Cross-border title claims to cultural objects: property or heritage?

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4 Claims to Nazi-looted art

ABSTRACT

Over the last two decades, rules that support restitution of artefacts lost as a result of Nazi looting have gained impetus. In that regard, the 1998 Washington Principles on Nazi-Confiscated Art set the international standard 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, recognising this may vary according to the facts and circumstances surrounding a specific case'. Positive law, however, is often not in line with such soft-law standards: post-War restitution laws have mostly expired; national ownership regulations vary widely and usually do not support claims based on a loss so long ago; and, besides, treaties aimed at harmonisation are non-retroactive. As a result, parties looking for 'justice' before a court of law often find themselves in a position where claims are inadmissible. In a reaction to the Washington Principles, several European countries installed advisory committees to deal with claims to Nazi-looted art, each with its own approach but often with a limited mandate. In the meantime, an increasing number of cases are being brought before American courts. Taking account of this 'institutional vacuum' in most European jurisdictions, this chapter argues in favour of a cross-border solution.

Questions addressed in this chapter are: How was restitution of Nazi-looted art arranged in the post-War period, and how is it arranged in today's system of the Washington Principles? In addition, what are the consequences of the differences between the 'legal' model in the US and the 'ethical' model in Western Europe?

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

1 INTRODUCTION

In November 2017 the Paris Tribunal de Grande Instance held that the painting *La Cueillette des Pois* ('Pea Harvest') by Camille Pissarro, in the possession of an American couple who had sent it on a short-term loan to Paris, was to be returned in ownership to the heirs of the Jewish art collector Simon Bauer whose collection had been confiscated in 1943.[1] They welcomed the verdict as pure justice: 'I think the French court has applied the natural law.'[2] The American collector, however, had acquired the Pissarro a Christie's in 1995, reportedly for $800,000, unaware of its wartime history. 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'.[3] This case may illustrate the clash of interests that may be at stake in cases that concern Nazi-looted art that no longer is in the hands of the 'perpetrator'. Usually, such cases are *not* settled in a court of law but in extra-legal procedures. This chapter will analyse the question how this field is regulated: what are the international standards for Nazi-looted art?[4]

Such standards exist at the interstate level: the obligation to return cultural objects taken during armed conflict to the state from which they came from

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1 *Bauer et al v B and R Toll* (2017) Tribunal de Grande Instance de Paris, No RG 17/58735 No 1/FF ; confirmed by the Cour de Cassation (2019), No B 18-25.695. In 2020, the representative of the US owners announced the case was brought before the ECtHR for infringement of their right to property, see <https://www.theartnewspaper.com/news/pissarro-european-court>.

2 A. Quinn, 'French Court Orders Return of Pissarro Looted by Vichy Government' (8 November 2017) *The New York Times* <https://www.nytimes.com/2017/11/08/arts/design/french-court-pissarro-looted-nazis.html?searchResultPosition=1> accessed 16 January 2019.

3 Ibid. Words of parties' representatives (Ron Soffer for defendants, Cedric Fischer for claimants) as cited in the New York Times article.

4 NB The term 'Nazi-looted art' can be used for various types of losses of cultural objects during the Second World War, see section 2, below.

is well-accepted under international law.[5] The focus of this chapter, however, will not be on interstate claims, but on the position of private (non-sate) parties. This position was addressed in the 1998 Washington Conference Principles on Nazi-confiscated Art, a non-binding declaration signed by over 40 governments that introduced the standard that former owners or their heirs are entitled to a 'just and fair solution', 'depending on the circumstances' with regard to Nazi-confiscated art that had not been restituted to them earlier.[6] Whilst in 1998 the focus was primarily on claims by family members of Jewish Holocaust victims to unclaimed confiscated artefacts that were found in museum or state collections, today the array has grown much wider. Nazi-looted art may surface in any collection, and claims are also no longer limited to art that was confiscated by the Nazis. They may concern artefacts lost to others than the Nazis, or sold by refugees in a neutral country: so-called *Fluchtgut* ('escape-goods'). These developments are an indication that norms are evolving. The question is, in what direction?

International practice today is typified by inconsistent outcomes and untransparent procedures. Often cases are settled – works are 'cleared' – in (confidential) agreements. However understandable from the perspective of the parties, a lack of publicly available argued decisions hinders the development of a consistent, predictable and understandable set of norms. It is desirable for similar cases to be treated similarly (and different cases differently), but in order to do so one must agree on which relevant circumstances need to be similar. The soft-law norm prescribing 'just and fair' solutions is open and still unsettled, which means that there is a need for precedents to further develop that norm. Parties looking for 'justice' before a court of law, however, will often find that claims are inadmissible: the expiration of post-War restitution laws, limitation periods for claims or adverse possession, are reasons for this.[7] Whilst several Western European countries have established special committees to advise on these claims, their mandate is limited.[8] That leaves

5 Interstate restitution as reparations for violations of the laws of war. On the development of this norm, see A.F. Vrdoljak, 'Enforcement of Restitution of Cultural Heritage through Peace Agreements' in F. Francioni and J. Gordley (eds) *Enforcing International Cultural Heritage Law* (2013) Oxford University Press. See section 2, below.

6 Washington Conference Principles on Nazi-Confiscated Art (3 December 1998) Released in connection with the Washington Conference on Holocaust-Era Assets, Washington, DC (Washington Principles) Principle VIII. See citation in section 3.1, below.

7 On post-war restitution laws, 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* (2015) Eleven International Publishing, 16-27. For the Dutch post-war restitution system, see L. van Vliet, 'The Dutch Postwar Restoration of Rights Regime Regarding Movable Property' (2019) 87 Legal History Review, 651. For an overview of obstacles to restitution, see B. Schönenberger, *The Restitution of Cultural Assets* (2009) Eleven International Publishing, ch 4.

8 See section 4, below.

the second important question open: who is to monitor compliance and explain the norm as propagated since 1998?

This chapter is structured as follows. For a better understanding of the legal setting section 2 starts with an overview of the post-War efforts to restore dispossessed owners in their rights. The third section proceeds to address the material norm and its rationale as it is applied in today's practice based on the Washington Principles, with a focus on the question what qualifies as unjustified Nazi-looting. For that, a closer look at the notion of a 'forced sale' in international practice in various jurisdictions is needed: what is at the heart of this notion and what are its limits? The fourth section analyses the question how compliance with the norm is arranged. The Washington Principles, along with later soft-law instruments in the field, highlight the importance of an extra-legal 'moral' approach and alternative dispute resolution (ADR) to settle claims. However, what (alternative) procedures are available? In this regard, differences between the US and Western European jurisdictions will be addressed. The last section of this chapter contains a recommendation on how the institutional vacuum in Western Europe in terms of access to justice could be addressed.

2 POST-WAR RESTITUTION SYSTEM

That the Nazi government looted works of art on a vast and systematic scale arguably lies at the base of the special treatment of Nazi-looted art claims. Nazi policy differed from country to country, but the overall objective was to obtain as much 'desirable' art as possible to reinforce the hegemony of the Third Reich. The methods of acquiring artefacts can be divided in (i) seizure or acquisition of private collections in the context of racial persecution, from own citizens as well as in occupied territories (i.e. this mostly concerned Jewish art collections); (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 'Aryan' neighbouring countries.[9]

2.1 The system of the Inter-Allied Declaration

Already at an early stage of the War, the Allied forces became aware that the Nazis were removing valuable objects from the areas they were occupying on a large scale. In response, they adopted the Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation or

9 See L. Nicholas, *The Rape of Europe* (1994) New York, Alfred Knopf; and the proceedings of the trial against A. Rosenberg in International Military Tribunal, *Trials of the Major War Criminals Before the International Military Tribunal*, vol. 22 (1948) Nuremberg.

Control of 5 January 1943.[10] With respect to property that originated from the occupied areas, they declared to 'reserve their rights to annul transfers or dealings which took the form of open looting or plunder as well as seemingly good faith transactions', making specific mention of the 'stealing and forced purchase of works of art'. It was a formal warning to the German occupiers but also to those who profited from such practices, that transactions could be reversed. The signatories to the Declaration solemnly recorded their solidarity in this matter. These principles were reaffirmed and elaborated upon in various instruments covering restitution, including Resolution VI of the Final Act of the Bretton Woods conferences after the War, and post-War restitution laws.[11] They are the basis of the post-war restitution system that relied on the following pillars:

- Tracing the objects that were taken from the occupied territories;
- Restitution ('external') to the government of the country from which they had last been transferred during the war on the basis of governmental claims;
- 'Internal' restitution to individual owners who had lost their artefacts as a result of confiscation or forced sales at the local (national) level.[12]

In as far 'external restitution' was concerned, international law provided a solid basis for return to the country it had been taken from. Both the destruction of monuments and looting[13] of cultural objects are prohibited during times of war, and this prohibition was codified in the 1907 Hague Convention.[14] The obligation to return artefacts looted in contravention of this prohi-

10 Inter-Allied Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation and Control (5 January 1943) London, in *The Department of State Bulletin*, vol. 8 (1943) US Government Printing Office, Washington (Inter-Allied Declaration).

11 Final Act of the United Nations Monetary and Financial Conference (signed at Bretton Woods on 22 July 1944). 1977, *Tractatenblad van het Koninkrijk der Nederlanden*, No. 40. See also A.F. Vrdoljak, 'Gross Violations of Human Rights and Restitution: Learning from Holocaust Claims' in L.V. Prott, *Realising Cultural Heritage Law: Festschrift for Patrick O'Keefe* (2013) Institute of Art & Law, 167.

12 L.V. Prott, 'Responding to WWII Art Looting' in International bureau of the Permanent Court of Arbitration (ed) *Resolution of Cultural Property Disputes* (2004) Kluwer Law International.

13 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 M. Cornu, C. Wallaert and J. Fromageau, *Dictionnaire comparé du droit du patrimoine culturel* (2012) CNRS Editions. In the present context, the term 'looting' is used to include takings in a situation beyond an 'armed conflict' such as confiscation as a result of racist legislation in Nazi Germany.

