GROTIUS CENTRE WORKING PAPER SERIES

GROTIUS CENTRE
WORKING PAPER
2017/067-PIL

Nazi-Looted Art
A Note in Favour of Clear Standards and Neutral Procedures

Evelien Campfens

Grotius Centre for International Legal Studies

Universiteit Leiden
The Netherlands

Nazi-looted art: a note in favour of clear standards and neutral procedures

Evelien Campfens[*]

Introduction

On 7 November 2017 the French *Tribunal de Grande Instance de Paris* ruled that the painting "Pea Harvest" by Camille Pissarro should be returned to the grandson of Jewish art collector Bauer who had lost his collection through confiscation by the Vichy government in 1943.[1] The American couple that sent it on a short-term loan to a Paris museum had acquired it at Christie's in New York in 1995, reportedly for $800,000.[2] Their discontent with the outcome and intention to appeal the verdict was voiced as: "It surely is not up to [us] to compensate Jewish families for the crimes of the Holocaust". The representative of the claimants on the other hand welcomed the verdict as 'pure justice': "I think the French court has applied the natural law."

On another level and some months earlier, in July 2017, the City of Munich informed the public that a 'fair and just solution' had been found regarding Paul Klee's "Swamp Legend", seized by the Nazis as 'degenerate art'.[3] It had changed hands several times when it was acquired for the Munich Lehnbachmuseum from a Swiss dealer in 1982. The press release informed the public that an undisclosed amount of money had been paid to the original owners to end decades of legal battle - after a German court had earlier found that the claim was inadmissible. A few months earlier litigation was initiated in the US over a painting by Kandinsky in the same museum – by other claimants - on allegations of it being Nazi-looted art.[4] And, lastly, another recent example of a successful claim by private claimants relating to their wartime losses: in February 2017 the Dutch Restitutions Committee recommended the return of a family portrait by J.F.A. Tischbein that was looted during the Soviet invasion of Poland in 1939 (probably by the soviet army) to a Polish family.[5]

---

[*] Grotius Centre for International Legal Studies, Leiden University. General secretary Dutch Restitutions Committee (2002-2016). The author would like to thank Sergei Vasiliev, Prof. Nico Schrijver, Patricia Kennedy Grimstead and Weyer VerLoren van Themaat for their valuable comments. Also, the author is indebted to Roos Hoek for her research assistance. This paper is dedicated to Prof. Norman Palmer, QC.

[1] Case *Bauer e.a. v. B. and R. Toll*, Tribunal de Grande Instance de Paris, Jugement le 7 Novembre 2017 (No. RG 17/587/35, no. 1/FF). *NB* Previously, 8 November1945, a Paris court had ruled the confiscation of the painting - from Simon Bauer - to be null and void, see ruling 7/11/2017, p. 4.

[2] A. Quinn, 'French court orders return of Pissarro Looted by Vichy Government', The New York Times, November 8, 2017.www.nytimes.com/2017/11/08/arts/design/french-court-pissarro-looted-nazis.html.

[3] Rathaus Landeshauptstadt München, Umschau 140 / 2017: Vergleich zur Beilegung der Auseinandersetzung im Falle des Gemäldes „Sumpflegende" von Paul Klee, 26 July 2017 (Press Release Municipality of Munchen, see https://ru.muenchen.de); See also https://www.nytimes.com/2017/07/26/arts/design/after-26-years-munich-settles-case-over-a-klee-looted-by-nazis.html and www.faz.net/aktuell/feuilleton/kunstmarkt/restitution-paul-klee-sumpflegende-bleibt-in-muenchen-15123237.html.

[4] *R.C. Lewenstein e.a. v. Bayerische Landesbank*, No. 17-cv-0160, U.S. NYSD, Complaint 3 March 2017.

[5] Recommendation of the Dutch Restitutions Committee regarding Krasicki (RC 1.152) of 20 February 2017. All recommendations available online: <http://www.restitutiecommissie.nl/adviezen.html>; *NB* In

The increasing number and changing nature of such cases raise the question of whether clear international rules exist with regard to claims to Nazi-looted art.[6] On the interstate level such rules exist: cultural objects have a protected status under international law and the obligation to return (restitute) cultural objects taken during armed conflict to the State it came from is well-accepted under international law.[7] This paper will not deal with interstate rights and obligations but will focus on rights of private (non-Sate) parties to their wartime losses. [8] In 1998, these rights were addressed in the *Washington Conference Principles on Nazi-confiscated Art*. This non-binding declaration, signed by 44 governments, introduced the international rule that former owners (or their heirs) are entitled to a 'fair and just solution' with regard to Nazi-confiscated art that had not been restituted to them earlier.[9] Whereas in 1998, however, the focus was primarily on claims by family members of Jewish Holocaust victims whose unclaimed confiscated artefacts were in Western museum collections, today the array of claims has grown much wider.[10] Today, claimants are not necessarily relatives of Holocaust victims, and a confiscated work of art may surface in any public or private collection in the world. Nor are claims limited to art confiscated by the Nazis but may regard cultural objects taken by others than the Nazis as a result of the War, or art that was sold by refugees in a neutral country like Switzerland (so-called 'Fluchtgut', i.e. 'escape-goods'). These developments are an indication that the 'fair and just' rule, developed to address the rights of private dispossessed former owners, is evolving. The question is, in what direction and by what logic?

International practice today is also typified by a lack of transparency: often cases are settled – works are 'cleared' - in a confidential agreement without legal argumentation, as in the Munich case. However understandable in specific cases this hinders the development of a consistent, predictable and understandable set of norms, while openness would seem important given conflicting outcomes to similar cases.[11] It is desirable for similar cases to be treated similarly and different cases differently, but in order for this to be so, one must agree on which relevant facts need to be similar. The soft-law norm (prescribing 'fair and just' solutions for ownership claims) is open and still unclear which means that there is a need for precedents – case law – to further develop that norm. The positive legal framework, on the other hand, is highly fragmented, and courts of law are often not able to assess claims on their merits. The expiration of post-war restitution laws, the non-retroactivity of conventional norms, and various legal concepts such as limitation periods for claims, or adverse possession, are reasons for this.[12] And although several Western European countries have

---

2005, the UK Spoliaton Panel also hounored a claim regarding a non-Nazi taking in its *Report in respect of a 12th century manuscript now in the possession of the British Library* of 23 March 2005.

[6] The term 'Nazi-looted art' can be used for various types of losses of cultural objects during the Second World War. This paper will focus, in line of case-law, on losses by persecuted owners in Western-Europe. See below, section 1.

[7] See below, section 1.

[8] Id. *NB* Obviously, the two legal frameworks are intertwined.

[9] 'Washington Conference Principles on Nazi Confiscated Art' ('Washington Principles') in J.D. Bindenagel (ed), *Washington Conference on Holocaust-Era Assets* (State Department 1999) 971-97. Principle VIII. See: https://www.state.gov/p/eur/rt/hlcst/270431.htm.

[10] Hereafter fn. 18 and accompanying text.

[11] See hereunder, section 1.3.1.3.

[12] For a general overview of obstacles to restitution: Beat Schönenberger 'The Restitution of Cultural Assets', (Eleven 2009), Chapter 4. On post-war restitution laws and non-retroactivity of conventional law: E. Campfens *Sources of Inspiration: Old and New Rules for Looted Art,* in: E. Campfens (ed.) 'Fair and Just Solutions? *Alternatives to litigation in Nazi-looted art disputes: status quo and new developments* (Eleven 2015), p. 16-27.

installed special committees to advise on these claims, their mandate is limited.[13] That leaves a second important question open: Who is to monitor compliance and explain the norm that individual owners have a right to a 'fair and just' solution regarding artefacts lost in the course of the Second World War, as propagated by the international community since 1998?

This article makes a case for clear standards and transparent neutral procedures. In tribute to the late Professor Norman Palmer who voiced this idea in 2014, this paper concludes with a proposition of the establishment of a European claims procedure.[14] The underlying thought is that a lack of clarity both at the level of substantive justice (what is the norm?) and at the procedural level (who will clarify that norm?), results in legal insecurity, inconsistent outcomes and, potentially, injustice. Moreover, while the number of cases is on the rise, the (European) soft-law model is challenged by a more legalistic approach in the US. The article is structured as follows:

- The first part addresses the material norm and its rationale. It focuses on the question of what qualifies as unjustified wartime-taking and takes a closer look at the concept of a 'forced sale'. What is at the heart of this concept and what are its limits? Does it extend, for example, to wartime sales in neutral countries ('Fluchtgut')?
- The second part addresses access to justice. The 1998 Washington Principles, along with later soft-law instruments in the field, stress the importance of a non-legalistic approach and alternative dispute resolution (ADR), but what procedures are available? And how does new legislation and an increase of litigation in the US impact on the situation in Europe?
- The last part of this paper proposes the establishment of a European claims procedure for difficult cases to enhance the development of common standards and provide better access to justice.

1. Elements of substantive justice

The 'fair and just' norm, introduced in 1998 in Washington, prescribes that "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."[15] This is an abstract norm which has not been much clarified by the various later international declarations.[16] In the Terezin Declaration of 2009, the most recent international declaration that was signed by 46 States, the 'fair and just' rule was rephrased as follows:

"[W]e urge all stakeholders to ensure that their legal systems or alternative processes, while taking into account the different legal traditions, *facilitate just and fair solutions with regard to Nazi-confiscated and looted art,* and to make certain that claims to recover such are resolved expeditiously and *based on the facts and the merits of the claims* [...]."[17]

---

[13] In the UK, the Netherlands, Austria, France and Germany. See part 2.
[14] Prof. N. Palmer QC *The best we can do? Exploring a collegiate approach to Holocaust-related claims* in Campfens (2015), p. 153-187.
[15] Id., Principle VIII.
[16] An overview in Campfens (2015), p. 37. In short: Resolution 1205 *On Looted Jewish Cultural Property* by the Parliamentary Assembly of the Council of Europe of 1999; the *Vilnius Forum Declaration on Holocaust Era Looted Cultural Objects* of 5 October 2000, signed by 38 governments (and Parliamentary Assembly of the Councel of Europe); The European Parliament Resolution and Report of 2003 (see section 2.2); and the *Terezin Declaration on Holocaust Era Assets and Related Issues* of June 2009, 46 signatory States.
[17] *Terezin Declaration on Holocaust Era Assets and Related Issues of June 2009*: <http://www.holocausteraassets.eu/program/conference-proceedings/declarations/>, p. 4-5.

The focus in many of the soft-law declarations is on Holocaust-related losses (by Jewish owners).[18] The Terezin Declaration allows for a somewhat wider notion as it considers 'Nazi-confiscated and looted art' as the subject of the fair and just norm, and in the preamble addresses "victims of the Holocaust" as well as "other victims of Nazi-persecution by the Nazis, the Fascists and their collaborateurs".[19] Although the 2009 *Draft UNESCO Declaration of Principles Relating to Cultural Objects Displaced in Connection with the Second World War* was never adopted, it takes an interesting and more inclusive (neutral) approach, aiming at cultural object that were lost under "circumstances deemed offensive to the principles of humanity and dictates of public conscience".[20]

At issue in the following section is the question of what makes a specific loss of an artefact during the Nazi-era qualify for special and preferential treatment – transcending regular standards for stolen property – under the 'fair and just' rule? That discussion will focus on claims by private former owners (i.e. non-State actors).

1.1 The 'fair and just' rule

The relevant soft-law rule thus prescribes that for Nazi-confiscated or looted *art* a *just and fair solution* should be reached *on the merits* of the case (the 'facts and circumstances surrounding a specific case'). That the rule was created specifically for *art* supports the view that its rationale should be found in the intangible heritage quality of art; the ability of cultural objects to symbolise a history of injustice and a lost family life is a reason for such items to be given special treatment, even where many years have passed and the acquired rights of current possessors present an obstacle. Another element of the rule is that it is aimed at a 'fair and just solution' implicating that it is not *per se* about the return of full ownership rights (restitution in the status quo ante). International practice over the years confirms that rights of former owners as well as rights of (innocent) new possessors are being acknowledged.[21] A third element is that such a 'fair and just' outcome depends on the merits of a case, the 'specific circumstances'. What, however, are those circumstances?

