



**PREMIER  
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Commission pour l'indemnisation des victimes  
de spoliations intervenues du fait des législations  
antisémites en vigueur pendant l'Occupation

# **Vingt ans de réparation des spoliations antisémites pendant l'Occupation : entre indemnisation et restitution**

Colloque organisé par  
la Commission pour l'indemnisation des victimes de spoliations intervenues  
du fait des législations antisémites en vigueur pendant l'Occupation (CIVS)  
le 15 novembre 2019 à Paris

# In search of 'just and fair' solutions (Prof. Dr. Matthias Weller's contribution to the symposium organized by the CIVS in Paris, on November 15, 2019)

(seul le prononcé fait foi)<sup>1</sup>

## 1. The challenges of rendering justice

"Just and fair solutions" – this is what Principle No. 8 of the "Washington Conference Principles on Nazi-Confiscated Art"<sup>2</sup> requires the participating states to achieve:

*"If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case."*

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

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

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

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<sup>1</sup> La vidéo de cette intervention est consultable à l'adresse :

<https://www.documentation-administrative.gouv.fr/adm-01859429v1>

<sup>2</sup> Also referred to as the "Washington Principles", <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/> (last accessed on 01/04/2020).

## 2. Towards a Restitution Culture

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

*"[...] the restitution of property looted from the Jewish population is a work of both justice and humanity whose moral and political meaning by far exceeds the material assets in question. It must become, before the eyes of France and the world, one of the great tangible manifestations of the reestablishment of the rule of law and republican legality."*<sup>3</sup>

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

## 3. Reconciling competing equities of ownership

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

Stuart E. Eizenstat, in his explanations of the Principles at the Washington Conference in 1998,<sup>4</sup> emphasises:

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

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<sup>3</sup> Cited from Mission d'étude sur la spoliation des Juifs de France, Rapport général, Paris 2000, p. 12: "[...] la restitution des biens spoliés aux israélites est une œuvre à la fois de justice et d'humanité dont la signification morale et politique dépasse de beaucoup les valeurs matérielles en cause. Elle doit être, aux yeux de la France et du monde, une des grandes manifestations tangibles du rétablissement du droit et de la légalité républicaine" (translation by the author).

<sup>4</sup> Stuart Eizenstat, In Support of Principles on Nazi-Confiscated Art. Presentation held at the Washington Conference on Holocaust-Era Assets in Washington DC, 3 December 1998, <http://fcit.usf.edu/holocaust/resource/assets/art.htm> (last accessed on 01/04/2020).

#### 4. Five Commissions “to assist in addressing ownership issues”

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

*“10. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.*

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

Five of the participating 44 states implemented these recommendations and entrusted national restitution commissions with the challenging task of establishing just and fair solutions in each particular case. These states are (in alphabetical order): Austria<sup>5</sup>, France<sup>6</sup>, Germany<sup>7</sup>, the Netherlands<sup>8</sup> and the United Kingdom<sup>9</sup>. Some comparative observations may appear appropriate:

#### 5. Procedural Aspects in Comparison

First of all, it seems fair to state that each of the commissions consists of members with relevant expertise and a reputation in the field. The German commission, for example, has always been presided by a former president of the Federal Constitutional Court of the Federal Republic of Germany, a function that certainly trains for the “*delicate process of reconciling competing equities*”. The other commissions are likewise presided by highest ranking and experienced judges or law professors of outstanding scholarly reputation. Furthermore, each commission gathers interdisciplinary expertise, such as in the fields of history, history of art, legal theory and philosophy and includes leading practitioners from the museum world and the art trade. Thus, each of the commissions appears to work with a “*balanced membership*” in the sense of Principle No. 10, although there are differences in detail. For example, the German commission has recently included a member with an international background in order to increase diversity. At the same time, none of the commissions makes use of party-appointed members or “community representatives”. This makes sense because the commissions work on a permanent basis, all panel members are required to act in absolute neutrality and to proceed in a non-adversarial manner.

Regarding the differences, it is crucial to remind ourselves of the Preamble of the Washington Principles according to which “*among participating nations there are differing legal systems and*

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<sup>5</sup> Kunstrückgabebeirat.

<sup>6</sup> Commission pour l’indemnisation des victimes de spoliations intervenues du fait des législations antisémites en vigueur pendant l’Occupation (CIVS).

<sup>7</sup> Beratende Kommission im Zusammenhang mit der Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes, insbesondere aus jüdischem Besitz (Beratende Kommission).

<sup>8</sup> Adviescommissie Restitutieverzoeken Cultuuroederen en Tweede Wereldoorlog (Restitutiecommissie).

<sup>9</sup> Spoliation Advisory Panel.