14 Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277, arts 46, 47, 56.

bition was widely considered to have customary status under international law at the time.[15]

To enable the last important step in the post-war restitution system, the return of lost possessions to their rightful owners, individual states were to enact special restitution laws ('internal restitution'). These laws were to ensure the rights of individual victims of dispossession due to persecution.[16] Such special legislation was mostly needed in civil law countries (i.e. in most European jurisdictions) where new possessors could otherwise rely on the passing of title to looted artefacts following a *bona fide* acquisition, a sale at a public auction, or just by the passage of time.

2.2 Internal restitution: A matter of human rights law

The internal restitution process in Germany came under the remit of occupying authorities. Strictly speaking the special restitution laws, issued for that purpose, were not covered by traditional international law. Restitution here did not aim to reverse the looting in occupied territories but the systematic dispossession by a government of its own citizens. In that sense, the post-War internal restitution programme was a novelty: it was an intervention by the international community in private law relations within a state, traditionally a matter of state sovereignty. The reason was that the dispossession had been part of genocide and persecution, notions covered by the (at the time) emerging field of international human rights law.[17] In the words of Bentwich the aim of such laws was: 'to remedy wrongs caused by the failure of a government to observe minimum international standards for the treatment of human beings'.[18] Accordingly, the preamble and first article of the Restitution Law

15 E.g., W.W. Kowalski, *Art Treasures and War* (1998) Institute of Art and Law 88; and A. Chechi, *The Settlement of International Cultural Heritage Disputes* (2014) Oxford University Press 270 (and note 135 referring for his conclusion on the customary status to authors as Francioni and Siehr). However, Russia takes the position that 'restitution in kind' is also permitted; on this basis, the Russians took and retained as war booty cultural objects which they found in the Russian zone of Germany in the post-war period.

16 A comparison of national restitution laws in N. Robinson, 'War Damage Compensation and Restitution in Foreign Countries' (1951) 16 Law and Contemporary Problems 347; See also Prott (2004) and Campfens (2015).

17 The term 'persecution' was developed in this period; in the Charter of the International Military Tribunal (adopted 8 August 1945, 82 UNTS 279) it fell under Article art 6 (c), covering crimes against humanity, which included: 'persecution of racial, religious, and cultural groups following the installation of the Nazi regime in 1933'.

18 N. Bentwich, 'International Aspects of Restitution and Compensation for Victims of the Nazis' in *BYIL (1955/1956)* Oxford University Press. A.F. Vrdoljak, 'Genocide and Restitution: Ensuring Each Group's Contribution to Humanity' (2011) 22 European Journal of International Law 17.

for the American zone in Germany (Law 59) echoed the definition of crimes against humanity in the London Charter (Nuremberg Tribunal):[19]

> 'It shall be the purpose of this Law to effect to the largest extent possible the speedy restitution of identifiable property [...] to persons who were wrongfully deprived of such property within the period from 30 January 1933 to 8 May 1945 for reasons of race, religion, nationality, ideology or political opposition to National Socialism.'[20]

Law 59 provided that title over looted possessions could not pass to a new possessor.[21] Another noteworthy element surfaces in Article 19, providing that with regard to goods that were acquired in the course of an ordinary business transaction, a right to restitution by the deprived owner would only exist if it concerns private property of artistic, scientific or sentimental personal value.[22]

In many European countries similar restitution laws were adopted, also in neutral countries such as Switzerland where looted artefacts had come on the market.[23] They suspended, for a limited period of time, regular private law to prevent that subsequent possessors – also if they were in good faith – would gain lawful title, and allowed for the restitution of property to the victims of dispossession. Such laws would typically render void *ab initio* confiscations which directly resulted from racial (Nazi) laws, while forced sales would be *voidable* upon a valid claim being made.[24] This difference is of

19 Charter of the International Military Tribunal (n. 17).

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

21 Ibid., Art. 1 (2): 'Property shall be restored to its former owner or to his successor in interest […] even though the interests of other persons who had no knowledge of the wrongful taking must be subordinated. Provisions of law for the protection of purchasers of good faith, which would defeat restitution, shall be disregarded except where this Law provides otherwise.'

22 Ibid. Art. 19: '(…) tangible personal property shall not be subject to restitution if the present owner or his predecessor in interest acquired it in the course of an ordinary and usual business transaction in an establishment normally dealing in that type of property. However, the provisions of the Article shall not apply to *religious objects* or to *property which has been acquired from private ownership if such property is of an unusual artistic, scientific, or sentimental personal value*, or was acquired at an auction or at a private sale in an establishment engaged mainly in the business of disposing property the subject of an unjust deprivation'. The provision mirrors Art. 15 of the UK restitution law for the British zone, and reflects elements of the Dutch Law (*Besluit Herstel Rechtsverkeer* (17 Sept. 1944) Staatsblad E100, art. 27 (2)) *[futher elaborated in E. Campfens, 'The Dutch Framework for Nazi-looted Art' (2020) Art Antiquity and Law, Vol XXV, 1, p 1-24; p 10].*

23 *Bundesratbeschluss betreffend die Klagen auf Ruekgabe in kriegsbesetzten Gebieten weggenommener Vermoegenswerte* (10 December 1945) 15 Bundesblatt 391, also known as the Booty Decree. See also E. Campfens (2015).

24 See Prott (2004); Campfens (2015), 21-26.

importance since claim possibilities to claim lost possession ended with the lapse of the often very short limitation periods in the special national restitution laws, whilst the rule that a loss of ownership was void (i.e. never occurred) may still sort effect today. The French Bauer case mentioned in the introduction illustrates this: in that case the transfer of ownership – as a result of confiscation in 1943 under the Vichy regime in Paris – was declared null and void in the post-War period and this lies at the base of the ruling by the Paris court that the Pissarro was to be restored in full ownership to the heirs of the pre-War Jewish owner.[25]

As Vrdoljak explains, in the post-War period legal scholars struggled to rationalise the ground-breaking aspects of the restitution programme within the existing legal framework.[26] According to a contemporary legal scholar, the rationale for these special laws should be found in new principles of international law and in the 'more comprehensive, interstate notion of justice'.[27] In other words, it was a matter of international human rights law that was emerging at the time.

2.3 Developments since the 1950s

In spite of the efforts to reverse the Nazi looting in the post-War period, the enthusiasm appeared short-lived. The national restitution laws soon expired, and many works found their way into collections all over the world before they could be returned.[28] Moreover, in the 1950s the signatory states to the *Convention on the Settlement of Matters Arising out of the War and the Occupation* seem to have made a choice to 'clear' looted artefacts in the hands of third parties by providing for a sunset clause for private restitution claims, set at 1956.[29] Under that system, dispossessed owners who could prove their arte-

25 *Bauer et al v B and R Toll* (n. 1) 4.

26 As was the case with the concept 'crimes against humanity'. Vrdoljak (2013) 'Gross Violations of Human Rights and Restitution' (n. 11).

27 'De Bundesratbeschluss hilft mit durch unseren Verzicht auf erworbene Rechte, und zwar (und darin liegt der wesentliche Unterschied …), durch Verzicht auf Rechte, die unserer Gesetzgebungsbefugnis unterstehen, einer umfassenderen, einer instersaatlichten Rechtsidee zu dienen'. G. Weiss, 'Beutegueter aus besetztend Laendern. Die privatrechtlichte Stellund des schweizerischen Erwerbens' (1946) 42 Schweizerische Juristen-Zeitiung, p. 274.

28 L.V. Prott (2004) 114.

29 '[..] 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 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.*' Convention on the Settlement of Matters Arising out of the War and the Occupation (adopted 26 May 1952), as amended by Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany

facts had been taken to Germany, would instead be able to claim compensation from the German State in the event that their looted artefacts were not located before that date.[30]

Obviously, this chapter was all but over as became clear at the end of the 1990s. Paintings on the walls of museums that had once belonged to Jewish families turned into tangible symbols of the injustices of the past. Amidst a renewed historical awareness of Nazi looting and scandals concerning other assets of perished Jewish owners that were never returned to their heirs, the artefacts came at the centre of public debate. Against this background, in 1998, the Washington Principles on Nazi-Confiscated Art were adopted.

3 Today's standards for Nazi-looted art claims

Similar to the post-war internal restitution laws, the return to individual owners is at stake in the present-day system of the Washington Principles for claims to Nazi-looted art. This means that although another model for the restitution of Nazi-looted art exists – the interstate model under public international law under which states may claim artefacts that were transferred from occupied territories – this should not be confused with the model for 'Nazi looting' as addressed in the Washington Principles. The latter creates rights, albeit of a non-binding nature, for individual victims of looting or their heirs to their lost artefacts without the intervention of a victim's national government. At times, these two models for claims to Nazi-looted art (for states and on the other hand for private individuals) may clash, but this will not be further addressed hereafter.[31] The next section addresses the rights of private claimants to their lost possessions under the soft law system of the Washington Principles. In that regard, the 'just and fair' 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.[32]

(adopted 23 Oct. 1954, entered into force 5 May 1955) 49 American Journal of International Law 69-83 (Settlement Convention) ch. 5, Art. 3 (1).

30 Ibid. ch 5 art 4. And a loss at the hands of the Vichy Government in France would be compensated by the French Government.

31 See P.K. Grimsted, 'Nazi-Looted Art from East and West in East Prussia: Initial Findings on the Erich Koch Collection' (2015) 22 International Journal of Cultural Property 7. Grimsted's research deals with artefacts held in Russian or Polish museums that were confiscated from persecuted individuals in western territories and were taken to these countries as 'war booty' in the post-war period. Neither Poland nor Russia implemented the Washington Principles. On the position of the Russian Federation regarding 'war booty', see n. 15.

32 Washington Principles, principle VIII.

This is an abstract norm which has not been clarified much by later declarations.[33] In the Terezín Declaration of 2009, signed by 46 states, the 'just and fair' 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 […].[34]

The focus in most instruments is on Holocaust-related losses by Jewish owners.[35] The Terezín Declaration allows for a somewhat wider notion as it addresses 'victims of the Holocaust' as well as 'other victims of Nazi-persecution by the Nazis, the Fascists and their collaborators'.[36] Another instrument is the 2009 UNESCO Draft Declaration of Principles Relating to Cultural Objects Displaced in Connection with the Second World War.[37] Although this draft was never adopted and therefore has no practical importance, it introduced a more inclusive and neutral definition, aiming at losses under 'circumstances deemed offensive to the principles of humanity and dictates of public conscience'.

