

An Introduction to the Washington Conference Principles on Nazi-Confiscated Art

COURSE SYLLABUS
Prof. Felix Uhlmann
Law [...]
Spring 2024
1 Credit
Room [...]

OFFICE HOURS

Off-campus

CONTACT INFORMATION

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FACULTY ASSISTANT CONTACT INFORMATION

N/A

COURSE DESCRIPTION

The Washington Principles, yet soft law, have an enormous effect on the work of museums and collections that possess works of art that changed hands between 1933 and 1945. The course "*An Introduction to the Washington Conference Principles on Nazi-Confiscated Art*" will analyze the basic ideas of this document and its legal and ethical implications. It will look at the practices of courts and restitution committees in their search for just and fair solutions.

LEARNING OUTCOMES

In this course, students will be introduced to the Washington Conference Principles on Nazi-Confiscated Art which play a major role for provenance research in public and private art collections. Students will understand the basic ideas of these principles, both in substance and procedure. The course will confront students with the crossroads of law and ethics in an important practical field. Students are invited to think beyond the relatively narrow scope of the Washington Principles and discuss the reparation of other historical injustices through the lens of these principles.

TEACHING METHODS

Residential. Discussion in class.

ONLINE PLATFORM

<https://www.ius.uzh.ch/de/staff/professorships/alphabetical/uhlmann/Miami-Law.html>

Course materials will be uploaded by January 13, 2024.

Cases and other sources indicated in the course schedule are subject to change.

CLASS CANCELLATION & MAKE-UP CLASS POLICY

Students may miss classes by excusing themselves by email before the class, indicating reasons. Missed classes must be compensated by larger research papers.

COURSE MATERIALS

See online platform.

ATTENDANCE POLICY

Attendance is mandatory.

COURSE REQUIREMENTS AND EXAM FORMAT

In lieu of a final examination, students will prepare a short research paper (5-10 pages) on a restitution committee's decision of their choice (or on a comparable document), discussing one (or more) research question(s) under the Washington Principles. Cases to choose from include:

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

<https://www.restitutiecommissie.nl/en/>

<https://www.civs.gouv.fr/home/>

<https://www.beratende-kommission.de/en>

The proposed case with the research question(s) will be presented by the students on the last day in class (3-5 minutes). The research paper is due four weeks after completion of the course.

Class participation and attendance will affect students' final grade.

GRADING

All students will be graded with a final letter grade as follows:

Research paper: 60%

Presentation of the proposed case and the research question(s) on the last day in class: 10%

Class participation and attendance: 30%

TITLE IX

The University of Miami seeks to maintain a safe learning, living, and working environment free from all types of sexual misconduct including but not limited to: Dating Violence, Domestic Violence, Sex- or Gender-Based Discrimination, Sexual Assault (including Sexual Battery), Sexual Exploitation, Sexual Harassment, and Stalking. For additional information about the University's efforts to prevent, stop, and address sexual misconduct, including resources and

reporting options, please visit www.miami.edu/titleix or contact the University's Title IX Office at titleixcoordinator@miami.edu.

CLASS RECORDINGS

Meetings of this course might be recorded. Any recordings will be available to students registered for this class. Class recordings are designed to supplement the classroom experience and are part of the class materials. As with all class materials, class recordings may not be reproduced, edited, redistributed, forwarded, posted or shared in whole or part through websites, social media or other online platforms without the instructor's prior express approval. The misuse of recorded lectures is an Honor Code violation which would be documented in your permanent record and reported to the Bar. If the instructor or a University of Miami office plans to use the recordings beyond this class, students identifiable in the recordings will be notified to request consent prior to such use.

DISABILITY ISSUES

If you have a disability, or suspect that you may have a disability, the Law School encourages you to contact Jessie Howell, Coordinator, Disability Services in the Office of Disability Services for information about available opportunities, resources, and services. Her phone number is 305-284-9907, and her email address is jhowell@law.miami.edu. You may also visit the Office of Disability Services website at www.law.miami.edu/disability-services.

COURSE SCHEDULE

<p>Session 1</p> <p>Monday, Jan. 22, 2024 12:30-1:50pm (80 minutes)</p>	<p>Legal Hurdles to the Restitution of Nazi-Confiscated Art</p> <p>Description: The restitution of Nazi-confiscated art is confronted with many legal obstacles. To dismiss a case on the grounds that the limitation period has expired, is the most obvious but other defenses as good faith may also effectively bar legal action. Additionally, practical difficulties may pose substantial hurdles.</p> <p>Reading:</p> <ul style="list-style-type: none">- <i>Grosz v. Museum of Modern Art</i>, 772 F. Supp. 2d 472 (S.D.N.Y. 2010); 403 Fed. Appx. 575 (2d Cir. 2010)- Washington Conference Principles on Nazi-Confiscated Art, Released in connection with the Washington Conference on Holocaust-Era Assets, Washington D.C. (December 3, 1998) (https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/)- Terezin Declaration on Holocaust Era Assets and Related Issues, Terezin (June 30, 2009) (https://www.state.gov/prague-holocaust-era-assets-conference-terezin-declaration/)
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<p>Session 2</p> <p>Tuesday, Jan. 23, 2024 12:30-1:50pm (80 minutes)</p>	<p>The Washington Principles on the Crossroad of Law and Ethics</p> <p>Description: The Washington Principles declare themselves as non-binding. Still, they may play a role in legal proceedings and if they are applied independently from a legal order before a committee, attention must be given to the questions if and to what extent the principles should be translated into a legal rationale. The Washington Principles are often supplemented to various degrees by national legislation.</p> <p>Reading:</p> <ul style="list-style-type: none"> - Washington Conference Principles on Nazi-Confiscated Art, Released in connection with the Washington Conference on Holocaust-Era Assets, Washington D.C. (December 3, 1998) - Terezin Declaration on Holocaust Era Assets and Related Issues, Terezin (June 30, 2009) - Austrian Statutory Regulation concerning the Art Restitution Law as amended on 25 January 2011 (Federal Law on the Restitution of Works of Art and Other Movable Cultural Assets from Austrian Federal Museums and Collections and Other Federal Property (Art Restitution Law – KRG) (NR: GP XX RV 1390 AB 1464 S. 146. BR: AB 5802 p. 646.) StF: BGBl. I Nr. 181/1998)
<p>Session 3</p> <p>Wednesday, Jan. 24, 2024 12:30-1:50pm (80 minutes)</p>	<p>The Core of the Washington Principles – A Just and Fair Solution</p> <p>Description: At the core of the Washington Principles lies the idea of finding a just and fair solution. The principles give little instruction how this idea should be approached and which elements should be taken into consideration. It seems natural to start from the injustice of confiscation but other factors may – or may not – play a role such as good faith and interest of the institution, monetary interest of the claimant, relationship of the heirs to the previous owner etc.</p> <p>Reading:</p> <ul style="list-style-type: none"> - Report of the Spoliation Advisory Panel in respect of eight drawings now in the possession of the Samuel Courtauld Trust (HC 757), 24 June 2009 - Decision of the Kunstkommission Basel in the Matter of Curt Glaser of 21 November 2018
<p>Session 4</p> <p>Thursday, Jan. 25, 2024 12:30-1:50pm (80 minutes)</p>	<p>Procedure and Institutions</p> <p>Description: Different countries have opted for different solutions as far a procedure and institutions are concerned. The Washington Principles contain some basic procedural safeguards and guidelines. In combination with concepts of natural justice, these sources form an amalgam for a fair and effective procedure.</p>

	<p>Reading:</p> <ul style="list-style-type: none"> - NL Restitutions Committee, Recommendation regarding Herman Hamburger (RC 1.193), 18 September 2023 - Recommendation of the German Advisory Commission in the case of the Heirs of Kurt and Else Grawi v. Landeshauptstadt Düsseldorf, 18 March 2021 - CIVS, Recommendation No. 5446 M-5446 BCM, 12 February 2021
<p>Session 5</p> <p>Friday, Jan. 26, 2024 2-5pm (180 minutes)</p>	<p>The Washington Principles: A Blueprint for the Correction of other Injustices?</p> <p>Description: The Washington Principles cover the relatively narrow frame of Nazi-Confiscated Art from 1933-1945. Countless other injustices have occurred throughout history such as slavery and racism, imperialism, exploitation of indigenous populations etc. Which concepts of the Washington Principles may be transposed into these settings, which not and why? What additional obstacles may be resolved on the path to just and fair solutions in these settings?</p> <p>Reading: On Benin Bronzes https://kulturgutverluste.de/en/contexts/colonial-contexts/returns On Parthenon Marbles https://www.parthenon.newmentor.net/legal.htm</p>
<p>Session 6</p> <p>Saturday, Jan. 27, 2024 10am-1pm (180 minutes)</p>	<p>Students Proposals</p> <p>Description: Students propose the content of their research paper on a restitution committee’s decision of their choice (or on a comparable document), discussing one (or more) research question(s) under the Washington Principles. Cases to choose from include:</p> <p><i>https://www.gov.uk/government/groups/spoliation-advisory-panel</i> <i>https://www.restitutiecommissie.nl/en/</i> <i>https://www.civs.gouv.fr/home/</i> <i>https://www.beratende-kommission.de/en</i></p> <p>Each student’s presentation lasts 3-5 minutes, followed by questions and comments of classmates and course instructor. Time permitting, a free discussion on all questions of the Washington principles will follow.</p>

Prof. Dr. Felix Uhlmann, LL.M. (Harvard), is a full professor of constitutional and administrative law as well as legislative theory at the University of Zurich, Switzerland. He regularly publishes on artistic freedom and cultural promotion. He was a board member of the Swiss Arts Council and is now president of the board of trustees for the Kunstmuseum Basel, dealing with restitution cases of Nazi-confiscated art. Most recently, he presided the round table to find experts to evaluate the provenance research of the Bührle Collection in the Kunsthaus Zurich and is a part of an international group of experts to advise the German government to reform the Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property.

See for further information (mostly in German):

<https://www.ius.uzh.ch/de/staff/professorships/alphabetical/uhlmann/KKR.html>

Grosz v. Museum of Modern Art

403 F. App'x 575 (2d Cir. 2010)
Decided Dec 16, 2010

No. 10-257.

576 December 16, 2010. *576

Appeal from a judgment of the United States District Court for the Southern District of New York (Colleen McMahon, Judge).

UPON CONSIDERATION WHERE-OF, IT IS HEREBY ORDERED, AD-JUDGED, AND DECREED that the judgment of the District Court is **AFFIRMED**.

David Rowland (Patricia Hertling, on the brief), Rowland Petroff, New York, NY; Raymond Dowd, Dunnington Bartholow Miller LLP, New York, NY, for Plaintiffs-Appellants.

Charles S. Sims (Margaret A. Dale, Jennifer L. Jones, on the brief), Proskauer Rose LLP, New York, NY, for Defendants-Appellees.

Edward McGlynn Gaffney, Jr., Valparaiso University School of Law, Valparaiso, IN; Jennifer Kreder, Law Office of Jennifer Kreder, Florence, KY, for Amici Curiae.

Present JOSE A. CABRANES, BARRINGTON D. PARKER, Circuit Judges, EDWARD R. KORMAN, District Judge.

– The Honorable Edward R. Korman, of the United States District Court for the Eastern District of New York, sitting by designation.

SUMMARY ORDER

Plaintiffs Martin and Lilian Grosz ("plaintiffs" or "Grosz heirs") are the legal heirs to the estate of the late painter George Grosz ("Grosz"). Three of Grosz's works of art, *Hermann-Neisse with Cognac*, *Self-Portrait with Model*, and *Republican Automaton* are currently in the possession of the Museum of Modern Art in New York ("MoMA"). Plaintiffs filed suit against MoMA on April 10, 2009 in the Southern District of New York, alleging claims for, among other things, conversion, ⁵⁷⁷ replevin, declaratory judgment, and constructive trust with respect to the works of art. On June 4, 2009, defendants moved under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) to dismiss the Complaint as time-barred. In its Decision and Order Granting Defendant's Motion to Dismiss the Complaint, *Grosz v. Museum of Modern Art, et al.*, No. 09-CIV-3706, ___ F.Supp.2d ___, 2010 WL 88003 (S.D.N.Y. Jan. 6, 2010), the District Court granted MoMA's motion. The District Court dismissed the case as barred by the three-year statute of limitations for conversion and replevin under New York law, [N.Y. C.P.L.R. § 214\(3\)](#). Plaintiffs appeal the judgment of the District Court, claiming that the three-year statute of limitations had not passed at the point at which suit was brought or, in the alternative, that the statute of limitations in this case should have been subject to equitable tolling. We assume the parties' familiarity with the facts and procedural history of this action.

I.

We review the dismissal of a complaint pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) *de novo*, construing the complaint liberally and accepting all factual allegations in the complaint as true. *See Chambers v. Time Warner, Inc.*, [282 F.3d 147, 152](#) (2d Cir. 2002).

Under New York State Law, "[a]n innocent purchaser of stolen goods becomes a wrongdoer only after refusing the owner's demand for their return." *Kunstsammlungen Zu Weimar v. Elicofon*, [678 F.2d 1150, 1161](#) (2d Cir. 1982). This "demand-and-refusal" rule dates back to 1966, when the New York Supreme Court became the first court in the country to address the statute of limitations issue for innocent purchasers of chattel in art dealings. *See Menzel v. List*, [49 Misc.2d 300, 267 N.Y.S.2d 804](#) (1966). In *Menzel*, a case involving a good faith purchase of a painting by Marc Chagall, the court held that a cause of action for conversion or replevin accrues "against a person who lawfully comes by a chattel . . . not upon the stealing or the taking, but upon the defendant's refusal to convey the chattel upon demand." *Id.* at 304, [267 N.Y.S.2d 804](#).

The Grosz heirs do not affirmatively assert that MoMA was a bad faith purchaser. Accordingly, a judgment declaring the plaintiffs' claims as time-barred rests on whether suit was brought within three years of refusal by MoMA. All parties agree that refusal by MoMA has taken place, they only disagree on when. As the District Court explained in its thoughtful and comprehensive opinion, the record indicates that refusal took place, at the latest, in a letter from the Director of MoMA to the Grosz heirs' agent on July 20, 2005, and that the agent of the Grosz heirs' confirmed his understanding that refusal had taken place in at least two subsequent letters to MoMA. Because plaintiffs did not file suit until April 10, 2010, more than three years after refusal took place, the District Court correctly dismissed the action as falling outside the statute of limitations.

II.

Plaintiffs claim, in the alternative, that MoMA should be equitably estopped from using the statute of limitations as a defense because plaintiffs relied upon continuing negotiations with MoMA in choosing not to file suit. Under New York law, "[t]he doctrine of equitable estoppel applies where it would be unjust to allow a defendant to assert a statute of limitations defense" — specifically, "where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action," *Zumpano v. Quinn*, [6 N.Y.3d 666, 673-74, 816 N.Y.S.2d 703, 849 N.E.2d 926](#) ^{*578} (2006) (internal quotation marks and citation omitted). "[T]he plaintiff must demonstrate reasonable reliance on the defendant's misrepresentations." *Id.*

The mere existence of settlement negotiations is insufficient to justify an estoppel claim. *See Cranesville Block Co., Inc. v. Niagara Mohawk Power Corp.*, [175 A.D.2d 444, 572 N.Y.S.2d 495, 496-97](#) (1991). Indeed, where "there was never any settlement agreement[;] continued difficulties in trying to settle the matter[;] no fraud or misrepresentation by defendants[; and] no agreement or promise by defendants upon which plaintiffs relied in failing to commence their lawsuit within the requirement period," equitable estoppel does not apply. *Marvel v. Capital Dist. Transp. Auth.*, [114 A.D.2d 612, 494 N.Y.S.2d 215](#) (1985).

The record indicates no fraud or misrepresentation on the part of MoMA, nor does it indicate evidence of reasonable reliance by plaintiffs on any alleged misrepresentations by MoMA. We therefore hold that the District Court correctly denied plaintiffs equitable tolling claim.

CONCLUSION

We have considered all of plaintiffs' claims on appeal and find them to be without merit. Accordingly, the judgment of the District Court is **AFFIRMED**.

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Washington Conference Principles on Nazi-Confiscated Art

OFFICE OF THE SPECIAL ENVOY FOR HOLOCAUST ISSUES

[Released in connection with The Washington Conference on Holocaust Era Assets, Washington, DC, December 3, 1998]

In developing a consensus on non-binding principles to assist in resolving issues relating to Nazi-confiscated art, the Conference recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws.

1. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.
2. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.
3. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.
4. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.
5. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.
6. Efforts should be made to establish a central registry of such information.
7. Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.
8. If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.
9. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, can not be identified, steps should be taken expeditiously to achieve a just and fair solution.

- 10. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.
 - 11. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.
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2009 Terezin Declaration on Holocaust Era Assets and Related Issues

OFFICE OF THE SPECIAL ENVOY FOR HOLOCAUST ISSUES

Upon the invitation of the Prime Minister of the Czech Republic we the representatives of 46 states listed below met this day, June 30, 2009 in Terezin, where thousands of European Jews and other victims of Nazi persecution died or were sent to death camps during World War II. We participated in the Prague Holocaust Era Assets Conference organized by the Czech Republic and its partners in Prague and Terezin from 26-30 June 2009, discussed together with experts and non-governmental organization (NGO) representatives important issues such as Welfare of Holocaust (Shoah) Survivors and other Victims of Nazi Persecution, Immovable Property, Jewish Cemeteries and Burial Sites, Nazi- Confiscated and Looted Art, Judaica and Jewish Cultural Property, Archival Materials, and Education, Remembrance, Research and Memorial Sites. We join affirming in this

Terezin Declaration on Holocaust Era Assets and Related Issues

Aware that Holocaust (Shoah) survivors and other victims of Nazi persecution have reached an advanced age and that it is imperative to respect their personal dignity and to deal with their social welfare needs, as an issue of utmost urgency,

Having in mind the need to enshrine for the benefit of future generations and to remember forever the unique history and the legacy of the Holocaust (Shoah), which exterminated three fourths of European Jewry, including its premeditated nature as well as other Nazi crimes,

Noting the tangible achievements of the 1997 London Nazi Gold Conference, and the 1998 Washington Conference on Holocaust-Era Assets, which addressed central issues relating to restitution and successfully set the stage for the significant advances of the next decade, as well as noting the January 2000 Stockholm Declaration, the October 2000 Vilnius Conference on Holocaust Era Looted Cultural Assets,

Recognizing that despite those achievements there remain substantial issues to be addressed, because only a part of the confiscated property has been recovered or compensated,

Taking note of the deliberations of the Working Groups and the Special Session on Social Welfare of Holocaust Survivors and their points of view and opinions which surveyed and addressed issues relating to the Social Welfare of Holocaust Survivors and other Victims of Nazi Persecution, Immovable Property, Nazi Confiscated Art, Judaica and Jewish Cultural Property, Holocaust Education, Remembrance and Research, which can be found on the weblink for the Prague Conference and will be published in the Conference Proceedings,

Keeping in mind the legally non-binding nature of this Declaration and moral responsibilities thereof, and without prejudice to applicable international law and obligations,

1. Recognizing that Holocaust (Shoah) survivors and other victims of the Nazi regime and its collaborators suffered unprecedented physical and emotional trauma during their ordeal, the Participating States take note of the special social and medical needs of all survivors and strongly support both public and private efforts in their respective states to enable them to live in dignity with the necessary basic care that it implies.
2. Noting the importance of restituting communal and individual immovable property that belonged to the victims of the Holocaust (Shoah) and other victims of Nazi persecution, the Participating States urge that every effort be made to rectify the consequences of wrongful property seizures, such as confiscations, forced sales and sales under duress of property, which were part of the persecution of these innocent people and groups, the vast majority of whom died heirless.
3. Recognizing the progress that has been made in research, identification, and restitution of cultural property by governmental and non-governmental institutions in some states since the 1998 Washington Conference on Holocaust-Era Assets and the endorsement of the Washington Conference Principles on Nazi-Confiscated Art, the Participating States affirm an urgent need to strengthen and sustain these efforts in order to ensure just and fair solutions regarding cultural property, including Judaica that was looted or displaced during or as a result of the Holocaust (Shoah).
4. Taking into account the essential role of national governments, the Holocaust (Shoah) survivors' organizations, and other specialized NGOs, the Participating States call for a coherent and more effective approach by States and the international community to ensure the fullest possible, relevant archival access with due respect to national legislation. We also encourage States and the international community to establish and support research and education programs about the Holocaust (Shoah) and other Nazi crimes, ceremonies of remembrance and commemoration, and the preservation of memorials in former concentration camps, cemeteries and mass graves, as well as of other sites of memory.
5. Recognizing the rise of Anti-Semitism and Holocaust (Shoah) denial, the Participating States call on the international community to be stronger in monitoring and responding to such incidents and to develop measures to combat anti-Semitism.

The Welfare of Holocaust (Shoah) Survivors and other Victims of Nazi Persecution

Recognizing that Holocaust (Shoah) survivors and other victims of Nazi persecution, including those who experienced the horrors of the Holocaust (Shoah) as small and helpless children, suffered unprecedented physical and emotional trauma during their ordeal.

Mindful that scientific studies document that these experiences frequently result in heightened damage to health, particularly in old age, we place great priority on dealing with their social welfare needs in their lifetimes. It is unacceptable that those who suffered so greatly during the earlier part of their lives should live under impoverished circumstances at the end.

1. We take note of the fact that Holocaust (Shoah) survivors and other victims of Nazi persecution have today reached an advanced age and that they have special medical and health needs, and we therefore support, as a high priority, efforts to address in their respective states the social welfare needs of the most vulnerable elderly victims of Nazi persecution – such as hunger relief, medicine and homecare as required, as well as measures that will encourage intergenerational

contact and allow them to overcome their social isolation. These steps will enable them to live in dignity in the years to come. We strongly encourage cooperation on these issues.

2. We further take note that several states have used a variety of creative mechanisms to provide assistance to needy Holocaust (Shoah) survivors and other victims of Nazi persecution, including special pensions; social security benefits to non-residents; special funds; and the use of assets from heirless property. We encourage states to consider these and other alternative national actions, and we further encourage them to find ways to address survivors' needs.

Immovable (Real) Property

Noting that the protection of property rights is an essential component of a democratic society and the rule of law,

Acknowledging the immeasurable damage sustained by individuals and Jewish communities as a result of wrongful property seizures during the Holocaust (Shoah),

Recognizing the importance of restituting or compensating Holocaust-related confiscations made during the Holocaust era between 1933-45 and as its immediate consequence,

Noting the importance of recovering communal and religious immovable property in reviving and enhancing Jewish life, ensuring its future, assisting the welfare needs of Holocaust (Shoah) survivors, and fostering the preservation of Jewish cultural heritage,

1. We urge, where it has not yet been effectively achieved, to make every effort to provide for the restitution of former Jewish communal and religious property by either in rem restitution or compensation, as may be appropriate; and
2. We consider it important, where it has not yet been effectively achieved, to address the private property claims of Holocaust (Shoah) victims concerning immovable (real) property of former owners, heirs or successors, by either in rem restitution or compensation, as may be appropriate, in a fair, comprehensive and nondiscriminatory manner consistent with relevant national law and regulations, as well as international agreements. The process of such restitution or compensation should be expeditious, simple, accessible, transparent, and neither burdensome nor costly to the individual claimant; and we note other positive legislation in this area.
3. We note that in some states heirless property could serve as a basis for addressing the material necessities of needy Holocaust (Shoah) survivors and to ensure ongoing education about the Holocaust (Shoah), its causes and consequences.
4. We recommend, where it has not been done, that states participating in the Prague Conference consider implementing national programs to address immovable (real) property confiscated by Nazis, Fascists and their collaborators. If and when established by the Czech Government, the European Shoah Legacy Institute in Terezin shall facilitate an intergovernmental effort to develop non-binding guidelines and best practices for restitution and compensation of wrongfully seized immovable property to be issued by the one-year anniversary of the Prague Conference, and no later than June 30, 2010, with due regard for relevant national laws and regulations as well as international agreements, and noting other positive legislation in this area.

Jewish Cemeteries and Burial Sites

Recognizing that the mass destruction perpetrated during the Holocaust (Shoah) put an end to centuries of Jewish life and included the extermination of thousands of Jewish communities in much of Europe, leaving the graves and cemeteries of generations of Jewish families and communities unattended, and

Aware that the genocide of the Jewish people left the human remains of hundreds of thousands of murdered Jewish victims in unmarked mass graves scattered throughout Central and Eastern Europe,

We urge governmental authorities and municipalities as well as civil society and competent institutions to ensure that these mass graves are identified and protected and that the Jewish cemeteries are demarcated, preserved and kept free from desecration, and where appropriate under national legislation could consider declaring these as national monuments.

Nazi-Confiscated and Looted Art

Recognizing that art and cultural property of victims of the Holocaust (Shoah) and other victims of Nazi persecution was confiscated, sequestered and spoliated, by the Nazis, the Fascists and their collaborators through various means including theft, coercion and confiscation, and on grounds of relinquishment as well as forced sales and sales under duress, during the Holocaust era between 1933-45 and as an immediate consequence, and

Recalling the Washington Conference Principles on Nazi-Confiscated Art as endorsed at the Washington Conference of 1998, which enumerated a set of voluntary commitments for governments that were based upon the moral principle that art and cultural property confiscated by the Nazis from Holocaust (Shoah) victims should be returned to them or their heirs, in a manner consistent with national laws and regulations as well as international obligations, in order to achieve just and fair solutions,

1. We reaffirm our support of the Washington Conference Principles on Nazi-Confiscated Art and we encourage all parties including public and private institutions and individuals to apply them as well,
2. In particular, recognizing that restitution cannot be accomplished without knowledge of potentially looted art and cultural property, we stress the importance for all stakeholders to continue and support intensified systematic provenance research, with due regard to legislation, in both public and private archives, and where relevant to make the results of this research, including ongoing updates, available via the internet, with due regard to privacy rules and regulations. Where it has not already been done, we also recommend the establishment of mechanisms to assist claimants and others in their efforts,
3. Keeping in mind the Washington Conference Principles on Nazi-Confiscated Art, and considering the experience acquired since the Washington Conference, we urge all stakeholders to ensure that their legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties. Governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property, in order to achieve just and fair solutions, as well as alternative dispute resolution, where appropriate under law.

Judaica and Jewish Cultural Property

Recognizing that the Holocaust (Shoah) also resulted in the wholesale looting of Judaica and Jewish cultural property including sacred scrolls, synagogue and ceremonial objects as well as the libraries, manuscripts, archives and records of Jewish communities, and

Aware that the murder of six million Jews, including entire communities, during the Holocaust (Shoah) meant that much of this historical patrimony could not be reclaimed after World War II, and

Recognizing the urgent need to identify ways to achieve a just and fair solution to the issue of Judaica and Jewish cultural property, where original owners, or heirs of former original Jewish owners, individuals or legal persons cannot be identified, while acknowledging there is no universal model,

1. We encourage and support efforts to identify and catalogue these items which may be found in archives, libraries, museums and other government and non-government repositories, to return them to their original rightful owners and other appropriate individuals or institutions according to national law, and to consider a voluntary international registration of Torah scrolls and other Judaica objects where appropriate, and
2. We encourage measures that will ensure their protection, will make appropriate materials available to scholars, and where appropriate and possible in terms of conservation, will restore sacred scrolls and ceremonial objects currently in government hands to synagogue use, where needed, and will facilitate the circulation and display of such Judaica internationally by adequate and agreed upon solutions.

Archival Materials

Whereas access to archival documents for both claimants and scholars is an essential element for resolving questions of the ownership of Holocaust-era assets and for advancing education and research on the Holocaust (Shoah) and other Nazi crimes,

Acknowledging in particular that more and more archives have become accessible to researchers and the general public, as witnessed by the Agreement reached on the archives of the International Tracing Service (ITS) in Bad Arolsen, Germany,

Welcoming the return of archives to the states from whose territory they were removed during or as an immediate consequence of the Holocaust (Shoah),

We encourage governments and other bodies that maintain or oversee relevant archives to make them available to the fullest extent possible to the public and researchers in accordance with the guidelines of the International Council on Archives, with due regard to national legislation, including provisions on privacy and data protection, while also taking into account the special circumstances created by the Holocaust era and the needs of the survivors and their families, especially in cases concerning documents that have their origin in Nazi rules and laws.

Education, Remembrance, Research and Memorial Sites

Acknowledging the importance of education and remembrance about the Holocaust (Shoah) and other Nazi crimes as an eternal lesson for all humanity,

Recognizing the preeminence of the Stockholm Declaration on Holocaust Education, Remembrance and Research of January 2000,

Recognizing that the Universal Declaration of Human Rights was drafted in significant part in the realization of the horrors that took place during the Holocaust, and further recognizing the UN Convention on the Prevention and Punishment of the Crime of Genocide,

Recalling the action of the United Nations and of other international and national bodies in establishing an annual day of Holocaust remembrance,

Saluting the work of the Task Force for International Cooperation on Holocaust Education, Remembrance and Research (ITF) as it marks its tenth anniversary, and encouraging the States participating in the Prague Conference to cooperate closely with the Task Force, and

Repudiating any denial of the Holocaust (Shoah) and combating its trivialization or diminishment, while encouraging public opinion leaders to stand up against such denial, trivialization or diminishment,

1. We strongly encourage all states to support or establish regular, annual ceremonies of remembrance and commemoration, and to preserve memorials and other sites of memory and martyrdom. We consider it important to include all individuals and all nations who were victims of the Nazi regime in a worthy commemoration of their respective fates,
2. We encourage all states as a matter of priority to include education about the Holocaust (Shoah) and other Nazi crimes in the curriculum of their public education systems and to provide funding for the training of teachers and the development or procurement of the resources and materials required for such education.
3. Believing strongly that international human rights law reflects important lessons from history, and that the understanding of human rights is essential for confronting and preventing all forms of racial, religious or ethnic discrimination, including Anti-Semitism, and Anti-Romani sentiment, today we are committed to including human rights education into the curricula of our educational systems. States may wish to consider using a variety of additional means to support such education, including heirless property where appropriate.
4. As the era is approaching when eye witnesses of the Holocaust (Shoah) will no longer be with us and when the sites of former Nazi concentration and extermination camps, will be the most important and undeniable evidence of the tragedy of the Holocaust (Shoah), the significance and integrity of these sites including all their movable and immovable remnants, will constitute a fundamental value regarding all the actions concerning these sites, and will become especially important for our civilization including, in particular, the education of future generations. We, therefore, appeal for broad support of all conservation efforts in order to save those remnants as the testimony of the crimes committed there to the memory and warning for the generations to come and where appropriate to consider declaring these as national monuments under national legislation.

Future Action

Further to these ends we welcome and are grateful for the Czech Government's initiative to establish the European Shoah Legacy Institute in Terezin (Terezin Institute) to follow up on the work of the Prague Conference and the Terezin Declaration. The Institute will serve as a voluntary forum for countries, organisations representing Holocaust (Shoah) survivors and other Nazi victims, and NGOs to note and promote developments in the areas covered by the Conference and this Declaration, and to develop and share best practices and guidelines in these areas and as indicated in paragraph four of Immovable (Real) Property. It will operate within the network of other national, European and international

institutions, ensuring that duplicative efforts are avoided, for example, duplication of the activities of the Task Force for International Cooperation on Holocaust Education, Remembrance and Research (ITF).

