’s gallery were purchased by the Städtisches Völkermuseum in Frankfurt for 5,000 guilders. I became curious and sent the museum a letter requesting more information. In response I received a large package of papers, including original bills relating to the transaction I had read about in the article. They were good documents. Among them there was also a statement that some of the objects purchased from my father in 1941 had been claimed by the Dutch State after the war. This related to eighteen items that were thus returned from Frankfurt to the Netherlands after the war. This is how I found out that these works had to have ended up in the Netherlands Art Property (NK) collection, the Dutch State’s heirless art collection. It was very easy to search through this NK collection on the internet via a database. During this research I did indeed find the objects concerned, that is to say, only eight of the eighteen works recovered after the war still remained.*

## RESTITUTION CLAIM

*I thought about what I should do with all this information. Previously, I had played with the idea now and again that something not quite right could have happened during the war. There were moments when I wondered how I could find out, because I knew for sure that things were taken from my grandfather’s gallery, even though I did not know on what grounds. When my grandfather could no longer be in the gallery himself during the war, starting in July 1942, his oldest daughter filled in for him. My aunt, a girl of seventeen or eighteen, then became responsible for the ups and downs of the business. There is no doubt that very great advantage was taken of the situation at that time.*

*As regards the eight objects I found in the NK collection, it was so that my grandfather sold them himself to the Städtisches Völkermuseum in 1941. So I wondered whether there were grounds for claiming them. I was aware that the Dutch restitution policy for art trade cases is based on the principle that many business transactions, including those by Jewish art dealers, were in principle ordinary – and not necessarily forced – sales because a gallery’s goal is of course to sell its trading stock. I was convinced on this basis that my case was fairly clear*

*and that any claim would probably be rejected. But during the period when I was having my doubts, I talked to an acquaintance who had learned about restitution problems in greater depth. She persuaded me to nevertheless submit a claim and I then followed her advice.*

#### INVESTIGATION CAPACITY

*In my 2007 restitution application to the Minister of Education, Culture and Science, I wrote down my thoughts and ideas. I also stated that I nonetheless wanted to claim because the Restitutions Committee simply had more investigation capacity available than I did. To me it seemed worthwhile to look into the matter thoroughly. There was probably more background information to be found in sources that the Committee’s investigation department could access more easily than I could. Meanwhile other questions had also occurred to me. Was it not remarkable that so many objects were sold in one batch in April 1941, when it was already clear in the Netherlands that German occupying forces would drive Jewish owners out of their businesses? As a Jewish art dealer aware of this situation, what do you do if a representative of a German museum wants to buy up all your stock? That situation gave rise to questions in my mind. On the other hand, as far as I could find out, the transaction in 1941 was based on market prices, so there were no complaints in that regard.*

*Ultimately everything was looked into by the investigation team of the Committee – an independent party. I am very pleased about that because afterwards we knew things for sure.*

#### CONFIDENCE

*My father and my two aunts, on whose behalf I had submitted the claim, agreed that I should initiate a restitution procedure. My older aunt, the one who was responsible at a young age for the art gallery during a large part of the war, wanted personally to let that period be. She was quite happy, however, for me to submit a claim, also on her behalf, even though she might not have done it herself. The procedure at the Restitutions Committee was executed well. As far as I know there is a department associated with the Committee in which a permanent team of researchers work. These people conduct the entire investigation, and then ultimately there is a Committee that makes a judgment based on it. I have the feeling that everything was tackled soundly and that the researchers did everything*

*they could. That gave me confidence. Another factor contributing to this was that halfway through the procedure I was sent a provisional investigation report with the opportunity to respond to it. I was consequently able to correct a few factual errors. After that I received the amended report at home together with the final Restitutions Committee's advice and the Minister's decision based on it.*

#### EMOTIONAL AND HISTORICAL VALUE

*At the time I was surprised and delighted by the decision about my restitution application. I had assumed that matters were clear and that I could expect a rejection. And indeed the Restitutions Committee advised the Minister to reject the largest part of my claim because my grandfather had sold the objects in 1941 without there being any direct threat or coercion, as far as is known, from the Nazi authorities. According to the Committee, other elements from the investigation also indicated a normal, well-balanced transaction. I expected that conclusion, but what surprised me was the different opinion the Committee had about one object – an ivory hunting horn. That item was returned to us, which was a joyful windfall. A photograph taken in the 1930s, which is still in the family's possession, of my grandfather posing with the hunting horn played a role in the Committee's considerations underlying this advice to grant. The Committee thought that this photograph gave a very telling insight into my grandfather and a work of art he appreciated. The emotional value of this object for us as a family was decisive in the Committee's further reasoning and the advice to retribute. Meanwhile the hunting horn has been put in my living room. The item has special value for my family and me. The horn belonged to my grandfather, who held it in his hands and was photographed with it. The object also has an interesting history. Firstly it was sold during the war to the Museum of Ethnology in Frankfurt, secondly it survived a fire in the museum, after that it was claimed by the Dutch State and finally there was also my recent research and the restitution claim. All these things contribute to the value of such an item. And it is not just about emotional value, it is also about historical value.*

*My father and aunts have seen and held the hunting horn. They followed the claim and the procedure with interest and were pleased with the outcome. Officially the object was restituted to them, but they were unanimous in their opinion that it should be in my home, because I had unearthed all sorts of things and the claim was my initiative.*

## RESTITUTION OR COMPENSATION

*While the ivory hunting horn represents something of special value to me, that does not mean I would have been opposed to us receiving a sum of money instead of the object itself. This situation could perhaps have come up if the hunting horn was hugely important or interesting to a museum. I think I would also have been pleased to be told that. If a sum of money were to be paid out in such a case, I would not have any problem with it at all. But I can imagine that this can vary from case to case.*

## MISSING OBJECT

*In some cases, though, it is not so much about restitution or compensation, but the way in which these cases are tackled. For example, we requested the return of eight items from the NK collection. It soon emerged that one of these eight objects was missing. This fact was communicated in the letter I received from the Ministry of Education, Culture and Science in response to my restitution application, together with the following comment. ‘This object is not part of the Dutch National Art Collection and therefore it cannot be submitted to the Restitutions Committee for advice’. To be quite frank, I thought this was very superficial. The Dutch State lost the object, and now the same state was saying, ‘I cannot give an opinion because I’ve lost it and it is not here anymore’. I would have appreciated it if an additional investigation had been carried out. Where is it? How long has it been missing? Where was it last seen and where might it be? In fact this lost item is one of the very earliest things my grandfather collected. In the gallery it had a very low inventory number. It is a special object as far as I am concerned and in such a case it is certainly more satisfactory if the trouble is taken to at least work out what happened to it. Even if a civil servant had got it to take home with him when he retired, so to speak, then fair enough at least we would know where it had gone. In any event I think it is curious and careless that objects that could belong to another have been lost. Apparently over the years even more items have disappeared because in our case eighteen ethnographic works were returned from Frankfurt after the war, but in 2007 I could only find eight of them in the NK collection’s database.*

JUSTICE

*I think that in principle there should always be a possibility to submit a claim to looted art. New sources can always appear, such as the article I suddenly came across on the internet. Things like that continue to happen, particularly as more and more archives are digitized and become available online. So people will keep on finding new information and discover they might still be entitled to something somewhere. Nevertheless, I can imagine that at a certain point the state will want to discontinue the restitution policy based on the point of view that everyone has had the opportunity to make a claim and everything has been properly investigated. Yet that remains risky because, if you do so, you need to know for sure that you have completely verified the provenance of all the works in public collections. If you ask me, it would be more just if the possibility to submit a claim remains forever. This option should have existed much earlier of course, and that is why I think it would be good to retain it for the time being”.*

**Photo VII Kunstzaal Van Lier situated at the Rokin 126 in Amsterdam.**



**Photo VIII** A painting of a vase of flowers by the Dutch painter Jan Sluijters (1881-1957). It hangs above a dresser in Kunstzaal Van Lier. The director of the Art Hall Carel van Lier is sitting next to it. Amsterdam, 1927.



**Photo IX Van Lier (around 1930) with an ivory hunting horn which was restituted by advice of the Restitutions Committee in 2009.**



## 11 FINAL REMARKS

*by the editor*

Restitution of Nazi-looted art has been the centre of much attention since the late 1990s. Far from dwindling, in the past years this attention has intensified, with the focus in some countries shifting from collections of heirless art – ‘tainted’ in their entirety – to other (museum) collections as well as private property. Promising declarations by governments and stakeholders, such as the Washington Principles and the Terezín Declaration and resolutions by the European Parliament and the Council of Europe, stress a moral duty to return Holocaust-related art to the victims of the Holocaust (or their heirs). These soft-law instruments mainly give guidelines for pro-active research; institutions are nowadays expected to have conducted research into the provenance of their collections with an eye to establishing a possible Nazi provenance. For the assessment of ownership issues these instruments provide the following guidelines: (i) claims should be approached proactively, (ii) the aim should be to find a ‘fair and just solution, taking into account all relevant facts and circumstances’ and (iii) stakeholders – governments and others – are expected to provide a framework for the expeditious handling of restitution claims on the merits of the case.

This publication set out to evaluate the status quo with regard to dispute resolution of Holocaust-related claims. Is it clear what the norm which instructs parties to achieve a ‘fair and just solution on the merits of a case’ actually entails? And what recourse do parties have for a (neutral) assessment of their claim, as the ‘framework for the expeditious handling of claims on their merits’? Is further international cooperation necessary and, if so, what form should this take? It is clear, in particular from the discussion between the stakeholders set out in Part II, that opinions on these issues vary. And yet there is also common ground. The following is an attempt to draw together elements mentioned in the previous chapters, grouped according to four of the questions stated in the introduction, and supplement them in places with the author’s own thoughts.<sup>1</sup>

### 11.1 THE SPECIAL STATUS OF HOLOCAUST-RELATED ART CLAIMS

It is generally accepted that restitution cases involving Holocaust-related art, based on immense historical injustices which have taken too long to redress, are not straightforward

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<sup>1</sup> The following does not reflect the position of the Dutch Restitutions Committee.

property claims. The works of art concerned were looted in the course of systematic persecution and deprivation of rights; the theft was an integral part of the genocide.

This factor seems to form the justification for a privileged treatment of Holocaust-related art claims as opposed to other cases of theft or looting. And it is this element which lies at the root of contemporary soft-law instruments and which provided the basis for several post-war national restitution laws as seen in Part I. There appeared to be agreement among the stakeholders on this point as seen in Part II.<sup>2</sup>

The fact that the persecution element is key to the special status of Holocaust-related art claims also entails a limitation, an issue raised by Polak (Chapter 6) among others. This lies in the fact that it implies, conversely, that if a claim to a work of art lost during the Nazi period does *not* include this persecution element the claimant will not be eligible for this privileged treatment. For example, it is debatable whether an artwork sold by a Jewish art owner in the 1930s in a country that was not at war and where no persecution was taking place at the time can be classified as *Nazi-confiscated art* as defined by the Washington Principles. The same applies to a work of art sold by an owner who was not the victim of persecution, even though such a sale may have constituted involuntary or even illegal loss of possession. Other legal norms are applicable to such losses of possession, but if there is no causal link between the loss of the work of art and persecution, such a case may not be covered by the ‘fair and just’ norm in the same way.<sup>3</sup> Whilst the specific circumstances will in practice determine how claims should be assessed, it would appear sensible to stay aware of the boundaries of the terms ‘Nazi-looted art’ and ‘Holocaust-related art’.

## 11.2 THE CONTENTS OF THE NORM: WHAT IS *FAIR AND JUST*?

The guideline prescribed by the Washington Principles for the assessment of restitution claims is to seek a “just and fair solution, recognising this may vary according to the facts and circumstances surrounding a specific case”. Solutions should be sought on moral rather than legal grounds, as is often stated. The intention would appear to be that general principles of justice – as a reflection of morality – should be leading in assessing each specific case on its merits, and that it should be acknowledged that a fair and just solution will not automatically follow from the legal assessment of a claim based on the applicable law. This, however, does not by itself answer the question of which principles (of morality or justice) should be leading in this and which circumstances are decisive for the outcome.

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<sup>2</sup> See Fisher and others in Chapter 5.

<sup>3</sup> The restitution of art objects looted during an occupation certainly is governed by legal norms under international law (see Chapter 2), but these are of a different nature. At the same time, other types of claims may also meet the ‘persecution’ or ‘genocide’ criterion (see Palmer, Chapter 7).

As we saw in Part II, the views of stakeholders vary widely. Some interpret the ‘fair and just’ norm as meaning that Holocaust-related art should always be returned to (the heirs of) the former owner, without further regard to the position of the present holder or possessor. Others believe that the present possessor cannot be held accountable and that claims should be settled through compensation by the original aggressor. One author summarises the norm as follows: “Cultural goods which have been expropriated as a result of persecution must be unconditionally returned to the victims or their descendants, if need be in return for the reimbursement of whatever sums *bona fide* purchasers may have spent on the acquisition and the upkeep of these objects.”<sup>4</sup> This last interpretation seems to be in line with the norm as adopted in the post-war restitution system, and more recently in international conventions on stolen and looted art. In this context, the good faith of the current possessor has no bearing on the matter of the dispossessed owner’s right to restitution – as the primary solution – and is only important in terms of the current possessor’s right to compensation.

This brings us to the position of the current possessor. If the fair and just norm means that restitution of Holocaust-related art to (those entitled to the property of) the original owner is the preferred solution, then where does this leave the current possessor? First of all, there would appear to be no doubt that the *good faith* of the current possessor is crucial in this respect. Inasmuch as a current possessor is in good faith, he or she would appear to be entitled to some kind of compensation in the event of restitution. However, opinions may differ on when a possessor can be said to be ‘in good faith’. This will in any case be dependent on the diligence in checking the art object’s provenance on *acquiring* the artwork. It is arguable whether referring to an unknown provenance in a distant past when the object was acquired, however, will be sufficient to establish good faith in this context. Especially since public institutions nowadays – and for quite some years – have a duty to *proactively* research the provenance of their collections. This obligation seems, again, to resurface when works of art are being sent on (international) loans and thus touches on the concept of art mobility. As Palmer puts it: “Objects must be made fit to travel and this requires the removal of any blemish on their provenance; only an imprudent borrowing institution would require less than a clean bill of health.”

The contributions in this book discuss various options for who should be responsible for a compensation of the good-faith possessor upon restitution of a work of art to the dispossessed owner, and how high the compensation should be.<sup>5</sup> A legal principle emphasised by Palmer and Weller, and which is relevant to the question of who is liable

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4 This is not one of the authors in this book, but Kurt Siehr ‘Legal aspects of the mystification and demystification of cultural property’ (2011) 16 *Art Antiquity and Law* 173, 201.

5 Ranging from redress upstream – for example in the post-war Swiss legislation – to the suggestion made during the panel discussion for the establishment of a fund for such compensations (Part II). See primarily Palmer (Chapter 7), also for a discussion of possible payment of a ‘reasonable hiring charge’.

for compensation of the current possessor, is that double compensation should be avoided. In this sense, sale proceeds or post-war compensation received at an earlier stage by dispossessed owners should be taken into account in finding a solution and could be used to compensate present possessors.

Returning to the view held by some that restitution should be the primary norm, the following should be noted. The chapter by Renold and Chechi shows that the reality of contemporary panel decisions and other cases produces a wide variety of solutions. These range from outright restitution to compensation to the claimant, loans, co-ownership and co-possession. Elsewhere, other solutions have been described, such as displaying the former owner's war story alongside the work of art. Such a solution takes into account non-economic interests that set this kind of claims apart from 'ordinary' ownership issues. As became clear from the interviews with claimants published in this book, such solutions deserve attention in their own right. So evidently, return of the art object to the heirs of the dispossessed owner is not seen as the only – or even primary – possible solution for dealing with Holocaust-related art. In this regard, two factors inherent to Nazi-looted art claims may be of influence.

In the first place: not all Nazi-looted art is confiscated art. The Washington Principles refer to *confiscated art*, but it is generally accepted that *forced* or *coerced sales* are also covered by the norm. What constitutes a forced or coerced sale is perhaps one of the most difficult questions of all. Circumstances which could be important under the post-war restitution laws for accepting something as a *forced sale* were the purchase price (was the price fair?), the time of the loss (before or after the official implementation of racist measures?), own initiative by the seller in the transaction, and the person of the other party (was this a representative of the occupier?). Under the post-war system, loss of possession due to confiscation was often null and void – with retroactive effect – whereas in the case of a forced sale a transfer was voidable.<sup>6</sup> In this last instance of forced sale, the position of the possessor who later had acquired the object in good faith could be taken into account. In present-day decisions, it would also appear that the remedy – outright restitution to the *status quo ante* or a lesser remedy such as partial compensation to the heirs of the dispossessed owners – may be dependent on the gravity of the loss of possession.<sup>7</sup>

In the second place, the exact circumstances of the loss of possession – which may have occurred 80 years ago – may remain unknown even after thorough research. In such instances outright restitution will not be the primary remedy. So while it is not always possible – or desirable – to turn back time after so many years (restitution in the sense of a restoration of the *status quo ante*), often it is possible to search for creative solutions, or at least to tell the story. That may be a factor underlying a shift in focus from restitution

6 See amongst others Robinson in Chapter 2 (n 27) and Chapter 3.

7 See for example Weller (Chapter 9).

in the traditional sense – full transfer of ownership rights – towards more creative solutions in which the context of the object and its history are key.

### 11.3 WHAT ABOUT TIME AND LIMITATION PERIODS?

Several points of view were expressed on the subject of time and limitation periods in relation to Nazi-looted art claims. Many, but certainly not everyone, agreed that time limits should apply at a certain point.

The contribution from Renold and Chechi includes a criterion that touches on the matter of time limitation. They argue that restitution requests are legitimate provided that (1) there is evidence that the object was confiscated by the Nazis (either through theft, confiscation or coerced sale) and (2) the *claimant has shown a sufficient degree of scrupulousness in tracing and recovering* such property (has shown diligence in attempting to find and identify their possessions). If these two conditions are met, then the claim will qualify for consideration and a solution will have to be sought.<sup>8</sup> This is reminiscent of the defence known in the United States as *laches*, to which Davidson refers in his contribution and under which dispossessed owners are expected to exercise continued due diligence in their quest for their property.