At issue in the following section is the question of what makes a loss of an artefact during the Nazi era qualify for preferential treatment – transcending regular standards for stolen property.

3.1 Elements of the 'just and fair' rule

The soft-law rule prescribes that in the case of Nazi-confiscated art a just and fair solution should be reached on the merits of the case. Although this rule is unspecific, certain elements may be distinguished.

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33 In short: Council of Europe, Resolution 1205, 'Looted Jewish Cultural Property' (1999) Doc 8563; Vilnius Forum Declaration (2000) <https://www.lootedart.com/MFV7EE39608> (signed by 38 governments and the Parliamentary Assembly of the Council of Europe); W. CEH De Clercq, Report on a Legal Framework for Free Movement Within the Internal Market of Goods Whose Ownership is Likely to Be Contested (2003) A5-0408/2003; Terezín Declaration on Holocaust Era Assets and Related Issues (2009) <https://www.lootedartcommission.com/NPNMG484641> (Terezín Declaration), with 46 signatory states. For an overview see E Campfens (2015) 37.

34 Terezín Declaration, 4-5.

35 In the Washington Principles: 'Pre-war owners of art confiscated by the Nazis or their heirs'; Resolution 1205, repeated in the Vilnius Forum Declaration; the Terezín Declaration has a focus on Holocaust victims.

36 Terezín Declaration, 4.

37 See UNESCO, Draft of the Declaration of Principles Relating to Cultural Objects Displaced in Connection with the Second World War (2009), 35 C/24, principle II. See also section 4.2, below.

That the rule was created specifically for *art* supports the view that its rationale should be found in the intangible quality of artefacts; the ability of cultural objects to symbolise a family history appears a reason for special treatment, beyond the regular rules for stolen property, even where many years have passed. As seen above, also in the Post-War restitution laws personal attachment to a specific object was a reason for special treatment.[38] A second element of the rule is that it is aimed at a 'just and fair solution' implying that it is not *per se* about the restitution of full ownership rights (restoration of the *status quo ante*). International practice supports the view that the interests of good faith new possessors also deserve a place in a 'just and fair' outcome, meaning that it is a matter of finding a fair balance between various interests – not solely a matter of establishing ownership title of the dispossessed owner.[39] A third element is that such a 'just and fair' outcome depends on the merits of a case, the 'facts and circumstances surrounding a specific case'. What, however, are those circumstances?

The following is a non-exhaustive list of circumstances that appear to determine the outcome of present-day restitution cases:[40]

- 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';
- 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 (e.g. the intangible interest or monetary value);

An analysis of all these circumstances exceeds the scope of this chapter. The first two elements – identification as former property and loss through looting – could, however, be classified as the basic requirements for the admissibility of a claim. If a specific work of art can be identified as being owned by the claimant's predecessor in rights at the moment of loss, and was lost through Nazi-looting, a claim can be considered (i.e. a right exists); if not, no claim arises under the soft law norm. Whereas identification of a work is a matter of factual research and interpretation of that research, the second

38 Section 2.2.

39 Numerous (confidential) financial settlements to claims to Nazi-looted that are concluded in the realm of the art trade (i.e. mostly when private owners are at stake) support that view. See also Dutch Restitutions Committte 'Binding Advice on Dispute Over the Painting Road to Calvary' (2010) RC 3.95. In that case, the sale proceeds were to be shared between the former and the present possessor. On the position of the new possessor in the Dutch post-War restitution practice, that also confirms this, see Campfens (2015) 27-30, 233.

40 This is a tentative list based on research and personal experience.

element is a matter of legal definition: when can a loss be defined as 'Nazi looting' in the sense of the Washington Principles?

3.2 Unjustified Nazi looting

The just and fair rule addresses losses where there is a causal relationship with persecution. A controversial issue, which will be the focus of the remainder of this section, is how direct and proximate the causal link with persecution should be. Clearly, thefts, confiscations and seizures by Nazi organisations – resulting from the so-called '*Möbel-Aktion*' or seizures by *Einsatzstab Reichsleiter Rosenberg* (ERR) – qualify, as do the forced so-called *Judenauktionen* ('Jewish auctions') set in motion by the Nazis.[41] In short, all losses that were directly based on racial legislation qualify.[42] Nazi acquisition policies were, however, often more subtle. Hence, also 'sales under duress' qualify as Nazi-confiscation under the just and fair rule – as they would under post-War restitution laws discussed above. But what are the limits to the notion of a forced sale? The next section will consider the question of forced sales.

3.2.1 Forced sales

At one end of the spectrum lies the typical 'gun-to-the-head' situation: a Jewish owner being forced to sell his or her artefacts to Nazi authorities under threat of reprisals. A loss occurring in the owner's absence (i.e. without the will or initiative on the part of the owner), because he or she had been forced into hiding or managed to escape the Nazis would similarly add up to a forced sale. A sale by an owner at an undervalue in order to keep himself alive while in hiding generally also qualifies, as dealt with in the first report of the UK Spoliation Panel and many similar cases by the Dutch Restitutions Commit-

41 E.g. the various *Gentili di Giuseppe* cases, in France (*Gentili di Giuseppe et al v Musée du Louvre* (1999) Court of Appeal of Paris, 1st Division, Section A, No RG 1998/19209) and the US. See for the forfeiture action in the US of a work from the same collection on loan from Italy: L. Bursey, E. Velioglu Yildizci and M.A. Renold, 'Case Christ Carrying the Cross Dragged by a Rascal – Gentili Di Giuseppe Heirs v Italy' (2015) Platform ArThémis, Art-Law Centre, University of Geneva.

42 See, e.g. Dutch Recommendation Regarding a Sculpture from Fritz Gutmann's Collection Confiscated by the ERR in Paris (2011) RC 1.114-B; the 1996 US *Gutmann* case (*Goodman v Searle* (1996) United States District Court for the Northern District of Illinois, No. 96C-6459) concerned a Degas painting that was part of the same group of artefacts confiscated by the ERR in Paris. Litigation ended by a settlement. Another example is the Altmann case, litigated in the US and settled by arbitration (*Republic of Austria et al v Altmann* (2004) Supreme Court of the United States, 541 US 677).

tee.[43] However, the circumstances are not always as clear-cut as this. Difficult categories 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 included:[44]

- a fair purchase price (or conversely: disparity between value and selling price);
- the time of the loss of possession (before or after the racial laws of 1935 in Germany, with different periods applying to each occupied state);
- own initiative on the part of the owner; and
- the identity of the acquiring party (was it a Nazi-official?).

These elements resurface in present-day recommendations by the respective European restitution committees and in US case law.[45] In view of the fact that these losses occurred a long time ago, in today's cases value is also attached to contemporary declarations and actions (or a lack thereof) by former owners on the involuntary nature of a sale. Post-War statements and documents can validate (or invalidate) claims by the owners that a sale should be considered to have been 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]. 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.[46]

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43 Report of the Spoliation Advisory Panel in Respect of a Painting Now in the Possession of the Tate Gallery (18 January 2001). All reports of the SAP are available online: <https://www.gov.uk/government/groups/spoliation-advisory-panel#panel-reports>. Dutch examples: e.g. Dutch Restitutions Committee, Recommendation RC 1.28 (2006) or Dutch Restitutions Committee, Recommendation RC 1.37 (2007). All recommendations of the Dutch Restitutions Committee online <https://www.restitutiecommissie.nl/en/recommendations>.

44 N. Robinson (1951); E. Campfens (2015) 21-26.

45 The term 'European Restitution Committees' signifies special panels tasked with the adjudication of Nazi-looted art claims, discussed below. In Germany, the focus is on a 'fair market price' (see the 'Guidelines' from the *Beratende Kommission* (annex V b), under 3); litigated cases obviously have a different character and usually revolve around 'technical' legal issues such as statutes of limitation, jurisdictional matters and conflict of law issues.

46 Dutch Restitutions Committee, Recommendation Regarding von Goldschmidt-Rothschild (2012) RC 1.110. Other examples with considerations as to this point: e.g. the US Glaser litigation: *Matter of Peters v Sotheby's Inc* (14 September 2006) Appellate Division of the Supreme Court of New York, First Department, NY Slip Op 6480 (34 AD3d 29).

Clear efforts to recuperate a lost work in the post-War period, on the other hand, may strengthen a claim.[47]

3.2.2 Early sales

An 'early sale' can be defined as a sale that occurred before racial laws were in force. Because such laws were often introduced gradually, such general conditions 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. Similarly, one can distinguish between periods of increasingly threatening general conditions, for example in the Netherlands or France.

An observation with regard to the category of 'early sales' is that there is no consistent approach amongst the European restitution committees. US courts, then again, seem to have predominantly dismissed such cases on the basis of 'technical defences' (i.e. statute of limitations or lack of jurisdiction),[48] and cases were also settled before judgment.[49] The inconsistency is illustrated by the conflicting outcomes in the various claims relating to the Glaser collection in the UK, the United States, the Netherlands, Germany and Switzerland.

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.[50] 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

47 See e.g. Dutch Restitution Committee, Recommendation RC 1.28 (2006).

48 See for example *Schoeps et al v Freistaat Bayern* (Summary Order, 2015) United States Court of Appeals for the Second Circuit, No. 14-2739: the claim based on a loss through the sale of a Picasso by Mendelssohn-Bartholdy in 1934 was dismissed on grounds of lack of jurisdiction over German property. This can be contrasted to rulings where clear confiscation was at stake and jurisdiction was accepted, for example in the *Altmann* case dealing with paintings located in an Austrian museum (*Republic of Austria et al v Altmann* (n. 42)).

49 E.g. *Schoeps et al v The Museum of Modern Art and The Solomon R Guggenheim Foundation* (Memorandum Order, 2009) United States District Court for the Southern District of New York, No. 07 Civ 11074 (JSR) 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 (*Schoeps et al v The Museum of Modern Art and The Solomon R Guggenheim Foundation* 4-6).

50 Report of the Spoliation Advisory Panel in Respect of Eight Drawings Now in the Possession of the Samuel Courtauld Trust (24 June 2009) HC 757.

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.

