

Guide to the work of the Restitution Committees

Five ways of resolving claims

FOREWORD

This Guide results from the decision of five European Restitution Committees to respond to the challenge laid down during the 2017 London conference, *70 Years and Counting: The Final Opportunity?* In his address, the British Minister for the Arts, Heritage and Tourism reminded participants that, since the 1998 Washington Conference, there had been numerous international gatherings on spoliation and the return of cultural property looted by the Nazis. This Conference should not become simply another set of lukewarm promises.

The *Kommission für Provenienzforschung* (Austria), the *Commission pour l'indemnisation des victimes de spoliations* (France), the *Spoliation Advisory Panel* (Great Britain), the *Beratende Kommission im Zusammenhang mit der Rückgabe NS-verfolgungsbedingt entzogenen Kulturguts, insbesondere aus jüdischem Besitz* (Germany) and the *Restitutiecommissie* (Netherlands) have decided to take up this challenge and to work together.

This is not an easy matter. As Dr Woodhead points out in the final section of this Guide, structural differences between the Committees exist, above all based on historical, cultural or legal grounds. However the Committees are guided by the same fundamental principle of Justice: what was taken by force must be restituted.

The European Restitution Committees established a network, because fair and just solutions for the spoliation of artwork can only be made effectively at international level: the mobility of looted cultural property adds to the geographic dispersal of victims.

First of all this Guide is intended for the victims' families. It presents the current claims processes in our five countries, makes the differences between them apparent too, in order to help the claimants in their efforts. This Guide aims to enable the public to understand different outcomes from one country to another. As Prof. Dr. Matthias Weller notes in the introductory section, the public opinion needs to be informed about the diverging solutions and to reflect and discuss them. This Guide could also inspire similar processes. Lastly, it is directed towards researchers who, before the Committees, established networks to identify and restitute spoliated cultural property. We present to them this Guide to assist them in their work.

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Director of the CIVS

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In search of “just and fair”
solutions

IN SEARCH OF “JUST AND FAIR” SOLUTIONS:

TOWARDS THE FUTURE OF THE “WASHINGTON PRINCIPLES ON NAZI-CONFISCATED ART“

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I. The challenges of rendering justice

”Just and fair solutions“ – this is what Principle No. 8 of the “Washington Conference Principles on Nazi-Confiscated Art“¹ requires the participating states to achieve:

“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.”

This is not an easy task. Mankind has been puzzled by the notion of justice ever since the dawn of time and consensus has never been achieved as to what “justice” truly means or requires. Even its most basic principles are still subject to constant dispute.

One of the first general philosophical treatises on justice, the fifth book of the Nicomachean Ethics by Aristotle, introduced fundamental distinctions upon which the discourse about justice still rests today. Amongst those, we find the category of *iustitia correctiva*, the justice relating to the rectification of wrongs, as opposed to *iustitia commutativa* – the justice relating to the equivalence and “fairness” in exchange relations like sales contracts. Another category concerns the justice relating to the distribution of wealth in society, the *iustitia distributiva*, which includes, for example, support for those in need.

The Washington Principles, non-binding standards agreed upon by 44 states in 1998, aim at corrective justice (*iustitia correctiva*). The declaration calls upon all participating states to find solutions in cases where art has been confiscated in the course or as a result of acts of persecution. To be sure, the confiscation of material goods belonging to Jewish owners is but one wrong among the innumerable crimes committed under the Nazi regime. We know, and deeply regret, that none of these wrongs can be rectified or “undone” in a literal sense; no payment of money can undo the murder of millions in the concentration camps and the atrocities of persecution. Yet, the restitution of looted property and the payment of money is an indispensable component of “correcting”, or, more precisely “reacting” to the wrong.

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1 - Also referred to as the “Washington Principles”, <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/> (last accessed on 21/09/2019).

II. Towards a Restitution Culture

In 1944, Émile Terroine, member of the Résistance, professor at the University of Strasbourg and later head of the French Restitution Authority, explained on this account:

“[...] the restitution of property looted from the Jewish population is a work of both justice and humanity whose moral and political meaning by far exceeds the material assets in question. It must become, before the eyes of France and the world, one of the great tangible manifestations of the reestablishment of the rule of law and republican legality.”²

Therefore, other measures beyond restitution and compensation must be taken, in particular measures that aim at reconciliation and remembrance. In this sense, restitution as well as compensation must be “embedded” in and understood as acts of acknowledgement. Such a “restitution culture” may ultimately pave the way for reconciliation. At the same time, it becomes apparent that the seemingly straightforward concept of “corrective justice” as “undoing the wrong” in no way produces self-evident suggestions for what would be an adequate resolution or, to put it differently, what would be “just and fair”.

III. Reconciling competing equities of ownership

Even though there is no doubt that nazi-confiscated art must be returned, the return does not undo the fact that the artwork in question was unlawfully taken. Certainly, its return allows reestablishing the situation that would exist today if the wrong had not occurred in the past. However, the Washington Principles themselves recognize that just and fair solutions – even here – “*may vary according to the facts and circumstances surrounding a specific case*”.

Stuart E. Eizenstat, in his explanations of the Principles at the Washington Conference in 1998,³ emphasises:

„After existing art works have been matched with documented losses comes the delicate process of reconciling competing equities of ownership to produce a just and fair solution.”

2 - Cited from Mission d'étude sur la spoliation des Juifs de France, Rapport général, Paris 2000, p. 12: “[...] la restitution des biens spoliés aux israélites est une oeuvre à la fois de justice et d'humanité dont la signification morale et politique dépasse de beaucoup les valeurs matérielles en cause. Elle doit être, aux yeux de la France et du monde, une des grandes manifestations tangibles du rétablissement du droit et de la légalité républicaine” (translation by the author).

3 - Stuart Eizenstat, In Support of Principles on Nazi-Confiscated Art. Presentation held at the Washington Conference on Holocaust-Era Assets in Washington DC, 3 December 1998, <http://fcit.usf.edu/holocaust/resource/assets/art.htm> (last accessed on 21/09/2019).

IV. Five Commissions “to assist in addressing ownership issues”

In order to provide structures for this “*delicate process*”, Washington Principles No. 10 and 11 recommend:

“10. 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.

11. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.”

Five of the participating 44 states implemented these recommendations and entrusted national restitution commissions with the challenging task of establishing just and fair solutions in each particular case. These states are (in alphabetical order): Austria⁴, France⁵, Germany⁶, the Netherlands⁷ and the United Kingdom⁸.

The five commissions present themselves and their work in the main part of this guide. Some comparative observations may appear appropriate to introduce and accompany this presentation. Charlotte Woodhead will add important aspects in her contribution below.

V. Procedural Aspects in Comparison

First of all, it seems fair to state that each of the commissions consists of members with relevant expertise and a reputation in the field. The German commission, for example, has always been presided by a former president of the Federal Constitutional Court of the Federal Republic of Germany, a function that certainly trains for the “*delicate process of reconciling competing equities*”. The other commissions are likewise presided by highest ranking and experienced judges or law professors of outstanding scholarly reputation. Furthermore, each commission gathers interdisciplinary expertise, such as in the fields of history, history of art, legal theory and philosophy and includes leading practitioners from the museum world and the art trade. Thus, each of the commissions appears to work with a “*balanced membership*” in the sense of Principle N^o. 10, although there are differences in detail.⁹ For example, the German commission has recently

4 - Kunstrückgabebeirat.

5 - Commission pour l'indemnisation des victimes de spoliations intervenues du fait des législations antisémites en vigueur pendant l'Occupation (CIVS).

6 - Beratende Kommission im Zusammenhang mit der Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes, insbesondere aus jüdischem Besitz (Beratende Kommission).

7 - Adviescommissie Restitutieverzoeken Cultuurogoderen en Tweede Wereldoorlog (Restitutie-commissie).

8 - Spoliation Advisory Panel.

9 - For further input on the nature and scope of the commissions see Charlotte Woodhead, below at p. 69, for example on the potential influence of government officials' participation.

included a member with an international background in order to increase diversity. At the same time, none of the commissions makes use of party-appointed members or “community representatives”. This makes sense because the commissions work on a permanent basis, all panel members are required to act in absolute neutrality and to proceed in a non-adversarial manner.

Regarding the differences, it is crucial to remind ourselves of the Preamble of the Washington Principles according to which “among participating nations there are differing legal systems and that countries act within the context of their own laws”. Thus, differences are inevitable and differences are not *per se* deficiencies.

One distinctive feature of the German commission compared to all other commissions is that it functions under a “principle of subsidiarity”. This means that the *Beratende Kommission* is only competent to hear a case after the claimant and the museum failed to establish a just and fair solution bilaterally. Consequently, most cases in Germany are resolved without ever coming before the German commission, and only 17 recommendations have been issued by the *Beratende Kommission* so far. The Austrian and the Dutch commissions each have a track record of several hundreds, the French commission, entrusted with a broader range of responsibilities beyond the implementation of the Washington Principles, even thousands of recommendations. The *Spoilation Advisory Panel* in the United Kingdom has dealt with a little more than 20 cases, but this is because the UK was never occupied, and therefore fewer cases of Nazi-confiscated art arise there.

Furthermore, some of the commissions invite the parties to participate and present their case (such as e.g. the German, the Dutch and the British commission). Other commissions function as an internal body of advice for the competent public authorities that ultimately have to take the decision on the just and fair solution in the particular case at hand (such as e.g. the Austrian and French commission). Closely related to this principal difference in structure and task of the respective commission is the question whether parties may submit themselves cases to the commission, be it upon bilateral agreement, be it unilaterally.

Another difference relates to transparency. The British, the Austrian and the Dutch commissions each publish their recommendations on the internet; the *Restitutiecommissie* even provides English translations – examples of best practices. In addition, the *Restitutiecommissie* publishes press releases in both Dutch and English language to inform the public about the relevant facts of a case. The French commission has not yet started publishing its decisions. The German *Beratende Kommission* publishes its recommendations as well. However, the early publications merely consisted of summarized press releases, sometimes very short. By now, the full text of the recommendation is made available online in German followed by an English translation. However, as was explained above, the German commission is only approached in exceptional circumstances, and most claims are settled bilaterally. Unfortunately, there is no uniform practice to publish these settlements. Some museums publish press releases; others do not inform the public at all, sometimes upon request by the claimant. It is intuitive to understand that the claimant must be protected to the fullest extent possible.

On the other hand, a convincing restitution culture needs the public to participate.¹⁰ Therefore, decisions on restitution claims should be published and comprehensively reasoned. The identity of the claimant may be protected by reference to “claimant AA” and “claimant BB”, as it is the practice in the Netherlands. All commissions fully respect data protection rights and publish the names of the claimants only upon their express prior consent. Claimants from the United States and the United Kingdom are anyway used to seeing their names in publicly accessible court judgments.

VI. Decisions in Comparison

The most important differences, however, occur when we look at the outcome of the “*delicate process of reconciling competing equities*” in difficult cases. Charlotte Woodhead, in her contribution below¹¹, will present an analysis of different outcomes for claims raised by the same claimants before two or more of the five restitution committees.

Here, we will be looking at different outcomes on the same subject-matter, namely on the controversial issue of “*Fluchtgut*” or “flight-related sales of goods” (“flight goods”). These concern sales of artworks by formerly persecuted persons outside the sphere of Nazi power in safe states after their emigration in order to raise money for their living. What is a just and fair solution in such cases? The commissions have come to different conclusions:¹²

The German *Beratende Kommission* was the first to deal with this issue in 2005.¹³ The case concerned Julius Freund who had managed to transfer his art collection to Switzerland at the end of 1933. Julius and his wife Clara emigrated from Germany and arrived in the UK in 1939. After Julius’ death in 1941, Clara needed money to cover her living expenses and sold the collection at the Gallery Fischer in Luzern in 1942. The works in question were acquired by the German Reich to become part of the so-called *Sonderauftrag Linz* (Special Assignment Linz). The German commission decided in favour of restitution, but was partly criticised for doing so. One of the arguments put forward was that the scope of the early post-war restitution legislation by the Allied Forces, Military Government Law No. 59 of 1947 for the US occupied zone in Germany and its corresponding laws in the British and French Zones, did not extend to “extraterritorial” sales. The implementation of the Washington Principles in Germany indeed follows the lines of this old legislation created by the US Military Government which, in principle, is favourable to the claimants. The quite far-reaching presumption for a forced sale that is applied in today’s recommendations by the German *Beratende Kommission*, for instance, directly derives from Article 3 of the US Military Government Law No. 59. In the case of Julius Freund, there would not have been a claim for restitution under this Law.

10 - See also Charlotte Woodhead, Redressing historic wrongs, returning objects to their rightful owners or laundering tainted objects? 21st-Century UK remedies for Nazi-era injustices, on the requirements for just and fair solutions vis-à-vis the public, I.J.C.P. 2014, 21(2), 113 et seq.

11 - At p.70.

12 - The following case notes are based on the facts as established by the respective commissions.

13 - Pressemitteilung der Bundesregierung Nr. 19/05 vom 12. Januar 2005, available at: https://www.kulturgutverluste.de/Content/06_Kommission/DE/Empfehlungen/05-01-12-Empfehlung-der-Beratenden-Kommission-im-Fall-Freund-Deutschland.pdf?__blob=publicationFile&v=6 (last accessed on 25/09/2019).

In 2006 and 2013, the Austrian *Kunstrückgabebeirat* decided against restitution in the case of George Grosz¹⁴, as well as in 2008 in the case of Hugo Simon¹⁵. The artist George Grosz handed over the work in question to the art dealer and collector Alfred Flechtheim in 1931. Flechtheim was persecuted by the Nazis at an early stage because of his Jewish background, whereas Grosz was defamed because of his political attitude. Flechtheim emigrated from Germany to England in 1933. Flechtheim intended to sell the painting in question on the art market in Amsterdam in 1936. After Flechtheim's death in 1937 the painting was auctioned off in the Netherlands. The second recommendation from 2013 concerns the German art collector Hugo Simon who suffered persecution because of his Jewish descent. After his flight to France in 1933, he gave his art collection to the Gallery Fischer in Luzern. The two paintings in question were not sold, but taken by Theodor Fischer himself. Through an arrangement with Karl Haberstock, one of Hitler's purchasers for the so-called Führermuseum, Fischer organised an exchange deal with the *Österreichische Galerie (Belvedere)* concerning the works in question. The reasoning in all of these cases was that even though there may have been a line of causality between the claimant's persecution and the loss of the relevant property, the loss took place outside the sphere of Nazi power. In 2016, the Austrian commission had to decide a case relating to flight-related sales, this time concerning works from the collection Julius Freund. The Austrian commission, based on the same facts as the German case of Julius Freund in 2005, decided not to recommend restitution.