Following the conference proceedings and the Terezin Declaration, the European Commission and the Czech Presidency have noted the importance of the Institute as one of the instruments in the fight against racism, xenophobia and anti-Semitism in Europe and the rest of the world, and have called for other countries and institutions to support and cooperate with this Institute.

To facilitate the dissemination of information, the Institute will publish regular reports on activities related to the Terezin Declaration. The Institute will develop websites to facilitate sharing of information, particularly in the fields of art provenance, immovable property, social welfare needs of survivors, Judaica, and Holocaust education. As a useful service for all users, the Institute will maintain and post lists of websites that Participating States, organizations representing Holocaust (Shoah) survivors and other Nazi victims and NGOs sponsor as well as a website of websites on Holocaust issues.

We also urge the States participating in the Prague Conference to promote and disseminate the principles in the Terezin Declaration, and encourage those states that are members of agencies, organizations and other entities which address educational, cultural and social issues around the world, to help disseminate information about resolutions and principles dealing with the areas covered by the Terezin Declaration.

A more complete description of the Czech Government's concept for the Terezin Institute and the Joint Declaration of the European Commission and the Czech EU Presidency can be found on the website for the Prague Conference and will be published in the conference proceedings.

List of States

1. Albania
2. Argentina
3. Australia
4. Austria
5. Belarus
6. Belgium
7. Bosnia and Herzegovina
8. Brazil
9. Bulgaria
10. Canada
11. Croatia
12. Cyprus
13. Czech Republic
14. Denmark
15. Estonia
16. Finland
17. France
18. FYROM

19. Germany
 20. Greece
 21. Hungary
 22. Ireland
 23. Israel
 24. Italy
 25. Latvia
 26. Lithuania
 27. Luxembourg
 28. Malta
 29. Moldova
 30. Montenegro
 31. The Netherlands
 32. Norway
 33. Poland
 34. Portugal
 35. Romania
 36. Russia
 37. Slovakia
 38. Slovenia
 39. Spain
 40. Sweden
 41. Switzerland
 42. Turkey
 43. Ukraine
 44. United Kingdom
 45. United States
 46. Uruguay
- The Holy See (*observer*)
Serbia (*observer*) *

** Editor's note: The Department of State notes that Serbia attended the Conference as an observer but later endorsed the Terezin Declaration. For this reason, Serbia is included in the Department's JUST Act Report.*

TAGS

Bureau of European and Eurasian Affairs

Holocaust Issues

Office of the Special Envoy for Holocaust Issues

Complete Statutory Regulation concerning the Art Restitution Law as amended on 25 January 2011

Full title

Federal Law on the Restitution of Works of Art and Other Movable Cultural Assets from Austrian Federal Museums and Collections and Other Federal Property (Art Restitution Law – KRG)
(NR: GP XX RV 1390 AB 1464 S. 146. BR: AB 5802 p. 646.)
StF: BGBl. I Nr. 181/1998

Amendment

BGBl. I Nr. 117/2009 (NR: GP XXIV RV 238 AB 349 p. 40. BR: AB 8187 p. 777.)

Text

Objects liable to restitution

§ 1. (1) The Federal Minister of Finance shall be empowered to return free of charge to their original owners or their legal heirs, those art objects and other movable cultural assets from Austrian federal museums and collections, including the collections of the Federal Administration of Moveable Objects (*Bundesmobilienverwaltung*), and other directly owned federal property that

1. were the subject of restitution to their original owners or their heirs or were to be restituted under the regulations at the time and that became the property of the Federal State after 8 May 1945 in direct connection with proceedings under the provisions of the Federal Law on the Prohibition of Export of Objects of Historical, Artistic or Cultural Significance (StGBI. No. 90/1918) and that remain State property;
2. that legally became the property of the State but that had been previously the object of a legal transaction or legal act under § 1 of the Federal Law on the Declaration of Annulment of Legal Transactions and Other Legal Acts Occurring During the German Occupation of Austria (BGBl. No. 106/1946) and are still State property;
- 2a. that legally became the property of the State but that had been the object of a legal transaction or legal act under § 1 of the Federal Law on the Declaration of Annulment of Legal Transactions and Other Legal Acts Occurring During the German Occupation of Austria (BGBl. No. 106/1946) between 30 January 1933 and 8 May 1945 in a territory of the German Reich outside the present Republic of Austria, that was comparable with legal transactions or legal acts taking place during the German occupation of Austria and are still State property;
3. that were not returned to the original owners or their legal heirs on conclusion of restitution proceedings and without payment became the property of the State as abandoned goods and are still State property.

(2) If the Federal State made payment for the transfer of title under para. 1 line 1, this amount or its value at the time of the restitution shall be returned by the original owners or their legal heirs before restitution. Amounts are to be adjusted in accordance with the consumer price index published by Statistics Austria. Payments under § 2b of the Federal Law on the National Fund of the Republic of Austria for Victims of National Socialism (BGBl. Nr. 432/1995) as most recently amended shall not be refunded.

Transfer of title

§ 2. (1) The Federal Minister of Education, Art and Culture, the Federal Minister for Economic Affairs, Family and Youth, the Federal Minister of Defence and Sport and the otherwise responsible member of the Federal Government shall be empowered

1. to determine the original owners or their legal heirs and to transfer the objects indicated in § 1 to them;
2. to transfer to the National Fund of the Republic of Austria for Victims of National Socialism for

sale those objects indicated in § 1 that cannot be returned to their original owners or their legal success because they cannot be determined, the proceeds of the sale then being used for the purposes designated in § 2a of the Federal Law on the National Fund of the Republic of Austria for Victims of National Socialism (BGBl. No. 432/1995).

(2) The specified Federal Ministers shall consult the committee established under § 3 before the transfer of title. The provisions of this Federal Law do not establish a claim to transfer.

(3) The Federal Minister of Education, Art and Culture shall submit an annual report to the National Council on the transfer of objects under § 1.

Committee

§ 3. (1) A committee shall be established in the Federal Ministry of Education, Art and Culture to advise the Federal Ministers designated in § 2 on determining the persons to whom the objects indicated in § 1 are to be transferred.

(2) Members of the committee shall be:

1. one representative each of the Ministry of Finance, the Ministry of Economic Affairs, Family and Youth, the Ministry of Justice, the Ministry of Education, Art and Culture, and the Ministry of Defence and Sport;
2. one representative of the State Attorneys (*Finanzprokurator*) in an advisory capacity;
3. one expert each in the fields of history and art history to be nominated by Universities Austria;
4. one representative of the appropriate Federal Ministry in so far as the committee is consulted on the return of an object that is not within the responsibility of any of the Federal Ministries indicated in para. (2)1.

(3) An alternate shall be nominated for each member.

(4) The committee shall make its recommendations on the basis of reports by the Commission for Provenance Research of the Federal Ministry of Education, Art and Culture. It may also consult other experts and suitable persons to provide information.

(5) The Federal Minister of Education, Art and Culture shall appoint and recall the chairman and his/her deputy from among the members (alternates) designated in para. (2) and shall appoint and recall the other members (alternates) designated in para. (2). The appointment shall be for three years at a time. Reappointment shall be permissible. A member (alternate) may be recalled by the Federal Minister of Education, Art and Culture after consultation with the notifying body only on his/her own request or if he/she is no longer in a position on account of physical, mental or other serious reasons to carry out his/her tasks conscientiously and impartially.

(6) The Federal Minister for Education, Art and Culture or the chairman shall convene meetings of the committee.

(7) The presence of at least half of the members and a majority of the votes cast shall be required for the adoption of a decision by the committee.

(8) The committee's rules of procedure shall be adopted by simple majority and must be approved by the Federal Minister of Education, Art and Culture. They shall govern the operation of the committee as expediently as possible with account taken of para. (1) and are to be approved if they comply with this requirement.

Exceptions to the Law on the Preservation of Historic Buildings and Monuments

§ 4. (1) The provisions of the Law on the Preservation of Historic Buildings and Monuments (*Denkmalschutzgesetz*, BGBl. No. 533/1923) as most recently amended on voluntary sale and shipment abroad shall not apply to objects transferred under the provisions of this Federal Law for twenty-five years after their transfer.

(2) Moveable cultural assets transferred on the basis of a provincial law or other decision by a municipal body under conditions in compliance with this Federal Law shall come under the exceptions indicated in para. (1) if the municipal body responsible for the transfer notifies the Federal Department for the Preservation of Historic Buildings and Monuments (*Bundesdenkmalamt*) and the approval for voluntary sale under § 6 of the Law on the Preservation of Historic Buildings and Monuments (BGBl. No. 533/1923) as most recently amended and export under § 17 of that Law is not refused within six weeks of receipt of the notification.

Commission for Provenance Research

§ 4a. The Commission for Provenance Research shall be established within the Federal Ministry of Education, Art and Culture. It shall act exclusively by order of the Federal Minister of Education, Art and Culture. Its tasks shall include in particular:

1. the description of the provenance of objects designated in § 1 in so far as it can form the basis for recommendations by the committee indicated in § 3;
2. research into the historical circumstances, in so far as this could be of significance for determining the provenance and for recommendations by the committee;
3. the collection, processing and archiving of the results of this research.

Exemption from levies

§ 5. The payments directly occasioned by this Federal Law shall be exempt from all levies.

Implementation clause

§ 6. The following shall be responsible for implementation of this Federal Law:

1. for §§ 1 and 5: the Federal Minister of Finance;
2. for § 2: the Federal Minister of Education, Art and Culture, the Federal Minister of Economic Affairs, Family and Youth, and the Federal Minister of Defence and Sport or the otherwise responsible member of the Federal Government in so far as it is within the scope of his/her responsibilities;
3. for § 3: the Federal Minister of Education, Art and Culture, the Federal Minister of Economic Affairs, Family and Youth, the Federal Minister of Justice, and the Federal Minister of Defence and Sport or the otherwise responsible member of the Federal Government in so far as it is within the scope of his/her responsibilities;
4. for §§ 4 and 4a: the Federal Minister of Education, Art and Culture.

DECISION OF THE KUNSTKOMMISSION IN THE MATTER OF CURT GLASER

DECISION OF THE KUNSTKOMMISSION IN THE MATTER OF CURT GLASER 1

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I. INTRODUCTION

1. Press Coverage

In October 2017, the Swiss television channel SRF broadcast a report about the Curt Glaser case on its news program, *Rundschau*. The Regierungsrat (executive council) of the Canton of Basel-Stadt was accused of not being truthful in a 2008 restitution case ("Flunkern mit Madonna" ["Flubbing with Madonna"]).¹ Subsequently, a number of media outlets seized on the story, including the *Basler Zeitung*.

At its meeting on November 21, 2017, the Kunstkommission resolved to examine the matter more thoroughly, not least in light of recent developments in matters of provenance.²

2. Historical Background (Summary)

The Kunstmuseum Basel acquired 200 drawings and prints at Auction 180 at the Berlin book and art dealer Max Perl on May 18-19, 1933. The best known of these are two lithographs by Edvard Munch (*Self Portrait*³ and *Madonna*⁴) (see **Appendix 1. Purchases KMB 1933**).

The previous owner of these drawings and prints was Curt Glaser. Glaser was the Director of the Staatliche Kunstbibliothek Berlin. He was suspended from his post on April 5, 1933 and relieved of his position permanently on September 27, 1933. He left Germany in middle of 1933, temporarily settled in Switzerland after a brief stay in Paris and had 14 crates of possessions that had been left in Berlin sent to Ascona. In 1941 he emigrated to the US and died there in 1943.

Curt Glaser's first wife—née Elsa Kolker—died on July 10, 1932. Curt Glaser married his second wife—née Maria Milch—on May 20, 1933.

In 1933, the Kunstkommission and the director of the Kunstmuseum Basel Otto Fischer (1886-1948) knew the origin of the drawings and prints from Max Perl's Auction 180. At the meeting of the Kunstkommission the transacted purchases were described as "cheap" as well as "attractive" and "opportune."⁵

3. 2008 Decision of the Basel Government

In 2004, the Kunstmuseum Basel was contacted by the lawyers of Curt Glaser's heirs. In early 2008 the Regierungsrat of the Canton of Basel-Stadt decided against returning the works. The press release from February 19, 2008 justified the decision as follows:

The Kunstmuseum Basel acquired the works at the auction in 1933 in good faith and has been in uncontested possession of them for over 70 years. At the time of the auction, there were absolutely no indications in the auction catalog or other publications that the art works came from the collection of Dr. Curt Glaser. The Perl auction house was based in Berlin. The prices paid for the works were "typical of the time" and conformed to the market. The works were exported from Germany into Switzerland in accordance with procedure. The Kunstmuseum had exercised all requisite care in such cases; there was neither reason nor obligation to make any further inquiries into the identity of the seller. The infamous so-

¹ See the report online at <https://www.srf.ch/news/schweiz/debatte-um-raubkunst-basler-regierungsrat-flunkern-mit-madonna>, accessed 09 November 2018

² Minutes of the Kunstkommission of 21 November 2017, Kunstmuseum Basel, Archiv, B1/12 Protokolle der Kunstkommission.

³ Edvard Munch, *Self Portrait (frontal)*, 1895, chalk and brush lithograph with scraping technique, Kunstmuseum Basel, Kupferstichkabinett, Inv. 1933.213.

⁴ Edvard Munch, *Madonna*, 1895/1902, chalk and brush lithograph from three stones, Kunstmuseum Basel, Kupferstichkabinett, Inv. 1933.212.

⁵ Minutes of the Kunstkommission of 6 May 1933, Kunstmuseum Basel.

called "Jewish auctions" at which the seized possessions of persecuted Jews were liquidated at rock bottom prices did not take place in Nazi Germany until 1938.⁶

The decision of the Regierungsrat is based on a report by the Department of Education from February 7, 2008. The report presents the statement of facts and legal analysis, including the Washington Principles (see **Ch. V. 2. a. *Washington Principles***).

There was no subsequent court proceeding against the Kunstmuseum Basel or the Canton of Basel-Stadt in the wake of the decision. The representatives of the heirs continued to contact the Kunstmuseum and the government; in a communication from October 15, 2008, they accuse the government of "failing on a human level" and in its rejection of the claim, "minimizing the Holocaust in all of its aspects."

In late 2009, the representatives of the heirs contacted the Anlaufstelle Raubkunst (Contact Bureau on Looted Art) at the Swiss Bundesamt für Kultur (BAK; Federal Office of Culture). The Canton of Basel-Stadt stated through its representative in a communication of February 18, 2010, that it was not interested in mediation through the Bund. In that communication, the Canton referred to its press release of February 19, 2008. It also mentioned the decision of the UK *Spoliation Advisory Panel* of June 24, 2009, which came to the same conclusion with regard to the auction of May 18-19, 1933. Finally, the Canton expressed the view that the October 15, 2008 letter from the lawyers of the heirs was defamatory. Attached to the February 18, 2010 letter from the Canton of Basel-Stadt were various documents, including a certified excerpt from the minutes of the Kunstkommission meeting of June 8, 1933.

The legal representatives of the heirs again contacted the Präsidialdepartement (Department of Presidential Affairs) of Basel-Stadt on November 29, 2017. The Regierungsrat of the Canton of Basel-Stadt decided in a resolution of December 19, 2017 that the Kunstkommission had to address the case before them.

⁶ See the full text of the explanation online at <http://www.medien.bs.ch/nm/2008-02-19-rrbs-005.html>, accessed 19 October 2018).

II. PROCEDURE

1. Jurisdiction

a) *Kunstkommission*

In accordance with § 7 para. 1 i.V.m. § 1 of the act governing the museums of the Canton of Basel-Stadt of June 16, 1999 (Museumsgesetz [Museum Act], SG 451.100), there is a commission ("Kunstkommission") in place for the Basel Public Art Collection—the Kunstmuseum Basel. This commission "monitors, advises, and supports the museum leadership" (§ 7 para. 1 Museumsgesetz). In accordance with § 4 para. 1 lit. a of the provision to the act governing the museums of the Canton of Basel-Stadt of December 19, 2000 (Museum Provision, SG 451.110), the Kunstkommission has decision-making power over, among other things, "purchases for the Museum collection, in so far as the commissions do not delegate this task to the respective leadership."

The purchases of the drawings and prints from Auction 180 at the Max Perl dealership were discussed by the Kunstkommission in 1933 and was expressly welcomed by the members of the Kunstkommission at the time. The current Kunstkommission considers it their responsibility to reflect on the possible consequences of these purchases.

The Kunstkommission encompasses a wide range of historical, artistic and art historical, legal, political, and societal expertise. It considers itself competent to assess the questions before it, particular given that these are not primarily legal, but rather moral in nature (see **Ch. V. 2. A. *Washington Principles***).

b) *Kunstkommission and Regierungsrat*

It must be noted in the present case that the Regierungsrat of the Canton of Basel-Stadt already made a formal decision regarding the claim of the heirs of Curt Glaser in February 2008. The Kunstmuseum Basel is an "agency of the responsible Department" (§ 6 Museumsgesetz) and therefore bound by the decision. Additionally, the Kunstkommission has no authority to alter or rescind the decision of the Regierungsrat from 2008.

As already stated, the Kunstkommission has an advisory function with regard to the Museum. This function can also be exercised with regard to the Regierungsrat. On these grounds, the Kunstkommission will issue a recommendation. Should this differ from the decision of the Regierungsrat of 2008 and endorse restitution, it would mean that the Kommission recommends that the Regierungsrat should reconsider its decision. The Kommission can also recommend to the Regierungsrat that it stand by its decision of 2008.

Due to the 2008 decision and the subsequent instructions of the cognizant division heads at the Kunstmuseum and the legal representatives, the Kunstmuseum and the Kunstkommission cannot enter into any actual negotiations with the representatives of the heirs. This was communicated to the heirs orally and in writing.

It must be noted that the Kunstkommission is empowered with more than just a purely advisory capacity. § 5 of the Museumsgesetz stipulates the *nontransferability of museum objects*. Exceptions require a decision by the Regierungsrat "by joint application from the respective museum leadership, the respective Kunstkommission, and the Rectorate of the University." As the Kunstkommission understands it, the possibility of returning the art works represents a transfer of objects. This is particularly the case given that the return would be grounded not primarily in legal but rather moral considerations. If the Regierungsrat should resolve to reconsider, it could not unilaterally decide to

return the pictures: it would be necessary to have a joint proceeding that included the Kunstmuseum, the Kunstkommission, and the Rectorate of the University as well as the Regierungsrat.

What needs to be assessed presently is not only the possibility of restitution, but also a "just and fair solution" in accordance with the Washington Principles (see **Ch. V. 2. A. Washington Principles**). There is no legal basis that provides any particular competence in this regard.

c) *Kunstkommission and Kunstmuseum*

On the basis of the above, the decision will be formally made by the Kunstkommission. The Kunstmuseum Basel is closely involved in the decision of the Kunstkommission and the Director has co-signed the present decision. Purchases of works are made at the request of the leadership; a surrender of works also requires a request from the leadership (§ 5 Museumsgesetz). Moreover, the Kunstmuseum possesses a great deal of cultural-historical expertise, without which the members of the Kunstkommission, who serve on a voluntary basis, would hardly be in a position to make the present decision. Accordingly, the Kunstkommission and the Kunstmuseum have worked closely together. This collaboration has proved successful.

2. Procedural Principles

a) *Access to documents and fair hearing*

There are no explicit procedural rules for the present process. The Kunstmuseum as an agency of the canton (§ 6 Museumsgesetz) and the Kunstkommission as the museum's advisory body (§ 7 Museumsgesetz) consider themselves bound by the procedural guarantees of the federal government (Art. 29 ff. BV) and the canton (§ 12 KV). In particular, the heirs have the right to a hearing and to inspect the files. Therefore, the Kunstkommission has heard the heirs' representatives and made the essential documents available to them, insofar as they are in the possession of the Art Museum.

b) *Independence*

A central procedural guarantee relates to the *independence* of the deciding authority. It should be noted, however, that this guarantee relates primarily to courts (Art. 30 BV; § 12 lit. d KV). In contrast, it is not uncommon for an administrative body (or an instance close to the administration, such as the Kunstkommission here) to make a decision that concerns its sphere of interests. It would be problematic if individuals serving on an official body had personal interest in the outcome of the present decision. There are no indications of this in the present case.

The Kunstkommission is aware that other countries have created national bodies that make recommendations regarding issues of looted art and flight assets. This complies with Art. 10 of the Washington Principles, according to which "[c]ommissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership." Such "balanced membership" does not exist in the case of the Kunstkommission, which is committed to the interests of the museum. The same also applies in the event of a decision by the Regierungsrat. This situation has to do with the allocation of powers in the Swiss Federal Constitution: "The cantons are responsible for the area of culture" (Art. 69 para. 1 of the Swiss Federal Constitution of 18 April 1999). Although the federal government has enacted the Federal Act on the International Transfer of Cultural Property of 20 June 2003 (Kulturgütertransfergesetz [Cultural Property Transfer Act], CPTA, SR 444.1) citing its authority to support cultural endeavors in accordance with Art. 69 para. 2 BV of the Federal Constitution and other economic and foreign trade responsibilities, this is not pertinent to the issues at hand. The cantons are typically responsible for questions of restitution. As a result, each canton, often each individual museum, is responsible for answering such questions.

For this reason, the Kunstkommission has examined whether the establishment of a kind of arbitral tribunal would be possible. However, such an ad hoc appointment appears problematic as well. On the one hand, there is no legal basis for such a procedure. On the other hand, a decision in the Kunstkommission is broadly supported. Further, the Kunstkommission and the Kunstmuseum are concerned with facing up to historical responsibility. "Delegating" the decision to another committee would avoid this responsibility. Finally, the present case concerns questions that must necessarily be decided by the Kunstkommission itself, such as for instance the question of the applicable legal basis (see ch. V. 3. a. *Applicable Sources*).

The Kunstkommission will therefore make a decision itself. It is aware that the preservation of museum objects is one of its legal duties. On the other hand, the Kunstkommission has an interest in maintaining the excellent reputation of the Kunstmuseum Basel. It is also aware of the museum's obligations and has specifically reaffirmed these obligations with the adoption of Principles of Provenance on 26 April 2017. The Kunstkommission therefore considers itself in a position to make an objective and fair assessment.

The Kunstkommission has kept the Department of Presidential Affairs regularly informed of this procedure for the attention of the Regierungsrat. However, the Regierungsrat and the Department of Presidential Affairs have had no influence whatsoever on the substantive content of the present decision. The Kunstkommission made this decision entirely on its own responsibility.

3. Process

a) *Decision-making on the Kunstkommission*

On 22 November 2017, the Kunstkommission made the fundamental decision take up the matter in greater depth. On 30 January 2018, it made further decisions, including the appointment of a three-member subcommittee. The subcommittee prepared the decision on behalf of the Kunstkommission. It heard the heirs and had the authority to call in experts.

For its part, the Kunstmuseum set up a working group on 13 December 2017. In addition to the director and the head of the Kupferstichkabinett (Department of Prints and Drawings), two other members of the Kunstmuseum's staff are also on the working group.

The subcommittee and the working group examined the matter before them in a total of eight joint sessions.

Each session of the Kunstkommission provided an overview of the current status of the process. At its meeting on 26 June 2018, the Kunstkommission reviewed the historical facts. At the meeting on 13 September 2018, a first possible direction for a decision was discussed. The present decision was adopted on 21 November 2018, whereby the subcommittee and working group were delegated the authority to make editorial adjustments. At the meeting on 21 March 2019, the Kunstkommission reviewed the edited version of the decision.

All decisions in the Kunstkommission and in the joint sessions of the subcommittee and working group were made unanimously and without abstentions.

b) *Inclusion of the heirs of Curt Glaser*

Two meetings were held in Basel with the representatives of the heirs. The Kunstkommission and the Kunstmuseum were represented by the subcommittee and the working group respectively. The first meeting took place on 27 February 2018. Only the heirs' lawyers took part in this meeting. The main

items on the agenda were the mutual presentation of positions and questions of procedure and further proceedings.

The second meeting on 29 August 2018 was also attended by the heirs of Curt Glaser. They described their position from a personal point of view. The heirs and representatives of the heirs then commented on the draft of the facts, which had been prepared by the working group and subcommittee over the summer of 2018. The oral statement at the meeting was supplemented by a written submission from the heirs' representatives dated 31 October 2018.

In conclusion of the second meeting a brief tour of the Kunstmuseum took place. The subcommittee and the working group thanked the heirs and representatives for their constructive assistance in establishing the historical facts.

c) *Informing the Public*

The Kunstkommission recognizes the public's interest in the reappraisal of the present case. Therefore, at its meeting on 30 January 2018, it had already expressed its support for the idea that the decision of the Kunstkommission should be thoroughly justified and made accessible to the public. It thus commits itself to transparency, as is also recommended by the Bund regarding questions of provenance.⁷

To the extent that it is authorized to do so, the Kommission is also publishing the relevant sources simultaneously with the decision. It is important to the Kunstkommission that its decision should at least be accepted as broadly as possible with regard to its procedure and justification, if perhaps not in its outcome

The Kunstkommission regrets the sometimes polemical reporting in the media. This form of reporting is not appropriate for difficult historical and moral questions. With the present decision, the Kunstkommission hopes to contribute to making the discussion more objective.

⁷ Cf. *Bericht EDI/EDA über den Stand der Arbeiten des Bundes im Bereich der NS-Raubkunst im Zeitraum von 2011–2016* [Report on the Status of the Bund's Work with Regard to Nazi looted Art in the Period 2011-2016]; accessed online 18 June 2019 at <https://biblio.parlament.ch/e-docs/387980.pdf>.

III. HISTORICAL CIRCUMSTANCES OF THE CASE

Curt Glaser (1879–1943) was born in Leipzig, the son of a Jewish family. In 1903 he began his studies of art history in Berlin and received his doctorate there in 1907. Most likely in 1903 as well, he married Elsa Kolker (1878-1932). Starting around 1910, with the support and in part at the behest of Glaser's father-in-law, Hugo Kolker, the couple began to build a significant art collection that encompassed, among others, the works of Edvard Munch, Vincent van Gogh, Henri Matisse, Pablo Picasso and Hans Purrmann.

In 1902, Glaser began to be active as an art critic and became one of the most important critics and commentators in Berlin. Starting in 1909, Glaser worked at the Königliches Kupferstichkabinett, where by 1912 at the latest he was significantly expanding the collection of modern and contemporary art and promoting it through numerous exhibitions. During the course of his tenure at the Kupferstichkabinett, Glaser authored his most important scholarly publications: *Zwei Jahrhunderte deutscher Malerei [Two Hundred Years of German Painting]* (1916), *Die Graphik der Neuzeit [Contemporary Graphics]* (1922), and monographs on Lucas Cranach the Elder (1921) and Hans Holbein the Younger (1924). In October 1924, Glaser became the director of the Kunstbibliothek in Berlin. Among his chief tasks, in particular, was to redefine the Kunstbibliothek as an art historical research library. In July 1925, the Glasers moved into a civil service apartment unattached to the director's post, in which their art collection was also exhibited. The Glasers now belonged to Berlin's intellectual elite and throughout the late 1920s held important art salons in their apartment.

In parallel to his professional acquisitions on behalf of the Kupferstichkabinett, Glaser undertakes private purchases and builds up a valuable collection of prints by artists like Honoré Daumier and Adolph von Menzel, but above all by contemporary artists such as Max Liebermann, Lovis Corinth, Erich Heckel, and Ernst Ludwig Kirchner. A significant emphasis is placed on the work of Edvard Munch, a lifelong friend whom Glaser supports. Glaser also collects Flemish and Dutch old master paintings and Japanese prints, which are his specialty. No inventory of his collection has survived, as far as is currently known. In 1932, Glaser's wife Elsa dies after a serious illness at the age of just 54. To commemorate her life as wife, collector, and patron of Munch's work, Glaser donates Munch's painting *Music on Karl Johan Street* (1889) to the Nationalgalerie in Berlin. The gift is an expression of Glaser's commitment to the presence of Munch's work in public collections and an example of the way his collection was continually undergoing transformation through gifts, purchases, and exchange transactions.

Following the seizure of power by the National Socialists in January 1933, the "Law for the Restoration of the Professional Civil Service" is enacted in April 1933, which makes it possible to remove Jews from the civil service and is thus directed as a discriminatory tool against Germany's Jewish population and opponents of the new power. On April 9, 1933, a large number of personnel changes is made public – for art historians, primarily among progressive museum directors. In April 1933, the *Deutsche Zeitung* published a defamatory report about Glaser's suspension, which was also

mentioned by the *Basler Nachrichten* and the *Neue Züricher Zeitung* between April and June 1933. The exact date of Glaser's suspension is not known, since several weeks might have passed between this and its publication. Glaser mentions the loss of his post and his apartment in a letter to Munch of May 19, 1933. The loss of the apartment might have already occurred prior to the loss of Glaser's job due to the confiscation of the entire building complex by the Gestapo in April/May 1933. On June 29, 1933, Hermann Schmitz succeeds Glaser as director of the Kunstbibliothek. On September 27, 1933, Glaser is permanently dismissed from the civil service. Beginning in January 1934, he is awarded a pension amounting to three quarters of what would be paid to an "Aryan" civil servant.

After the death of his first wife and the loss of his apartment and his position, Glaser decides to liquidate his art collection and leave Germany with his future second wife, Maria Milch (1901-1981). It is impossible to determine the exact point at which the decision to sell was made. It is however possible that this decision was not made until late in January 1933 or even early in April. The greater portion of Glaser's art collection and library, as well as his furnishings, is auctioned at the Internationales Kunst- und Auktions-Haus, at auction no. 156 on May 9, 1933 and at the Berlin Buch- und Kunst-Antiquariat Max Perl, at auction no. 180 on May 18-19, 1933. An auction was the option that offered the best price on the free market at this point at time. Contemporary commentary suggests that the appraisal values in the first Glaser auction turned out to be accurate and were exceeded in the case of only a few lots. The same has been found for the second auction of May 18-19, 1933.

Otto Fischer, curator of the Öffentliche Kunstsammlung Basel since 1927, was aware of the catalog of the Max Perl auction in May 1933, whereby he would have also known from the reports in the *Basler Zeitung* and the *Weltkunst* during that same period that Glaser had been relieved of his post. The meeting minutes of the Kunstkommission of May 16, 1933 demonstrate that the Kommission approved of Fischer "seeking to make inexpensive purchases."⁸ In addition to expanding the collection of old German masters, Fischer followed a purchasing strategy to establish new collection foci, such as modern art. The further development of the modern collection was bound by the principle of the optimal use of limited means. On June 8, 1933, Fischer gave a report to the Kommission about the auction—at which the prices were "not exactly rock-bottom" but nevertheless "remained at the level of the appraisal prices, which were in themselves low"—and about his acquisitions (among them, Lovis Corinth, Oskar Kokoschka, Henri Matisse). The Kunstkommission approved the "beautiful and inexpensive purchases" at the "Glaser auction in Berlin," thus ensuring the preservation of the largest lot from Glaser's collection, which was scattered all over the world.⁹ The final sale amounts at the auction reflect the trend that important pieces attained high prices while less important works remained below expectations. The two prominent lithographs by Munch that were acquired for the Kunstmuseum Basel were bid up above the appraisal (by 29.2% and 8.3%), while the total price of all 200 works acquired for the museum amounted to 10.1% below the appraised value. Existing research,

⁸ Protokoll der Sitzung der Kunstkommission vom 16.05.1933 [Minutes of the meeting of the Kunstkommission of May 16, 1933], Kunstmuseum Basel, Archiv: B1/13-Protokolle der Kunstkommission, p. 51.