A New York court had previously also denied a claim by the Glaser heirs in the US in 2006 in respect of a painting by Munch, sold by Curt Glaser's brother after Glaser himself had left the country. In line with the UK Panel's decision, the New York court relied on a contemporaneous letter from Glaser himself, reasoning that:

> 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]

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* upheld shortly after. The recommendation by the Dutch Restitutions Committee relied on the view that the loss was involuntary as a direct result of the Nazi regime, and on the consideration that sale proceeds shall not to be taken into account if these were 'used in an attempt to leave the country or go into hiding'.[52] In Germany several other claims by the Glaser heirs were successful, resulting in financial settlements.[53] Furthermore, in March 2020, 12 years after a first rejection, also the Kunstmuseum Basel in Switzerland honoured a claim by the Glaser heirs to works sold at the same 1933 auction.[54]

3.2.3 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'.[55] 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

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51 *Matter of Peters v Sotheby's Inc* (n. 46) 6.

52 Dutch Restitutions Committee, Recommendation regarding Glaser (2010) RC 1.99.

53 E.g. the settlement with the Stiftung Preusssischer Kulturbesitz, that, in the words of SPK's chairman should be considered against a special background, namely: 'In acknowledgment of Prof. Glaser's persecution by the Nazi Regime and in honour of his great achievements for the museums in Berlin'. Hermann Parzinger (Speech, 27 November 2015) <https://www.preussischer-kulturbesitz.de/fileadmin/user_upload/documents/presse/news/2015/151128_Provenienzforschung_Rede-P-final-korr.pdf>.

54 See <https://www.nytimes.com/2020/03/27/arts/design/swiss-nazi-era-art-claim-settled.html>, acc. 5 May 2021.

55 This proposition is supported by Andrew Adler. 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' (2007) 14 *International Journal of Cultural Property* 57.

influence of Nazi rule: 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.[56] These laws were limited in place and time, and claims were restricted to losses in territories under Nazi rule.[57] However, in current practice it is less clear how '*Fluchtgut*' should be classified.[58]

In fact, the first recommendation of the *Beratende Kommission* allowed such a claim in the *Julius Freund* case, however an argumentation was lacking.[59] As Matthias Weller observes in this regard: 'The recommendation […] does not […] explain why the principle of justice laid down in Military Law No. 59 should apply to sales outside Germany in safe states.'[60] In a later '*Fluchtgut*' case concerning the sale in London in 1934 by the 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.[61]

A similar approach to *'Fluchtgut'* – i.e. a hesitant rejection of the claim – was adopted in 2012 by the UK Spoliation Advisory Panel (SAP) in a case regarding fourteen clocks and watches that had been sold by a refugee in London in 1939,[62] and in two Dutch opinions regarding the sale by the German-Jewish

56 To this author's knowledge there is no case law, legislation or literature in support of such an extensive interpretation. See also Robinson (1951).

57 Namely, in the case of Germany to the period of Nazi rule (1933-1945), and in neutral countries the period starting with the outbreak of the War in 1939.

58 Arguments were made by the President of the World Jewish Congress, Ronald Lauder, to treat Fluchtgut in the same way as looted art. See his remarks in Zürich (2 February 2016)<https://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>.

59 *Beratende Kommission,* First Recommendation (12 January 2005) Nr. 19/05.

60 M. Weller, 'Key Elements of Just and Fair Solutions: The Case for a Restatement of Restitution Principles' in E. Campfens (ed) *Fair and Just Solutions? Alternatives to Litigation in Nazi-Looted Art Disputes* (2015) Eleven International Publishing) 205.

61 *Beratende Kommission,* Recommendation of the Advisory Commission in the Matter of the Heirs of Alfred Flechtheim v Stiftung Kunstsammlung Nordrhein-Westfalen, Düsseldorf (21 March 2016).

62 Report of the Spoliation Advisory Panel in Respect of Fourteen Clocks and Watches Now in the Possession of the British Museum (7 March 2012) HC 1839.

businessman Semmel in the Netherlands in 1933.[63] The SAP in its 2012 report considered that, although the sale by a Jewish refugee of a collection of clocks and watches in London in 1939 was 'forced' – in the sense that 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.[64]

Interestingly, in this case the SAP introduced a 'scale of gravity' whereby restitution or compensation could be recommended if the sale was at the 'high end' rather than the 'low end' of the scale. 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.'[65]

The Dutch Restitutions Committee followed this line of reasoning in the two Semmel cases – i.e. rejecting the claims in spite of the assessment that the loss was involuntary and recommending instead the display of its provenance in the museums alongside the exhibited objects.[66] Nevertheless, in two other claims concerning objects from the same Semmel collection sold at the same auction the Dutch Restitutions Committee *did* recommend a return. In one case, the reason may be that the painting was part of the NK-collection – for which a more lenient policy applies that does not allow for the

63 Dutch Restitution Committee, Binding opinion in the dispute on restitution of the painting entitled Christ and the Samaritan Woman at the Well by Bernardo Strozzi (2013) RC 3.128, and Dutch Restitutions Committee, Binding opinion regarding the dispute about the return of the painting Madonna and Child with Wild Roses by Jan van Scorel (2013) RC 3.131. On 19 April 2021 in the case regarding the Strozzi painting in (RC 3.128) Museum De Fundatie, however, paid the Semmel heirs 200.000 euro to settle the ongoing dispute, in spite of this outcome. See <https://www.nrc.nl/nieuws/2021/04/19/museum-de-fundatie-betaalt-200000-euro-aan-erfgenamen-nazi-roofkunst-a4040357>.

64 Report of the Spoliation Advisory Panel in Respect of Fourteen Clocks and Watches Now in the Possession of the British Museum (2012) 19-21, 27.

65 In the SAP Glaser case, concerning an early sale in 1933 in Germany, stemming 'from mixed motives', the SAP introduced a similar approach: '[W]e 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 [...]'. *Report in Respect of Eight Drawings now in the Possession of the Samuel Courtauld Trust* (2009) 34, 47.

66 RC 3.128 as well as RC 3.131.

weighing of interests of the present owner –,[67] and in the other instance the reasoning was that the painting was of no particular interest to the museum.[68] This approach was heavily criticised, especially after the Committee's 2018 recommendation concerning the sale of a Kandinsky painting in 1940 in the Netherlands (i.e. not a 'Fluchtgut' case).[69] The Committee rejected that claim by arguing that the interests of the Museum outweighed the interest of the claimant; such a balance of interests is, according to the decision's critics, incompatible with the Washington Principles. And indeed, while it appears from the recommendation that the Committee was of the opinion the loss did not qualify as a forced sale, that question was not clearly addressed.

In the United States, the question of whether '*Fluchtgut*' qualifies as 'unlawful looting' was addressed in a ruling by an Ohio court regarding the sale of a Gauguin painting by Martha Nathan, a Jewish refugee, in Switzerland in 1938. The court ruled in favour of the Toledo 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.[70]

In a similar US case, regarding a claim by the Nathan heirs to a Van Gogh painting in the Detroit Institute of Arts, which was sold by Martha Nathan in Switzerland in 1938 as well, a Michigan court also ruled against the claimants.[71] A more recent US Fluchgut case – again, a denial on the ground of the equitable latches defence – involves the 1938 sale of Picasso's The Actor by the German Jewish couple Paul and Alice Leffmann to non-Nazi buyers outside Germany.[72]

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67 Dutch Restitutions Committee (2009) RC 1.75.

68 Dutch Restitutions Committee, Binding opinion in the dispute on restitution of the painting The Landing Stage by van Maarten Fransz. van der Hulst from the estate of Richard Semmel, currently owned by Stichting Kunstbezit en Oudheden Groninger Museum (2013) RC 3.126.

69 Dutch Resttitutions Committee, Binding Opinion Regarding the Dispute About Restitution of the Painting with Houses by Wassily Kandinsky, Currently in the Possession of Amsterdam City Council (2018) RC 3.141.

70 *Toledo Museum of Art v Claude George Ullin et al* (2006) United States District Court for the Northern District of Ohio, No. 3:06 CV 7031, 7. Concluding: 'Defendants [the Nathan heirs, EC] can prove no set of facts that entitle them to relief.'

71 *Detroit Institute of Arts v Ullin*, Slip Copy (2007) United States District Court for the Eastern District of Michigan, No. 06-10333. For a pending US '*Fluchtgut*' case, see *Zuckerman v The Metropolitan Museum of Art* (Complaint, 2016), No. 1:16-cv-07665.

72 *Zuckerman v. Metropolitan Museum of Art* (2018) United States District Court for the Southern District of New York No. 1:16-cv-07665, aff'd, No. 18-634 (2d Cir. N.Y. 26 June 2019), cert. denied, No. 19-942 (U.S. 2 March 2020). For a discussion of the case in relation to the HEAR Act, see S Drawdy 'Claims for the Return of Holocaust Art: the Scope and Legacy of the HEAR Act' (2020) 25 AAL 79.

On the whole, '*Fluchtgut*' cases appear not to be fully supported by European restitution committees – although increasingly they seem to be honoured –,[73] and much less so by US courts. However, the line of reasoning by European panels in such cases is inconsistent. In the view of the present author, bringing such sales in neutral countries within the notion of 'Nazi-loot' over-stretches the definition.

3.2.4 Business transactions by art dealers

Artefacts often fall into a category of personal possessions with emotional or spiritual value, valued for their beauty and handed down through generations.[74] Sales by art dealers often lack this intangible aspect and therefore also could be considered to be a special category. The objects are, in this context, commodities and any sale would normally possess the nature of a business transaction. In other words, the special personal, spiritual or cultural-historical interest in the artefact is not a given. If one takes this intangible heritage value of the artefact as a basic element of the just and fair rule, as put forward in section 3.1 above, sales by art dealers stand out. Another difference is that the objective of an art dealer is to buy and sell artefacts and a sale by a dealer cannot automatically be presumed to be involuntary.

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 trading with the Germans was prohibited,[75] this did not prevent art from being traded on a wide scale by Dutch dealers, both Jewish and non-Jewish, during the early stages of the occupation.[76] 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 by Jewish art dealers in principle constituted ordinary

73 E.g. *Beratende Kommission,* Recommendation of the Advisory Commission in the case of the heirs of Kurt and Else Grawi vs. Landeshauptstadt Düsseldorf (2021), honouring a claim to a painting sold in 1940 in New York. See also the 2021 voluntary settlement in the Dutch Semmel case (RC 3.128), mentioned above (n. 63).