In 2009, the Dutch *Restitutiecommissie* had its first case of flight-related sales.¹⁶ Richard Semmel was a German industrialist and art collector of Jewish descent who fled from Germany to the Netherlands in 1933 and settled in New York in 1940. He and his family experienced the pressure of persecution directly after the Nazi regime had taken over in 1933. Richard Semmel was persecuted because of his Jewish background but also for his involvement in the German Democratic Party (*Deutsche Demokratische Partei*). After his escape from Germany in April 1933, he sold parts of his art collection at the auction house of Frederik Muller & Cie in Amsterdam. The commission held: "*Semmel lost possession as a result of circumstances directly related to the Nazi Regime*" and thus recommended restitution.¹⁷ However, in a later decision in 2013 on four other objects from sales of parts of the Semmel collection, the *Restitutiecommissie* decided against restitution,¹⁸ except for one item.¹⁹

14 - Kunstrückgabebeirat, Beschluss vom 29. März 2006, http://www.provenienzforschung.gv.at/beiratsbeschluesse/Grosz_George_2006-03-29.pdf (last accessed on 21/09/2019).

15 - Kunstrückgabebeirat, Beschluss vom 21. November 2008, available at: http://www.provenienzforschung.gv.at/beiratsbeschluesse/Simon_Hugo_2008-11-21.pdf (last accessed on 21/09/2019).

16 - Restitutiecommissie, recommendation regarding Semmel, RC 1.75, 1 July 2009, available at: https://www.restitutiecommissie.nl/en/recommendations/recommendation_175.html (last accessed on 21/09/2019).

17 - Restitutiecommissie, recommendation regarding Semmel, para. 7, available at: https://www.restitutiecommissie.nl/en/recommendations/recommendation_175.html (last accessed on 21/09/2019).

18 - Restitutiecommissie, RC 3.127, RC 3.128, RC 3.131.

19 - Restitutiecommissie, RC 3.126.

In 2012, the *Spoliation Advisory Panel* in the United Kingdom had to come to a decision about flight-related sales in the case of Otto Koch.²⁰ Otto Koch died in 1919. Otto's widow Ida married Emil Netter in 1930. Emil died in 1936. Otto Koch had been a collector of watches and clocks, which Ida inherited. She managed to bring 161 watches and clocks of this collection to England when she emigrated which were eventually sold by Christie's in London in June 1939. The panel assumed – on a balance of probabilities – that this was a “forced sale” in principle, but nonetheless held 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 or where all assets had to be sold in Germany in the late 1930s to pay extortionate taxes. The sale was not compelled by any need to purchase freedom or to sustain the necessities of life.”

In 2014, the German commission dealt with its next case on flight-related sales, this time in the case of Clara Levy.²¹ Clara Levy had managed to emigrate to Luxembourg in order to join one of her children. She had managed to transfer large parts of her belongings to Luxembourg, including 78 paintings. Clara died in 1940 and passed on her assets to her four children. One of these children, her daughter Else Bergmann, had emigrated to New York in 1938. Part of Clara's household stored in Luxembourg was shipped to New York, and on a quite clear balance of probabilities the painting in question, Lovis Corinth's “*Drei Grazien*” (“Three Graces”) from 1904 was shipped out as well. The remaining parts of the assets were taken by the Nazis. In 1941, the “Three Graces” were put up for public auction and sold to Curt Valentin, Buchholz Gallery, New York. In 1949, the *Kunstmuseum* in Bern, Switzerland, acquired this painting and resold it to the Bavarian State Gallery in 1950. The German commission held: no forced sale, since

“[i]t is not to be presumed that the Washington Declaration even if it is interpreted in the widest possible sense and thus extended to cover also forced sales or other forms of persecution-related confiscation, aims to reverse sales transactions such as this one (which was effectively concluded under civil law by the rightful owners in New York) and the subsequent re-sales of the painting.”

20 - Spoliation Advisory Panel, Report in respect of 14 clocks and watches now in the possession of the British Museum, London (HC 1839), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/78037/SAP-report-BM-HC1839.pdf (last accessed on 21/09/2019).

21 - *Beratende Kommission*, recommendation regarding the painting “Three Graces” by Lovis Corinth, available at: https://www.kulturgutverluste.de/Content/06_Kommission/EN/Empfehlungen/14-08-21-Recommendation-Advisory-Commission-Levy-BayerischeStaatsgemaeldesammlung.pdf?__blob=publicationFile&v=7 (last accessed on 21/09/2019).

In 2016, the German commission was seized in the case of Alfred Flechtheim in connection with an auction in London.²² It reasoned as follows:

“If an art dealer and collector persecuted by the Nazis sold a painting on the regular art market or at auction in a safe country abroad, there would have to be very specific reasons to recognize such a sale as a loss of property as the result of Nazi persecution. In the case of Flechtheim and the painting “Violon et encrier”, no such reasons are apparent.”

This recommendation marks an important step in the development of the recommendation practice in Germany. Finally, we may be able to identify an underlying general reasoning or in legal terms, a sort of *ratio decidendi*: In principle, *Fluchtgut* of the kind discussed here does not lead to restitution, unless there are very specific reasons to the contrary. This principle appears to be more favourable to claimants than the absolute position on *Fluchtgut* taken in Austria and the United Kingdom. However, the recommendation does not shed any light on what might constitute such “very specific reasons” as required by the German commission.

In March of 2019, the most recent German recommendation on *Fluchtgut* was handed down in the case of Max Emden.²³ Max Emden was the founder of a chain of leading department stores in Germany in the 1920's, among them *Kaufhaus des Westens* in Berlin, *Oberpollinger* in Munich, and 30 department stores with roughly 10,000 employees. Emden sold all of these assets to *Karstadt* in 1926, emigrated from Germany to Switzerland in 1927 and bought two islands, the Brissago Islands, in the Lago Maggiore. He ultimately became a Swiss citizen, but large parts of his assets remained in Germany and were later taken by the Nazis. Facing increasing economic difficulties in Switzerland after 1937, he sold several paintings by Canaletto in Switzerland. The German Commission decided to recommend restitution since

“Max Emden’s economic plight [...] was directly caused by National Socialist persecution [...]”

Are we thus considering a case in which the *Beratende Kommission* saw “very specific reasons” that would justify the qualification as “forced sale”? The Commission’s exact reasoning does not become apparent in this point.

In the case of France, a territorial restriction like the one in Austria has applied until recently. Under this restriction, the CIVS did not recommend compensation or restitution in kind if the relevant loss of assets occurred outside the European territory of France (including the regions held under Nazi control in the north) or assimilated territory (Algeria and Tunisia). Rather,

22 - *Beratende Kommission*, recommendation in the matter of the Heirs of Alfred Flechtheim vs. Stiftung Kunstsammlung Nordrhein-Westfalen, Düsseldorf, available under: https://www.kulturgutverluste.de/Content/06_Kommission/EN/Empfehlungen/16-03-21-Recommendation-Advisory-Commission-Flechtheim-KunstsammlungNRW.pdf?__blob=publicationFile&v=7 (last accessed on 21/09/2019).

23 - *Beratende Kommission*, recommendation in the case of Dr. Max James Emden vs. The Federal Republic of Germany, available at: https://www.kulturgutverluste.de/Content/06_Kommission/EN/Empfehlungen/19-03-26-Recommendation-Advisory-Commission-Emden-Germany.pdf?__blob=publicationFile&v=5 (last accessed on 21/09/2019).

restitution or compensation for the loss of assets inflicted by German authorities or the so-called “Vichy Regime” could only be obtained as far as the relevant actions had taken place within French territory. However, under the new organization of 2018 for the restitution of cultural property spoliated due to national socialism, certain changes on this matter were introduced.²⁴

VII. Conclusion: Diverging notions of “justice”

What is the lesson to be learned from this line of cases? “Difficult” cases produce diverging solutions. Each of these solutions may be equally “just and fair” – if there are valid reasons to decide a case either way. This is why the public opinion needs to be informed about these reasons and needs to reflect and discuss them.

In order to further support and structure reflections in this sense, the German Government financed the project of a „Restatement of Restitution Rules“ on Nazi-Confiscated Art, an academic research project that has started in April 2019 and aims at distilling rules from the practice of restitution in the jurisdictions of the five commissions presented here.²⁵ The idea of a restatement similar to the US-American “Restatements of the Law” by the American Law Institute (ALI) was developed in a presentation at the first of the conferences of the five commissions at The Hague in 2012.²⁶ It seems to fit perfectly in the findings of the 2017 London conference of the five commissions “70 Years and Counting: The Final Opportunity?”, on which Charlotte Woodhead will report below.²⁷

At the end of the day, it is up to the five commissions presented here to reach the best possible solution in each constellation. In order to further support them in the “*delicate process of reconciling competing equities of ownership*”, the public needs to have a frank and open discussion on this topic. For the public to be able to take part in this discourse, we need a precise, comprehensive and transparent reasoning that is publicly accessible for each and every recommendation handed down by the commissions. It is on this basis that all of us can, again and again, embark on an ever intensifying discourse on “just and fair” solutions according to the highest ethical standards in reference to *Jürgen Habermas*’ “Discourse Ethics”.

But even then, after reaching a “reflective equilibrium” of all relevant arguments and aspects, this time in reference to *John Rawls*’ “Justice as Fairness”, we must accept that the respective commissions may adopt diverging solutions, and all of these diverging solutions are equally “just and fair”. Justice is a discursive project. Let us continue this project in the spirit of the Washington Principles to do the best we can to render justice to the victims of the Holocaust and their descendants.

24 - For more details see below at p. 39.

25 - For further information see <https://www.jura.uni-bonn.de/professur-prof-dr-weller/research-project-restatement-of-restitution-rules/> or contact: restatement@jura.uni-bonn.de.

26 - Matthias Weller, Key elements of just and fair solutions – the Case for a Restatement of Restitution Principles, in: Evelien Campfens (ed.), Fair and just solutions? Alternatives to litigation in Nazi looted art disputes: status quo and new developments”, Den Haag 2015, pp. 201 et seq.

27 - See also Charlotte Woodhead, Implementing Recommendation no 3 of the 2017 London Conference Action Plan, London 2019, 46 pp.

AUSTRIA

Commission for Provenance
Research at the Austrian Federal
Chancellery

COMMISSION FOR PROVENANCE RESEARCH AT THE AUSTRIAN FEDERAL CHANCELLERY

On the one hand, Austria celebrated in 2018 the centenary of the end of the First World War and the founding of the First Republic, on the other hand it commemorated the eightieth anniversary of the *Anschluss*, the annexation of Austria to Nazi Germany in March 1938. The campaign against political opponents of the Nazi regime and people discriminated for “racial” reasons began immediately afterwards. The arrest of more than 70,000 people in the first few weeks and the ensuing deportations to Dachau concentration camp, were merely a prelude to the darkest seven years in Austrian history. The increasing discriminatory measures established by the new Nazi order were aimed at, amongst others, the members of the Viennese Jewish Community or, in general, at those who after the Nuremberg laws were classified as being Jewish. The Nazis closed down Jewish organisations and institutions with the intent to force Jews to emigrate, while at the same time systematically seizing their property, terminating their employment and preventing Jews from participating in social, political or cultural life in general. By the end of 1941, about 130,000 Jews had left Vienna. They left behind most of their assets, but were forced to pay compulsory charges including the Reich Flight Tax, a tax imposed on all émigrés from the German Reich.

The majority of those who stayed – more than 65.000 Viennese Jews – were deported to concentration or extinction camps, only a few thousand survived. Unlike Germany, which after the end of the Second World War was easily identified as being guilty of the “rupture of civilisation”, as described painfully and accurately by Dan Diner, Austria took a different course in dealing with its involvement in the crimes against humanity.

Official post-war Austria cited the 1943 Moscow Declaration, which stated among other things, that Austria was the first victim of Nazi aggression. For decades it simply kept quiet about the additional comment that “Austria is reminded, however, that she has a responsibility, which she cannot evade, for participation in the war on the side of Hitlerite Germany, and that in the final settlement account will inevitably be taken of her own contribution to her liberation.” Hence, this was the hour of birth of the so-called Austrian “victim myth” (*Opfermythos*), which should form a central part of the Austrian collective identity and draw increasing criticism from the 1980s onward.

Nevertheless, between 1946 and 1949, the Republic of Austria passed a total of seven laws dealing with the restitution of seized assets. The First and Second Restitution Acts were applicable to seized works of art held by the State or in public ownership. The Third Restitution Act was applicable to privately owned art objects, directing people to civil proceedings.

However, the “victim myth” that served as a potentially collective self-victimisation of the Austrian population had severe effects for example on the post-war jurisdiction. Hence in the first few years until 1947/1948 the denazification process was rigorously carried

out by special courts, the so called Volksgerichte. The then political will to deal with the Nazi past rapidly faded due to inner-Austrian political interests and the beginning of the Cold War. With the signing of the Austrian Treaty (Österreichischer Staatsvertrag) and the withdrawal of allied authorities in 1955 it nearly came to an end. Looking back, it therefore cannot be said that Austria dealt with its Nazi past satisfactorily. Furthermore, the restitution of looted property was increasingly low.

Through a systematic insistence over several decades on the victim theory, the Nazi era was barely processed in Austria until the early 1990s, and the role of many Austrians as perpetrators remained under the radar. It is only since 1986, following the Waldheim affair, that an intensified confrontation with the Nazi past has taken place. In 1991, Chancellor Franz Vranitzky was the first official representative of Austria to acknowledge the crimes committed by Austrians and to ask for forgiveness from the victims and their heirs. Consequently, the National Fund of the Republic of Austria for Victims of National Socialism was established in 1995 to express Austria's special responsibility towards the victims of National Socialism.