In proposing a criterion for an absolute limitation period, Ekkart places responsibility with the current possessors. In his view, once current possessors have made a thorough attempt to reconstruct the provenance of their artworks and have shared these results with the public, a specific term should be set within which relevant claims must be made. In his epilogue to the panel discussion, Polak argues that in practice this could lead to the – in his view undesirable – situation where in some cases no time limits will ever be set. In the interest of legal certainty for future generations, he therefore proposes a different criterion, which he links to the special status of Nazi-looted art claims. He states that this special treatment should only apply to the ‘direct victims’ and their first-degree descendants. He defines ‘direct victims’ as people who lived during the Nazi era and were the victim of looting, and if they perished their spouses and children – and their first-degree descendants. He argues that in other cases where there is no direct link to the distinguishing criterion of the case, there is no reason for this special treatment and, consequently, normal or more lenient limitation periods should apply.

Palmer also touches on this issue. He raises the – in his view contentious – question of whether a lack of ties between claimant and victim can be material to the moral strength of the case. This is a topic that, like the proposal by Polak, is closely linked to the special status of Nazi-looted art. Following on from Palmer’s question one could say that a view

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8 In that case, they add, it should be of no consideration to such a solution whether the object leaves a public exhibition to return to private hands. See Chapter 8.

in which such ties are indeed material, takes into consideration not only the situation *at the time of the looting* – with the original owner as the victim and the Nazis as the perpetrator – but also the situation *now*. The situation *now* pitches the current claimant – with or without personal or family ties to the dispossessed owner or the object – against the current possessor – who may or may not have responsibility for or knowledge of the past. Veraart’s argument may to some extent be consistent with this. First he argues, from the point of view of legal theory, that the law has a modest role in cases involving historical injustices. At this stage, it is the *reconciliation* of existing interests that is important rather than the restoration of (property) rights. In his view, therefore, the principal role of the law in Nazi-looted art cases is to develop procedures that enable parties to reach voluntary solutions in a fair and just way.

#### 11.4 HOW TO GET THERE?

Weller, too, emphasises the importance of transparent and thorough procedures, especially at a stage in which there is (still) a lack of clarity with regard to the norm. Legal uncertainty and inconsistent outcomes – as in the current situation – means *injustice*. Weller maintains that *procedural justice*, in the sense of transparent procedures and solid and knowable argumentation of decisions, is all the more important in such a situation.

But what procedures are available? When it comes to Holocaust-related art claims, positive law is often at odds with morality and a formalistic legal approach will mostly prove inefficient. Palmer as well as Renold and Chechi describe the obstacles and drawbacks of litigation in ordinary courts. Legal action – understood as an assessment on the merits as envisaged in the Washington Principles and the Terezín Declaration – may simply not be available as a result of limitation periods, a superior title by a new possessor or a lack of jurisdiction. However, there are also other factors that mean that courts of law are not the best platform for dealing with these kinds of claims. In light of this, the Washington Principles as well as subsequent declarations point to alternative dispute resolution (ADR) mechanisms as an instrument for resolving ownership issues.

Several countries have indeed established government panels. Although there are big differences in terms of mandate and working methods, five of these panels – the Beirat in Austria (1998), the CIVS in France (1998), the Spoliation Advisory Panel in the UK (2001), the Restitutions Committee in the Netherlands (2001) and the Beratende Kommission in Germany (2003) – have in common that they provide an alternative procedure for Holocaust-related art claims. With the exception of the Dutch model, these panels are focused on national or public collections. To summarise just a few notable characteristics of the committees as described in Chapter 2:

- The Austrian Committee, established in 1998, decides on the basis of pro-active provenance research – *ex officio* – whether a specific loss of possession of a work of art that is now part of a federal collection should be considered void according to the Austrian Art Restitution Law of 1998, in which case restitution will be recommended. This can also apply to items that were originally restituted after the war but that subsequently became State property in the course of proceedings related to the Austrian export ban. The Art Restitution Law, as amended in 2009, makes reference to a post-war restitution law, which states that all legal transactions caused by the Nazi-occupation are void. By August 2014, the Austrian Committee had issued more than 300 opinions.
- The main objective of the French CIVS, established in 1999, is *compensation* for lost items, provided they were lost within the territory of France and during the Nazi period. In practice, this can result in a situation where a claimant has a compensation claim in France for the loss of an item alongside a claim for restitution of that same item from a museum in another country. As of April 2014, the CIVS had dealt with 3,197 cases involving personal property, of which 270 involved artworks. In four of these cases, it was advised to reconstitute the works of art. These works were part from the so-called MNR collection of heirless art.
- The UK Spoliation Advisory Panel, having dealt with 15 cases as of August 2014, was established in February 2000 in order to provide an alternative process to litigation through the UK courts and resolve claims for looted art in public UK collections. It takes into account the *moral strength of a claim* and asks itself whether any moral obligation rests on the institution. Claimants can submit claims to the Panel unilaterally. An interesting feature is that the jurisdiction of the Panel is not limited to Nazi-looted art but extends to restitution claims regarding art that was lost in the aftermath of the war.
- The Dutch Restitutions Committee, established in 2001, had dealt with 129 cases regarding 1,540 objects as of August 2014, most of them concerning works of art in the national collection. Claims involving works of art in the national collection are automatically referred to the committee, but claims involving works of art in other collections can also be submitted. In view of this the Dutch Museum Association (NMV) has advised its members to refer claims which cannot be settled amicably to the committee and the City of Amsterdam has adopted a policy to refer all Nazi-related art claims to the committee for research and advice.
- Germany's Beratende Kommission, installed in 2003, mediates in disputes between public institutions and former owners or their heirs. A request for advice can be laid before the committee provided that at least one party is a public institution and all the parties involved approve. Through its advice, the Beratende Kommission seeks to find a fair and just solution in accordance with the Washington Principles and policy lines

as laid down in the so-called *Gemeinsame Erklärung*.<sup>9</sup> As of August 2014, the Kommission has issued nine recommendations.

For cases that fall outside the remit of these panels, parties are reliant on themselves. The majority of such cases are resolved among the parties in settlements, with or without the assistance of third parties. These can be special-interest organisations that work on a not-for-profit basis such as the Commission for Looted Art in Europe, or organisations such as the Art Loss Register, auction houses or specialised agencies. However, if parties fail to reach agreement, what procedures are available? A proposal put forward in 2003 to establish a special chamber of the Permanent Court of Arbitration (PCA) for cultural property cases such as Nazi-looted art cases would not appear to have led to more arbitration in this area.<sup>10</sup> Renold and Chechi state that they know of only one arbitration case in the field. Various drawbacks which also apply to litigation, such as a formal setting and the costs, could be the reason for this. Another possibility is mediation, for example with the assistance of the International Council of Museums (ICOM).<sup>11</sup>

Given the undertakings made in a series of international declarations to ensure that national legal systems or alternative processes facilitate expeditious resolution and just and fair solutions on the merits of each case, one may wonder whether this is sufficient.

## 11.5 INTERNATIONAL COOPERATION?

There would appear to be common ground that further international cooperation is necessary, particularly in the area of provenance research and development of the norm. A binding regulation in the form of a treaty is generally considered to be unrealistic and even undesirable. A treaty or a supranational tribunal would – in my view – also be at odds with the starting point that a non-legalistic approach is preferable. This book puts forward two proposals for further cooperation in the field by establishing a non-governmental organisation. Renold and Chechi propose the establishment of an *international platform* for the resolution of Holocaust-related art restitution claims, as an informal structure whose goal it would be to help claimants deal with their restitution requests in light of the experience of others.<sup>12</sup> Palmer's proposal is consistent with this but takes matters further. With reference to the responsibilities that states have taken upon themselves, for example in the

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9 See Section 3.5.5. and Chapter 8

10 See Chapter 1 (n 11).

11 ICOM/WIPO have jointly developed a mediation process for art and cultural heritage disputes, see: 'ICOM-WIPO Art and Cultural Heritage Mediation' (*World Intellectual Property Organization*) <[www.wipo.int/amc/en/center/specific-sectors/art/icom/](http://www.wipo.int/amc/en/center/specific-sectors/art/icom/)> accessed 12 September 2014.

12 See Chapter 8.

Terezín Declaration,<sup>13</sup> and the complexity of the subject matter, Palmer states that cooperation or at the very least discussion is needed. He proposes the establishment of a multi-functional organisation in the field of Nazi-looted art and elaborates this proposal as follows:

[...] the formation of a privately-constituted body (non commercial) that can offer a variety of services, to which nations and individuals might refer claims. Either on an ad hoc basis or on the basis of a formal agreement. The availability of this process, together with its proven objectivity and independence, might provide a solution for those states which lack either the resources or the political impetus to establish a claims resolution process on their own soil. Drawing on contemporary experience of alternative dispute resolution models in general, and of Holocaust claims panels in particular, the architects of the new body might offer a variety of approaches to claims: arbitration, mediation and conciliation, expert neutral appraisal, binding expert opinion, or the straightforward process of recommendation and moral assessment that lies at the heart of the English regime in this field. Research services might also form part of the overall function. States that are inclined to subscribe to this extra-territorial process might commit themselves by statute or formal agreement to the exclusive reference of claims to that body, or might alternatively choose to refer claims on an ad hoc basis. For reasons of trust and transparency, it might be advisable for the body to be run on non-profit principles, perhaps under the auspices of a charitable foundation.<sup>14</sup>

Key features of these proposals are that they are voluntary and are based on a pooling of resources in the field of research. The resolution adopted by the European Parliament in 2003, discussed in Chapter 2, proposing a study into a cross-border coordination administrative authority to deal with disputes regarding title of cultural goods fits in with this. Even though the resolution was not followed up, it would appear to have lost little of its relevance.

A last word on the narrative aspects of procedures and ‘fair and just’ solutions. Where restitution claims regarding specific pieces of art are interrelated with individualised histories of suffering, one role of a procedure is to ensure that those stories are told and heard. In this sense, a *neutral fact-finding phase*, integrating the narrative function in a procedure and at the same time limiting the risk of decisions based on a wrong impression of the facts, could well be of importance to any fair and just solution. Non-economic factors

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13 See Section 2.6 and Appendix 6.

14 Please refer to Chapter 7.

should not be underestimated in these cases. Or, as one of the claimants interviewed in this book expressed it: *“Our objective is not to recover every stolen work of art. For us it’s about recognition. The most important issue for us is that our name is put back into the work’s provenance. We believe it’s unjust that not only was our grandparents’ home looted, but their link to a particular object has also been erased. Seeing to it that his name is associated in any event with a couple of objects, that is what has great emotional value for us. Then some justice will have been done.”*<sup>15</sup>

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15 See the interview in this book with Ella Andriessse and Robert Sturm.



Photo 1: *The Art of Painting* by Johannes Vermeer (about 1662-1665) from the collection of the *Kunsthistorisches Museum* in Vienna. It has been the subject of several restitution procedures based on the claim that it was sold under duress by the Czernin family to Hitler for the Führermuseum in Linz in 1940. In its decision of 18 March 2011 the Austrian *Beirat* gave the view that the 1940 sale cannot be considered a forced sale under the provisions of the 1998 *Kunstrückgabegesetz*.



Photo 2: Wooden crates with looted objects are unloaded from a truck during *Möbel-Aktion*, the Nazi operation to confiscate furniture and home inventories. Paris, around July 1943. See section 3.2.1.



Photo 3: Adolf Hitler presenting the painting *The Falconer* by Austrian artist Hans Makart to Hermann Göring as a birthday present.



Photo 4: In 2008 the heirs of the Jewish art dealer Alfred Flechtheim requested restitution of the painting *Portrait of Tilla Durieux* by Oskar Kokoschka from the collection of the Museum Ludwig in Cologne. The heirs claimed that Flechtheim sold the painting under duress due to circumstances relating to Nazi-persecution, while the Museum claimed that Flechtheim had to sell the painting because of financial problems. On 9 April 2013 the German *Beratende Kommission* ruled that it is to be assumed that Alfred Flechtheim was forced to sell the disputed painting because he was persecuted and that the painting should be returned to his heirs.

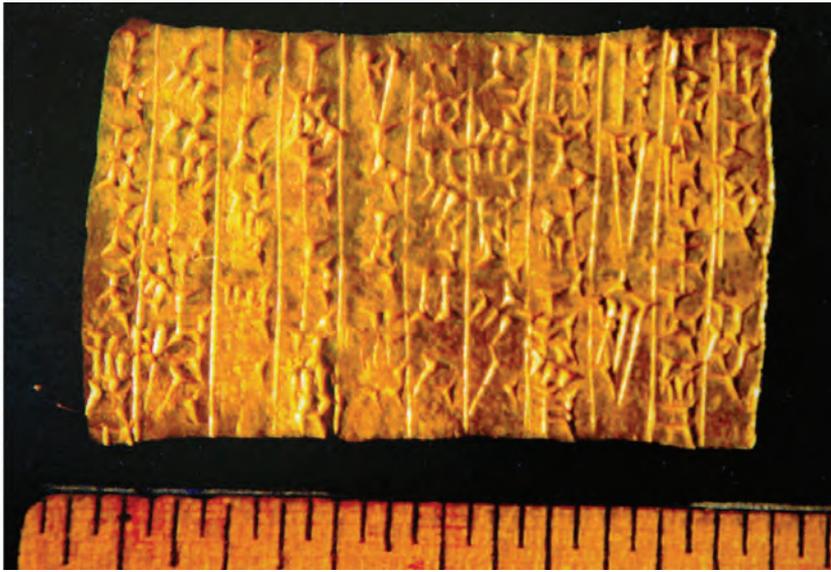


Photo 5: In the case of Riven Flamenbaum, Deceased versus the *Vorderasiatisches Museum* the New York Court of Appeals ruled, in its verdict of 14 November 2013, that this ancient gold tablet should be returned to the Berlin museum from where it had disappeared at the end of the Second World War. Riven Flamenbaum was a Holocaust survivor who may have acquired it in a trade with Russian soldiers.

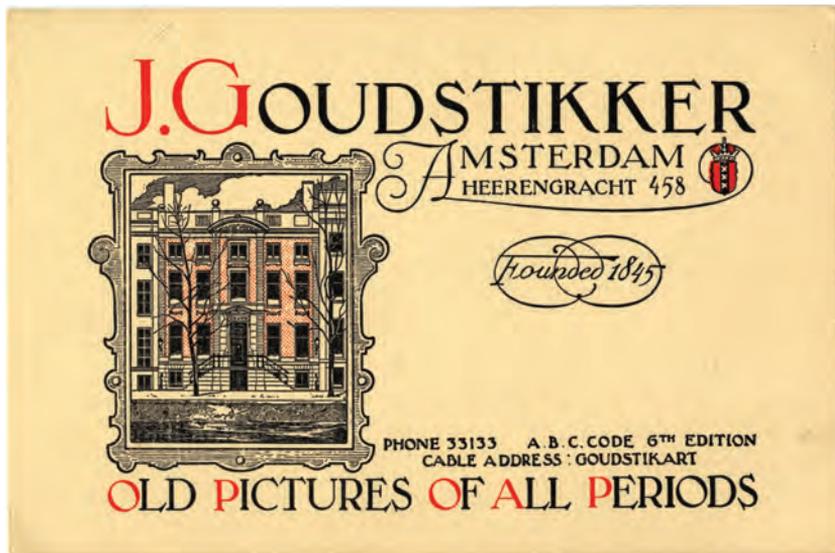


Photo 6: In May 1940 the trading stock of the Goudstikker gallery amounted to at least 1,113 works of art. After Jacques Goudstikker had fled the country in 1940 his staff sold nearly the entire trading stock and immovable property to the Germans Alois Miedl and Hermann Göring. Claims filed by heirs of Jacques Goudstikker were assessed by the Dutch Restitutions Committee and the Austrian *Beirat*.



Photo 7: This 15th century limewood Pietà was returned to the heirs of the Jewish art collector Fritz Gutmann following a recommendation of the Dutch Restitutions Committee. In 1939 the sculpture was stored in Paris for safekeeping, where it was consequently seized. American troops found the sculpture in a train carriage full of works of art that Göring had left in a tunnel (see photograph next to the sculpture). After the war, the Pietà became part of the NK collection. The work was subsequently purchased by *Museum Catherijneconvent* in Utrecht, where it had been on long-term loan. As can be seen in the picture, the museum tells the object's story by displaying the photo and a text (not pictured).



Photo 8: This drawing that serves as the background of the cover of this book is *L'Olivette* by Vincent van Gogh. It was restituted in August 1999 by the *Stiftung Preussischer Kulturbesitz* (Prussian Cultural Heritage Foundation) to the sole heir of Max Silberberg in what can be seen as an early example of a 'fair and just' solution.



Photo 9: Egon Schiele's painting *Portrait of Wally* from the collection of the *Leopold Museum* in Vienna was seized when on loan to the *Museum of Modern Art* in New York in 1998 on suspicion of having been looted by the Nazis from Lea Bondi Jaray in 1939. After a decade-long litigation over this and another painting the parties came to an agreement. This case is seen as a turning point for the museum world with regard to international loans. For the rise of immunity from seizure legislation and relevance to the present discussion, see e.g. Palmer's contribution.



Photo 10: Ardelia Ripley Hall (1899-1979) returning a portrait of St. Catherine by Rubens to Germany in 1952. Ardelia Hall, of the US State Department, stated in 1951 that the recovery programme “provides for an appropriate continuation of the cultural restitution programmes. For the first time in history, restitution may be expected to continue for as long as works of art known to have been plundered during a war continue to be rediscovered.”