*that countries act within the context of their own laws*". Thus, differences are inevitable and differences are not *per se* deficiencies.

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

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

Another difference relates to transparency. The British, the Austrian and the Dutch commissions each publish their recommendations on the internet; the *Restitutiecommissie* even provides English translations – examples of best practices. In addition, the *Restitutiecommissie* publishes press releases in both Dutch and English language to inform the public about the relevant facts of a case. The French commission has not yet started publishing its decisions. The German *Beratende Kommission* publishes its recommendations as well. However, the early publications merely consisted of summarized press releases, sometimes very short. By now, the full text of the recommendation is made available online in German followed by an English translation. However, as was explained above, the German commission is only approached in exceptional circumstances, and most claims are settled bilaterally. Unfortunately, there is no uniform practice to publish these settlements. Some museums publish press releases; others do not inform the public at all, sometimes upon request by the claimant. It is intuitive to understand that the claimant must be protected to the fullest extent possible. On the other hand, a convincing restitution culture needs the public to participate.<sup>10</sup> Therefore, decisions on restitution claims should be published and comprehensively reasoned. The identity of the claimant may be protected by reference to "claimant AA" and "claimant BB", as it is the practice in the Netherlands. All commissions fully respect data protection rights and publish the names of the claimants only upon their

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

express prior consent. Claimants from the United States and the United Kingdom are anyway used to seeing their names in publicly accessible court judgments.

## 6. Decisions in Comparison

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

Here, we will be looking at different outcomes on the same subject-matter, namely on the controversial issue of “*Fluchtgut*” or “flight-related sales of goods” (“flight goods”). These concern sales of artworks by formerly persecuted persons outside the sphere of Nazi power in safe states after their emigration in order to raise money for their living. What is a just and fair solution in such cases? The commissions have come to different conclusions:<sup>11</sup>

The German *Beratende Kommission* was the first to deal with this issue in 2005.<sup>12</sup> The case concerned Julius Freund who had managed to transfer his art collection to Switzerland at the end of 1933. Julius and his wife Clara emigrated from Germany and arrived in the UK in 1939. After Julius’ death in 1941, Clara needed money to cover her living expenses and sold the collection at the Gallery Fischer in Luzern in 1942. The works in question were acquired by the German Reich to become part of the so-called *Sonderauftrag Linz* (Special Assignment Linz). The German commission decided in favour of restitution, but was partly criticised for doing so. One of the arguments put forward was that the scope of the early post-war restitution legislation by the Allied Forces, Military Government Law No. 59 of 1947 for the US occupied zone in Germany and its corresponding laws in the British and French Zones, did not extend to “extraterritorial” sales. The implementation of the Washington Principles in Germany indeed follows the lines of this old legislation created by the US Military Government which, in principle, is favourable to the claimants. The quite far-reaching presumption for a forced sale that is applied in today’s recommendations by the German *Beratende Kommission*, for instance, directly derives from Article 3 of the US Military Government Law No. 59. In the case of Julius Freund, there would not have been a claim for restitution under this Law.

In 2006 and 2013, the Austrian *Kunstrückgabebeirat* decided against restitution in the case of George Grosz<sup>13</sup>, as well as in 2008 in the case of Hugo Simon<sup>14</sup>. The artist George Grosz handed over the work in question to the art dealer and collector Alfred Flechtheim in 1931. Flechtheim was persecuted by the Nazis at an early stage because of his Jewish background, whereas Grosz was defamed because of his political attitude. Flechtheim emigrated from Germany to England in 1933. Flechtheim intended to sell the painting in question on the art market in Amsterdam in 1936. After Flechtheim’s death in 1937 the painting was auctioned off in the Netherlands. The second recommendation from 2013 concerns the German art

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<sup>11</sup> The following case notes are based on the facts as established by the respective commissions.

<sup>12</sup> Pressemitteilung der Bundesregierung Nr. 19/05 vom 12. Januar 2005.

<sup>13</sup> Kunstrückgabebeirat, Beschluss vom 29. März 2006.

<sup>14</sup> Kunstrückgabebeirat, Beschluss vom 21. November 2008.

collector Hugo Simon who suffered persecution because of his Jewish descent. After his flight to France in 1933, he gave his art collection to the Gallery Fischer in Luzern. The two paintings in question were not sold, but taken by Theodor Fischer himself. Through an arrangement with Karl Haberstock, one of Hitler's purchasers for the so-called Führermuseum, Fischer organised an exchange deal with the *Österreichische Galerie (Belvedere)* concerning the works in question. The reasoning in all of these cases was that even though there may have been a line of causality between the claimant's persecution and the loss of the relevant property, the loss took place outside the sphere of Nazi power. In 2016, the Austrian commission had to decide a case relating to flight-related sales, this time concerning works from the collection Julius Freund. The Austrian commission, based on the same facts as the German case of Julius Freund in 2005, decided not to recommend restitution.