The following is a non-exhaustive list of circumstances that are of importance in determining the outcome of present-day restitution cases:[22]

- The identification of the artefact as property of the claimant's predecessor in right at the time of looting (the original title);
- The circumstances of the loss by 'Nazi-looting' (specific circumstances like confiscation or forced sale; general circumstances like time and place);
- Previous post-war compensations and settlements;
- The extent to which the owner made efforts to recover the work over time;
- The circumstances in which the present possessor acquired the work and the provenance research carried out prior to acquiring it;
- The specific interest of the parties in the artefact (the intangible heritage interest or monetary value);
- The interest of the general public (public order).

[18] In the Washington Principles: 'Pre-war owners of art confiscated by the Nazis or their heirs'; 'Looted Jewish Property' in Resolution 1205 of 1999, repeated in the Vilnius Forum Declaration; the Terezin Declaration has a focus on Holocaust victims. See hereafter, fn. 110 and text 2.2.
[19] Terezin Declaration, p. 4 (supra fn. 17).
[20] UNESCO *Draft UNESCO Declaration of Principles Relating to Cultural Objects Displaced in Connection with the Second World War (35 C/24 of 31 July 2009)*, principle II. See also para 2.2.
[21] See the numerous financial settlements arranged for with the help of auction houses.
[22] This list is based on research of cases and personal experience), and open for discussion.

Discussion of this full list exceeds the scope of this article. The first two elements – identification as former property and loss through looting – could, however, be classified as being basic requirements for the admissibility of a claim.[23] If a specific work of art can be (i) identified as former property (at the moment of loss) and (ii) was lost through Nazi-looting, a claim can be considered (a right exists under the soft law norm); if not, no claim exists under the soft law norm. Whereas identification of a work is a matter of factual provenance research and interpretation of that research, the second element is a matter of legal definition: when can a loss be defined as 'Nazi looting' in the sense of the soft-law norm in the Washington Principles? A discussion of this question follows after a brief discussion of the legal setting.

1.2 The legal setting

Cultural objects have a protected status under international law and both the destruction of monuments and looting[24] of cultural objects is prohibited. This prohibition was codified in the 1907 Hague Convention.[25] The obligation to return artefacts looted in spite of this prohibition is a settled norm of customary international law as well.[26] It can be invoked on the interstate level. The existence of these rules, as history teaches us, does not prevent looting from happening.

That the Nazis looted works of art on a vast and systematic scale is well known and, arguably, lies at the base of a special treatment. Nazi policy differed from country to country but one of the objectives was to obtain as much 'desirable' art as possible to underline the hegemony of the Third Reich. The ways of acquiring artefacts included (i) plunder of private collections in the context of racial policies and persecution, from own citizens (and institutions) and in occupied territories; (ii) pillage of public art collections in occupied territories, mostly in Eastern European countries, and (iii) acquisition of artefacts on the art market in Western countries.[27]

It is the first category – plunder of private property – that seems to underlie the (soft law) norm that urges stakeholders to find fair and just solutions as defined in the Washington Principles (also: the 'fair and just rule'). This means that although another notion of unlawful Nazi looting exists – and in fact *all* transfers of artefacts from occupied territories were prohibited under international law and

---

[23] And arguably the third element: a prohibition of expropriation applies if no *proper compensation* was paid (Art. 1 First Protocol European Convention of Human Rights).

[24] The terms 'looting' and 'pillage' are used in the cultural heritage field to define misappropriation of cultural goods in the event of a national or international armed conflict, see *Dictionnaire comparé du droit du patrimoine culturel*, ed. M. Cornu, J. Fromageau, C. Wallaert, Paris, CNRS. Editions (2012)). In this article the term 'looting' is used to include takings in a situation beyond the an 'armed conflict' such as confiscation as a result of racist legislation in Nazi Germany. For this, the UNESCO definition of takings "offensive to the principles of humanity and dictates of public conscience" seems useful (see fn. 20).

[25] *Convention concerning the Laws and Custom of War on land*, Convention IV, The Hague, ad. 18 October 1907. 205 CTS 277. Art. 46, 47 and 56.

[26] E.g. A. Chechi, The Settlement of International Cultural Heritage Disputes (OUP 2014). Problematic in this regard is that some states (e.g. Russia) argue that 'restitution in kind' is allowed as well; i.e. as reparations for the wide-scale Nazi-looting and destruction of cultural objects in Russia by the Nazis artefacts found in the Russian zone of Germany in the post-war period were taken (and are kept) as war-booty.

[27] See for a description of the methods in the proceedings of the trial agains A. Rosenberg *Trial of the Major War Criminals Before the International Military Tribunal*, vol 22 (International Military Tribunal 1948) 540. Cited in J.H. Merryman and A. Elsen *Law, Ethics and the Visual Arts*, (Kluwer 1998), p. 31.

the Inter-Allied Declaration[28]-, this should not be confused with 'Nazi-looting' as addressed in the fair and just rule. The latter norm aims to create rights – albeit of a non-binding nature – for individual victims of looting or their heirs to their lost artefacts; it does not seek to create (more) rights for nation states in the way they already exist under traditional international law or the post-war system. In this sense the fair and just norm, aiming at rights of individual victims, can be classified as a matter of international human rights law.[29] To complicate matters, these two sorts of norms in place for Nazi-looted art (for States and individual former owners) may create coinciding rights/obligations to same objects; for example with regard to art held in Russian or Polish museums that may have been confiscated in occupied territories and taken to those countries as 'war booty' in the post-war period.[30] This issue will not be discussed in this paper.

- **Post-war redress**

The post-war system of the Inter-Allied Declaration provided for interstate restitution and cooperation to reverse all kinds of Nazi-looting, also of artefacts taken from public collections or that were sold in voluntary transactions. It relied on location of looted cultural objects and their return to the country from where it had (last) been transferred, and restitution to individual owners who had lost their artefacts as a result of confiscation or forced sales on a local level.[31] However, the enthusiasm of these earlier restitution efforts was short-lived and many works found their way into collections all over the world before they could ever be returned.[32] The various national restitution laws enabling individual owners to claim their property after the War, soon expired. Moreover, in the 1950s the signatory states to the Settlement Convention seem to have made a choice to 'clear' looted artefacts in the hands of third parties by introducing a general sunset clause for restitution claims, set at 1956.[33] Dispossessed owners were, under that post-war system, eligible for

[28] *Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation and Control* (5 January 1943): a warning that the Allies "reserved their rights to annul transfers or dealings which took the form of open looting or plunder as well as seemingly good faith transactions", as confirmed in the UN Monetary and Financial Conference at Bretton Woods, 1944; see Resolution VI, 939-943 and *Final Act of the Paris Conference on Reparations; with annex. Paris, 21st December, 1945*. Furthermore, cultural objects have a protected status and pillage from occupied territories is prohibited by customary international law, see Art. 46, 47 and 56 of the *1907 Hague Convention respecting the Laws and Customs of War on Land,* 205 CTS 277.

[29] As post-war Allied internal restitution Laws for Germany. Vrdoljak, A.F. 'Gross Violations of Human Rights and Restitution: Learning from Holocaust Claims', in *Realising Cultural Heritage Law: Festschrift for Patrick O'Keefe* (Crickadarn: Institute of Art and Law, 2013), Pages 163-187.

[30] For examples see P. Kennedy Grimstead "Nazi-looted Art from East and West in East Prussia: Initial Findings on the Erich Koch Collection", IJCP vol. 22 (2015), nr. 1, p. 7-61. Problematic is that Poland nor Russia implemented the Washington Principles.

[31] Principles were laid down in the *Interallied Declaration* (*supra* fn. 28); the *Agreement between the United States, the United Kingdom and France in respect of the Control of Looted Articles, 8 July 1946 (1951, 25 Department of State Bulletin 340, 15);* and in the *Convention on the Settlement of Matters Arising out of the War and the Occupation signed at Bonn, May 26, 1952, as amended by Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany*, signed at Paris, October 23, 1954; in force May 5, 1955. (1955). *American Journal of International Law, 49*(S3), 69-83. ('Settlement Convention') Chapter 5, Art. 1 and 2.

[32] L.V. Prott, 'Responding to WWII Art Looting', in The Bureau of the Permanent Court of Arbitration (ed.), The Permanent Court of Arbitration/Peace Palace Papers: Resolution of Cultural Property Disputes (Kluwer Law International 2004), 114. And Campfens (2015), p. 15-26.

[33] "[..] any person who, or whose predecessor in title, during the occupation of a territory, has been dispossessed of his property by larceny or by duress (with or without violence) by the forces or authorities of Germany or its Allies, or their individual members (whether or not pursuant to orders), shall

compensation by the German State if their cultural object could not be located for which owners or heirs should file claims (as in other countries compensation schemes were introduced).[34]

- **fair and just rule: causal link between persecution and loss**

In 1998, upon the recognition by the wider public that many artefacts confiscated from owners persecuted by the Nazis were never returned, the fair and just rule was introduced. It relates to losses of artefacts that are the result of, or closely linked to, persecution. This includes 'confiscation' in the narrow sense – seizure based on racial legislation – but also forced sales (sales under duress).[35] In other words, losses with a *direct causal relation to persecution*. This notion should also serve to define the limits of the rule: a loss that is *not* directly related to persecution is not covered by the fair and just rule.

The close causal link between persecution, loss of possession and a right to reparation was included in the first article of US Law 59, the post-war restitution law for the US Zone of Allied-occupied Germany.[36] Its purpose was "to effect to the largest extent possible the speedy restitution of property that was lost by wrongful deprivation within the period from 30 January 1933 to 8 May 1945 for reasons of race, religion, nationality, ideology or political opposition to National Socialism".[37] Losses in other (occupied) territories would fall under similar (special restitution) legislation enacted in the respective countries, and typically would declare *ab initio* void those confiscations or seizures resulting from racial laws and make forced sales *voidable* (upon a claim).[38]

Intermediate conclusion

A conclusion at this point is that the fair and just rule creates certain (non-binding) rights for individual former owners to their lost cultural objects notwithstanding obstacles under positive (property) law. As such, its legal setting is in the field of international human rights law (as opposed to traditional international law) and it can be seen as an evolving right of individual former owners (or groups of people) to their lost cultural objects.[39] The intangible heritage quality of art – as a symbol for past injustices or a family history - on the one hand, and a causal relation between persecution and the loss of a work of art on the other, are at the core of the preferential treatment of such claims

A more controversial issue, which will be the focus in the remainder of this section, is *how* direct and proximate the causal link with persecution should be. Obviously thefts, confiscations and seizures by Nazi organisations – resulting from the so-called 'Mobel-Aktion' or seizures by Einsatzstab

---

have a claim against the present possessor of such property for its restitution. [..] *No such claim shall exist if the present possessor has possessed the property bona fide for ten years or until 8 May 1956, whichever is later*." Settlement Convention (fn. 31), Chapter 5, Art. 3 (1).

[34] Ibid., Chapter 5, Art. 4. And a loss by the hands of the Vichy Government in France would be compensated by the French government.

[35] And already accepted in the Interallied Declaration, supra fn. 28.

[36] 'Law No. 59 of the Military Government in Germany, US Zone: Restitution of Identifiable Property', art. 1, in: United States Courts of the Allied High Commission for Germany, *Court of Restitution Appeals Reports* (United States Courts of the Allied High Commission for Germany 1951) 499-536.