74 See also the Conference on Jewish Material Claims Against Germany (Claims Conference): 'Looted Art and Cultural Property Initiative' (*Claims Conference/WJRO*) <http://art.claimscon.org/home-new/looted-art-cultural-property-initiative/>.

75 The prohibition was enacted by Law A6 adopted by the Dutch Government in exile (Koninklijk Besluit A6 'Besluit Rechtsverkeer in Oorlogstijd' (7 June 1940)).

76 F. Kunert and A. Marck, 'The Dutch Art Market 1930-1945 and Dutch Restitution Policy Regarding Art Dealers' in E. Blimlinger and M. Mayer (eds) *Kunst sammeln, Kunst handeln: Beiträge des Internationalen Symposiums in Wien* (2012) Böhlau Verlag; see also E. Muller and H. Schretlen, *Betwist Bezit* (2002) Waanders, 25-30.

sales'.[77] Whereas private sales by Jewish owners during the Nazi rule benefit from the presumption of a forced sale, the same is not true for art dealers. On these grounds, the Committee denied, for example, claims by the heirs of the Jewish art dealers Katz regarding objects they had sold during this period.[78]

However, this does not mean all sales by Jewish art dealers are deemed by the Dutch Restitutions Committee to have been voluntary.[79] This is demonstrated by its two recommendations concerning the Mogrobi art dealership: a first claim, regarding thirteen artefacts, was allowed as it concerned sales from 1942 onwards while the owner was persecuted and in hiding (RC 1.37), but a later claim that concerned sales by the same art dealer in the early years of the Nazi occupation was rejected (RC 1.145).[80] The latter claim was rejected on the grounds that:

> (a) The purchaser [..] 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.[81]

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, concerning an ivory horn. The grounds were that this particular object was of special value for the family since Van Lier himself is depicted blowing this horn in a portrait dating from around 1930. In the words of the Committee '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.'[82] Here we can see that the specific intangible heritage value of an artefact is being recognised.

The German *Beratende Kommission* has also 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 2013 recom-

77 Ekkart Committee's Recommendations Regarding the Art Trade (2003) <https://zoek.officielebekendmakingen.nl/kst-25839-34.html>.

78 Dutch Restitutions Committee, Recommendation regarding Katz (2009) RC 1.90-A. The case is complicated by the fact that the dealers acted as an intermediate in sales, i.e. they did not necessarily own the artefacts.

79 E.g. the Dutch *Stern* case (RC 1.96) concerning a sale in Germany after 1935.

80 Dutch Restitutions Committee, Recommendation Regarding Kunsthandel Mozes Mogrobi (2007) RC 1.37, and Dutch Restitutions Committee, Recommendation Regarding Mogrobi II (2015) RC 1.145.

81 Recommendation Regarding Mogrobi II (2015) RC 1.145.

82 Dutch Restitutions Committee, Recommendation regarding Van Lier (2009) RC 1.87.

mendation, 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.'[83] However, not all losses by Flechtheim were under the same circumstances as is illustrated by other *Flechtheim* cases in Germany and the US.[84]

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.[85]

After this rejection in Germany, the *Welfenschatz* claim was brought before a US court.[86]

Another well-known art dealer case concerns the trading stock of Jacques Goudstikker, a prominent Jewish art dealer who escaped Amsterdam on the arrival of the Nazis, leaving behind more than 1,000 works of art. These were bought (fell prey) to German art lovers Aloïs Miedl and Nazi chief Hermann

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83 *Beratende Kommission*, Recommendation of the Advisory Commission on the Return of Cultural Property Seized as a Result of Nazi Persecution, Press Release (9 April 2013) <https://www.kulturgutverluste.de> para 4. All recommendations of the Beratende Kommission are available on this website.

84 *Beratende Kommission*, Recommendation of the Advisory Commission in the Matter of the Heirs of Alfred Flechtheim v Stiftung Kunstsammlung Nordrhein-Westfalen, Düsseldorf (21 March 2016). This claim was denied, see above. In the US, a Flechtheim claim concerning paintings in the possession of a Munich museum has been pending since Dec. 2016. In that case the Museum argues that the works were sold before Hitler came to power (*Hulton et al v Bayerische Gemäldesammlungen* (2016) United States District Court for the Southern District of New York, No. 16-CV-9360).

85 *Beratende Kommission*, Recommendation of the Advisory Commission regarding the Welfenschatz (2014).

86 *Philipp et al v Federal Republic of Germany et al* (2015) United States District Court for the District of Columbia, No. 1:15-CV-00266. On 3 February 2021, the US Supreme Court, in a 'writ for certiorari' (No. 19-351) ruled in favour of Germany and the Berlin Museums. See section 4.3 below.

Goering.[87] After the War many of these works returned to the Netherlands – leading to a post-war settlement and, eventually, the return in 2005 by the Dutch Government of 202 paintings.[88] However, many of those works did not return to the Netherlands after the war and, hence, resurface elsewhere. In the United States, the case of *Von Saher v Norton Simon Art Foundation*, concerning a claim by the Goudstikker heir to two paintings by Cranach that were part of the trading stock of Goudstikker, took twelve years of litigation to eventually be halted in the US Supreme Court in 2019.[89] The specific 'art-dealership element' is demonstrated by the fact that Goudstikker bought the Cranach paintings at a 1931 Berlin auction of artefacts that had been 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.[90]

This provenance was well known at the time and the auction aroused protest.[91] It appears that the Cranachs had been seized in Ukraine in the 1920s.[92] Many people bought artefacts at this auction and Goudstikker, as a dealer,

87 That the sale was 'forced' seems beyond doubt. The Dutch Restitution Committee in its Recommendation Regarding the Application by the Amsterdamse Negotiatie Compagnie NV in Liquidation (2005) RC 1.15, as well as US courts considered the sale as forced. See, for example, the 2016 US ruling (*Von Saher v Norton Simon Museum of Art at Pasadena et al* (2016) United States District Court for the Central District of California, No. 2:07-cv-02866-JFW) 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 between the Dutch State and the widow of Jacques Goudstikker, Desi Goudstikker, see RC 1.15.

88 As published in the Decision by Secretary of Culture by letter of 6 February 2006, see Parliamentary Documents, Kamerstuk 25839, No 38, Vergaderjaar 2005-2006.

89 The Supreme Court denied to review the case after earlier rulings in favour of the museum. *Von Saher v Norton Simon Museum of Art at Pasadena* (2019) 587 U.S. 18-1057. Litigation iniated in 2007.

90 *Von Saher v Norton Simon Museum of Art at Pasadena et al* (n. 87) 2.

91 A letter of protest by the Stroganoff family, whose collection was auctioned, was published in the New York Herald Tribune of 13 May 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-Scherbatoff v Weldon* (1976) United States District Court for the Southern District of New York, 420 F. Supp 18.

92 The argument supporting the paintings' Ukrainian provenance is presented (in Ukrainian) on <http://lostart.org.ua/ua/research/61.html>, and was previously mentioned in N.H. Yeide, K. Akinsha and A.M. Walsh, *The AAM Guide to Provenance Research* (2001) American Association of Museums, 135.

bought the paintings with the intention of reselling them. Claims challenging Soviet seizures of art works have been brought before US, French and English courts, but have in all cases proved unsuccessful as the courts have invoked the Act of State doctrine (unlike certain claims in respect of Nazi confiscations, as to which see part 3, below).[93] Nevertheless, in the context of the ethical framework of the Washington Principles, the question is whose interests in such cases should have priority: a museum that bought the paintings in the 1970s on the regular art market; heirs of the art dealer that acquired the 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?

3.3 Concluding remarks on the material norm

Inconsistencies in outcomes, as seen in the categories of 'early sales', 'sales by art dealers' and '*Fluchtgut*' sales, illustrate that no clear definition exists of what is considered an unjustified taking ('Nazi looting'). In addition to establishing what constitutes a 'forced sale' – and the limits of that concept – many other difficulties surface in determining what is a 'just and fair 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 Pissarro case noted in the introduction)? Furthermore, how should earlier compensation or settlements regarding the artefact influence the outcome of claims now?

On another note: is it justifiable to take stock of the interests of the general public in cases involving important works of art in museums, in line with the internationalist (or 'universalist') point of view in the wider restitution debate?[94] How to see, for example, the disappearance of an iconic painting like the Klimt portrait of Adele Bloch Bauer II from public display?[95] If the interest of the general public are considered relevant, that would amount to an argument against the return of such works to private ownership, and

93 For the US case: *Stroganoff-Scherbatoff v Weldon* (n. 91); the UK case is *Princess Paley Olga v Weisz* (1929) Court of Appeal, 1 KB 718; and the French case, in part denied on the basis of the Act of State doctrine: *De Keller v Maison de la Pensée Française* (1954) 82 Journal du Droit International (Clunet) 119 (Civil Tribunal of Seine).

94 'Cultural property internationalism is shorthand for the proposition that everyone has an interest in the preservation and enjoyment of cultural property', an argument formulated by Merryman and often used against the restitution of artefacts to source countries and in support of the idea that major (western) public museums are the best place for important works of art. See J.H. Merryman, 'Cultural Property Internationalism' (2005) 12 *International Journal of Cultural Property* 11.

95 K. Kazakina, 'Oprah Said to Snag $150 Million Selling Klimt to Chinese Buyer' (8 February 2017) *Bloomberg News* <https://www.bloomberg.com/news/articles/2017-02-08/oprah-said-to-snag-150-million-selling-klimt-to-chinese-buyer>.

perhaps in favour of a financial settlement over restitution. This in turn raises another question: what exactly is the *rationale* of the present-day norm? Is it compensation for injustices of the past by a government that may be held responsible in some way, or is it about restoring families in their rights with regard to specific artefacts (i.e. re-uniting families with their heirlooms)?

Every case is different and, as such, alternative procedures, with the flexibility to accommodate creative and fact-specific solutions, may be an efficient way to resolve claims. This also requires the availability of mechanisms to further develop the fair and just norm. However, at a procedural level, there appears to be a discrepancy between the approach in the US, where cases are litigated, and the 'ethical approach in Europe, where cases depend on ADR methods, as illustrated in the next section.

