# A Note in Favour of Clear Standards

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**Abstract**

Some believe looted objects should always be returned to their former owners: 'once stolen, always stolen'. Others believe 'fair and just' means that the interests of the various parties should be balanced. Of a more fundamental nature, in my view, is the lack of clarity about what should qualify as 'Nazi-looted art': what lies at the core of this concept and what are its limits? Does the rule – even in the broad sense[1] – include, for example, the loss through a sale by a refugee in a neutral country, like Switzerland, on way to safety, or a sale that took place before or after the Nazi-era in a specific place (i.e. without a direct and proximate causal link to persecution)? This paper is an attempt at an analysis of the 'fair and just' norm. This, by looking at the (soft) law instruments, its legal setting, and case law of the past years. Focus is on the question what constitutes 'unjustified Nazi-looting' and its limits as it relates to a 'forced sale'.

**Keywords:** Washington Principles, Nazi looting, Stedelijk Museum, restitution.

1 Including loss under duress. The narrow sense would be confiscation as in seizure based on racial legislation.

## Introduction

What kinds of losses constitute 'Nazi-confiscation' and what circumstances are key to a 'fair and just solution' to disputes regarding Nazi-looted art? A case dealt with by the Dutch Restitutions Committee in a recommendation of October 2018, may serve as an introduction to these questions.[2] The recommendation concerns the painting 'Bild mit Häusern' by Wassily Kandinsky that, since its sale by the Jewish owner in 1940, is part of the collection of the Amsterdam Stedelijk Museum. The committee rejected the claim to this painting for which, as a first step, it established that the sale of the work in 1940 did not constitute Nazi-confiscation or theft, however, could not be seen in isolation from the Nazi regime either. After this the DRC continued to weigh the museum interests against the interest of the claimants, and concluded that the museum's interest outweighed those of the claimant: 'the work has important art historical value and is an essential link in the limited overview of Kandinsky's work [..] and is included in the [museum's] permanent display'; whereas the claimant – no direct family of the pre-war owner – had not shown an 'emotional or other intense bond with the work'. The representative of the claimants announced that he planned to appeal the outcome, stating that weighing the museum's interests is incompatible with the Washington Principles.[3] Under Dutch guidelines, however, outcomes to Nazi-looted art claims do not solely depend on the question if something is qualified as a 'Nazi-related loss'. They may also depend on parties' interests in a given work of art. In fact, according to those guidelines, the Restitutions Committee may also take the public interest (i.e. accessibility of a work) into account.

These different views may illustrate that the 'fair and just' norm is all but crystal clear. And therefore, open to many different interpretations. Some believe looted objects should always be returned to their former owners: 'once stolen, always stolen'. Others believe 'fair and just' means that the interests of the various parties should be balanced. Of a more fundamental nature, in my view, is the lack of clarity about what should qualify as 'Nazi-looted art': what lies at the core of this concept and what are its limits? Does the rule – even in the broad sense[4] – include, for example, the loss through a sale by a refugee in a neutral country, like Switzerland, on way to safety, or a sale that took place before or after the Nazi-era in a specific place (i.e. without a direct and proximate causal link to persecution)?

What follows is an attempt at an analysis of the 'fair and just' norm. This, by looking at the (soft) law instruments, its legal setting, and case law of the past years. Focus is on the question what constitutes 'unjustified Nazi-looting' and its limits as it relates to a 'forced sale'.

## The 'Fair and Just' Rule

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'. [5] This norm has not been much clarified by the various later international declarations.[6] 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 […].[7]

The focus in many of the soft-law declarations is on Holocaust-related losses (by Jewish owners).[8] 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 collaborators'.[9] Although the

2 *Binding opinion regarding the dispute about restitution of the painting Painting with Houses by Wassily Kandinsky, currently in the possession of Amsterdam City Council,* case number RC 3.141 of 22 October 2018.

3 See: https://www.nrc.nl/nieuws/2018/11/01/erven-willen-advies-kandinsky-uit-stedelijk-ongedaan-maken-a2753547.

4 Including loss under duress. The narrow sense would be confiscation as in seizure based on racial legislation.

5 '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.

6 An overview in E. Campfens (ed.) 'Fair and Just Solutions? *Alternatives to litigation in Nazi-looted art disputes: status quo and new developments* (Eleven 2015). 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.

7 *Terezin Declaration on Holocaust Era Assets and Related Issues of June 2009*: <http://www.holocausteraassets.eu/program/conference-proceedings/declarations/>, p. 4-5.

8 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.

9 Terezin Declaration, p. 4 (supra fn.6).

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'.[10]

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?