[37] Ibid. art. .1

[38] In that sense, the confiscation in 1943 in the French Bauer case was void (see introduction, fn. 1). On post-war restitution laws: Campfens (2015), p. 21-26.

[39] E. Campfens "Whose cultural heritage? Crimean treasures at the crossroads of politics, law and ethics", AAL, Vol. XXII, issue 3, p. 205-206.

Reichsleiter Rosenberg (ERR) - qualify, as do the so-called Judenauktionen ('Jewish auctions' set in stage by the Nazi's).[40] In short, all transfers directly based on certain racial legislation under Nazi rule.[41] But what are the limits to the notion of 'Nazi-looted art', and what exactly is a forced sale? This section will deal hereafter with forced sales.

1.3 Forced sales

Forced sales or 'sales under duress' qualify as Nazi-confiscation under the fair and just rule. At one end of the spectrum lies the typical 'gun-to-the-head' situation: a Jewish owner being forced to sell their artefacts to Nazi authorities under threat of reprisals. Similar would be a loss in the absence of the owner (i.e. without the will or initiative on the part of the owner), because they had been forced into hiding or were able to make it away in time. Sales in order to keep oneself alive while in hiding for undervalue would also qualify, like the sale 'for an apple and an egg' by the Jewish owner in hiding in occupied Belgium of their Griffier painting as dealt with in the first report of the UK Spoliation Panel.[42] Not always, though, circumstances are so clear. Difficult categories without clear standards include 'early sales', sales by art dealers and so-called 'Fluchtgut' sales; these will be discussed below.

Under post-war restitution laws, decisive elements in determining whether a sale should be classified as forced or not included: [43]

- a fair purchase price (or conversely: disparity between value and selling price) and free availability of the proceeds;
- the time of the loss of possession (before or after the racial laws of 1935 in Germany, with different periods applying to each country depending on when they were under Nazi control);
- own initiative; and
- the nature of the acquiring party (was it a Nazi-official?).

These elements resurface in present-day recommendations by the respective European panels and in US case law.[44] In view of the fact that the losses occurred a long time ago and that facts are not

---

[40] E.g. the various *Gentili di Giuseppe* cases, a.o. in France (*Chistiane Gentili di Giuseppe et al. v. Musée du Louvre*, Court of Appeal of Paris, 1st Division, Section A, 2 June 1999, No. 1998/19209) and the US. See for the forfeiture action in the US of a work from the same collection on loan from Italy: Platform ArThemis, Art-Law Centre, University of Geneva (hereafter: Arthemis) https://plone.unige.ch/art-adr/cases-affaires/christ-carrying-the-cross-dragged-by-a-rascal-2013-united-states-v-painting.

[41] In this sense, e.g. Dutch Recommendation of 11 April 2011 (RC 1.114-B) regarding a sculpture from Fritz Gutmann's collection confiscated by the ERR in Paris; The 1996 US Gutmann case, (*Goodman v. Searle*, Complaint, No. 96-6459 (N.D. Ill. July 17, 1996) concerned a Degas painting that was part of the same group of artefacts confiscated by the EER in Paris. Litigation ended by a settlement (see Arthemis: https://plone.unige.ch/art-adr/cases-affaires/landscape-with-smokestacks-2013-friedrich-gutmann-heirs-and-daniel-searle). Another example is the *Altmann case*, litigated in the US and settled by arbitration (*Republic of Austria v. Altmann,* No. 124 S. Ct 2240, US Sup Ct, 7 June 2004).

[42] *Report of the Spoliation Advisory Panel in Respect of a Painting now in the Possession of the Tate Gallery* of 18 January, 2001. All reports of the SAP available online: https://www.gov.uk/government/groups/spoliation-advisory-panel#panel-reports.

[43] N. Robinson 'War Damage Compensation and Restitution in Foreign Countries' (1954) in 16 Law and Contemporary Problems 347-376; E. Campfens "Sources of Inspiration: old and new rules for Looted Art", in Campfens (2015), p. 21-26.

[44] With 'European Panels' are meant special Committees tasked with the adjudication of Nazi-looted art claims, discussed in section 2.1. In the German situation focus is on a 'fair market price' (see the

always clear, in today's cases value is also attached to declarations and actions (or a lack thereof) by former owners or their heirs. Statements and post-war documents can validate (or invalidate) claims by the owners that a sale was considered forced. In this sense, for example, the Dutch Restitutions Committee considered the lack of action in the post-war period a circumstance of importance in its 2012 Recommendation regarding the loss of two statues under unclear circumstances at an unknown moment after 1934 in Berlin:

> "If the exchange had been involuntary, it would have been obvious for Max von Goldschmidt-Rothschild's private secretary [...] to have mentioned this in his letter of 6 July 1946 (writing about the artefacts at stake, EC). He did not do so, however. It would also be logical that if the exchange had been involuntary in nature, the Von Goldschmidt-Rothschild family would have submitted an application for restitution of or compensation for the sculptures after the War, as they did for the works of art that were sold in 1938 under the pressure of the Nazi authorities." [45]

1.3.1.1 Early Sales

An 'early sale' can be defined as a sale that occurred before racial laws were (fully) in force. Because such laws were often introduced gradually the general conditions used to justify an assumption that a sale by an owner that was targeted by such laws was a forced sale (under duress), vary from country to country. Allied restitution laws for Germany for example made a distinction between a sale before or after the Nuremberg Race Laws of September 1935, and this resurfaces in present-day German decisions today. Similarly one can distinguish between periods of (increasingly) threatening general conditions for example in the Netherlands or France.

A preliminary observation based on ongoing research into the category of 'early sales' is that there is no clear line amongst the European panels. US courts seem to have predominantly dismissed such cases on the basis of 'technical defences' (i.e. statute of limitations or a lack of jurisdiction)[46], or cases were settled before they were decided upon.[47] Conflicting outcomes in the various claims relating to the Glaser collection in the UK, the Netherlands, Germany and the US may serve to illustrate this.

'Guidelines' (annex V b), under 3); Litigated cases focus, in the US and elsewhere, on technical legal issues like statutes of limitation, jurisdictional matters and conflict of law issues.

[45] *Recommendation regarding Von Goldschmidt-Rothschild* (RC 1.110) of 6 December 2012. Other examples: e.g. the US Glaser litigation: *In re Ellen Ash Peters, as Executrix for the Estate of Maria Ash v. Sotheby's Inc.*, 2006 N.Y. Slip Op 6480 [34 AD3d 29].

[46] See for example *Schoeps et. al. v. Freistaat Bayern*, No. 14-2739, Summary Order, US Courts of Appeals 2d Cir., 22 May 2015: the claim based on a loss by the sale of a Picasso by Mendelssohn-Bartholdy in 1934 was dismissed on grounds of lack of jurisdiction over German property. This, as opposed to rulings where confiscation in the narrow sense was at stake and jurisdiction was accepted, for example in the *Altmann case* dealing with Austrian museum property (*Republic of Austria v. Altmann,* No. 124 S. Ct 2240, US Sup Ct, 7 June 2004).

[47] E.g. *Schoeps et al. v. The Museum of Modern Art; and The Solomon R. Guggenheim Foundation (*No. 07 Civ. 11074 JSR, Memorandum Order, U.S. Dist. C.D. New York, S.D., 23 March 2009) on what seems an early loss of two Picasso paintings (unclear facts). The case was settled on the eve of the trial. Interestingly, judge Rakoff explicitly voiced his discontent with the confidentiality of the settlement as being: "against public interest".

In its 2009 Report in Respect of Eight Drawings now in the Possession of the Samuel Courtauld Trust, the UK Spoliation Panel denied the claim of the Glaser heirs. [48] Curt Glaser, a prominent Jewish art historian, lost his job and house almost immediately after Hitler came to power in January 1933 and auctioned his art collection in May 1933 in Berlin to start a new life abroad. The Panel considered that, although Nazi persecution was the main reason for the sale, Glaser had obtained reasonable market prices ("reflecting the general market in such objects and [the prices were] not depressed by circumstances attributable to the Nazi regime"). Besides, it argued, his widow was awarded compensation under an agreed and conclusive settlement with the awarding authorities. The Panel denied the claim but recommended that The Courtauld display alongside the drawings an account of their history and provenance during and since the Nazi era.

Both in the Netherlands and in Germany, however, claims relating to Glaser works sold at the same auction –meaning they were lost under exactly the same circumstances – *were* honoured. The Dutch recommendation relied on the view that the loss was involuntary as a direct result of the Nazi regime, and on the consideration that proceeds shall not to be taken into account if these were 'used in an attempt to leave the country or go into hiding' according to Dutch restitution policy rules.[49] In Germany several other claims by the Glaser heirs were successful, resulting in financial settlements.[50]

A New York court had previously denied a claim by the Glaser heirs in the US in 2006 on a painting by Munch, sold by Kurt Glaser's brother after Glaser himself had left the country. In line with the UK Panel's decision the court relied on a contemporaneous letter of Glaser himself: "If Professor Glaser did not treat the painting as stolen in 1936, his wife's estate will not be heard to speculate, some 70 years after the fact, that it might have been misappropriated and that its acquisition at auction (..) was therefore tainted."[51]

1.3.1.2 Business transactions by art dealers

Artefacts often concern personal possession with emotional or spiritual value, valued for their beauty and handed down through generations.[52] Sales by art dealers often miss this intangible aspect and therefore can be considered a special category. The objects are commodities and a sale, normally, would have the nature of a business transaction by a legal entity. In other words, the special personal, spiritual or cultural-historical interest in the artefact is not a given. If one takes such intangible (heritage) value of the artefact as a basic element of the fair and just rule - as is proposed in this article -, sales by art dealers stand out. Another difference is that the objective of an art dealer is to buy and sell artefacts and, hence, the involuntary nature of a sale (at an early date) cannot automatically be assumed.

---

[48] Spoliation Advisory Panel, *Report in Respect of Eight Drawings now in the Possession of the Samuel Courtauld Trus*t, 24 June 2009.
[49] *Recommendation regarding Glaser of 4 October 2010* (RC 1.99); all recommendations on: http://www.restitutiecommissie.nl/en/recommendations.
[50] E.g. the settlement with the Stiftung Preusssischer Kulturbesitz, that must be seen, in the words of SPK's chairman H. Parzinger against a special background: "In acknowledgment of Prof. Glaser's presecution by the Nazi Regime and in honour of his great achievements for the museums in Berlin". Speech 27 November 2015 https://www.preussischer-kulturbesitz.de/en/services/search.html?q=restitution+glaser&x=39&y=3&id=610&L=1.
[51] *In re Ellen Ash Peters, as Executrix for the Estate of Maria Ash v. Sotheby's Inc.*, 2006 N.Y. Slip Op 6480 [34 AD3d 29], p. 6.
[52] See also the Conference on Jewish Material Claims Against Germany (Claims Conference): http://art.claimscon.org/home-new/looted-art-cultural-property-initiative/.