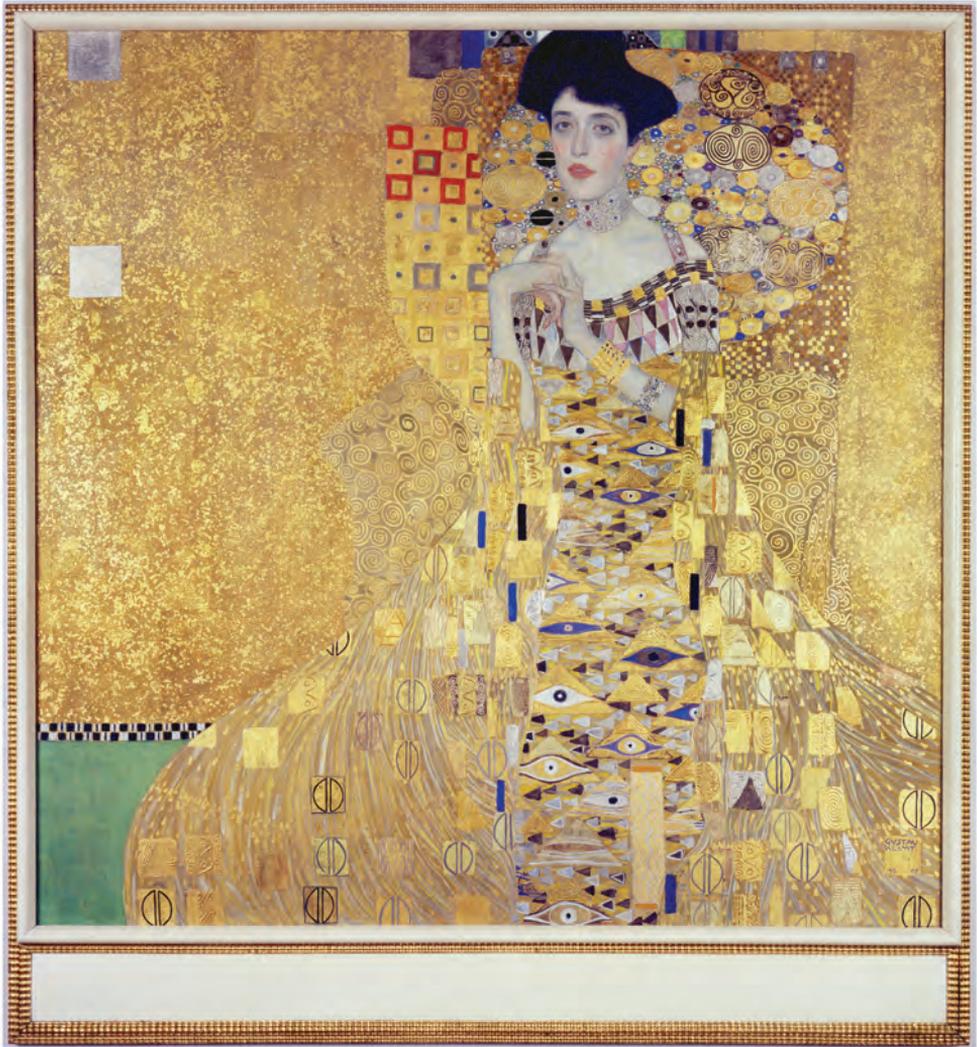


Photo 11: The dispute that arose around Gustav Klimt's *Portrait of Adele Bloch Bauer I* from the confiscated art collection of Ferdinand Bloch resulted in a landmark restitution case. The painting was the subject of a long legal battle (1999-2005), mostly in the U.S. courts, between the Austrian government and Bloch's heirs. The case was ultimately settled on its merits through binding arbitration in 2005; the *Portrait of Adele Bloch-Bauer I* was restituted to Bloch's heirs and purchased for the *Neue Galerie* museum in New York.



Photo 12: Officers of the *Monuments, Fine Arts, and Archives Section* of the U.S. Army (*MFA&A*) prepare Michelangelo's *Madonna and child* in the Kaiser Joseph salt mine at Altaussee, Austria for transportation to the Munich Central Collecting Point. The sculpture was looted from the Church of Our Lady in Bruges, Belgium.



Photo 13: An American soldier looks over some of the paintings stored in a castle near Merano.



Photo 14: In one of its first binding opinions the Dutch Restitutions Committee advised the restitution of *A prayer before supper* by Jan Toorop to the heirs of the Jewish art collector Ernst Flersheim on reimbursement of the purchase price to the *Zeeuws Museum* in the Netherlands.



Photo 15: Rose Valland (left) and her colleague Edith Standen inspecting a statue at Wiesbaden Collecting Point in Germany, 24 May 1946. See section 3.2.3.



Photo 16: Poster announcing the 1946 exhibition *Herwonnen kunstbezit* at the *Centraal Museum* in Utrecht, which displayed artworks returned to the Netherlands after the War.



Photo 17: To identify works of art that had been lost during the occupation and returned to the Netherlands after the war, the authorities organised three so-called 'claim exhibitions' in 1949 and 1950. This photo was taken at the claim exhibition at the *Rijksmuseum* in Amsterdam in April 1950.



Photo 18: Hermann Göring admires two paintings by Matisse, held by Bruno Lohse of the *Einsatzstab Reichsleiter Rosenberg*, at the *Galerie Nationale du Jeu de Paume*. Standing to Göring's left is his art advisor Walter Andreas Hofer.



Photo 19: Adolf Hitler, accompanied by Joseph Goebbels, visits the Degenerate Art Depot in Berlin. By 1937 the Nazis had removed more than 16,000 so-called degenerate artworks from the walls of German museums. Post-war restitution laws did not provide for restitution of these losses to German museums. See section 2.4.

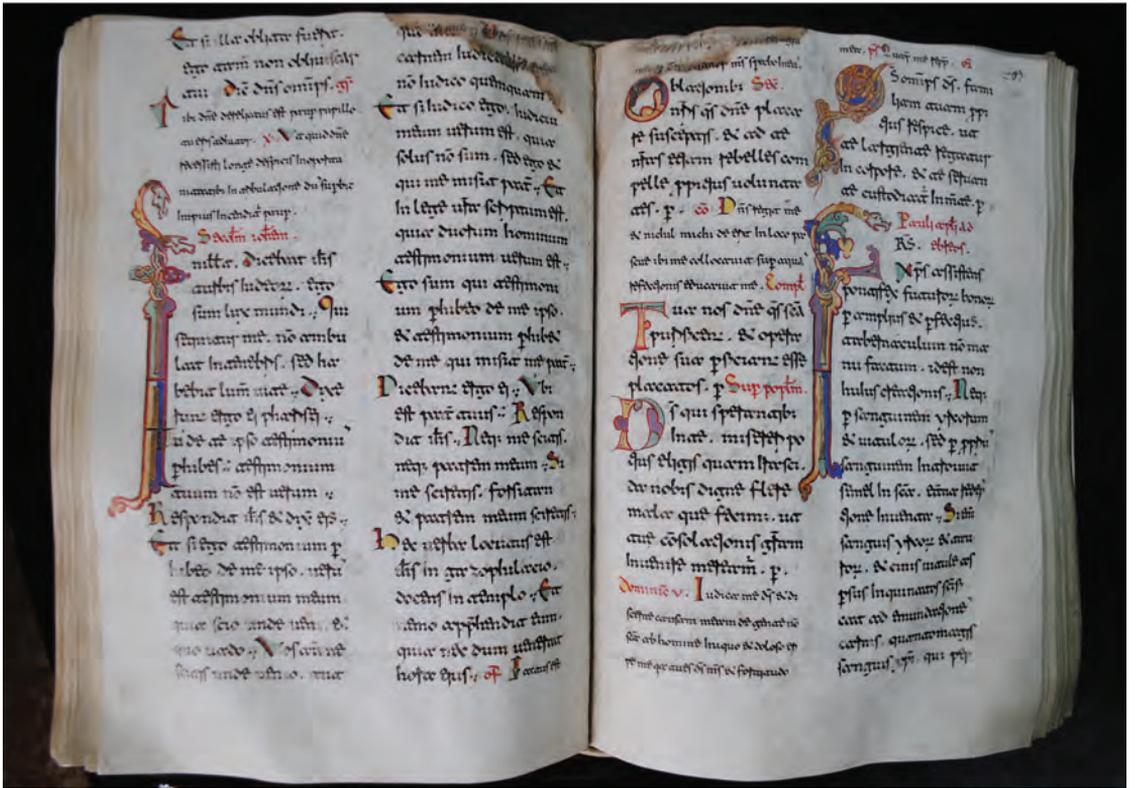


Photo 20: The Beneventan Missal case can be seen as an example of a restitution case involving non-Holocaust-related looting. This 12th century manuscript was looted from the cathedral of the Italian town of Benevento in 1943. In early 1944 a British soldier acquired the manuscript in a second-hand bookshop in Naples, after which it was sold in Britain and became part of the collection of the *British Library*. Following recommendations from the UK's *Spoilation Advisory Panel* the Missal was returned to Benevento Cathedral in 2011.

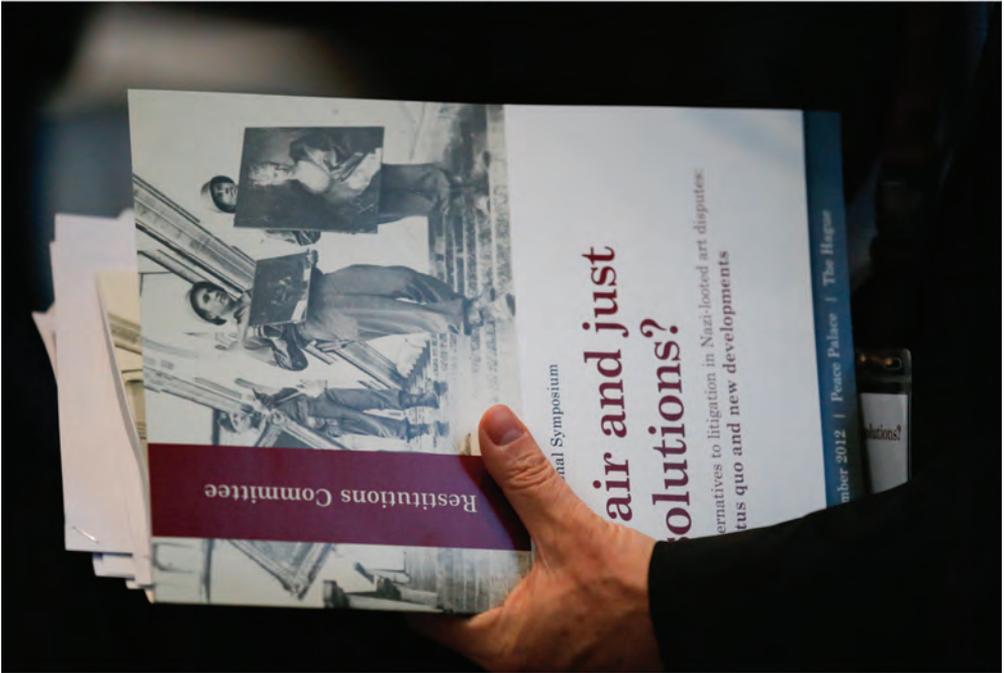


Photo 21: A participant at the international symposium *Fair and just Solutions?* holding a folder with documentation. Peace Palace, The Hague, 27 November 2012.

# APPENDICES



# 1 INTER-ALLIED DECLARATION AGAINST ACTS OF DISPOSSESSION COMMITTED IN TERRITORIES UNDER ENEMY OCCUPATION OR CONTROL

## DECLARATION

The Governments of the Union of South Africa; the United States of America; Australia; Belgium; Canada; China; the Czechoslovak Republic; the United Kingdom of Great Britain and Northern Ireland; Greece; India; Luxemburg; the Netherlands; New Zealand; Norway; Poland; the Union of Soviet Socialist Republics; Yugoslavia; and the French National Committee:

Hereby issue a formal warning to all concerned, and in particular to persons in neutral countries, that they intend to do their utmost to defeat the methods of dispossession practised by the Governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.

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

The Governments making this Declaration and the French National Committee solemnly record their solidarity in this matter.

London,  
January 5, 1943



## 2 WASHINGTON CONFERENCE PRINCIPLES ON NAZI-CONFISCATED ART

On 3 December 1998 the 44 governments participating in the Washington Conference on Holocaust-Era Assets endorsed the following principles for dealing with Nazi-looted art:

*[Released in connection with The Washington Conference on Holocaust Era Assets, Washington, DC, December 3, 1998]*

In developing a consensus on non-binding principles to assist in resolving issues relating to Nazi-confiscated art, the Conference recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws.

- I. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.
- II. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.
- III. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.
- IV. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.
- V. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.
- VI. Efforts should be made to establish a central registry of such information.
- VII. Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.
- VIII. If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.
- IX. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, can not be identified, steps should be taken expeditiously to achieve a just and fair solution.

*FAIR AND JUST SOLUTIONS?*

- X. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.
- XI. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.

### 3 RESOLUTION 1205 (1999) ON LOOTED JEWISH CULTURAL PROPERTY OF THE COUNCIL OF EUROPE<sup>1</sup>

On 5 November 1999 the Parliamentary Assembly of the Council of Europe unanimously passed Resolution 1205 calling for the restitution of looted Jewish property in Europe.

(Extract from the Official Gazette of the Council of Europe – November 1999)

1. One essential part of the Nazi plan to eradicate the Jews was the destruction of the Jewish cultural heritage of movable and immovable property, created, collected or owned by Jews in Europe.
2. This involved the systematic identification, seizure and dispersal of the most significant private and communal Jewish property.
3. Subsequent expropriation and nationalisation of Jewish cultural property, whether looted or not, by communist regimes was illegal, as was similar action in countries occupied by the Soviet Union.
4. Though early moves were made following the end of the second world war to find and return this looted property, a very considerable amount has not been recovered and has remained in private and public hands.
5. A new attempt is now being made, characterised inter alia by major conferences held in London and in Washington, to complete this process and advance the recovery of looted Jewish cultural property before the last of those persons from which it was taken has died.
6. The Assembly has long recognised the Jewish contribution to European culture (Resolution 885 (1987)) and recently underlined the significance of Yiddish culture (Recommendation 1291 (1996)). From local community to national and European levels, Jewish culture is a part of the heritage.
7. Moreover, Europe, as represented in the Council of Europe, now includes the wider Europe, including Russia, throughout which looted Jewish cultural property remains dispersed.

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1 Text adopted by the Standing Committee, acting on behalf of the Assembly, on 4 November 1999. See Doc. 8563, report of the Committee on Culture and Education, rapporteur: Mr Zingeris.

8. The Assembly believes that restitution of such looted cultural property to its original owners or their heirs (individuals, institutions or communities) or countries is a significant way of enabling the reconstitution of the place of Jewish culture in Europe itself.
9. A number of European countries have already made moves in this direction, notably Austria and France.
10. The Assembly invites the parliaments of all member states to give immediate consideration to ways in which they may be able to facilitate the return of looted Jewish cultural property.
11. Attention should be paid to the removal of all impediments to identification such as laws, regulations or policies which prevent access to relevant information in government or public archives, and to records of sales and purchases, customs and other import and export records. Russia in particular should keep open its files on Jewish heritage.
12. Bodies in receipt of government funds which find themselves holding looted Jewish cultural property should return it. Where such works have been destroyed, damaged or are untraceable, or in other cases where restitution may not be possible, such bodies should be assisted to pay compensation at the full market value.
13. It may be necessary to facilitate restitution by providing for legislative change with particular regard being paid to:
  - i. extending or removing statutory limitation periods;
  - ii. removing restrictions on alienability;
  - iii. providing immunity from actions for breach of duty on the part of those responsible for collections;
  - iv. waiving export controls.
14. Such legislative change may require modification and clarification of human rights laws in relation to security and enjoyment of property.
15. Consideration should also be given to:
  - i. providing guarantees for those returning looted Jewish cultural property against subsequent claims;
  - ii. relaxing or reversing anti-seizure statutes which currently protect from court action works of art on loan;
  - iii. annulling later acquired titles, that is, subsequent to the divestment.
16. The Assembly encourages co-operation in this question of non-governmental organisations, and in particular the European Jewish communities, at both national and European levels. Such encouragement extends to the exploration and evolution of out of court forms of dispute resolution such as mediation and expert determination.
17. Due diligence should be imposed on purchasers and the art world by the implementation of the Unidroit convention on stolen or illegally exported cultural objects.
18. In circumstances where dealers, agents or intermediaries know or suspect a work they have in their possession to be looted, provision should be made in law requiring them

3 *RESOLUTION 1205 (1999) ON LOOTED JEWISH CULTURAL PROPERTY OF THE COUNCIL  
OF EUROPE*

to hold on to it and alert the relevant authorities, and every effort should be made to locate and alert the dispossessed owner or his or her heirs.

19. The Assembly calls for the organisation of a European conference, further to that held in Washington on the Holocaust era assets, with special reference to the return of cultural property and the relevant legislative reform.



## 4 VILNIUS FORUM DECLARATION (2000)

On 3-5 October 2000 the city of Vilnius hosted the International Forum on Holocaust-Era Looted Cultural Assets held under the auspices of the Secretary General of the Council of Europe and the Prime Minister of the Republic of Lithuania. The participating governments, 38 in total, agreed to the following declaration.

### **Declaration**

The Vilnius Forum,

Recognizing the massive and unprecedented looting and confiscations of art and other cultural property owned by Jewish individuals, communities and others, and the need to reach just and fair solutions to the return of such art and cultural property,

Referring to Resolution 1205 of the Parliamentary Assembly of the Council of Europe and the Washington Conference Principles on Nazi-Confiscated Art,

Noting in particular their emphasis on reaching just and fair solutions to issues involving restitution of cultural assets looted during the Holocaust era and the fact that such solutions may vary according to the differing legal systems among countries and the circumstances surrounding a specific case,

Makes the following declaration:

1. The Vilnius Forum asks all governments to undertake every reasonable effort to achieve the restitution of cultural assets looted during the Holocaust era to the original owners or their heirs. To this end, it encourages all participating States to take all reasonable measures to implement the Washington Conference Principles on Nazi-Confiscated Art as well as Resolution 1205 of the Parliamentary Assembly of the Council of Europe.
2. In order to achieve this, the Vilnius Forum asks governments, museums, the art trade and other relevant agencies to provide all information necessary to such restitution. This will include the identification of looted assets; the identification and provision of access to archives, public and commercial; and the provision of all data on claims from the Holocaust era until today. Governments and other bodies as mentioned above are asked to make such information available on publicly accessible websites and further to co-operate in establishing hyperlinks to a centralized website in association with the Council of Europe. The Forum further encourages governments, museums, the art

- trade and other relevant agencies to co-operate and share information to ensure that archives remain open and accessible and operate in as transparent a manner as possible.
3. In order further to facilitate the just and fair resolution of the above mentioned issues, the Vilnius Forum asks each government to maintain or establish a central reference and point of inquiry to provide information and help on any query regarding looted cultural assets, archives and claims in each country.
  4. Recognizing the Nazi effort to exterminate the Jewish people, including the effort to eradicate the Jewish cultural heritage, the Vilnius Forum recognizes the urgent need to work on ways to achieve a just and fair solution to the issue of Nazi-looted art and cultural property where owners, or heirs of former Jewish owners, individuals or legal persons, cannot be identified; recognizes that there is no universal model for this issue; and recognizes the previous Jewish ownership of such cultural assets,
  5. The Vilnius Forum proposes to governments that periodical international expert meetings are held to exchange views and experiences on the implementation of the Washington Principles, the Resolution 1205 of the Parliamentary Assembly of the Council of Europe and the Vilnius Declaration. These meetings should also serve to address outstanding issues and problems and develop, for governments to consider, possible remedies within the framework of existing national and international structures and instruments.
  6. The Vilnius Forum welcomes the progress being made by countries to take the measures necessary, within the context of their own laws, to assist in the identification and restitution of cultural assets looted during the Holocaust era and the resolution of outstanding issues.