Establishing the Commission for Provenance Research, the Art Restitution Act, the Advisory Board

It was not until 1998, under massive international pressure, that Austria appointed a committee of historians to investigate and report on the looting from 1938 to 1945 and to review previous cases of compensation and restitution. As a result of this research and its efforts additional restitution was ordered.

Another movement arose in the same year, clearly the consequence of worldwide interest. It focused on the provenance of artworks and cultural assets on display in museums and collections.

The prelude to this took place in New York, but it had a strong connection to Vienna. In 1997, the Leopold Museum exhibited works by Egon Schiele at the Museum of Modern Art in New York. When the exhibition ended and the artworks were to be brought back to Vienna, New York County District Attorney Robert M. Morgenthau subpoenaed the *Portrait of Wally* together with another Schiele painting, *Dead City III*, in January 1998, claiming that they were illegally acquired Nazi loot.

Portrait of Wally was originally owned by the Jewish art dealer Lea Bondi-Jaray, who had been forced to flee Vienna in 1939. Under duress, she had handed over the painting to art dealer Friedrich Welz, while her art gallery had already been "aryanised" and all paintings seized. After the war, the painting was recovered by the US Army and eventually purchased by Rudolf Leopold in 1954. He was also the person who Lea Bondi had asked to retrieve the painting, which she believed to be in the Belvedere.

In 1994, *Portrait of Wally* was among 5,400 works in Rudolf Leopold's art collection purchased for \$500 million by the Austrian government and used to create the Leopold Museum, with Leopold named as director for life, a position he held until his death in June 2010.

The seizure of *Wally* led to a worldwide discussion about the provenance of artworks, especially in State museums, and about their rightful ownership. Austrian authorities saw themselves under enormous pressure, which is why the minister responsible set up the Commission for Provenance Research in early 1998. The members of this new Commission were appointed to systematically examine the inventories of the Austrian federal museums, especially acquisitions between 1938 and 1945, and the restitutions straight after 1945 with a view to establishing whether the Republic of Austria had legal title to the objects. On 3 December 1998 another international event took place that intensified the debate about looted art and its restitution: the Washington Conference on Holocaust Era Assets, held in Washington D.C., where the Washington Principles on Nazi-Confiscated Art were signed by forty-four states, which undertook to identify art that had been confiscated by the Nazis and to take expeditious steps to achieve just and fair solutions.

The next day, on 4 December 1998, the Austrian Federal Act on the Restitution of Artworks from Austrian Federal Museums and Collections (Art Restitution Act) was legislated in order to permit the restitution of artworks confiscated or (illegally) acquired during the Nazi regime.

On 9 December, the independent Advisory Board convened for the first time to pass decisions on restitution or non-restitution based on the work of the Commission members. These decisions are in fact recommendations by the Board to the minister in charge and for the past twenty years every decision has been complied with. Since 1998 more than ninety sessions have been held, and based on the resolutions of the Advisory Board more than 15.800 objects have been recommended to be restituted by the Republic of Austria, including paintings, drawings, prints, sculptures, objects of applied arts, folkloristic, scientific and technical objects, coins and medals. In addition to these more than 52.000 books, photos, autographs, manuscripts, maps and musical compositions should be returned to their rightful owners.

Thus, in addition to last year's celebration of Austrian centenaries, it might be noted that 2018 also marked the twentieth anniversary of the Commission for Provenance Research as well as the Advisory Board and the Art Restitution Act. In retrospect, with nearly 360 recommendations, the Austrian Art Restitution Act has turned out to be the most systematic and effective tool for implementing the Washington Principles.

The Art Restitution Act (Kunstrückgabegesetz [KRG])

The Art Restitution Act (amended in 2009, now entitled Federal Law on the Restitution of Art Objects and Other Movable Cultural Assets from Austrian Federal Museums and Collections and from Other Federal Property) defines the conditions that must be fulfilled for the restitution of objects to their former owners or legal successors. It is a statutory act authorising the Federal Minister responsible for the collection to proactively return title to assets, removed by the Nazis and held by the State, to the original persecuted owners or their heirs – without waiting for a request from the families concerned. According to Section 2(1)2 of the law, if the original owners or any of their heirs cannot

be determined, the confiscated items are to be transferred to the National Fund of the Republic of Austria for Victims of National Socialism for disposal. Although the Art Restitution Act does not provide for a court or administrative procedure, the Art Restitution Advisory Board established by the Art Restitution Act, is to be consulted before every ministerial decision. This ensures an objective basis for each decision. All decisions are published on the website of the Commission for Provenance Research, and the National Council (parliament) is informed of the Commission's activities in an annual Restitution Report. The Art Restitution Act therefore involves a three-phase process, namely the investigation by the Commission for Provenance Research, the recommendation of the Art Restitution Advisory Board, and the final decision by the Federal Minister.

Requirements of the Art Restitution Act

Section 1(1) of the KRG defines four requirements, detailed in subparagraphs 1, 2, 2a and 3, three of which are also of significance for the Board's recommendations.

Subparagraph 1 concerns the restitution of objects that were returned to their legal owners after 1945 but became the property of the State as a result of the restrictive application of the Federal Law on the Prohibition of Export of Cultural Assets (Bundesgesetz über das Verbot der Ausfuhr von Gegenständen von geschichtlicher, künstlerischer oder sonstiger kultureller Bedeutung). This law was enacted directly after the collapse of the Habsburg monarchy in 1918 to prevent the disappearance of cultural assets. After the Second World War, the export license required for an object restituted to victims of National Socialism now living outside of Austria was used by the Federal Monuments Authority (Bundesdenkmalamt) as leverage for federal museums to now acquire the object restituted beforehand.

Subparagraph 2 concerns assets that are legally owned by the State today, but were previously the object of a legal transaction or a legal act deemed invalid under the 1946 Annulment Act (Nichtigkeitsgesetz). In its recommendations, the Advisory Board therefore regularly consults the judicature of the Austrian restitution commissions, in particular regarding the Third Restitution Act of 1947.

Subparagraph 2a extends the scope of subparagraph 2 explicitly to Nazi confiscations in the territory of the German Reich outside the present Republic of Austria between 30 January 1933 and 8 May 1945.

Subparagraph 3, which has proved less relevant in practice up to now, refers to objects that were not returned to their original owners on conclusion of restitution proceedings and became the property of the State as "abandoned goods".

According to Section 1(2), in all of the above mentioned cases any payment made by the State to acquire the objects is to be paid back before the transfer.

Commission for Provenance Research

The Commission is implemented in Section 4a of the KRG, which also defines its responsibilities. Hence, it has to ensure that all collection inventories are part of the ongoing investigations and, in the case of objects appearing to meet the requirements of the Art Restitution Act, that reports or dossiers are created for the Advisory Board with the relevant documentation.

Apart from the office in the Federal Chancellery, the Commission consists of provenance researchers in federal collections and a Bureau.

The provenance researchers are sent to the federal collection by the Commission, where they systematically investigate all acquisitions from 1933 to the present. Indications by victims or their families are, of course, followed up, although they are not a precondition for the investigations. The aim is to investigate all acquisitions since 1933 in terms of their fulfillment of the requirements of the Art Restitution Act and to compile dossiers for the Art Restitution Advisory Board. In many cases the origins can be reconstructed with great precision. Apart from the internal records of the institutions concerned, the researchers have access to all available sources from the Nazi era and the early restitutions after 1945 as well as the diverse records in public and private archives in Austria and other countries.

The Bureau of the Commission for Provenance Research is the contact and coordination point for federal provenance research. It provides assistance to the Commission management and the provenance researchers at the federal museums. Apart from administration, research, investigation of files and archiving the Commission's research results, the Bureau also deals with inquiries about historical records. In addition, the archival material of the Federal Monument Authority which are of particular interest for provenance research, is processed by the Bureau and supplemented by copies from other relevant institutions, such as the Austrian State Archive, the municipal or provincial archives or the German Federal Archive in Koblenz and Berlin.

The ongoing work of the Commission, the federal museums and the Bureau is described in the annual Restitution Report, which is provided to the parliament and is publicly available.

Art Restitution Advisory Board

The Board has a vital role to play, because its decisions determine whether the cases presented in the dossiers by the Commission for Provenance Research meet the requirements of the KRG and thus fulfill the criteria for transfer of title.

The Advisory Board has seven members entitled to vote and is currently under the responsibility of the Federal Minister for the EU, Arts, Culture and Media in the Federal Chancellery. Members and chairpersons are appointed by the Federal Minister on the basis of recommendations by his own Ministry, the Federal Minister of Finance, the Federal Minister for Digitalisation and Economic Affairs, the Federal Minister for Constitution, Reforms, Deregulation and Justice, and the Federal Minister of Defence. Universities Austria (Österreichische Universitätenkonferenz) provides an expert in

history and one expert in art history and a representative of the Finanzprokuratur (legal advisor of the Republic of Austria) is part of the Board, acting in an advisory capacity. Since 2007 the Board has been chaired by Clemens Jabloner, who was president of the Austrian Administrative Court until 2013, chairman of the Austrian Historical Commission established by the federal government in 1998 and now is Vice Chancellor and Federal Minister for Constitution, Reforms, Deregulation and Justice since June 2019.

In accordance with Section 3(4) of the Art Restitution Act, the Advisory Board examines the Commission's dossiers on the basis of the criteria defined in the law and reaches a decision recommending the restitution or non-restitution of the objects concerned. If the Advisory Board deems it necessary, other experts or informants can be consulted. As mentioned, the Board's recommendations are published directly on the Commission website. The Art Restitution Advisory Board currently meets three to four times a year and since 1998 has issued around 360 recommendations on a wide variety of objects in Austrian federal museums, including the National Library.

On the basis of such a recommendation, the Federal Minister responsible decides whether the objects should be restituted. For reasons of constitutional law, he or she is not legally bound by the recommendations, but the arguments contained in them are of great significance. To this date, no single recommendation has been overturned.

Output of the Commission for Provenance Research

Whereas the decisions of the Advisory Board are published on the Commission's website, the dossiers written by the historians and art historians working for the Commission are confidential. The Commission does, however, seek to gain visibility and attention for its research, especially concerning new knowledge about public and private collections during and after the Nazi period, about the Nazi looting system and about victims of the Nazis and their biographies, also prior to their prosecution. Telling these stories is important.

The *Schriftenreihe der Kommission für Provenienzforschung* was founded in 2009 to place the research findings in a broader context and make them accessible to the public. Altogether nine volumes have been published since 2009, when the first volume was published to mark the tenth anniversary of the Commission for Provenance Research. They are either anthologies consisting of different case studies, have a specific focus, for example the salvaging of artworks during the Second World War, or deal with one special case, such as the famous *Art of Painting* by Jan Vermeer, which had been acquired by Adolf Hitler from the Austrian-Czechoslovakian Czernin collection and is now in the Kunsthistorisches Museum in Vienna. The most recent volume looks back at the twenty years in which the Art Restitution Act has been in force in Austria.

In connection with these publications, the Commission started a digital initiative prepared over a period of several years by a small group of Commission members, in the form of an online provenance research encyclopaedia. It consists of a regularly updated compendium of articles on historical persons, institutions and art galleries that have been

looked into by the Commission in the past twenty years. Another project is the zdk-online website, which for the first time offers the possibility of parallel research on the looting of art by the Nazis in two connected sources located in different institutions in Vienna: the archive of the Kunsthistorisches Museum and that of the Federal Monuments Authority (BDA), managed by the Bureau of the Commission for Provenance Research. The two Central Depot card indexes provide a record of objects from private art collections in Vienna that were confiscated from Jews after March 1938 by the Nazi regime and subsequently dispersed in museums, including the planned Führer Museum in Linz.

In order to collect the backside documentation of paintings and graphics as well as the provenance characteristics of other art and cultural objects, the Database of Provenance Features (Datenbank der Provenienzmerkmale) was created in 2011 and is constantly being updated.

In addition, the Commission for Provenance Research organises monthly Lunchtime Lectures (Mittagsgespräche). The concept is quite simple: provenance researchers from different institutions and countries give lectures on their research or present their books on different fields of our general topic.

Twenty years after the enactment of the Art Restitution Act, provenance research is more or less acknowledged in Austria and in Austrian museums. The Technisches Museum in Vienna has paid a special tribute to it. Public debate on provenance research has always been dominated by the restitution of valuable artworks such as paintings and drawings. It usually overlooks the fact that the Nazis mainly stole everyday objects from those persecuted on “racial”, social and/or political grounds: radio sets and cameras, furniture, bicycles, musical instruments, linen, motor vehicles and motorcycles. Since it was first established, the Technisches Museum has always collected everyday objects, and its collection, too, has been found to comprise objects previously in Jewish ownership. In 2015, the exhibition Inventory No. 1938 opened in the museum. It is the first permanent exhibition of its kind on the subject of provenance research by a museum in a German-speaking country, and it documents the “Aryanisation” of everyday objects from 1938 onward. A database on vehicles looted by the Nazis gives visitors an opportunity to carry out some investigative research of their own. The exhibition shows the day-to-day practice of Nazi raids, reconstructs the life stories of those who were dispossessed, and documents the search currently underway to trace the rightful heirs, who are now dispersed all over the world.

The Austrian Museum of Folk Life and Folk Art (Österreichisches Volkskundemuseum) has chosen a different way of telling the stories of their objects that have been restituted. This museum is not owned by the State, but by a private association. Nevertheless, it has committed itself to the Art Restitution Act and hence to the decisions of the Advisory Board. In place of objects looted by the Nazis eighty years ago and formerly shown in the permanent exhibition but now restituted, there are photographs of the removed pieces, with extensive information about them. The museum recounts the lives of the original collectors and about their dispossession, persecution, expulsion or extermination by the Nazis. There is also a plaque saying “restituted”. In this way, the objects do not disappear without a trace from the museum, but instead their story – the story of their owners and of their restitution – is recalled.

With respect to the confiscation of Egon Schiele's *Wally* in New York, as mentioned above, in 2010, after more than a decade of proceedings and legal wrangling, the Bondi estate accepted \$19 million as restitution for the painting in an arrangement completed shortly before Rudolf Leopold's death, only weeks before a civil trial was scheduled to start in United States District Court. As stated, the Austrian Art Restitution Act of 1998 does not apply to private museums, such as the Leopold Museum Private Foundation. The Foundation, however, still seeks to comply with the principles expressed in the 1998 statement of the Washington Conference. In cooperation with the Federal Chancellery, the Private Foundation set up its own provenance research. A board, similar to the Advisory Board, was established. Its recommendations, presuming that the Republic of Austria would in fact be the owner of an object, can also be found online.