4 ACCESS TO JUSTICE

The next section addresses access to justice and the extent to which claims may be assessed on their individual merits. The issue here is whether parties have a neutral forum to turn to for clarification of the just and fair rule, and whether compliance to the norm is overseen by a public body. The Washington Principles, along with later soft-law instruments, stress the importance of a non-legalistic approach. In these Principles, the signatory states agreed to 'develop national processes [..], particularly as they relate to ADR mechanisms for resolving ownership issues.'[96] But what neutral ADR procedures are available for a neutral assessment and interpretation of facts – fact that often are ambiguous?

4.1 The ethical model in Western Europe: Restitution committees

At the turn of the 21st century, a number of Western European governments set up alternative procedures for dealing with Nazi-looted art claims: the Spoliation Advisory Panel in the UK, the *CIVS*[97] in France, the Dutch Restitutions Committee in the Netherlands, the *Beratende Kommission* in Germany and the Advisory Board in Austria.[98] These government-appointed committees

96 Washington Principles, principle XI.

97 Commission pour l'indemnisation des victimes de spoliations intervenues du fait de législations antisémites en vigueur pendant l'Occupation (CIVS). See <http://www.civs.gouv.fr/home/>.

98 For an overview of the committees, 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 E. Campfens (ed) *Fair and Just Solutions? Alternatives to Litigation in Nazi-Looted Art Disputes* (2015) Eleven International Publishing.

specialise in out-of-court adjudication or mediation of Holocaust-related art claims. To summarise a few notable characteristics of these committees:

- The role of the Advisory Board of the Commission for Provenance Research in Austria (*'Beirat'*), established under the Art Restitution Act of 1998,[99] is to investigate and decide on the basis of systematic provenance research whether works of art in federal collections should be considered for restitution, regardless of whether or not an individual has brought a claim. This can also apply to items that were originally restituted after Second World War, but subsequently became state property in the course of post-war proceedings on the basis of protective rules for works that were considered national patrimony. At the time of writing, the Commission has issued 337 opinions.[100]
- The French CIVS, established in 1999, is charged with examining individual claims presented by the victims or their heirs to make reparations for damage resulting from spoliations of property that occurred in France under the responsibility of the Vichy authorities.[101] 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. In June 2017, the CIVS had dealt with 3,259 cases involving personal property, of which 287 involved works of art.[102] Restitution was advised in only a few of these cases, concerning works belonging to the Musées Nationaux Récupération ('MNR') collection of heirless art.
- The UK Spoliation Advisory Panel (SAP), which had dealt with nineteen cases at the time of writing, was established in February 2000 in order to provide an alternative process to litigation and resolve claims relating to art in collections in the UK, lost during the Nazi-era. As stated in its terms of reference, the Panel's function is to achieve a solution which is fair and just to both the claimant and the institution and it may take into account non-legal obligations such as the moral strength of a claim.[103] Claimants can submit claims against institutions to the Panel unilaterally or, in the case of a private collection, at the joint request of the claimant and owner.[104]

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99 Federal Law on the Restitution of Works of Art from the Austrian Federal Museums and Collections (1998) Federal Law Gazette I No. 181/1998 <http://www.provenienzforschung.gv.at/en/empfehlungen-des-beirats/gesetze/kunstruckgabegesetze/>.

100 *Kommission für Provenienzforschung*, <https://www.provenienzforschung.gv.at/en/empfehlungen-des-beirats/beschluesse/beschluesse-alphabetisch/?decisions-letter=T> accessed 6 November 2017.

101 Marck and Muller (2015) 59.

102 See CIVS, 'Key Figures' (2017) <http://www.civs.gouv.fr/images/pdf/thecivs/key_figures_june_2017.pdf>.

103 The terms of reference of the Spoliation Panel are available at: <https://www.gov.uk/government/groups/spoliation-advisory-panel#terms-of-reference>.

104 Ibid. para 6.

- The Dutch Restitutions Committee, established in 2001, has since dealt with 182 cases regarding 1,617 objects.[105] Most of these objects were part of the Dutch State collection, more specifically belonging to the so-called NK-collection[106] of 'heirless art' – a term used to describe art collections left in the custody of a government and not returned to their pre-war owners. All claims involving works in the Dutch state collection are referred to the Restitutions Committee as a matter of general policy, while claims with regard to other collections can be voluntarily submitted if both parties agree. The Committee's task is to find a 'fair and reasonable' solution for these cases. Dutch Museums generally refer claims involving works of art to the Committee.
- Germany's Advisory Commission on the return of cultural property seized as a result of Nazi persecution (*Beratende Kommission*), initiated in 2003, mediates between current possessors and former owners or their heirs. A request for advice can be laid before the Commission provided that at least one party is a public institution and all the parties involved approve. The Commission seeks to find a just and fair solution in accordance with the Washington Principles and the policies laid out in the so-called *Gemeinsame Erklärung* ('Common Statement'). As of November 2017, the Commission had issued fifteen recommendations.[107]

The mandates, working methods and number of cases dealt with by these committees vary considerably. Charlotte Woodhead notes in relation to the situation in the United Kingdom, that 'in reality the Spoliation Panel's jurisdiction is the *only* method of formal dispute resolution rather than an *alternative* method'.[108] This is an important observation and similarly applies in most other countries. For disputes regarding objects which do not fall within the mandate of these special panels, often no neutral claims procedure is in place to fall back on – with the exception of the US, or in the few cases that still fall under the post-War restitution laws (as in the Bauer case mentioned in the introduction). However, the Gurlitt case in Germany – where a large number of artefacts were found in possession of the son of one of Hitler's main art

105 Dutch Restitution Committee, Two Tasks <https://www.restitutiecommissie.nl/en/two_tasks.html> accessed 6 November 2017. Information on the numbers kindly provided by the Committee on 17 February 2020.

106 *Nederlands Kunstbezit-collectie.*

107 German Lost Art Foundation, Previous Recommendations of the Advisory Commission <https://www.beratende-kommission.de/Webs_BK/EN/Recommendations/Index.html>.

108 C. Woodhead, 'Nazi Era Spoliation: Establishing Procedural and Substantive Principles' (2013) 18 *Art Antiquity and Law* 167.

dealers – is one of the many examples of how problems are *not* limited to public collections.[109]

4.2 Access to justice through courts of law

Parties looking for just and fair solutions to their disputes through regular litigation may find themselves in a legal labyrinth. 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, moreover, differs from country to country and in the US, from state to state, as well as over time. 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).[110] In countries with a civil law tradition, like most European countries, the position of the current possessor is stronger as a good-faith acquisition, or even the passage of time (adverse possession), may convey to a new possessor a perfectly valid legal title over artefacts that were stolen.[111] All jurisdictions, nevertheless, have in common that possibilities for a court to assess a property claim on its merits are subject to time limits. At a certain moment, the law adjusts itself to reality for the sake of legal certainty, though the moment it does so varies widely.[112]

As explained above, while after the War special restitution laws were enacted in Europe, mostly these laws lost their effect as a result of limitation

109 C. Hickley, *The Munich Art Hoard: Hitler's Dealer and His Secret Legacy* (2015) Thames and Hudson; N Palmer, 'Unclaimed art and the duty of active pursuit: Cornelius Gurlitt and the hidden hoard' (2014) 19 *Art Antiquity and Law* 41.

110 In the words of J. Holmes: '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* (1850) New York Court of Appeals, 3 NY 379, 383-384, cited in *Menzel v List* (1966) Supreme Court, New York County, 267 NYS 2d 804.

111 For opposite outcomes in similar cases on Second World War looting the Dutch Land Sachsen ruling denying a claim on a painting looted from Dresden applying the limitation period from the moment of the loss (*Land Sachsen* (1998) Hoge Raad, Case No. 16546, ECLI:NL:HR:1998:ZC2644), versus UK and US similar cases that were upheld: (England and Wales): *City of Gotha and Federal Republic of Germany v Sotheby's and Cobert Finance SA* (1998) No. 1993 C 3428 (QB); (US): *Kunstsammlungen zu Weimar v Elicofon* (1982) United States Court of Appeals for the Second Circuit, 678 F2d 1150). For a German denial of a claim regarding Nazi-loss on the basis of the 30-year limitation period, see *Landgericht Frankfurt am Main Urt* (2016) Az: 2-21 O 251/15. See also, on the clash between legal approaches, *Malewicz v City of Amsterdam* (2005) United States District Court for the District of Columbia, 362 F. Supp2d 298, 302-304, in this case Dutch law vs. US (NY) law.

112 E.g. Chechi (2014) 89.

periods laid down therein for filing claims.[113] Since 1954, international conventions were adopted that address looting of cultural objects and their return to countries of origin or former owners.[114] However, these conventions must be implemented into national law and, more importantly in the present context, do not apply retroactively. Also these convention therefor are of no avail in this field.

Several of the international declarations, signed by the international community as a follow-up to the 1998 Washington Principles, include recommendations to proceed with legislative reforms.[115] These recommendations, however, are mostly characterised by non-committal wording. The Terezín Declaration on Holocaust Era and Related Issues 2009, for example 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.[116]

Attempts by the EU and UNESCO to harmonise rules, or develop dispute resolution methods, 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 relies on interstate co-operation and return as in the post-war Inter-Allied model for 'external restitution', was never adopted.[117] This was primarily due to conflicting views on the issue of 'restitution in kind' – i.e. on the legality of holding on to artefacts taken from

113 At times judges may find a 'loophole', mostly if it concerned a loss by clear confiscation, either on grounds of a 'void' transaction (France) or on grounds that it had been impossible for claimants to meet deadlines set in restitution laws. See the German *Hans Sachs Poster Collection* (2012) Bundesgerichtshof, V ZR 279/10; in France, the 2017 *Bauer* case (n. 1) and the *Gentili di Giuseppe et al v Musée du Louvre* (n. 41).

114 E.g. Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954) 249 UNTS 240 and First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954) 249 UNTS 358; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970) 823 UNTS 231; Convention on Stolen or Illegally Exported Cultural Objects (adopted 24 June 1995) 2421 UNTS 457.

115 The 1999 Council of Europe Resolution 1205 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 [emphasis added, the word 'may' is noncommittal].