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States participating through national delegations were the following:

Albania; Argentina; Austria; Belgium; Canada; Croatia; Czech Republic; Cyprus; Denmark; Estonia; Finland; France; Greece; Germany; Holy See; Hungary; Israel; Italy; Latvia; Lithuania; Luxembourg; Malta; Netherlands; Norway; Poland; Portugal; Republic of Macedonia; Romania; Russian Federation; Slovak Republic; Slovenia; Spain; Sweden; Switzerland; Turkey; Ukraine; United Kingdom; United States. The Parliamentary Assembly of the Council of Europe was also represented through an official delegation.

## 5 EUROPEAN PARLIAMENT RESOLUTION (2003)

[Please note that this is an Extract]<sup>1</sup>

### **Resolution and Report of Committee on Legal Affairs and the Internal Market**

26 November 2003

**REPORT** on a legal framework for free movement within the internal market of goods whose ownership is likely to be contested (2002/2114(INI))

Committee on Legal Affairs and the Internal Market

Rapporteur: Willy C.E.H. De Clercq

### **PROCEDURAL PAGE**

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### **MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION**

**on a legal framework for free movement within the internal market of goods whose ownership is likely to be contested**

(2002/2114(INI))

The European Parliament,

- having regard to its resolutions of 14 December 1995 on the return of plundered property to Jewish communities<sup>2</sup> and of 16 July 1998 on the restitution of property belonging to Holocaust victims<sup>3</sup>,
- having regard to the European Convention on Offences relating to Cultural Property of 23 June 1985 and Council Directive 93/7/EEC of 15 March 1993<sup>4</sup> on the return of cultural objects unlawfully removed from the territory of a Member State,
- having regard to Rule 163 of its Rules of Procedure,

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1 Willy CEH De Clercq, 'Report on a legal framework for free movement within the internal market of goods whose ownership is likely to be contested' (European Parliament- A5-0408/2003).

2 OJ C 17, 22.1.1996, p. 141.

3 OJ C 292, 21.9.1998, p. 112.

4 OJ C 120 E, 24.4.2001, pp. 182-183.

- having regard to the report of the Committee on Legal Affairs and the Internal Market (A5-0408/2003),
- A. whereas early moves were made following the end of the Second World War to find and return looted property to its country of origin,
- B. whereas a very considerable amount of property has not been recovered by its owners or their successors,
- C. whereas litigants have often been confronted with difficult problems due to conflicts of law, varying prescriptive periods and other difficulties, and that this hampers or prevents access to swift and efficient resolution of the interests of all parties affected,
- D. whereas this is an important human and legal problem as victims continue to encounter legal and technical problems,
- E. whereas a public hearing was held on 18 March 2003,
- F. whereas this is a widespread European legal problem,
- 1. Welcomes the recognition among various governments that the unique problems associated with cultural goods (i.e. public or private property considered as constituting an artistic creation or cultural property) which were plundered in wartime through acts of violence, confiscation or by apparently legal transactions or auctions need to be addressed;
- 2. Recognises that, although the problem of these goods is a matter of public knowledge, it has often proved remarkably difficult for private claimants to recover their property and to clarify their provenance;
- 3. Welcomes the efforts being made by third countries (especially the United States of America and the Russian Federation) to take parallel or reciprocal action;
- 4. Calls on the European Commission, with due regard for Article 295 of the EC Treaty, to undertake a study by the end of 2004 on:
  - establishing a common cataloguing system, to be used by both public entities and private collections of art to gather together data on the situation of looted cultural goods and the exact status of existing claims;
  - developing common principles regarding access to public or private archives containing information on property identification and location and tying together existing databases of information about title to disputed properties;
  - identifying common principles on how ownership or title is established, prescription, standards of proof, rights to export or import property which has been recovered;
  - exploring possible dispute resolution mechanisms that avoid lengthy and uncertain judicial procedures and take into account principles of fairness and equity;
  - the value of creating a cross-border coordination administrative authority to deal with disputes on title of cultural goods;
- 5. Calls on the Member States and applicant States to make all necessary efforts to adopt measures to ensure the creation of mechanisms which favour the return of the property

- referred to in this resolution and to be mindful that the return of art objects looted as part of crime against humanity to rightful claimants is a matter of general interest for the purposes of Article 1 of Protocol 1 to the European Convention of Human Rights;
6. Calls on the Presidency of the European Union to assign this issue to a working group of the Council;
  7. Instructs its President to forward this resolution to the Council, the Commission, the Member States, accession States and the Council of Europe.

## EXPLANATORY STATEMENT

### *Background: the Nature of the Problem*

Various aspects of the problem of property looted during World War II have been the subject of international agreements. One issue remains outstanding: the problem of cultural goods whose ownership is likely to be contested.

The problem of looted cultural goods (i.e. public or private property considered as constituting an artistic creation or cultural property), which were plundered in wartime through acts of violence, confiscation or by apparently legal transactions or auctions, unfortunately remains part of human history even at the beginning of the twenty-first century. Such plundering occurred throughout the ages, but became more acute during the nineteenth and twentieth centuries. During World War II cultural goods were looted on a massive scale never before seen. The scale of the looting was well-documented both during and after the war, and has been recognised and accepted by all the Member States. Post-war records show that several million objects were looted, including museum quality works of art, furniture, books, religious objects and other culturally significant works. From the records of post-war claims made by survivors and their families, and by Member States it appears that thousands of major art works in circulation (including some in museum collections) have gaps in their provenance which are traceable to the World War II period in Europe (1939 – 1945). It is also acknowledged by public entities that considerable numbers of art works have been moved through the art market without any clear identification of title, and with gaps in the history of their ownership. Museums and art dealers acknowledge the need for legal certainty to clarify the provenance of their collections and acquisitions.

Although the problem of looted cultural goods is a matter of public knowledge, it has often proved remarkably difficult for private claimants to recover their property. One reason for this is that many European nations have chosen to ignore international law regarding the status of this property, and permit a thief (or those in the chain of possession from the thief) to pass valid title to buyers under national law. In addition, looted cultural

goods cases often become enmeshed in complex issues of choice of law and statutes of limitation, based on where the art was looted, where it has been over time or where it was found. Finally, claimants have faced significant hurdles in researching their claims, due to varying standards of archival access over Europe.

Immediately after World War II, various national laws dealing specifically with looted property were adopted, many of which were then allowed to lapse. The subject returned to the forefront of public attention when the Berlin Wall fell and archives in Eastern Europe and Russia were opened. Many private organisations began to work actively on the issue of looted cultural goods, and various national commissions and working groups were established to scrutinise archives, enquire into the provenance of works of art and, in some cases, examine individual requests for restitution.

Unfortunately, it is generally acknowledged that the problem of looted art in Europe did not end in 1945. By way of example, the Commission on Real Property Claims in Bosnia-Herzegovina has recognised claims for loss of property in connection with the recent Serbian ‘ethnic cleansing’ campaign in Bosnia. Sadly, similar claims are almost certain to arise from future conflicts.

### *Current State of Play*

The Nazi regime was responsible for looting vast amounts of valuable cultural goods, not only in Germany, but also in every country which was allied with or occupied by that regime, including Austria, Belgium, Czechoslovakia, France, Hungary, Italy, Luxembourg, the Netherlands, Norway, Poland, Romania and the former Soviet Republics occupied by Nazi forces (the Baltic Republics, Russia, Ukraine and Belarus). Under international law, this looting was illegal. During the war the United Nations made it clear that looted property recovered by States was to be restored to its nation of origin for return to its original owner. This looted property was then granted special status by the Nuremberg Tribunal, which expressly ruled that under Article 6(b) of the Nuremberg Charter, the looting of private property during the war could constitute a crime under international law. In its final judgment, the Tribunal specifically ruled that certain looting conducted after September 1, 1939 was a crime against humanity.<sup>5</sup> (The panel did not excuse looting from Jews before that date, finding only that it was not a war crime. Germany itself recognised the earlier looting as illegal in various post-war treaties). Numerous post-war treaties also recognised that States had a duty to recover looted property, notwithstanding transfers to seemingly innocent purchasers, and a duty to care for and maintain that property pending return to the nation of origin. Thus, under international law, States became custodians for looted property, not owners of it.

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<sup>5</sup> See Judgment of the International Military Tribunal, 30 September 1946.

National laws adopted after the war in Switzerland, Belgium, France, Germany, Greece, Italy and the Netherlands recognised this concept, creating a presumption in favour of the original owner of property looted during this period. Today, however, the majority of these national laws have lapsed or expired owing to statutes of limitations, and there is no international convention applicable to the World War II period. Given that the problem is recognised, States are still seeking legal instruments to harmonise discrepancies in national laws. At institutional level, the Parliamentary Assembly of the Council of Europe has adopted a Resolution on Looted Jewish Cultural Property<sup>6</sup>. In addition to these rules, on the occasion of a diplomatic conference in Washington on Holocaust Era Assets on 3 December 1998, 44 States including all EU Member States adopted ‘non-binding’ principles and morally undertook to return looted cultural goods. The participating States recognised the mass of looted cultural goods still in circulation and enacted eleven recommendations by which they agreed to (i) take all measures to identify and distribute a list of works of art of doubtful origin, (ii) develop mechanisms allowing the resolution of ownership issues and taking into account the difficulties claimants often have to establish their title, and (iii) ease the requirements regarding the burden of proof faced by claimants seeking return of looted property. The follow-up October 2000 Vilnius International Forum on Holocaust Era Looted Cultural Assets aimed at bringing the Washington principles and the Council of Europe Resolution into effect<sup>7</sup>. Some EU Member States and third countries such as Russia<sup>8</sup> have recently adopted measures for victims of looted art, for example examination of recovery claims<sup>9</sup>, relaxation of the rules of tort and property law, such as limitation periods, and the establishment of Parliamentary Commissions to study this subject.

At European level, Directive 93/7/EEC of 15 March 1993 addressed the return of cultural objects unlawfully removed from the territory of a Member State. This Directive aimed to establish cooperation between Member States and create mutual recognition of the relevant national laws in the field of cultural national treasures. However, it did not establish a level playing field for individual claims, which must still rely on extremely varied national legal requirements. The Parliament has subsequently adopted two resolutions on the issue of looted cultural goods, one in 1995<sup>10</sup> on the return of plundered property to Jewish communities and the other, on the restitution of property belonging to Holocaust victims, in

6 Resolution 1205, adopted on 4 November 1999.

7 The reference to the ‘Holocaust Era’ should not be taken to indicate that these initiatives were concerned only with art looted from Jews. During the period in question, large numbers of individuals and groups throughout Europe were victims of such looting, carried out by a variety of perpetrators.

8 The Russian Parliament modified its law on cultural assets in 2000.

9 A Bundesrat Resolution regarding the ‘Modernisation of the Law of Obligations Act’ (*Gesetz sur Modernisierung des Schuldrechts*) reaffirmed the Berlin declaration and made it clear that the recent legislation was not intended to alter German law to cut off looted art claims (Autumn 2001).

10 OJ C17, 22.01.1996.

1998<sup>11</sup>. Thus the European Union has rightly taken steps to recognise the historical fact of art-looting between 1933 and 1945, but it has not yet established a comprehensive framework to resolve the remaining legal problems arising from looted art, which have an effect on the freedom of circulation of all works of art in the Internal Market.

*Need for EU Action on a European Legal Problem*

The legal situation in this area is at present entirely unclear, so that museums, art dealers, victims and heirs have been unable to recover looted goods or fill the gap in provenance of art ownership. Claimants face a bewildering array of *legal* problems, many driven by the sheer accident of where looted property happens to be found. Access to data varies from nation to nation, as do the legal standards regarding such fundamental issues as determining the applicable law, proving ownership, assessing when a claim must be brought and the effect of intervening transfers to allegedly innocent transferees. There is a need for a legal and institutional framework that will be fairer to claimants, current holders and state-owned and not-for-profit entities. Moreover, this is very much a European problem which requires a European solution, and the forthcoming enlargement of the European Union makes the issue still more important as it directly affects a number of candidate Member States.

Around 170 claims are currently pending in courts all over Europe, including Russia. All face the same *legal* problems: establishing the origin of a cultural good, assessing how to account for the legal gap in ownership between 1933 and 1945, defining the applicable jurisdiction, deciding who may be a 'good faith' purchaser and what that purchaser's rights may be, determining if any limitations period should apply etc. Moreover, differences between civil and common law in the Member States lead to different results and cause endless litigation and a legal morass for victims and heirs to looted cultural goods. While some of these problems may appear to be cultural, the aim of a European legal and institutional framework on looted cultural goods must be to find a legal solution to decidedly legal problems, rather than allowing this to become a cultural problem.

There is no doubt that this is a *legal* problem. Firstly, the systematic and discriminatory plunder of property by totalitarian regimes was and remains a serious violation of the human right, recognised by the ECHR and the Charter of Fundamental Rights of the European Union, to peaceful enjoyment of property. Deciding how the rights of those affected by these violations should be addressed raises distinctly legal issues.

Secondly, the problem posed by such looting arises from conflicts of law which result in different treatment across the EU for similarly situated claimants, depending on where their property has come to rest.

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11 OJ C292, 21.09.1998

Thirdly, addressing looted cultural goods issues entails sorting through legal questions relating to public international law, the operation of various treaties, private international law, access to information, property rights, the burden of proof and prescriptive periods.

To conclude, looted cultural goods cases generally present the following issues, all of which are subject to diverging *legal* standards under the laws of Member States: (1) how is ownership or title established and what access to necessary information do Member States offer claimants? (2) when must a demand be made for return of property, and what should be the relevant statute of limitations? (3) what rights, if any, do 'good faith' purchasers have in looted cultural goods? (4) what claims run against professional sellers such as art dealers who have bought or sold looted cultural goods? and (5) if a looted cultural good is recovered, may there be limitations on an owner's ability to export it? The different answers to these questions in the Member States cloud title and impede the movement of cultural goods in the Internal Market.

#### *Assessment of Possible EP Initiatives*

The current legal system relating to looted cultural goods is neither consistent nor predictable; it does not encourage the voluntary or efficient settlement of claims, protect the rights of victims seeking recovery of looted property or accomplish the stated goals of international law established by the nations of the world after World War II. In order fully to appraise the issues raised by looted cultural goods, the European Parliament held a hearing in March 2003 with a view both to raise public awareness and to identify potential EU solutions to the problems posed. To pave the way to a comprehensive European framework for the fair resolution of disputes relating to the ownership of looted cultural goods, such a hearing:

- evaluated efforts to implement the principles set forth at the Washington Conference, in Council of Europe Resolution 1205, and at the Vilnius Forum.
- reviewed Member States' existing programmes for identifying and returning looted cultural goods.
- assessed existing or planned databases relating to looted cultural goods and the feasibility of expanding public databases to allow more comprehensive asset searches tied to specific works and/or claims.
- evaluated EU laws and regulations relating to access to archives on (a) cultural goods, (b) World War II-era expropriation, asset sales, or looting, (c) post-war lists of items looted, items returned to 'countries of origin', claims filed, and claims settled, (d) museum and dealer records regarding objects bought or sold in Europe between 1933 and 1945. A key question was the relationship between respect for individual privacy and ensuring that the ability of claimants to take action is not impeded.

- established uniform standards for the identification and handling of looted cultural goods, including looted cultural goods which raises provenance questions.
- evaluated the current scope of EU regulation and inter-European treaties or agreements regarding import/export and customs regulation that might relate to establishing uniform standards for the identification and treatment of looted cultural goods.
- reviewed existing efforts to establish parallel cooperation with the authorities in Russia, the Central and East European Countries, and other jurisdictions linked to the identification and recovery of looted cultural goods.
- appraised the use and development of the Lugano Convention and current practice relating to use of that Convention to enforce judgments as to movable property (or cultural objects).
- discussed how the European Convention on Human Rights, the Charter on Fundamental Rights and the jurisprudence that has developed in the ECJ and Court of Human Rights might relate to stolen or looted cultural goods.

### *General conclusions*

The hearing abundantly showed that the current situation lacks legal certainty, transparency and a coherent approach. This is a cross border issue calling for a cross-border solution.

The main objective of this European Parliament initiative is to propose the development of transparent remedial structures, which should be consistent with applicable principles of European and international law.

The European Union should play a leading role in creating a cross-border, coordinating authority that would replace the present system where these disputes are addressed case by case under national law.

In order to play this leading role, the European Union should establish a level playing field of provisions addressing the resolution of disputes relating to the identification, ownership and return of looted cultural goods. To this purpose, it is urgent to create a central database and to provide general access to public and private archives.

These measures not only contribute to a more consistent and predictable internal market in art works, they also improve access to justice and respect the rule of law.

It is ultimately a moral and ethical issue urgently calling for a moral and ethical solution.

We need a clear and coherent approach, not only based on rules and legal principles, but also on principles such as equity and morality. This might be done by a coordinating, administrative authority on European level, setting out these common rules. Cross-border problems need cross-border solutions.