⁹ Protokoll der Sitzung der Kunstkommission vom 08.06.1933 [Minutes of the meeting of the Kunstkommission of June 8, 1933], Kunstmuseum Basel, Archiv: B1/13-Protokolle der Kunstkommission, p. 58–59.

as well as the Glaser compensation proceeding of 1963, indicates that Glaser lost a considerable portion of his fortune in the auctions. It is difficult to deduce unequivocally what factors influenced these results—the outcomes of the Berlin auctions at the time were affected by the consequences of the world economic crisis, the National Socialists' seizure of power, and an increasing number of auctions of entire collections belonging not only to fleeing Jews but recently impoverished owners as well. According to the research, pricing at public auctions at the time of the Glaser auctions was still based on regulation by supply and demand. The high quality works achieved high prices, as demonstrated by the prices of the Munch lithographs acquired by the Kunstmuseum Basel. While proceeds from auctions by Jewish consignors were already being transferred to blocked accounts during the first years of the Nazi regime, in Glaser's case the research assumes that he received the proceeds of the auctions. It cannot be ascertained whether and to what extent Glaser had access to his salary and bank accounts from abroad in 1933 due to the foreign currency legislation of 1931. Glaser's pension was transferred abroad. After November 1, 1936, however, the Reich Flight Tax introduced by the Nazis was deducted.

Glaser's exposed position at the time of the Nazi assumption of power in 1933 made him a target of the injustice regime. However, it is impossible to determine when he decided to undertake his further emigration. After a stay in Paris in June/July 1933, he wrote in August 1933 from Ascona, Switzerland – where he was temporarily staying with his wife – to give notice that he was giving up his role as an art critic in Berlin. As reasons for his decision, he cites a "constant serious conflict of conscience" as well as "other difficulties" that could "make his activity as a Berlin art critic impossible."¹⁰ In the latter half of 1933, Glaser had 14 crates of goods shipped to him at Ascona for relocation. These contained selected artworks and valuables that he had not auctioned off. Between 1936 and 1938/39, the Glasers stayed repeatedly in Florence with their daughter, who was born in 1936. In the summer of 1938, Glaser applied unsuccessfully for the directorship of the Kunstmuseum Basel. In December 1940, after the Kunsthaus Zürich approached him, Glaser offered to sell them *Music on Karl Johan Strasse* for CHF 15,000 (the painting had been removed from the National Galerie under its new directorship). Glaser expressed regret that he was not in a position to donate the picture to the museum. The painting was ultimately bought for CHF 12,000. In 1940, Glaser had his deposits of Munch paintings collected from the Kunsthaus Zürich and they were later sold. In 1941, the Glasers emigrated to New York with their daughter and moved in 1943 to Lake Placid. Glaser was never professionally active again in the USA either. He died on November 23, 1943 after a protracted illness. The two Munch paintings belonging to Glaser that still remained in Switzerland were deposited at the Kunstmuseum Basel in 1947 by his widow, and in subsequent years either sold by her or returned by the Kunstmuseum to the heirs.

¹⁰ Letter to Herbert Ihering, of the *Berliner Börsen-Courier*, of August 24, 1933, in: Archiv der Akademie der Bildenden Künste Berlin, NL Herbert Ihering, aus 1336. Quoted in Wolfgang Benz und Angelika Königseder, Gutachten über die historischen Umstände des Verlustes der Kunstsammlung Prof. Dr. Curt Glaser im Jahr 1933 [Report on the historical circumstances of the loss of the art collection Prof. Dr. Curt Glaser in 1933], Zentrum für Antisemitismusforschung an der TU Berlin, May 31, 2010, p. 54.

IV. DECISIONS BY OTHER INSTITUTIONS

Since 2007, various German museums, a Dutch museum, as well as two private collections have restituted or financially compensated works from the auctions of May 9, 1933 at the International Art and Auction House (*Internationales Kunst- und Auktions-Haus*) in Berlin and of 18/19 May, 1933 at Max Perl in Berlin to the heirs of Curt Glaser:

- 2007 Niedersächsisches Landesmuseum Hannover¹¹
- 2010 Rijksmuseum Amsterdam¹²
- 2012 Kupferstichkabinett, Staatliche Museen zu Berlin, Preussischer Kulturbesitz¹³
- 2013 Bayerische Staatsgemäldesammlungen¹⁴
- 2013 Germanisches Nationalmuseum Nürnberg¹⁵
- 2014 Museum Ludwig, Köln¹⁶
- 2015 Hamburger Kunsthalle (restitution with repurchase)¹⁷
- 2016 Nationalgalerie and Kunstbibliothek, Staatliche Museen zu Berlin, Preussischer Kulturbesitz¹⁸
- 2017 two private collections in Germany¹⁹
- 2018 Museen der Stadt Bamberg²⁰
- 2018 Kunsthalle Hamburg²¹

¹¹ See the information of the Zentrum für Kulturgutverluste, accessed online on 24 November 2018: https://www.kulturgutverluste.de/Content/03_Forschungsfoerderung/Projekt/Landeshauptstadt-Hannover/Projekt2.html.

¹² See the announcement of the Dutch Restitutionskommission, accessed online on 24 November 2018: https://www.restitutiecommissie.nl/en/recommendations/recommendation_199.html.

¹³ See the press release of the Stiftung Preussischer-Kulturbesitz of 30 November 2012, accessed online on 4 January 2019: <http://www.preussischer-kulturbesitz.de/meldung/article/2012/11/30/pressemeldung-stiftung-preussischer-kulturbesitz-restituiert-vier-werke-von-munch-und-kirchner-an-di.html>.

¹⁴ See the press release of the Bayerischen Staatsgemäldesammlungen of 15 May 2013, accessed online on 4 January 2019: https://www.pinakothek.de/sites/default/files/downloadable/2017-11/PM_Restitution%20Behrens%20und%20Glaser.pdf

¹⁵ See the announcement of the Germanischen Nationalmuseums of 3 July 2013, accessed online on 4 January 2019: https://www.gnm.de/fileadmin/redakteure/Service/Presse/2013/PDF/PM_Restitution_Curt_Glaser.pdf

¹⁶ See the announcement of the city of Köln, accessed online on 7 January 2019: https://www.stadt-koeln.de/mediaasset/content/pdf-dezernat7/restitution_flechtheim_glaser.pdf; vgl. ebenfalls die Bildliste Restitution Flechtheim / Glaser, accessed online on 4 January 2019): https://www.museum-ludwig.de/fileadmin/content/07_Presse/Bildliste_Flechtheim_Glaser_final.pdf.

¹⁷ See the press release of the Hamburger Kunsthalle of 10 September 2015, accessed online on 24 November 2018: https://www.hamburger-kunsthalle.de/sites/default/files/pm_aquarell_walchensee_von_l._corinth_in_hamburger_kunsthalle_restituiert.pdf

¹⁸ See the press release of the Stiftung Preussischer Kulturbesitz of 20 April 2016, accessed online on 7 January 2019: <http://www.smb.museum/nachrichten/detail/provenienzforschung-faire-und-gerechte-loesung-mit-den-erben-von-curt-glaser.html>

¹⁹ See the press release of the Law Offices Rowland & Associates, accessed online on 7 January 2019: <https://rowlandlaw.com/wp-content/uploads/2016/07/Press-Release-Corot-English.pdf>), sowie Artikel des Art Newspaper vom 04.10.2017, online unter (7.01.2019): <https://www.theartnewspaper.com/news/christies-to-auction-long-lost-painting-by-mannerist-artist-spranger>.

²⁰ See the press release of the city of Bamberg, accessed online on 1 February 2018: <https://www.stadt.bamberg.de/B%C3%BCrgerservice/Rathaus-Service/Webadressen/-Faire-und-gerechte-L%C3%B6sung.php?object=&ModID=7&FID=1829.12941.1&NavID=2730.241&La=1>

Year	Collection / Institution	Work/-s Provenance	Decision
2007	Niedersächsisches Landesmuseum Hannover	Painting by Lovis Corinth, <i>Roman Landscape</i> ²² (1914) 9.05.1933: Auction 156, Internationales Kunst- und Auktions-Haus, Berlin, No. 264	Restitution to the heirs of Curt Glaser on 24 September 2007. ²³
2010	Rijksmuseum Amsterdam, the Netherlands	Painting by Jan van de Velde II, <i>Winter Landscape</i> ²⁴ 9.05.1933: Auction 156, Internationales Kunst- und Auktions-Haus, Berlin, No. 233 The painting entered the collection of the Rijksmuseum as a donation of a private collector in 1935.	The Dutch Restitution Commission recommends that the painting be restituted by the National Collections of the Netherlands. The State Secretary for Education, Culture and Science complies with the recommendation. ²⁵
2012	Kupferstichkabinett, Staatliche Museen zu Berlin, Preussischer Kulturbesitz	Six prints by Edvard Munch 18./19.05.1933: Auction 180, Max Perl, Berlin, No. 1105; 1086; 1144 Acquisitions by Berlin Kuperstichkabinett ²⁶ Three prints by Ernst Ludwig Kirchner Donation to the Berlin Kupferstichkabinett directly after the auction. ²⁷	The following works were restituted to the heirs: ²⁸ 1. Edvard Munch, <i>Girl on the Beach</i> , mezzotint 2. Edvard Munch, <i>Old Man Praying</i> , woodcut 3. Edvard Munch, <i>Death and the Woman</i> , etching 4. Ernst Ludwig Kirchner,

²¹ See the press release of the city of Hamburg, Behörde für Kultur und Medien, of 30 July 2019, accessed online on 7 January 2019: <https://www.hamburg.de/pressearchiv-fhh/11449606/restitution-landschaftsgemaelde-rueckkauf-kunsthalle/>

²² Lovis Corinth, *Roman Landscape*, 1914, oil on canvas, 71.5 x 96 cm.

²³ See Dormann 2008, p. 60: „Im Dezember 2003 kam es zu einem ersten Kontakt zwischen dem juristischen Vertreter der Erbgemeinschaft Curt Glaser und dem Landesmuseum Hannover. Nach der Erstellung eines unabhängigen Gutachtens befürwortete der Rat der Stadt Hannover im Februar 2007 aufgrund der Washingtoner Grundsätze und der Gemeinsamen Erklärung für die Rückgabe des Gemäldes an die Erben. Mit dieser Resitution sind jedoch vermutlich weder der Fall Glaser noch der Fall Doebbekke abgeschlossen.“

²⁴ Jan van de Velde II, *Winter Landscape*, wood, 8 x 11 cm.

²⁵ See the press release of the Dutch Restitutionskommission of 4 October 2010 (accessed online on 4 January 2019: https://www.restitutiecommissie.nl/en/pressreleases/press_release_rc_199.html): „The painting *Winter Landscape* by Jan van de Velde II in the Rijksmuseum Amsterdam was claimed by the heirs of Curt Glaser, a prominent German art historian of Jewish descent. From 1924, Glaser was director of the *Staatliche Kunstbibliothek* (the State Art Library) in Berlin. In its recommendation, the Committee describes how, soon after the Nazis assumed power in Germany in 1933, Glaser was subject to anti-Jewish measures and persecution. The authorities ordered Glaser to empty and vacate his home, after which the Gestapo established its headquarters there. In addition, Glaser lost his job due to a law that provided for the removal of Jews and political opponents from the civil service. In preparation for his escape from Germany, Glaser sold his extensive art and book collection, which included the Van de Velde II painting. In July 1933, Glaser and his wife managed to flee from Germany to the United States, where he died in 1943. After having moved from one place to another, the painting by Van de Velde II ended up in the Rijksmuseum in 1935, through a donation from a private collector. Since then, it has been part of the Dutch national art collection. Because the painting by Van de Velde II is government property, it comes under the Dutch government's generous restitution policy. The Restitutions Committee is of the opinion that Curt Glaser lost possession of this painting involuntarily in 1933, as a result of the persecution he endured by the Nazi regime. The Committee therefore advises the State Secretary to return the painting to Curt Glaser's heirs.“

²⁶ See Inventory of the Nationalgalerie FIII, cited after Thielecke 2014, p. 390.

²⁷ It can no longer be determined today, who the donor was; in the inventory the works were recored as „a donation of an unknown person“, see Inventory of the Nationalgalerie FIII, cited after Thielecke 2014, p. 390.

²⁸ See the press release of the Stiftung Preussischer Kulturbesitz of 30 November 2012 (accessed online on 7 January 2019: <http://www.preussischer-kulturbesitz.de/meldung/article/2012/11/30/pressemeldung-stiftung-preussischer-kulturbesitz-restituiert-vier-werke-von-munch-und-kirchner-an-di.html>): „In Anerkennung der Verfolgung Prof. Glasers durch das Nazi-Regime und in Würdigung seiner großen Verdienste für die Berliner Museen einigten sich die Stiftung Preußischer

			<i>Farmers in Conversation</i> , woodcut
2013	Bayerische Staatsgemäldesammlungen	<p>Two watercolors by Max Pechstein, <i>White House</i> (1919)²⁹ and <i>Wiesental</i> (1911)³⁰</p> <p>18./19.05.1933: Auction 180, Max Perl, Berlin, No. 1224, Acquisition by Berliner Nationalgalerie 1937: Confiscation of both watercolors during the campaign „Entartete Kunst“ („Degenerate Art“)</p> <p>1939: Acquisition by Sofie and Emanuel Fohn through exchange</p> <p>1964: Donation together with other works to the Bayerische Staatsgemäldesammlungen.</p>	The restitution claim of the heirs was recognized as justified; both parties contractually agreed that both watercolors by Max Pechstein will remain property of the Bayerische Staatsgemäldesammlungen and the association of heirs will be adequately compensated. ³¹
2013	Germanisches Nationalmuseum Nürnberg	<p>Painting by Joseph Ignaz Mildorfer, <i>Farewell of the Apostles Peter and Paul</i>³²</p> <p>Watercolor by Friedrich Brentel the Elder, <i>Landscape with Galathea, Acis and Polyphem</i>³³</p> <p>Watercolor by an unknown artist, copy after Joseph Heintz d. Ä., <i>Diana and Actaeon</i>³⁴</p> <p>Painting by Johann Wenzel Bergl, <i>Job on a Dunghill</i>³⁵ [at the time attributed to Jan Lys], acquired by Germanisches Nationalmuseum in 1934 from Kunsthaus Kahlert & Sohn, Berlin</p>	By mutual agreement, the association of heirs and the Germanisches Nationalmuseum agreed that the four works from the collection of the Germanisches Nationalmuseum remain in the museum and that the association of heirs will be adequately compensated. ³⁶

Kulturbesitz und die Erben von Prof. Dr. Curt Glaser im Rahmen einer ‚fairen und gerechten Lösung‘ im Sinne der Washingtoner Prinzipien. Danach werden die Werke von Edvard Munch „Mädchen am Strand“ (Schabkunst), „Gebet eines alten Mannes“ (Holzschnitt) und „Der Tod und die Frau“ (Radierung) sowie ein Holzschnitt von Ernst Ludwig Kirchner „Bauernunterhaltung“ an die Erben von Prof. Curt Glaser zurückgegeben. Die restlichen Werke verbleiben mit Zustimmung der Erbgemeinschaft – nicht zuletzt zur Erinnerung an den ehemaligen Direktor und bedeutenden Wissenschaftler Prof. Dr. Curt Glaser – im Eigentum der Stiftung Preußischer Kulturbesitz.“

²⁹ Max Pechstein, *White House*, 1910, watercolor and pencil, 14 x 11 cm.

³⁰ Max Pechstein, *Wiesental*, 1911, watercolor and pencil, 15 x 10 cm.

³¹ See the press release of the Bayerischen Staatsgemäldesammlungen of 15 May 2013 (accessed online on 4 January 2019]: https://www.pinakothek.de/sites/default/files/downloadable/2017-11/PM_Restitution%20Behrens%20und%20Glaser.pdf):

„Für die Bayerischen Staatsgemäldesammlungen steht außer Zweifel, dass Prof. Curt Glaser ein Verfolgungsschicksal erlitten hat. Die Verauktionierung seiner Kunstbibliothek und seiner Kunstsammlung auf der vorgenannten Max-Perl-Auktion, darunter auch die beiden Pechstein-Aquarelle, werten die Bayerischen Staatsgemäldesammlungen als verfolgungsbedingten Verlust. Das Restitutionsbegehren der Erben nach Prof. Curt Glaser wird als berechtigt anerkannt. Die Erben haben der Bitte der Bayerischen Staatsgemäldesammlungen nach einem Verbleib der Werke in der Sammlung entsprochen. Gemeinsam wurde vertraglich festgelegt, dass die beiden Aquarelle von Pechstein im Eigentum der Bayerischen Staatsgemäldesammlungen verbleiben und die Erbgemeinschaft im Gegenzug angemessen entschädigt wird.“

³² Joseph Ignaz Mildorfer, *Farewell of the Apostles Peter and Paul*, canvas, 52 x 33 cm.

³³ Watercolour by Fiedrich Brentel the Elder., *Landscape with Glathea, Acis and Polyphem*, canvas, 10 x 16 cm.

³⁴ Unknown, Copy after Joseph Heintz d. Ä., *Diana and Actaeon*, 11 x 17 cm.

³⁵ Johann Wenzel Bergl, *Job on a Dunghill*, canvas, 90 x 70 cm.

³⁶ See the press release of the Germanisches Nationalmuseum of 3 July 2013 (accessed online on 7 January 2019] :https://www.gnm.de/fileadmin/redakteure/Service/Presse/2013/PDF/PM_Restitution_Curt_Glaser.pdf): „Das Germanische Nationalmuseum in Nürnberg und die Erben von Prof. Dr. Curt Glaser haben sich nach umfangreichen historischen Recherchen zu vier Kunstwerken aus der ehemaligen Sammlung von Prof. Curt Glaser auf eine faire und gerechte Lösung gemäß der Prinzipien der Washingtoner Konferenz und in Umsetzung der Gemeinsamen Erklärung der Bundesregierung, der Länder und kommunalen Spitzenverbände zur Auffindung und Rückgabe NS-verfolgungsbedingt entzogenen Kulturguts, insbesondere aus jüdischem Besitz, vom 14. September 1999 verständigt. [...] In Anerkennung des Verfolgungsschicksals von Prof. Curt Glaser und des NS-verfolgungsbedingten Verlustes seiner Kunstwerke haben sich die Erbgemeinschaft und das Germanische Nationalmuseum einvernehmlich darauf geeinigt, dass die vier Kunstwerke im Bestand des Germanischen Nationalmuseums verbleiben und die Erbgemeinschaft im Gegenzug angemessen entschädigt wird.“

		9.05.1933: Auction 156, Internationales Kunst- and Auktions-Haus, Berlin, No. 226; 248; 249; 232	
2014	Museum Ludwig, Köln	<p>Five drawings by Erich Heckel, Georges Kars and Ernst Ludwig Kirchner</p> <p>Erich Heckel, <i>Dancing Nude</i> (c. 1980/10)³⁷</p> <p>Georges Kars, <i>Female Nude Sitting</i> (1920)³⁸</p> <p>Georges Kars, <i>Seated Female Nude, Legs Crossed</i> (1920)³⁹</p> <p>Ernst Ludwig Kirchner, <i>Three Female Nudes</i> (c. 1911/12)⁴⁰</p> <p>Ernst Ludwig Kirchner, <i>Shepherd with two Calves</i> (c. 1920)⁴¹</p> <p>18./19.05.1933: Auction 180, Max Perl, Berlin, No. 880; 950; 958; 956 Acquisition from Dr. Joseph Haubrich, Köln attorney in law 1946: Donation to Wallraf-Richart-Museum (from 1976: Museum Ludwig Köln)</p>	The city of Köln restituted to the heirs of Curt Glaser five drawings from the Museum; those remain after the restitution in the Museum Ludwig. ⁴²
2015	Hamburger Kunsthalle	<p>Watercolor by Lovis Corinth, <i>Walchensee</i> (1919)⁴³</p> <p>18./19.05.1933: Auction 180, Max Perl, Berlin, No. 644 No indication of the buyer at the auction 1949: Acquisition by Hamburger Kunsthalle from a private collector</p>	The watercolor by Lovis Corinth was restituted and remains after a repurchase by the Kunsthalle in the collection of the Hamburger Kunsthalle. ⁴⁴ The work will be in future labelled with the following addition: „From the collection of Professor Dr. Curt Glaser, restituted to the heirs and repurchased from the heirs in 2015.“

³⁷ Erich Heckel, *Dancing Nude*, c. 1980/10, chalk on paper, 45 x 35 cm.

³⁸ Georges Kars, *Female Nude Sitting*, 1920, charcoal, red chalk on paper, 57 x 44.2 cm.

³⁹ Georges Kars, *Seated Female Nude, Legs Crossed*, 1920, charcoal, red chalk on paper, 54.2 x 43.4 cm.

⁴⁰ Ernst Ludwig Kirchner, *Three Female Nudes*, c. 1911/12, pencil on cardboard, 27 x 36.2 cm.

⁴¹ Ernst Ludwig Kirchner, *Shepherd with two Calves*, c. 1920, watercolor and pencil on cardboard, 50.2 x 36.5 cm.

⁴² See the announcement of the city of Köln (accessed online on 7 January 2019]: https://www.stadt-koeln.de/mediaasset/content/pdf-dezernat7/restitution_flechtheim_glaser.pdf): „Vor diesem historischen Hintergrund wurde seitens des Museums und der Stadt Köln das Restitutionsbegehren der Erbgemeinschaft als berechtigt anerkannt. In einem von Sachverstand, Respekt und Fairness getragenen Verfahren haben sich die Erben von Professor Dr. Curt Glaser und die Stadt Köln auf die Zahlung einer angemessenen Entschädigung geeinigt. Die Erben haben so dem Wunsch des Museum Ludwig auf einen Verbleib dieser Werke in der Sammlung entsprochen.“

⁴³ Lovis Corinth, *Walchensee*, 1919, oil on plywood, 37.2 x 27.2 cm.

⁴⁴ See the press release of the Hamburger Kunsthalle of 10 September 2015 (accessed online on 7 January 2019]: https://www.hamburger-kunsthalle.de/sites/default/files/pm_aquarell_walchensee_von_l_corinth_in_hamburger_kunsthalle_restituiert.pdf: „Die Hamburger Kunsthalle und die Erben von Prof. Dr. Curt Glaser haben sich nach umfangreichen historischen Forschungen hinsichtlich des Aquarells „Walchensee“ von Lovis Corinth aus der Sammlung von Prof. Dr. Curt Glaser nach einem einvernehmlichen Verfahren und Austausch auf eine gerechte und faire Lösung geeinigt. In Anerkennung der Verfolgung von Prof. Dr. Curt Glaser durch das Nazi-Regime haben sich die Erbgemeinschaft und die Freie und Hansestadt Hamburg darauf verständigt, dass das Aquarell von Lovis Corinth nach erfolgter Restitution von der Kunsthalle zurückgekauft und somit in der Sammlung der Hamburger Kunsthalle verbleibt.“

2016	Nationalgalerie and Kunstbibliothek, Staatliche Museen zu Berlin, Preussischer Kulturbesitz	Two drawings by Christian Bernhard Rode , Two designs for allegorical reliefs, (1796) 26 documentary photographs of artworks from the collection of c. 10'000 photographs that were donated by Glaser to the Deutsches Bildarchiv in der Staatlichen Kunstbibliothek shortly before his emigration. ⁴⁵	The heirs and the SPK met an agreement that made it possible for the works to remain in the collections of the Stiftung Preussischer Kulturbesitz (SPK) „against a compensation payment“. ⁴⁶
2017	Private collection, Germany	Drawing by Camille Corot, <i>Baroque Portal in Toledo</i> 18./19.05.1933: Auction 180, Max Perl, Berlin, No. 840 Arnold Blome, art dealer in Bremen 1938: Exhibition at Kunsthalle Bremen of 1938 Auction 2007: German private collector	⁴⁷
2017	Private collection, Germany	Painting by Bartholomäus Spranger, <i>Mercury Carrying Psyche to Mount Olympus</i> (1576) ⁴⁸ 9.05.1933: Auction 156, Internationales Kunst- und Auktions-Haus, Berlin, No. 231 1933–1965: Wolfgang Gurlitt 18.11.1965: Auction at Lempertz, Köln 1965–2017: private collection Oktober 2017: Restitution to the heirs of Curt Glaser	⁴⁹

⁴⁵ The „Bildarchiv“ (photo archive) was founded in 1929 with the view to enable the most comprehensive possible documentation of art, applied arts and architecture in the media of photography, reproductions and printed images. Parts of the holdings of the archive were destroyed in the Second World War. After the closure of the archive its remaining holdings were distributed among various museum collections. It cannot thus be ruled out that more photographs stemming from the collection of Curt Glaser will be identified in future.

⁴⁶ See the press release of the Stiftung Preussischer Kulturbesitz of 20 April 2016 (accessed online on 7 January 2019: <https://www.smb.museum/nachrichten/detail/provenienzforschung-faire-und-gerechte-loesung-mit-den-erben-von-curt-glaser.html>): „Im Zuge der systematischen Erforschung der Bestände des Kupferstichkabinetts wurden zwei Zeichnungen identifiziert, die die Nationalgalerie auf einer der beiden Auktionen, bei denen Prof. Glaser seine Kunstsammlung versteigern ließ, erworben hatte. Bei Recherchen in der Kunstbibliothek wurden außerdem 26 Fotografien gefunden, die ebenfalls aus dem Alteigentum Prof. Glasers stammen. Sie gehören zu einem Bestand von ca. 10.000 Fotografien, die er kurz vor seiner Emigration 1933 der Kunstbibliothek schenkte, die jedoch weitgehend als verloren gelten müssen. In Anerkennung der Verfolgung Prof. Glasers durch das Nazi-Regime und in Würdigung seiner großen Verdienste für die Staatlichen Museen zu Berlin einigten sich die SPK und die Erben von Prof. Dr. Curt Glaser im Rahmen einer fairen und gerechten Lösung im Sinne der Washingtoner Prinzipien darauf, dass die Werke gegen Leistung einer Entschädigungszahlung im Eigentum der Stiftung Preußischer Kulturbesitz verbleiben.“

⁴⁷ See the announcement of Law Offices Rowland & Associates, accessed online on 7 January 2019: <https://rowlandlaw.com/wp-content/uploads/2016/07/Press-Release-Corot-English.pdf>): „At the auction *Books, Hand Drawings, Paintings/Graphic of the 16th to 20th Century* at the Berlin auction house *Max Perl* the Bremen art dealer and art collector Arnold Blome (1894-1972) acquired four pencil drawings, which were offered for sale in lot 840. One of the pencil drawings was the *Baroque Portal in Toledo*. This drawing, together with other artworks from the collection Arnold Blome, was exhibited at the *Kunsthalle Bremen* from October-November 1938. When the drawing was auctioned off once again in 2007, the auction catalog mentioned the provenance collection Arnold Blome and the exhibition at the *Kunsthalle Bremen* in 1938. The drawing subsequently came in possession of a German private art collection, which remarkably informed the heirs of Professor Glaser about the whereabouts of this drawing. In acknowledgement of this historical background the restitution claim by the heirs of Professor Glaser was recognized. In a proceeding directed by expertise, respect and fairness, the heirs of Professor Glaser and the German art collector agreed to a payment of appropriate compensation. The heirs of Professor Glaser accepted the request that the drawing remains in the private collection.

⁴⁸ Bartholomäus Spranger, *Mercury Carrying Psyche to Mount Olympus*, 1576, oil on canvas, 95.3 x 135.4 cm.

⁴⁹ See the article in Art Newspaper of 4 October 2017 (accessed online on 7 January 2019: <https://www.theartnewspaper.com/news/christies-to-auction-long-lost-painting-by-mannerist-artist-spranger>): „He died when I was a baby,” says Paul Livant, Curt Glaser’s great-nephew and one of his heirs, a guitarist in New York. “He never fully emotionally recovered from having to flee Germany. My great-aunt was constantly talking about him and his life in Berlin. Curt was a major figure when I was growing up. There was a feeling of loss, but also a sense of what our roots were.” See also lot 13, Auction Christie’s, London, of 7 December 2017, accessed online on 7 January 2019): <http://www.christies.com/lotfinder/Lot/bartholomaeus-spranger-antwerp-1546-1611-prague-mercury-carrying-6117510-details.aspx>.

		7.12.2017: Auction at Christie's, London, No. 201 (estimated price: GBP 400,000 - GBP 600,000; price: GBP 3,368,750 (CHF 4'400'000))	
2018	Museen der Stadt Bamberg	Drawing by Georg Christian Wilde (attributed, signed by C.W.), <i>East Choir of Bamberg Cathedral</i> , 1833, ink and pencil drawing, 21 x 20.5 cm. 18./19.05.1933: Auction 180, Max Perl, Berlin, No. 644 1933–1934: Berliner Antiquariat Altmann 1934: Acquisition by the city of Bamberg	The drawing was restituted by the city of Bamberg and the Museums of the City of Bamberg; both parties agreed on repurchase of the painting. ⁵⁰
2018	Hamburger Kunsthalle	Oil painting in the style of the Flemish painter Tobias Verhaecht , ⁵¹ <i>Landscape with the Flight to Egypt</i> <u>Not the property of Curt Glaser, but of his brother-in-law, Hanns Schwager (attorney in law in Berlin, married to the sister of the second wife of Curt Glaser)</u> ⁵² who handed the painting over to Curt Glaser. 9.05.1933: Auction 156, Internationales Kunst- und Auktions-Haus, Berlin, No. 237	The painting was restituted to the heirs and remains at Hamburger Kunsthalle, which repurchased it. ⁵³

⁵⁰ See the press release of the city of Bamberg of 1 February 2018 (accessed online on 7 January 2019: <https://www.stadt.bamberg.de/B%C3%BCrgerservice/Rathaus-Service/Webadressen/-Faire-und-gerechte-L%C3%B6sung-.php?object=&ModID=7&FID=1829.12941.1&NavID=2730.241&La=1>): „In Anbetracht des NS-verfolgungsbedingten Verlustes des Kunstwerkes wird die Zeichnung an die Erben von Prof. Dr. Curt Glaser restituiert. Da die Stadt Bamberg und die Museen der Stadt Bamberg aufgrund des Sujets am Erhalt der Zeichnung für die Museumssammlung interessiert sind, verständigten sich die Parteien auf einen Rückkauf der Zeichnung. [...] Wie bereits andere Besitzer von Kunstwerken aus der Sammlung Glaser, sowohl öffentliche Einrichtungen und Museen als auch Privatpersonen, suchten die Stadt Bamberg und die Museen der Stadt Bamberg, aufgrund eigener systematischer Erforschungen ihrer Bestände, den Kontakt zu den Erben von Prof. Dr. Curt Glaser und den diese vertretenden Rechtsanwälten.“

⁵¹ Oil painting in the style of the Flemish Painter Tobias Verhaecht, *Landscape with the Flight to Egypt*, oil on wood, 37 x 46 cm.