**The 'Merits of a Claim': What Circumstances?**

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 this 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 new possessors acquired title. Another element 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. 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 list of circumstances that may be of importance in determining the outcome of present-day restitution cases:[11]

- 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).

The first two points – identification as former property and loss through looting – could be classified as basic requirements for the admissibility of a claim.[12] 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 the second question will be the focus of the next section.

**Nazi-Looting**

As is sufficiently known, the Nazis looted artefacts in many different ways. These included both pillage of artefacts in occupied territories (as has happened throughout history) and looting of private property in the context of racial policies and persecution. It is this latter category that underlies the (soft-law) norm. This means that, although a wider notion of 'unlawful Nazi looting' does exist – prohibited under general international law and the Inter-Allied Declaration[13] – this wider category should not be confused with 'Nazi-confiscated art'. This last category – aimed at redress for victims of the Nazis who lost their artefacts as a result of persecution – is essentially a matter of international human rights.[14]

The close causal link between persecution, loss of possession and a right to reparation can be understood from the first article of US Law 59, the post-war restitution law for the US Zone of Allied-occupied Germany.[15] 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*'*.[16]

10 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.

11 This list is based on research and personal experience, and open for debate.

12 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).

13 *Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation and Control* (5 January 1943). Furthermore, pillage (transfer) of artefacts from occupied territories is prohibited by international customary law, as codified in the *1907 Hague Convention respecting the Laws and Customs of War on Land,* 205 CTS 277.

14 Case-law specifically in the US confirms this human rights connotation, e.g. the 2005 Altmann and 2016 Simon cases (*Altmann v. Republic of Austria*, 541 U.S. 677 (4/6/2004); *Simon v. Republic of Hungary*, No. 14-7082, (D.C. Cir. Jan. 29, 2016).

15 'Law No. 59 of the Military Government in Germany, US Zone: Restitution of Identifiable Property'.

16 Ibid. art. 1

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 and it can be seen as an evolving right of individual former owners (or groups of people) to their lost cultural objects.[17] 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 following 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 Reichsleiter Rosenberg (ERR) - qualify, as do the so-called Judenauktionen ('Jewish auctions' set in stage by the Nazi's).[18] In short, all transfers directly based on certain racial legislation under Nazi rule.[19] But what are the limits to the notion of 'Nazi-looted art', and what exactly is a forced sale?

**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.[20] 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: [21]

- 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.[22] In view of the fact that the losses occurred a long time ago and that facts are not 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

17 E. Campfens 'Whose cultural heritage? Crimean treasures at the crossroads of politics, law and ethics', Art Antiquity and Law, Vol. XXII, issue 3, p. 205-206.

18 E.g. the various *Gentili di Giuseppe* cases, a.o. in France (*Christiane 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.

19 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).

20 *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.

21 N. Robinson 'War Damage Compensation and Restitution in Foreign Countries' (1954), 16 Law and Contemporary Problems 347-376.

22 With 'European Panels' are meant special Committees tasked with the adjudication of Nazi-looted art claims. In the German situation focus is on a 'fair market price' (see the '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.

1938 under the pressure of the Nazi authorities.[23]

**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.

An observation 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)[24], or cases were settled before they were decided upon.[25] 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.

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.[26] 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.[27] In Germany several other claims by the Glaser heirs were successful, resulting in financial settlements.[28]

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'.[29]

**Business Transactions by Art Dealers**

Artefacts often concern personal possession with emotional or spiritual value, valued for their beauty and handed down through generations.[30] 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

23 *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].

24 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).

25 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'.

26 Spoliation Advisory Panel, *Report in Respect of Eight Drawings now in the Possession of the Samuel Courtauld Trus*t, 24 June 2009.

27 *Recommendation regarding Glaser of 4 October 2010* (RC 1.99); all recommendations on: http://www.restitutiecommissie.nl/en/recommendations.

28 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.

29 *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.

30 See also the Conference on Jewish Material Claims Against Germany (Claims Conference): http://art.claimscon.org/home-new/looted-art-cultural-property-initiative/.

and, hence, the involuntary nature of a sale (at an early date) cannot automatically be assumed.

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[31], 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. [32] 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'.[33] 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.[34] This does not mean all sales by Jewish art dealers are considered voluntary by the Dutch Restitutions Committee.[35] 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).[36] 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.[37]

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'.[38] Here, the intangible heritage value of artefacts for specific people is being addressed.

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'.[39] That not all losses by Flechtheim were under the same circumstances may be illustrated by other Flechtheim cases in Germany and the US.[40]

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

31 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).

32 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.

33 Ekkart Committee's Recommendations regarding the Art Trade <https://zoek.officielebekendmakingen.nl/kst-25839-34.html>.

34 *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.