## 6 TEREZÍN DECLARATION (2009)

[Please note that this is an Extract]<sup>1</sup>

Upon the invitation of the Prime Minister of the Czech Republic we the representatives of 46 states listed below met this day, June 30, 2009 in Terezín, where thousands of European Jews and other victims of Nazi persecution died or were sent to death camps during World War II. We participated in the Prague Holocaust Era Assets Conference organized by the Czech Republic and its partners in Prague and Terezín from 26-30 June 2009, discussed together with experts and non-governmental organization (NGO) representatives important issues such as Welfare of Holocaust (Shoah) Survivors and other Victims of Nazi Persecution, Immovable Property, Jewish Cemeteries and Burial Sites, Nazi-Confiscated and Looted Art, Judaica and Jewish Cultural Property, Archival Materials, and Education, Remembrance, Research and Memorial Sites. We join affirming in this

### TEREZÍN DECLARATION ON HOLOCAUST ERA ASSETS AND RELATED ISSUES

- Aware that Holocaust (Shoah) survivors and other victims of Nazi persecution have reached an advanced age and that it is imperative to respect their personal dignity and to deal with their social welfare needs, as an issue of utmost urgency,
- Having in mind the need to enshrine for the benefit of future generations and to remember forever the unique history and the legacy of the Holocaust (Shoah), which exterminated three fourths of European Jewry, including its premeditated nature as well as other Nazi crimes,
- Noting the tangible achievements of the 1997 London Nazi Gold Conference, and the 1998 Washington Conference on Holocaust-Era Assets, which addressed central issues relating to restitution and successfully set the stage for the significant advances of the next decade, as well as noting the January 2000 Stockholm Declaration, the October 2000 Vilnius Conference on Holocaust Era Looted Cultural Assets,
- Recognizing that despite those achievements there remain substantial issues to be addressed, because only a part of the confiscated property has been recovered or compensated,
- Taking note of the deliberations of the Working Groups and the Special Session on Social Welfare of Holocaust Survivors and their points of view and opinions which

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1 See Terezín Declaration <[www.holocausteraassets.eu/program/conference-proceedings/declarations/](http://www.holocausteraassets.eu/program/conference-proceedings/declarations/)> accessed 12 September 2014.

surveyed and addressed issues relating to the Social Welfare of Holocaust Survivors and other Victims of Nazi Persecution, Immovable Property, Nazi Confiscated Art, Judaica and Jewish Cultural Property, Holocaust Education, Remembrance and Research, which can be found on the weblink for the Prague Conference and will be published in the Conference Proceedings,

- Keeping in mind the legally non-binding nature of this Declaration and moral responsibilities thereof, and without prejudice to applicable international law and obligations,
1. Recognizing that Holocaust (Shoah) survivors and other victims of the Nazi regime and its collaborators suffered unprecedented physical and emotional trauma during their ordeal, the Participating States take note of the special social and medical needs of all survivors and strongly support both public and private efforts in their respective states to enable them to live in dignity with the necessary basic care that it implies.
  2. Noting the importance of restituting communal and individual immovable property that belonged to the victims of the Holocaust (Shoah) and other victims of Nazi persecution, the Participating States urge that every effort be made to rectify the consequences of wrongful property seizures, such as confiscations, forced sales and sales under duress of property, which were part of the persecution of these innocent people and groups, the vast majority of whom died heirless.
  3. Recognizing the progress that has been made in research, identification, and restitution of cultural property by governmental and non-governmental institutions in some states since the 1998 Washington Conference on Holocaust-Era Assets and the endorsement of the Washington Conference Principles on Nazi-Confiscated Art, the Participating States affirm an urgent need to strengthen and sustain these efforts in order to ensure just and fair solutions regarding cultural property, including Judaica that was looted or displaced during or as a result of the Holocaust (Shoah).
  4. Taking into account the essential role of national governments, the Holocaust (Shoah) survivors' organizations, and other specialized NGOs, the Participating States call for a coherent and more effective approach by States and the international community to ensure the fullest possible, relevant archival access with due respect to national legislation. We also encourage States and the international community to establish and support research and education programs about the Holocaust (Shoah) and other Nazi crimes, ceremonies of remembrance and commemoration, and the preservation of memorials in former concentration camps, cemeteries and mass graves, as well as of other sites of memory.
  5. Recognizing the rise of Anti-Semitism and Holocaust (Shoah) denial, the Participating States call on the international community to be stronger in monitoring and responding to such incidents and to develop measures to combat anti-Semitism.

## NAZI-CONFISCATED AND LOOTED ART

Recognizing that art and cultural property of victims of the Holocaust (Shoah) and other victims of Nazi persecution was confiscated, sequestered and spoliated, by the Nazis, the Fascists and their collaborators through various means including theft, coercion and confiscation, and on grounds of relinquishment as well as forced sales and sales under duress, during the Holocaust era between 1933-45 and as an immediate consequence, and

Recalling the Washington Conference Principles on Nazi-Confiscated Art as endorsed at the Washington Conference of 1998, which enumerated a set of voluntary commitments for governments that were based upon the moral principle that art and cultural property confiscated by the Nazis from Holocaust (Shoah) victims should be returned to them or their heirs, in a manner consistent with national laws and regulations as well as international obligations, in order to achieve just and fair solutions,

1. We reaffirm our support of the Washington Conference Principles on Nazi-Confiscated Art and we encourage all parties including public and private institutions and individuals to apply them as well,
2. In particular, recognizing that restitution cannot be accomplished without knowledge of potentially looted art and cultural property, we stress the importance for all stakeholders to continue and support intensified systematic provenance research, with due regard to legislation, in both public and private archives, and where relevant to make the results of this research, including ongoing updates, available via the internet, with due regard to privacy rules and regulations. Where it has not already been done, we also recommend the establishment of mechanisms to assist claimants and others in their efforts,
3. Keeping in mind the Washington Conference Principles on Nazi-Confiscated Art, and considering the experience acquired since the Washington Conference, we urge all stakeholders to ensure that their legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties. Governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property, in order to achieve just and fair solutions, as well as alternative dispute resolution, where appropriate under law.

## **JUDAICA AND JEWISH CULTURAL PROPERTY**

Recognizing that the Holocaust (Shoah) also resulted in the wholesale looting of Judaica and Jewish cultural property including sacred scrolls, synagogue and ceremonial objects as well as the libraries, manuscripts, archives and records of Jewish communities, and

Aware that the murder of six million Jews, including entire communities, during the Holocaust (Shoah) meant that much of this historical patrimony could not be reclaimed after World War II, and

Recognizing the urgent need to identify ways to achieve a just and fair solution to the issue of Judaica and Jewish cultural property, where original owners, or heirs of former original Jewish owners, individuals or legal persons cannot be identified, while acknowledging there is no universal model,

1. We encourage and support efforts to identify and catalogue these items which may be found in archives, libraries, museums and other government and non-government repositories, to return them to their original rightful owners and other appropriate individuals or institutions according to national law, and to consider a voluntary international registration of Torah scrolls and other Judaica objects where appropriate, and
2. We encourage measures that will ensure their protection, will make appropriate materials available to scholars, and where appropriate and possible in terms of conservation, will restore sacred scrolls and ceremonial objects currently in government hands to synagogue use, where needed, and will facilitate the circulation and display of such Judaica internationally by adequate and agreed upon solutions.

### List of States

1. Albania
2. Argentina
3. Australia
4. Austria
5. Belarus
6. Belgium
7. Bosnia and Herzegovina
8. Brazil
9. Bulgaria
10. Canada
11. Croatia
12. Cyprus
13. Czech Republic

14. Denmark
  15. Estonia
  16. Finland
  17. France
  18. FYROM
  19. Germany
  20. Greece
  21. Hungary
  22. Ireland
  23. Israel
  24. Italy
  25. Latvia
  26. Lithuania
  27. Luxembourg
  28. Malta
  29. Moldova
  30. Montenegro
  31. The Netherlands
  32. Norway
  33. Poland
  34. Portugal
  35. Romania
  36. Russia
  37. Slovakia
  38. Slovenia
  39. Spain
  40. Sweden
  41. Switzerland
  42. Turkey
  43. Ukraine
  44. United Kingdom
  45. United States
  46. Uruguay
- The Holy See (observer)
  - Serbia (observer)



# 7 DRAFT UNESCO DECLARATION OF PRINCIPLES RELATING TO CULTURAL OBJECTS DISPLACED IN CONNECTION WITH THE SECOND WORLD WAR (2009)

[Please note that this is an Extract]<sup>1</sup>

Paris, 31 July 2009

**General Conference – 35 C/24 (31 July 2009)**

**Item 8.1 of the provisional agenda**

DRAFT OF THE DECLARATION OF PRINCIPLES RELATING TO CULTURAL  
OBJECTS DISPLACED IN CONNECTION WITH THE SECOND WORLD WAR

‘[....]’

## **DECLARATION OF PRINCIPLES RELATING TO CULTURAL OBJECTS DISPLACED IN CONNECTION WITH THE SECOND WORLD WAR**

*Considering* the tragic events that took place in relation to the Second World War, where many cultural objects were destroyed, lost or displaced, *Having in mind* the relevant regulations of the Annex to the 1907 Fourth Hague Convention (Regulations Respecting the Laws and Customs of War on Land),

*Acknowledging* the 1998 Washington Conference Principles on Nazi-Confiscated Art and the 2000 Vilnius Declaration to Facilitate the Restitution of Disputed Works, and noting the essential role of non-governmental participants in successful practices and procedures based on those documents,

*Noting* with appreciation the growing number of returns of cultural objects displaced in relation to the Second World War, and that such returns should be further encouraged by the international community,

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1 See UNESCO, ‘Draft Declaration of Principles Relating to Cultural Objects Displaced in connection with the Second World War’ (2009) 35C/24 <<http://unesdoc.unesco.org/images/0018/001834/183433e.pdf>> accessed 17 September 2014.

*Acknowledging* that to date only some countries have adopted national legislation or other measures to regulate or resolve such displacements that are consistent with applicable international law,

*Inviting* States to develop, where appropriate, national processes to take into account the following Principles,

*Noting* with concern that a number of issues related to cultural objects displaced in relation to the Second World War have not yet been settled,

*Also noting* that the return of cultural objects to their countries of origin is a major concern of many countries,

*Invites* States concerned to resolve disputes on the return of cultural objects displaced in relation to the Second World War, taking into account, as appropriate, the following principles:

**PRINCIPLE I**

*Scope of application*

These Principles are of a non-binding character and aim at providing, without prejudicing any possible future agreements related to cultural objects, general guidance for bilateral or multilateral inter-State negotiations in order to facilitate the conclusion of such agreements.

Under these Principles “Cultural Objects” means objects, which:

- (i) are listed in Article 1 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; and
- (ii) have been removed from, or the possession of which has been lost within, a territory during or in connection with hostilities or occupation related to the Second World War, even if such occupation was total or partial or had met with no armed resistance.

**PRINCIPLE II**

*Meaning of loss of possession or removal*

These Principles apply to any loss of possession or removal where there are reasonable grounds to conclude that the Cultural Objects concerned:

- (i) were looted or plundered; or
- (ii) were appropriated in a manner contrary to the law in force in the territory where they were located at the time, or appropriated in a manner in conformity with a law or a judicial or administrative measure, the recognition of which would be offensive to the principles of humanity and dictates of public conscience; or
- (iii) were transferred pursuant to a transaction apparently, but not actually legal, or vitiated for whatever reason, even when the transaction purports to have been voluntarily effected; or

- (iv) had otherwise left the possession of a person or an entity in circumstances deemed offensive to the principles of humanity and dictates of public conscience.

### **PRINCIPLE III**

*Measures that should be taken by the Responsible State*

- (i) A State, being also the State of location, that was responsible for the loss of possession or removal of Cultural Objects, should return such objects to the competent authorities of the territory from which they were removed or where their possession was lost.
- (ii) A State, not being the State of location that was responsible for the loss of possession or removal of Cultural Objects, should participate in the search for and in negotiations to secure the return of such objects.

### **PRINCIPLE IV**

*Multiple Responsible States*

Where more than one State is responsible for the same or successive acts of removal or loss(es) of possession of a Cultural Object, each of these States shall be considered as a responsible State within the meaning of these Principles.

### **PRINCIPLE V**

*Measures that should be taken by the State of Location or Depositary State*

- (i) States, other than responsible States within the meaning of these Principles, within whose territory the Cultural Objects are currently located for reasons other than deposit, should take appropriate steps to promote and facilitate their return to the competent authorities of the territory from which they were removed or where their possession was lost.
- (ii) States that are recipients of Cultural Objects deposited in their care by another State for the purpose of protecting the objects against the dangers of the events referred to in Principle I should secure their return to the competent authorities of the territory from which they were removed or where their possession was lost and should, within the limits of their domestic law, prohibit their export until such return.

### **PRINCIPLE VI**

*Measures that should be taken by the Recipient State*

The competent authorities of the territory to which the Cultural Objects have been returned, should exercise due diligence to seek out and identify the person or the entity, if any, which was entitled to the Cultural Objects at the time the loss of possession occurred, or the successor to that person or entity, and to return these objects to such a person or entity.

**PRINCIPLE VII**

*Successive displacements*

Where there have been successive displacements, the Cultural Objects should be returned to the competent authorities of the territory where they were located immediately before the first removal or loss of possession as referred to in Principle I.

**PRINCIPLE VIII**

*Documentation*

Cultural Objects being returned should be accompanied by the relevant scientific, technical and legal documentation available.

**PRINCIPLE IX**

*Exclusion of war reparations*

Cultural objects referred to in Principle I shall never be retained as war reparations.

**PRINCIPLE X**

*Time limit*

No time limits apply to the above Principles.

**PRINCIPLE XI**

*Relationship to international law*

Nothing in these Principles shall be interpreted as amending, abrogating or replacing relevant international law.

# 8 BUNDESGESETZ ÜBER DIE RÜCKGABE VON KUNSTGEGENSTÄNDEN AUS DEN ÖSTERREICHISCHEN BUNDESMUSEEN UND SAMMLUNGEN

*[Federal Act Regarding the Restitution of Artworks from Austrian Federal Museums and Collections]*

BGBl. I Nr. 181/1998 and BGBl. I Nr. 117/2009

## BUNDESGESETZBLATT FÜR DIE REPUBLIK ÖSTERREICH

Jahrgang 1998	Ausgegeben am 4. Dezember 2009	Teil I
181. Bundesgesetz:	Rückgabe von Kunstgegenständen aus den Österreichischen Bundesmuseen und Sammlungen (NR: GP XX RV 1390 AB 1464 S. 146. BR: AB 5802 S. 646.)	

### **181. Bundesgesetz über die Rückgabe von Kunstgegenständen aus den Österreichischen Bundesmuseen und Sammlungen**

Der Nationalrat hat beschlossen:

§ 1. Der Bundesminister für Finanzen wird ermächtigt, jene Kunstgegenstände aus den österreichischen Bundesmuseen und Sammlungen, wozu auch die Sammlungen der Bundesmobilienvverwaltung zählen, unentgeltlich an die ursprünglichen Eigentümer oder deren Rechtsnachfolger von Todes wegen zu übereignen, welche

1. Gegenstand von Rückstellungen an die ursprünglichen Eigentümer oder deren Rechtsnachfolger von Todes wegen waren und nach dem 8. Mai 1945 im Zuge eines daraus folgenden Verfahrens nach den Bestimmungen des Bundesgesetzes über das Verbot der Ausfuhr von Gegenständen von geschichtlicher, künstlerischer oder kultureller Bedeutung, StGBI. Nr. 90/1918, unentgeltlich in das Eigentum des Bundes übergegangen sind und sich noch im Eigentum des Bundes befinden;
2. zwar rechtmäßig in das Eigentum des Bundes übergegangen sind, jedoch zuvor Gegenstand eines Rechtsgeschäftes gemäß § 1 des Bundesgesetzes vom 15. Mai 1946 über die Nichtigerklärung von Rechtsgeschäften und sonstigen Rechtshandlungen, die

während der deutschen Besetzung Österreichs erfolgt sind, in das Eigentum der Republik Österreich gelangt sind, BGBl. Nr. 106/1946, waren und sich noch im Eigentum des Bundes befinden;

3. nach Abschluß von Rückstellungsverfahren nicht an die ursprünglichen Eigentümer oder deren Rechtsnachfolger von Todes wegen zurückgegeben werden konnten, als herrenloses Gut unentgeltlich in das Eigentum des Bundes übergegangen sind und sich noch im Eigentum des Bundes befinden.

## § 2.

- (1) Der Bundesminister für Unterricht und kulturelle Angelegenheiten, der Bundesminister für wirtschaftliche Angelegenheiten und der Bundesminister für Landesverteidigung werden ermächtigt,
  1. die ursprünglichen Eigentümer oder deren Rechtsnachfolger von Todes wegen festzustellen und die Kunstwerke an diese zu übereignen;
  2. jene Kunstgegenstände gemäß § 1, welche nicht an die ursprünglichen Eigentümer oder deren Rechtsnachfolger von Todes wegen rückübereignet werden können, weil diese nicht festgestellt werden können, an den Nationalfonds der Republik Österreich für Opfer des Nationalsozialismus zur Verwertung zu übereignen, der den Verwertungserlös für die in § 2a des Bundesgesetzes über den Nationalfonds der Republik Österreich für Opfer des Nationalsozialismus, BGBl. Nr. 432/1995, genannten Zwecke zu verwenden hat.
- (2) Die genannten Bundesminister haben vor der Übereignung den nach § 3 eingerichteten Beirat anzuhören. Durch die Bestimmungen dieses Bundesgesetzes wird keinerlei Anspruch auf Übereignung begründet.
- (3) Der Bundesminister für Unterricht und kulturelle Angelegenheiten hat den Nationalrat über die erfolgte Übereignung von Kunstgegenständen in einem Bericht jährlich zu informieren.