⁵² See the press release of the city of Hamburg, Behörde für Kultur und Medien, of 30 July 2019 (accessed online on 7 January 2019: <https://www.hamburg.de/pressearchiv-fhh/11449606/restitution-landschaftsgemaelde-rueckkauf-kunsthalle/>): „Der Berliner Rechtsanwalt Dr. Hanns Fischer gehörte seit dem 30. Januar 1933 aufgrund seiner ‚jüdischen Abstammung‘ zu dem Personenkreis, der in seiner Gesamtheit von der damaligen deutschen Regierung und der NSDAP aus rassistischen Gründen verfolgt wurde (Kollektivverfolgung). Als niedergelassener Rechtsanwalt und Notar musste er unmittelbar nach Machtergreifung der Nationalsozialisten aufgrund von Boykottmaßnahmen einschneidende Umsatzeinbußen hinnehmen. Dr. Hanns Fischer war der Schwager von Prof. Dr. Curt Glaser, einem Berliner Arzt, Kunsthistoriker und Verfasser zahlreicher bedeutender kunsthistorischer Publikationen, der selbst eine umfangreiche Kunstsammlung besaß. Diesem übergab Fischer das Gemälde *Landschaft mit der Flucht nach Ägypten*. Glaser ließ es zusammen mit seinen Besitztümern auf der Auktion im Internationalen Kunst- und Auktionshaus am 9. Mai 1933 in Berlin versteigern. Wer das Werk auf der Auktion ersteigerte, konnte bisher nicht ermittelt werden. Die Freie und Hansestadt Hamburg erhielt das Gemälde von Max Arnolds, La Tour-de-Peilz (Schweiz), 1972 als Geschenk.“

⁵³ See the press release of the city of Hamburg Hamburg, Behörde für Kultur und Medien, of 30.07.2019 (accessed online on 7 January 2019: <https://www.hamburg.de/pressearchiv-fhh/11449606/restitution-landschaftsgemaelde-rueckkauf-kunsthalle/>): „Die Hamburger Kunsthalle hat das Ölgemälde *Landschaft mit der Flucht nach Ägypten* von Tobias Verhaecht (1561–1630), Nachfolger – ein namentlich nicht bekannter, in der Nachfolge und Art des flämischen Malers Verhaecht wirkender Künstler – restituiert und zurückgekauft. Die Rückgabe des Werkes an die Erbgemeinschaft nach Dr. Hanns Fischer erfolgte nach umfangreicher Forschung und in Anerkennung der Verfolgung Dr. Hanns Fischers durch das Nazi-Regime. Der Rückkauf des Gemäldes durch die Hamburger Kunsthalle sichert dessen Verbleib in der Sammlung des Museums.“

A memorial plaque was installed in the foyer of the Kunstbibliothek in Berlin, where Curt Glaser worked, to commemorate Curt Glaser. The press release of the **Staatliche Museen zu Berlin (State Museums in Berlin)**, General Directorate, of May 9, 2016 reads as follows:

In 2012 the Prussian Heritage Foundation (Stiftung Preussischer Kulturbesitz) and the heirs of Professor Dr Curt Glaser agreed on the return of four prints by Evarud Munch and Ernst Ludwig Kirchner to the heirs a part of a „fair and just“ solution in accordance with the Washington Principles. The Department of Prints and Drawings (Kupferstichkabinett) had acquired these high-quality prints from the Glaser collection at one of the two auctions in 1933. Five other works in the Kupferstichkabinett and in the Kunstbibliothek from Curt Glaser's earlier possessions remained with the approval of the association of the heirs the property of the Staatliche Museen zu Berlin. In 2016 the SPK and the heirs of Professor Curt Glaser again reached an agreement for a few other works that were identified in the collections of the Staatliche Museen zu Berlin as the belonging to Curt Glaser. Both solutions were found in recognition of the persecution of Professor Glaser by the Nazi regime and in recognition of his great service to the Staatliche Museen zu Berlin.⁵⁴

Until now, the rejections of claims of the Glaser heirs in Basel in 2008 by the Canton of Basel-Stadt⁵⁵ and in London on June 24, 2009 by the **UK Spoliation Advisory Panel**⁵⁶ are publicly known. The **Museum of Fine Arts in Boston**, USA, suggests on its website that the heirs of Curt Glaser claimed a restitution of the painting by Joachim Anthoniesz Wtewael with the provenance of „Curt Glaser Collection“ that had been auctioned in the auctions in May 1933 without precising the particular actions by the heirs. The museums explicitly refers to the decision of the UK Spoliation Advisory Panel and thus to the rejection in London: „The heirs of Curt Glaser have sought restitution of the works of art auctioned in May, 1933, alleging that the sales were due to Nazi persecution and therefore forced. In 2009, the United Kingdom's Spoliation Advisory Panel issued a report regarding eight drawings that were auctioned in May, 1933. The Advisory Panel found that Glaser's decision to sell the bulk of his collection was due to a number of factors and that the prices attained at auction were fair. The panel concluded that the claim was not sufficiently strong to recommend restitution of the drawings.”⁵⁷

⁵⁴ See the announcement, accessed online on 24 November 2018: <https://www.smb.museum/nachrichten/detail/provenienzforschung-faire-und-gerechte-loesung-mit-den-erben-von-curt-glaser.html>.

⁵⁵ See the press release of the Regierungsrat Basel-Stadt of 19 February 2008, accessed online on 19 October 2018: <http://www.medien.bs.ch/nm/2008-02-19-rrbs-005.html>.

⁵⁶ See *Report Courtauld Institute of Art 2009 24.06.2009*, accessed online on 4 January 2019: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248231/0757.pdf

⁵⁷ See the announcement, accessed online on 13 November 2018: <https://www.mfa.org/collections/object/actaeon-watching-diana-and-her-nymphs-bathing-33583>.

V. LEGAL SOURCES

1. Law and Morality

Based on the exchange with the representatives of the heirs, the Kunstkommission is proceeding on the assumption that the Canton of Basel-Stadt is not being confronted with an actual *legal claim* that could be enforced in court. The legal assessment made by the legal representative in 2008 supports this assessment. The representatives of the heirs rely heavily on sources commonly referred to as "soft law" (or "non-binding principles"). These sources primarily make a moral claim. The Kunstkommission therefore is not making a decision in the legal sense. In the event of any future legal proceedings, the statements of the Kunstkommission would be unprejudicial in every respect.

The contradistinction between the law and morality should not be overemphasized. The legal system is an expression of valid moral precepts, as is clearly evident in concepts such as "good faith" (Art. 2 para. 1 ZGB⁵⁸ and Art. 3 ZGB) and "immorality" (Art. 19 para. 2 OR).⁵⁹ Legal considerations guide moral judgment. For its part, the law is open to moral values, as these are manifest in the Washington Principles and other declarations; open concepts of law are capable of absorbing moral notions and, in individual cases, make them into law. Finally, it should be noted that the Kunstmuseum Basel has expressly committed itself to the Washington Principles (see **following chapter**). Such a self-imposed commitment binds the museum to make a decision that aligns with the corresponding declaration.

2. Legal sources in detail

a) *Washington Principles*

The "Washington Conference Principles on Nazi-Confiscated Art" ("Washington Principles") of 3 December 1998 were adopted under the aegis of the "Washington Conference on Holocaust-Era Assets." The text in full is as follows:

In developing a consensus on non-binding principles to assist in resolving issues relating to Nazi-confiscated art, the Conference recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws.

1. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.
2. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.
3. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.
4. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.
5. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.
6. Efforts should be made to establish a central registry of such information.
7. Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.
8. If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.
9. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, cannot be identified, steps should be taken expeditiously to achieve a just and fair solution.

⁵⁸ Schweizerisches Zivilgesetzbuch of 10 December 1907 (SR 210), accessed online on 19 October 2018 at <https://www.admin.ch/opc/de/classified-compilation/19070042/index.html>.

⁵⁹ Federal Act on the Supplement to the Swiss Civil Code (Part Five: Code of Obligations) of 30 March 1911 (SR 220) accessed online on 19 October 2018 at <https://www.admin.ch/opc/de/classified-compilation/19110009/index.html>.

10. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.
11. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.⁶⁰

Most relevant here is Art. 8. In the case of artworks "[that] have been confiscated by the Nazis and not subsequently restituted," requisite steps should be taken quickly "to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case."

The question of whether "confiscated" encompasses not just confiscation but also "flight assets" (a term used in the Bergier Report) and "divestiture due to persecution" (see **ch. V. 2. e. *Handreichung der deutschen Bundesregierung***) is controversial, but tends to be rejected in Switzerland.⁶¹ The "just and fair solution" opens up a broad spectrum of possible solutions; anything is conceivable—from the mere recognition of the circumstances surrounding the acquisition of a work of art to its return.⁶²

The Washington Principles explicitly declare themselves to be "non-binding." In 1998, the Kunstmuseum Basel, together with other Swiss art museums, signed a declaration in line with the Washington Principles.⁶³ In this declaration, the Kunstmuseum commits itself "with regard to the assertion of claims of ownership relating to the time in question, to examine such applications thoroughly and in the case of justifiable claims to contribute constructively to a joint solution " (No. 3). The museums "principally disapprove of the unlawful appropriation of cultural property and support efforts to either return such objects to their rightful owners or heirs or to find a solution that is appropriate for both sides."

b) ICOM

The Kunstmuseum Basel is bound by the ICOM Code of Ethics for Museums.⁶⁴ Its Art. 2.2 and 2.3 state as follows:

2. 2 Valid Title

No object or specimen should be acquired by purchase, gift, loan, bequest, or exchange unless the acquiring museum is satisfied that a valid title is held. Evidence of lawful ownership in a country is not necessarily valid title.

2. 3 Provenance and Due Diligence

Every effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest, or exchange has not been illegally obtained in, or exported from its country of origin or any intermediate country in which it might have been owned legally (including the museum's own country). Due diligence in this regard should establish the full history of the item since discovery or production.

The provisions do not explicitly address the return of works of art, but are a clear commitment to stringent research of the provenance. They rule out the possibility that the Kunstmuseum may retain works of art with dubious provenance in its holdings. Nothing can be inferred from the guidelines regarding where to draw the line between looted art and flight assets.

⁶⁰ Accessed online on 19 October 2018 at <https://www.state.gov/p/eur/rt/hlcst/270431.htm>.

⁶¹ Cf. the views of Peter Mosimann und Beat Schönenberger (eds.), *Fluchtgut – Geschichte, Recht und Moral*, Bern 2015.

⁶² Cf. the BAK/EDI brochure, "Factors Contributing to Just and Fair Solutions," March 2019, p. 1. Accessed online on 18 June 2019 at <https://www.bak.admin.ch/bak/de/home/kulturerbe/raubkunst/gerechte-und-faire-loesungen.html>

⁶³ Printed in Peter Mosimann, Marc-André Renold and Andrea Raschèr (eds.), *Kultur – Kunst – Recht*, Schweizerisches und Internationales Recht, Basel 2009, Appendix 6.3.

⁶⁴ Accessed online on 19 October 18 at http://icom.museum/fileadmin/user_upload/pdf/Codes/code_ethics2013_eng.pdf.

c) Swiss Civil Code (ZGB)

The Swiss Civil Code (ZGB)⁶⁵ defines the concept of good faith in Art. 3 para. 2 ZGB. Notwithstanding the question of the direct, legal applicability of this provision to the present case, Art. 3 para. 2 of the Swiss Civil Code provides a general measure for the degree of care that a buyer of a work of art must take. Thus the Federal Supreme Court in BGE 139 III 305 ff., 308 f. E. 3.2.2, states the following⁶⁶:

The degree of attentiveness that may be required of the purchaser depends on the circumstances. What this means in any specific case is largely a matter of individual judgment [...] What must particularly be considered is the relevant sector's prevailing practice of proceeding, whereby ordinary lack of attention, in any case, cannot lead to a reduction in the required due diligence [...] According to the settled case-law of the Federal Court, there is no general obligation on the purchaser to ascertain whether the seller has the power of disposal; only if there are concrete grounds for suspicion do the exact circumstances need to be clarified [...] Higher requirements must be placed on those branches of business that are especially exposed to offers of goods of dubious origin and consequently to defects of title, as is the case with trade in second-hand goods of all kinds [...] Even if this does not stipulate a general obligation to investigate, in these cases there is an obligation to clarify or enquire about the seller's right to dispose not only upon concrete suspicion of the defect of title, but whenever there is cause for distrust due to the circumstances [...] These increased due diligence requirements are not limited to the dealers in commercial transactions; the decisive factor is rather the acquirer's familiarity with the sector [...].

The Kunstmuseum applies these higher standards of due diligence in the acquisition of art works and considers itself bound by them.

d) The Terezin Declaration

The declaration of the Washington Principles was followed by two further conference in Vilnius (2000) and Terezin (2009). The Terezin Declaration strengthens the Washington Principles.⁶⁷ Its choice of words speaks less exclusively of "confiscation." Point 2 of the Declaration states:

Noting the importance of restituting communal and individual immovable property that belonged to the victims of the Holocaust (Shoah) and other victims of Nazi persecution, the Participating States urge that every effort be made to rectify the consequences of wrongful property seizures, such as confiscations, forced sales and sales under duress of property, which were part of the persecution of these innocent people and groups, the vast majority of whom died heirless.

According to this definition, "wrongful property seizures" include "confiscations, forced sales and sales under duress of property" (in the German translation, "Beschlagnahme, Zwangsverkauf und Verkauf in einer Zwangslage").⁶⁸

Swiss museums have not made any discernable statement thus far regarding the applicability of the Terezin Declaration.⁶⁹

The Confederation took part in both of the conferences that followed Washington (Vilnius, Terezin) and co-approved the declarations. In response to Interpellation No. 13.4027 by Josiane Aubert of 27 November 2013, the Federal Council made the following comments:

⁶⁵ Swiss Civil Code of 10 December 1907 (SR 210), accessed online on 19 October 2018 at <https://www.admin.ch/opc/de/classified-compilation/19070042/index.html>.

⁶⁶ For extensive treatment, see also Peter Mosimann, Provenienzforschung der Museen als Rechtserfordernis, in Mosimann/Schönenberger 2015, p. 103ff.

⁶⁷ Accessed online on 19 October 2018 at <http://www.holocausteraassets.eu/program/conference-proceedings/declarations/>.

⁶⁸ Accessed online on 19 October 2018 at <http://www-temp.bak.admin.ch/kulturerbe/04402/04712/index.html?lang=de>.

⁶⁹ Cf. the EDI/EDA report on the state of the work of the Swiss Confederation in regard to Nazi-looted art from 2011–2016 of 19 October 2016, Bern 2016, p. 1 (accessed online on 19 October 2018 at <https://biblio.parlament.ch/e-docs/387980.pdf>).

In 2009, Switzerland and 45 other countries adopted the Terezin Declaration, which reaffirms the Washington guidelines. At the federal level, Switzerland implements the Washington Principles.

[...]

The Washington Principles serve as an important signal for private individuals to find fair and equitable solutions and are regarded as international best practice.⁷⁰

The Federal Council made similar statements with regard to further inquiries:⁷¹ In each case the Council always refers to the Terezin Declaration as a "confirmation" or an "affirmation" of the Washington Principles, but in its subsequent material considerations makes reference exclusively to the Washington Principles. The differences in content are not taken up.

e) Guidelines of the German Federal Government

In December 1999, the German Federal Government, the German Bundesländer, and the national associations of local authorities issued a statement on the implementation of the Washington Principles, which is itself in turn fleshed out in the "Guidelines for implementing the Statement by the Federal Government, the *Länder* and the national associations of local authorities on the tracing and return of Nazi-confiscated art, especially Jewish property" (*Handreichung zur Umsetzung der "Erklärung der Bundesregierung, der Länder und der kommunalen Spitzenverbände zur Auffindung und zur Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes, insbesondere aus jüdischem Besitz"*) (February 2001, revised in November 2007; so-called *Handreichung*).⁷² In addition to the Washington Principles, the *Handreichung* is based on the Allied restitution regulations.⁷³ The corresponding legal basis and case law of the restitution courts is referenced in the "Comments on the Guidelines" (cf. *Handreichung*, p. 92 ff.).

The inclusion of dispossession due to persecution is already evident in the original German title of the *Handreichung* (which uses the phrase "*Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes*" – "return of cultural objects taken as a result of Nazi persecution"). To examine the question of persecution-related loss, the *Handreichung* provides the following guidelines (*Handreichung*, p. 29):

1. Were the claimant or his/her legal predecessor persecuted on racial, political, religious or ideological grounds between 30 January 1933 and 8 May 1945?
2. Did the claimant or his/her legal predecessor sustain a loss of property through forced sales, expropriation or in any other form? Who has to bear the onus of proof, i.e. who has to provide evidence showing that the loss was due to persecution by the Nazi regime?
3. Can the statutory presumption according to which losses that resulted from legal transactions should basically be considered cases of Nazi-confiscated property, be disproved by showing
 - that the seller received a fair purchase price
 - and
 - that he was free to dispose of the purchase price as he pleased [...]

In addition to the material provisions, it is particularly significant from a practical point of view that the application of the guidelines results in a reversal of the burden of proof. For Jewish victims, the presumption of collective persecution exists for the period from 30 January 1933 (*Handreichung*, p. 92). With regard to an appropriate purchase price, the *Handreichung* (p. 95) states:

⁷⁰ Accessed online on 19 October 2018 at <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20134027>.

⁷¹ Question session, No. 14.5664, Alec von Graffenried on 8 December 2014, accessed online on 19 October 2018 at <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20145664>; Motion No. 14.3480 by Mathias Reynard on 18 June 2014, accessed online on 19.10.2018 at <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20143480>.

⁷² Accessed online on 19 October 2018 at http://www.lostart.de/Content/01_LostArt/DE/Downloads/Handreichung.pdf?__blob=publicationFile&v=4; English version: https://www.lootedart.com/web_images/pdf/English%20handreichung.pdf, accessed 24 November 2018

⁷³ See Sheila Heidt, *Restitutionsbegehren bei NS-Raubkunst. Praxis Leitfaden*, Berlin 2017, p. 28 ff.

The appropriateness of the purchase price is fundamentally to be determined by the objective market value that the object would have had at the time of sale among persons who were not persecuted. In the case of direct sales of works of art, it would depend on whether a market price can be ascertained for similar works by the artist, for instance through auction catalogues from around the same period. For art auctions, due to private consignment, it must be left to the discretion of the institution concerned whether to always regard the proceeds of the auction as an appropriate 'market price' or to assume in favor of the claimant in individual cases that at the time of the loss of assets, due to increasing persecution measures and the concomitant large number of sales, the price level was 'too low' in general.

In Switzerland, the *Handreichung* was first applied with regard to the Gurlitt Collection, which was bequeathed to the Kunstmuseum Bern. As a component of German administrative practice, the *Handreichung* was declared to be applicable in the contract between the Kunstmuseum Bern and the German government. Other Swiss museums have, as far as can be seen, not expressed an opinion on the applicability of the handbook in Switzerland.

In connection with Interpellation No. 14.4157 by Raphaël Comte of 11 December 2014,⁷⁴ the Federal Council has held:

The Agreement [i.S. Gurlitt] refers explicitly to the Washington Principles. The substantive interpretation of these is stipulated to be the "Statement by the Federal Government, the *Länder* and the national associations of local authorities on the tracing and return of Nazi-confiscated art, especially Jewish property." This statement provides an additional legal basis to the Washington Principles and was established by the Federal Republic of Germany for its territory in view of its historical connections.

Such a contractually agreed interpretation binds exclusively the Foundation Kunstmuseum Bern, the Federal Republic of Germany and the Free State of Bavaria with regard to the works of art in the Gurlitt estate and not third parties, such as other museums in Switzerland or the Confederation.

The formulation does not specify whether the Federal Council considers the application of the *Handreichung* to other cases desirable; the wording seems rather to indicate some reservations.

3. Legal sources for assessing the present case

a) Applicable sources

The Kunstmuseum Basel has expressly committed itself to the Washington Principles. It is also bound by the ICOM Code of Ethics for Museums and applies the due diligence standards of the Swiss Civil Code when making acquisitions. These legal sources apply without restriction.

The Terezin Declaration and the German *Handreichung* appear less unambiguously applicable as legal sources. Although the Swiss Confederation signed the Terezin Declaration, the Federal Council continues to cite the Washington Principles as the basis for restitution cases.

The Kunstkommission doubts that a strictly literal understanding of the Washington Principles, and thus a strict handling only in cases of actual confiscations by the National Socialists, is appropriate. As a flexible instrument, the Washington Principles are designed to be developed further within the international community. They contain a dynamic that must be adequately taken into account in their application. This is also laid out the Bergier Report of 2001.⁷⁵

This understanding is in line with the Terezin Declaration, which is conceived as a confirmation of the Washington Principles, but at the same time departs from the narrow definition of confiscation. The Terezin Declaration can be understood as a kind of "proposed interpretation" for the Washington Principles.

⁷⁴ Accessed online on 19 October 2018 at <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20144157>.

⁷⁵ Cf. Francini/Heuss/Kreis 2001, p. 387.

More restraint appears to be indicated with a regard to the German *Handreichung*. In addition to relying on the Washington Principles, the *Handreichung* is based on the specific restitution practice in Germany and the Allied restitution regulations. The Kunstkommission doubts whether a wholesale adoption is appropriate for Switzerland. However, the German *Handreichung* can be consulted selectively where in regard to a specific issue it conveys additional insights that also seem appropriate under the Washington Principles and the Terezin Declaration.

In this view, the Washington Principles remain the decisive starting point for any assessment. The Washington Principles cannot, and do not aim to, compensate for every injustice. At their core, they are directed at the confiscation of art objects by the National Socialists. Confiscation is a grave injustice because those affected lose something against their will and without compensation.

The central substance of the injustice of the confiscation must guide the decision of the Kunstkommission. For the assessment of the individual case, however, the Terezin Declaration as well as the German *Handreichung*, where appropriate, can and should be taken into account. In the opinion of the Kunstkommission, they represent an important, but not in every case binding, clarification of the Washington Principles.

b) *Openness of the Washington Principles with regard to fact, legal consequences, and scope*

With regard to their outcome—or in juridical terms, their legal consequence—the Washington Principles appear to be very open. What is required is a "fair and just solution." It is less clear whether the same openness also applies toward the circumstances to be assessed under the Washington Principles (or legally: statement of facts). The same applies to the question of the scope of application.

The Kunstkommission proceeds on the assumption that the Washington Principles should be regarded as a flexible source of law in all dimensions. Thus, no sharp boundaries exist with respect to confiscation or persecution-related loss (facts); neither does it seem appropriate to limit the scope of the Washington Principles in terms of time or place. Rather, the openness of the legal consequences ("fair and just solution") also indicates openness with respect to both scope and legal consequences. This also distinguishes a moral judgment from a strictly legal subsumption in which, where doubt exists, sharper boundaries are indicated with respect to the facts of the case and the scope of application.

VI. ASSESSMENT

1. Key questions and methodology

The legal sources presented here operate with open concepts. There is no consensus on how to concretize them. Even in specific decisions, which particular aspects of the case were actually decisive for the decision of the Kunstkommission is indicated only in part. There is therefore no established practice on which the Kunstkommission can base its decision.

The causuistic approach of the Washington Principles is understandable insofar as each case must be considered individually and in the light of all the circumstances.⁷⁶ The Kunstkommission considers this approach to be correct. A consideration of the individual case also corresponds best to the requirements of a fair and just solution.

In applying the Washington Principles, many decisions have followed this basic idea. But this also gives rise to challenges and difficulties. In the present case, it is not easy to obtain a *distillate of fair decision-making* from the various individual decisions. From the point of view of the Kunstkommission, it is rightly argued that an actual "grammar of the basis for just and fair solutions" is currently lacking.⁷⁷ The Kunstkommission therefore details extensively which criteria it considers to be essential and how it has assessed and weighed them in the present case.

It must also be noted that in their legal consequences the Washington Principles are very open. A "just and fair solution" opens up a wide range of possible consequences. The affirmation of a case under the Washington Principles does not automatically mean returning the works. In contrast to a civil court, which largely has to make a binary decision regarding the question of ownership, a decision under the Washington Principles can represent all the shades of gray between black and white.

2. Circumstances of the transfer of ownership as main criterion

The scope of the Washington Principles applies to works of art "confiscated by the Nazis." The term confiscation contains *two elements of injustice*. First, the transfer of ownership takes place against the will of the owner. Secondly, the owner does not receive the equivalent value of the object that was taken away from him or her. Thus, there is a financial loss.

These two elements can also be found in other documents, such as the Terezin Declaration. The facts mentioned there are "confiscations, forced sales and sales under duress." The German *Handreichung* defines its scope of application as "loss due to persecution." "Due to persecution" stands in contrast to voluntary divestiture. As in the case of confiscation, the owner was not free to decide whether to sell or otherwise give away an art object. The persecution must therefore be marked by National Socialism.

The second element is expressed in the term "loss." "Loss" means that the expropriated person is not "fully compensated."⁷⁸ The previous owner received either no or insufficient value.⁷⁹

⁷⁶ Cf. the *Leitfaden für Museen zur Durchführung von Provenienzrecherchen* des BAK/EDI of June 2016, p. 2. Accessed online on 18 June 2019 at <https://biblio.parlament.ch/e-docs/387980.pdf>, p. 43.

⁷⁷ Matthias Weller, Gedanken zur Reform der Limbach-Kommission, in *KUR. Journal für Kunstrecht, Urheberrecht und Kulturpolitik*, Vol. 19/No. 5–6 (2017) p. 136 ff., 141.

⁷⁸ In this regard, cf. Article 22 of the Swiss Federal Constitution on the Guarantee of Ownership.

⁷⁹ In this regard, cf. *Bericht EDI/EDA über den Stand der Arbeiten des Bundes im Bereich der NS-Raubkunst im Zeitraum von 2011–2016* [Report on the Status of the Bund's Work with Regard to Nazi looted Art in the Period 2011–2016], p. 24–25;

The application of the concept of "flight assets" in a judiciary judgment seems questionable and must not be considered decisive here.⁸⁰ What is decisive is whether or not a change of ownership in the period 1933-1944 was confiscatory in its effect.⁸¹

The Kunstkommission is of the opinion that the two elements—involuntariness and loss—must be at the center of the assessment of the present case. At the conclusion, it will also comment on possible ancillary criteria (see **Ch. VI. 4. Extent of financial losses and availability of equivalent value**).

3. Involuntariness

a) Timing of decision to sell

A key question in the present case concerns the *timing* of when Curt Glaser made the decision to sell the works acquired by the Kunstmuseum Basel at Auction 180 on 18-19 May 1933. Not only the clarification of the historical details is difficult, but also the conclusions to be drawn from them.

The first question to be asked is what is considered to be the relevant point in time at which conditions of persecution have to exist. The Kunstkommission assumes that for an assessment based on the Washington Principles and other legal sources, it is not the *time of the sale* (May 1933), but rather the *time of the decision to sell* that must be the decisive point. This understanding results from the concept *verfolgungsbedingt* ("due to persecution") in the German *Handreichung*. "Due to persecution" posits a strong causal relationship between persecution and sale; the sale is a consequence of external pressure, therefore it is "contingent" (*bedingt*) in the sense of the terminology of the German *Handreichung*. Thus, for an assessment, it is not primarily the time of the sale - May 1933, when Curt Glaser had already lost his job - but the time of the decision to sell that is a determining factor.

Determining this point in time has proved difficult. The Kunstkommission is of the opinion that the sale was carefully prepared. Curt Glaser had divided his furniture, library, and art collection into two auctions in different auction houses. The catalogue of Auction 180 of 18-19 May 1933 is detailed, although some lot numbers are missing and works are in part grouped together in sets. The preparations for such extensive auctions could have easily taken several months. Time would be needed not only for the selection, but also for the printing and dissemination of the catalogue. Although it is conceivable that the auctions were prepared faster than usual, due to the volume of sales alone, it still does not seem plausible that the decision had not already been made prior to April. The documents of the auction house are no longer available, as far as is presently known.

If one were to assume the decision to sell was made before the National Socialists seized power, it would appear questionable whether the Washington Principles and other sources of law would apply at all. Legally speaking, the question of *temporal scope* arises. The Kunstkommission is however of the opinion that the Washington Principles have no such "sharp boundaries" (see **Ch. V. 3. b. Openness of the Washington Principles with regard to fact, legal consequences, and scope**). A formal approach does not appear appropriate. Thus, we can leave open the question of whether Curt Glaser had already been persecuted before the National Socialists seized power or had already found himself under duress. The Kunstkommission therefore comes to the interim conclusion that the present case is

accessed online 18 June 2019 at <https://biblio.parlament.ch/e-docs/387980.pdf>.

⁸⁰ Cf. *Glossar NS-Raubkunst [Glossary of Nazi Looted Art]* of the BAK/EDI of April 2018, p. 2–3, as well as the *Leitfaden für Museen zur Durchführung von Provenienzrecherchen* of the BAK/EDI of June 2016, p. 2, accessed online on 18 June 2019 at <https://biblio.parlament.ch/e-docs/387980.pdf>, p. 51–52, 43.

⁸¹ Cf. *Glossar NS-Raubkunst [Glossary of Nazi Looted Art]* of the BAK/EDI of April 2018, p. 2–3, as well as the *Leitfaden für Museen zur Durchführung von Provenienzrecherchen* of the BAK/EDI of June 2016, p. 2, accessed online on 18 June 2019 at <https://biblio.parlament.ch/e-docs/387980.pdf>, p. 51–52, 43.

to be examined under the Washington Principles, irrespective of the exact time of Curt Glaser made the decision to sell.

b) *Motives for the sale*

Curt Glaser had brought up the sale of his art collection, particularly in his correspondence with Edvard Munch. From the point of view of the Kunstkommission, the relevant passages do not appear clear. They might refer either to his personal situation (the death of the wife) or to the political situation in Germany. Both motivations may also be relevant. The report of the Spoliation Advisory Panel of the United Kingdom speaks of "mixed motives."⁸²

It is clear to the Kunstkommission that Curt Glaser must be regarded as a victim of National Socialism. He held an exposed position at the time the National Socialists seized power and was the target of the injustice regime. There is no evidence that Curt Glaser was already personally in fear for his life and limb at the time of his emigration. From the point of view of the Kunstkommission, however, this is irrelevant, since his decision to emigrate was undoubtedly justified by objective circumstances. He recognized the signs of the times earlier than others.