35 E.g. the Dutch *Stern case* (RC 3.195) concerning a sale in Germany after 1935.

36 *Recommendations regarding Kunsthandel Mozes Mogrobi* (RC 1.137) of 12 February 2007, and (RC 1.145) of 20 July 2015.

37 Id. (RC 1.145).

38 *Recommendation concerning Van Lier*, (RC 1.87) of 6 April 2009.

39 *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.

40 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. 71. 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).

> 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.[41]

After this rejection in Germany the Welfenschatz case was brought before a US court.[42] 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.[43] After the War many works returned to the Netherlands – leading to the return of 202 paintings in 2005 by the Dutch government[44], however many did not return and, hence, may surface anywhere. In the US, the *Von Saher v. Norton Simon Art Foundation* case, concerning two works by Cranach that were part of the trading stock of Goudstikker, is now in its tenth year of litigation.[45] 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.[46]

This provenance was well-known at the time and the auction evoked protest.[47] It appears that the Cranach paintings were seized in Ukraine in the 1920s.[48] 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. Nevertheless, in the present context of the fair and just soft-law 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?

**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'.[49] 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 not qualify for restitution.[50] Such laws were limited in terms of place and time, and possibilities for restitution were restricted to losses under Nazi rule.[51] However, in present-day practice it is less

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

42 *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).

43 That the sale was 'forced' is 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.

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

45 *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.

46 Idem, p. 2.

47 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.

48 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.

49 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.

50 To this author's knowledge there is no case-law, legislation or literature to support such an extensive interpretation. See also Robinson (fn. 36).

51 Namely, the restitution was limited, in the case of occupied states

clear how 'Fluchtgut' should be classified.[52]

In fact, the first recommendation of the *Beratende Kommission* honoured such a claim in the Julius Freund case.[53] The Commission was not very clear as to the reasons underlying what may be seen as an extended application of Law no. 59.[54] 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.[55]

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[56] as well as in two Dutch binding opinions regarding sales by a German Jewish businessman in the Netherlands in 1933.[57] 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. Furthermore, the sale was arranged by a prominent English auction house with [..] no cause to question the seller's reasons for selling.[58]

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'.[59] 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.[60]

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'.[61]

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:

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.

52 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.

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

54 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), p. 205.

55 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>).

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

57 *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).

58 SAP Report *7 March 2012*, pp. 19-21, 27.

59 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.

60 (RC 3.128) as well as (RC 3.131), see fn. 72; 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.

61 Idem, (RC 3.128), (RC 3.131) and (RC 3.126).

> 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.[62]

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.[63]

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' overstretches that definition.

**Concluding Remarks on the 'Fair and Just' Norm**

Inconsistencies in outcomes – as seen above 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' 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 verdict ordering the restitution of 'Pea Harvest' by Camille Pissarro, acquired by an American couple at Christie's in New York in 1995, reportedly for $800,000.[64] Their discontent with the outcome was voiced as: 'It surely is not up to [us] to compensate Jewish families for the crimes of the Holocaust'.[65] And how should earlier compensation and settlements influence the outcome of present-day claims? Is it justifiable to take account of the interests of the general public in cases involving important works of art in museums, in line with the 'universalist' notion of cultural property debate in other restitution issues?[66] 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 the question in cases where compensation in some form was awarded in the post-war period: when will a case be settled definitely?

**Final Observations**

While Nazi looting is a moral issue the thesis underlying this paper 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.

The proposition of this paper is 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 stolen property or ownership. 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.

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 discrepancy between a 'legalistic' approach in countries like the US – in the sense of litigating 'big' cases – and the 'soft' ADR model based on non-binding 'moral' policy instruments in Europe.

International practice today is also typified by a lack of transparency: often cases are settled – works are 'cleared' – in confidential agreements without legal argumentation. 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. 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

62 *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'.

63 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).

64 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.

65 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.

66 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 by opponents to restitution in other types of looted art cases.

hand, is highly fragmented, and courts of law are often – with some exceptions - not able to assess claims on their merits if seen as a matter of stolen property. 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.[67] And although several Western European countries have installed special committees to advise on these claims, their mandate is limited.[68] That leaves another 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?

In tribute to the late Professor Norman Palmer who voiced this idea in 2014, this paper concludes with his proposition of the establishment of an international claims procedure.[69] 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.[70]

67 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 Campfens (2015), p. 16-27.

68 In the UK, the Netherlands, Austria, France and Germany. See: 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.

69 Prof. N. Palmer QC *The best we can do? Exploring a collegiate approach to Holocaust-related claims* in Campfens (2015), p. 153-187.

70 This is an updated and shortened version of a publication in *Art, Antiquity and Law*, vol. XXII, issue 4. For a complete bibliography for this article, please contact the editor of this journal.