## § 3.

- (1) Beim Bundesministerium für Unterricht und kulturelle Angelegenheiten wird ein Beirat eingerichtet, der die in § 2 genannten Bundesminister bei der Feststellung jener Personen, denen Kunstgegenstände zu übereignen sind, zu beraten hat.
- (2) Mitglieder des Beirates sind:
  1. je ein Vertreter des Bundesministeriums für wirtschaftliche Angelegenheiten, des Bundesministeriums für Justiz, des Bundesministeriums für Unterricht und kulturelle Angelegenheiten sowie des Bundesministeriums für Landesverteidigung;
  2. ein Vertreter der Finanzprokuratur;

3. je ein von der Rektorenkonferenz zu nominierender Experte auf dem Gebiet der Geschichte sowie der Kunstgeschichte.
- (3) Für jedes Mitglied ist ein Ersatzmitglied zu bestellen.
- (4) Der Beirat kann weiters Sachverständige und geeignete Auskunftspersonen beiziehen.
- (5) Die Bestellung und Abberufung des Vorsitzenden und dessen Stellvertreter aus dem Kreise der in Abs. 2 genannten Mitglieder sowie die Bestellung und Abberufung der weiteren in Abs. 2 genannten Mitglieder des Beirates obliegt dem Bundesminister für Unterricht und kulturelle Angelegenheiten. Die Bestellung erfolgt jeweils auf ein Jahr. Neuerliche Bestellungen sind zulässig.
- (6) Der Bundesminister für Unterricht und kulturelle Angelegenheiten oder der Vorsitzende berufen den Beirat zu Sitzungen ein.
- (7) Zu einem Beschluß des Beirates ist die Anwesenheit von mindestens der Hälfte der Mitglieder und die Mehrheit der abgegebenen Stimmen erforderlich.
- (8) Der Beirat beschließt seine Geschäftsordnung, die vom Bundesminister für Unterricht und kulturelle Angelegenheiten zu genehmigen ist, mit einfacher Mehrheit. Die Geschäftsordnung hat unter Bedachtnahme auf Abs. 1 die Tätigkeit des Beirates möglichst zweckmäßig zu regeln. Die Geschäftsordnung ist zu genehmigen, wenn sie dieser Voraussetzung entspricht.

§ 4. Die Bestimmungen des Denkmalschutzgesetzes, BGBl. Nr. 533/1923, in der Fassung des Bundesgesetzes BGBl. Nr. 473/1990 über die freiwillige Veräußerung von Denkmalen, die sich im alleinigen Eigentum des Bundes befinden, sowie die Bestimmungen des Bundesgesetzes über das Verbot der Ausfuhr von Gegenständen von geschichtlicher, künstlerischer oder kultureller Bedeutung, StGBL. Nr. 90/1918, in der Fassung des Bundesgesetzes BGBl. Nr. 605/1987 finden auf die Übereignung sowie die Ausfuhr von Gegenständen, die nach den Bestimmungen dieses Bundesgesetzes ausgefolgt werden, auf die Dauer von 25 Jahren nach Inkrafttreten dieses Bundesgesetzes keine Anwendung.

§ 5. Die durch dieses Bundesgesetz unmittelbar veranlaßten Zuwendungen sind von allen Abgaben befreit.

§ 6. Mit der Vollziehung dieses Bundesgesetzes sind betraut:

1. hinsichtlich der §§ 1 und 5 der Bundesminister für Finanzen;

2. hinsichtlich der §§ 2 und 3 der Bundesminister für Unterricht und kulturelle Angelegenheiten, der Bundesminister für wirtschaftliche Angelegenheiten und der Bundesminister für Landesverteidigung, soweit ihr Wirkungsbereich betroffen ist;
3. hinsichtlich des § 4 der Bundesminister für Unterricht und kulturelle Angelegenheiten.

## Klestil

## Klima

### BUNDESGESETZBLATT FÜR DIE REPUBLIK ÖSTERREICH

Jahrgang 2009	Ausgegeben am 23. November 2009	Teil I
117. Bundesgesetz:	Änderung des Bundesgesetzes über die Rückgabe von Kunstgegenständen aus den Österreichischen Bundesmuseen und Sammlungen (NR: GP XXIV RV 238 AB 349 S. 40. BR: AB 8187 S. 777.)	

#### **117. Bundesgesetz, mit dem das Bundesgesetz über die Rückgabe von Kunstgegenständen aus den Österreichischen Bundesmuseen und Sammlungen geändert wird**

Der Nationalrat hat beschlossen:

Das Bundesgesetz über die Rückgabe von Kunstgegenständen aus den Österreichischen Bundesmuseen und Sammlungen, BGBl. I Nr. 181/1998, zuletzt geändert durch das Bundesgesetz BGBl. I Nr. 3/2009, wird wie folgt geändert:

1. *Der Titel des Bundesgesetzes lautet:*

**„Bundesgesetz über die Rückgabe von Kunstgegenständen und sonstigem beweglichem Kulturgut aus den österreichischen Bundesmuseen und Sammlungen und aus dem sonstigen Bundeseigentum (Kunstrückgabegesetz – KRG)“**

2. *§ 1 samt Überschrift lautet:*

#### **„Rückgabefähige Gegenstände**

§ 1. (1) Die Bundesministerin / Der Bundesminister für Finanzen wird ermächtigt, jene Kunstgegenstände und sonstiges bewegliches Kulturgut aus den österreichischen Bundesmuseen und Sammlungen, wozu auch die Sammlungen der Bundesmobilienvverwaltung zählen, und aus dem sonstigen unmittelbaren Bundeseigentum unentgeltlich an die ursprünglichen Eigentümer oder an deren Rechtsnachfolger von Todes wegen zu übereignen, welche

- 1 Gegenstand von Rückstellungen an die ursprünglichen Eigentümer oder deren Rechtsnachfolger von Todes wegen waren oder nach den damaligen Bestimmungen zu restituieren gewesen wären und nach dem 8. Mai 1945 im engen Zusammenhang mit einem daraus folgenden Verfahren nach den Bestimmungen des Bundesgesetzes über das Verbot der Ausfuhr von Gegenständen von geschichtlicher, künstlerischer oder kultureller Bedeutung, StGBI. Nr. 90/1918, in das Eigentum des Bundes übergegangen sind und sich noch im Eigentum des Bundes befinden;
  - 2a zwar rechtmäßig in das Eigentum des Bundes übergegangen sind, jedoch zuvor Gegenstand eines Rechtsgeschäftes oder einer Rechtshandlung gemäß § 1 des Bundesgesetzes über die Nichtigerklärung von Rechtsgeschäften und sonstigen Rechtshandlungen, die während der deutschen Besetzung Österreichs erfolgt sind, BGBl. Nr. 106/1946, waren, und sich noch im Eigentum des Bundes befinden;
  - 2 zwar rechtmäßig in das Eigentum des Bundes übergegangen sind, jedoch zwischen dem 30. Jänner 1933 und dem 8. Mai 1945 in einem Herrschaftsgebiet des Deutschen Reiches außerhalb des Gebietes der heutigen Republik Österreich Gegenstand eines Rechtsgeschäftes oder einer Rechtshandlung waren, die Rechtsgeschäften oder Rechtshandlungen gemäß § 1 des Bundesgesetzes über die Nichtigerklärung von Rechtsgeschäften und sonstigen Rechtshandlungen, die während der deutschen Besetzung Österreichs erfolgt sind, BGBl. Nr. 106/1946, vergleichbar sind und sich noch im Eigentum des Bundes befinden;
  - 3 nach Abschluss von Rückstellungsverfahren nicht an die ursprünglichen Eigentümer oder deren Rechtsnachfolger von Todes wegen zurückgegeben werden konnten, als herrenloses Gut unentgeltlich in das Eigentum des Bundes übergegangen sind und sich noch im Eigentum des Bundes befinden.
- (2) Hat der Bund für den Eigentumsübergang gemäß Abs. 1 Z 1 eine Gegenleistung erbracht, so ist diese oder ihr Wert im Zeitpunkt der Rückgabe dem Bund von den ursprünglichen Eigentümern oder deren Rechtsnachfolgern von Todes wegen vor der Rückgabe zurückzuerstatten. Ein erhaltener Geldbetrag ist nach den von der Bundesanstalt Statistik Österreich verlautbarten Indizes der Verbraucherpreise zu valorisieren. Zahlungen gemäß § 2b des Bundesgesetzes über den Nationalfonds der Republik Österreich für Opfer des Nationalsozialismus, BGBl. Nr. 432/1995 in der jeweils geltenden Fassung, sind nicht zurückzuerstatten."
- 3 § 2 erhält die Überschrift „**Übereignung der Gegenstände**“, § 3 erhält die Überschrift „**Beirat**“ und § 5 erhält die Überschrift „**Abgabenbefreiung**“.
  - 4 Im § 2 Abs. 1 und § 2 Abs. 3 wird jeweils die Wortfolge „Der Bundesminister für Unterricht und kulturelle Angelegenheiten“ durch die Wortfolge „Die Bundesministerin / Der Bundesminister für Unterricht, Kunst und Kultur“ ersetzt.

- 5 *Im § 2 Abs. 1 wird die Wortfolge „der Bundesminister für wirtschaftliche Angelegenheiten und der Bundesminister für Landesverteidigung“ durch die Wortfolge „die Bundesministerin / der Bundesminister für Wirtschaft, Familie und Jugend und die Bundesministerin / der Bundesminister für Landesverteidigung und Sport bzw. das sonst zuständige Mitglied der Bundesregierung“ ersetzt.*
- 6 *Im § 2 Abs. 1 Z 1 werden der Ausdruck „Kunstwerke“ und in Z 2 die Wortfolge „Kunstgegenstände gemäß § 1“ sowie in § 3 Abs. 1 der Ausdruck „Kunstgegenstände“ jeweils durch die Wortfolge „Gegenstände gemäß § 1“ ersetzt.*
- 7 *Im § 2 Abs. 2 und § 3 Abs. 1 wird jeweils die Wortfolge „genannten Bundesminister“ durch die Wortfolge „genannten Bundesministerinnen / Bundesminister“ ersetzt.*
- 8 *Im § 2 Abs. 3 wird der Ausdruck „Kunstgegenständen“ durch die Wortfolge „Gegenständen gemäß § 1“ ersetzt.*
- 9 *Im § 3 Abs. 1 wird jeweils die Wortfolge „Beim Bundesministerium für Unterricht und kulturelle Angelegenheiten“ durch die Wortfolge „Beim Bundesministerium für Unterricht, Kunst und Kultur“ ersetzt.*
- 10 *§ 3 Abs. 2 lautet:*
  - „(2) Mitglieder des Beirates sind:
    1. je eine Vertreterin / ein Vertreter des Bundesministeriums für Finanzen, des Bundesministeriums für Wirtschaft, Familie und Jugend, des Bundesministeriums für Justiz, des Bundesministeriums für Unterricht, Kunst und Kultur sowie des Bundesministeriums für Landesverteidigung und Sport;
    2. eine Vertreterin / ein Vertreter der Finanzprokuratur mit beratender Stimme;
    3. je eine / ein von der Universitätenkonferenz zu nominierende Expertein / zu nominierender Experte auf dem Gebiet der Geschichte sowie der Kunstgeschichte;
    4. sofern der Beirat über die Rückgabe eines Gegenstandes berät, welcher nicht in die Zuständigkeit eines der in Z 1 genannten Bundesministerien fällt, eine Vertreterin / ein Vertreter des zuständigen Bundesministeriums.“
- 11 *§ 3 Abs. 4 lautet:*

„(4) Der Beirat fasst seine Empfehlungen auf Grund von Berichten der Kommission für Provenienzforschung des Bundesministeriums für Unterricht, Kunst und Kultur. Der Beirat kann weiters andere Sachverständige und geeignete Auskunftspersonen beiziehen.“
- 12 *§ 3 Abs. 5 lautet:*

„(5) Die Bestellung und Abberufung des Vorsitzenden / der Vorsitzenden und dessen / deren Stellvertreter / Stellvertreterin aus dem Kreise der in Abs. 2 genannten Mitglieder (Ersatzmitglieder) sowie die Bestellung und Abberufung der weiteren in Abs. 2 genannten Mitglieder (Ersatzmitglieder) des Beirates obliegt der Bundesministerin / dem Bundesminister für Unterricht, Kunst und Kultur. Die Bestellung erfolgt jeweils auf drei Jahre. Neuerliche Bestellungen sind zulässig. Ein Mitglied (Ersatzmitglied)

kann von der Bundesministerin / dem Bundesminister für Unterricht, Kunst und Kultur nur auf eigenen Wunsch oder wenn es aus körperlichen, geistigen oder sonstigen schwerwiegenden Gründen nicht mehr in der Lage ist, seine Aufgaben gewissenhaft und unparteiisch zu erfüllen, nach Anhörung der entsendenden Stelle abberufen werden."

13 § 3 Abs. 6 lautet:

„(6) Die Bundesministerin / Der Bundesminister für Unterricht, Kunst und Kultur oder der / die Vorsitzende berufen den Beirat zu Sitzungen ein.“

14 Im § 3 Abs. 8 wird die Wortfolge „vom Bundesminister für Unterricht und kulturelle Angelegenheiten“ durch die Wortfolge „von der Bundesministerin / vom Bundesminister für Unterricht, Kunst und Kultur“ ersetzt.

15 § 4 samt Überschrift lautet:

„Ausnahmen vom Denkmalschutzgesetz

§ 4. (1) Die Bestimmungen des Denkmalschutzgesetzes, BGBl. Nr. 533/1923 in der jeweils geltenden Fassung, über die freiwillige Veräußerung und die Verbringung ins Ausland finden auf Gegenstände, die nach den Bestimmungen dieses Bundesgesetzes übereignet werden, auf die Dauer von 25 Jahren nach Übereignung keine Anwendung. (2) Bewegliches Kulturgut, das auf Grund eines Landesgesetzes oder auf Grund eines sonstigen Beschlusses eines Organs einer Gebietskörperschaft unter diesem Bundesgesetz gleichzuhaltenden Voraussetzungen übereignet wird, fällt unter die Ausnahmen vom Denkmalschutzgesetz gemäß Abs. 1, wenn das zur Übereignung zuständige Organ der Gebietskörperschaft die Übereignung dem Bundesdenkmalamt anzeigt und dieses nicht binnen sechs Wochen nach Einlangen der Anzeige durch Bescheid die Bewilligungen der freiwilligen Veräußerung gemäß § 6 Denkmalschutzgesetz, BGBl. Nr. 533/1923 in der jeweils geltenden Fassung, und der Ausfuhr gemäß § 17 Denkmalschutzgesetz, BGBl. Nr. 533/1923 in der jeweils geltenden Fassung, verweigert.“

16 Nach § 4 wird folgender § 4a samt Überschrift eingefügt:

**„Kommission für Provenienzforschung**

§ 4a. Die Kommission für Provenienzforschung ist beim Bundesministerium für Unterricht, Kunst und Kultur eingerichtet. Sie wird ausschließlich im Auftrag der Bundesministerin / des Bundesministers für Unterricht, Kunst und Kultur tätig. Ihre Aufgaben umfassen insbesondere:

1. Die Darstellung der Provenienzen von Gegenständen gemäß § 1, soweit diese Grundlagen von Empfehlungen des Beirates gemäß § 3 bilden können.
2. Die Forschung im Bereich geschichtlicher Sachverhalte, soweit diese von Bedeutung für die Feststellung der Provenienzen und Empfehlungen des Beirates gemäß § 3 sein können.
3. Die Sammlung, Bearbeitung und Evidenthaltung der Ergebnisse dieser Forschungstätigkeit.“

17 § 6 samt Überschrift lautet:

**„Vollziehungsklausel**

§ 6. Mit der Vollziehung dieses Bundesgesetzes sind betraut:

1. hinsichtlich der §§ 1 und 5 die Bundesministerin / der Bundesminister für Finanzen;
2. hinsichtlich des § 2 die Bundesministerin / der Bundesminister für Unterricht, Kunst und Kultur, die Bundesministerin / der Bundesminister für Wirtschaft, Familie und Jugend und die Bundesministerin / der Bundesminister für Landesverteidigung und Sport bzw. das sonst zuständige Mitglied der Bundesregierung soweit sein Wirkungsbereich betroffen ist;
3. hinsichtlich des § 3 die Bundesministerin / der Bundesminister für Unterricht, Kunst und Kultur, die Bundesministerin / der Bundesminister für Finanzen, die Bundesministerin / der Bundesminister für Wirtschaft, Familie und Jugend, die Bundesministerin / der Bundesminister für Justiz und die Bundesministerin / der Bundesminister für Landesverteidigung und Sport bzw. das sonst zuständige Mitglied der Bundesregierung soweit sein Wirkungsbereich betroffen ist;
4. hinsichtlich der §§ 4 und 4a die Bundesministerin / der Bundesminister für Unterricht, Kunst und Kultur.“

**Fischer**

**Faymann**

# 9 DÉCRET N°99-778 DU 10 SEPTEMBRE 1999 INSTITUANT LA CIVS

*[Decree No. 99-778 of 10 September 1999 establishing a commission for the compensation of victims of spoliations resulting from the anti-Semitic legislation in force during the Occupation]*

NOR: PRMX9903660D

Version consolidée au 29 décembre 2008

Le Premier ministre,

Vu l'ordonnance du 9 août 1944 relative au rétablissement de la légalité républicaine sur le territoire continental,

## Article 1

Il est institué auprès du Premier ministre une commission chargée d'examiner les demandes individuelles présentées par les victimes ou par leurs ayants droit pour la réparation des préjudices consécutifs aux spoliations de biens intervenues du fait des législations antisémites prises, pendant l'Occupation, tant par l'occupant que par les autorités de Vichy.

La commission est chargée de rechercher et de proposer les mesures de réparation, de restitution ou d'indemnisation appropriées.

## Article 2

La commission s'efforce de parvenir à une conciliation entre les personnes intéressées.

En cas d'échec de la conciliation, elle peut émettre toutes recommandations qui lui paraîtraient utiles.

## Article 3

Modifié par Décret n°2001-530 du 20 juin 2001 – art. 1 JORF 21 juin 2001

La commission est composée de :

1. Deux magistrats du siège hors hiérarchie de la Cour de cassation, en activité ou honoraires;
2. Deux conseillers d'Etat, en activité ou honoraires;
3. Deux conseillers maîtres à la Cour des comptes, en activité ou honoraires;
4. Deux professeurs d'université;
5. Deux personnalités qualifiées.

Le président de la commission est choisi parmi les membres mentionnés au 1°. Il peut être suppléé par le vice-président de la commission, choisi parmi les autres membres, notamment pour formuler les recommandations selon la procédure prévue au deuxième alinéa de l'article 5.

Le président, le vice-président et les membres de la commission sont désignés par décret du Premier ministre pour une durée de trois ans.

Le président est assisté, pour la direction des services de la commission, par un directeur, nommé par arrêté du Premier ministre, auquel il peut déléguer sa signature.

En outre, un rapporteur général et des rapporteurs sont nommés auprès de la commission par arrêté du ministre de la justice parmi les magistrats de l'ordre judiciaire et les membres des juridictions administratives.