Due to the clear presence of persecution, it is irrelevant to the Kunstkommission whether the decision to sell might also be based on other motives. The Kunstkommission does not overlook the fact that Curt Glaser's statements, especially in the letters to Edvard Munch, do indeed appear somewhat ambiguous. Nor can it be ruled out that the death of his first wife, with whom he built up his collection, as well as his marriage to his second wife, played a role, especially considering that he had to give up his large apartment. Ultimately, however, these possibilities do not form a solid basis for explaining the sale of Curt Glaser's household goods and collection. They must not be held against the heirs. This is also supported by the logical application of Art. 4 of the Washington Principles, according to which "unavoidable gaps or ambiguities in the provenance" should not be interpreted to the detriment of those affected. For the Kunstkommission, persecution therefore stands front and center. It is the reason why Curt Glaser emigrated and prior to this, on 18-19 May 1933, auctioned off a considerable part of his art collection, 200 drawings and prints of which the Kunstmuseum Basel acquired.⁸³

c) *Export as alternative?*

It is undisputed that after he provisionally settled in Ticino in 1933, Curt Glaser shipped a considerable amount of goods to Switzerland (see **Ch. III. 3. e. Timing of decision to sell**) and was able to bring several paintings by Edvard Munch to Switzerland in later years as well.⁸⁴ In 1933, Curt Glaser did not have to pay any Reich Flight Tax. Mobile consumer goods could still be transferred abroad in 1933 relatively freely. Finally, Curt Glazier's dismissal did not affect his civil servant's salary, which he continued to be entitled to for three months (October to December 1933).⁸⁵ However, "in accordance with the Withholding Ordinance of 8 June 1932 (GS.S.199), in the period from 1 July 1932 up to and including 31 December 1933, 5 percent of [Curt Glaser's] salary, a total of 1,029.21

⁸² Cf. Report, Courtauld Institute of Art 2009, p. 6, item 34.

⁸³ The majority of the furnishings and the library were sold at the first auction on 9 May 1933 at the Internationales Kunst- und Auktionshaus, Berlin.

⁸⁴ For instance, *Music on Karl Johan Street*, 1899; see <http://www.kunsthau.ch/de/sammlung/provenienzen/fallbeispiele/drei-verdachtsfaelle/musik-auf-der-karl-johan-strassevon-edvard-munch/>, accessed 13 November 2018 (see **ch. III. 5. b. Relationship to his own art collection**).

⁸⁵ Cf. the letter from the Prussian Minister of Science, Art, and Education to the General Director of the Staatlichen Museen in Berlin of 23 December 1933, in LAB, APr.Br. Rep. 042 Nr. 9773, sheet 1.

RM, was withheld."⁸⁶ Starting in January 1934 he provisionally received three quarters of his pension (see **Chapter III. 4. a. Financial situation**).

Thus, at the time of his emigration, Curt Glaser had a comparatively great deal of freedom to sell certain works of art and keep others. To a certain extent, he was therefore able to determine the scope of the sale and select works of art that he did not want to sell. The extent to which Curt Glaser made use of this option and how many works of art he took with him to Switzerland cannot be determined with certainty. There are 14 large crates of household effects known to contain "works of art, silver, precious porcelain, carpets and all kinds of valuables."⁸⁷ He was apparently able to keep a certain number of drawings of Old Masters, which he bequeathed to Maria Glaser-Ash, until he emigrated to the USA (see **Ch. III. 5. b. Relationship to his own art collection**).

The Kunstkommission does not thereby fundamentally question that a situation of duress existed. But the extent of the duress, i.e., as a counterpart to the extent of involuntariness, is in Curt Glaser's case less than in others, not least due to Curt Glaser's foresightedness. This last point will be taken into account below in the discussion of the purchase price.

4. Extent of financial losses and availability of equivalent value

a) Appropriateness of purchase price in light of market situation

The appropriate purchase price is considered to be "the objective market value at the time of the sale."⁸⁸ The standard measure should be the price "that any buyer or seller would have paid without regard to personal circumstances."⁸⁹ The determining factor is the market situation among persons not suffering from persecution (see *Handreichung*, p. 95).

The Kunstkommission proceeds on the assumption that Curt Glaser carefully prepared the sale of his works. This is supported by his professional relationship to the art market as well as the choice to sell at auction, which always defines the best possible price at a given time. Curt Glaser's collection was not static; he had repeatedly sold and then acquired new works prior to 1933, and he was also an expert on the current market due to his profession.

On the whole, the auction did not attain the price levels hoped for by Curt Glaser, which is not surprising given the generally poor market situation. The sum of the auction proceeds for the collection of prints by Edvard Munch was around 90% of the estimated prices. For the collection of 200 prints by various artists acquired by the Kunstmuseum Basel, the prices paid were approx. 10% below the estimated price. For the two prominent Munch lithographs, however, the Kunstmuseum paid significantly more than the estimated prices, namely, 29.1% more for the *Madonna* and 8.3% more for the *Self Portrait* (see **Ch. III. 3rd a. Auction No. 180 at Max Perl**).

It is, however, difficult to determine whether the sales actually attained a "market price." Neither is it possible, on the basis of the existing scholarly literature, to make a (definitive) claim regarding the extent to which the comparatively low prices in May 1933 were a result of National Socialist persecution or a consequence of the global economic crisis. Nevertheless, the result of Auction 180 at

⁸⁶ Letter from the acting General Director of the Staatlichen Museen to the Prussian Building and Finance Department of 5 January 1934, in LAB, APr.Br. Rep. 042 No. 9773, sheet 1RS as well as the letter of the letter from the Prussian Building and Finance Department of 19 January 1934, in LAB, APr.Br. Rep. 042 No. 9773, sheet 2.

⁸⁷ Maria Glaser-Ash, affidavit of 22 December 1962, LAB Entschädigungsakte Dr. Curt Glaser, Reg.Nr. 52785.

⁸⁸ Heidt 2017, p. 168.

⁸⁹ Heidt 2017, p. 168 with reference to a decision by the OLG Karlsruhe of 24 November 1949.

Max Perl's was certainly disappointing for Curt Glaser. "Best possible" - under the given circumstances - cannot be equated with "good."

b) *Appropriateness of purchase price in the judgment of the Kunstmuseum Basel*

The minutes of the Kunstkommission reveal that the Kunstmuseum considered the prices paid to be "cheap" or "favorable."⁹⁰ However, from the perspective of the Kunstkommission today, these comments should not be overestimated. Museums always strive to buy only when prices are "low" or "favorable," so that as much as possible can be purchased with the limited - here public - funds. One might criticize such a strategy, but it undoubtedly corresponds to the practice of all the larger institutions at the time and in the present. No director would recommend the purchase of a work to the cognizant committee if its price cannot be described at least as "acceptable." In this light, the purchases of Curt Glaser's works do not represent a special case. It cannot therefore be inferred from the corresponding comments in the minutes of the Kunstkommission that the director at the time, Otto Fischer, and the Kunstkommission were of the opinion that the works could be acquired at "rock-bottom prices."⁹¹

c) *Appropriateness of purchase price in the compensation proceedings of 1963*

In 1963, on the basis of a settlement with the Entschädigungsamt Berlin and in accordance with § 56 of the Bundesentschädigungsgesetz (Federal Compensation Act), the widow Maria Glaser-Ash received DM 5,000 as capital compensation for "*Verschleuderungsschaden*" (monetary loss due to discounted divestiture of assets) in connection with "the particularly valuable objects offered for sale" in the two auctions of 1933. The total compensation, which amounted to DM 7,100, also included the payment of a Reich Flight Tax (DM 1,800), which had been demanded of Curt Glaser as of November 1, 1936, and emigration costs (travel and transport costs; DM 300).⁹² However, the investigations appear to be less detailed than those of the Kunstmuseum Basel. In addition, the term "*Verschleuderungsschaden*" referred more to the household effects and the library and graphic art than to the paintings, so that the compensation proceeding does not seem conclusive. The compensation paid in 1963 does not, however, in principle conflict with the claims of Curt Glaser's heirs.

d) *Present value*

The Kunstkommission believes that while the current value of the artworks might be relevant to the question of the amount of any compensation under the Washington Principles, it can hardly be relevant to the question of the restitution of the artworks or the question of *whether* a just and fair solution can be found at all.

e) *Accessibility of purchase price*

The Kunstkommission assumes that Curt Glaser received the equivalent value from Auction 180 of 18-19 May 1933. The contrary is not evident in the documents, was not the subject of the compensation applications made by Maria Glaser-Ash, and is not asserted by the heirs today. A Reich Flight Tax was not levied on Curt Glaser when he left the country in 1933 as a result of the sales.

⁹⁰ Minutes of the Kunstkommission of 8 June 1933, Kunstmuseum Basel, Archiv, B1_12_Protokolle_1932_11-1934_04_p. 58-59.

⁹¹ Ibid.

⁹² The claimants proposed on 21 February 1963 to settle the "claim for damages to property and assets as follows: (1) Reich Flight Tax, DM 1,800; (2) emigration costs, DM 1,000; (3) damages from discount divestment of property, DM 10,000 (see **Ch. III. 3. b. Appropriateness of the purchase price**).

5. Ancillary criteria

a) *Lawfulness or illegality of the transaction*

The assessment of the present case is primarily based on the Washington Principles and subsequent sources. The Kunstkommission notes that, as far as it can tell, the ownership of the drawings and prints is not in question, or has already been considered to be virtually incontestable in the investigations carried out in 2008.

The legal status is not a decisive factor for the assessment under the Washington Principles. As an expression of a valid moral position, however, it appears appropriate. It argues against restitution of the works or compensation of the heirs, but should not be overestimated in light of the basic idea of the Washington Principles.

b) *Knowledge of the Kunstmuseum Basel at time of purchase*

The Kunstmuseum Basel had been aware in 1933 that the art objects offered for sale at Auction 180 at Max Perl on 18-19 May 1933 belonged to Curt Glaser. The political situation in Germany may be assumed to have been known in Basel.

The knowledge of the Kunstmuseum in 1933 appears to be a useful ancillary criterion for an assessment under the Washington Principles. On the one hand, it offers some indication of the appropriateness of the purchase price (**see Ch. VI. 4. a/b. Extent of financial loss and availability of equivalent value**). On the other hand, any consciousness of injustice on the part of the Kunstmuseum in 1933 would indicate that the transfer of ownership was already viewed critically at the time by contemporaries.

The available documents show that the prices were regarded as "cheap" - not, however, as "rock-bottom," which might have been considered problematic. In this light, the assessment of the Kunstmuseum and the Kunstkommission at the time does not appear unethical. In the opinion of the Kunstkommission, the heirs cannot derive their claim from the knowledge of the Kunstmuseum at the time. However, the Kunstmuseum cannot derive anything in its favor from the committee minutes either. It cannot argue that the origin of the drawings and prints was unknown. Similarly, it may be assumed that an institution such as the Kunstkommission was aware of the conditions in Germany.

c) *Behavior of the parties after the transfer of property*

As far as can be seen, during his stay in Switzerland, Curt Glaser was not critical of the Kunstmuseum as the purchaser of part of his art collection. His relationship with the Kunstmuseum does not appear to be disturbed in any way. Conversely, after the war, the Kunstmuseum Basel stored paintings for Mrs. Maria Glaser-Ash at no charge.

The Kunstkommission is however of the opinion that the behavior of the parties after the transfer of ownership can only be taken into account to a limited extent, if at all. It may be true that the legal system normally stipulates time limits within which the party concerned must dispute the lawfulness of the transfer of ownership once specific conditions of duress cease to exist (see Art. 21 and Art. 31 OR) and Curt Glaser did not do this during his stay in Switzerland. However, for an assessment under the Washington Principles, which primarily follow the moral attitudes of today, this point appears to be of only minor importance.

d) *Personal circumstances of the affected parties*

The Kunstkommission has examined the question of whether or not the economic and personal circumstances of the affected individual are relevant for an assessment under the Washington Principles. The issue to be considered is whether a claim should be judged all the more generously, the worse the National Socialist persecution has affected the persons concerned and potentially their family.

In the view of the Kunstkommission, this factor can be of significance at most in individual cases, but not in the present case. Professional success could hardly be held against an aggrieved person. Conversely, any expulsion from the home country appears degrading. After emigrating to Switzerland and later to the USA, Curt Glaser could no longer gain a professional foothold.

e) *Proximity of the heirs*

From a purely legal point of view, the proximity of the heirs to the testator is irrelevant. The question does arise, however, whether the same holds true for the application of the Washington Principles. In other words, it must be asked whether it matters in the present case that the heirs are not direct descendants or blood relatives of Curt Glaser.

From the point of view of the Kunstkommission, the issue is irrelevant for answering the present question. It may be that in individual cases a direct experience of blood relatives with the art objects of the aggrieved party deserves special attention; the relatively distant relationship to Curt Glaser, however, must not be considered to the detriment of the heirs. This assessment is also supported by the consideration that the passage of time would otherwise work against the heirs (because the distance to the testator increases over time). This is not in the spirit of the Washington Principles.

f) *Assessment of the situation by other institutions*

The Kunstkommission has taken note of the various assessments made by other institutions (see **Ch. IV. Decisions of other institutions**). In the case of Curt Glaser, German, Dutch and English institutions have made different decisions in comparable cases. German institutions in particular have spoken out in favor of restitution or compensation, as has the Dutch Restitution Commission. The UK Spoliation Advisory Panel decided otherwise, as did the Government Council of the Canton of Basel-Stadt in 2008. The Museum of Fine Arts, Boston, USA, refers on the homepage of a painting sold at the Glaser Auction of 9 May 1933 at the International Art and Auction House in Berlin to the fact that Curt Glaser's heirs demanded the restitution of works auctioned in the May auctions of 1933. The museum explicitly refers to the decision of the UK Spoliation Advisory Panel.⁹³

The Kunstkommission notes that museums in Germany have recently made restitutions (see **Ch. IV. Decisions of other institutions**). These decisions are put into perspective somewhat by the fact that only brief justifications are provided, at least in the official announcements. These do not make it clear to what extent the museums have also dealt with the circumstances that speak against restitution. It also remains unclear whether the museums have fulfilled the asserted claims completely or only partially. This is in the nature of the relevant negotiations, but it makes it more difficult to assess the present case.

⁹³ Accessed online on 13 November 2018 at <https://www.mfa.org/collections/object/actaeon-watching-diana-and-her-nymphs-bathing-33583>: "The heirs of Curt Glaser have sought restitution of the works of art auctioned in May, 1933, alleging that the sales were due to Nazi persecution and therefore forced. In 2009, the United Kingdom's Spoliation Advisory Panel issued a report regarding eight drawings that were auctioned in May, 1933. The Advisory Panel found that Glaser's decision to sell the bulk of his collection was due to a number of factors and that the prices attained at auction were fair. The panel concluded that the claim was not sufficiently strong to recommend restitution of the drawings."

It should also be taken into account that the heirs have not disclosed which institutions, aside from the aforementioned, have *completely rejected* the claims of the heirs of Curt Glaser or where negotiations are currently still being conducted. Of course, the heirs are not obliged to do so. However, the existing prejudices must also be qualified from this perspective, since not all cases are known to the Kunstkommission. No clear, unambiguous position of other institutions ("practice") is available in this regard.

6. Summation and Overall assessment

a) Curt Glaser as victim of National Socialism

Curt Glaser is a victim of National Socialism. He held an exposed position at the time the National Socialists seized power and was the target of the unjust regime. There is no evidence that Curt Glaser was personally in fear for his life and limb at the time of his emigration. From the point of view of the Kunstkommission, however, this is irrelevant, since his decision to emigrate was undoubtedly justified by objective circumstances.

The Kunstkommission also finds the precise point of the decision to sell irrelevant. That Curt Glaser recognized the signs of the times earlier than others should not be a disadvantage. His far-sightedness must not be held against him. Accordingly, this question can be left open. In the assessment of the Kunstkommission, subject to the surfacing of new documents, it is not possible to clarify the exact timing of the decision to sell any further.

Finally, it seems irrelevant whether other motives for the sale played a role for Curt Glaser in addition to the persecution. His statements, especially in letters to Edvard Munch, do indeed appear somewhat ambiguous. Nor can it be ruled out that the death of his first wife, with whom he built up his collection, and the marriage to his second wife played a role, especially considering that he had to give up his apartment. Ultimately, however, these possibilities do not constitute a viable basis for explaining Curt Glaser's emigration. They must not be held against the heirs. The logical application of Art. 4 of the Washington Principles, according to which "unavoidable gaps or ambiguities in the provenance" should not be interpreted to the detriment of those affected, also speaks in favor of this. For the Kunstkommission, persecution is therefore primary. It is the reason why Curt Glaser emigrated and on 18-19 May 1933 auctioned off a considerable portion of his artworks, 200 drawings and prints of which the Kunstmuseum Basel acquired.

Accordingly, the case of Curt Glaser can and should be assessed under the Washington Principles.

b) Question of Restitution

The Washington Principles demand a just and fair solution. This can encompass everything from the return of the art objects to mere acknowledgment of persecution. The just and fair solution can be material or intangible.

The restitution of a work of art represents the *unconditional recognition* of a claim under the Washington Principles. In such a case, the acquisition constitutes a fundamental injustice, which can only be compensated by the return of the work. From the point of view of the Kunstkommission, the restitution of the pictures would not represent a just and fair solution, as shall be justified below. Both questions of the transfer of ownership and other accompanying circumstances must be taken into account.

Regarding the circumstances of the auction: At the time of his emigration, Curt Glaser had a comparatively large degree of freedom to sell certain works of art and to keep others. How many works of art Curt Glaser took with him to Switzerland cannot be determined with certainty. Fourteen

large crates of goods were reported. At the time of the auction, Curt Glaser was also not subject to the Reich Flight Tax, and until the end of 1933 he drew the salary he had been paid prior to his dismissal. This in no way relativizes his persecution, but the extent of the duress to divest himself under unfavorable conditions is doubtless less in Curt Glaser's case than in others, not least because of Curt Glaser's far-sightedness.

The Kunstkommission is also of the opinion that under the circumstances the sale of the works in May 1933 had proceeded nearly as well as possible. Curt Glaser was an expert on his art collection and the rest of the property. He divided his sales between two auctions in two auction houses, selecting what he wanted to retain. The auction catalogue is on the whole carefully compiled, even though certain errors have crept in in the form of gaps in the lots and works of graphic art have been subsumed in bundles. The fact that, as the best connoisseur of his own collection and also a professional observer of the market, he was in the best position to be able to estimate the prices is shown, for example, by the fact that the 200 prints purchased at the auction by the Kunstmuseum Basel deviated only by about 10% from the estimated price (and the Kunstmuseum paid considerably more than the estimated price for the two most valuable prints). A (definitive) statement regarding the extent to which the comparatively low prices in May 1933 can be explained as a result of National Socialist persecution or the extent to which the consequences of the global economic crisis were to blame - or how the two factors interacted - cannot be made on the basis of the existing scholarly literature either. There are no indications that the proceeds of the auction were not accessible to Curt Glaser. Nevertheless, the result of the auction was certainly disappointing for Curt Glaser. "Best possible" - under the given circumstances - cannot be equated with "good."

The status quo under civil law speaks against restitution as well. This should not be the decisive factor under the Washington Principles - it is precisely the fundamental idea of the Washington Principles to create a standard of assessment that is independent of the legal system. Nevertheless, the legal situation must be taken into consideration for a just and fair solution since, as explained above, it is also an expression of ethical decision-making. The ownership of the works by the Kunstmuseum is undisputed; at least the heirs have not put forward any legal arguments and there is no other reason to deviate from the Canton's legal assessment of 2008.

The Kunstkommission is also of the opinion that the Kunstmuseum did not engage in any wrongdoing when it acquired Curt Glaser's pictures in 1933. The purchase was undoubtedly favorable - but at that time, works owned by non-persecuted persons would also have been sold at favorable prices. In addition, the museum generally endeavored to make purchase only when prices were "low" or "favorable" so that as much as possible could be bought with the limited funds. One might criticize such a strategy, but it undoubtedly corresponds to the practice of all the larger institutions at that time and today. No director would recommend to the cognizant committee the purchase of a work whose price could not be described at least as "acceptable." In this light, the purchases of Curt Glaser's works do not constitute a special case. It cannot therefore be inferred from the corresponding comments in the minutes of the Kunstkommission that then-director Otto Fischer and the Kunstkommission were of the opinion that the works could be acquired at "rock-bottom prices."

It is certainly not decisive, but it is telling that Curt Glaser's relationship to the museum was not damaged after the purchase of the works by the Kunstmuseum. The museum was entrusted with works from Curt Glaser's collection, which the museum kept for the heirs and actively sought to return. The facts of the case are certainly fragmentary in this respect, but, as stated, not essential for the decision of the Kunstkommission in any case. Finally, it must be remembered that Curt Glaser was a man of the museum. His collection was largely destroyed by the sale in 1933. The Kunstmuseum has acquired a substantial part of it and is legally obliged to preserve these works (§ 5 Museumsgesetz). This is not a decisive point either, but it tends to speak against the return of works.

It follows from the foregoing that, from the point of view of the Kunstkommission, restitution of the drawings and prints is not an appropriate solution under the Washington Principles. It would be too one-sided. The Kunstmuseum Basel did not act wrongfully when it acquired the works of Curt Glaser. But it has taken on a responsibility that it must face today.

c) *Acknowledgment and initiation of negotiations*

The Kunstmuseum has a responsibility to the heirs of Curt Glaser. This decision is an attempt to accept this responsibility. The Kunstmuseum and the Kunstkommission have endeavored to provide the most comprehensive possible reassessment of the historical facts and circumstances that can meet scholarly standards. This is part of a fair and just solution.

Curt Glaser was a man of art and of the museum. The Kunstmuseum Basel intends to honor him in the form of a mid-size exhibition. The aim of the exhibition would be a historical examination of Curt Glaser's role as a collector, art historian, art critic and museum director, based on the holdings that came from his collection into the Kunstmuseum Basel. The case is of great interest in terms of institutional history and programmatic in terms of prioritizing provenance research in the Kunstmuseum. Wherever possible, the exhibition should be planned in consultation with the heirs of Curt Glaser. From the museum's point of view, this is the form of tribute that, under the Washington Principles, is particularly appropriate to Curt Glaser as a person and to the present case under the Washington Principles.

The question of financial compensation remains. With regard to value, financial compensation lies in between advocating and rejecting restitution; it is a "gray area" that is possible under the Washington Principles, where necessary, in order to do justice to the conflicting interests of the parties involved. The Kunstkommission is of the opinion that it and the Kunstmuseum should face up to their responsibility in this matter as well. Curt Glaser is a victim of National Socialism and some of his works have come into the possession of the Canton. Accordingly, the Kunstkommission is in favor of opening up negotiations with the heirs in order to achieve a just and fair solution in financial terms.

The Kunstkommission is of the opinion that an attempt should be made to reach a financial solution that is mutually satisfactory. Such negotiations are also advisable because the heirs have incurred costs for travel to Switzerland, and possibly also attorney's fees. This will have to be taken into account in the negotiations.⁹⁴

⁹⁴ Although in a state liability case, the Federal Supreme Court rejected the claim of a Jewish refugee who was turned away at the Swiss border in 1942, it found a very generous solution within the framework of compensation of expenses. (See BGE 126 II 145 ff., 169 f. E. 5b/bb).

VII. RECOMMENDED MEASURES

1. The Kunstkommission reaffirms the applicability of the Washington Principles to the deliberations of the Kunstmuseum Basel. The Terezin Declaration has been taken into consideration for the decision as well. The so-called *Handreichung* of the German government has been selectively consulted.
2. The Kunstkommission recognizes that Curt Glaser was a victim of National Socialism. His case must be assessed under the Washington Principles.
3. The Kunstkommission rejects any restitution of the works of Curt Glaser. It does not make any application to the Regierungsrat for the return of the works to the heirs.
4. The Kunstmuseum Basel will honor the history of Curt Glaser's drawings in an appropriate form and where possible in consultation with the heirs.
5. The Kunstkommission is in favor of entering into negotiations with the heirs regarding financial compensation.
6. The recommendation of the Kunstkommission (including its justification) will be made public.

cc: - representatives of the heirs for the attention of the heirs of Curt Glaser
 - Department of Presidential Affairs for the attention of the Regierungsrat

Basel, date 21 November 2018

Felix Uhlmann, President, Kunstkommission

Josef Helfenstein, Director, Kunstmuseum Basel

VIII. ATTACHMENTS

1. List of purchases by the Kunstmuseum Basel at Auction 180 of 18-19 May 1933 at Max Perl
2. Transcript of the annotations in the catalog of Auction 180 of 18-19 May 1933 at Max Perl
3. Price comparisons
4. Comparative cases of the timing of decision to sell

IX. LITERATURE CITED

Herman Hamburger - Restitutiecommissie

R restitutiecommissie.nl/en/recommendation/herman-hamburger

Recommendation regarding Herman Hamburger

Herman Hamburger

Report number: RC 1.193

Advice type: NK Collection

Advice date: 18 September 2023

Period of loss of ownership: 1940-1945

Original owner: Private individual

Location of loss of ownership: In the Netherlands

NK3401 – God Appearing to Abraham at Sichem by Nicolaes Moeyaert (photo: Museum Catharijneconvent)



Summary of Recommendation regarding Herman Hamburger

The Restitutions Committee has assessed an application for restitution of the painting *God Appearing to Abraham at Sichem* by Nicolaes (Claes) Moeyaert, which is in the Netherlands Art Property (NK) Collection of the Dutch State. The Committee came to the conclusion on the grounds of the investigation conducted by the Expert Centre Restitution (ECR) that it is highly likely that the artwork came from the private collection of the Jewish art dealer and

collector Herman Hamburger. It has also become sufficiently plausible that Hamburger lost possession of the painting as a result of circumstances directly connected with the Nazi regime.

Research has revealed that Herman Hamburger acquired the work by Moeyaert in 1936. The German authorities declared that Hamburger's possessions in the Netherlands were 'enemy assets' because during the occupation he was abroad. On that basis, the Mühlmann Agency, a German looting organization, was able to get hold of the artwork in 1941 by means of a forced sale. The Mühlmann Agency sold the work on and subsequently delivered it to Germany for Hitler's Führer Museum. It was returned to the Netherlands after the war and taken into the NK Collection.

The Committee has advised the State Secretary for Culture and Media to reconstitute the painting *God Appearing to Abraham at Sichem* by Nicolaes Moeyaert to the heir of Herman Hamburger.

Recommendation regarding Herman Hamburger

On 24 September 2021 the Minister of Education, Culture and Science (hereinafter referred to as the Minister) asked the Restitutions Committee (hereinafter referred to as the Committee) to issue advice. This recommendation concerns the application by XX (hereinafter referred to as the Applicant) for restitution of the painting *God Appearing to Abraham at Sichem* by Nicolaes Moeyaert. The artwork is part of the Netherlands Art Property Collection of the Dutch State (hereinafter referred to as the NK Collection). Its inventory number is NK 3401. Since 1976 it has been in the Museum Catharijneconvent, inventory number RMCC S.23. The painting by Moeyaert was the subject, or one of the subjects, of two previous restitution applications ([RC 1.160](#) and [RC 1.155](#)), which were rejected in 2016. According to the Restitutions Committee at the time, it was not sufficiently plausible that the artwork had belonged to Gustaaf Hamburger and Siegfried Granaat respectively.

1. The Application

In a letter of 24 September 2021, the Netherlands Cultural Heritage Agency (hereinafter referred to as the RCE) asked the Committee on behalf of the Minister to issue advice about restitution of the painting. This was prompted by the request by XX to the Minister as contained in a letter of 13 August 2021, in which he stated he was the only heir of the former owner. The painting was originally supposedly the property of the businessman and art dealer Herman Hamburger.

2. The Procedure and the Applicable Assessment Framework

The Committee told the Applicant in a letter of 1 November 2021 about the request for advice from the Minister and in a letter of 11 February 2022 about the Committee's procedure and regulations. The Committee took note of all the documents submitted by the Applicant and the RCE. It sent copies of all documents to the Applicant and the RCE. The Committee furthermore asked the Restitution of Items of Cultural Value and the Second World War Expert Centre of the NIOD Institute for War, Holocaust and Genocide Studies (hereinafter referred to as the ECR) to launch an investigation into the facts. The findings of the investigation were recorded in the investigation report referred to below.

Chronological overview of the committee's actions and the responses to them

- In a letter of 13 August 2021, the Applicant asked the Minister to restitute the painting, which is currently in the Museum Catharijneconvent in Utrecht. On 24 September 2021 the RCE, on behalf of the Minister, asked the Committee to advise about this request.
- On 11 February 2022 the Committee asked the ECR to launch an investigation into the facts. The results were recorded in a draft investigation report, which was sent with a letter dated 17 August 2022 to the RCE and the Applicant for additional information and/or comments. The RCE responded to it on 28 September 2022 and the Applicant did so on 12 October 2022. The ECR amended the wording of the draft investigation report with regard to several points on the basis of the responses. The responses to the draft investigation report and a selection of the relevant correspondence were attached to the amended draft version, which was sent to the Committee on 7 November 2022.
- The final investigation report was approved on 2 December 2022. The Applicant did not respond to this, even after a reminder dated 9 February 2023. The RCE responded in an e-mail van 20 December 2022.
- On 27 July 2023 the Committee sent its draft recommendation and asked whether the Applicant needed a hearing.
- The RCE responded on 31 July 2023 by making a minor change to the draft recommendation and, as regards a hearing, it stated it would comply with the wishes of the Applicant. In an e-mail of 31 August 2023, the Applicant stated he had no comments on the draft recommendation and had no need for a hearing.

3. Establishing the Facts

The Committee establishes the following facts on the grounds of the investigation into the facts.

The Hamburger family

The Jewish businessman and art dealer Herman Hamburger was born on 12 November 1879 in Utrecht as the youngest son in a family with seven brothers: Alexander (1858-1943), David (1860-unknown), Abraham (1862-1934), Isaac/Izaak (1864-1951), Daniel (1868-1959), Willem (1871-unknown) and Jacob (1875-1918). On 4 June 1920 he married Simonne Marie Heumann. Their only son Gilbert Hamburger was born on 23 June 1921. Simonne Marie Hamburger-Heumann died shortly thereafter, on 2 July 1921. Over the years Herman Hamburger and his brothers settled in France. They were involved in a large number of enterprises in which the bank Daniel Hamburger & Co – established in the late nineteenth century by Herman's brother Daniel – played a key role. From 1920 their two nephews Gustaaf and Albert Hamburger (sons of Alexander Hamburger) continued with this bank under the name Hamburger & Co Bankierskantoor, also known as Hambo. Members of the Hamburger family were involved in numerous subsidiaries of the bank through (asset) management and shareholding.

The Hamburgers also owned an art gallery, the N.V. tot Uitoefening van den Kunsthandel. It was located at Herengracht 551 in Amsterdam. Formally speaking the business was managed by Albert Hamburger and his uncle Isaac, with Herman as a non-executive director, but it was Herman who ran it on a day-to-day basis. Together with other family members, Herman was also dealing in art in Paris under the name *Hamburger Frères*.

Herman Hamburger and his son Gilbert both survived the Second World War in France. Isaac Hamburger also survived the war. Albert Hamburger was rounded up in Amsterdam and deported to Auschwitz, where he was murdered on or around 22 October 1943. Gustaaf Hamburger fled the Netherlands and settled in the United States.

After the war Herman Hamburger ran the art gallery again. He died in Amsterdam in 1948 at the age of 69.

Provenance of the painting NK 3401

The claimed artwork is a painting, oil on canvas, by Nicolaes (Claes) Corneliszoon Moeyaert measuring 102 x 168 cm, entitled *God Appearing to Abraham at Sichem*. The painting is signed and dated 1628 and it is part of the NK Collection under inventory number NK 3401. It is currently in the Museum Catharijneconvent in Utrecht.