Under the terms of the arrangement with the Bondi estate, the painting was to be returned to the Leopold Museum, where it would be hung together with the Schiele self-portrait regarded as a pair with the *Wally* portrait, showing Egon and Wally as lovers, now reunited. So *Wally* returned to Vienna, which prompted the museum to claim "Welcome Wally", recalling "Ciao Adele" four years earlier in 2006, after an independent arbitration panel had decided in favour of the restitution of the famous Klimt painting to the Bloch-Bauer heirs. Part of the *Wally* arrangement was for the story of the looting and the legal proceedings from 1998 to 2009 to be noted on a plaque next to the painting in the permanent exhibition. Such plaques are still quite rare and mostly put up as a result of legal negotiations, and not automatically by the museums themselves. These still tend to prefer to inform the public about the object itself rather than its often complex and troubling history. Beside the legal implications it is also a part of the work and the intention of the Commission for Provenance Research to constantly make the public and its institutions aware of the stories behind the surface.

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FRANCE

Commission
for the compensation of victims
of spoliation resulting from the
anti-semitic legislation in force
during the Occupation

Mission for research
and restitution of cultural
property spoliated between
1933 and 1945

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COMMISSION FOR THE COMPENSATION OF VICTIMS OF SPOILIATION RESULTING FROM THE ANTI-SEMITIC LEGISLATION IN FORCE DURING THE OCCUPATION

The French Republic established the Commission for the Compensation of Victims of Spoliation Resulting from the Anti-Semitic Legislation in Force During the Occupation, or “the CIVS,” by decree of September 10, 1999 to investigate the confiscations carried out under the Anti-Semitic Legislation by the Nazi Occupation forces or the Vichy authorities during World War II and to compensate the victims for the confiscations. As of December 31, 2018, the victims of the Holocaust or their children, grandchildren and all other legal heirs or assigns, had filed 29,586 claims with CIVS. Of those, 19,639 claims were for “material spoliations”; 9,947 claims were for “bank-related spoliations”, in other words, seizures of assets in banks or contents of safety deposit boxes.

France has not set a ceiling for the amount of compensation. Nor has France set a deadline for filing claims with CIVS. All spoliations committed on territory where French sovereignty was exercised can obtain compensation. For the remainder, as of today, regardless of the nationality of the spoliation victims, 21 percent of the claims that were submitted to the CIVS came from other countries, 9 percent of those came from Israel, and 7 percent from the United States.

Michel Jeannoutot, Honorary Judge of the Court of Cassation, the highest court in the French judiciary, is the Chairman of the CIVS. Mr. Jeannoutot was also Chief Justice of the Bastia, Chambery and then the Dijon Courts of Appeal between 1998 and 2009.

History and the purpose of the CIVS

On July 16, 1995, President Jacques Chirac spoke of the “unremitting debt” of the Nation to the Jews of France (about 300,000 in 1939, 40 percent of whom were French citizens), including the 76,000 Jews deported by the Nazi Occupation forces or the Vichy regime.

In 1997, the French government created the Mattéoli Working Party. This working party conducted a thorough investigation into the confiscations of property and all valuables in France occupied by the Nazis Resulting from the Anti-Semitic Legislation, including legislation on persons deported from France. The working party produced an exhaustive 3,000-page report that included recommendations for the government to repair these wrongs promptly and decisively. One such recommendation was that the government establish a body charged with examining claims that were submitted by the victims of the Anti-Semitic legislation passed by France under the Nazi occupation.

The French Republic followed the Mattéoli Working Party recommendation and created the CIVS on September 10, 1999. Its role is “to review individual claims submitted by victims or their legal heirs or assigns to receive reparations for losses caused by the

spoliations of property Resulting from Anti-Semitic Legislation in Force During the Occupation, either by the occupying authorities or the Vichy Authorities,” and “to draft and propose suitable reparation or compensation measures.”

Organizational overview of the CIVS

The CIVS is an administrative commission of the French government under the Prime Minister. The Commission is not a court. It investigates claims, determines the nature and extent of material losses and submits recommendations for compensation to the Prime Minister or any other institution involved, and to banks in particular. Action has always been taken on the recommendations that are issued in accordance with the commitments made by the Prime Minister and the banks.

The CIVS consists of three divisions. The first initiates the process by logging in the claim, contacting the claimants and conducting research in specialized archives. The second is the Rapporteurs, who are judges in one of the French judicial or administrative jurisdictions. They review the claims and propose an assessment of losses after the Principal Rapporteur of the CIVS approves the reports. The third division organizes the hearings of the Deliberative Panel and then issues a recommendation on the claim and proposes the amount of compensation.

When it was established, the CIVS launched an international campaign in the print and radio media to notify potential claimants of their right to compensation and to inform institutions that deal with matters related to the Holocaust and the key Jewish organizations about the Commission. The CIVS also maintains a telephone line to provide assistance to potential claimants and interested third parties, as well as a website in French, English and German. The website contains information about the Commission, answers to the most frequently asked questions, claim forms and other documents on the reparation measures for the Holocaust in France. Each year the CIVS publishes a public report of its activity.

Principles underlying the claim process

The CIVS operates according to three principles, and underlie its approach to compensating Holocaust victims: equity, pragmatism and promptness.

The CIVS must answer claimants promptly, who may be elderly or in a difficult financial situation. Therefore, the CIVS expedites the proceedings of direct victims of spoliations and those who are elderly or in a financially or otherwise difficult situation.

The CIVS seeks to provide full compensation to each claimant for his or her losses, or at least to get as close to full compensation as possible. Moreover, there is no ceiling on the amount of compensation that the CIVS can provide.

The CIVS considers that claimants are acting in good faith when they apply for compensation for the losses they sustained. In many cases, it is impossible to gather evidence of losses sustained during deportations, internments or other events in Nazi

Occupied France. Therefore, reflecting its pragmatic approach, the CIVS has often relied on good-faith estimates in lieu of specific evidence of losses sustained when such evidence did not exist. Estimates may also suffice to prove material losses that occurred as part of everyday life or other plausible losses, so long as the claim is based on a coherent statement. Compensation decisions based on a claimant's supposed good faith also follow the principle that similarly-situated victims should receive the same treatment.

Claimants may apply for compensation from the CIVS and there is no opposition based on the statute of limitations. The CIVS is not subject to provisions of the law that deals with the statute of limitations, which would have resulted in the dismissal of the great majority of claims. Moreover, France has not set a deadline to submit claims to the CIVS, unlike some programs in other European countries.

Finally, the CIVS process lightens the burden of proof on claimants, whose declarations are always presumed to be made in good faith. Personnel and rapporteurs frequently communicate with claimants and their representatives to assist them in managing each step of the claims process.

Eligibility for the CIVS Compensation

Eligible claimants

Claimants of any nationality are eligible to submit a claim for compensation to the CIVS. While most claimants reside in France, a certain number reside in the United States, Israel or other countries. Most spoliation victims were born in European countries other than France, although many of these victims were born in France, Germany, Ukraine, Hungary and in a number of Eastern European countries.

Direct victims of spoliations may apply for compensation, as may their children, grandchildren, spouses, brother, sisters, nieces, nephews, great nephews and great nieces, in addition to all other legal heirs or assigns, whether they are family members or not, according to the rules of the governing law of succession.

All victims of spoliations that resulted from the Anti-Semitic Legislation in Force During the Occupation can receive compensation. Therefore, only the application of these laws is taken into consideration as a cause of spoliation, and not just the fact that the victim is Jewish.

Eligible claims

The CIVS was established to review individual claims submitted by the victims or by their legal heirs or assigns to repair losses caused by the spoliations of property that occurred due to the Anti-Semitic Legislation in Force During the Occupation, by the Occupier and by the Vichy authorities. Claims for "material spoliations" and "bank-related spoliations," as provided for in the Washington Agreement between France and the United States of January 18, 2001, can be compensated by the CIVS. Damages of a physical or moral nature are not included in the scope of compensation.

Material spoliations

The CIVS processes claims from persons that sustained material losses that resulted from the Anti-Semitic Legislation in Force During the Occupation, attributable to the French or Nazi Occupying authorities on French territory and assimilated territories. The CIVS compensates spoliations perpetrated by public or private entities, such as insurance companies, banks or the Caisse des Dépôts et Consignations (CDC).

It is possible to obtain compensation through the CIVS for a wide variety of material losses, including but not limited to:

- confiscation of money, personal property or liquid assets
- lootings of family residences or apartments
- work-related losses (such as merchandise inventory, raw materials, machines and equipment as well as losses of customer base and businesses)
- confiscation of money or personal property in the French internment camps, on the occasion of transport to a destination or upon departure from the internment camps
- confiscation of vehicles
- confiscation of works of art or other cultural property
- confiscation of real estate
- money paid to human smugglers to leave Nazi Occupied France to then enter Switzerland or Spain or, before 1943, to move from the occupied zone to the unoccupied zone
- confiscation of personal effects and furniture items located in residences that were used to hide victims during the Nazi Occupation
- unpaid veterans' pensions.

The claims for material spoliations that are filed most often with the CIVS are claims for confiscation of money, jewelry, valuables, liquid assets or personal property of the victims at the time of their arrest, entry or detention at French internment camps, and in particular Drancy, Mérignac and others. According to the records of the Mattéoli Working Party, the victims' property was confiscated by French police and gendarmes or by the SS and German military personnel.

Bank-related spoliations

Pursuant to the Washington Agreement between France and the United States, certain financial institutions have established two compensation funds for bank-related claims. The first fund, in the amount of \$50,000,000, has compensated victims whose assets have been identified. The second fund, in the amount of \$22,500,000, has paid compensation in the form of a "lump sum" for certain bank-related claims for which the CIVS procedures were insufficient to determine the amount of the loss.

The claims process

Filing a claim

Any person, regardless of country of residence, can file a claim with the CIVS, either in person or through an appointed representative (an attorney, family member or an organization that advocates on behalf of victims of the Holocaust, such as the Holocaust Claims Processing Office in New York, for example). The claimant simply sends a letter, fax or email. A claim form is also available on the CIVS website. The process is free of charge and no special formal procedure is required. The CIVS logs in the claim upon receipt. It then notifies the claimant that the claim has been received and also sends the claimant a questionnaire and power of attorney form to authorize the CIVS to conduct the necessary searches concerning the victims and the spoliated property, at no charge.

A claimant is advised to mention as much information as possible on the claim form, and in particular the claimant's status, the type of property confiscated and where, the capacity of other persons involved, etc. However, the CIVS contacts claimants directly to assist them to complete the questionnaire or retrieve information that is essential for processing the claim. Such communications are strictly confidential.

Researching a claim

After the questionnaire is logged in, the CIVS forwards the claim to its "Control Network" for research in the archives.

Research in the archives is an essential part of the claim compensation process. For material losses, it would be practically impossible to assess the property at issue without such research. Research in the archives can also uncover spoliations that were unknown at that time and then they can be included in the claim.

In addition, research in the archives is important because, according to one of the Mattéoli Working Party's recommendations, the CIVS does not provide compensation for claims that have previously received compensation under another program, such as the German Federal Compensation Act (BRüG) or the French law on war damages, unless the compensation recommended under these arrangements did not really provide compensation for the value of the spoliated property. Thus, prior to 2019, the CIVS sent more than 20,000 files to its Berlin office. Nearly 60 percent of these claims had already been compensated by Germany to some extent. The CIVS supplements the compensation paid by Germany or the compensation paid for war damages if it deems this compensation insufficient.

The Control Unit reviews the claim and identifies the various possible types of property reported confiscated, and it also uses the documents in the file as a basis. The CIVS case officers forward copies of the relevant documentation to relevant sources of archives for research. These include:

- National Archives of France (CIVS satellite office) and the archives in the French departments
- Paris Archives (CIVS satellite office)

- Berlin Archives (CIVS satellite office)
- Ministry of Culture, Department of Museums of France
- Ministry of Foreign Affairs, Department of Archives
- Paris Police Headquarters
- Center of Contemporary Jewish Documentation
- Caisse des Dépôts et Consignations
- French Federation of Insurance Companies

Persons who submit a claim for compensation for material spoliations that took place during arrest or internment at French camps may especially benefit from research performed in certain collections of archives. For example, the CIVS has searched the files of the Caisse des Dépôts et Consignations and found conclusive answers about consignments of property that was confiscated from persons detained at Drancy internment camp for over 3,600 claims. The CIVS research team that works at the National Archives of France consults digitized records at the Paris Police Headquarters of those arrested and detained at the Drancy, Pithiviers and Beaune-la-Rolande internment camps.

Investigating the Claim

The Minister of Justice appoints sitting or retired judges, known as “rapporteurs,” to investigate the CIVS claims. In general, these judges are part of French judicial, administrative or financial jurisdictions and they spend several days a week investigating files that are submitted to the CIVS.

The rapporteurs are responsible for conducting an investigation for any claim at the conclusion of the research in the archives and they are to assemble all information to determine the existence and extent of spoliations. The rapporteurs may summon any person whose testimony is deemed relevant and may request their opinion or the advice of certain government bodies or a qualified third party.

At this time there are 11 rapporteurs and one Principal Rapporteur, who is also a judge and who oversees and coordinates the rapporteurs' work.

A rapporteur assigned to a claim contacts the claimant or the person representing the claimant to arrange a meeting. This meeting can be conducted in person, at the Commission's offices or at the claimant's (or representative's) residence if the claimant has health issues. The claimant may also request a meeting by telephone or letter correspondence.

The meeting between the rapporteur and the claimant is meant to facilitate the claims process and ensure that claimants receive the full compensation to which they are entitled. For example, the rapporteur may check that claimants did not inadvertently fail to mention the cases of spoliations in their claims. The rapporteur may also consider it necessary to ask claimants questions about their family, explain the rapporteur's work to them and solicit their opinion on the proposed compensation.

Rapporteur's proposed compensation for a claim

The rapporteur prepares a compensation proposal based on the type and extent of the verified spoliations. This amount is to include offsets, if any exist, for prior compensation that has already been paid by the French or German authorities.