#### Article 3-1

Modifié par Décret n°2001-530 du 20 juin 2001 – art. 2 JORF 21 juin 2001

Un commissaire du Gouvernement, nommé par arrêté du Premier ministre, est placé auprès de la commission. Il est suppléé par un ou plusieurs adjoints nommés dans les mêmes formes.

Le commissaire du Gouvernement reçoit copie des rapports établis par les rapporteurs à l'issue de l'instruction des dossiers. Il peut formuler des observations écrites ou orales. Il assiste aux séances au cours desquelles les rapports sont examinés. Il assiste aux séances de la formation plénière et des formations restreintes de la commission et peut présenter des observations, écrites ou orales, sur les demandes que ces formations examinent.

#### Article 4

Modifié par Décret n°2001-530 du 20 juin 2001 – art. 3 JORF 21 juin 2001

Les victimes ou leurs ayants droit saisissent la commission par une demande écrite accompagnée de tous les documents utiles.

Chaque demande est instruite par un rapporteur qui procède aux vérifications nécessaires. Le rapporteur peut convoquer toute personne dont l'audition lui paraît utile et solliciter de tout tiers qualifié un avis ou une consultation. Il peut notamment faire appel aux services de l'établissement public régi par le décret n° 70-982 du 27 octobre 1970.

#### Article 5

Modifié par Décret n°2001-530 du 20 juin 2001 – art. 4 JORF 21 juin 2001

A l'issue de l'instruction, le rapporteur formule dans son rapport des propositions motivées en tenant compte, le cas échéant, des indemnisations déjà versées antérieurement au demandeur.

Lorsque la situation personnelle du demandeur nécessite un traitement rapide de son dossier ou que l'affaire ne présente pas de difficulté particulière, le président peut, après instruction de la demande, recommander qu'il soit donné totalement ou partiellement satisfaction à celle-ci. L'affaire n'est examinée en formation collégiale que si le demandeur ou la personne destinataire de la recommandation le sollicite expressément dans le délai d'un mois à compter de la réception de la recommandation.

Lorsqu'un dossier est examiné par une formation collégiale, le demandeur et la personne dont la conciliation est recherchée sont avisés de la date de la séance. Ceux-ci peuvent demander à être entendus.

#### Article 6

La commission peut demander au rapporteur de procéder à toutes mesures d'instruction complémentaires qui lui paraissent utiles.

Elle peut entendre toute personne dont l'audition paraît utile et solliciter de tout tiers qualifié un avis ou une consultation.

#### Article 7

Pour les besoins de la procédure, le demandeur et les personnes impliquées peuvent se faire assister par la personne de leur choix.

Ils peuvent également se faire représenter par toute personne pourvue d'un mandat régulier.

Article 8

Modifié par Décret n°2001-530 du 20 juin 2001 – art. 5 JORF 21 juin 2001

La commission peut se réunir en formation plénière ou en formation restreinte.

Les formations restreintes comprennent au moins trois membres de la commission. Leur présidence est assurée par le membre désigné par le président de la commission.

La formation plénière ne peut se réunir valablement que si au moins six des membres de la commission sont présents.

Les séances de la formation plénière et des formations restreintes ne sont pas publiques.

Article 8-1

Créé par Décret n°2000-932 du 25 septembre 2000 – art. 4 JORF 26 septembre 2000

Les recommandations sont adoptées en formation restreinte à la majorité des membres présents. En cas de partage, la voix du président de la formation est prépondérante.

Lorsque le président de la commission ou le rapporteur général l'estime utile, les dossiers sont examinés par la formation plénière. Cette formation examine également les dossiers qui lui sont renvoyés par les formations restreintes. Les recommandations sont adoptées en formation plénière à la majorité des membres présents. En cas de partage, la voix du président de la commission est prépondérante.

Article 8-1-1

Créé par Décret n°2001-530 du 20 juin 2001 – art. 6 JORF 21 juin 2001

Les demandeurs qui contestent une recommandation émise par la commission en formation restreinte peuvent solliciter un nouvel examen de leur dossier par la formation plénière. Ils adressent cette demande au président de la commission en fournissant les pièces nouvelles ou en indiquant les faits nouveaux sur lesquels se fonde leur contestation ou en précisant les points sur lesquels la recommandation leur paraît entachée d'erreur matérielle. Le président fait droit à la demande de nouvel examen sauf si les éléments présentés à l'appui de celle-ci apparaissent manifestement insuffisants pour remettre en cause la recommandation.

Lorsqu'un dossier a été examiné par la commission en formation plénière, sans avoir préalablement fait l'objet d'un examen en formation restreinte, le demandeur peut, dans

les mêmes formes et sous les mêmes conditions, solliciter un nouvel examen par la formation plénière.

#### Article 8-2

Créé par Décret n°2000-932 du 25 septembre 2000 – art. 4 JORF 26 septembre 2000

Lorsque la commission propose que l'Etat prenne à sa charge une mesure d'indemnisation, elle transmet sa recommandation au Premier ministre (secrétariat général du Gouvernement).

Les décisions d'indemnisation prises par le Premier ministre (secrétariat général du Gouvernement) sur la base des recommandations de la commission sont notifiées aux intéressés et à l'Office national des anciens combattants et victimes de guerre qui est chargé de les exécuter.

Pour assurer la gestion comptable et financière des décisions mentionnées à l'alinéa précédent, l'Office national des anciens combattants et victimes de guerre reçoit des crédits du chapitre 46-02 du budget des services généraux du Premier ministre.

#### Article 8-2-1

Créé par Décret n°2001-530 du 20 juin 2001 – art. 7 JORF 21 juin 2001

La commission est régulièrement informée des suites réservées à ses recommandations.

#### Article 9

Les crédits nécessaires au fonctionnement de la commission sont inscrits au budget des services généraux du Premier ministre.

#### Article 9-1

Créé par Décret n°2001-530 du 20 juin 2001 – art. 8 JORF 21 juin 2001

La commission adresse chaque année un rapport d'activité au Premier ministre.

#### Article 10

Le garde des sceaux, ministre de la justice, le ministre de l'éducation nationale, de la recherche et de la technologie, le ministre des affaires étrangères, le ministre de l'économie, des finances et de l'industrie, le ministre de la défense, la ministre de la culture et de la communication, le secrétaire d'Etat au budget et le secrétaire d'Etat à la défense chargé

des anciens combattants sont chargés, chacun en ce qui le concerne, de l'exécution du présent décret, qui sera publié au Journal officiel de la République française.

Lionel Jospin

Par le Premier ministre :

Le garde des sceaux, ministre de la justice, Élisabeth Guigou

Le ministre de l'éducation nationale, de la recherche et de la technologie, Claude Allègre

Le ministre des affaires étrangères, Hubert Védrine

Le ministre de l'économie, des finances et de l'industrie, Dominique Strauss-Kahn

Le ministre de la défense, Alain Richard

La ministre de la culture et de la communication, Catherine Trautmann

Le secrétaire d'Etat au budget, Christian Sautter

Le secrétaire d'Etat à la défense chargé des anciens combattants, Jean-Pierre Masseret

# 10 SPOILIATION ADVISORY PANEL, CONSTITUTION AND TERMS OF REFERENCE<sup>1</sup>

## *Designation of the Panel*

1. The Secretary of State has established a group of expert advisers, to be convened as a Panel from time to time, to consider claims from anyone (or from any one or more of their heirs), who lost possession of a cultural object (“the object”) during the Nazi era (1933 -1945), where such an object is now in the possession of a UK national collection or in the possession of another UK museum or gallery established for the public benefit (“the institution”).
2. The Secretary of State has designated the expert advisers referred to above, to be known as the Spoliation Advisory Panel (“the Panel”), to consider the claim received from .....on ..... for ..... in the collection of ..... (“the claim”).
3. The Secretary of State has designated ..... as Chairman of the Panel.
4. The Secretary of State has designated the Panel as the Advisory Panel for the purposes of the Holocaust (Return of Cultural Objects) Act 2009.

## *Resources for the Panel*

5. The Secretary of State will make available such resources as he considers necessary to enable the Panel to carry out its functions, including administrative support provided by a Secretariat (“the Secretariat”).

## *Functions of the Panel*

6. The Panel shall advise the claimant and the institution on what would be appropriate action to take in response to the claim. The Panel shall also be available to advise about any claim for an item in a private collection at the joint request of the claimant and the owner.
7. In any case where the Panel considers it appropriate, it may also advise the Secretary of State
  - (a) on what action should be taken in relation to general issues raised by the claim, and/or
  - (b) where it considers that the circumstances of the particular claim warrant it, on what action should be taken in relation to that claim.

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1 Revised following enactment of the Holocaust (Return of Cultural Objects) Act 2009

8. In exercising its functions, while the Panel will consider legal issues relating to title to the object (see paragraph 15(d) and (f)), it will not be the function of the Panel to determine legal rights, for example as to title;
9. The Panel's proceedings are an alternative to litigation, not a process of litigation. The Panel will therefore take into account non-legal obligations, such as the moral strength of the claimant's case (paragraph 15(e)) and whether any moral obligation rests on the institution (paragraph 15(g));
10. Any recommendation made by the Panel is not intended to be legally binding on the claimant, the institution or the Secretary of State;
11. If the claimant accepts the recommendation of the Panel and that recommendation is implemented, the claimant is expected to accept the implementation in full and final settlement of his claim.

***Performance of the Panel's functions***

12. The Panel will perform its functions and conduct its proceedings in strictest confidence. The Panel's "proceedings" include all its dealings in respect of a claim, whether written, such as in correspondence, or oral, such as at meetings and/or hearings.
13. Subject to the leave of the Chairman, the Panel shall treat all information relating to the claim as strictly confidential and safeguard it accordingly save that (a) such information which is submitted to the Panel by a party/parties to the proceedings shall normally be provided to the other party/parties to the proceedings in question; and (b) such information may, in appropriate circumstances, including having obtained a confidentiality undertaking if necessary, be communicated to third parties. "Information relating to the claim" includes, but is not limited to: the existence of the claim; all oral and written submissions; oral evidence and transcriptions of hearings relating to the claim.
14. In performing the functions set out in paragraphs 1, 6 and 7, the Panel's paramount purpose shall be to achieve a solution which is fair and just both to the claimant and to the institution.
15. For this purpose the Panel shall:
  - (a) make such factual and legal inquiries, (including the seeking of advice about legal matters, about cultural objects and about valuation of such objects) as the Panel consider appropriate to assess the claim as comprehensively as possible;
  - (b) assess all information and material submitted by or on behalf of the claimant and the institution or any other person, or otherwise provided or known to the Panel;
  - (c) examine and determine the circumstances in which the claimant was deprived of the object, whether by theft, forced sale, sale at an undervalue, or otherwise;
  - (d) evaluate, on the balance of probability, the validity of the claimant's original title to the object, recognising the difficulties of proving such title after the destruction

- of the Second World War and the Holocaust and the duration of the period which has elapsed since the claimant lost possession of the object;
- (e) give due weight to the moral strength of the claimant's case;
  - (f) evaluate, on the balance of probability, the validity of the institution's title to the object;
  - (g) consider whether any moral obligation rests on the institution taking into account in particular the circumstances of its acquisition of the object, and its knowledge at that juncture of the object's provenance;
  - (h) take account of any relevant statutory provisions, including stipulations as to the institution's objectives, and any restrictions on its power of disposal;
  - (i) take account of the terms of any trust instrument regulating the powers and duties of the trustees of the institution, and give appropriate weight to their fiduciary duties;
  - (j) where appropriate assess the current market value of the object, or its value at any other appropriate time, and shall also take into account any other relevant circumstance affecting compensation, including the value of any potential claim by the institution against a third party;
  - (k) formulate and submit to the claimant and to the institution its advice in a written report, giving reasons, and supply a copy of the report to the Secretary of State, and
  - (l) formulate and submit to the Secretary of State any advice pursuant to paragraph 7 in a written report, giving reasons, and supply a copy of the report to the claimant and the institution.

***Scope of Advice***

16. If the Panel upholds the claim in principle, it may recommend either:
  - (a) the return of the object to the claimant, or
  - (b) the payment of compensation to the claimant, the amount being in the discretion of the Panel having regard to all relevant circumstances including the current market value, but not tied to that current market value, or
  - (c) an ex gratia payment to the claimant, or
  - (d) the display alongside the object of an account of its history and provenance during and since the Nazi era, with special reference to the claimant's interest therein; and
  - (e) that negotiations should be conducted with the successful claimant in order to implement such a recommendation as expeditiously as possible.
17. When advising the Secretary of State under paragraph 7(a) and/or (b), the Panel shall be free to recommend any action which they consider appropriate, and in particular may under paragraph 4(b), recommend to the Secretary of State the transfer of the object from one of the bodies named in the Holocaust (Return of Cultural Objects) Act 2009.



# 11      **DECREE ADVISORY COMMITTEE ON THE ASSESSMENT OF RESTITUTION APPLICATIONS FOR ITEMS OF CULTURAL VALUE AND THE SECOND WORLD WAR<sup>1</sup>**

[Please note that this is an unofficial English translation]

Decree Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War

The State Secretary for Education, Culture and Science, Dr. F. van der Ploeg;

Acting in accordance with the views of the Council of Ministers;

Having regard to Article 15, third paragraph, of the 1995 Public Records Act,

Herewith decrees as follows:

## Article 1

For the purposes of this Decree, the terms below shall be defined as follows:

- a. the Minister: the Minister for Education, Culture and Science;
- b. the Ministry: the Ministry for Education, Culture and Science;
- c. the Committee: the Committee as referred to in Article 2 of this Decree;
- d. NK-collection: collection of recuperated cultural objects that are presently in the possession of the State of the Netherlands and which are registered with the National Service for Cultural Heritage in the NK-inventory section.

## Article 2

1. There shall be a Committee whose task is to advise the Minister, at his request, on decisions to be taken concerning applications for the restitution of items of cultural value of which the original owners involuntarily lost possession due to circumstances directly related to the Nazi regime and which:
  - a. are part of the NK-collection; or

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<sup>1</sup> text valid as from 19-07-2012

- b. belong to the other possessions of the State of the Netherlands.
2. A further task of the Committee shall be to issue an opinion, on the Minister's request, on disputes concerning the restitution of items of cultural value between the original owner who, due to circumstances directly related to the Nazi regime, involuntarily lost possession of such an item, or the owner's heirs, and the current possessor which is not the State of the Netherlands.
3. The Minister shall only submit a request for an opinion as referred to in the second paragraph to the Committee if and when the original owner or his heirs and the current possessor of the item in question have jointly asked the Minister to do so.
4. The Committee gives advice about applications within the meaning of the first paragraph, under a, submitted with the Minister before 30 June 2015, with due observance of the relevant government policy. Applications within the meaning of the first paragraph, under a, submitted on or after 30 June 2015 are handled by the Committee in accordance with the fifth paragraph.
5. The Committee gives advice about applications within the meaning of the first paragraph, under b and the second paragraph based on the principles of reasonableness and fairness.
6. In its advisory role, referred to in the first paragraph, the committee attaches great importance to the circumstances of the acquisition by the possessor and the possibility of knowledge of the suspicious origin at the time of the acquisition of the cultural object in question.

### Article 3

1. The Committee shall comprise no more than 7 members, including the chairman and the deputy chairman.
2. Both the chairman and the deputy chairman shall be qualified lawyers (*meester in de rechten*).
3. The Committee shall include at least one member whose expertise on matters concerning World War II constitutes a substantial contribution to the work of the Committee.
4. The Committee shall include at least one member whose expertise on matters concerning art history and museology constitutes a substantial contribution to the work of the Committee.
5. The Minister shall appoint the chairman, the deputy chairman and the other members for a period not exceeding three years. They shall not form part of the Ministry or work in any other capacity under the responsibility of the Minister.
6. The chairman, the deputy chairman and the other members may be reappointed.

Article 4

1. Each request for advice shall be considered by a group of at least three Committee members, to be selected by the chairman, with the proviso that at least the chairman or the deputy chairman shall be involved in the consideration of the request.
2. The Committee may issue further regulations pertaining to the method to be adopted.

Article 5

1. The Minister shall provide the Committee with a Committee Secretariat.
2. The Secretariat shall be headed by the Committee Secretary, who shall be a qualified lawyer (*meester in de rechten*).
3. The Secretary shall be accountable only to the Committee for the work performed for the Committee.

Article 6

1. If required for the execution of its task, the Committee may, at a meeting, hear the person that has submitted a restitution application as referred to in Article 2, first paragraph and a Ministry representative or, as the case may be, the parties whose dispute, as referred to in Article 2, second paragraph, has been submitted to the Committee for advice.
2. If required for the execution of its task, the Committee may directly approach any third parties in order to obtain information, and may invite such third parties to a meeting so as to learn their views.
3. The Minister shall ensure that all documents that the Committee needs in order to execute its task and that are in the Ministry's files are made available to the Committee in time and in full.
4. Each and every officer of the Ministry shall comply with a summons or a request issued by the Committee.
5. The restrictions relevant to the public accessibility of records as referred to in Section 1, subsection c, under 1 and 2 of the 1995 Public Records Act that the Committee needs for the execution of its task and are filed in State Archives shall not be applicable to the Committee.

Article 7

1. Every year the Committee shall report to the Minister on the current situation regarding the tasks referred to in Article 2.
2. The first report shall be submitted in January 2003.

Article 8

The members of the Committee shall receive a fee '[...].'<sup>2</sup>

Article 9

The Committee's records shall be transferred to the archives of the Ministry's Cultural Heritage Department after dissolution of the Committee or at such earlier time as may be dictated by circumstances.

Article 10

From the date that this Decree takes effect, the following persons shall be appointed for a period of three years:

'[...].'<sup>3</sup>

Article 11

This Decree shall come into effect on the second day after the date of the Government Gazette in which it is published.

Article 12

This Decree shall be cited as: Decree Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War.

This Decree and the associated explanatory notes will be published in the Government Gazette.

The State Secretary for Education, Culture and Science,

F. van der Ploeg

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2 This article has been superseded by 'Besluit vaste beloning Restitutiecommissie' [decree fixed fee Restitutions Committee], see <<https://zoek.officielebekendmakingen.nl/stcrt-2007-231-p16-SC83196.html>> accessed 15 September 2014.