Research has revealed that the painting was part of the collection of Werner Dahl in Düsseldorf between 1864 and 1905. In 1905 it went under the hammer at the Frederik Muller & Co auction house in Amsterdam. It has furthermore emerged from documentation that in 1911 the painting was the property of David Granaat of Amsterdam and later of his son Siegfried Granaat, who owned an art gallery. Siegfried Granaat was also the owner of the premises where Hambo was housed, Herengracht 579 in Amsterdam. He kept a large art collection in his residence at Herengracht 512. The painting by Moeyaert, part of his collection, hung in the house's dining room.

In 1930 the ownership situation of the artwork changed when Siegfried Granaat sold it, together with dozens of other works of art, to Hambo for a total of NLG 40,305. On the occasion of the transaction, the parties drew up an agreement which stipulated, among other things, that the objects would remain in safekeeping with Granaat provided that he would hand them over to Hambo if the bank so requested. Hambo was also entitled to oblige Granaat to buy back all or some of the goods for the price the bank had paid for them. If Granaat was unable to fulfil this obligation, the bank was entitled without judicial intervention to have the artworks auctioned off or sold privately.

In 1936 Hambo requested Granaat to buy back the works of art, including the painting by Moeyaert. When it emerged that Granaat was unable to do this, Hambo sold the collection to Herman Hamburger. That has been revealed by, among other things, correspondence between Granaat and Hambo that same year, in which it is stated that Hambo sold the works to 'Mr Herman Hamburger, Paris'. According to a statement prepared on 18 June 1936, the works continued in safekeeping with Siegfried Granaat, but this time 'for Mr Herman Hamburger, Paris, 121 Avenue de Wagram'.

This state of affairs was confirmed in a letter of 4 February 1941 from the lawyer J. Jolles to the German who had meanwhile become the manager of Granaat's possessions: '... then followed the sale to Mr. Herman Hamburger, then living in Paris, Avenue Wagram 121. ... The settlement between Hamburger & Co's Bankierskantoor and Granaat was made on 18 June 1936. So the end of the story was that ... Mr Herman Hamburger got free ownership of the objects. Some or all of the items were left by Herman Hamburger at Heerengracht 512, where they still are.'

The artwork during the occupation

On the grounds of regulation 26/1940 of 24 June 1940, the German occupying forces considered the assets in the Netherlands belonging to Herman Hamburger, who remained in France, as 'enemy assets' that could be demanded. The same applied to the possessions of Siegfried Granaat, who had fled to the United Kingdom shortly after the German invasion. Consequently, their goods were in the hands of the Nazi regime at an early stage.

On 23 November 1940, C.H. Oldach was appointed manager (Verwalter) of Siegfried Granaat's assets on the grounds of the aforementioned regulation. After he had been appointed, Oldach analyzed the ownership situation of the items in Granaat's home. On 19 February 1941 he sent a report to the General Section of the Enemy Assets Department of the General Commissariat for Finance and Economics. He enclosed an inventory and stated that it emerged unambiguously from it which household effects and artworks belonged to Herman Hamburger and which to Granaat. The inventory lists the painting by Moeyaert as the property of Herman Hamburger.

On 26 February 1941 an official in the Enemy Assets Department wrote to Oldach saying that he was planning to terminate the management of the assets of Siegfried Granaat, who turned out to be bankrupt. He requested Oldach to contact the Mühlmann Agency, a German looting organization, before that so that the Agency could make a selection of Herman Hamburger's artworks. Oldach did just that and on 12 May 1941 Eduard Plietsch of the Mühlmann Agency came to Granaat's premises on Heerengracht. It emerges from correspondence that Plietsch selected ten paintings from Herman Hamburger's possessions, including the work by Moeyaert.

On 9 September 1941 an agreement was subsequently entered into by, on the one hand, S. Zadoks as administrator of Siegfried Granaat and on the other hand Herman Hamburger; with Hambo employee Hubert Bok acting as representative of Hamburger, 'whose residence and whereabouts are unknown'. Among other things this agreement stated 'that [Herman] Hamburger gave Granaat a number of items he owned for safekeeping, which items were in the premises where Granaat lived at Heerengracht 512 in Amsterdam. ... that the parties know that the "art advisor" Dr Plietsch according to his statement removed the following 10 paintings belonging to Hamburger from the premises on Heerengracht' This was followed by a summary of the ten paintings, including the work by Moeyaert.

The Mühlmann Agency sold the Moeyaert on for RM 13,270 to the Special Mission Linz, the looting organization that made acquisitions for Hitler's future Führer Museum in Linz in Austria. In connection with this sale the Agency paid an equivalent sum of NLG 10,000 to N.V. tot Uitoefening van den Kunsthandel, which was under German management.

After the war Herman Hamburger supposedly submitted a claim to the Dutch authorities about Hubert Bok, the employee who had been involved in the sale of Hamburger's artworks. This resulted in an investigation in connection with suspected collaboration. It can be deduced from the file that Hamburger withdrew the complaint.

The painting after the liberation

Several (internal) declaration forms were found in the SNK's archive concerning the claimed painting by Moeyaert:

- A declaration form completed by Herman Hamburger dated 31 October 1945. On this form, with number 3390, it is stated by means of crossings out that the work was originally with S. Granaat for safekeeping and came into the possession of 'Muehlmann' as a result of a forced sale.
- An internal declaration form dated 6 October 1945, probably completed by an SNK employee. It is stated on the form that the painting was originally owned by Siegfried Granaat and came into the hands of the Mühlmann Agency after confiscation.

- An internal declaration form dated 3 December 1945, probably completed by an SNK employee and, in view of the reference to declaration number 3390, probably completed on the basis of information from the aforementioned declaration by Hamburger. It is stated on the form that the work was originally in the possession of 'Albert Hamburger, Waldeck Pymontlaan 20, South Amsterdam, but was held by S. Granaat of Heerengracht 512, Central Amsterdam, for safekeeping.' and that it came into the possession of 'Dr Mühlmann' as the result of a forced sale. It is not known on what grounds the SNK linked the name Albert Hamburger to the work. It emerges from an undated post-war note from the Bureau for Restoration Payments and the Restoration of Property (Hergo; the successor of the SNK) that, according to Gustaaf Hamburger and his authorized agent R.G. Somers, this information was incorrect.

The artwork by Moeyaert was not returned to the Netherlands until 1957, after which it ended up in the Dutch State's NK Collection. It is not known whether family members were notified of the return. In 1976 the Dutch State placed the work in the Museum Catharijneconvent in Utrecht, where it still is.

Gilbert Hamburger, Gustaaf Hamburger and the SNK/Hergo

There is no specific mention in the correspondence found in the SNK archive from (heirs of) Herman Hamburger of the artwork by Moeyaert. It is possible that this is linked to the fact that the painting did not return to the Netherlands until 1957. There was correspondence, however, about a few other works that the Mühlmann Agency appropriated from Herman Hamburger's collection managed by Granaat and that were returned after the war. On 24 September 1949 Herman's son Gilbert Hamburger wrote a letter to the SNK from London in which he stated that two paintings by Jan Davidsz. de Heem and Willem Kalf 'are reclaimed by my father, the late Herman Hamburger'. He furthermore stated 'as the only heir of the late Herman Hamburger, that the aforementioned paintings had been part of the Granaat collection, which was purchased by the late Herman Hamburger in around 1936 on the instructions of Mr G. Hamburger and that he had consented to the said paintings being put at the disposal of G. [Gustaaf] Hamburger by your Foundation.' It emerges from a letter from Gustaaf Hamburger to the SNK at that time that Gilbert Hamburger had authorized him to take receipt of the two paintings.

On 5 December 1952 a Hergo employee wrote a letter to Hamburger & Co's Bankierskantoor in which he stated that his bureau was holding a portrait of a man by Van Mieris: 'In my documentation I found a declaration form completed by Herman Hamburger, also regarding Mieris: "portrait of a man", on which it is stated that the dimensions are "small", and I also found in my documentation that this painting was supposedly sold for M.3000.-, which sum was deposited at the Deutsche Revisions- und Treuhand A.G. Would you be so kind as to

tell me whether Mr Herman Hamburger believes he is entitled to restoration of rights, in which case proof of former ownership will have to be supplied, while in the event of restitution, among other things the selling price will have to be transferred to my Bureau.'

The aforementioned undated note from Hergo refers to the portrait by Van Mieris: 'According to our information, the painting belonged to HERMAN Hamburger; was with Granaat for safekeeping. ... HERMAN Hamburger is dead and Gilbert is supposedly his son and only heir. It emerges from the file that in the past a painting was given back previously, and the son stated that the painting was his property and could be delivered to Mr Gustaaf Hamburger. It was agreed with Somers that he will write to the son in Paris and that we will then receive a declaration that this was also the case with this painting.'

On 7 September 1953 Hambo wrote to Hergo about the Van Mieris: 'We furthermore enclose a statement by Mr Gilbert Hamburger, only son and heir of the late Mr Herman Hamburger, concerning the release of the painting to Mr Gustaaf Hamburger.'

Shortly after that, Gustaaf Hamburger asserted he was the original owner of the Van Mieris. That emerges from a unilateral statement of 9 October 1953 in which Gustaaf states that 'before the aforementioned painting [by Van Mieris] came into the hands of the Germans, he had been the only rightful owner'. He had this statement registered at a tax office on 16 November 1953. A few weeks before that, on 23 October 1953, he authorized Hambo to receive the portrait of a man by Van Mieris, which happened on 16 December 1953.

The nineteen-seventies: discussion about the ownership

Between 1959 and 1981 members of the Hamburger family initiated various cases against the German State personally and on behalf of the N.V. tot Uitoefening van den Kunsthandel in liquidation. Documentation relating to these cases reveals that the 'Granaat-Hamburger collection', including the artwork by Moeyaert, was the subject of research and discussion for a few years.

In connection with one of these cases, the Hamburger family's lawyer, Werner Diamand, sent a list of works of art on 21 August 1970 to the Berlin Restitution Agency. On a list, the title of which has been cut off, there is the entry '*C. Mooyaert, Biblical scene*'. A letter of 20 August 1970 from Hambo employee Hubert Bok to Diamand explains why this modification had been made. Bok had asked the lawyer to remove the title 'Property of Mr Herman Hamburger, Bordeaux' from the list concerned 'in order to avoid later unnecessary explanations'. Because, he pointed out to Diamand, 'as you already know, these objects served as security for Granaat's obligations in respect of our Bank and Mr Herman Hamburger was only acting for us as a trustee.'

It can be deduced from notes in the file that afterwards the German authorities waited for a few years for an expert's certificate from the Netherlands Institute for War Documentation (RIOD; predecessor of the NIOD Institute for War, Holocaust and Genocide Studies). RIOD researcher Hans van der Leeuw pointed out in a letter to Diamand of 14 November 1973 that various issues still needed to be clarified, in particular the ownership situation of the 'Granaat-Hamburger collection': 'Apart from the said questions about the looting of artworks during the occupation and the partial return after the war, there are still additional issues that need to be resolved. In the first place concerning the ownership of the looted objects. There are no problems in so far as G. Hamburger or the N.V. tot uitoefening van de kunsthandel were the victims. Difficulties do arise, however, particularly with regard to the Granaat-Hamburger collection. In my opinion you should be briefed as well as possible about the status of this collection.'

On 1 April 1974 Hubert Bok – who was the liquidator of the art gallery in the nineteen-seventies – stated in writing to Werner Diamand: 'The original art collection given to the Bank by Mr S. Granaat as security later, in 1936 (deeds available) in consultation with him, became the property of Mr Alex Hamburger (because Mr Granaat sold it to Mr Alex Hamburger). ... Mr Herman Hamburger (director of the art gallery), acted in this transaction as a trustee and he therefore, upon the outbreak of the war, was known to Granaat as owner of the art collection.'

On 1 November 1978 Werner Diamand notified the District Court in Berlin that settlement negotiations had taken place in which the parties – the Hamburger family and the German State – had agreed to have the RIOD conduct an investigation into a number of unresolved issues and that this investigation was still ongoing at the time of writing. On 1 December 1978 a German civil servant wrote in a letter to Diamand that, with regard to the Granaat-Hamburger collection, it was not clear 'who owned the items'.

In Hans van der Leeuw's archive, which is in the NIOD, there are different draft versions of an expert opinion by Van der Leeuw dated 22 December 1978. In one of these versions Van der Leeuw writes with regard to the Granaat-Hamburger collection that it 'was assigned by a Mr. S. Granaat, Heerengracht 512 in Amsterdam to Hamburger & Co's Bankierskantoor as security in 1930/31 and later became the unrestricted property of the Hamburger Group.'

In a second draft version, Van der Leeuw writes that the Granaat-Hamburger collection 'was assigned by a Mr S. Granaat, Heerengracht 512 in Amsterdam to Hamburger & Co's Bankierskantoor as security in 1930/31 and in 1936 became the property of Mr Alexander Hamburger, the father of Mr Albert and Mr Gustaaf Hamburger. The relevant contracts are still in place, I was able to see them.'

In Van der Leeuw's archive there is also a copy or draft of an expert opinion of 17 May 1979 to the German authorities in which Van der Leeuw once again writes that the Granaat-Hamburger collection became the property of Alexander Hamburger in 1936.

At the end of the nineteen-seventies the German government made a settlement proposal with regard to two cases brought by Gustaaf Hamburger and the N.V. tot Uitoefening van den Kunsthandel: compensation of DM 41,000 in respect of Gustaaf Hamburger / German State and DM 53,000 in respect of N.V. tot Uitoefening van den Kunsthandel i.l. / German State. It can be deduced from the contents of the file that payment on the basis of these sums in all probability took place.

4. Substantive Assessment of the Application

The Committee has established that the requirements in section 1 a to e of the assessment framework have been met and that the application is therefore eligible for substantive handling.

Pursuant to section 2 of the assessment framework, the Committee must assess whether it is highly plausible that the painting NK 3401 was the property of Herman Hamburger and on the grounds of section 3 whether it is sufficiently plausible that possession of the painting was lost involuntarily as a result of circumstances directly related to the Nazi regime. To this end the Committee finds as follows:

Ownership requirements (section 2 of the assessment framework)

Documentation dating from the nineteen-thirties that was found during the investigation indicates that Herman Hamburger had been the rightful owner of the painting *God Appearing to Abraham at Sichem* by Nicolaes Moeyaert since 1936. After the purchase, the work remained in the home of Siegfried Granaat at Herengracht 512 in Amsterdam. It emerges from communications from the lawyer J. Jolles and the manager (Verwalter) C.H. Oldach, as well as from an agreement between S. Zadoks and Herman Hamburger, who was in France, all drawn up in 1941, that Herman Hamburger was still owner of the artwork during the German occupation of the Netherlands. Shortly after the war, Herman Hamburger furthermore completed SNK forms concerning the work by Moeyaert and other works with a comparable provenance. After his death in 1948, his son Gilbert Hamburger issued authorizations for release of a few of these works and stated that his father had purchased them around 1936. The undated internal Hergo note also indicates that the Moeyaert was the property of Herman Hamburger. This note about a painting with a comparable provenance, in which Herman emerges as former owner, reveals that contact was established with R.G. Somers, Gustaaf Hamburger's authorized agent ('It was agreed with Somers that he will write to the son in Paris and that we will then receive a declaration that this was also the case with this painting.'). This involvement of Somers indicates that confirmation came from Gustaaf's side that Herman Hamburger (and/or his branch of the family) was the owner.

Although it was asserted later that Herman Hamburger had not been rightful owner of, among other things, the artwork by Moeyaert, and only acted as 'trustee', in the Committee's opinion there are insufficient grounds to support this interpretation. Dutch law does not recognize the concept of the 'trust', so no trust can be formed under Dutch law. It would furthermore have been expected that if Herman Hamburger did not purchase the artwork in 1936 in his personal capacity, this would have subsequently been specified in the relevant sources dating from the nineteen-thirties and -forties. The Committee gives greater weight to the contemporaneous sources from the period when Herman Hamburger was still alive than to sources postdating his lifetime, such as Gustaaf Hamburger's unilateral ownership declaration in 1953 referred to above, and the sometimes contradictory documentation relating to the compensation claims submitted to the German State. It is true that Herman's son Gilbert Hamburger stated in 1949 that the purchase by his father in 1936 had been 'on the instructions of Mr G. Hamburger'. Such instructions, however, do not alter the fact that his father became the owner as a result of the transaction.

On the grounds of this information the Committee has come to the conclusion that it is highly likely that the artwork came from the private collection of Herman Hamburger. This means that the ownership requirement of section 2 of the assessment framework has been met.

The consequence of this is that the Committee now has to evaluate whether, with regard to the artwork, there was involuntary loss of possession as a result of circumstances directly associated with the Nazi regime.

Involuntary loss of possession (section 3 of the assessment framework)

It has been established that in 1941 the artwork *God Appearing to Abraham at Sichem* by Nicolaes Moeyaert got into the hands of the Mühlmann Agency, and was then sold on for Hitler's Führer Museum. During the occupation Herman Hamburger was outside the Netherlands and pursuant to Nazi law came within the scope of regulation 26/1940, which classified his assets as 'enemy assets'. It was on that basis that the Mühlmann Agency could get hold of the artwork by means of a forced sale.

According to the Committee it is highly likely that the work had been the private property of Herman Hamburger since 1936. Given that Hamburger was Jewish, the underlying principle is that the loss of possession in 1941 was involuntary, unless the facts expressly show otherwise. On the grounds of the established facts, the Committee finds that the latter is not the case.

The Committee therefore concludes that the loss of possession was involuntary, caused by circumstances directly related to the Nazi regime. This also means that the requirements relating to involuntary loss of possession in section 3 of the assessment framework have been met.

Conclusion with regard to the restitution application

The Committee concludes that it is highly plausible that the artwork *God Appearing to Abraham at Sichem* by Nicolaes Moeyaert came from the collection of Herman Hamburger, and that it is sufficiently plausible that he lost possession of the work in 1941 involuntarily as a result of circumstances directly related to the Nazi regime.

In view of sections 2 and 3 of the assessment framework (criterion 3.1 and part 2 at the end of section 3), the upshot of all this is that the Committee will recommend that the artwork should be restituted to the Applicant.

5. Recommendation

The Restitutions Committee advises the State Secretary for Culture and Media to retribute the painting *God Appearing to Abraham at Sichem* by Nicolaes Moeyaert, currently part of the Netherlands Art Property Collection under inventory number NK 3401, to the heir of Herman Hamburger.

Adopted at the meeting on 18 September 2023 by D. Oostinga (Vice-Chair), J.F. Cohen, S.G. Cohen-Willner, J.H. van Kreveld and C.C. Wesselink, and signed by the Vice-Chair and the Deputy Secretary.

D. Oostinga, Vice-Chair N.L.E.M. Bynoe, Deputy Secretary

Relevant press release

PAGE

The painting *God Appears to Abraham at Sichem* returns to Herman Hamburger's heir
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**Advisory Commission
on the return of cultural property
seized as a result of Nazi persecution, especially Jewish property**

Office: Seydelstr. 18, 10117 Berlin

**Recommendation of the Advisory Commission in the case of
the heirs of Kurt and Else Grawi vs. Landeshauptstadt Düsseldorf**

The Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property, chaired by Prof. Hans-Jürgen Papier, decided on February 10, 2021, in the case of the heirs of Kurt and Else Grawi versus Landeshauptstadt Düsseldorf to recommend that the painting *Füchse* (Foxes) by Franz Marc be restituted to the community of heirs of Kurt and Else Grawi. The case was decided by a majority of six votes (with three votes against).

1. This case concerns the painting *Füchse* (Foxes) (1913) by Franz Marc (1880–1916). The painting is oil on canvas, 79.5 x 66 cm. The painting entered the holdings of the Städtische Kunstsammlung Düsseldorf (Stiftung Museum Kunstpalast, inv. no. 0.1962.5490) in 1962 as a donation from Helmut Horten (1909–1987). Landeshauptstadt Düsseldorf is the body responsible for the Stiftung Museum Kunstpalast and is represented by the cultural department. The claimants are the descendants of Kurt and Else Grawi.

2. Kurt (Denny) Grawi (1877–1944) was persecuted during the National Socialist era, both individually and collectively. Grawi had qualified as a banker and worked at Darmstädter und Nationalbank (Danat-Bank) as a broker with general powers to execute transactions until 1931. After the collapse of Danat-Bank and its merger with Dresdner Bank during the global economic crisis, Grawi lost his job and became an independent entrepreneur. He acquired stakes in various companies and managed the Gesellschaft für den Bau medico-technischer Apparate m.b.H., based in Berlin.

From 1933 onwards, Grawi and his family increasingly suffered as a result from the pressure of National Socialist persecution. Grawi had married the widowed Else Breit, née Schultz (1894–1964), in August 1929. Else Grawi, who was not of Jewish descent, bore the couple two sons: Wolfgang and Peter. Because Else Grawi's deceased first husband Erich Breit (1878–1925) had been of Jewish descent, the two sons were vilified and discriminated against as "first degree half-breeds". Grawi's younger sister, the actress Irma Neumann, was banned from her profession after 1933. Her resistance activities led to her arrest along with that of her husband on July 22, 1944—her husband was sentenced to three years' imprisonment by the People's Court, while Irma Neumann was deported to Auschwitz. She survived the Holocaust. Grawi's elder sister, Dr. Erna Grawi, was deployed as a forced laborer in armaments factories from 1939; she died from the effects of this work in Berlin at the end of February 1943. Her sister Irma found the body which she secretly disposed of outdoors because she thought a proper burial would be too risky.

Kurt Grawi was also subjected to extensive repressive measures. All his enterprises and shareholdings were forcibly dissolved or “Aryanized” after 1935. The family bought a residential building with six apartments in Berlin-Lankwitz in 1937. In order to protect the asset, Else Grawi acted as the buyer. The family used one apartment for themselves and rented out the others. After the Kristallnacht pogrom, Kurt Grawi was imprisoned in Sachsenhausen concentration camp for several weeks. At the end of April 1939, he emigrated via Belgium to Santiago de Chile, where he joined relatives of his wife’s deceased first husband on June 4, 1939. Grawi was only allowed to take RM 10 with him when he left Germany. He signed the rest of his assets over to his non-Jewish wife Else, who initially remained in Berlin with the two sons. Else Grawi sold the property in Berlin-Lankwitz in August 1939 so that she could emigrate to join her husband, and triggered the imposed compulsory levies: Jewish property tax, emigration tax and Golddiskontbank levy. In December 1939, she and her two sons left Germany and traveled via Italy to Chile, where the reunited family—now virtually penniless—began to forge a new existence. Else Grawi proceeded to earn a living as a dressmaker. Kurt Grawi died from cancer on September 5, 1944.

3. In information he provided to Alois J. Schardt who compiled the catalogue raisonné of Franz Marc’s works, Kurt Grawi stated that he had purchased the painting *Füchse* in 1928. The previous owner had been Max Leon Flemming (1881–1956), who had first offered the work for sale via Galerie Neumann-Nierendorf in 1927. The price Grawi paid is unknown; a sum of USD 3,000 was retrospectively indicated in 1939, although it is not known what exchange rate was applied. In May 1936, Grawi loaned *Füchse* to Galerie Nierendorf in Berlin for its large Franz Marc memorial exhibition.

While in Brussels shortly before continuing his onward journey to Chile, Kurt Grawi wrote a letter on April 30, 1939, to Ernst (Ernest) Simon, who had been driven by persecution to emigrate in 1937. The letter says that *Füchse* had been left with a “mutual friend”, Dr. Paul Weill, for onward shipment to New York. Weill was staying in Paris at that time, with the aim of emigrating from there to Argentina. The painting was shipped from Le Havre to New York, where Simon was to sell it on behalf of Grawi “despite the unfavorable times”. Grawi further emphasized that, for himself and his family, “the result of the sale will provide the basis for our emigration”.

On August 9, 1939—while Else Grawi was in Berlin preparing to leave Germany—Ernst Simon informed the Museum of Modern Art (MoMA) in New York that he had the painting *Füchse* in his possession and that the owner was a German refugee who urgently needed cash (“The owner of this painting is a German refugee who is trying to obtain some cash which he is in dire need.”). Grawi was said to have originally purchased the painting for USD 3,000. By November 6, 1939, the painting had been taken to the museum to be viewed. On January 2, 1940, a purchase price of USD 800 was offered at the suggestion of the director Dr. Alfred Barr. Simon announced that he would consult the owner on the matter. Among the notes relating to the offer, there is a telegram from Montevideo dated February 9, 1940, addressed to Simon in which a limit of “1,250” is stated. The parties agree that this can be interpreted as a rejection of the offer and the setting of a minimum price by Grawi. Simon had the painting collected from MoMA by art dealer Curt Valentin, who had emigrated from Berlin to New York in 1937. Between February 19 and September 27, 1940, it was sold for an unknown price to

the German-American film director William (Wilhelm) Dieterle and his wife Charlotte in Los Angeles by the art dealer Karl Nierendorf, who had likewise emigrated from Berlin to New York. In June 1961, the couple consigned the artwork to an auction held by Galerie Klipstein & Kornfeld in Berne. It was withdrawn from this auction and acquired by Helmut Horten for the purpose of donating it to a museum. Horten donated *Füchse* to the Städtische Kunstsammlung Düsseldorf in 1962.

4. The parties are in agreement that Kurt Grawi was the owner of *Füchse* until at least February 1940 and that the painting had been sold in New York to William and Charlotte Dieterle by September 1940 at the latest via Karl Nierendorf in a transaction brokered by Ernst Simon.

a) Landeshauptstadt Düsseldorf asserts that Kurt and Else Grawi had already managed to pay the imposed compulsory levies through the sale of the real estate asset and some of the furnishings. These sales, according to the current holders, would have generated more liquid funds than the amount that would have been permitted to be exchanged into foreign currency. Accordingly, Else Grawi even decided not to sell a box of silver cutlery worth approximately RM 4,000 before she left Germany and instead gave it to her mother for safekeeping. In addition, according to Landeshauptstadt Düsseldorf, it was possible to transport the painting *Füchse* to New York with substantial support from other émigrés who had also fled persecution, and sell it there. It was true that there was no evidence concerning the exact circumstances of the sale to William and Charlotte Dieterle which was conducted via Karl Nierendorf between February and September 1940, and in particular concerning the purchase price finally agreed or the transfer of this to Kurt Grawi by Ernst Simon. Nevertheless, Landeshauptstadt Düsseldorf holds the view that the New York art market would have guaranteed a fair purchase price, and the seller is assumed to have been free to dispose of it. There was no evidence that the sale took place contrary to Grawi's instructions or that he did not receive the purchase price. This assumption was also supported by the further connection between Else Grawi and Paul Weill, and also Paul Weill and Ernst Simon beyond 1945. The buyers of the painting, William and Charlotte Dieterle, were firmly committed to supporting émigrés and frequently did so successfully—for example, they had provided financial assistance to Alois J. Schardt and his family who emigrated to Los Angeles in fall 1939. There was therefore nothing to suggest that Kurt Grawi was disadvantaged in any way, especially since he was in a position to settle the terms of the sale himself, as demonstrated by the rejection of the offer from MoMA. Taking all known events into consideration, the transfer of ownership was not considered to be confiscation as a result of National Socialist persecution, but a sale governed by civil law which took place outside the National Socialist sphere of influence.

b) The claimants, on the other hand, are of the view that the painting was sold solely out of necessity. Kurt Grawi had tried to avoid selling it for as long as possible and was eventually compelled to do so only because he had to emigrate as a result of persecution. As late as August 1937, he had refused to sell the painting to Josef Nierendorf and, at most, offered the prospect of parting with it in the event of a change of residence. As he himself wrote in his

letter of April 1939, the proceeds of the sale would form the “basis for emigration”. He emphasized that it was not a favorable time for a sale. It is thus clear that, had there been no National Socialist rule, the sale would not have taken place—its sole purpose was to finance the Grawi family’s escape to South America. All persons involved in the sale were aware of the owner's plight, meaning that his negotiating position was weakened. Furthermore, the exact circumstances of the sale are not known. It has not been established what price was achieved or whether Grawi even received this. Taking all of these factors together, confiscation as a result of Nazi persecution therefore must be assumed.

5. The Commission believes that the painting *Füchse* by Franz Marc should be restituted to the claimants, even though the sale took place outside the National Socialist sphere of influence. The sale in 1940 in New York was the direct consequence of imprisonment in a concentration camp and subsequent emigration, and was so closely connected with National Socialist persecution that the location of the event becomes secondary in comparison.

a) It is immaterial that a fair price was probably paid for the painting. The “Guidelines for implementing the Statement by the Federal Government, the Länder and the national associations of local authorities on the tracing and return of Nazi-confiscated art, especially Jewish property” of December 1999 (new edition 2019) (hereinafter: *Guidelines*) declare the “objective market value” to be the decisive criterion in this regard, i.e. the market value “the object would have had at the time of sale had the seller not been subject to persecution”. According to this definition, a fair purchase price would generally be assumed outside the National Socialist sphere of influence because—in purely formal terms—there were always buyers who were not subject to Nazi persecution. However, this conclusion is subject to constraints. The assumption that, on the market outside the National Socialist sphere of influence, participants were fundamentally free and equal between 1933 and 1945 may also be disrupted by long-distance effects of political persecution. Landeshauptstadt Düsseldorf has also stated that the persons involved were aware of the persecution-related constraints under which Grawi acted. In his letter to MoMA dated August 9, 1939, Simon, the intermediary used by Grawi, explicitly referred to the predicament: “The owner of this painting is a German refugee who is trying to obtain some cash which he is in dire need.” The museum’s own note “Any offer which the Museum cares to make would apparently be considered.” can certainly be read in the sense that the museum was aware of its negotiating position.

The painting was not purchased by the museum in the end, presumably because a minimum price of USD 1,250 was stipulated via a telegram from Montevideo. The purchase price that Grawi ultimately achieved is unknown. The failure of negotiations with MoMA suggests that Grawi was not compelled to accept any offer. Landeshauptstadt Düsseldorf has cited a number of factors to indicate that Grawi’s situation was not exploited by the persons involved. In particular, William Dieterle was well known for supporting immigrants from Germany in honorable ways, so it was not expected that he took advantage of Grawi. In addition, according to the submission from Landeshauptstadt Düsseldorf, it could be assumed that Grawi was just as involved in the negotiations between Simon, Nierendorf and Dieterle as he was previously

in those between Simon and MoMA. Therefore the agreed price would not have deviated significantly from Grawi's expectations. As Landeshauptstadt Düsseldorf has stated, the assumption that this was an achievable market price in the United States at that time and thus a fair purchase price in line with the *Guidelines* was not implausible.

b) Also irrelevant to the decision is the assumption that the purchase price was transferred to Kurt Grawi. It should be noted that the free right of disposal according to Military Government Law no. 59 did not have to be proven with the same unconditionality by the buyer as that stipulated by the *Guidelines* for their legal successors. For foreign sales by émigré owners in particular, the burden of proof should not be excessive. Landeshauptstadt Düsseldorf has presented several indicators which suggest that payment of the purchase price as directed was the probable course of events. Payments from Dieterle to Nierendorf can be proven to have been made for this period, but cannot be attributed to individual paintings. It cannot be assumed that Nierendorf or Simon withheld the purchase price; there is also no evidence of any technical problems that may have prevented the money being transferred from New York to Kurt Grawi in Santiago de Chile. More evidence cannot be expected from Landeshauptstadt Düsseldorf.