The rapporteurs calculate the loss based on the specific characteristics of spoliations where feasible.

- Spoliations of property taken from residences are appraised using criteria in the German BRüG Act (based on the type of building, number of rooms and occupants) or, if the property was insured, based on the insurance policy.
- Material and bank-related losses are appraised as of the date they occurred and are expressed at their updated value.
- Businesses or work-related assets that are confiscated are valued based on specialized reference work in the sector and following consultation with businesses.
- Works of art are assessed based on an appraisal by the French Museums or reference work specializing in prices for works of art.

When the details of these characteristics are not known, the rapporteur proposes lumpsum compensation.

Based on research in archives and the other relevant documents in the file, the rapporteur, in consultation with the claimant, determines who the legal heirs or assigns are for compensation so that the “reserve portions” are set aside for other legal heirs or assigns. This may require preparing the claimant's family tree beforehand.

The rapporteur sends a first draft of the compensation proposal to the claimant for his or her opinion. At that time the claimant may make comments or dispute the proposal. In most cases, the claimant has agreed with the rapporteur's proposal.

At this point in the process, the claimant receives a copy of the rapporteur's report as well as his request for other documents or references in the claim file that may be of use in supporting the claim. Even if the claimant does not request them, in many cases the rapporteur sends the claimant a copy of documents that support his or her proposal or that may be of historical interest for the victim or the victim's family. Then the rapporteur submits his report and the claim file to the Principal Rapporteur who approves it and forwards it to the Hearings Secretariat.

If a claimant is not satisfied with the rapporteur's investigation, he or she may request that the rapporteur conduct an additional investigation if he or she finds, for example, that there is a material error in the first investigation, or if there is new evidence or information that has been updated. If the rapporteur determines that these conditions are not present, the claimant may contact the Chairman of the CIVS or Principal Rapporteur to request a new investigation.

Hearings before the Deliberative Panel

Under the authority of its Chairman, the CIVS then schedules a review of the claim at a hearing of the Deliberative Panel. The panel is comprised of members with extensive and relevant professional and personal experience in the field; there are two sitting judges from the Court of Cassation, including the chief justice, two members of the Council of State [Conseil d'Etat], two senior advisors from the French Audit Office [Cour des Comptes], two university professors and two prominent persons active in Jewish rights organizations.

The Principal Rapporteur assigns claims to the Deliberative Panel either in plenary formation, or to a sub-commission with three members, based on the complexity of the claim.

The claimant is invited to attend the hearing and may take the floor should he wish to do so. At the hearing, the claimant may also be represented by an attorney or any other person of his choosing, such as a family member.

The CIVS has organized regular missions to Israel and the United States so that residents of those countries, who have submitted a substantial number of claims to the CIVS, can participate in the hearings more easily and take part in the review of their claim, just like claimants residing in France. Nearly 75 percent of all claimants whose claims were on the agenda attended the hearings held in the United States and Israel. Total compensation for these claims has amounted to 20.7 million euros.

The process for the Deliberative Panel hearing is generally as follows: 1) the rapporteur makes his report; 2) the claimant is invited to speak; 3) the Panel asks any questions they may have of the claimant or rapporteur; 4) the government's commissioner, appointed by order of the Prime Minister, and who represents the government, gives a simple opinion on how to handle the claim, although this opinion is not binding on the Deliberative Panel; and 5) the claimant may speak last. Then the Panel deliberates and issues a recommendation for the claim. The Principal Rapporteur attends all plenary sessions and some sub-commission sessions.

The Commission forwards the recommendation to the Compensation Unit of the Prime Minister, which contacts the claimant. Once approved by the Prime Minister, the compensation decision is sent to the National War Veterans Administration (ONAC) for payment. Recommendations for compensation for bank-related spoliations are forwarded to the two funds administered by the United Jewish Welfare Fund, which orders the CDC to pay the amount. Decisions of the Prime Minister may be appealed to a French court of competent jurisdiction, but given the degree of satisfaction that the CIVS process provides for claimants, only a few claims have been appealed. Some appeals have been determined to be admissible, and then the CIVS has proposed additional compensation.

When other potential legal heirs or assigns become known during the claims process, the CIVS sets aside their portion of the compensation for spoliation claim. Such legal heirs or assigns, or their own legal heirs or assigns, are required to contact the CIVS and submit the necessary documents to obtain their reserved share of compensation.

MISSION FOR RESEARCH AND RESTITUTION OF CULTURAL PROPERTY SPOILIATED BETWEEN 1933 AND 1945

Since 1951, 121 cultural works and property recovered by France after the Second World War have been restituted (25 of which were restituted after 2012). Approximately, 2,000 are placed in the custody of national museums whilst awaiting restitution.

The French Government decided in 2018 to improve its public organization for the return of art and cultural objects spoliated due to national socialism. Two administrations become responsible for implementing this policy, with one specially charged with handling cases and the other with suggesting compensation measures:

- the Mission for Research and Restitution of Cultural Property Spoliated between 1933 and 1945 is created within the Ministry of Culture. This Mission directs research with a view to identifying and restituting such property.
- On the basis of this research, the CIVS proposes reparation measures to the Prime minister (restitution or, failing such, compensation).

Why a new structure?

The aim is to give new momentum to research on spoliated works and to strengthen public action undertaken for their restitution:

- by centralizing all decisions relating to restitution at Prime-Minister level
- by grouping and strengthening research means within a new Mission attached to the Minister of Culture and possessing its own specific budget
- by widening the possibilities of referral to the CIVS, whose Deliberative Panel is strengthened by the arrival of four new individuals with qualifications in the fields of art history, the art market, the history of the Second World War and heritage law.

The Mission for Research and Restitution of Cultural Property Spoliated between 1933 and 1945 was created on April 16, 2019. In addition to the review of cases of spoliated cultural property, the Mission is also tasked with a broader remit:

- coordinating research for all cultural property spoliated during this period
- informing and raising awareness among the public and professionals on the issue of spoliated cultural property, particularly artwork in the custody of public institutions (museums or libraries for example)
- encouraging and assisting scientific research on spoliations and restitutions.

Mr David Zivie is responsible for the Mission since May 2019.

What property is concerned?

- Any cultural property (work of art, book, etc.) spoliated in France during the Occupation.
- Any cultural property spoliated between 1933 and 1945 by the Nazis and now currently on French soil.

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www.civs.gouv.fr/home/ (English version)
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To contact the Mission for research and restitution of cultural property spoliated between 1933 and 1945

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GERMANY

Germany's advisory
commission on the return
of cultural property seized
as a result of nazi persecution,
especially jewish property

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GERMANY'S ADVISORY COMMISSION ON THE RETURN OF CULTURAL PROPERTY SEIZED AS A RESULT OF NAZI PERSECUTION, ESPECIALLY JEWISH PROPERTY

In order to support the parties in case of a dispute over cultural property seized as a result of Nazi persecution, Germany's Federal Government, the Federal States and the local authorities set up in 2003 the "Beratende Kommission im Zusammenhang mit der Rückgabe NS-verfolgungsbedingt entzogener Kulturgüter" ("Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property", "Commission").

The establishment of the Commission constitutes – among e.g. the Koordinierungsstelle Magdeburg (1994 – 2014), the Arbeitsstelle für Provenienzforschung (2008 – 2014), the Lost Art Database (online since April 2000), and the "Handreichung" („Guidelines“, 2001) another important measure for the implementation of the international "Principles of the Washington Conference With Respect to Nazi-Confiscated Art Published in Connection with the Washington Conference on Holocaust-Era Assets, Washington D.C., 3 December 1998" ("Washington Principles") from 1998 and Germany's "Gemeinsame Erklärung der Bundesregierung, der Länder und der kommunalen Spitzenverbände zur Auffindung und zur Rückgabe NS-verfolgungsbedingt entzogenen Kulturguts, insbesondere aus jüdischem Besitz" ("Common Declaration") from 1999.

The "Accord between the Federal Government, the Federal States and the national associations of local authorities on the establishment of an Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property"

The Commission is based on the "Accord between the Federal Government, the Federal States and the national associations of local authorities on the establishment of an Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property".

The Accord stipulates that an independent Advisory Commission shall be established which, if desired, may be jointly called upon in individual cases in connection with the restitution of cultural property seized as a result of Nazi persecution, especially Jewish property, in which the claimant and the holder of the cultural property seek mediation. Public institutions which hold cultural property and to which the Washington Principles of 1998 and the Common Declaration of 1999 to implement the Washington Principles directly apply, may lodge a request for mediation, as may private institutions and persons holding cultural property in Germany which, upon request for mediation, declare that they agree to be bound by these Principles.

Furthermore, the Accord states that at every stage of the procedure it shall be the Commission's task to work towards an amicable settlement. As a result of its work, the Commission may issue legally non-binding recommendations that will be published together with their explanations. Public institutions and private parties are expected to follow these recommendations.

The Deutsches Zentrum Kulturgutverluste (German Lost Art Foundation, which is the national and international contact partner in Germany for all matters pertaining to the illegal seizure of cultural assets in Germany in the 20th century; the main activities of the Foundation focus on cultural property seized as a result of Nazi persecution, especially Jewish property; please see for further information www.kulturgutverluste.de) serves as the secretariat of the independent Advisory Commission and is responsible for administrative matters such as preparing the Commission's meetings.

Members of the Commission

The Commission is composed of up to ten qualified persons with legal, ethical, cultural and historical expertise. The Commission members are appointed by the *Beauftragte der Bundesregierung für Kultur und Medien* (Federal Government Commissioner for Culture and the Media) in agreement with the *Kultusministerkonferenz* ("Conference of Ministers of Education and Cultural Affairs" or KMK) and the *Kommunale Spitzenverbände* (national associations of local authorities) for a period of ten years (for new members). All Commission members work in an honorary capacity.

The Commission consists of the former president of the Federal Constitutional Court, Professor Hans-Jürgen Papier (Chair of the Commission), art historian Professor Wolf Tegethoff (Deputy Chair of the Commission), the former president of the German Bundestag, Professor Rita Süßmuth, the former member of the Bundestag, Marieluise Beck, the former president of the Federal Administrative Court, Marion Eckertz-Höfer, the historian Prof. Raphael Gross, the former president of the Association of German Cities, Dr. Eva Lohse, the former director of the Museum für Kunst und Gewerbe Hamburg, Dr. Sabine Schulze, the humanities scholar Dr. Gary Smith, and philosopher of law Professor Dietmar von der Pfordten.

The Commission's "Rules of Procedure"

The work of the Commission is based on its "Rules of Procedure".

According to these "Rules", the Commission shall become active if both parties agree to a mediation by the Commission and wish to receive and follow the Commission's recommendation.

Thereby, the Commission may become active upon application if the holder of the cultural property has examined the misappropriation of the object as a result of Nazi persecution and the right of the claimant in line with the guidance provided by the "Handreichung zur Umsetzung der "Erklärung der Bundesregierung, der Länder und der kommunalen

Spitzenverbände zur Auffindung und zur Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes, insbesondere aus jüdischem Besitz” vom Dezember 1999” (“Guidelines”) of 2001 in its current version, efforts to reach an amicable settlement have been made and a decision regarding the question of restitution has been taken by the competent authority.

Concerning the procedure, for every case a rapporteur is appointed from the ranks of the Commission. At the hearing the applicant is first be given the opportunity to present his/her position. Then the other party illustrates his/her point of view. After that the case is discussed by the Commission and the parties. Before and after the hearing of the parties, the Commission discusses the case internally.

The criteria for the Commission’s discussions and recommendations are internationally recognized principles, such as the already mentioned 1998 Washington Principles, the German Joint Declaration of 1999, the “Guidelines” of 2001, and the 2009 Terezin Declaration.

In its discussions and recommendations the Commission takes particular account e.g. of the circumstances resulting in the loss of cultural property, the circumstances in which the cultural property was acquired and the research conducted concerning its provenance.

If necessary, the Commission may request expert opinions.

Against the background of finding a fair and just solution according to the Washington Principles and the Common Declaration, which opens a wide range of possibilities, the Commission may recommend e.g. that the cultural property should be returned or that it should be returned against payment of a compensation. It can also recommend that the cultural property should be returned subject to further conditions or that it should remain with the current holder or owner and a compensation should be paid. The Commission can also recommend that the request for the restitution of cultural property should be rejected. It is important to keep in mind that additional measures may be recommended depending on the specific circumstances of the individual case.

As soon as the written version of the recommendation and its explanation is available, it is transmitted to the parties by the secretariat. Furthermore, the secretariat publishes the recommendation and its explanation on the website of the German Lost Art Foundation at www.kulturgutverluste.de.

To provide transparency, these rules of procedure have been published on the website of the German Lost Art Foundation.

Recommendations

As of October, 14th, 2019, the Commission has issued 17 recommendations; against the background of the range of possible just and fair solution, the recommendations include e.g. restitution, settlement and compensation.

The difficulties and challenges of the assessment of the historical facts - especially with regard to the original ownership of the object in dispute and the question of Nazi

persecution - and the finding of a recommendation based on it can be seen by several recommendations: For example, in the recent case of Dr. and Mrs. Max Stern Foundation v Bayerische Staatsgemäldesammlungen the Commission decided on June 25, 2019 to recommend²⁸ that the painting “Uhlans on the March” by Hans von Marées (in the possession of the Bayerische Staatsgemäldesammlungen) should be restituted to the heir of Dr. Max Stern, the Dr. and Mrs. Max Stern Foundation, subject to two conditions: The first condition of this restitution is that the Dr. and Mrs. Max Stern Foundation undertakes not to sell the painting within the next ten years, in order that the work can be restituted to a primary injured party if such a party should be determined. In the event that further research on Dr. Max Stern conducted within the next ten years (term to commence when unrestricted access to all documents belonging to the estate is assured) yields new findings that argue against restitution, for example because it later emerges that the sale of the painting or comparable art sales in this period (June 1936) would in their essence very likely have occurred even had the Nazis not been in power, the Dr. and Mrs. Max Stern Foundation undertakes – as the second condition – to return the painting to the Bayerische Staatsgemäldesammlungen. For the first time in the history of the Commission, this recommendation, which was made with more than the required two-thirds of the votes, included a minority dissenting opinion which sets out on what basis a fair and just solution in the spirit of the Washington Principles could also lead to different assessments.