The Dutch Restitutions Committee has dealt with a number of cases concerning works of art sold by Jewish art dealers. The background to this is that the art market in the Netherlands flourished during the Nazi occupation after years of depression. Although dealing with the Germans was prohibited[53], this did not prevent art from being dealt on a wide scale by Dutch dealers, at the early stages of the occupation by both Jewish and non-Jewish. [54] In light of this, the present-day Dutch restitution policy makes a distinction between private owners and art dealers with the following rationale: "That the art trade's objective is to sell the trading stock so that the majority of the transactions even at the Jewish art dealers' in principle constituted ordinary sales".[55] Whereas private sales by Jewish owners during the Nazi rule benefit from the assumption of a forced sale, the same is not true for art dealers. On these ground claims by the heirs of the Jewish art dealers Katz regarding sold objects were, for example, denied[56]. This does not mean all sales by Jewish art dealers are considered voluntary by the Dutch Restitutions Committee.[57] This is demonstrated by its two recommendations concerning the Mogrobi art dealership: a first claim, regarding 13 artefacts, was honoured as it concerned sales from 1942 onwards while the owner was in hiding (RC 1.37), but a later claim that concerned sales in the early years of the Nazi occupation was rejected (RC 1.145).[58] The latter rejection on the grounds that:

> (a) The purchaser of the currently claimed items was a museum director who later became involved in the resistance during the War. The earlier recommendation concerned German buyers, primarily German museums.
> (b) The dates on which the currently claimed items were sold were 1 February 1941 and a day in March 1942. The sales involved in the earlier recommendation took place in 1942 and in 1943.[59]

In the Van Lier Case (RC 1.87) regarding artefacts sold by the Jewish art dealer Van Lier the Dutch Committee rejected all but one claim, on an ivory horn. The grounds were that this particular object had a special value for the family since Van Lier is depicted blowing this horn in a portrait of from around 1930. In the words of the Commitee "this photograph provides a salient image of their forefather and of an art object that was of unique value to him, thus giving the object an emotional value to the family."[60] Here, the intangible heritage value of artefacts for specific people is being addressed.

---

[53] The prohibition was enacted by Law A6 adopted by the Dutch government in exile (Koninklijk Besluit A6 'Besluit Rechtsverkeer in Oorlogstijd' of 7 June 1940).
[54] F. Kunert and A. Marck, 'The Dutch Art Market 1930–1945 and Dutch Restitution Policy Regarding Art Dealers' in Eva Blimlinger and Monika Mayer (eds.), *Kunst sammeln, Kunst handeln: Beiträge des Internationalen Symposiums in Wien* (Böhlau Verlag 2012); E. Muller and H. Schretlen, *Betwist Bezit* (Waanders Uitgevers 2002) 25-30.
[55] Ekkart Committee's Recommendations regarding the Art Trade <https://zoek.officielebekendmakingen.nl/kst-25839-34.html>.
[56] *Restitutions Committee Recommendation regarding Katz* (RC 1.90) of 1 July 2009. The case is complicated by the fact that the dealership acted as an intermediate in sales, i.e. they did not necessarily own the artefacts.
[57] E.g. the Dutch *Stern case* (RC 3.195) concerning a sale in Germany after 1935.
[58] *Recommendations regarding Kunsthandel Mozes Mogrobi* (RC 1.137) of 12 February 2007, and (RC 1.145) of 20 July 2015.
[59] Id. (RC 1.145).
[60] *Recommendation concerning Van Lier*, (RC 1.87) of 6 April 2009.

The German *Beratende Kommission* has dealt with art dealer cases, for example, in its two Flechtheim cases. These concerned the art collection of the prominent Jewish Berlin dealer in modern ("degenerate") art. In its recommendation in 2013 restitution of a painting sold in 1934 in Germany was granted on the grounds 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."[61] That not all losses by Flechtheim were under the same circumstances may be illustrated by other Flechtheim cases in Germany and the US.[62]

Another case dealt with by the *Beratende Kommission* concerns the sale in 1935 of the so-called "Welfenschatz" ("Guelph Treasure") to the Dresdner Bank by a consortium of Jewish art dealers. In its recommendation, the Commission held that the sale in 1935 cannot be seen as a forced sale:

> According to the findings of the commission, the art dealers had been trying to resell the Welfenschatz since its acquisition in 1929. Although the commission is aware of the difficult fate of the art dealers and of their persecution during the Nazi period, there is no indication in the case under consideration by the Advisory Commission that points to the art dealers and their business partners having been pressured during negotiations [...]. Furthermore, the effects of the world economic crisis were still being felt in 1934/1935. [...] Moreover, there is no evidence to suggest that the art dealers and their business partners were not free to dispose of the proceeds.[63]

After this rejection in Germany the Welfenschatz case was brought before the a US court.[64] Another well-known art dealer case concerns the trading stock of Jacques Goudstikker, a prominent Dutch (Jewish) art dealer who escaped Amsterdam on the arrival of the Nazis, leaving over 1000 works of art behind. These fell prey to German art lovers like Alois Miedl as well as to Nazi chief Hermann Goering.[65] After the War many works returned to the Netherlands – leading to the return of 202 paintings in 2005 by the Dutch government[66]-, however many did not return and, hence, may surface anywhere. In the US, the *Von Saher v. Norton Simon Art Foundation* case, concerning two

---

[61] *Recommendation of the Advisory Commission on the return of cultural property seized as a result of Nazi persecution*; Press Release of 9 April 2013; see: < https://www.kulturgutverluste.de>, para 4.

[62] Recommendation of the Beratende Kommission in the matter of the *Heirs of Alfred Flechtheim v. Stiftung Kunstsammlung Nordrhein-Westfalen*, Düsseldorf of 21 March 2016 < https://www.kulturgutverluste.de>. This claim was denied, see hereafter, fn. 78. In the US, a Flechtheim case concerning paintings in possession of a Munich museum is pending since December 2016. In that case the Museum argues that the works were sold before Hitler came to power (*Michael R. Hulton and Penny R. Hulton v. Bayerische Gemäldesammlungen*, No. 16-CV-9360, U.S. NYSD).

[63] Recommendation of 20 March 2014 of the Beratende Kommission regarding the 'Welfenschatz', see < https://www.kulturgutverluste.de>.

[64] *Philipp et al. v. Federal Republic of Germany et al.* No. 1:15-CV-00266, Complaint, U.S. Dist. (C.D. Columbia, 23 February 2015). See below section 2.4.

[65] That the sale was 'forced' seems beyond doubt. The Dutch Restitutions Committee in its *Recommendation regarding the application by the Amsterdamse Negotiatie Compagnie NV in Liquidation* of 19 December 2005 (RC 1.15), as well as US courts considered the sale as forced. Eg. the 2016 US ruling (*Marei von Saher v. Norton Simon Museum of Art at Pasadena, et. al.*, Case 2:07-cv-02866-JFW, District Court Central District of Cal., August 9, 2016), p 2: "In July 1940, after the Goudstikkers escaped, Nazi Reichsmarschall Herman Göring, and his cohort, Aloïs Miedl, acquired the Firm's assets through two involuntary "forced sales"."; A complication in this case is that in the post-war period a settlement agreement was signed with the widow of Jacques Goudstikker, Desi Goudstikker, see RC 1.15.

[66] *Recommendation regarding the application by the Amsterdamse Negotiatie Compagnie NV in Liquidation* of 19 December 2005 (RC 1.15).

works by Cranach that were part of the trading stock of Goudstikker, is now in its tenth year of litigation.[67] The specific 'art-dealership element' surfaces in the circumstance Goudstikker bought the Cranach paintings at a 1931 Berlin auction of artefacts that were confiscated by the Soviet government from the aristocracy and others. As stated in the 2016 US ruling:

"On or about May 11, 1931, Jacques, on the Firm's behalf, purchased the Cranachs from the Soviet Union at the Lepke auction house in Berlin. Although the auction was entitled the "Stroganoff Collection" and featured artworks that the Soviet Union had forcibly seized from the Stroganoff family, it also included other artworks, such as the Cranachs, that were never owned by the Stroganoff family but rather that were seized from churches and other institutions."[68]

This provenance was well-known at the time and the auction evoked protest.[69] It appears that the Cranach paintings were seized in Ukraine in the 1920s.[70] Many bought artefacts at this auction and Goudstikker, being a business man, bought the objects with a view to selling them with profit. In US (and French) courts such soviet seizures of artefacts have been challenged, but these claims have been 'off limits' on the basis of the Act of State doctrine (unlike Nazi confiscations, see part 3).[71] Nevertheless, in the context of the fair and just norm the question whose interests in such cases should have priority can be raised: a museum that bought the paintings in the 1970s on the regular art market; heirs of the shareholder of the art dealership that acquired confiscated works in 1931 and lost them as the result of the Nazi-regime in 1940; or perhaps even an unknown third party in Ukraine that lost the works as the result of confiscation in the early 1920s?

1.3.1.3 Sales in neutral countries ('Fluchtgut')

Sales in neutral countries during the Nazi-era are at the far end of the spectrum of what some consider a 'forced sale', bringing them within the realm of the notion of 'Nazi-looting'.[72] These could be sales in Switzerland by Jewish owners on their way to freedom, or sales that took place in other countries prior to occupation. In other words, sales concluded outside the direct influence of Nazi rule or the so-called 'Fluchtgut' cases. Although the reason for such sales may well have been persecution – the owner flees the country and therefore needs money to survive – there is no direct causal link between the loss and persecution. Under the post-war restitution laws such cases would

---

[67] *Marei von Saher v. Norton Simon Museum of Art at Pasadena, et. al.*, Order granting Case 2:07-cv-02866-JFW, District Court Central District of Cal., August 9, 2016. Litigation initiated in 2007.
[68] Idem, p. 2.
[69] Letters of protest by the Stroganoff family, whose collection was auctioned, was published in the New York Herald Tribune of May 13, 1931, at. 15: "The soviet republic has taken possession of this collection in a way that sets at defiance every principle of international law", see *Stroganoff-Sherbatoff v. Weldon*, 420 F. Supp. 18 (SDNY 1976), as reproduced in J.H. Merryman and A. Elsen *Law, Ethics and the Visual Arts*, (Kluwer 1998), p. 40-41.
[70] Their provenance as coming from Ukraine is presented (in Ukrainian) on http://lostart.org.ua/ua/research/61.htmlin, and earlier was mentioned in N.H. Yeide, K. Akinsha and A.M. Walsh *the AAM Guide to Provenance Research* (American Association of Museums, 2001), p. 135.
[71] See hereunder, fn. 114 and accompanying text.
[72] Arguments in favour: A. Adler *Expanding the scope of museums' ethical guidelines with respect to Nazi-Looted art: Incorporating restitution claims based on private sales made as a direct result of persecution*, in International Journal of Cultural Property (2007) 14:57-84. Also R.S. Lauder, president of the World Jewish Congress, argued that 'Fluchtgut' should be included in Zürich 2 Feb 2016, see: http://www.worldjewishcongress.org/en/news/remarks-by-ronald-s-lauder-in-zurich-a-crime-committed-80-years-ago-continues-to-stain-the-world-of-art-today-2-2-2016.

not qualify for restitution.[73] Such laws were limited in terms of place and time, and possibilities for restitution were restricted to losses under Nazi rule.[74] However, in present-day practice it is less clear how 'Fluchtgut' should be classified.[75]

In fact, the first recommendation of the *Beratende Kommission* honoured such a claim in the Julius Freund case.[76] The Commission was not very clear as to the reasons underlying what may be seen as an extended application of Law no. 59.[77] However, in a later 'Fluchtgut' case concerning the sale in London in 1934 by German art dealer Flechtheim the *Beratende Kommission* explained its position by stating that:

> "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. For this reason as well, the Advisory Commission cannot recommend the restitution desired by the Flechtheim heirs."[78]

A similar approach to 'Fluchtgut' (a denial) was adopted in a 2012 UK Spoliation Advisory Panel (SAP) case regarding fourteen clocks and watches that had been sold by a refugee in London in 1939[79] as well as in two Dutch binding opinions regarding sales by a German Jewish businessman in the Netherlands in 1933.[80] The SAP in its 2012 case considered that, although the sale by a Jewish refugee of a collection of clocks and watches in London in 1939 was a 'forced sale' – i.e. the items would not have been sold had the Nazis not come to power – this particular sale was:

> "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.

---

[73] To this author's knowledge there is no case-law, legislation or literature to support such an extensive interpretation. See also Robinson (fn. 43).

[74] Namely, the restitution was limited, in the case of occupied states to the period of occupation (e.g. France and the Netherlands), in the case of Germany to the period of Nazi rule (1933-1945), and in neutral countries the period starting from the breakout of the War in 1939.