If the purchase price was transferred to Grawi, he was also free to dispose of it. The criterion of free disposal was defined primarily in legal terms during the period in which the Allied restitution laws were in force. It referred to conditions which, on racist or ideological grounds, restricted the rights of individuals to freely dispose of their own assets, such as the obligation to pay into a blocked account. Purely economic constraints or restrictions that were not directly ideologically based did not militate against free disposability, however. That is why there was no clear consensus even on the emigration tax as a relevant restriction of free disposability, despite its undeniable discriminatory impact, because it existed prior to January 30, 1933, and therefore was not an instrument of National Socialist persecution. The same also applies to foreign exchange regulations.

This definition appears too narrow from today's perspective. Even though the emigration tax or foreign exchange limits may have applied to everybody in the same way, victims persecuted under the Nazi regime were overwhelmingly affected by them after 1933. To regard economic and legal constraints not as restrictions of free disposability solely because they were the consequence of merely de facto discrimination but not of normative discrimination, is not convincing in light of a clearly discriminatory legal reality. Nevertheless, there cannot be an exclusion of free disposability in every restriction of economic usability. In the case of Grawi, the proceeds from the sale were not used to pay emigration taxes or other compulsory levies. Though Grawi himself was reliant on external support from Brussels onwards, his family's emigration was financed by other means. According to the criteria in the *Guidelines*, he would therefore have been free to dispose of the purchase price.

c) The two further criteria for checking whether property was seized as the result of Nazi persecution, which are mentioned in the *Guidelines* for sales from September 15, 1935 onwards,

are clearly tailored to sales within Germany. This is due to the fact that, historically, the *Guidelines* were developed from Allied military legislation, which aimed to rectify the unlawful movements of assets that had taken place within the Nazi sphere of influence. The “transfer of assets abroad” cited therein as an example, which enables a present-day owner to rebut the presumption of seizure, therefore also applies in cases involving the transfer of proceeds to safety abroad following a sale in Germany. The opposite scenario—which also applies to the current case— in which the cultural property itself had already been taken abroad prior to its sale and the price was paid in full there, is not dealt with in the *Guidelines*.

However, this does not mean that property in such situations would not be suitable for restitution. The assumption of a loss as the result of Nazi persecution does not formally relate to the domain of National Socialism, but to the pressure of persecution manifested in this domain. However, this pressure of persecution did not necessarily diminish as soon as a victim of persecution left the borders of the German Reich behind. In this respect, though, the *Guidelines* are limited to the severability clause that even if an item changed hands outside the National Socialist sphere of influence, it “still cannot be ruled out” that it changed hands as a result of Nazi persecution. But the *Guidelines* do not mention any further indicators of when confiscation as the result of persecution can be assumed outside the National Socialist sphere of influence in an individual case. However, there is no apparent reason for applying the tighter criteria of the *Guidelines* and taking into account emigration tax and other compulsory levies in a case where property was sold in a forced sale shortly before emigration, while declaring the direct consequences of the deprivation of rights in Germany to be irrelevant in a case where property was sold after emigration. Just because an immediate danger to life was averted does not mean economic, political or legal opportunities were restored at the same time, especially if the escape abroad was preceded by imprisonment in a concentration camp and the seizure of virtually all assets.

d) In view of the above, the Commission concluded that Kurt Grawi’s sale of the painting *Füchse* is considered to have occurred as the result of Nazi persecution, even though the sale was completed outside the National Socialist sphere of influence and, in the light of information currently available, the payment of a fair price and the opportunity for free disposal are plausible. The sale was a direct consequence of the forced emigration. The decision to sell and the arrangements for the sale directly resulted from National Socialist repression. All in all, there was such a close connection between persecution, escape and sale that the impact of the first continues to have an effect in the last.

Kurt Grawi did not plan to sell the painting. For the period prior to January 30, 1933, there is no evidence of any intention to sell. The question can be left open as to whether the letter mentioned by the claimants from Josef to Karl Nierendorf dated August 30, 1937, actually related to Franz Marc’s *Füchse*. It refers in general terms to a painting Grawi intended to sell should the need arise if he had to move, but does not describe it in detail. A few weeks after this letter, the Grawi family put some of their furniture up for auction because they had moved into a much smaller apartment at the start of the year. However, the family did not take this

as an opportunity to part with the painting *Füchse*. Grawi decided to sell the painting only when he was forced to leave Germany.

After his imprisonment in a concentration camp, Grawi had to give up his place of residence at very short notice. No direct order to leave Germany is documented on file, but at the same time it is highly likely one was issued. Just four months after being released from the concentration camp, Grawi found himself practically destitute in Brussels. A return to Germany was not possible. His efforts to sell the painting *Füchse* were directly linked to his expulsion from Germany and his attempt to build a new life abroad. Grawi himself took the painting abroad, probably at great personal risk. The first record of an intention to sell the artwork can be dated to April 30, 1939, when Grawi, then still in Brussels, informed Ernst Simon in New York that he planned to ship the painting there, expressing his hope of obtaining a “basis for our emigration [...] despite the unfavorable times”. Else Grawi and the couple’s two sons were still in Germany at that point. The emigration tax was not set until October 1939. Grawi himself had no more funds and was reliant on assistance from friends even for his onward journey from Brussels. Whether the Grawis still owned assets in Germany is of no importance because there was no prospect of being able to access these assets in the foreseeable future.

The fact that the sale was eventually completed a good year after Grawi left Germany does not take away the direct connection between this event and Grawi’s escape. Such transactions often take a long period of time, even under normal circumstances. At the same time, the suffering associated with the escape did not only begin on the day of departure from Germany and end on the day of arrival abroad. Else Grawi and the children were not able to travel to Chile until December 1939. The family has vividly described the difficulties facing the Grawis as they made a new start in Chile. Along the way, Grawi continued his efforts to sell the painting on terms that would enable the family to begin a new life in Chile. Had this been possible without selling the painting, he would have had the option of canceling the sale at any time.

There is no question that the Dieterles supported émigrés and persecuted victims of the Nazi regime in honorable and exemplary ways. It is not known to what extent Grawi was able to benefit from this. However, honorable intentions on the part of the buyer do not diminish the fact that the sale was necessitated by Grawi’s emigration. The *Guidelines*—like Military Government Law no. 59—assume a regular causality between persecution and loss, the disruption of which is the exception requiring proof. Therefore the critical factors are the situation and motives of the seller at that time, not the ethos and intentions of the buyer. Thus it is of no relevance whether William and Charlotte Dieterle perhaps only bought the painting in order to help Grawi start a new life in exile. In particular, there is nothing to indicate the protection of Grawi’s property interests here—irrespective of the question whether this can be taken into account anyway as an exonerating factor in the case of a sale abroad. For this, a commitment would be expected that goes beyond what a contract partner of average loyalty would have done in this situation, while behavior merely in accordance with the contract is not sufficient. The fact that the sale probably led to a result that was presumably in line with market conditions at the time and perhaps not as bad as Grawi had feared, is therefore not protecting Grawi’s property interests “in an unusual manner and with substantial success”.

e) Landeshauptstadt Düsseldorf has repeatedly stated that, in the event of a sale in Germany under the same conditions, it obviously would have restituted the painting. That it has not adopted the same approach towards initiating a return in the event of this sale which has now been proven to have happened abroad is evidently due to the fact that the *Guidelines*, as discussed, do not offer any useful criteria for such situations. It is regrettable that more than 20 years after the Washington Conference, it has not been possible to come to conclusions in this respect which are valid beyond the individual case. However, in accordance with the general principles, the Commission has decided to recommend that Landeshauptstadt Düsseldorf restitute the painting to the heirs of Kurt Grawi.

In the event of disputes concerning cultural property seized as a result of Nazi persecution, the function of the Advisory Commission is to mediate between those currently in possession of the cultural property and the former owners, or their heirs, if requested to do so by both parties. Contributors to the above recommendation as members of the Commission in an honorary capacity were Prof. Hans-Jürgen Papier (chairman), Prof. Wolf Tegethoff (deputy chairman), Marieluise Beck, Marion Eckertz-Höfer, Prof. Raphael Gross, Dr. Eva Lohse, Dr. Sabine Schulze, Dr. Gary Smith and Prof. Rita Süßmuth.

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Recommendation 5446 M – 5446 BCM

THE COMMISSION,

Meeting in plenary session;

Having regard to Decree No. 99-778 of 10 September 1999, as amended by Decree Nos. 2000-932 of 25 September 2000 and 2001-530 of 20 June 2001;

Having regard to Decree No. 2018-829 of 1 October 2018, addressing the establishment of a procedure for seeking out the owners, or their heirs, of cultural property spoliated during the Occupation, and particularly Article 3-1 of said Decree;

Having regard to the application, dated 1 April 2001, submitted by Mrs A., born on ... in ..., now deceased, acting in her personal name and as the heir of her father, Georges Mandel, Minister of the Republic, assassinated by the Militia;

Having regard to the letter from the Principal Rapporteur, dated 13 February 2002, by which the Commission provisionally closed this application as it had not received the introductory questionnaire of the application sent to Mrs A.;

Having regard to the reactivation of the application decided on in December 2017, following the request of Mr B., President of the Société des Amis de ..., son of ..., Principal Secretary of Georges Mandel; application taken over by Mrs C. successor to the rights of her mother, Mrs A., who died in 2003;

Having regard to the statutory declaration, dated 23 October 2018, drawn up by Maître ..., Notary and Partner at the Société Civile Professionnelle, ..., with a business address at ..., from which it appears that Mrs A., divorced in the first marriage from ..., wife in the second marriage of Mr D., born on ... in ..., residing at ..., heir to everything of her father, Georges Mandel, left as heirs, with equal shares, her daughter, Mrs C., the claimant and her husband Mr D.;

Having regard to the resumption of this application by Mr D. following the death of Mrs C. on ...;

Mr D. acting as the spouse entitled to succeed, is represented by Maître ..., whose office is at ...Paris;

Having regard to the deed of acceptance of the estate of Mrs C. drawn up on 25 September 2020 by Maître ..., Notary, practising at ..., by which Mr E., born on ... in ..., residing at ..., in his capacity of universal legatee appointed by a notarised will dated 5 November 2019, accepts, with liability for estate debts limited to the net assets (known as benefit of inventory), the estate of Mrs C.;

Having regard to the e-mail dated 21 January 2021, sent to the Commission, in which Mr E., neither assisted nor represented, involved himself in this application;

Having regard to the research undertaken by the Diplomatic Archives of the Ministry for Europe and Foreign Affairs, by the Mission for Research and Restitution of Cultural Property Spoliated between 1933 and 1945, and by the Commission for the Compensation of Victims of Spoliation;

Having regard to the letter dated 24 February 2020 from the Head of the Mission for Research and Restitution of Cultural Property Spoliated between 1933 and 1945 addressed to the Principal Rapporteur of the Commission for the Compensation of Victims of Spoliation;

Having regard to the last report by Mr AUGUSTIN, Rapporteur, dated 4 January 2021;

Having regard to the statement of Maître ..., dated 10 February 2021, drawn up in the interests of Mr D.;

Having heard the report of Mr AUGUSTIN, Rapporteur, and read the written observations of Mr DACOSTA, Government Commissioner;

Mr E. was informed of the date of this hearing.

Mr D. and his counsel, Maître ..., appeared before the Commission to make their observations known.

Firstly, it should be noted that the Commission was informed by the Stiftung Preußischer Kulturbesitz, a cultural foundation based in Berlin (10785 - Germany), Von der Heydt, Straße 16-18, of the existence in its collections at the Berlin State Library and Dresden University Library of three books that belonged to Georges MANDEL stolen from his library in PARIS when his apartment was looted by German soldiers in August 1940. These are the following works:

- "De l'Alsace à la Flandre. Le mysticisme linguistique" by René GILLOUIN;*
- "Syrie terre irrédente. L'histoire secrète du traité franco-syrien" by Marcel HOMET;*
- "Air-Afrique. Voie impériale" by Gaston BERGERY;*

As the Foundation expressed its unreserved intention to return these works to Georges Mandel's heirs, the Commission therefore invited the claimants and the Foundation to contact each other in order to mutually agree on the terms and conditions of these restitutions, with the claimants assuming responsibility for sharing these works between them.

Secondly, according to the evidence on file, corroborated by the statements of the claimants and Maître ..., it appears that Georges Mandel was the victim of spoliation as a result of the anti-Semitic legislation in force during the Occupation, namely:

- the looting of personal property with museum value, including the artworks, in the home occupied by Georges Mandel, his partner ... and his daughter Mrs A., at 67 Rue Victor Hugo, Paris (16th arrondissement),*
- the looting of basic household effects at the home with the same address,*
- the looting of Georges Mandel's library, which was located there,*
- the confiscation of gold bars that Georges Mandel had on him at the time of his arrest,*
- the confiscation of the possessions and valuables that Georges Mandel must have had on him at the time of his internment in the Buchenwald camp and then in the Prison de la Santé before being murdered by the Militia in Fontainebleau forest.*

It should be clarified that the nature and quality of the spoliated property preclude any distinction between cultural and so-called material property, with the result that the Commission is obliged to give its ruling in one single opinion.

The research carried out and the results of this research, which are on file, reveal that Georges Mandel's apartment, located at 67 Avenue Victor Hugo, Paris (16th arrondissement), was looted as early as August 1940, at the request of Otto Abetz, the ambassador of the Third Reich in France; in January 1941, 45 boxes of unidentified objects were removed from the apartment; as of 9 April 1941, the Rassemblement National Populaire [National Popular Rally] set up its headquarters there and the rest of the apartment's contents were entirely moved out in early December 1942;

In particular, 14 paintings were stolen by the occupying troops, transported to the Reich embassy in Paris and most probably sent to Germany, while art objects from Georges Mandel's collection were listed in the inventories of the Einsatzstab Reichsleiters Rosenberg (E.R.R.).

Mrs A., daughter of Georges Mandel and a minor at the time, represented by her guardian ..., took various steps during the immediate post-war years seeking the restitution of his spoliated property from the French and German authorities. She drew up an inventory on 31 October 1944.

It contained many valuable, even very valuable, objects (antique or period furniture, antique tapestries, sculptures, a library of 15,000 or 17,000 books according to the documents, stamp collections, silverware, jewellery and a Pleyel upright piano) and in particular artworks, some of which were signed by leading artists (BOUCHER, COURBET, UTRILLO, ROSA BONHEUR, PANNINI, TENIERS, RODIN, CANALETTO), as well as a large quantity of documents and archives.

Although some property was returned between 1946 and 1950, the restitutions mainly concerned furniture (two inlaid chests of drawers, a Chinese screen, two tapestries, one from Flanders (18th century) "Enfant cueillant des fleurs" and the other from Aubusson "Animaux et architectes"), around 300 books and various "painted works" (in particular a painting designated as follows: "École flamande XVIIème- La galerie des tableaux" attributed to David TENIERS, two large canvases by PANNINI entitled "Ruines et personnages", a "portrait de femme assise" by BONVIN, a "portrait d'Astruc" by Carolus Duran, and a seascape by Isabey), as well as boxes of archive papers.

The reality of this looting was recognised after the war by the French authorities, which awarded compensation for war damage of FRF 887,100, and by the German authorities, which, in application of the Brügg Act, awarded compensation of DEM 1,900,000, approved by the German Restitution Offices in June 1960, paid in three instalments between 1961 and 1968, with interest on arrears.

Mrs A. received in total the equivalent of €3,699,110 after conversion to current value.

In her initial application to the German authorities in 1959, she had estimated the replacement value of the looted property at DEM 5,480,000, or €11,481,600 after conversion, but then claimed total compensation of FRF 197,164,000, i.e. DEM 2,366,308, or €4,593,004 after conversion, on the basis of the estimate made by Maître Maurice RHEIMS in 1959 at the earliest.

Regarding the method used to calculate the compensation, it should be noted that the German authorities did not base it either on the lump-sum method that they usually used or on the amount covered by any insurance policy that Georges Mandel might have taken out before the war.

It is highly likely that the German authorities followed the valuation of Maître Maurice RHEIMS for the property in the inventory produced by Mrs A. and the expert's valuation of the stamp collections. The books belonging to Georges Mandel were not included in these valuations.

Consequently, the Commission considers that the compensation paid did not fully compensate the damage suffered. Since the compensation paid by the German authorities under the Brügg Act necessarily covered a very large proportion of the artworks, the compensation already paid in this respect should be supplemented. The Commission therefore retains the expert valuations as relevant elements for determining the amounts.

However, the amounts for furniture and artworks already returned should be deducted from this compensation, namely:

- *Artworks and tapestries, amounting to €223,545 at current value,*
- *Two chests of drawers, with a current value of €3,830,*

▪ *“Portrait d’une jeune femme assise” by Thomas COUTURE, a canvas returned to Mrs C. in 2019, with a current value of €21,290.*

It is also necessary to take into account the valuation of Maître Maurice RHEIMS, which includes the works and objects already returned to Mrs A. several years earlier.

The Commission also considers that Georges Mandel’s library has only been partially returned and that additional compensation should be awarded for this.

Mr B. stated before the Commission that although Georges Mandel was indeed in possession of “two bars of gold” on the day of his arrest in Morocco in 1940, a decision by an investigating judge in Algiers in March 1942 ordered the return of the gold to ...; consequently, there is no reason to grant the application in this respect.

Considering the last head of damage, namely the possessions and valuables that Georges Mandel had on him at the time of his arrest, the Commission considers it fair that compensation be awarded, as no compensation has been paid to date.

Consequently, in the light of the Rapporteur’s investigations, which are detailed in his report and developed during the hearing, it is fair to recommend that the claimants be awarded compensation of €250,000 for all causes of loss (additional library items, additional artworks, additional furniture, and possessions and valuables confiscated at the time of the arrest).

THE COMMISSION IS OF THE OPINION,

1° - That Mr E., as universal legatee of Ms C., and Mr D. should be recognised as heirs of a victim of spoliation arising from anti-Semitic legislation during the Occupation;

2° - That total compensation of €250,000 be awarded, with the sum to be distributed as follows:

- ½, i.e. €125,000 to Mr D.,*
- ½, i.e. €125,000 to Mr E.;*

NOTES that the recommendation will be transmitted, for information, to the Cultural Foundation Stiftung Preußischer Kulturbesitz, located in BERLIN (10785 - GERMANY), Von der Heydt, Straße 16-18, either to:

- Hermann PARZINGER, President of the Foundation,*
- Carola THIELECKE, Head of Legal Affairs,*
- Jana KOCOUREK, Manuscript Department.*

NOTES that the claimants will have to personally handle any sharing of the compensation awarded with any known or future heirs.

NOTES that this recommendation will be transmitted to the Prime Minister’s office and notified

- to the claimants,*
- to Mr B.,*
- to Maître*

-The Ministry for Europe and Foreign Affairs was represented by Mr CHAUFFOUR,

- The Ministry of Culture was represented by Ms CHASTANIER.

During the deliberation, the Commission was composed of Mr JEANNOUTOT - Mr TOUTÉE - Mr BADY - Mr RUZIÉ - Ms DRAI - Ms ANDRIEU - Ms ROTERMUND-REYNARD - Mr RIBEYRE.

Paris, 12 February 2021

*The Chargé de Mission,
Hearing Secretary*

Emmanuel Dumas

The Chairman,

Michel Jeannoutot

Returns

We provide information on the state of the debate on the restitution of cultural goods and collections from colonial contexts and present examples of the return and repatriation of human remains.

How Returns are Handled

There is currently no legal basis for the appropriate handling of Cultural Goods and Collections from Colonial Contexts, nor does any agreement exist that is comparable to the Washington Principles, though the subject is repeatedly discussed at various political levels, both in Germany and other countries.

Returns have been demanded by the countries and societies of origin concerned ever since the colonial era and increasingly since the 1960s, while at the same time there has been some debate on the creation of the relevant legal framework conditions. This resulted in the UNESCO Convention of 1970, for example, though the latter does not apply retrospectively, so it does not include the peak phase of colonialism. It was not until recent years that reappraisal of the colonial past in Germany started to become the subject of broader social debate. There is still no international consensus on how to deal with the colonial legacy, and in some cases there are significant differences between the various (European) countries regarding the state of the discussion on cultural goods and collections from colonial contexts.

What is more, a very large number of countries would need to be involved in any such agreement: ever since the 15th century, almost every region of the world has been part of colonial structures, at least for a certain period of time. As such, cultural objects and collections brought to Europe originate from a variety of different acquisition contexts, each of which potentially involve specific forms of handling. Appropriate action also depends on the nature of the collection: it makes a difference whether the items are of a day-to-day character, sacred objects or zoological specimens. In addition to returns, other solutions can potentially be considered

such as permanent loans, legal transfer of ownership without physical relocation, financial compensation or joint handling and research of holdings. The mortal remains of human beings have a particularly sensitive status in this connection: nowadays, these are mainly to be found in anthropological and medical-anatomical collections. Here, return with subsequent burial is almost always the only possible form of appropriate handling, providing this is desired by the society of origin.

In addition to the term “return”, the terms “restitution” and “repatriation” are also used in the debate. Given the multitude of cases and constellations, “return” has become accepted as a kind of generic term. The term “repatriation” emphasises the return of an item to its social or cultural context and is often used in the field of human remains, while the term “restitution” emphasises legal aspects such as ownership.

Prominent Examples of Returns

There has been a whole series of returns in recent years, and the projects on provenance research funded by the Foundation have also been able to contribute.

Returns to Namibia

Namibia is now a key player in the debate on the return of cultural property and human remains. There have been repeated returns since the 1990s. The first, in 1996, was when the Übersee-Museum Bremen returned two books of correspondence by Hendrik Witbooi, who led the Nama resistance against the German colonial power and whose property was partly taken to German museums as war booty. The books of correspondence were included in the UNESCO Memory of the World Register and are now kept in the National Archives in Windhoek. This was followed by two private returns of books and documents to the descendants of Hendrik Witbooi.

The first return of human remains from the Berlin Charité took place in 2011, followed by further returns in 2014 and 2018. These three returns involved the remains of 82 individuals being repatriated from seven German institutions and one private collection. They had been looted from graves, among other origins, and taken from prison camps during the colonial war in Namibia (1904-1908). Since it was not possible to establish the individual identity of the bones by means of provenance research, these mortal remains have not yet been buried.

In 2019, a Bible and a whip, likewise attributed to Hendrik Witbooi, were returned from the Linden Museum in Stuttgart; they are now in the National Archives and the National Museum in Windhoek. In the same year, the German Historical Museum returned the Stone Cross of Cape Cross to Namibia, which was erected on the country's coast by Portuguese seafarers in 1486 and taken down in 1893.

In 2022, 23 objects from the Ethnological Museum in Berlin were handed over to the National Museum in Windhoek. Other German museums are currently in talks with Namibian actors regarding the return of cultural property.

Search

The German Lost Art Foundation supports the developments described above not only by promoting provenance research on individual objects, but also by compiling a comprehensive list of Namibian cultural property held at museums and universities in German-speaking countries and by publishing a finding aid on the subject.



German-Namibian memorial service in St. Matthew's Church on the occasion of the repatriation of mortal remains from Berlin to Windhoek, September 2011.

Return of the "Benin bronzes" to Nigeria

The colonial occupation of the Kingdom of Benin by British troops in February 1897 marked the end of one of the most powerful West African kingdoms. One consequence was the worldwide scattering of thousands of works of art made of bronze, ivory and wood that had been looted from the royal palace. Some of these so-called Benin bronzes ended up in German museums and collections.

The first demands for these items to be returned were made as early as the 1930s. There were individual demands and negotiations in the decades that followed, but no actual returns were made. The Benin Dialogue Group was established in 2010 and involves museums in Germany, the UK, the Netherlands, Austria and Sweden working together with Nigerian partners as well as representatives of the Royal Court of Benin. It has focused primarily on scholarly cooperation.

In April 2021, at the invitation of the Minister of State for Culture and the Media, the German museums who belong to the group, the ministers of culture of the participating federal states, the City of Cologne as the body responsible for the Rautenstrauch-Joest-Museum, and the Federal Foreign Office approved a joint declaration on the handling of the Benin bronzes in German museums and institutions. In October 2021, a German delegation visited Nigeria and a memorandum of understanding was signed stating that the first returns were to take place in the course of 2022. The “Joint Declaration on the Return of Benin Bronzes and Bilateral Museum Cooperation between the Federal Republic of Germany and the Federal Republic of Nigeria” was officially issued in July 2022. Two of the Benin bronzes were handed over at the signing itself. The process itself then got underway in December 2022 with the initial handover of 20 Benin bronzes from Berlin, Hamburg, Leipzig, Stuttgart and Cologne. Further returns are to follow.

The Foundation has been able to fund several projects dealing with the provenance of objects from the Kingdom of Benin.

For details of funded projects, see our project finder and our press releases.



Benin bronzes in the permanent exhibition of the Übersee-Museum.

Since 2011, the mortal remains of persons have also been returned to their descendants from German collections. Important milestones in the debate on the proper handling of human remains from colonial contexts were the publication of the [“Recommendations for the Care of Human Remains in Museums and Collections”](#) by the German Museums Association in 2013 ([new revised edition of 2021](#)), which recommends return or burial if a context of injustice exists, and the position paper issued by the [Federal-Länder Commission](#) of 2019, which attaches particular priority to the return of remains from colonial contexts. This position paper states the following: “The general willingness to return artefacts from colonial contexts, in particular human remains, to the countries and societies of origin is important for the dialogue in a spirit of partnership for which we strive. [...] Human remains from colonial contexts are to be returned.” (p. 7)

During the colonial period, the bones were usually stolen from graves or brought to Germany following military conflict, executions, imprisonment and abuse. Provenance research in this area therefore attempts not only to explore the circumstances of the relocation, but also to identify the deceased and reconstruct the circumstances of their lives and deaths (see also: [Guideline for Interdisciplinary Provenance Research](#)).

One example of such repatriation is the return of the remains of eight individuals to the Office of Hawaiian Affairs (USA) by the Übersee-Museum Bremen in February 2022 [[press release on the return](#)]. In this case, the [preceding provenance research](#) was funded by the Foundation. The mortal remains probably came from burial sites and found their way to the museum from the mid-19th century onwards. For decades, Hawaiian initiatives and institutions have been trying to secure repatriation of the remains of their ancestors that were taken to various western museums. The aim is to rebury them.



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Return ceremony of human remains to Hawai'i at the Übersee-Museum Bremen

TOWARDS A NEW
ACROPOLIS MUSEUM

A BRIEF HISTORY
OF BRITISH CONCERN

BM TRIES TO
DOWNGRADE GREEK
ABILITY TO CONSERVE

LAW AND ETHICS DERIVING
FROM THE PARTHENON
MARBLES CASE

CLEANING SCANDAL
AT THE BRITISH MUSEUM

TWO POEMS

WHAT WE THINK

ABOUT US

THANKS



LEGAL AND ETHICAL ISSUES

This important contribution to the debate is long and detailed. You are welcome to save this page to your hard disk so that you can read it at your leisure.

The law and ethics deriving from the Parthenon Marbles case

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* The author is grateful for the helpful suggestions made by Prof. Dr. M. Stathopoulos, Professor of civil law at Athens University, during the drafting of this article. However, the final responsibility for the text lies solely with the author. This article was first published in [1997] 2 Web JCLI, Copyright © 1997 Irini A. Stamatoudi.

Summary

Nearly two hundred years ago Lord Elgin removed vast amounts of Marble sculptures from the Parthenon on the Acropolis in Athens. This removal and the subsequent shipment of the Marbles to Britain took place in dubious circumstances. The Marbles ended up in the British Museum where they have been on display since. Should these important pieces of cultural heritage be returned to their country of origin? Should they be re-united with the Acropolis site for which they were intended and of which they form an integral part? The answer to this question will be provided after a careful examination of all legal arguments in favour and against the return of the Marbles to Greece as they are found in national and international legal instruments. These arguments will be based on both legal and ethical grounds.

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Introduction

One of the most interesting themes of the 20th century, in relation to the protection of cultural heritage, is the restitution and repatriation of cultural objects, which were taken from their country of origin, by reason of theft and illicit exportation, or by reason of legal means, during periods of colonisation, conquest or war.

A significant number of these objects has already been returned to their country of origin in response to popular demand, international initiatives and legal pressure. Nevertheless, the case that has incurred the greatest publicity, and which has given rise to the most interesting literature in this area, is the Parthenon Marbles case.

This article will examine the current debate on the return of the Parthenon Marbles from the United Kingdom to Greece, the legal and moral implications of such a prospect and whether there are sufficient grounds to justify their return to their country of origin.

I. The Background to the Case

Lord Elgin was appointed British Ambassador to the Ottoman Empire in Constantinople in 1799. Since 1901 and under rather ambiguous conditions, he gained access to the Acropolis site of Athens, which was under the Ottoman occupation, and started to remove from there the Parthenon sculptures, hereby dismembering them from the central temple of the site. ⁽¹⁾ All the Marbles taken from the most representative temple of the High Classical period of the Greek art, were shipped to Scotland for the private use of Lord Elgin. The most probable intended use was said to be the decoration of his country house in Scotland. The Marbles taken by Elgin consisted of fifty slabs and two half-slabs of the frieze and fifteen metopes. Part of them were shipped in "Mentor" (a ship Elgin had purchased for this purpose) and sank in deep water off Kythera. There inevitably most of the marbles were never found.

In 1816, Elgin experienced financial difficulties and decided to sell the Marbles to the British Crown. The decision to purchase was taken by the British Parliament in 1816 in full knowledge of the facts surrounding the acquisition of the Marbles. Elgin was paid £35,000. Later that year the Marbles were technically transferred as property to the Trustees of the British Museum by a further Act of Parliament that was passed on 11 July 1816 "To Vest the Elgin Collection of Ancient Marbles and Sculptures to the Trustees of the British Museum for the Use of the Public". However, Britain promised to return the Marbles as soon as Greece gained its independence from the Ottomans. But this promise was not kept. During the 1940's Britain promised again to return the Marbles as compensation to its wartime allies for the losses they had incurred during the war. Nevertheless, the Marbles were still not returned because the time was found not to be appropriate for such a decision. This attitude was exemplified by Attlee, the Lord Privy Seal, who told the House of Commons in 1941 that, as regards the introduction of a piece of legislation allowing the return of the Marbles to Greece, the moment was "inopportune".

After the restoration of democracy in Greece, in 1975, the Minister of Culture, Constantinos Trypanis, set up a committee for the preservation of the monuments of the Acropolis. Henceforth requests for the return of the Parthenon Marbles were made to Britain in order for the items taken from the Acropolis site to be restored. However, the first official request from the Greek government was only made in 1983 and it was delivered to the Foreign Office on 12 October by the Greek Ambassador, Mr Kyriazides. In the request it was argued that the Marbles should be returned to Greece, because

"-they are an integral part of a unique building symbolic to the Greek cultural heritage-it is now universally accepted that a work of art belongs to the cultural context in which (and for which) it was created, and -they were removed during a period of foreign occupation when the Greek people had no say in the matter." (Greenfield 1989, p 83)

In 1983 a Bill was introduced to the British Parliament, which would enable the Trustees of the British Museum to return the Marbles. The Bill was discussed and finally defeated in the House of Lords on 27 October 1983. It was claimed that the Marbles were well cared for in the British Museum and that the return would set a precedent for the denuding of the world's museums. In April 1984 the Greek official request was formally declined by the British Government in a reply that was delivered to the Greek Ambassador in

London on grounds that the Marbles were "secured" by Lord Elgin "as the result of a transaction conducted with the recognised legitimate authority at the time."