One has to keep in mind that recommendations on objects also from the same collection can differ such as in the case of Alfred Flechtheim:

a. In April 2013, the Commission recommended that the painting “Portrait of Tilla Durieux” (1910) by Oskar Kokoschka should be returned to the heirs of Alfred Flechtheim. The recommendation is based on the following facts²⁹: Alfred Flechtheim (1878 - 1937), an important art dealer and collector, was persecuted by the National Socialists because he was a Jew and a prominent advocate of modern art. His art collection comprised many works including the painting «Portrait of Tilla Durieux» (1910) by Oskar Kokoschka. The painting is presumed to have been purchased by Flechtheim at some time before 1918. Flechtheim was the owner of «Galerie Alfred Flechtheim GmbH» in Berlin and Düsseldorf which for a time also had branches in other German cities. In the spring of 1933, he had to close down his business in Düsseldorf, after an auction in his gallery had been broken up by Nazis. In November 1933, his Berlin gallery, too, had to close. In the spring of 1934, the winding-up proceedings initiated in November 1933 resulted in an out-of-court settlement. In early 1937, the company was deleted from the commercial register. Flechtheim, who had been a target of Nazi attacks even before 1933 and who, after the seizure of power by the National Socialists, did not have a chance of continuing his successful work as an art dealer in Germany, tried from 1933 until his early death in 1937

28 - Please see the full recommendation at https://www.kulturgutverluste.de/Content/06_Kommission/DE/Empfehlungen/19-08-19-Empfehlung-der-Beratenden-Kommission-im-Fall-Stern-Bayerische-Staatsgemaeldesammlungen.pdf?__blob=publicationFile&v=4

29 - The following text is based on the recommendation; please see the full recommendation at https://www.kulturgutverluste.de/Content/06_Kommission/DE/Empfehlungen/13-04-09-Empfehlung-der-Beratenden-Kommission-im-Fall-Flechtheim-Koeln.pdf?__blob=publicationFile&v=6

to start a new life first in Paris and then in London. Already at the end of March 1933, Alex Vömel, the former manager of „Galerie Alfred Flechtheim GmbH“ in Düsseldorf opened the „Galerie Alex Vömel“ in the same rooms that had previously been used by Flechtheim’s gallery. Together with the rooms he obviously took over also part of the art works of the Flechtheim gallery and of Alfred Flechtheim’s private collection. Among them was the painting «Portrait of Tilla Durieux» which had been exhibited in 1931 at Kunsthalle Mannheim as being part of the «Private collection Alfred Flechtheim». In June 1934, Vömel sold the painting whose insured value was set at 3,000 Reichsmark in 1931, for 1,800 Reichsmark to the Cologne art collector Dr Josef Haubrich. In 1946, Haubrich donated his art collection including the «Portrait of Tilla Durieux» to his native city of Cologne which in turn entrusted the collection to the Wallraf-Richartz-Museum. When the Cologne museum landscape was restructured in 1976, the painting ended up in the Museum Ludwig. In 2008, the heirs of Alfred Flechtheim, filed a claim for the restitution of the painting. They hold the view that the sale of the painting constitutes a loss as a result of Nazi persecution. The City of Cologne refused to return the painting, claiming that while Alfred Flechtheim had been persecuted by the National Socialists and suffered economic losses as a result, the present case did not constitute a loss resulting from Nazi persecution. The view of the Commission is that while the present case cannot be exhaustively clarified, it is to be assumed in the absence of concrete evidence to the contrary that Alfred Flechtheim was forced to sell the disputed painting because he was persecuted. For this reason the painting is considered to have been confiscated as a result of Nazi persecution.

b. Three years later, in March 2016, the Commission issued in the matter of the Heirs of Alfred Flechtheim v. Stiftung Kunstsammlung Nordrhein-Westfalen, Düsseldorf, a recommendation³⁰. The proceedings concern the painting “Violon et encrier” (Violin and inkwell) by Juan Gris. Two things above all were in dispute: firstly, whether Flechtheim was the owner of the painting when it was sold in London in 1934; and secondly, whether the sale of the painting at the Mayor Gallery constitutes a loss of property as the result of Nazi persecution. The Flechtheim heirs justified their claim to restitution by arguing that Alfred Flechtheim was one of the most visible representatives of modern art already during the Weimar Republic and thus one of the explicit targets of National Socialist enmity. They viewed the sale of the Gris painting by the Mayor Gallery as a sale under duress made necessary by Flechtheim’s financial emergency resulting from Nazi persecution. According to the Stiftung Kunstsammlung Nordrhein-Westfalen, there was no reason to assume that the sale price was less than the market value and that there was no evidence for the supposition that Flechtheim, as a member of the buyers’ syndicate of 1921, acquired sole ownership of the Gris painting. After careful examination of the documents and evidence presented and after hearing the parties, the Commission came to the conclusion that the sale of the Juan Gris painting “Violon et encrier” in London in 1934 did not constitute a loss of property as the result of Nazi persecution and that it therefore couldn’t recommend

30 - The following text is based on the recommendation; please see the full recommendation at https://www.kulturgutverluste.de/Content/06_Kommission/DE/Empfehlungen/16-03-21-Empfehlung-der-Beratenden-Kommission-im-Fall-Flechtheim-Kunstsammlung-Nordrhein-Westfalen.pdf?__blob=publicationFile&v=6

returning the painting to the heirs of Alfred Flechtheim. The above mentioned case on Oskar Kokoschka's portrait of Tilla Durieux differed from the present case that Flechtheim's ownership of the Kokoschka painting was not in dispute and that the loss of ownership was directly connected to the closing of the Galerie Alfred Flechtheim in Düsseldorf which was forced by the political circumstances.

The German museums and institutions followed without exception the recommendations of the Commission, whereas unsuccessful applicants did not accept the Commission recommendation and subsequently turned to German (case of the poster collection of Hans Sachs³¹) or American (case of the "Welfenschatz" ("Guelph Treasure"))³² courts.

The Commission is currently working on the case of a painting located in Bavaria, which is being reclaimed.

Critic

Sometimes, it is criticized that the Commission can only take action if both parties agree and, furthermore, that the Commission's recommendations are not legally binding. It should be noted that, especially in the spirit of the "Washington Principles" and the "Common Declaration" and with regard to the principle of voluntariness, the Commission was set up as a mediation body on a moral-ethical level; a legal entity should be avoided. Therefore, no party should be involved in a procedure against its will. Furthermore, binding recommendations would make them seem judgmental, which is also not in the sense of the offer of a voluntary mediation. In this context, it should finally be remembered that numerous disputes have already been resolved in the past, without it being necessary for the Commission to intervene.

International cooperation

The Advisory Commission works also internationally. Starting already in 2007, the Commission met with the French Commission for the Compensation of Victims of Spoliation Resulting from the Anti-Semitic Legislation in Force during the Occupation (CIVS) in Paris and Berlin, which resulted in, among other things, the joint book project «L'Irréparable. Itinéraires d'artistes et d'amateurs d'art juifs, réfugiés du «Troisième Reich» en France. Irreparabel. Lebenswege jüdischer Künstlerinnen, Künstler und Kunstkenner auf der Flucht aus dem "Dritten Reich" in Frankreich.» from the publication series of the former Koordinierungsstelle Magdeburg which has been transferred into the Deutsches Zentrum Kulturgutverluste in 2015. Furthermore, the Commission and the Dutch Restitution Committee met in 2011 and 2012 for talks in The Hague and Berlin.

31 - Please see the recommendation at https://www.kulturgutverluste.de/Content/06_Kommission/DE/Empfehlungen/07-01-25-Empfehlung-der-Beratenden-Kommission-im-Fall-Sachs-DHM.pdf?__blob=publicationFile&v=6

32 - Please see the recommendation at https://www.kulturgutverluste.de/Content/06_Kommission/DE/Empfehlungen/14-03-20-Empfehlung-der-Beratenden-Kommission-im-Fall-Welfenschatz.pdf?__blob=publicationFile&v=7

Since then, the Commission is in close contact with the other European bodies. Against this background, the Commission and its administrative office are e.g. part of the Network of European Restitution Committees created in January 2019 and linking the five commissions in Europe (Kommission für Provenienzforschung (Austria), the Commission pour l'indemnisation des victimes de spoliations (France), the Spoliation Advisory Panel (Great Britain), the Restitutiecommissie (Netherlands), and the Commission) to e.g. enable joint actions and to share information.

Future

Although in restitution matters with regard to Nazi-looted property in Germany a lot has been moved in the past and considerable successes have been achieved, there is still much to do, since e.g. the necessary clarification process of historical facts will likely continue for a long time due to the complexity and difficulty of this task.

Against this background, the Advisory Commission will continue to support the parties in disputes over Nazi-looted property to find also in the years to come fair and just solutions according to the Washington Principles and the Common Declaration.

To contact the Beratende Kommission im Zusammenhang mit der Rückgabe NS-verfolgungsbedingt entzogener Kulturgüter

Postal address:

Beratende Kommission für die Rückgabe NS-verfolgungsbedingt entzogener Kulturgüter, insbesondere aus jüdischem Besitz

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THE NETHERLANDS
Restitutions Committee

RESTITUTIONS COMMITTEE

Between 1933 and 1945 the Nazis seized, stole or purchased artworks, antiques, jewellery and other objects from private individuals and art galleries on a large scale throughout Europe. After the Second World War, the allies found many of these items of cultural value, particularly in Germany, after which they were brought back to their country of origin. This recovery was accompanied by the instruction to national governments to manage the art being returned and to ensure it was returned (restituted) to the rightful owners or their heirs. In the Netherlands, the Netherlands Art Property Foundation (SNK) was tasked with the recovery and restitution activities. Some of the items of cultural value that were not restituted after the war were auctioned off by the Dutch State during the nineteen-fifties. The remainder was incorporated in the Netherlands Art Property Collection (NK collection), as part of the Dutch National Art Collection.

Starting at the end of nineteen-nineties, renewed interest arose in the Netherlands and other countries in the return of art treasures that had been looted during the Second World War. There were calls for a flexible restitutions policy, for example in such international instruments as the Washington Principles on Nazi Confiscated Art (1998) and in a resolution on Looted Jewish Cultural Property (1999) adopted by the Parliamentary Assembly of the Council of Europe. Recommendations were made to opt for a form of alternative dispute settlement outside the standard judicial process. The actions taken in the Netherlands in response to these principles included establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War (Restitutions Committee) in a decree dated 16 November 2001.

Composition of the Restitutions Committee

The Restitutions Committee is an independent committee and was established by the Minister of Education, Culture and Science (OCW). The Restitutions Committee has seven members, including the chair and vice-chair. The chair and vice-chair must have a law degree. The current chair is Dr A. Hammerstein, former extraordinary state councillor of the Council of State. When the committee was established, the Minister of OCW stipulated that at least one committee member must have sufficient expertise in the history of the Second World War that a substantial contribution can be made to the committee's work. In addition at least one committee member must have sufficient expertise in art history or museology that a substantial contribution can be made to the committee's work.

The Restitutions Committee has had a permanent advisor, Dr J.F. Cohen, since May 2019. The committee is supported in its work by a secretary and an office manager. In individual cases the committee can furthermore have research, including provenance research, conducted by the history and art history researchers of the Restitution of Items of Cultural Value and the Second World War Expertise Centre, which was established on 1 September 2018 and is part of the NIOD Institute for War, Holocaust and Genocide Studies in Amsterdam.

Tasks and Powers

The Minister of OCW gave the Restitutions Committee two tasks. The first is to issue advice to the Minister of OCW about claims to items of cultural value in the Dutch National Art Collection, which contains all items of cultural value owned by the Dutch State, including the NK collection. In these cases the committee issues advice to the Minister of OCW at his or her request. The minister takes the final decision about the restitution application. The committee's advice in this type of case is not legally binding on the minister, but in practice the minister has almost always accepted the committee's advice.

The second task the Minister of OCW gave the committee was to advise about claims to items of cultural value held by others. These can, for example, be provincial and local authorities, institutions and private individuals. In this type of case the claimant and the current owner ask the committee to make a ruling about a restitution application. Beforehand they state they will accept committee's opinion as binding. The committee then issues a binding opinion within the meaning of article 7:900 of the Dutch Civil Code. If necessary this binding opinion can be enforced by a court. The Dutch State is not a party in this procedure. The committee has drawn up regulations for this procedure.

In both types of cases the rightful claimants can request restitution of items of cultural interest that the original owner lost possession of involuntarily due to circumstances directly related to the Nazi regime. The rightful claimants are, for instance, those who are entitled to the claimed work of art on the grounds of inheritance. A requirement for restitution is that the involuntary loss of possession must have taken place during the period of the Nazi regime and must be due to circumstances directly related to the Nazi regime. Examples are theft, confiscation and forced sale. It is not a requirement that the original owner belonged to a population group persecuted by the Nazis. There is furthermore no geographical limit to the loss of possession. It can have taken place in Germany, the Netherlands or in other occupied countries. In certain situations, loss of possession in neutral or safe countries may also be designated as involuntary due to circumstances directly related to the Nazi regime.

In 2001 the Minister of OCW selected a policy-based approach to the restitution issue. There is no Restitution Act in the Netherlands. Among other things this means that the restitution of items of cultural value in the Netherlands takes place on a voluntary basis. The present owner of an item of cultural value, possession of which was lost by the original owner due to circumstances directly related to the Nazi regime, cannot be forced to submit a case to the Restitutions Committee. As far as the Dutch National Art Collection is concerned, the Minister of OCW promised the Lower House of the Dutch Parliament that restitution applications would always be brought before the Restitutions Committee for advice.

The Restitutions Committee issues advice about restitution applications on the basis of the yardsticks of reasonableness and fairness, in accordance with the Washington Principles, which prescribe that efforts must be made to find a just and fair solution, recognizing that

this may vary according to the facts and circumstances surrounding a specific case. If a claim is granted, the committee can recommend that the claimed artwork is returned to the original owner's heirs, but it can also recommend other solutions.