3 This article has been superseded by 'Besluit van 30 oktober 2013 tot herbenoeming van de leden van de Adviescommissie restitutieverzoeken cultuurgoederen en Tweede Wereldoorlog voor een periode van drie jaren' [Decree reappointing the members of the Restitutions Committee for a period of three years], see <<https://zoek.officielebekendmakingen.nl/stcrt-2013-31001.html>> accessed 12 September 2014.

**12      ABSPRACHE ZWISCHEN BUND, LÄNDERN UND  
KOMMUNALEN SPITZENVERBÄNDEN ZUR  
EINSETZUNG EINER BERATENDEN KOMMISSION  
IM ZUSAMMENHANG MIT DER RÜCKGABE  
NS-VERFOLGUNGSBEDINGT ENTZOGENEN  
KULTURGUTS, INSBESONDERE AUS JÜDISCHEM  
BESITZ**

SEKRETARIAT DER STÄNDIGEN KONFERENZ DER KULTUSMINISTER DER  
LÄNDER IN DER BUNDESREPUBLIK DEUTSCHLAND

Absprache zwischen Bund, Ländern und kommunalen Spitzenverbänden zur Einsetzung einer Beratenden Kommission im Zusammenhang mit der Rückgabe NS-verfolgungsbedingt entzogenen Kulturguts, insbesondere aus jüdischem Besitz

(Beschluss der Kultusministerkonferenz vom 05.12.2002)

- (1) Für den Fall, dass im Zusammenhang mit der Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes, insbesondere aus jüdischem Besitz, in Einzelfällen der Anspruchsteller und der über das Kulturgut Verfügende gemeinsam Mediation wünschen, wird eine Beratende Kommission aus bis zu acht geeigneten Persönlichkeiten gebildet, die im Bedarfsfall angerufen werden kann (Anlage).
- (2) Die Kommissionsmitglieder werden ehrenamtlich tätig. Im Ergebnis ihrer Tätigkeit spricht die Kommission Empfehlungen aus.
- (3) Die Kommissionsmitglieder werden von der Beauftragten der Bundesregierung für Angelegenheiten der Kultur und der Medien im Einvernehmen mit der Kultusministerkonferenz und den kommunalen Spitzenverbänden berufen.
- (4) Die Geschäftsführung für die Berufung und die Begleitung der Beratenden Kommission liegt bei der Koordinierungsstelle für Kulturgutverluste in Sachsen-Anhalt in Abstimmung mit der Beauftragten der Bundesregierung.

Mitglieder einer Beratenden Kommission im Zusammenhang mit der Rückgabe NS-verfolgungsbedingentzogenen Kulturguts, insbesondere aus jüdischem Besitz

Prof. Dr. Thomas Gaethgens

Prof. Dr. Jutta Limbach

Prof. Dr. Günther Patzig

Prof. Dr. Dr. Dietmar von der Pfordten

Prof. Dr. Reinhard Rürup

Prof. Dr. Rita Süßmuth

Dr. Richard von Weizsäcker

Prof. Dr. Ursula Wolf

## 13 THE HOLOCAUST (RETURN OF CULTURAL OBJECTS) ACT 2009

The following is Annex A to Chapter 7 by Norman Palmer: ‘The Best We Can Do? Exploring a Collegiate Approach to Holocaust-Related Claims’

The Holocaust (Return of Cultural Objects) Act 2009 enables certain national institutions in the United Kingdom to relinquish Holocaust-related material.<sup>1</sup> Such relinquishment will of course occur principally in response to claims by Holocaust survivors or their descendants. So much is plain from the heading to section 2 of the Act, which reads ‘Power to return victims’ property’.

The enlarged ability of national museums and galleries to relinquish Holocaust-related objects from their collections gives recognition to the value of a claimant’s personal association with such an object. It impliedly acknowledges that in some instances only the retrieval of the object (as compared for example to a money payment) is an appropriate response to the claimant’s sense of personal loss.

For some time there had been disquiet over the British Museum’s perceived inability to respond in this manner to the claim by the descendants of Dr Feldmann.<sup>2</sup> In 2005, the Chancery Division of the High Court held that it was impermissible to override the constraints imposed by the British Museum Act by an appeal to section 27 of the Charities Act 1993.<sup>3</sup> It became clear to the government that new legislation was needed. A Consultation Paper seeking advice on the potential form of that legislation was published in 2006.<sup>4</sup>

The new legislation is tightly drawn, both in regard to the institutions covered<sup>5</sup> and in regard to the material that might be relinquished. It is couched in discretionary terms and

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1 By section 4(2) the Act extends to England and Wales, and Scotland.

2 David Hirst, *Report of the Spoliation Advisory Panel in respect of four Drawings now in the Possession of the British Museum* (Spoliation Advisory Panel 2006) <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/231795/1052.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/231795/1052.pdf)> accessed 13 August 2014.

3 *Attorney-General v Trustees of the British Museum* [2005] EWHC 1089 (Ch), noted by Sir Anthony Mason (2006) XI Art Antiquity and Law 101.

4 Department for Cultural, Media and Sport, ‘Restitution of Objects Spoliated in the Nazi-Era: A Consultation Document’ (2006) <[www.museumsassociation.org/download?id=234793](http://www.museumsassociation.org/download?id=234793)> accessed 13 August 2014.

5 These are prescribed by section 1 of the Act, by which the Act applies to the following bodies: the Board of Trustees of the Armouries, the British Library Board, The Trustees of the British Museum, The Trustees of the Imperial War Museum, The Board of Trustees for the National Galleries of Scotland, The Board of Trustees of the National Gallery, The Trustees of the National Library of Scotland, The Trustees of the National Maritime Museum, The Board of Trustees of the National Museums and Galleries on Merseyside, The Board of Trustees of the National Museums of Scotland, The Board of Trustees of the National Portrait Gallery, The Trustees of the Natural History Museum, The Board of Trustees of the Royal Botanic Gardens,

at no point mandates the return of any object. So much is plain from its long title, “An Act to Confer Power to Return Certain Cultural Objects on Grounds Relating to Events Occurring During the Nazi Era”. By section 2(1) of the Act:

2(1) A body to which this Act applies may transfer an object from its collections if the following conditions are met.

(2) Condition 1 is that the Advisory Panel has recommended the transfer.

(3) Condition 2 is that the Secretary of State has approved the Advisory Panel’s recommendation.<sup>6</sup>

The foregoing power does not affect, and thus cannot enable an institution to override, any trust or condition subject to which any object is held. So much is stipulated by section 2(6), which resembles in this regard the equivalent provision in section 47(4) of the Human Tissue Act 2004.

By section 3(1), the term ‘Advisory Panel’ means for the purposes of the Act a panel for the time being designated by the Secretary of State for those purposes. The Secretary of State may designate a panel for the purposes of this Act only if the panel’s functions consist of the consideration of claims which (a) are made in respect of objects, and (b) relate to events occurring during the Nazi era.

Aside from various provisions related to the coming into force of the Act,<sup>7</sup> the sole outstanding provision of the Act is the sunset clause contained in section 4(7). Under that provision, “This Act expires at the end of the period of 10 years beginning with the day on which it is passed”.

## THE LIMITS OF THE ACT

The fact that the Act authorises an institution to transfer an object from ‘its’ collections indicates with reasonable clarity that relinquishment is authorised only where the object

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Kew, The Board of Trustees of the Science Museum, The Board of Trustees of the Tate Gallery, The Board of Trustees of the Victoria and Albert Museum, The Board of Trustees of the Wallace Collection.

By section 2(4) The Secretary of State may approve a recommendation for the transfer of an object from the collections of a Scottish body only with the consent of the Scottish Ministers. By section 2(5) ‘Scottish body’ means the Board of Trustees of the National Galleries of Scotland, the Trustees of the National Library of Scotland, and the Board of Trustees of the National Museums of Scotland.

6 The power conferred by section 2(1) is an additional power: section 2(7).

7 “(3) The preceding sections of this Act come into force on such day as the Secretary of State may by order appoint.

(4) An order may make different provision for different purposes.

(5) Before appointing a day for the coming into force of the preceding sections of this Act so far as they relate to Scottish bodies the Secretary of State must consult the Scottish Ministers.

(6) ‘Scottish body’ has the meaning given by section 2(5).”

has already become the property of that institution. On this analysis, there is no statutory authority to relinquish where the institution is merely in possession of the object and does not own it. It can hardly be supposed that the Act empowers an institution to dispose of an object that is not its property. If, therefore, there is any realistic prospect that a Holocaust-related object remains the property of some person other than the institution, the statutory enablement may not apply and the institution would need to take further advice before relinquishing that object. Of course, if the owner of the object is the claimant now seeking its transfer, there would seem to be no pre-existing bar on its release by the institution to that party, and the Act is unnecessary to achieve that: the institution would simply be returning the object to the party who has legal title. Moreover, there are many cases (probably the majority) where, however deplorable the original deprivation, the institution is in fact the current owner. So much is clear from the substantial number of cases before the Spoliation Advisory Panel where the Panel has concluded, or the parties have conceded, that the victim's original ownership has been extinguished. But in cases where there might exist other potential claimants capable of asserting title, it might be imprudent of the institution to assume that it owns the object and that the Act itself justifies release to the immediate claimant. Such a situation might arise where family members are in disagreement (or have simply not been consulted) about the ownership and desired destination of the object.

The Act is designed to operate when the museum wishes to return the object. Moreover, one can imagine that the very existence and availability of the Panel might lead a court to look unfavourably at a claimant who has chosen to forego the chance to pursue the claim before the Panel, and has preferred the more costly (albeit ultimately successful) option of litigating the claim. Might the respondent museum then resist a claim for costs on the ground that it was willing to submit to the Panel and that the claimant's refusal to do so was unreasonable? Or could the claimant argue that the lack of imperative remedial powers in the Panel made litigation the only practical option?

The 2009 Act gives rise to another observation. Clearly the Act is unnecessary where the claimant retains ownership of the object, coupled with the immediate right to possession. No statutory authority is needed where the museum is merely returning to a claimant something that the claimant has owned all along. But in that context, the secondary question arises as to whether the Act is confined to empowering the return of objects that are unquestionably in the ownership of the museum at the time of its decision to return. To some observers any wider proposition would appear extraordinary: how can a museum effectively give away what does not belong to it, and how can the museum, by purporting to confer ownership on the donee, deprive the true owner of his title? And yet it is understood that the wider view has taken root in some governmental quarters. If that view is right, the Act has created a new exception to the principle *nemo dat quod non habet*.



## 14 PARALLEL OR ANALOGOUS CLAIMS

The following is Annex B to Chapter 7 by Norman Palmer: ‘The Best We Can Do? Exploring a Collegiate Approach to Holocaust-Related Claims’

In Chapter 7, section 7.2.1.1, the question was raised as to why an aboriginal survivor of colonial genocide should enjoy only inferior rights of redress to those available to a Jewish or Slavic survivor of twentieth-century genocide. The point was taken by an aboriginal community during the inquiry conducted by the Ministerial Working Group on Human Remains in Museum Collections in London in 2003. They opened the broader debate as to whether initiatives taken to redress Nazi persecution and other wartime injustices might convincingly be used as a model for the treatment of other, indigenous material in museums.<sup>1</sup> Although to some extent the balance has since been redressed, their questions are worth repeating in full:<sup>2</sup>

477. Activity in the field of spoliation invites comparison with our own subject matter. At a meeting at the offices of the Tasmanian Aboriginal Centre in Hobart in February 2002, members of the Centre drew the attention of the Chairman of the Working Group to six points of contrast between the recommendations made by the Seventh Report of the Select Committee on Culture, Media and Sport (Select Committee) in relation to Holocaust-related cultural property, and the same Committee’s recommendations relating to human remains:

1. *Setting up a panel.* Even before the publication of the Select Committee Report, the Secretary of State for Culture, Media and Sport had established the Spoliation Advisory Panel. The Select Committee commended this initiative. No such panel had then been established to deal with human remains, and the Select Committee did not explicitly recommend such a panel.
2. *Assistance with provenance.* The Select Committee recommended that the Government provide assistance to museums to enable them to identify the volume and provenance of cultural objects that were possibly tainted by

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1 The tentative parallel had earlier been drawn by Stephen Weil, ‘The American Legal Response to the Problem of Holocaust Art’ (1999) 4 *Art Antiquity and Law* 5.

2 What follows is a quotation from the report of the Working Group in November 2003 (footnotes omitted); see Department for Culture, Media and Sport, ‘Report of the Working Group on Human Remains’ (Department for Culture, Media and Sport 2003) <[www.museumbund.de/fileadmin/geschaefts/dokumente/Leitfaeden\\_und\\_anderes/DCMS\\_Working\\_Group\\_Report\\_2003.pdf](http://www.museumbund.de/fileadmin/geschaefts/dokumente/Leitfaeden_und_anderes/DCMS_Working_Group_Report_2003.pdf)> accessed 13 August 2014.

Holocaust associations, and to ensure the availability of such research in a common and accessible format. No such assistance was recommended to enable the identification of human remains. The Select Committee merely proposed that the Department for Culture, Media and Sport (DCMS) seeks commitments about access to information on holdings of indigenous human remains.

3. *Pace of legislation.* The Select Committee recommended urgent cross-party consultations with the object of securing early and expedited legislation to permit museums to relinquish cultural objects wrongfully taken during the period 1933–1945. No such urgency or expedition was recommended in the case of museum holdings of human remains. The Select Committee did however recommend that DCMS undertakes a consultation exercise on the terms of legislation to permit national museums to remove human remains from their collections, with a view to early introduction of such legislation.
4. *Removal of bars.* The Select Committee held that it was essential to remove legislative barriers to the restitution of spoliated cultural objects where restitution was seen to be the appropriate response to a claim. The removal of legislative barriers in relation to human remains was not explicitly stated to be essential. The Select Committee did however consider that the question of human remains might merit specific legislation of its own.
5. *Subordination of educational value to vindication of property.* The Select Committee stressed that continuing public access to spoliated cultural objects in museums must be treated as subordinate to the interests and wishes of rightful owners. It also emphasised the enormous emotional and symbolic value of particular items to particular families and the cardinal value of redressing evil by allowing survivors and their descendants to recover such objects. In the case of human remains, the Select Committee emphasised the tension between scientific aspirations and community expectations, which might be taken to imply an acceptance of the need for compromise between scientific research and the moral demands of repatriation. The Select Committee did, however, accept that there is a qualitative distinction between human remains and artefacts, and expressed the view that the existing guidance for museums on restitution and repatriation gives insufficient weight to the particular issues concerning claims for the return of human remains.
6. *Material in private hands.* The Select Committee recommended that DCMS undertakes discussions with interested parties to explore the extent to which the Spoliation Panel or a similar body could consider issues relating to spoliated cultural objects which are currently in private hands, including

the legitimate interests of claimants and current possessors. No such recommendations were made by the Select Committee in relation to human remains which are currently held by private individuals.

478. Those who drew these comparisons unequivocally disclaimed any objection to the measures that were being proposed to assist victims of the Nazi Holocaust, which appeared to them appropriate and just. Nor did they assert that their own circumstances, although the product of much suffering and wrong, were factually congruent with the plight of Nazi Holocaust victims or their surviving families. They did, however, ask the Chairman to bear in mind that their own claims concerned the relics of human beings and not artefacts. In their submission, the measures favoured in relation to objects displaced during the period 1933–1945 suggested a model for the treatment of their own claims, and they asked the Chairman to convey this view to the Working Group.

479. The Working Group has considered this argument and believes that, irrespective of the independent merits of the case for the return of human remains, the comparison is constructive in terms of the remedies proposed.

480. In so concluding, we accept that there can be no exact parallel between the treatment of spoliated material and that of indigenous human remains. It might be argued that it is harder to evaluate on a scale of priorities the scientific and medical benefits of retaining human remains in museums than it is to assess the benefits of the public appreciation of art. On the other hand, the claims of indigenous peoples are for the remains of human beings: their ancestors and families. Their advocates understandably insist that nothing could be more important than that. This material has no inherent economic value and there can be no prospect of commercial gain, or (we suggest) of any financial settlement based on such value.

481. We therefore conclude that the Government's response to the spoliation question provides a useful model for establishing a system for dealing with the treatment of human remains in museums. In particular, we see a role for a national advisory panel (perhaps operating alongside museums' own claims panels) as a mechanism for considering disputed claims. This is further considered at paras 491 et seq below, and in Chapter 12.



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Photo II: private family archive

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Photo VII: RKD – Netherlands Institute for Art History

Photo VIII: National Archives of the Netherlands/Spaarnestad Photo/Het Leven/photographer unknown

Photo IX: collection Van Lier family, photographer Erwin Blumenfeld

## *Photo quires*

Photo 1: The Art of Painting, Johannes Vermeer van Delft (1665/1666), Kunsthistorisches Museum Vienna, Picture Gallery Inv.-Nr. GG\_9128

Photo 2: Bundesarchiv, B 323 Bild-311-008/ photo: o.Ang.

Photo 3: Ullstein bild, Germany

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Photo 5: Associated Press/Reporters

Photo 6: Amsterdam City Archives, the Netherlands

Photo 7: Restitutions Committee, the Netherlands

Photo 8 and book cover: bpk / Jörg P. Anders, photograph courtesy of Stiftung Preuischer Kulturbesitz

Photo 9: Egon Schiele Portrait of Wally Neuzil, 1912, Oil on wood 32 x 39,8 cm – courtesy of the Leopold Museum, Vienna, inv.no. 453

Photo 10: Smith College Archives, Smith College

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RC

The title of this book, *Fair and Just Solutions?*, refers to the norm for the assessment of ownership claims to Nazi-looted art as codified in the so-called Washington Principles in 1998:

*If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.*

The question mark in the title is a reference to the lack of clarity surrounding this norm. What is 'fair and just'?

This publication aims to evaluate the status quo in the field of non-governmental restitution claims to Nazi-looted art. In addition, through contributions by leading experts and a discussion amongst stakeholders, it explores a way to move forward.

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This book was created under the auspices of the Dutch Restitutions Committee and based on papers, discussions and insights gathered during an international conference at the Peace Palace in The Hague in November 2012. Both the book and the conference were initiated and developed by the Bureau of the Restitutions Committee. This book was edited by Evelien Campfens, director of the Bureau of the Restitutions Committee.

ISBN 978-94-6236-471-4



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