The discussion was briefly re-opened in January 1996 when Lord Jenkins brought a question before the House of Lords on whether the British Government is willing to return the Marbles to Greece. The official position however remained unchanged.

II. The Law of the Case

The issues that derive from the Parthenon Marbles case are not only based on moral or emotional grounds, but also on principles and set questions of law. Both parties have put forward a number of arguments, which will hereafter be analysed in discussing the case, and assessing which party has the strongest right to the Marbles.

1. The Applicable Law

Before discussing the substance of the case we must first examine which is the applicable law. The case seems to involve four possible laws each of which could potentially be applied. The first three are the national laws of the United Kingdom, Greece and Turkey, while the fourth is public international law. The choice, however, between one of the aforementioned national laws does not seem to be appropriate in the present case for the following reason. No provisions relating to disputes about cultural heritage are provided for in the laws of the three countries. Therefore any relevant existing rules can be applied only by analogy and may in the present case prove inadequate. Thus, national laws present a legal vacuum which must be superseded in order for the case to be decided.

As is well-known and established in the codes of the various countries and according to the British-United States Claims Arbitral Tribunal of 1910:

"...domestic law may not contain, express rules decisive of a particular case; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, corollaries of general principles, and so to find ... the solution of the problem".

In that context it would be teleologically fairer to use principles deriving from the law of most civilised countries, and mainly common to the legal systems of the United Kingdom and Greece, instead of deciding the case in the light of one national system.

However, in conjunction with those principles we can also use, according to art. 38(1) of the Statute of the International Court of Justice, the general principles deriving from international law, recognised as basic sources of it, along with international conventions (art. 38(1)b). Disputes, such as the Parthenon Marbles case, where nations are involved, would be better settled in an international context and by an international judiciary. Both Greece and the United Kingdom are Members of the United Nations. Therefore, according to art.36(2) "may at any time declare that they recognise as compulsory ... the jurisdiction of the Court in all legal disputes concerning ... any question of international law" and under that article invoke the Court's jurisdiction to arrive at a judicial settlement of the case.

At this point, it must be stressed that, although the Conventions that will be considered, as well as any other legal material, were not in force at the time of the removal of the Marbles from Greece, the principles which the Conventions enshrine and which they codified are thought to go back to the start of the 19th century. Moreover, most of the Treaties that will be considered in this article, whether or not they have been ratified by the states at issue, by reason of their intention to have a general effect, and the incorporation of well-established principles, are thought to be "law-making" Treaties (distinguished from those which merely regulate issues between a few Member States). Therefore the rules deriving from them are considered to be general binding rules (Shaw (1991), p 81).

As regards the law in force at the time of the removal, we do not, unfortunately, have access to it and accordingly the case will be examined from the aspect of the current law.

2. The legitimacy of the Acquisition of the Marbles

Perhaps the most decisive and important issue to be examined is the title Lord Elgin acquired to the Marbles. The question will be analysed in two basic parts: 1) whether the Turks, conquerors of the Greeks at the time, had the authority to dispose of the Marbles, and 2) whether Elgin was really authorised to remove the Marbles and ship them to Scotland.

(a) Whether the Ottomans had the authority to dispose of the Marbles

It is alleged that since Greece was at the time part of the Ottoman Empire, the Ottomans "had a solid claim to legal authority over the Parthenon because it was public property, which the successor nation acquires on a change of sovereignty" (O'Connell (1956), p 226). However, this public property is transferred upon the successor nation in trust and not with the perspective of being disposed of. According to art.5 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter the Hague Convention), countries "in occupation of the whole or part of the territory of another (State) ... shall as far as possible support the competent national authorities of the occupied country in safeguarding and preserving its cultural property". The Ottomans acted contrary to and in breach of such obligation. Although the Convention was signed in 1954, the general principles found in it, which the Convention codified, create legal obligations because of the long-standing tradition and conduct of the States, which were also applicable to situations before the Convention came into force.

Moreover, the uprooting of cultural heritage is considered an illegal act of foreign occupation and therefore condemned by international law with regard to conduct at times of war. Art.4 of the Hague Convention provides in s.3 that the countries must: "undertake to prohibit, prevent and if necessary put a stop to ... any acts of vandalism directed against cultural property", as well as

to "refrain from requisitioning moveable cultural property" situated in the territory of another State. Art.11 of the same Convention also reads: "The export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit". If these are obligations undertaken at the time of war, one would assume that, at the time of peace, countries are even more obliged to respect the cultural heritage of another State, as well as the objects that are of special significance to its nationality, history and religion.

These latter rights are also enshrined in articles 18 and 19 of the Universal Declaration of Human Rights of 10 December 1948, as well as in articles 9 and 10 respectively of the European Convention on Human Rights of 1950. Specifically they provide that everyone has a right to conscience, religion and expression. The above provisions, which, in fact, enshrine constitutional rights of the laws of most States, are subject to a teleological and flexible approach. Since cultural heritage contributes to the self-determination of people and to their intellectual integrity, the disposal of someone's national patrimony, or eradication of what constitutes his history and culture can only be a violation of the right to his personality, religion, national and cultural identity. (2)

Apart from the human rights' dimensions that the disposal of someone's cultural property has, the Ottomans also had no right to dispose of the Parthenon Marbles for one further reason. The Parthenon and the Acropolis site are the symbol not only of Athens but of Greekness itself and this is the very reason they constitute part of the things known in Roman law as *res extra commercium*. In the Greek Civil Code (hereinafter GCC), in art. 966, these things are defined as those "which are of common use and those destined for serving public municipal, communal or religious purposes". Thus, the enhanced public interest brings them into the category of "untradeable" objects, which are not subject to any legal commercial transaction. The UK, paradoxically, does not seem to have any relevant provisions thereon, although there are some categories of things, e.g. public offices, which cannot be subject to a commercial transaction. But these excluded categories are generally those which are contrary to the standard morals rather than ones which merely seek to exclude a number of things from all commercial transactions. The UK has a favourable and strong attitude towards the protection of property and this liberal approach would not permit any derogations even in situations where cultural property is involved.

However, this concept of "untradeable" objects is also found, although in another context, in the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinafter the 1970 Unesco Convention). Art.7(b)(i) provides that State Parties shall "prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution".

But, even if we reverse the situation and consider Britain's attitude towards the exportation of a similar object of such a significance to its nation, we will observe that, although an "art-market" State, it would probably not grant an export licence. Taking into account the criteria that should be met (known as the Waverley criteria and found in the Report of the Committee on the Export of Works of Art etc which is known as the Waverley Report 1952) for the withholding of a licence (close association with Britain's history and national life, of outstanding aesthetic importance, of outstanding significance for the study of some particular branch of art, learning of history), the Parthenon Marbles would have been considered "untradeable" at least for the international market. Actually, in 1952, the Waverley committee considered the Elgin Marbles as an example of cultural objects of outstanding aesthetic importance for which no export licence would have been granted (see Maurice and Turnor 1992, p 280).

(b) Whether Lord Elgin was authorised to remove the Marbles

In the examination of Elgin's authorisation to remove the Marbles from Parthenon, three questions should be considered. First, whether there was, in fact, any authorisation. Secondly, the nature of this authorisation, and lastly the extent of the powers it conferred on Elgin.

It is said that Lord Elgin, in order to have access to the Acropolis site, obtained a firman (a Turkish administrative written instrument) as a result of his request to the Sultan:

>

- "(1) to enter freely within the walls of the Citadel, and to draw and model with plaster the Ancient Temples there.
- (2) to erect scaffolding and to dig where they (Elgin's working team) may wish to discover the ancient foundations.
- (3) liberty to take away any sculptures or inscriptions which do not interfere with the works or walls of the Citadel." (Smith 1916, p 190)

However, the authoritative firman for the removal of the Marbles was never found. It was not presented either to the British Parliament in 1816, nor found in the archives of the Turkish government, where all the documents were kept as evidence of their content. Only an Italian translation of the firman is available, whose origin was not precisely defined, but it is attributed to the Reverend D P Hunt, secretary to Lord Elgin.

Yet, even if a firman was granted, its legal nature is basically uncertain. According to writers specialised in the Ottoman history (Sarris 1985, p 223ff.), and to the Oxford English Dictionary, a firman is "an edict/order/decreed/permit/letter from the Ottoman government addressed to one of its officials ordering/suggesting/requesting that a favour be conferred on a person". Firmans were held in the Ottoman Empire, in fact, to be written permissions, which were not capable of annulling or amending the law (if the latter was providing for something contrary to the content of the firman) and which could not be held to constitute any kind of contract.

Moreover, the identity of the authority that edited the firman was never confirmed. Mr Abair, the British Ambassador who succeeded to Lord Elgin said that, on the basis of a letter written in 1811 by Lord Elgin, he understood that the Ottoman government "denied that the persons who had sold those Marbles to me (Elgin) had any right to dispose of them ...".

But, were the Marbles actually sold to Elgin? No contract of purchase was found (given also that the firman cannot be held to constitute one), nor was any form of consideration given to the Ottoman authorities. According to historians and the Report on the Elgin marbles of 1816, Lord Elgin used his special office as Ambassador and the defeat of the French in Cairo on 17 June 1801, as well as bribery, in order to obtain what otherwise would have been impossible.

Allegations such as "whatever the motivation (of the responsible officials) may have been, they had the legal authority to perform those actions" (Merryman 1983, p 776) seem to carry little weight. By virtue of the well-established principles enshrined in the laws of all the civilised countries, actions against the morals and the public interest affect the validity of an act and render it null. Article 178 GCC reads: "An act which is contrary to morality shall be null and void" (See further Stathopoulos 1995, pp. 114ff.). English law is also very likely to consider such acts illegal, as they might fall within the category of contracts through which a civil wrong is committed. Other legal systems also adopt a similar approach. Under the German Civil Code, in art.138, the transaction is void if it is contrary to public policy and the Swiss Code of Obligations holds transactions, which are contra *bonos mores*, as invalid.

Another issue that should be considered is the kind and extent of permission the firman conferred on Elgin. The phrase in the firman that seems to have authorised Elgin's massive removals of Marbles is the following, as quoted in the Report of the Parliamentary Committee on the Elgin Marbles of 1816:

"[Elgin's working team had permission] to view, draw and model the ancient Temples of the Idols, and the sculptures upon them and to make excavations and to take away any stones that might appear interesting to them" [\(3\)](#)

Unfortunately, the whole text of the firman cannot be quoted here in order to attempt a complete analysis and comparison with Elgin's initial request. Nevertheless, the aforementioned clause has to be seen in conjunction with the third paragraph of Elgin's request as outlined above. In that context, the firman's contended sentence seems to have been put there rather cursorily without any serious thought. The powers it confers on Elgin are evidently ambiguous, whereas the Ottoman intention seems to be narrow and strict.

What is most likely is that at the time the Ottomans could not have foreseen Elgin's real intentions. They relied on their assumptions that Elgin basically wanted to copy the architectural structure of Parthenon as well as make copies of its decorations. They were probably deceived. Therefore, Lord Elgin, being surely "the best interpreter of the instrument by which he had acted, if he erred, he erred knowingly". [\(4\)](#) What the Ottoman's actions would have been if they had realised Elgin's principle aim, is not clear. But it is more likely that they would not permit the denuding of the Temple and the dismantling of the sculptures, causing serious damage to the site, given that they themselves recognised its significance and had used it in the past as a Mosque.

From the foregoing it follows that Elgin had exceeded the powers conferred on him by the firman and it casts doubt on whether Elgin legitimately removed the Marbles from the Acropolis site or stole them on his own initiative, being supported by Turkish officials, who, by reason of their offices in Athens, could assist him after they were bribed.

The argument of estoppel, by reason of subsequent ratification by both Greek and Turks, derived from the inactivity of legal authorities, which can indicate acquiescence by implication, fails to consider two major issues. First, there is nothing which confirms that Greek and Turks were not displeased over the dismantling of the Marbles from the Temple, and it is unclear what the circumstances were which prevented them from taking radical steps. On the other hand, the local authorities of that time were not subject to any organisation or supervisory system that would enable them to act quickly and efficiently; nor could they understand the gravity of Elgin's act. Therefore, their inactivity should be interpreted restrictively.

In addition, an excess of authority on their part cannot be made legitimate by reason of implied ratification for two basic reasons. Firstly, no ratification by local authorities, which had no competence regarding the disposal of national property, could have been valid. But even if they were competent, the indifference or bad execution of public servant's duties cannot be turned against the State itself, which entrusted them in good faith with these duties. Secondly, implied ratification of an unlawful act is a notion alien to international law and therefore of no legal significance (Shaw 1991).

Thus, it follows that Elgin did not have any documentary proof of title or at least not a valid one. Consequently, he never became the owner of the Marbles. According to s.23 (sale under voidable title) of the Sale of Goods Act 1979 (hereinafter SOGA 1979), "when the seller of goods has a voidable title to them, but his title has not been voided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect". To the same result provide also art.1034 in conjunction with art.1036(1) GCC, according to which the purchaser does not become an owner, in a case where he purchases from someone, who is not the owner himself, unless he acts in good faith.

Given that the British Parliament before purchasing the Marbles was in full knowledge of the facts surrounding their acquisition as well as the inability of Lord Elgin to produce any documentary proof of title before them; and the fact that no good faith existed, according to the Latin maxim "nemo plus juris ad alium transferre potest quam ipse habet", enshrined in s.21(1) SOGA 1979 "where goods are sold by a person who is not their owner ... the buyer acquires no better title to the goods than the seller had ...", the British Government never acquired title to the Marbles, nor by extension did the Trustees of the British Museum.

3. Legal Consequences of the Long Passage of Time

A second legal basis that should be considered is the long passage of time and the effects it has on any claims of return of cultural property. From 1815 (when the last removals of the Marbles took place) until 1983 (when there was the first official request for their return from the Greek government), 168 years have passed and therefore any rights of return have been statute-barred. Specifically, according to s.2 Limitation Act 1980 (hereinafter LA 1980), an action founded on tort is prescribed in "six years from the date on which the cause of action has accrued". Article 937(1) GCC provides for five years. However, s.4 LA 1980 reads: "The right of any

person from whom a chattel is stolen to bring an action in respect of a theft shall not be subject to the time limits under s.2 ...". Whereas art.937(2) GCC provides only for a longer prescription, equal to the one provided in the Greek Penal Code: five years from the time the injured party has had knowledge of the injury and of the person liable for compensation; or in any case for a twenty year period after the occurrence of the act.

Moreover, in the case where the British government is considered to be the trustee of the Parthenon Marbles, s.21(1)(b) LA 1980 is of interest since "no period of limitation prescribed in this Act shall apply to an action by a beneficiary under a trust, being an action ... to recover from the trustee trust property".

There is, of course, the view which holds that the Parthenon Marbles are immovable property, because they constitute an integral part of the Temple, although this view is not strongly related to a common-law system. This notion is found in English law under the concept of "fixtures" (objects which are attached in a permanent way to the building and which cannot be separated from the immovable and therefore are susceptible to any rules relating to it). The GCC enshrines this concept in its art.953 relating to "constituent parts", while the French Civil Code expresses it in art.526. Two English cases that had to deal with cultural property of this kind held that a door and a door frame that had been designed by the famous architect Adam and that had been detached from the house, should be returned and re-installed as they constituted an integral part of it and continued to do so after their unauthorised removal (*Phillips v Lamdin* [1949] 2 KB 33). While in *Norton v Dashwood* [1896] 2 Ch 497, tapestries which had been affixed to the walls of a house for more than one hundred years were also considered an integral part of it and therefore could not be separated without causing damage to their context.

However, the most interesting case, albeit a French one, is *Ville de Genève et Fondation Abegg v Consorts Margail* D 1985.208 where it was held that the frescoes detached from a building and sold outside the country remained immovables even after their detachment, and therefore they were subject to the rules relating to immovables. This case and its outcome present strong similarities with the English *Phillips v Lamdin* case.

The real issue about fixtures is whether these items have become part of the building. If any chattel is affixed definitively to a building as part of the overall and permanent architectural scheme that will be the case. The building with the fixtures incorporated in it is then treated as a single immovable item. Carved oak wall panels and balustrading to the staircase were considered to be fixtures as defined above in *Corthorn Land & Timber Company Ltd v The Minister of Housing and Another* (1965) LGR 490. Modern English law protects such fixtures along with any listed building under s.1(5) Planning (Listed Buildings and Conservation Areas) Act 1990. Any removal of such fixtures is an offence, whether or not the person removing them realised that they were fixtures attached to a listed building or not. The offence is one of strict liability and no *mens rea* needs to be demonstrated. The decision in *R v Wells Street Metropolitan Stipendiary Magistrate, ex parte Westminster City Council* [1986] 3 All ER 4; [1986] 1 WLR 1046, does not allow for any other conclusion. And as long as a reasonable percentage of the material which formed part of the unlawfully demolished building (70 to 80 per cent of a listed barn in the case at issue, *R v Leominster District Council, ex parte Antique Country Buildings Ltd and Others* and *Scott and Others v Secretary of State for the Environment and Another* (1988) 56 P&CR 240; (1988) 2 PLR 23; (1988) JPL 554) remains available the appropriate sanction is the restoration of the building. Fixtures which have been detached from the building can only be treated again as chattels if they have been detached lawfully. Any other conclusion would be wrong because it would favour the offender who took fast and radical action to destroy the building and its architectural scheme. The argument advanced by Hoffman J which was quoted in *R v Leominster District Council, ex parte Antique Country Buildings Ltd and Others* and *Scott and Others v Secretary of State for the Environment and Another* that the remaining pieces of a wrongfully demolished building are still a building for legal purposes applies here by analogy.

If we continue our application by analogy and consider the Elgin Marbles case in the light of the current English law the outcome is rather straightforward, albeit obviously not legally binding. The Marbles are an integral part of the Temple building and must be considered as fixtures. Their removal can, in the light of the evidence, hardly be considered to be entirely lawful. The intentions and motives of the parties involved are without relevance. The only outcome can be the restoration of the Temple to its original state. This presents, at the very least, a strong moral argument for the return of the Marbles to Greece. What is the mandatory solution for any listed building in England, must clearly also be the appropriate solution for one of the world's unique pieces of architectural heritage.

Or do we operate a dual standard when on the one hand returning the Stone of Scone to Scotland, after having taken it in the 13th century in circumstances which were definitely not as doubtful as those in which Lord Elgin acquired the Marbles, while on the other hand retaining the Parthenon Marbles in London? If all time limitations could be ignored in the former case and moral arguments were allowed to take the higher ground in the absence of an cast iron legal case favouring either side, surely the same should apply in the case of the Marbles, even if cynics would add that in Athens there are no votes to be won by British politicians.

Section 15 LA 1980 provides in cases relating to immovable for a limitation period of 12 years while art.249 GCC provides for a 20 years period. Nevertheless, both the English statute, in s.28(1) and the Greek law in art.255 provide that this time limitation is suspended in case of force majeure. English law provides more specifically for an "extension of limitation period in case of disability". If in the period, where someone is entitled to raise an action certain events take place, which make it impossible for him to claim his rights, the statutory limitation periods are suspended. Since 1830, when Greece became an independent State and until the final restoration of democracy, it has had to face five wars and two dictatorships. Thus, it was by analogy unable to claim back cultural property when more pressing problems had to be given priority.

Nevertheless, even apart from any provisions in national law, international law does not recognise any statutory limitation periods. Consequently, any rights of return can still be claimed since national law cannot prescribe any rights in international law (see Shaw 1991). Moreover the Hague Convention as well as the 1970 Unesco Convention have no provision on prescription. ICOM, the International Council of Museums, also made clear that "in no event shall the State, which holds the cultural property in question, be able to invoke any statutes of limitation" (Venice Committee, Unesco Doc. SHC-76/CONF.615/5,5). In that light, because of the special interest and bonds of people to their cultural heritage, many cases have been settled, irrespectively of time limits, including

the case concerning the Manuscripts taken from the library at Heidelberg in 1622 (Nahlik 1983 , p 12).

4. Restitution and return of the Marbles

According to art.2 of Directive 93/7/EEC of 15 March 1993 ((1983) OJ L 74, 27.03.1993, p 74) cultural objects unlawfully removed from the territory of a Member State "shall be returned in accordance with the procedure and in the circumstances provided for in this Directive". Art.7(b)(ii) of the 1970 Unesco Convention, also, comes in support of this obligation. Specifically it provides that: the Parties at this Convention undertake "at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property". Also the most recent international legal instrument in the area of cultural property, the 1995 Unidroit Convention on stolen or illegally exported cultural objects (hereinafter the Unidroit Convention) provides in art.3(1) that "the possessor of a cultural object which has been stolen shall return it"; while in relation to illegally exported cultural objects it provides in art.5(1) that "a contracting state may request the court or other competent authority of another contracting state to order the return of a cultural object illegally exported from the territory of the requesting state". One needs to add though that the international legal instruments referred to above do not cover claims before their entrance in force. Thus, in this article they are considered from a general principles point of view.

Therefore, given that the Marbles have been illicitly exported from the Greek territory, the British Museum is obliged to return them to their country of origin according to the principles deriving from the European Directive and the International Conventions. "The principle of physical return of cultural property is, through increasing State and Institutional practice, becoming a custom of international law" (Greenfield 1989, p 104); and rules of customary law may become an overriding principle of international law known as "ius cogens" (see e.g. Brownlie 1990, p 512ff.).

However, the same issue has already been the subject of close scrutiny at the Unesco World Conference on Cultural Policies, which was attended by Ministers of Culture in Mexico in 1982. The Conference has published Recommendation No.55, which reads as follows:

" *Recalling* resolution 4/09 adopted by the General Conference of Unesco at its twenty-first session, on the return of cultural property to its countries of origin,

Recalling the recommendations adopted by the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation at its second session (Paris, 14-18 September 1981).

Considering that the removal of the so-called Elgin marbles from their place in the Parthenon has disfigured a unique monument which is a symbol of eternal significance for the Greek people and for the whole world,

Considering it right and just that those Marbles should be returned to Greece, the country in which they were created, for reincorporation in the architectural structure of which they formed part,

1. *Recommends* that Member States view the return of the Parthenon Marbles as an instance of the application of the principle that elements abstracted from national monuments should be returned to those monuments;

2. *Recommends* that the Director-General give his full support to this action which comes properly under the heading of the safeguarding of the cultural heritage of mankind".

If this Recommendation is taken up Britain might have a claim for compensation if the Parthenon Marbles are returned. Art.7 of the 1970 Unesco Convention in s.7(b)(ii) provides that "the requesting State shall pay just compensation to an innocent purchaser or to a person who has a valid title to that property". Articles 3(3) and 6(1) of the Unidroit Convention contain a similar solution. However, it has become clear so far that Britain was neither an innocent purchaser acting in good faith nor does it have a valid title given the questionable acquisition of the Marbles by Elgin.

Nevertheless, Britain can claim as a bailee the costs of the preservation of the Marbles. The preservation of cultural antiquities is very costly and few museums can afford to give away objects in which they have invested time and money. However, Britain has, in fact, been compensated in two ways. First, it has been compensated *in natura* by the number of tourists who have visited London over the last 180 years to see the Marbles and secondly, by setting off its claims against Greece's claim for the demolition of the Parthenon Temple.

III. The Ethics of the Case

The moral issues deriving from the Parthenon Marbles case have to be considered at this stage, not only because they represent some very interesting points, but also because they carry weight both in national and to an even larger extent in international law. In international law they can justify the return of the Marbles when being considered as an independent basis, apart from any claims at national level. 1. Was Lord Elgin a Preservationist?

The British have occasionally set out various reasons to justify their insistence on the Marbles staying in Britain. The first reason to be mentioned is that England succeeded in preserving the Parthenon Marbles in a period where the antiquities in Greece were in danger because of the war or because of the ignorance of certain people. Therefore Elgin acted in the spirit of a preservationist rather than in the spirit of someone who is only pursuing his own profit.

The retention of the Parthenon Marbles on such grounds is unjustifiable. This is so firstly, because the question why the Marbles that were left on Parthenon did not suffer any damage receives no satisfactory answer. And secondly, because, although Elgin did spend

much of his fortune removing the Marbles from the Parthenon and shipping them to Scotland, he had no intention of either preserving the Marbles for the Greeks or of making them a gift to the British State. If Elgin had been altruistic and had merely taken the Marbles out of danger, the logical conclusion would be that the antiquities should be returned to Greece now that the reasons of their initial removal no longer exist.

2. Are the Parthenon Marbles Safer in London?

Safety is no longer an issue since after their return to Greece the Parthenon Marbles will not be exposed to the open air natural environment, but they will be housed at the Acropolis Museum, where they can be preserved in the best possible way.

The ornaments, friezes, metopes, and pediments will be in their architectural context when placed in the Athens Museum, although they will still be displayed in a museum, whereas in the British Museum they are not being displayed in their authentic setting. Such an approach is fully in line with the recommendation that "there is deep-rooted and indissoluble bond between nature, man and his artistic creations" (Zaire, UNGA (XXX) Explanatory Memorandum A/9199,2). The Marbles are an integral part of the Parthenon Temple itself, so, seeing them in conjunction with the Temple is essential for a better understanding and assessment of these pieces of art. Dissociated from the rest they lose most of their meaning, mystique and significance.

3. Would the Return of the Marbles Set a Precedent for the Denuding of the World Museums?

This argument seems to fail to distinguish between the particularities some cases present. Debates on cultural property should always be subject to a case-by-case approach, so that strong petitions which are well-founded as the Parthenon Marbles one, can be separated from the ones that are weak and unjustified as for example items of lesser significance which can be found in large numbers so as not to constitute irreplaceable pieces of art which are of priceless national significance and form the symbol for a nation and a culture. Greece's claim is particularly strong. Mainly, because the Parthenon is a unique piece of cultural heritage of great architectural, philosophical and historical significance. Therefore its integrity should be supported. And secondly, because the idea of the Parthenon was conceived and realised by Greek sculptors in Athens, where the Temple still remains in recognisable form while the partial damage is due to Elgin's massive removals.

However, the Parthenon Marbles case was not the first one to be considered. Many antiquities have found their way back to their country of origin. In 1948, the Wright Brothers' Kittyhawk aircraft was returned to the United States from London's Science Museum. In 1962 the University Museum of Archaeology and Anthropology at Cambridge returned cultural objects to the Kabaka of Uganda. The Ethiopian Manuscripts were returned in 1872 and in early 1930s Ceylon took back the shrine, sceptre and orb of the last King of Kandy. Did these cases and numerous others change the flow of history or did they upset the international status quo?

In addition, given that the legitimacy of the acquisition of the Marbles is questionable, their return would not merely constitute an act of good will by Britain, but it would also be in compliance with the world-wide approved ethics of no retention of cultural material whose legitimacy is ambiguous. Art.3(2) of the ICOM Code of Professional Ethics of 1986 states: "A Museum should not acquire whether by purchase, gift, bequest or exchange, any object unless ... (it is) satisfied that it can acquire a valid title to the object in question and that in particular it has not been acquired in, exported from, its country of origin ... in violation of that country's laws".

Lastly, arguments against the return of cultural objects on grounds of alleged nationalism (Merryman 1983, p 785) are devoid of substance. It is doubtful whether in that light Britain would be willing to dispose of Big Ben, Westminster Abbey, Shakespeare's own manuscripts if these are ever found or America of its Statue of Liberty. In his article Merryman seems to confuse the notion of "cultural internationalism" with that of "cultural imperialism", and, after all, as O'Keefe and Prott point out in a characteristic way, "there is something equally nationalistic in the view that a particular ... State is an especially appropriate custodian of other people's material culture, irrespective of their laws and their views" (O'Keefe and Prott 1989, p 470.).

Conclusion

In this article the law and the ethics of the Parthenon Marbles case have been analysed, showing the complexity of the issues involved. Both parties have interesting points and arguments to make, but evidently any solution has to favour just one of them. The two basic arguments of the retentionists regarding Britain's title of possession and the passage of time have proved to be weak and they are therefore unconvincing. On the side of morality based arguments it has also been concluded that preservation and safety are no longer viable arguments since Greece is able to provide both. However, these arguments were once more presented by the British government as a response to Lord Jenkins' question and plea for the return of the Parthenon Marbles when it was brought before the House of Lords. On 18 January 1996 this discussion took place and the same ethical issues, as the ones that were rebutted in this article, were raised. In spite of the flimsiness of these arguments the British government made it clear that it had no intention of returning the Marbles.

Nevertheless, the Parthenon Marbles case is not only a legal and moral one, but it also touches the heart of the Greek nation. Characteristic in this respect are the words of the former Greek Minister of Culture, Melina Mercouri:

"This is our history ..." (San Francisco Chronicle, 26 May 1983, p 26)

"(T)hey are the symbol and the blood and the soul of Greek people ... (W)e have fought and died for the Parthenon and the Acropolis ... (W)hen we are born, they talk to us about all this great history that makes Greekness ... (T)his is the most beautiful, the most impressive, the most monumental building in all Europe ..." (New York Times, 4 March 1984, p 9).

Even J H Merryman agrees that "if the matter were to be decided on the basis of direct emotional appeal, the Marbles would go back to Greece tomorrow" (Merryman 1983, p 759). As has been shown above even if the matter were to be decided on the more tangible

grounds of law, Greece would still have a strong case. And after all, law cannot be considered in isolation. If it is to fulfil its natural role it has to be blended in with the realities and the real life in which it finds its roots and from which it is destined to be an emanation.

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Footnotes

(1) The Parthenon is the central building of the Acropolis of Athens. It is the most representative temple of the High Classical period of the Greek art. It was built in 488 B.C., during the Golden Century of Pericles (famous statesman at the period of Athenian Democracy), by the architects and sculptors Phidias and Ictinus. It was a temple in Doric style which succeeded in a unique way to combine optimism, quality, symmetry and simplicity. The whole work took sixteen years to be completed. The basic material used for its construction was Pentelican Marble. The pillars were made of marble as well as the sculptures which decorate it. There were no separate decorations attached to it. The pillars, the pediments, the frieze and the metopes were an integral part of the whole structure and the ornaments were sculptured on them. [Back to text.](#)

(2) It is worth mentioning here that the denuding of one of the most important cultural sites of the world by Elgin lead the French to associate his name with a form of cultural vandalism (Elginisme). [Back to text.](#)

(3) Quoted from the translation of the Italian text which Dr Hunt submitted to the 1816 Parliamentary Committee. [Back to text.](#)

(4) See Mr Best's speech in the June debate of the Parliamentary Committee on the purchase of the Marbles. [Back to text.](#)

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An Introduction to the Washington Conference Principles on Nazi-Confiscated Art (LAW965 A)

Professor Felix Uhlmann (Spring 2024)

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