Brief Description of the Procedures

A restitution application for an item of cultural value in the Dutch National Art Collection can be submitted to the Netherlands Cultural Heritage Agency (RCE), a part of the Ministry of OCW. The RCE then lays the application before the Restitutions Committee for advice. The committee may ask the expertise centre to conduct an investigation and prepare an overview of the facts. After the parties have had an opportunity to respond, and possibly after a hearing, the committee issues its advice to the Minister of OCW. If the Minister of OCW decides to restitute, the RCE takes care of the further handling. This includes calling in a notary to establish the entire circle of entitled individuals (this can take quite a long time, particularly if the circle is large and not fully known or is in a foreign country), arranging transport from any museum involved to the RCE's depot, preparing a condition report, and organizing transport from the depot to a location selected by the heirs.

The committee has adopted regulations that describe the binding opinion procedure. The current owner and the heirs of the original owner may jointly decide to ask the Restitutions Committee for binding advice. To do this they must declare beforehand that they accept the regulations and will consider the ruling to be binding. Applicants for restitution must demonstrate that they are rightful claimants to the assets of the asserted former owner. The committee applies this requirement because, unlike cases involving the Dutch National Art Collection, no notary is called in to establish the entire circle of entitled individuals. After the Committee has received the joint request from the parties, it asks the Minister of OCW for consent to issue a binding opinion. The committee may ask the expertise centre to conduct an investigation and prepare an overview of the facts. After the parties have had an opportunity to respond, and possibly after a hearing, the committee issues a binding opinion to the parties. The parties are responsible for the further handling and elaboration of the binding opinion.

If, after advice or an opinion has been issued, new facts come to light on the grounds of which the result of the case might have been different, the committee may be asked to reconsider. In the case of a binding opinion, this is only possible if both parties request it.

The Committee's working language is Dutch, and it also corresponds with foreign applicants in English. The committee publishes all its recommendations and opinions in Dutch and English. Overviews of the facts are not published. Since the Restitutions Committee was established in 2001 it has issued 158 recommendations and opinions and has had 180 claims submitted to it. The committee gives account of its activities in its annual report.

There is more information about the Restitutions Committee and its procedures on its website (www.restitutiecommissie.nl/en).

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THE UNITED KINGDOM
Spoliation Advisory Panel

SPOLIATION ADVISORY PANEL

The Spoliation Advisory Panel was established in 2000, following the 1998 Washington Conference on Holocaust Era which encouraged all EU Member States to adopt non-binding principles to assist in resolving issues relating to Nazi-looted art. Additionally, the Vilnius Forum Declaration in 2000 asked all governments to undertake every reasonable effort to achieve restitution of cultural assets looted during the Holocaust Era to their original owners.

Prior to 2009, where the Panel upheld a claim for an object in a national collection, it was unable to recommend the return of the object because this was not possible under the governing legislation of the body involved. The Holocaust (Return of Cultural Objects) Act 2009 allows national museums to return cultural objects in response to a claim where the Panel recommends it and the Secretary of State for Digital, Culture, Media and Sport agrees.

The Spoliation Advisory Panel has advised on 20 claims in 18 years. 13 claims have been upheld and 7 rejected. The Panel's reports are published and laid before the UK Parliament. They can be found here:

<https://www.gov.uk/government/collections/reports-of-the-spoliation-advisory-panel>

On 4 July 2019, the Holocaust (Return of Cultural Objects) (Amendment) Act 2019 became law in the UK. The 2009 legislation had a sunset clause which would have meant that the powers of return would have ended on 11 November 2019. The 2019 Act removes the sunset clause and ensures that families who lost cultural objects during the Nazi-era and which are now in a UK national collection, can continue to have their property returned to them.

Composition of the Spoliation Advisory Panel

Under Section 3 (2) of the Holocaust (Return of Cultural Objects) Act 2009, the Secretary of State may designate a panel for the purposes of the Act.

There are two Panel chairs, The Rt Hon Sir Donnell Deeny and The Rt Hon Sir Alan Moses and eight members. The following areas of experience and backgrounds are represented on the Panel - legal, museums, economics, moral philosophy, fine art and the history of Europe during the Nazi-era.

The Panel has a small Secretariat provided by the Department for Digital, Culture, Media and Sport which carries out research, as required.

Tasks and Powers

The Spoliation Advisory Panel consider claims from anyone who lost possession of a cultural object during the Nazi era where the object is in a UK museum or gallery. The Panel may also consider claims for items in private collections where the owner consents. The Panel's proceedings are an alternative to litigation, not a process of litigation and the Panel will therefore take account of the moral strength of the claimant's case and whether any moral obligation rests on the institution.

Where the Spoliation Advisory Panel upholds a claim, 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.

The Panel's recommendation is not binding on the parties although the institutions involved have always sought to implement the Panel's recommendation.

Brief Description of the Procedures

On receipt of a claim, the Secretary of State for Digital, Culture, Media and Sport decides, on the basis of the above, whether to designate a Panel to consider the claim, whether for the purposes of the Holocaust (Return of Cultural Objects) Act 2009 (the Act) or otherwise.

Where a Panel has been designated to advise on a claim, the Panel's Secretariat shares the claim with the institution concerned, which then has six weeks to submit its statement of case.

For the Panel to begin work on assessing a claim, the parties should provide the Panel with sufficient information regarding the object, its present location and the circumstances in which it was lost, amongst other things. Further guidance on the information required is available on the website address below. In accordance with the principles of fairness and transparency, all parties are expected to disclose anything relevant which emerges from their research, whether or not they perceive it to be helpful to their case.

The Panel then reaches its determination on the claim based on the written statements and drafts its report. An embargoed copy of the draft report is then shared with the parties to allow them an opportunity to identify any factual errors.

The draft report is then presented to Ministers prior to its publication as a report to the UK Parliament.

To contact the Spoliation Advisory Panel

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Action towards consistent
'just and fair' solutions

ACTION TOWARDS CONSISTENT 'JUST AND FAIR' SOLUTIONS

*Dr Charlotte Woodhead**

I. The London conference and “Action Plan”

The 2017 London conference, *70 Years and Counting: The Final Opportunity?* followed the Dutch *Restitutecommissie's* 2012 Conference.³³ 2018 saw the Berlin conference, “*20 Years Washington Principles: Roadmap for the Future*”³⁴ and more recently the 2019 Conference commemorating the 10th Anniversary of the Terezin Declaration took place in Prague.

The London conference participants were keen to develop positive and concrete outcomes to ensure that change was effected. As part of this commitment, an Action Plan was produced - ‘Agreed outcomes and recommendations’.³⁵ Action and a desire to make progress permeated the document; more than a set of general principles or aspirations, it represented tangible actions that could be implemented and posed questions about key areas for development.

A central theme of the Action Plan was the need to address the **differences** between the five national restitution committees. This included definitional differences in ‘loss’, ‘forced’ sale and the categories of claimants. The committees were invited to consider in particular differences in process, information provided and the criteria used to determine claims. The Action Plan also called for consistency in the standards in the presentation of provenance research. The second theme was **transparency and provision of information**. This included encouraging publication of the outcomes of claims and information to support provenance research and claims, including access to collection inventories and the digitisation of other archives. The third theme focused on **identifying and encouraging best practice** which might help other countries develop similar committees or inform the resolution of private claims.³⁶ **Training** represented the fourth theme. Each of the countries was encouraged to identify and resource a provenance researcher who could undertake training and work with stakeholders. The Action Plan also called for the **development of links** through a network of the committees and further international conferences.

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33 - Which led to the publication of E. Campfens (ed.), *Fair and Just Solutions? Alternatives to Litigation in Nazi-Looted Art Disputes: Status Quo and New Developments* (Eleven Publishing 2015).

34 - See Emily Gould’s conference report (2018) 23 *Art Antiquity and Law* 369. At this event representatives from Germany and the United States signed a joint declaration *Concerning The Implementation of the Washington Conference Principles from 1998*.

35 - <https://www.gov.uk/government/groups/spoliation-advisory-panel>

36 - This also included the committees offering to act as mediators.

In the first step towards implementing the Action Plan research was undertaken for the UK's Department for Digital Culture Media and Sport (DCMS) and Spoliation Advisory Panel (SAP).³⁷ This was followed by the 2018 meeting of the representatives of the five committees in London; these discussions led to the creation of the Network of European Restitution Committees.

II. Differences in process, information and criteria – Recommendation 3 of the Action Plan

The report on Recommendation 3³⁸ was intended to identify the areas of practice of the five restitution committees where there were apparent inconsistencies, or differences in practice relating to the process applied, the information provided and the criteria used to determine claims. This would then provide a basis on which the committees might unify processes, improve access to information, develop common criteria and inform best practice guidance.³⁹ The report also highlighted areas for future research.

This section provides a brief summary of the key areas of the research and the differences that were identified. It does not address all the differences raised in the report.⁴⁰

Differences between the approaches of the committees may be based on *historical, cultural, or legal* grounds. In response to historical differences, particular to individual countries, the national committees have developed distinct mechanisms or criteria for dealing with these different categories. Such differences are often justified because of the peculiarities presented by the particular situation.

Some historical differences present no need for different approaches. As Matthias Weller discussed above, fewer spoliated works of art came to the UK than to other countries because it was not occupied during the war. One effect of this is simply that the UK SAP has heard a relatively small number of cases over the years.

France⁴¹ and the Netherlands⁴² have collections of objects returned after the war with uncertain provenance. Consequently, in France the MNR collections, unlike other cultural objects in museums, can be restituted because of this special legal status. In the Netherlands, in the early years of the *Restitutecommissie's* work, the NK collection, together with cultural objects in state collections benefited from a stronger presumption in favour of return.⁴³ A particular category of cultural objects in Austria is objects acquired

37 - Tony Baumgartner wrote a note on Recommendations 1 and 6 of the Action Plan; the current author was commissioned to write a report on Recommendation 3.

38 - Woodhead, report 2019

39 - Recommendation 3 of the London Conference Action Plan.

40 - The report is accessible on the websites of the Committees. For example:
<http://www.civs.gouv.fr/en/our-network/partners/>

41 - Musées Nationaux Récupération (MNR).

42 - Nederlands Kunstbezit (NK).

43 - The reversed burden of proof is no longer used; all cases use the yardstick of fairness and reasonableness.

by the Federal State after the war in exchange for export permits for other cultural objects, or in transactions closely connected to these. The 1998 Restitution Act (together with the 2009 amendments) therefore includes these categories.

A specific issue in the Netherlands is the large number of claims involving art dealerships because the Dutch art market flourished during the occupation.⁴⁴ In response, the *Restitutiecommissie* developed applicable principles.

Nature and scope of the committees

The French Commission pour l'indemnisation des victimes de spoliations (CIVS) process is administrative, rather than a jurisdiction, with a quasi-legal status.⁴⁵ It hears claims about goods spoliated due to anti-Semitic legislation of the Occupiers or the Vichy authorities.⁴⁶ It can also act as a conciliator between interested parties.⁴⁷ The UK SAP, whilst not a process of litigation,⁴⁸ seems to have a *quasi-legal* nature⁴⁹ as it acts within the context of English law principles and procedures.⁵⁰ It is a 'neutral third-party facilitator' – at best an 'innominate category'.⁵¹ Claims relate to loss of possession of a cultural object during the Nazi Era⁵² and so extend beyond direct or indirect Nazi involvement. The Dutch *Restitutiecommissie* has an advisory role in providing recommendations to the Minister for Education, Culture and Science about objects in the NK collection or state museums.⁵³ It can provide binding opinions where objects are in non-state collections or privately owned.⁵⁴ Decisions concern objects of 'cultural value of which the original owners involuntarily lost possession due to circumstances directly related to the Nazi regime'.⁵⁵

44 - E. Campfens, 'Nazi-Looted Art: A note in favour of clear standards and neutral procedures' (2017) 22 *Art Antiquity and Law* 315, 326.

45 - CIVS Report 2001, p.34.

46 - 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, art. 1.

47 - *ibid.*, art. 2. E.g. CIVS mediated in the claim and ultimate return of Constable's *Dedham from Langham* from the Musée des Beaux-Arts La Chaux-de-Fonds, Switzerland.

48 - Spoliation Advisory Panel, *Constitution and Terms of Reference* (updated 2016), para. 9.

49 - C. Woodhead, 'Nazi Era spoliation: establishing procedural and substantive principles' (2013) 18 *Art Antiquity and Law* 167, 189.

50 - *Goldschmidt* claim (2006 HC 890), para. 25.

51 - N. Palmer, 'The Best We Can Do? Exploring a Collegiate Approach to Holocaust-related Claims' in Campfens *Fair and Just Solutions?* p. 183.

52 - Or from their heirs: SAP Terms of Reference, para. 1.

53 - Besluit adviescommissie restitutieverzoeken cultuuroederen en Tweede Wereldoorlog, 16 November 2001, art. 2(1).

54 - *ibid.* 2(2). These are subject to judicial review as formal settlements: see Article 7:900 of the Dutch Civil Co. See further T. I. Oost, 'Restitution policies on Nazi-looted art in the Netherlands and the United Kingdom: a change from a legal to a moral paradigm?' (2018) 25 *IJCP* 139, 170.

55 - Art. 2(1).

The German *Beratende Kommission* acts as mediator in all cases (whether the museum is public or private).⁵⁶ The *Kommission* acts in a similar way where the possessor is a private individual.⁵⁷ Its remit is disputes about the restitution of cultural property seized as a result of persecution by the Nazi regime.⁵⁸

The Austrian Beirat advises the Minister whether to transfer cultural objects from Austrian federal museums and collections⁵⁹ where the owners lost possession in Austria during the German occupation (or any other place under the German sphere of control between 1933–45).⁶⁰ There is no applicability to non-federal museums and collections. In practice, specific committees have been established to deal with some of the museums falling outside the remit of the 1998 Act⁶¹ A point of further discussion is whether there is scope for combining the processes so that claimants would have a single point of entry at which to bring claims and thus provide a degree of clarity of process for them.

Differences in the legal nature of the committees and the legal status of collections (e.g. state, locally or privately owned) will exist between the countries. The differences in structure of the committees do not, necessarily impede justice, but the restrictive scope of activity of some committees may lead to different outcomes.⁶² Where differences impede justice there is an argument for unification of processes (or the willingness to learn from the good practice of other committees) to ensure justice for claimants wherever their claim arises. Occasionally claims brought in different countries by the same claimants have had different outcomes, causing confusion, concern and perhaps even a distrust of the system.⁶³ Any difference in outcome must be justified in an open and transparent manner, thus enabling the public and claimants to understand why justice is still achieved.