116 Terezin Declaration; this is obviously not a firm obligation as it depends on national views if it is 'appropriate'.

117 Section 2, above.

the territory of Germany by the Red Army as War reparations.[118] With regard to such an interstate system and its (in)efficiency in respect of ensuring rights of individual former owners, it should be considered that the persecuted and dispossessed families, today often are no longer nationals of the country where the looting took place.

At a European Union level, in 2003 the European Parliament adopted a resolution on artefacts looted during the Second World War.[119] In this Resolution, which was never followed up, the lack of legal certainty, transparency and coherent approach was highlighted. It therefore called upon the European Commission to launch an investigation into the development of a 'transparent remedial structure' for disputes.[120] The resolution emphasised that this '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 further considered the issue and has worked on a resolution that calls for legislation on the subject of provenance research, and the creation of databases that would document ownership information to enhance due diligence in the art trade.[121] In other words, the objective of such legislation would be to facilitate claims by making information more accessible.

4.3 The US approach

Title claims to Nazi-looted art pose major challenges for former owners and, often, are not supported by private law regulations. The US legal system is an exception. Claimants have more success in litigating Nazi-looted art cases and courts, particularly in California and New York, are more willing to exercise jurisdiction. In this regard, as early as 1966 a claim by Erna Menzel, a Jewish art collector, to a Chagall painting found in possession of Alfred List was upheld by the New York Supreme Court.[122] The painting had been confiscated 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

118 Annex IV to the UNESCO Draft of the Declaration of Principles Relating to Cultural Objects Displaced in Connection with the Second World War (n. 37). See also Campfens (2015) 35-36.

119 See n. 33, above.

120 Ibid.

121 European Parliament Resolution of 17 January 2019 on Cross-border Claims of Works of Art and Cultural Goods Looted in Armed Conflicts and Wars, 2017/2023 INI.

122 *Menzel v List* (n. 110).

> as a bulwark against the handiwork of evil, to guard to rightful owners the fruits of their labors.[123]

As a point of interest, in the *Menzel v List* case, List was awarded damages in a third-party action amounting to the value of the painting, payable by the art dealer who had sold him the Chagall (i.e. redress 'upstream').[124] Such liability, however, seems to be often excluded by auction houses today.

4.3.1 US jurisdiction and state immunity

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 reason for courts – in the US and elsewhere – to dismiss claims regarding artefacts confiscated and nationalised in the 1920s by the Soviet authorities.[125] In the case of Holocaust takings, however, this doctrine does not always apply in the US as it never recognised the Third Reich as a sovereign state.[126]

Following the *Altmann* litigation (2001-2004), US courts have considered 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.[127] The *Altmann* litigation dealt with six paintings by Gustav Klimt, amongst them the famous *Lady in Gold,* which had belonged to the Jewish Bloch-Bauer family, and were confiscated during the Nazi era in Vienna. The Austrian National Gallery came into the possession of the paintings and refused to return them to the heir – by then living in the US – 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, 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), claims based on

123 Ibid.

124 The value of the painting at the time of trial, awarded on the basis of a breach of an implied warranty: *Menzel v List and Perls* (1969) New York Court of Appeals, No. 298 NYS 2d 979. Similarly, in the case *Rosenberg v Seattle Art Museum and 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 possession of the Matisse painting by confiscation in Paris in 1941. See <https://plone.unige.ch/art-adr/cases-affaires/odalisque-painting-2013-paul-rosenberg-heirs-and-seattle-art-museum>.

125 See the cases in n. 93, above, an accompanying text. The Soviet Government was recognised by the US in 1933. For a recent case concerning Bolshevik takings see *Konowaloff v The Metropolitan Museum of Art* (2012) United States Court of Appeals for the Second Circuit, No. 11-4338.

126 *Menzel v List* (n. 110).

127 *Republic of Austria et al v Altmann* (n. 42).

Nazi takings may be the exception.[128] 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.'[129] As to this last condition of 'commercial activity', the *Altmann* case made it clear that the availability of a museum catalogue in the US is sufficient. Such a low threshold illustrates the readiness of US courts to take jurisdiction in Holocaust-related cases.[130] In this regard the Californian District Court in the *Altmann* case in 2001 rejected the plea by Austria that the matter should have been litigated in Austria on the ground that the US court was forum *non conveniens*:

> Plaintiff's claims, if asserted in Austria, will most likely be barred by the statute of limitations of thirty years. […] If Plaintiff's claims are barred by the statute of limitations, she would be left without a remedy; clearly, therefore, Austria is not an adequate alternative forum for Plaintiff's claims.[131]

This trend, of US courts being willing to hear Holocaust-related art claims, is expected to get a boost with the enactment of two pieces of legislation. In the first place, in 2016 the so-called HEAR Act was adopted.[132] It establishes a federal limitation period of six years for claims to Nazi-confiscated art after the actual discovery of the objects, 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 Terezín 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

128 Ibid. It was a 'Statutory Holding' allowing retroactive 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. After this ruling, the parties then agreed on international arbitration.

129 As cited in de *Csepel et al v Republic of Hungary et al* (Memorandum Opinion, 2016) United States District Court of the District of Columbia, No 10-1261 (ESH), 28.

130 Schönenberger (2007) 213, citing in fn 1102 from a review by G. Cohen of M.J. Bazyler, *Holocaust Justice: The Battle for Restitution in America's Courts* (2003) New York University Press: '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'.

131 *Altmann v Republic of Austria et al* (2001) United States District Court for the Central District of California, 142 F. Supp2d 1187, 1209.

132 Holocaust Expropriated Art Recovery Act of 2016 (114th Congress, 2nd Session, S.2763) (HEAR Act). See N.M. O'Donnell, 'The Holocaust Expropriated Art Recovery Act. A Sea Change in US Law of Restitution' (2017) 22 Art Antiquity and Law 273. See also (in Dutch) L.P.W. Van Vliet 'Verjaring en kunstvoorwerpen' in: Loth M.A., Van Vliet L.P.W., *Recht over tijd. Hoever reikt het privaatrecht in het verleden? Preadviezen Nederlandse Vereniging voor Burgerlijk Recht* (2018), Zutphen 2018, p. 128-132.

commenced within six years after the claimant's actual discovery.' A 'sunset' clause is set for 2029.

The second legal change in 2016 concerns the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act.[133] Initially this legislation was aimed at providing greater security exceptions that may have the opposite effect. The first exception is 'Nazi-era claims', and the second exception concerns 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 or their agents on loan in the US that are allegedly lost under these circumstances, appear not to be barred from litigation in the US.

A third development is that in a 2016 ruling in the case *Simon v Republic of Hungary* – that on itself does not concern artefacts – the court held that confiscation of private property can, in itself, constitute genocide.[134] Leaving aside the matter of whether this interpretation of 'genocide' is consistent with the generally accepted notion of the term,[135] it may be a sign that US courts are willing to adjudicate cases involving Holocaust losses (in this case, confiscations by the Hungarian Wartime authorities). This notion was confirmed in the *Herzog* verdict later in 2016 that does concern confiscated artefacts.[136]

4.3.2 US jurisdiction over European cases

Possibilities to litigate Holocaust-related art claims in the US would seem to be a positive development in terms of ensuring access to justice. Moreover, it facilitates the clarification of standards by US courts. From a European perspective, however, it may have undesirable consequences, namely that cases that concern European collections and European parties, are being brought before US courts.[137] Some examples will be given below.

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133 Foreign Cultural Exchange Jurisdictional Immunity Clarification Act of 2016 (114th Congress, HR 6477). See I. Wuerth, 'An Art Museum Amendment to the Foreign Sovereign Immunities Act' (2017) Lawfare <https://www.lawfareblog.com/art-museum-amendment-foreign-sovereign-immunities-act>.

134 *Simon v Republic of Hungary* (2016) United States Court of Appeals for the District of Columbia Circuit, No. 14-7082: 'Such takings, did more than effectuate genocide or serve as a means of carrying out genocide. Rather, we see the expropriations as themselves genocide.'

135 Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) UNGA Res 260 A (III).

136 *De Csepel et al v Republic of Hungary, et al* (n. 129) 112.

137 See, on the expected favourable consequences of this act for claimants: W.D. Cohan, 'A Suit Over Schiele Drawings Invokes New Law on Nazi-Looted Art' (27 February 2017) *The New York Times* <https://www.nytimes.com/2017/02/27/arts/design/a-suit-over-schiele-drawings-invokes-new-law-on-nazi-looted-art-html>. See also O'Donnell (2017).

The *Altmann* case, concerning six Klimt paintings as discussed above, is perhaps the most well-known example.[138] Although the claim was later settled by international arbitration in 2006, this was enabled by the fact that Altmann was authorised by the US Supreme Court in 2004 to proceed with a civil action against Austria.[139]

The litigation regarding Egon Schiele's *Portrait of Wally* in Vienna's Leopold Museum collection, which ran from 1998 to 2010, is another well-known example.[140] The case was initiated while *Portrait of Wally* was on loan in New York in 1998, and eventually ended after the parties agreed to settle their dispute by way of payment of US $19 million to the heirs of the former owners.[141]

As in the Schiele case, the case of *Malewicz v City of Amsterdam* concerned a collection on a temporary loan to the US, this time a collection of Malewicz paintings from the Stedelijk Museum in Amsterdam.[142] Although Nazi-looting was not the issue, the initial loss by Malevicz of his artefacts occurred within the context of the Nazi-period. The district court rulings in 2005 and 2007 enabled jurisdiction by a US court, even though immunity for seizure arrangements had been in place. It held that immunity for seizure does not mean immunity from suit.[143] Also in this case, the *Malewicz* case was settled out of court in favour of the heirs.[144]

Another well-known example that centres around Nazi-looted art held by a European museum is the case *Cassirer v Thyssen-Bornemisza Collection Foundation*, subject to litigation from 2005 till 2019.[145] It concerns the painting *Street Scene* by Pissarro that had been part of the pre-War collection of the Jewish Cassirer family, had been lost in Germany in 1939, and had eventually been bought by baron Thyssen-Bornemisza bought at a New York gallery in 1976. The 2015 district court verdict, rendered under Spanish law, found in favour of the Spanish museum. Nevertheless, 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

138 Section 4.3.1, above.

139 *Republic of Austria et al v Altmann* (n. 42).