[75] Arguments were made by the President of the World Jewish Congress Ronald Lauder to treat *Fluchtgut* in the same way as looted art. See C. Hickley 'Swiss under pressure over art that Jews were forced to sell', Art Newspaper 3 March 2016.

[76] 'The First Recommendation of the Advisory Commission' of 12 January 2005, see Press release via https://www.kulturgutverluste.de/Webs/EN/AdvisoryCommission/Recommendations/Index.html.

[77] Cf. "The recommendation [...] does not [...] tell us whether these considerations were or were not taken, or should or should not be taken into account. Nor does the recommendation explain why the principle of justice laid down in Military Law No. 59 should apply to sales outside Germany in safe states.". M. Weller *Key elements of Just and Fair Solutions: The case for a Restatement of Restitution Principles*, in Campfens (2015), see fn.1, p. 205.

[78] Recommendation of the Beratende Kommission in the matter of the *Heirs of Alfred Flechtheim v. Stiftung Kunstsammlung Nordrhein-Westfalen*, Düsseldorf of 21 March 2016 (< https://www.kulturgutverluste.de>).

[79] *Report in respect of fourteen clocks and watches now in the possession of the British Museum*, London, 7 March 2012.

[80] *Binding opinion in the dispute on restitution of the painting entitled Christ and the Samaritan Woman at the Well by Bernardo Strozzi* of 25 April, 2013 (RC 3.128) and *Binding opinion regarding the dispute about the return of the painting Madonna and Child with Wild Roses by Jan van Scorel* of 25 April, 2013 (RC 3.131).

> Furthermore, the sale was arranged by a prominent English auction house with (…) no cause to question the seller's reasons for selling."[81]

Interestingly, the SAP introduces here a 'scale of gravity': restitution or compensation could be recommended if the sale was at the 'high end' but not at the 'low end'. The SAP dismissed the restitution claim but found an alternative solution in "the display alongside the objects, or any of them whenever they are displayed, of their history and provenance during and since the Nazi era."[82] In fact, the Dutch Restitutions Committee followed this line of reasoning – i.e. rejecting the claim after establishing the sale was involuntary and recommending a display alongside the exhibited objects in the museums as a commemoration of its provenance.[83]

On the notion of the involuntary nature of the sale the committee concludes "the sale of his paintings at the auction at Frederik Muller & Cie. in 1933, while at first sight prompted by economic factors, cannot be seen separately from Semmel's persecution by the Nazi regime in Germany. The Committee therefore concludes that this sale must be considered to have been involuntary."[84]

In the United States the question whether 'Fluchtgut' qualifies as 'unlawful looting' was addressed in a ruling by an Ohio court regarding the sale of a painting by Gauguin by Jewish refugee Martha Nathan in Switzerland in 1938. The court ruled in favour of the museum and held that:

> "In short, this sale occurred outside Germany by and between private individuals who were familiar with each other. The painting was not confiscated or looted by the Nazis; the sale was not at the direction of, nor did the proceeds benefit, the Nazi regime."[85]

In a similar US litigated case, regarding a claim by the Nathan heirs to a painting by Van Gogh in the Detroit Institute of Arts - sold by Martha Nathan in Switzerland in 1938 as well -, a Michigan court also ruled against the claimants.[86]

---

[81] SAP Report *7 March 2012*, pp. 19-21, 27.

[82] In the SP Glaser case, concerning an early sale in 1933 in Germany, stemming 'from mixed motives', the Panel introduced a similar approach: "we consider that the claimants' moral claim is insufficiently strong to warrant a recommendation that the drawings should be transferred to them. We also consider that, whenever any of the drawings is on show, the Courtauld should display alongside it a brief account of its history and provenance (..). SAP *Report in respect of eight drawings now in the possession of the Samuel Courtauld Trust* of 24 June 2009, at 34 and 47.

[83] (RC 3.128) as well as (RC 3.131), see fn. 79; in two cases concerning objects from the same Semmel collection (RC 3.126) of 2013, and (RC 1.75) of 2009), the artefacts were returned. This is explained by a difference in policy lines between cases that concern the Dutch State collection of heirless art and cases concerning other collections. In the last category the Committee will balance the interests of the parties, which turned out advantageous for the claimant in one of these cases (RC 3.126). In a fourth Semmel case (RC 1.127), the painting could not be identified as ever having been pre-war property of Semmel.

[84] Idem, (RC 3.128), (RC 3.131) and (RC 3.126).

[85] *Toledo Museum of Art v. Claude George Ullin, et al*., No. 3:06 CV 7031, US Dist. (N.D. Ohio, 28 December 2006), at 7. Concluding: "Defendants [the Nathan heirs, EC] can prove no set of facts that entitle them to relief."

[86] The claim was barred by the statute of limitations, *see Detroit Institute of Arts v. Ullin*, Slip Copy, 2007 WL 1016996 (E.D. Mich. 2007). For a pending US 'Fluchtgut' case see *Zuckerman v. The Metropolitan Museum* of *Art*, Index No. 1:16-cv-07665), Complaint, U.S. Dist. (C.D. New York, S. D., 30 September 2016).

On the whole, 'Fluchtgut' appear not to be well accepted as 'Nazi-loot' by national panels and less so by courts. However, the line is not clear. In the view of the present author bringing such sales within the notion of 'looting' over-stretches that definition.

1.4 Concluding remark on the substantive norm

Inconsistencies in outcomes – as seen in the categories of 'early sales', 'sales by art dealers' and 'Fluchtgut' sales - illustrate that no clear definition of what is considered 'Nazi-looting' within the context of the 'fair and just' norm exists. In addition to establishing what constitutes a 'forced sale' – and what are the limits of that concept – there are many other difficulties in determining a 'fair and just solution'. How, for example, to deal with the interests of a new possessor, who may have acquired the artefact for a considerable sum of money and in good faith (as in the French example in the introduction)? And how should earlier compensation and settlements influence the outcome of present-day claims? Is it justifiable to take into account the interests of the general public in cases involving important works of art in museums, in line of the 'universalist' notion of the cultural property debate?[87] If so, that would be an argument against return to private ownership. A financial settlement, in that view, would be the preferred solution, as in practice is often done. That, then, evokes another question if compensation was already awarded in the post-war period: when will a case be settled definitely? Further research into existing case law involving circumstances on the list given under 2.1 above and clarification of the norm would seem useful in this respect.

Every case is different and from that perspective an open norm ('fair and just') and alternative procedures with the flexibility to accommodate creative and fact-specific solutions may be needed. This requires the *availability* of neutral and transparent procedures to further develop that norm. At the procedural level, though, there appears to be a worrying discrepancy between the present 'legalistic' approach in countries like the US – for litigating 'big' cases – and the 'soft' ADR model based on non-binding 'moral' policy instruments in Europe.

2. Access to justice

The next part addresses access to justice: possibilities for the assessment of claims on their merits. The question discussed here is what neutral institution parties can turn to for clarification of the fair and just rule, given its non-binding (soft-law) status and abstract nature and obstacles in positive law. The Washington Principles, along with other soft-law instruments, stress the importance of a non-legalistic 'moral' approach and alternative dispute resolution. In these Principles the 44 signatory States agreed to "develop national processes (..), particularly as they relate to alternative dispute resolution mechanisms (ADR) for resolving ownership issues."[88] But what neutral ADR procedures *are* available? Where to turn to for a neutral assessment and interpretation of ambiguous facts?

2.1 ADR approach in Europe

In response to the call for 'fair and just' solutions and alternative (out-of-court) procedures for ownership issues, around the turn of the century a number of European countries set up alternative

[87] J.H.M. Merryman "Cultural property internationalism is shorthand for the proposition that everyone has an interest in the preservation and enjoyment of cultural property" in Cultural Property Internationalism, International Journal of Cultural Property (2005) 12:11-39. This argument is often used against restitution of artefacts looted in the past to source countries.
[88] Principle XI of the Washington Principles, see fn. 9.

procedures for dealing with Nazi-looted art claims: the *Spoliation Advisory Panel* in the UK, the *CIVS*[89] in France, the *Dutch Restitutions Committee* in the Netherlands, the *Beratende Kommission* in Germany, and the *Beirat* in Austria.[90] These are government-appointed panels specialised in out-of-court adjudication or mediation of Holocaust-related art claims. To summarise a few notable characteristics of the committees:[91]

- The Advisory Board of the Commission for Provenance Research in Austria ('Beirat'), established by the Art Restitution Law of 1998,[92] decides on the basis of proactive provenance research – ex officio – whether a specific loss of possession of a work of art that is now part of a federal collection should be considered void, in which case restitution will be recommended. This can also apply to items that were originally restituted after the War but subsequently became state property in the course of proceedings related to the Austrian export ban. As at November 2017 the Austrian Committee had issued 337 opinions.[93]
- The main objective of the French CIVS, established in 1999, is compensation for lost items, provided they were lost within the territory of France and during the Nazi occupation (i.e. under responsibility of the collaborating Vichy regime).[94] In practice this can result in a situation whereby a claimant has a compensation claim in France for the loss of an item alongside a claim for restitution of that same item from a museum in another country. As at June 2017 the CIVS had dealt with 3,259 cases involving personal property, of which 287 involved works of art.[95] In 2014 restitution was advised in four of these cases, concerning works belonging to the so-called MNR collection of heirless art.[96]
- The UK Spoliation Advisory Panel (SAP), which had dealt with 19 cases as at November 2017, was established in February 2000 in order to provide an alternative process to litigation and resolve claims relating to art lost during the Nazi era currently in UK public collections. As stated in its terms of reference, the Panel's function is to achieve a fair and just solution whereby it may take into account non-legal obligations such as the moral strength of a claim. [97] Claimants can submit claims to the Panel unilaterally; in the case of a joint request by claimant and owner the Panel can also consider claims relating to items in a private collection.
- The Dutch Restitutions Committee, established in 2001, has at November 2017 dealt with 148 cases regarding 1,556 objects. [98] Most of these objects are part of the Dutch State collection, more specifically belonging to the so-called NK collection of 'heirless art' - a term used to describe art collections left in the custody of a specific government and not returned to their pre-war owners in the years after the Second World War. All claims involving works in the State collection that were

[89] Commission pour l'indemnisation des victime de spoliations intervenues du fair de legislations antisemites en vigueur pendant l'Occupation (CIVS).
[90] For the official names, see above. For an overview of the committees: A. Marck and E. Muller 'National Panels advising on Nazi-looted art in Austria, France, the United Kingdom, the Netherlands and Germany – a brief overview', in: Campfens (2015), p. 41-91.
[91] Based on: Campfens (2015), p. 237.
[92] Art Restitution Act, Federal Law GazetteNo. 181/1998 www.provenienzforschung.gv.at/empfehlungen-des-beirats/gesetze/kunstruckgabegesetze.
[93] http://www.provenienzforschung.gv.at/empfehlungen-des-beirats/beschluesse/beschluesse-alphabetish/?lang=en.
[94] Marck and Muller (2015), p. 59.
[95] See http://www.civs.gouv.fr/images/pdf/thecivs/key_figures_june_2017.pdf.
[96] MNR stands for: 'Musees Nationaux Recuperation'.
[97] Terms of reference of the Spoliation Panel https://www.gov.uk/governments/groups/spoliation-advisory-panel.
[98] www.restitutiecommissie.nl/en/two_tasks.html. Information on the numbers provided for by the Restitutions Committee on 6 November 2017.

lost as a result of the Nazi regime are referred to the Restitutions Committee as a matter of general policy, while other parties can voluntarily submit a case. The Committee's task is to find a 'fair and reasonable' solution for these cases. The Dutch Museums Association has advised its members to refer claims involving works of art which cannot be settled amicably to the Committee.