56 - Verfahrensordnung der Beratenden Kommission im Zusammenhang mit der Rückgabe NS-verfolgungsbedingt entzogener Kulturgüter, insbesondere aus jüdischem Besitz, s. 1.

57 - *ibid.*

58 - *ibid.*, s. 1(1).

59 - Bundesgesetz über die Rückgabe von Kunstgegenständen und sonstigem beweglichem Kulturgut aus den österreichischen Bundesmuseen und Sammlungen und aus dem sonstigen Bundeseigentum, BGB1. Nr. 181/1998 (as amended by BGB1. Nr. 117/2009), s. 3(1). The Minister's power to transfer is under section 1(1).

60 - *ibid.* s. 1(1)(2a).

61 - E.g. the Wiener Rückstellungskommission, established by a Resolution of 29 April 1999 and the Advisory Board of the Leopold Private Foundation.

62 - E.g. the *Freund* claims, discussed below.

63 - These are discussed at p. 70 below.

Composition of membership and secretariat

As Matthias Weller has pointed out, many committees have members with specialisms in branches of history, history of art and law. For some committees, ministers or government representatives act as participants in the decisions or sit on the committee (sometimes in an advisory capacity). In some cases government departments provide Secretariat facilities.⁶⁴

The report concluded that further work could usefully be undertaken to consider whether the involvement of representatives of the ministries affects how the committees and their fairness and independence are viewed. No research exists about the effect, if any, that the composition of the committee and the breadth expertise has on the committee's decisions and also the public's perception of the decisions. In particular, the effect that legal expertise might have on outcomes is unclear (where there is a strong representation of either legal scholars, practitioners or the judiciary).⁶⁵

'Appeals': reconsideration by the committees and legal challenges

It is important for claimants to understand the effect of committees' decisions and the ability for these to be revisited (where new information comes to light). Although the committees were established as an alternative to court proceedings, occasionally challenges to those decisions may be brought in the courts.⁶⁶

In France claimants may challenge decisions of the CIVS.⁶⁷ The UK and Austrian committees, despite not having formal appeal routes, have nevertheless reheard claims where further evidence became available after the publication of the recommendations⁶⁸ or where the applicable law changed.⁶⁹ In the Netherlands, the Committee can reconsider an earlier recommendation if new facts come to light. If a claimant wishes to challenge a recommendation on the basis of 'alleged or proven formal errors' then it would be for them to pursue an action in the civil courts.⁷⁰ In the Netherlands the binding opinion

64 - The *Jenkins review* of the UK's SAP addressed some concerns that had been raised about the perception that was given by the Secretariat being provided by a government department (the DCMS), particularly where the respondent is a national museum (in receipt of direct public funding) or where the SAP recommends that the government makes a payment. Sir Paul Jenkins considered that this did not pose a problem, in particular given the fact that the Secretariat was ring-fenced from the museum team: Sir Paul Jenkins KCB, QC, *Independent Review of the Spoliation Advisory Panel*, 2015, p. 10.

65 - Oost has argued that there is a legal and moral paradigm: Oost, 'Restitution policies', p. 144; this difference may be more pronounced in the case of committees with a greater representation of lawyers. In the review of the UK SAP, the issue of the number of lawyers on the Panel was raised in the consultation: Jenkins Review, p. 22.

66 - E.g. *Altmann v Republic of Austria*, 541 U.S. 677 (2004) and the Sachs litigation: Higher Administrative Court of Saxony-Anhalt 3rd Senate 24th March 2017.

67 - French Décret, art. 8.

68 - In the UK *Tate/Constable* claim (2014 HC 1016).

69 - In the Austrian *Feldmann* reports of 14 December 2005 and 3 October 2008.

70 - Ministerie van Onderwijs, Cultuur en Wetenschap, October 4 2016, *Policy on Restitution of Items of Cultural Value and the Second World War*.

procedure is subject to the exclusive competence of the Dutch Courts.⁷¹ The recent *Stern* recommendation shows the German *Kommission* recommending return, but making provision if further information comes to light, or other claimants come forward.⁷² In France the CIVS provides for situations where not all of the heirs are available; it reserves the portion of compensation for unlocated claimants.⁷³

The report raised the issue of whether anonymity, not only of the claimants but also of the original owner, may prevent other potential claimants coming forward and making themselves known, or further information coming to light.

DETERMINATION OF CLAIMS

The report also considered the different ways in which the committees approach the status⁷⁴ of the parties, circumstances of loss, the relevance of provenance checks that were taken by the current possessor when they acquired the work⁷⁵ and the primary considerations of the committees including their approaches to remedies. Matthias Weller has helpfully demonstrated the various approaches that the committees have taken on the subject of *Fluchtgut*. Rather than summarise all the report's conclusions here, the following highlights the results of the analysis of the claims brought by the same claimants before two or more of the five restitution committees. This allows us to see the extent of the differences where committees are faced with near-identical fact patterns and whether their conclusions about what is a just and fair solution differs.

George Eduard Behrens

Netherlands: return 2008

Germany: rejected 2015

Despite the claims relating to objects originally owned by the same person, the circumstances of loss in the two claims were different. The facts of the successful Dutch claim (where return was recommended) involved a later loss that could be more clearly attributable to the National Socialists. Although the object was not part of the NK collection it was part of the national collection and at that time subject to the more liberal approach to restitution.

71 - Regulations for the Binding Opinion Procedure, art. 18(1). See the challenge of the Semmel decision: A, B v Stichting (*Museum de Fundatie*), *Rechtbank Overijssel*, 11 June 2014. Further recent legal challenges were discussed in the report at pp. 16-17.

72 - (19 August 2019).

73 - CIVS Report 2016.

74 - The report focused on the issue of art dealerships as Tony Baumgartner's paper dealt with lineage and genealogy issues.

75 - Woodhead, report 2019, p. 25-26.

The German *Kommission* rejected the claim because an appropriate price had been paid, the sale was before the Nuremberg laws came into force and there was no doubt that Behrens was freely able to use the proceeds. No facts suggested that the gallery had failed to pay the purchase price and at that time legal action would have been taken against any gallery who failed to pay.

Jakob & Rosa Oppenheimer

Netherlands: return 2008, 2011, 2013 and share of proceeds 2010

UK: rejected 2015

Two claims before the *Restitutecommissie* were brought for objects held in the Dutch National collection. A further claim was for an object in the NK collection. In all these claims return was recommended. A fourth claim was brought under the binding opinion procedure. Here the *Restitutecommissie* recommended that on any sale of the painting the current owner should transfer a 1/3 share of the proceeds to the heirs. The Oppenheimer family would then do all they could to effect the sale including removing it from the Art Loss Register.

In the subsequent UK claim the SAP had access to files from the archives of the German Federal Office for Central Service and Unresolved Property Issues (BADV) indicating that the painting was one of several used to repay a commercial debt. The SAP concluded that the sale was forced by commercial circumstances rather than by persecution and rejected the claim, but the SAP added that it would be 'fitting to incorporate into the Painting's narrative history when displayed the Oppenheimer's connection with the Painting.'⁷⁶

Franz W Koenigs

Netherlands: rejected 2003, 2013

UK: rejected 2007

Both restitution committees rejected the claims. The *Restitutecommissie* heard claims relating to four categories of objects, one of which overlapped with the claim before the UK's SAP. The UK SAP concluded that the loss was because of a bank calling in a loan and realising its security, rather than because of any act of theft, forced sale or sale at an undervalue.

76 - *Oppenheimer* claim (2015 HC 440), para. 87.

Arthur Feldmann*Netherlands: return 2006**UK: return 2007; ex gratia payment 2006**Austria: rejected 2005 but successful in 2008: return*

In the UK claims the objects had been seized by the Gestapo. When the SAP heard the claim the trustees of the British Museum were unable to transfer NS Era objects out of the collection;⁷⁷ instead an *ex gratia* payment was recommended. However, the SAP recommended return in the Courtauld claim. The 2005 unsuccessful claim in Austria was later reconsidered with a claim for another object after more information became available; this clarified that the object was likely to have still been in Feldmann's collection at the relevant time, so return was recommended. The Dutch *Restitutiecommissie* recommended return on the basis that the drawings were likely to have been seized in 1939.

Curt Glaser*Netherlands: return 2010**UK: upheld, but account of history 2009*

In the Dutch claim the painting was in a state collection and at that time assessed under the reversed burden of proof, resulting in return. The UK SAP considered that a letter from Glaser to Munch demonstrated mixed motives for the sale. It saw both the previous compensation received by Glaser's heir and what the SAP considered to be a fair price received at auction as potential double compensation. The SAP therefore concluded that 'the moral claim was insufficiently strong' to warrant return, but instead recommended the display of an account of the objects' histories.⁷⁸

Julius Freund⁷⁹*Germany: return 2005**Austria: rejected 2016*

Both claims involved sales in Switzerland of Fluchtgut. The successful German claim was because Freund's wife was compelled to sell the objects following her exile. In Austria the *Beirat* was unable to rule out the possibility that his wife would have sold the objects even in the absence of persecution. The sale was outside the area of NS control and therefore a legal transaction which was not null and void under § 1 of the Invalidity Act.

77 - This pre-dated the Holocaust (Return of Cultural Objects) Act 2009.

78 - Glaser claim (2009 HC 757), para. 47.

79 - See Matthias Weller's contribution discussing this case.

Emma Budge

Netherlands: return 2018

UK: return in 4 claims in 2014

Austria: return 2013

In all these successful claims the loss occurred in the same circumstances and return by the possessor institution was possible.

Heinrich Rothberger

UK: Return/ex gratia payment with account of history, 2 claims 2008

Austria: return 2000 (although two items not returned), 2003, 2005, 2013 (including the two items previously not returned).

The UK claims involved seizure of objects by the Gestapo. In the case involving the Fitzwilliam Museum return was possible. However, at the time of the claim, the trustees of the British Museum were unable to transfer an object from their collection;⁸⁰ the SAP therefore recommended the payment of an *ex gratia* sum and the display of an account of the object's history instead of return.

Three claims were brought before the Austrian *Beirat*. In 2000 it recommended that some objects were returned because although they had been restituted after the war they were then transferred to a museum in order to secure export licences for other objects. The *Beirat* recommended that two porcelain bowls were not returned; however, these were returned as a result of the 2013 claim. The latest claim in 2013 arose in circumstances under which Rothberger had obtained export licences for some other objects. The two bowls were reconsidered following the amendments to the Art Restitution Act in 2009; they had been exchanged for other works, in circumstances closely connected with the export licence agreement. Return was therefore possible at this point.

Alfred Flechtheim

Germany: return 2013; rejected 2016

Austria: rejected 2013

The successful 2013 German claim involved a sale of a painting in 1934 from the manager of Flechtheim's Dusseldorf gallery to a Cologne Art collector. However, the 2016 claim was rejected because the object was sold in London and Flechtheim was freely able to dispose of the proceeds.

The Austrian *Beirat* concluded that the George Grosz painting was sold at auction in 1938 in Amsterdam. Although both Grosz and Flechtheim were persecuted and this caused them to flee the country, the sale took place before the Netherlands was occupied.

80 - Because this decision pre-dated the 2009 Act.

Berolzheimer*Netherlands: return 2017**Austria: return 2001, 2018*

Both committees recommended return; the sales took place at the same auction which was found to be involuntarily undertaken.

Max Stern*Netherlands: return 2008**Germany: return 2019 subject to conditions*

In the successful Dutch claim the object had formed part of the NK collection. Although no clear evidence showed when Max Stern sold the object, based on the circumstances the *Restitutecommissie* concluded that Stern lost possession involuntarily, as a direct result of the NS regime.

In the recent German claim the *Kommission* recommended return, subject to conditions. Under this agreement the heirs would refrain from selling the painting for ten years and (1) if a third party were proved to be the primary victim the object would be returned to them;⁸¹ (2) if as a result of further research the findings indicated that restitution was inappropriate (for example if evidence emerged that the sale of the painting, or sales of similar paintings on those terms would have come about even without the NS coming to power) it would be returned to the museum.

III. Concluding thoughts

Of the ten claims where the claimants brought claims in more than one country, four claims returned the same outcome. Whilst at first sight that appears to be a significant difference of approach, it should be noted that these differences were not ones of differing criteria per se. In the *Rothberger* claims, all were successful, but the law at the time prevented one of the UK museums from transferring it, so money was given instead. Regarding two other claimants the circumstances of loss were different between the claims in the two countries (*Behrens* and *Flechtbeim*). In the *Oppenheimer* claim further information became available to the second committee that heard the claim. In the *Glaser* claims, whilst both committees upheld the claim in principle, the remedy was different, for the UK SAP placed greater emphasis on the mixed motives for sale and potential double-recompense. The difference in approach of the *Freund* claim came about because the Austrian remit of the *Beirat* does not extend beyond the sphere of NS control and, unlike Germany, would not apply to *Fluchtgut*.

81 - Where a primary victim was found after 10 years the assumption was that the Stern Foundation would provide compensation as a just and fair solution.

The London Action Plan hoped to encourage the development of common criteria. A key part of developing common criteria is to make visible these decisions involving the same claimants. The *Restatement of Restitution Rules* project led by Matthias Weller will be instrumental in bringing about such common criteria.

Whilst undertaking the research it became clear that there are some excellent areas of good practice, particularly relating to **facilitating claims and the provision of information** (including making visible the work of the committee), processes that **demonstrate empathy with the claimants and context** and those which **maintain the historical record**.⁸² Sharing this good practice is essential for the development of fair and just approaches to claims and to make the public aware of the tangible responses to past injustices.

Where committees' processes differ because of cultural, legal or historical reasons these should be made clear to the public, including making explicit the rationale for these differences in approach. All of this manages the expectations of claimants and informs them in advance of processes and possible outcomes.⁸³ A single point of access to this information (kept up-to-date) would facilitate provenance researchers and potential claimants in their preparation of claims.

Establishing the Network of European Restitution Committees shows tangible progress in addressing the outcomes of the Action Plan. The network has the potential to overcome some of the differences between the committees as well as to harmonise the provision of information, facilitating future claims. It is for this reason that the newly formed network provides such an exciting opportunity.

82 - See Woodhead, Report, pp. 43-45.

83 - E.g. the German Rules of Procedure set out how costs are borne between the parties



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