140 *United States v Portrait of Wally* (2009) United States District Court for the Southern District of New York, 663 F. Supp 2d 232.

141 Stipulation and Order of Settlement and Discontinuance of 19 July 2010. Ibid.

142 *Malewicz v City of Amsterdam* (2007) United States District Court for the District of Columbia, 517 F. Supp 2d 322: foreign states lending art to the United States are not *per se* immune from jurisdiction, even if the loaned objects were precluded from seizure under the Immunity From Seizure Act (IFSA).

143 This case was the reason for the amendment of the IFSA, see Wuerth (n. 133). A Chechi, E Velioglu and MA Renold, 'Case Note – 14 Artworks – Malewicz Heirs and City of Amsterdam' (2013) Platform ArThémis, Art-Law Centre, University of Geneva.

144 Chechi, Velioglu and Renold (2013).

145 *Cassirer v Thyssen-Bornemisza Collection Foundation* (2015) United States District Court for the Central District of California, 153 F. Supp 3d 1148.

acceptance of the Washington Conference Principles and the Terezín Declaration, and, specifically, its commitment to achieve 'just and fair solutions' for victims of Nazi persecution.'[146]

Another (ongoing) case concerns the so-called '*Welfenschatz*' ('Guelph Treasure') – a hoard of medieval treasures originating from Brunswick Cathedral in Germany.[147] In 2014, the German *Beratende Kommission* denied this claim, according to the committee because it did not meet the criteria defining a forced sale. Subsequently, a claim against the Berlin Museum Foundation (SPK) and the German Government was filed in the US.[148] The suit was filed on behalf of the heirs of the two art dealers who had acquired the Guelph Treasure from the Duke of Brunswick in 1929 and who in 1935 had sold most of the objects to the Dresdner Bank. In March 2017, the District Court ruled in favour of US jurisdiction, under reference to the HEAR Act: 'Congress specifically recognized and did not foreclose the use of litigation as a means to resolve claims to recover Nazi-confiscated art'.[149] In February 2021, however, the US Surpreme Court ruled in favour of the German State by limiting jurisdiction over claims to Nazi looted art to takings 'in violation of international law'.[150] Since that ruling did not shut de door for jurisdiction by a US court over this case, litigation is expected to continue in lower courts

Furthermore, in December 2016 the Bavarian *Staatsgemäldesammlungen* and the Bavarian State were sued in a New York court by the heirs of Flechtheim, a Jewish art dealer from Berlin, over eight paintings by Beckmann, Klee and Gris in a Munich museum.[151] As seen above in section 3.3.1.2, previously two *Flechtheim* cases had been considered by the German *Beratende Kommission*. The first claim was upheld, while the second was dismissed.[152]

Likewise, in March 2017, litigation was initiated in New York over Kandinsky's *Das Bunte Leben* in the Munich Lenbachhaus Museum, a painting

146 After appeal the district court confirmed that the Thyssen-Bornemisza Museum acquired lawful ownership according to Spanish law. See *Cassirer v Thyssen-Bornemisza Collection Foundation* (2019) United States District Court for the Central District of California, No. CV 05-CV-03459.

147 See section 3.2.4, above.

148 *Philipp et al v Federal Republic of Germany et al* (n. 86).

149 Ibid. See also O'Donnell (2017) 277.

150 In its ruling of 3 February 2021 the Supreme Court confirmed (revived?) the 'domestic takings' doctrine that implicates that the expropriation by foreign governments of their own nationals are off-limit to US courts, by ruling that the expropriation exception in the FSIA ('in violation of international law') is limited to the expropriation of *non*-nationals (those being covered by international law) (n. 86). See <https://www.lawfareblog.com/recent-supreme-court-rulings-foreign-sovereign-immunities-act> (acc. 28 April 2021).

151 *Hulton et al. v Bayerische Gemäldesammlungen* (n. 84).

152 Recommendation of the Advisory Commission on the Return of Cultural Property Seized as a Result of Nazi Persecution (n. 83); Recommendation in the Matter of the Heirs of Alfred Flechtheim v Stiftung Kunstsammlung Nordrhein-Westfalen, Düsseldorf (n. 61).

owned by a German bank.[153] The painting had been owned by the Dutch Lewenstein family, and the claim that is filed on behalf of the heirs seeks damages for the value of the painting, stated in the complaint as US$ 80 million.[154] The case is related to a claim to another Kandinsky painting that also had been owned by the Lewenstein family and that, today, is in the collection of the Amsterdam Stedelijk Museum (mentioned above in section 3.2.3). Although that last claim was denied before the Dutch Restitutions Committee in 2018, and the Amsterdam District Court did not see any reason to reverse this outcome, it may well be reversed in the light of (political) pressure to reconsider the claim.[155]

4.4 Concluding remarks on access to justice

The current legal framework is highly fragmented as to the possibilities of getting claims resolved by a neutral forum. There is a discrepancy between the US and European jurisdictions. 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 looted by the Nazis, also in cases that concern works in Europe or are under an immunity for seizure arrangement whilst on loan in the US. This does not mean however that the ADR model as propagated in the Washington Principles has been abandoned in the US, particularly given the following statement in the 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.[156]

In other words, the existence of a European ADR system with certain guarantees as to due process might reduce the need to take cases overseas. In Europe, however, the present situation is fragmented. In some European states, the

153 *Lewenstein et al v Bayerische Landesbank* (2017) No 17-CV-0160 (United States District Court for the Southern District of New York).

154 Ibid., at 22.

155 Binding Advice in the case Bild mit Häusern by Wassily Kandinsky (2018) RC 3.141, *Plaintiffs v. Municipality of Amsterdam*, ECLI:NL:RBAMS:2020:6277 (District Court Amsterdam, 16 December 2020). On the political pressure to reverse this outcome, see the Letter of the Mayor and Aldermen to the Amsterdam Municipal Council, https://amsterdam.raadsinformatie.nl/modules/1/Berichten%20uit%20het%20college/651069 (acc. 15 May 2021).

156 HEAR Act, section 8.

Washington Principles appear not to be implemented at all.[157] In some Western-European countries, certain claims can be referred to national committees. Other cases are settled in confidential agreements – provided the parties are willing: the 'moral' approach. Such settlements will obviously depend on the bargaining chips brought to the table.[158] One such bargaining chip might well be the possibility of taking a case to the United States for costly and lengthy litigation.

5 FINAL OBSERVATIONS

Although the looting of cultural objects by the Nazis obviously has moral and ethical implications, the conclusion of this chapter is that a legal approach is also needed. The role of law in this regard should be to set clear, consistent and transparent standards to ensure cases are treated equally and outcomes are just and fair.

The findings in the preceding sections highlight a lack of clarity of today's standards in the ethical model. The opinion was put forward that the rule in the Washington Principles, prescribing 'fair and just solutions, according to the circumstances of a case' for title claims to Nazi-looted art, is based on two pillars. First, the intangible quality of artefacts, and their ability to be symbolic for lost family histories, is reason for special treatment: these claims are not merely about stolen possessions but about family heirlooms. Furthermore, the rule aims at redress for involuntary losses with a direct causal link between the persecution of the owner, such as a confiscation, theft or sale under duress. If that link cannot be established and it concerns a voluntary transaction, then the 'just and fair' rule should not apply as it does not concern 'Nazi-looted art'. The 2009 Draft UNESCO Declaration – that was never adopted but nevertheless may serve as inspiration – defines Nazi-looting as takings that are 'offensive to the principles of humanity and dictates of public conscience'.

Another finding was that access to justice in the ethical framework is limited. The Washington Principles, along with other non-binding instruments in this field, stress the importance of alternative dispute resolution for resolving ownership issues. And indeed, parties searching for just and fair solutions on the merits of a case often *need* alternative procedures as most legal systems do not support ownership claims regarding losses that took place so many years ago. Increased possibilities to litigate Holocaust-related cases in the United States, however, raise the question as to how this trend will have an

157 See W.A. Fisher and R. Weinberger, 'Holocaust-Era Looted Art: A Current World-Wide Overview' (2014) <https://www.lootedart.com/QTV75V817471>.

158 F. Shyllon, 'The Rise of Negotiation (ADR) in Restitution, Return and Repatriation of Cultural Property: Moral Pressure and Power Pressure' (2017) 22 Art Antiquity and Law 130.

impact on European cases. This institutional vacuum in terms of a lack of access to justice in Europe needs to be addressed. A lack of clarity at both a material and a procedural level – what is the norm and who can clarify it? – may result in legal insecurity, inconsistent outcomes and injustice. Or, as the European Parliament put it as early as 2003: 'the current situation lacks legal certainty, transparency and a coherent approach. This is a cross-border issue calling for a cross-border solution'.[159]

To fill this 'vacuum', the establishment of a European claims procedure could be considered. States which have signed instruments like the Washington Principles and the Terezín Declaration, would in that way meet their promise to develop mechanisms to ensure that the 'just and fair' norm is upheld. The late Professor Norman Palmer voiced this idea as follows:

> [T]he formation of a body [...] 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 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.[160]

It is a separate matter where such an organisation would fit in – e.g. the European Union or the Council of Europe. It would also be premature to delve into the question of whether such a process should be voluntary or semi-obligatory – for example by including a declaration of intent in the codes of conduct of museums and art dealer associations, or incorporating in the general terms of art fairs and auction houses the requirement that disputes be referred to the body in question. The paramount issue would be the neutrality and transparency of procedures, and the authority of its working methods. With regard to this, a pragmatic argument in conclusion. Recognition of the rights of victims of the Holocaust to their lost cultural objects has triggered broader awareness and discussion on the legitimacy of possession of 'tainted' cultural objects. A proactive and international approach might help structure that wider field. Whilst the historical background of looting practices may be specific to a certain place and time, the effects of such looting practices can be felt in any country in the world with an art market, art collectors or museums, and at any moment in time.

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159 See n. 33 and section 4.2 above.

160 The thought builds on the 2003 Resolution of the European Parliament and was supported by a recent study: M.A. Renold and ArThemis, 'Cross-Border Restitution Claims of Art Looted in Armed Conflicts and Wars and Alternatives to Court Litigations' (2016) <http://publications.europa.eu/resource/cellar/f600d443-20a9-11e6-86d0-01aa75ed71a1.0001.03/DOC_1>.