- Germany's Advisory Commission on the return of cultural property seized as a result of Nazi persecution ('Beratende Kommission'), installed in 2003, mediates in disputes between public institutions and former owners or their heirs. A request for advice can be laid before the committee provided that at least one party is a public institution and all the parties involved approve. Through its advice, the Beratende Kommission seeks to find a fair and just solution in accordance with the Washington Principles and policy lines as laid down in the so-called Gemeinsame Erklärung. As at November 2017 the Kommission had issued 15 recommendations.[99]

In establishing these panels and their working methods the focus is on national issues like in France and the Netherlands the presence of 'heirless art' collections.[100] Given the obligations of governments under post-war agreements to return confiscated art to the individual owners (see above), such cases are essentially different from those involving artefacts that over time and perhaps after many transfers have ended up in possession of third parties, public or private.

The number of cases dealt with by the different committees varies, as do their working methods and their mandate. An important observation to make here – as Charlotte Woodhead points out on the situation in the UK – is that "in reality the Spoliation Panel's jurisdiction is the *only* formal dispute resolution rather than an *alternative* method".[101] The same applies in most other countries. For disputes regarding objects which do *not* fall within the mandate of these panels, it would appear that often no institutionalised neutral claims procedure is available. The Gurlitt case in Germany serves as an example of how problems are not limited to public collections, as well illustrating the complex legal status of looted art and the political minefield it can create for governments.[102]

2.2 Access to justice through courts of law

Parties looking for fair and just solutions to their disputes through regular courts may find themselves in a legal labyrinth – or vacuum, depending on your perspective. A common denominator in Nazi-looted art cases is that relevant facts are spread out over a period of some 70-80 years and involve multiple jurisdictions. Property law, on the other hand, differs from country to country (and in the US from state to state), and from period to period. In common law countries – like the UK and US – the position of the dispossessed owner is relatively strong based on the underlying principle that a thief cannot convey good title (the *nemo dat* rule).[103] In countries with a civil law tradition – including countries like the Netherlands, Switzerland and Germany – the position of the present possessor is stronger: a good-faith acquisition or even just the passage of time (adverse possession) may convey to a new possessor a perfectly valid legal title over artefacts that

[99] www.kulturgutverluste.de/Webs/EN/AdvisoryCommission/Recommendations/Index.html.
[100] For the Netherlands: the so-called 'NK-collection', in France the MNR.
[101] C. Woodhead 'Nazi Era Spoliation: Establishing Procedural and Substantive Approaches' in: Art Antiquity and Law, Vo. XVIII, Issue 2, July 2013.
[102] Related in C. Hickley *The Munich Art Hoard: Hitler's dealer and his secrets (*2015, Thames and Hudson).
[103] In the words of an American judge: "Throughout the course of human history, the perpetration of evil has inevitably resulted in the suffering of the innocent, and those who act in good faith. And the principle has been basic in the law that a thief conveys no title as against the true owner" (Silsbury v. McCoon, 3 N.Y. 379, 383–384 (1850); II Kent Comm. 14th ed., per Holmes, 324–325), cited in *Menzel v. List*, 49 Misc. 2d 300, 267 N.Y.S.2d 804 (1966).

were stolen.[104] All jurisdictions, however, have in common that possibilities for a court to assess a claim on its merits are subject to time limits (which vary between jurisdictions).[105] On a certain moment, the law adjusts itself to reality for the sake of legal certainty, the moment it does varies however widely. As explained above, while after the War special restitution laws were enacted in Europe in many cases these laws lost their effect today as a result of limitation periods.[106]

The international community acknowledged this fragmented situation and the need to ensure better protection for cultural objects in the future. As a result several international conventions have addressed the unlawful transfer of cultural objects and their return to countries of origin or former owners since 1954.[107] These conventions must be implemented in national law and – more importantly in the present context – do not have retroactive effect. Thus, they do not apply to Nazi looting.

Several of the international declarations on the subject of Nazi-looted art, signed by the international community as a follow-up of the 1998 Washington Principles, include recommendations to proceed with legislative reforms.[108] These recommendations, however, are characterized by vague and non-committal wording. In the 2009 Terezin Declaration, for example, it was declared that "Governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property, in order to achieve just and fair solutions, as well as alternative dispute resolution, where appropriate under the law."[109]

---

[104] For opposite outcomes in similar cases on Second World War looting (non-Holocaust related) the Dutch *Land Sachsen* ruling denying the claim on a painting looted from Dresden applying the absolute limitation period from the moment of the loss (ECLI:NL:HR:1998:ZC2644, Hoge Raad, 8 May 1998), versus UK and US cases that were honoured: (UK) *City of Gotha e.a. v. Sotheby's and Cobert Finance SA*, UK High Court of 9 September 1998; (US): *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982). For a German denial of a claim regarding Nazi-loss on the basis of the thirty years' absolute limitation period, see this 2016 ruling on a Pechstein painting: *Landesgericht Frankfurt am Main, Urt. V. 02.11.2016, Az.: 2-21 O 251/15*. See on the clash between legal approaches also e.g. *Malewicz v. City of Amsterdam*, 362 F.Supp.2d 298, at 302-304 (D.D.C. 2005); in this case Dutch law vs. US (NY) law.

[105] Time limitation may start to run from the moment of the loss of property, or from the moment of discovery of the object (or when one would reasonably have been able to discover it); or - as under New York - from the moment of 'demand and refusal'.
See Schönenberger (2009) and A. Chechi, The Settlement of International Cultural Heritage Disputes (OUP, 2014), p. 89.

[106] *NB* In France and Germany courts held claims admissible, either on grounds of a 'void' transaction (France) on on grounds that it had been impossible for claimants to meet deadlines set in restitution laws. In these cases – concerning clear confiscations - the artefacts had to be returned. See the German *Hans Sachs Postercollection* case (Bundesgerichtshof V ZR 279/10, 16 March 2012); in France: the 2017 *Bauer case* (fn. 1) and the *Gentili di Giuseppe* case (C. Gentili di Giuseppe e.a. v. Musee du Louvre, Cour d'Appel, 1st Division, Section A, 2 June 1999).

[107] UNESCO *[Hague] Convention for the Protection of Cultural Property in the Event of Armed Conflict* and its First Protocol, signed The Hague, May, 1954; UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Paris, 14 November 1970*; the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects Art. 5.2 (2), June 24, 1995.

[108] The 1999 Council of Europe resolution being most firm in recommending (13): "It may be necessary to facilitate restitution by providing for legislative change with particular regard being paid to: (i) Extending or removing statutory limitation periods; (ii) removing restrictions on inalienability [...] (iv) Waiving export controls. Supra, fn. 16.

[109] Supra, f.n.17.

Attempts at EU and UNESCO level to harmonise rules or developing methods to solve disputes regarding Nazi-looted artefacts have so far remained unsuccessful.

The 2009 UNESCO Draft Declaration of Principles Relating to Cultural Objects Displaced in Connection with the Second World War, which relied on a restitution model based on intergovernmental return as in the post-war Inter-Allied model (see above), was never adopted. The main reason for that seems conflicting views on the issue of 'restitution in kind' – i.e. on the legality of keeping the artefacts taken earlier from the territory of Germany by the Red Army as War reparations.[110] With regard to an interstate system of returns and its (in)efficiency today with regard to ensuring rights of individual former owners, a consideration to keep in mind is that families that owned these works often are not nationals of the country where the looting took place.

At European Union level a resolution was adopted by the European Parliament in 2003 on artefacts looted during Second World War.[111] In the resolution, that was never followed up, the EP stresses the lack of legal certainty, transparency and coherent approach and calls upon the European Commission to launch an investigation into the development of a "transparent remedial structure" for disputes. The resolution emphasises that these measures "should not only contribute to a more consistent and predictable internal market in art works, they should also improve access to justice and respect the rule of law". Since 2014 the European Parliament has taken on the subject again:[112] it has been working on a resolution calling for legislation on the subject of provenance research and the creation of central databases that would document (past) ownership information, to enhance due diligence in the art trade. Whether such legislation can provide a solution for dispute resolution of restitution claims – while the objective seems to facilitate such claims by making information more accessible – seems uncertain.

2.3 The US approach

In general, legal claims to Nazi-looted art pose major challenges to former owners and, more often than not, will *not* be supported by the law. The US legal system forms an exception. Claimants have more success in litigating Nazi-looted art cases and courts are more willing to exercise jurisdiction – at least in cases where the loss was clearly the result of confiscation and in as far as it concerns courts in California and New York. In this sense, in 1966 a claim by Erna Menzel, a Jewish art collector, to a Chagall painting found in possession of Alfred List was honored by the New York Supreme Court.[113] The painting had been confiscated from Menzel in 1941 in Brussels and she had been looking for it ever since:

> "The court has found that (…) it was pillaged and plundered by the Nazis. No title could have been conveyed by them as against the rightful owners. The law stands as a bulwark against the handiwork of evil, to guard to rightful owners the fruits of their labors."

The Act of State Doctrine would normally require a court to refrain from examining the validity of acts by foreign governments (like seizures or post-war restitution decisions), and is for example a

[110] UNESCO, 'Draft Declaration of Principles Relating to Cultural Objects Displaced in Connection with the Second World War' (31 July 2009) 35 C/24. Annex IV to the Draft Declaration (n. 81). See also Campfens (2015), p. 35-36.
[111] Willy CEH De Clercq, 'Report on a legal framework for free movement within the internal market of goods whose ownership is likely to be contested' (European Parliament – A5-0408/2003).
[112] Procedure file 2017/2023 (INL) < www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2017/2023(INL)#basicInformation>.
[113] *Menzel v. List*, 49 Misc. 2d 300, 267 N.Y.S.2d 804 (1966).

reason for courts - in the US and elsewhere - to dismiss claims regarding artefacts confiscated and nationalised in the 1920s by the Soviet authorities.[114] In the case of Holocaust takings, however, this doctrine does not apply in the US as the US never recognised the Third Reich as a sovereign state.[115] As a side note – interesting in connection with the discussion of the interests of good faith new possessors – in the *Menzel v. List case* List was awarded in a third party action damages amounting to the value of the painting, payable by the art dealer who had sold him the Chagall (i.e. redress 'upstream').[116]

Following the *Altmann* litigation (2001-2004) US courts are also able to hear Nazi-looted art cases concerning artefacts not physically in the US, even where post-war acts by recognised states are involved (for example post-war restitution decisions).[117] The Altmann litigation dealt with six paintings by Gustav Klimt, amongst them the famous "Lady in Gold", that had belonged to the Jewish Bloch-Bauer family and were confiscated during the Nazi era in Vienna. They had come into the possession of the Austrian National Gallery, which refused to return them after the War. The case is considered seminal because it opened the doors of the US courts to claimants of Nazi-looted art seeking redress against foreign nations or institutions (read: national museums), in spite of the rule stating that foreign states and their acts are normally exempt from jurisdiction in another state. The implication of the Supreme Court's 2004 ruling is that, in spite of such immunity as provided for in the US by the Foreign Sovereign Immunity Act (FSIA), Holocaust confiscations fall under an exception.[118] This exception "abrogates sovereign immunity in any case where rights in property taken in violation of international law are in issue and that property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." [119] As to this last condition of 'commercial activity', the Altmann case made clear that availability of a museum catalogue in the US is sufficient. Such a low threshold illustrates US courts' readiness to take jurisdiction over Holocaust-related cases.[120] Also interesting in this regard is the rejection by the Californian District Court in 2001 of the plea by Austria that the matter should have been litigated in Austria (the US being a forum non conveniens):

> "Plantiff's claims, if asserted in Austria, will most likely be barred by the statute of limitations of thirty years. (…) If Plaintiffs' claims are barred by the statute of limitations, she

[114] E.g. *Stroganoff-Scherbatoff v. Weldon*, No. 74 Civ. 626, 74 Civ. 5750, US Dist, S.D. New York, 18 May 1976. The Soviet government was recognized by the US in 1933. A recent case concerning Bolshevik takings: *Konowaloff v. The Metropolitan Museum of Art*, No. 11-4338 (2d Cir. 2012).

[115] See (*Menzel v. List*) fn.113.

[116] The value of the painting at the time of trial, awarded on the basis of a breach of implied warranty: *Menzel v. List v. Perls*, No. 24 N.Y. 2d 91, NY Ct. of Appeals, 26 February 1969. Similarly, in the case *Rosenberg v. Seattle Art Museum v. Knoedler-Modarco* the Knoedler gallery in the US was held liable to compensate the museum for its loss of a Matisse painting (l'Odalisque) after restitution to the heirs of Rosenberg, who lost the Matisse painting by confiscation in Paris (Jewish) in 1941. See: *https://phone.unige.ch/art-adr/cases-affairede*.

[117] *Altmann v. Republic of Austria*, 541 U.S. 677 (4/6/2004).

[118] It was a 'Statutary Holding' allowing retro-active application of the exceptions in the FSIA to foreign States' immunity from suit and by doing so, allowing for US courts to take on jurisdiction. Parties then agreed on international arbitration.

[119] As cited in *David L. de Csepel, et al., v. Republic of Hungary, et al.*, No. 10-1261 (ESH), Memorandum Opinion, U.S. Dist. (C.D. Columbia, 14 March 2016), at p. 28.

[120] Schönenberger (2009), p. 213, in fn. 1102 cites from a write-up by G. Cohen for the book of M.J. Bazyler, (Holocaust Justice, New York/London, 2003) "The author (…) posits that the 'real hero' is the American justice system, the only forum in the world where Holocaust claims can be heard today".

> would be left without a remedy; clearly, therefore, Austria is not an adequate alternative forum for Plaintiff's claims."[121]

This trend of US courts being willing to hear Holocaust-related art claims is expected to get another boost with the adoption of two bills in 2016 and a recent verdict:

- The so-called *HEAR Act*,[122] which establishes for claims to Nazi-confiscated art a federal (uniform) limitation period of six years after the actual discovery of the object, basically eliminating so-called 'technical defences' and allowing claims to be considered on their merits. The rationale is stated as follows: "[..] the enactment of a Federal law is necessary to ensure that claims to Nazi-confiscated art are adjudicated in accordance with United States policy as expressed in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration." The extension of limitation periods is found in Section 5, (a): "This bill will allow civil claims or causes of action for the recovery of artwork or certain other property lost between January 1, 1933, and December 31, 1945, because of Nazi persecution to be commenced within six years after the claimant's actual discovery [...etc. giving further possibilities]." It provides for a 'sunset' clause in 2029;
- The *Foreign Cultural Exchange Jurisdictional Immunity Clarification Act*,[123] initially aimed at providing greater security for foreign museums sending their works on loan to the US, however with two notable exceptions: the first being "Nazi-era claims" and the second artefacts "taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group." Thus, artefacts (owned by foreign states) on loan in the US subject to claims based on such circumstances, are not barred from litigation in US courts.
- A 2016 ruling in the case *Simon v. Republic of Hungary*. Whilst not dealing with artefacts the ruling is relevant since the court argued that confiscation of private property can, in itself, constitute genocide.[124] Leaving aside the matter of whether this interpretation of the term 'genocide' is consistent with the generally accepted notion of genocide,[125] it is another sign that US courts are willing to adjudicate cases involving Holocaust losses (in this case confiscations by the Hungarian Wartime authorities).

2.4 US jurisdiction over European cases

Possibilities for claimants to litigate Holocaust-related art claims in the US exist and are widening. This would seem a positive development in terms of ensuring access to justice and will facilitate further clarification of restitution principles by US courts. However, from the European perspective, it may have undesirable consequences. One aspect of this trend is that cases that could be described

[121] Maria V. Altmann v. Republic of Austria, et al., 142 F. Supp. 2d 1187 (CD Cal. 2001), 1209.
[122] S.2763 - Holocaust Expropriated Art Recovery Act of 2016, 114th Congress, 2nd session, 4/1/2016 (2015-2016). See also N.M. O'Donnell 'The Holocaust Expropriation Art Recovery Act, a Sea Change in US Law of Restitution', AAL XXII 3 (October 2017), p. 273-279.
[123] H.R.6477 - Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, 114th Congress (2015-2016).
[124] *Simon v. Republic of Hungary*, 2016, No. 14-7082, (D.C. Cir. Jan. 29, 2016): "Such takings, did more than effectuate genocide or serve as a means of carrying out genocide. Rather, we see the expropriations as themselves genocide." This notion was confirmed in the *Herzog* verdict two months later: *De Csepel et al v. Republic of Hungary, 2016,* see fn. 119.
[125] *Convention on the Prevention and Punishment of the Crime of Genocide* (GA Res. 260 A (III) of 9 December 1948); www.ohchr.org/EN/ProfessionalInterest/Pages/CrimeOfGenocide.aspx.

as 'typically European' – as they concern European collections and European parties – are being assessed by US courts.[126] A schematic overview follows.

2.4.1 Earlier examples

Earlier examples of such forum shopping are:

- The *Altmann* case, discussed in the previous paragraph[127], concerning six Klimt paintings that had been seized and not returned by Austria to the heirs of the former owner, part of Austrian museums. After in 2004 the US Supreme Court ruled in favour of the claimants – allowing jurisdiction by US courts - the case was settled by an arbitral award in 2006 holding that most of the claimed Klimt paintings should be returned to Altmann;[128]
- Litigation regarding Egon Schiele's "Portrait of Wally" in the collection in the Leopold Museum in Vienna that lasted from 1998-2010.[129] Litigation eventually ended after parties agreed to settle their dispute, including payment of 19 million dollars to the heirs of the former owners.[130]
- Litigation about a collection of Malevicz paintings of the Amsterdam Stedelijk Museum that had been sent on short-term loan in the US (*Malewicz v. City of Amsterdam)*.[131] Although in the *Malevicz case* Nazi-confiscation was not an issue, the loss occurred within the context of the Nazi-period (the 'degenerate' paintings had to be hidden after Malevicz had left them in Berlin) and, similar to Klee case mentioned in the introduction,[132] the owners had been persecuted in the Soviet Union which was the reason why they could not have claimed them earlier. The Malevicz case was settled between the heirs of Malevicz and the City of Amsterdam after a for the heirs favourable outcome. The 2005 and 2007 district court rulings enabled jurisdiction by US courts even though immunity for seizure arrangements had been in place (immunity from seizure does not mean immunity from suit).[133]

2.4.2 Examples of ongoing US litigation about 'European' cases

- 2005: Pissarro in Madrid[134]

Litigation regarding the painting "Street Scene" by Pissarro that is held by the Thyssen-Bornemisza Museum in Spain has been ongoing since 2005. The painting had been part of the collection of the (Jewish) Cassirer family and was sold in Germany in 1939 and was bought by Baron Thyssen-

---

[126] See on the expected favourable consequences of this act for claimants: NYT 27 February, 2017 <https://www.nytimes.com/2017/02/27/arts/design/a-suit-over-schiele-drawings-invokes-new-law-on-nazi-looted-art-html>; O'Donnell (2017).

[127] See fn. 121 and accompanying text.

[128] *Republic of Austria et al. v. Maria V. Altmann*, 541 U.S. 677 (U.S. 2004). An overview in ArThemis database Https://plone.unige.ch/art-adr/cases-affaires/6-klimt-paintings-2013-maria-altmann-and austria/CaseNoteSixKlimtpaintingsMariaAltmannandAustria.pdf/view.

[129] *United States v. Portrait of Wally, a Painting by Egon Schiele*, No. 99 Civ. 9940 LAP, Southern District of New York.

[130] Stipulation and Order of Settlement and Discontinuance (*United States v. Portrait of Wally, a Painting by Egon Schiele*, No. 99 Civ. 9940 LAP, Southern District of New York).

[131] Supra, fn. 3.

[132] *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322 (D.D.C. 2007) and *Malewicz v. City of Amsterdam*, 362 F.Supp. 2d 298 (D.D.C. 2005): foreign states lending art to the United States are not *per se* immune from jurisdiction under the FSIA, even if the loaned objects were precluded from seizure under the Immunity From Seizure Act (IFSA).

[133] This case was reason for the IFSA to be amended, see fn. 123. See the case note on Arthemis: https://plone.unige.ch/art-adr/cases-affaires/14-paintings-2013-malewicz-heirs-and-city-of-amsterdam.

[134] *Cassirer v. Thyssen-Bornemisza Collection Foundation*, Case No. CV 05-3459-JFW-E (C.D. Cal. June 4, 2015)

Bornemisza at a New York gallery in 1976. The latest verdict of June 2015, rendered under Spanish law, found in favour of the Spanish museum. Interestingly, in the conclusion the judge urged the museum to "pause, reflect and consider whether it would be appropriate to work towards a mutually agreeable resolution of this action, in light of Spain's acceptance of the Washington Conference Principles and the Terezin Declaration, and, specifically, its commitment to achieve 'just and fair solutions' for victims of Nazi persecution." In other words, Spanish law was not considered to be just and fair.

- 2010: *Herzog collection in Hungary*[135]

In 2010 the Hungarian State and several Hungarian institutions were sued over the ownership of forty-four artefacts – including paintings by El Greco, Velázquez, Van Dyck, Courbet and Corot – once owned by Baron Herzog, a Jewish-Hungarian art collector and confiscated in Hungary during the Nazi period. The ruling of March 2016 confirms that confiscations during the Holocaust violate international law and, moreover, along with the view as developed in the Simon case some months before[136] that such confiscations can constitute genocide *per se* and therefore fall under the jurisdiction of US courts regardless of the nationality of the aggressor or the victim.

- 2014: *The Guelph Treasure in Berlin*[137]

After the denial in 2014 by the German Beratende Kommission of the claim regarding the "Welfenschatz" ("Guelph Treasure")[138] – a hoard of medieval treasures originating from Brunswick Cathedral in Germany – the Berlin Museum Foundation (SPK) and German Government were sued in Washington. The suit was filed on behalf of family members of the two art dealers who acquired the objects from the Duke of Brunswick in 1929 and sold most of the objects to the Dresdner Bank on 14 June 1935. On 31 March 2017 the US District Court ruled in favour of US jurisdiction, under referral to the brand-new HEAR Act: "Congress specifically recognized and did not foreclose the use of litigation as a means to resolve claims to recover Nazi-confiscated art".[139]

- 2015: *Schiele in possession of London art dealer Nagy*[140]

An example of litigation concerning non-museum property concerns proceedings initiated against London-based art gallery Richard Nagy regarding an Egon Schiele work. The work once belonged to Fritz Grünbaum, a Viennese performer persecuted and murdered in Dachau concentration camp who owned an art collection containing eighty-one works by Egon Schiele. Nagy has one of these works in his possession. An earlier ruling of 2012 regarding a work from the same collection now in possession of a US art dealer dismissed the claim on the grounds of laches (essentially: the heirs had waited too long to seek the work's return).[141] The circumstances of the loss are unclear, it is argued that the works were not looted but validly sold after the War by Grünbaum's sister-in-law. Then

[135] *David L. de Csepel, et al., v. Republic of Hungary, et al.*, No. 10-1261 (ESH), Memorandum Opinion, U.S. Dist. (C.D. Columbia, 14 March 2016)

[136] See fn. 124.

[137] *Philipp et al. v. Federal Republic of Germany et al.* No. 1:15-CV-00266, Complaint, U.S. Dist. (C.D. Columbia, 23 February 2015)

[138] Above, fn. 63 and section 1.3.1.2.

[139] See O'Donnell (2017), p. 277; *Philipp et al. v. Federal Republic of Germany*, see fn. 137,, Ruling D.D.C. 31 March 2017.

[140] *Timothy Reif and David Fraenkel, as Co-Executors of the Estate of Leon Fischer and Milos Vavra v. Richard Nagy,* No. 161799/2015, Summons, Supreme Court of New York (New York County, 16 November 2015); NB Nagy had sent the specific work to a US fair - so in this aspect the Nagy case stands out from the others mentioned above.

[141] *Bakalar v. Vavra* 819 F. Supp. 2d 293 (S.D.N.Y. 2011) and 500 Fed. App'x 6 (2d Cir. 2012)

again, a third work of the Grünbaum collection was subject to a settlement agreement awarding a certain sum of money to the heirs when it was put up for auction at Christie's.[142]

- September 2016: damages for loss of 306 paintings[143]

In *Toren v. Federal Republic of Germany* the heir of David Friedmann, David Toren, seeks the return or the present value of 306 works of art from the German State as redress "for the genocidal expropriation of property". Allegedly, these works are listed in archival records of the seizure of Friedman's art collection during the Nazi era but their location is (as yet) unknown.[144] In May 2015 one painting on the list, "Riders on the Beach" by Max Liebermann which was located in the Gurlitt collection, was returned to Toren.[145]

- September 2016: *Matisse in London*[146]

This dispute concerns "Portrait of Greta Moll" by Matisse in the National Gallery, which according to the complaint was sent to Switzerland in the post-war period by the Jewish owner "in order to protect the painting from the danger of looting by Allied troops and in particular from Russian troops."[147] Seemingly no Holocaust loss is at issue in this case, and the claim was dismissed in September 2017 on the grounds of lack of jurisdiction and because the claimants "did not diligently pursue their rights to the Painting given that they knew as of the late 1970s or early 1980s that the National Gallery owned the Painting, which they believed had been stolen from Greta Moll."[148]

- December 2016: *Beckmann, Klee and Gris in Munich*[149]

In December 2016 the Bavarian Staatsgemäldesammlungen and the Bavarian State were sued in a New York court by the heirs of art dealer Flechtheim, a Jewish Berlin dealer in modern art, over eight paintings by Beckmann, Klee and Gris in a Munich museum. As seen above in section 1.3.1.2, previously two Flechtheim cases had been considered by the German Beratende Kommission. The first claim was honoured, while the later one – concerning 'Fluchtgut', namely a sale in London in 1934 - was dismissed.[150] In the case pending before the New York District Court, the Museum argues the works were sold before Hitler came to power.

---

[142] XX

[143] *Toren v. Federal Republic of Germany*, No. 1:16-cv-01885, District of Columbia Dist.

[144] J.V. Staff in 'Jewish Voice', 28/9/2016 and N. O'Donnell's Art Law Report of September 29, 2016.

[145] The heirs of the late Cornelius Gurlitt - who inherited nearly 1,500 works of art from his father Hildebrand, an art dealer of the Nazi era - endorsed the return after recommendation of the Gurlitt Task Force. Toren had filed suit in the US for the Liebermann in 2014 in *David Toren v Federal Republic of Germany and Free State of Bavaria*, No. 14-cv-00359-ABJ, D.D.C., March 5, 2014; See also: N. O'Donnell, Art Law Report May 13, 2015.

[146] Green et al v. The National Gallery of Art, London, The American Friends of the National Gallery of Art, London, and Great Britain, No. 1:16-CV-06978, U.S. Dist. (New York, S.D.).

[147] Ibid., complaint 6 September 2016.

[148] Ibid, Memorandum Opinon & Order of 21 September 2017: "(T) there has been no taking in violation of international law as required by FSIA, and the Court does not have jurisdiction over the National Gallery and Great Britain pursuant to FSIA's expropriation exception"(p.12)

[149] *Michael R. Hulton and Penny R. Hulton v. Bayerische Gemäldesammlungen*, No. 16-CV-9360, U.S. NYSD, Complaint 5 December 2016.

[150] *Recommendation of the Advisory Commission on the return of cultural property seized as a result of Nazi persecution*, of 9 April 2013; Recommendation of the Beratende Kommission in the matter of the *Heirs of Alfred Flechtheim v. Stiftung Kunstsammlung Nordrhein-Westfalen*, Düsseldorf, of 21 March 2016. Supra, fn. 61 and 62.

[150] Recommendation of 20 March 2014 of the Beratende Kommission regarding the 'Welfenschatz', see < https://www.kulturgutverluste.de>; See footnote 63

- March 2017: *Kandinsky in Munich*[151]

In March 2017 litigation was initiated in New York over Kandinsky's "Das Bunte Leben" in the Munich Lenbachhaus museum, owned by a German bank, on allegations the work was confiscated from the Dutch Lewenstein family during the German occupation. The claim seeks damages at least equal to the estimated value of the painting, stated in the complaint as $ 80,000,000.'[152]

2.5 Concluding remark on access to justice

The current legal framework is of an amazing diversity as to the possibilities and impossibilities in terms of getting claims resolved on their merits by a neutral forum. There is a discrepancy between the approach and possibilities in the US and Europe. In the US, where the interests of original owners of stolen artworks are traditionally taken more into consideration, courts are willing to take jurisdiction over works that were confiscated by the Nazis, also in cases that concern works in Europe or are under an immunity for seizure arrangement on loan in the US. This will intensify with the adoption of the HEAR Act.

This does not mean however that the ADR model has been abandoned in the US, given the following statement in the aforementioned HEAR Act:

"While litigation may be used to resolve claims to recover Nazi-confiscated art, it is the sense of Congress that the private resolution of claims by parties involved, on the merits and through the use of alternative dispute resolution such as mediation panels established for this purpose with the aid of experts in provenance research and history, will yield just and fair resolutions in a more efficient and predictable manner." [153]

The rationale appears to be that parties should attempt, seriously and in good faith, to solve their dispute by means of ADR before resorting to litigation in the US. In arguing for example that a US court is not the correct forum to litigate a claim concerning artefacts in European museums before local remedies have been exhausted – the 'forum non conveniens' argument – it would be important to have an efficient and authoritative ADR procedure in place.[154] In other words: the installation of a European ADR committee with certain guarantees as to due process might reduce the need to take cases overseas.

In Europe, however, the present situation is highly fragmented. In some European States the Washington Principles seem not implemented at all.[155] In other countries, neutral adjudication on the merits of cases is left to the respective national panels. Cases beyond that mandate tend to be settled – provided parties are willing –; the 'moral' approach. Such settlements will obviously

---

[151] *Robert C. Lewenstein, Francesca M. Davis and E. Hannchen Guidotti v. Bayerische Landesbank*, No. 17-cv-0160, U.S. NYSD, Complaint 3 March 2017; a Guardian report on the issue: https://www.theguardian.com/artanddesign/2017/mar/03/banks-kandinsky-painting-looted-nazis-family-colourful-life.

[152] Ibid., Complaint page 22.

[153] Section 8, HEAR Act, see fn. 122.

[154] "The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; [...] Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system. 'Interhandel case' (Switzerland v. United States of America), Preliminary Objections, 1959 I.C.J. 6, 26-27.

[155] See, e.g. W.A. Fisher and R. Weinberger "Holocaust-Era Looted Art: A Current World-Wide Overview", Claims Conference (2014) http://art-69bd.kxcdn.com/wp-content/uploads/2014/11/Worldwide-Overview.pdf.

depend on the bargaining chips brought to the table.[156] One such bargaining chips is the possibility of taking a case to the US for costly and lengthy litigation.

3. Conclusions and final observations

The observations above are based on ongoing research and are intended to incite further discussion. Many issues that also deserve attention are not included.

While Nazi looting is a moral issue the thesis underlying this article is that a legal approach to dispute settlement is needed. The role of law should be to set clear, consistent and transparent standards to ensure that equal cases can be treated equally and outcomes are fair and just. To summarise:

1) The soft-law norm of finding 'fair and just solutions' for Nazi-looted art is open to many different interpretations. Some believe looted objects should always be returned to their former owners – 'once stolen, always stolen' – while others believe 'fair and just' means that the various interests should be weighed. The first section of this paper seeks to highlight the lack of clarity surrounding the 'fair and just' norm. The thesis is put forward that the rule is based on two elements. First, the intangible heritage quality of artefacts and their ability to act as a symbol for lost family histories is reason for a special (favourable) treatment: these cases are not merely about ownership rights. Furthermore, the fair and just rule is meant for involuntary losses – a confiscation, theft or sale under duress. A sale under duress is a sale where there is a direct link between the persecution of the owner and the loss of the object. If that link cannot be established, the 'fair and just' rule does not apply.

2) Access to justice is limited. The Washington Principles, along with other soft-law instruments, stress the importance of a non-legalistic 'moral' approach and alternative dispute resolution (ADR) for resolving ownership issues. And indeed, parties searching for 'fair and just' solutions on the merits of a case *need* alternative procedures as most legal systems do not support claims regarding losses that took place so many years ago. Increased possibilities to litigate (Holocaust-related) cases in the US, however, raise the question of how this trend will reflect on the European situation. This article proposes that the (institutional) vacuum in terms of access to justice be addressed. A lack of clarity at both the substantive and the procedural level – what is the norm and who will clarify it – may otherwise result in legal insecurity, inconsistent outcomes and, potentially, injustice. Or, as the European Parliament put it in 2003:

".. the current situation lacks legal certainty, transparency and a coherent approach. This is a cross-border issue calling for a cross-border solution."[157]

To fill the institutional 'vacuum' in jurisdictions where no *neutral* forum is in place which can apply soft-law norms that reflect present-day morality, the establishment of an international claims procedure could be considered. Such establishment would also meet the obligation that states have assumed – by signing soft-law instruments like the Washington Principles and the Terezin Declaration – to develop mechanisms to ensure that the 'fair and just' norm is upheld. The late Professor Norman Palmer voiced this idea in 2014 as follows:

"...the formation of a body that can offer a variety of services, to which nations and individuals might refer claims. Either on an ad hoc basis or on the basis of a formal agreement. (It) might offer a

[156] F. Shyllon 'The Rise of Negotiation (ADR) in Restitution, Return and Repatriation of Cultural Property: Moral Pressure and Power Pressure' (2017) XXII *Art Antiquity and Law* 130-142.
[157] See f.n.111

variety of approaches to claims: arbitration, mediation and conciliation, expert neutral appraisal, binding expert opinion, or the straightforward process of recommendation and moral assessment that lies at the heart of the English regime in this field."[158]

It is a separate matter where such an organisation would fit in – UNESCO, ICOM, the European Union or the Council of Europe – or rather should be a standalone. It also exceeds the limits of this paper to delve into the question of whether such a process should be voluntary or semi-obligatory – for example by incorporating in the general terms of art fairs and auction houses the requirement that certain disputes be referred to the body in question, or including a declaration of intent in the codes of conduct of museums and art dealer associations. The paramount issue would seem to be the neutrality and transparency of such an organisation, and the authority of its working methods and solutions found. With regard to the idea of such a specialized ADR body, a practical argument in conclusion. Recognition of the rights of victims of the Holocaust to their lost cultural objects has triggered wider awareness and discussion on the legality of looting of cultural objects - in the past and present - and on the rights of former owners (individuals or groups, like indigenous peoples).[159] A pro-active (and international) approach might help to structure this field. Whilst the historical background of the actual looting may be specific to a certain place, the effects of that looting can be felt in any country with an art market, art collectors or museums.

[158] See, fn.14. The thought builds on the 2003 Resolution of the European Parliament (section 2.2, fn. 111) and was supported by a recent study by M.A. Renold and ArThemis (2016), see: < http://publications.europa.eu/resource/cellar/**f6ood443**-20a9-11e6-86do-01aa75ed71a1.0001.03/DOC_1 >.

[159] An illustration of public awareness in other areas: 'Dispossessions of Cultural Objects between 1914 and 1989/1991' is the subject of a conference organized by the Slovenian France Stele Institute of Art History in March 2018.