In 2009, the Dutch *Restitutiecommissie* had its first case of flight-related sales.<sup>15</sup> Richard Semmel was a German industrialist and art collector of Jewish descent who fled from Germany to the Netherlands in 1933 and settled in New York in 1940. He and his family experienced the pressure of persecution directly after the Nazi regime had taken over in 1933. Richard Semmel was persecuted because of his Jewish background but also for his involvement in the German Democratic Party (*Deutsche Demokratische Partei*). After his escape from Germany in April 1933, he sold parts of his art collection at the auction house of Frederik Muller & Cie in Amsterdam. The commission held: "*Semmel lost possession as a result of circumstances directly related to the Nazi Regime*" and thus recommended restitution.<sup>16</sup> However, in a later decision in 2013 on four other objects from sales of parts of the Semmel collection, the *Restitutiecommissie* decided against restitution,<sup>17</sup> except for one item.<sup>18</sup>

In 2012, the *Spoilation Advisory Panel* in the United Kingdom had to come to a decision about flight-related sales in the case of Otto Koch.<sup>19</sup> Otto Koch died in 1919. Otto's widow Ida married Emil Netter in 1930. Emil died in 1936. Otto Koch had been a collector of watches and clocks, which Ida inherited. She managed to bring 161 watches and clocks of this collection to England when she emigrated which were eventually sold by Christie's in London in June 1939. The panel assumed – on a balance of probabilities – that this was a "forced sale" in principle, but nonetheless held that

*"[...] the sale is at the lower end of any scale of gravity for such sales. It is very different from those cases where valuable paintings were sold, for example, in occupied Belgium to pay for food or where all assets had to be sold in Germany in the late 1930s to pay extortionate taxes. The sale was not compelled by any need to purchase freedom or to sustain the necessities of life."*

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<sup>15</sup> Restitutiecommissie, RC 1.75, 1 July 2009.

<sup>16</sup> Op.cit., at para. 7.

<sup>17</sup> Restitutiecommissie, RC 3.127, RC 3.128, RC 3.131.

<sup>18</sup> Restitutiecommissie, RC 3.126.

<sup>19</sup> Spoilation Advisory Panel, Report in respect of 14 clocks and watches now in the possession of the British Museum, London (HC 1839).

In 2014, the German commission dealt with its next case on flight-related sales, this time in the case of Clara Levy.<sup>20</sup> Clara Levy had managed to emigrate to Luxembourg in order to join one of her children. She had managed to transfer large parts of her belongings to Luxembourg, including 78 paintings. Clara died in 1940 and passed on her assets to her four children. One of these children, her daughter Else Bergmann, had emigrated to New York in 1938. Part of Clara's household stored in Luxembourg was shipped to New York, and on a quite clear balance of probabilities the painting in question, Lovis Corinth's "Drei Grazien" ("Three Graces") from 1904 was shipped out as well. The remaining parts of the assets were taken by the Nazis. In 1941, the "Three Graces" were put up for public auction and sold to Curt Valentin, Buchholz Gallery, New York. In 1949, the *Kunstmuseum* in Bern, Switzerland, acquired this painting and resold it to the Bavarian State Gallery in 1950. The German commission held: no forced sale, since

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

In 2016, the German commission was seized in the case of Alfred Flechtheim in connection with an auction in London.<sup>21</sup> It reasoned as follows:

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

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

In March of 2019, the most recent German recommendation on *Fluchtgut* was handed down in the case of Max Emden.<sup>22</sup> Max Emden was the founder of a chain of leading department

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<sup>20</sup> Beratende Kommission, recommendation regarding the painting "Three Graces" by Lovis Corinth.

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

<sup>22</sup> *Beratende Kommission*, recommendation in the case of Dr. Max James Emden vs. The Federal Republic of Germany, available at:



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

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

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

In the case of France, a territorial restriction like the one in Austria has applied until recently. Under this restriction, the CIVS did not recommend compensation or restitution in kind if the relevant loss of assets occurred outside the European territory of France (including the regions held under Nazi control in the north) or assimilated territory (Algeria and Tunisia). Rather, restitution or compensation for the loss of assets inflicted by German authorities or the so-called “Vichy Regime” could only be obtained as far as the relevant actions had taken place within French territory. However, under the new organization of 2018 for the restitution of cultural property spoliated due to national socialism, certain changes on this matter were introduced.

## **7. Conclusion: Diverging notions of “justice”**

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

In order to further support and structure reflections in this sense, the German Government financed the project of a „Restatement of Restitution Rules” on Nazi-Confiscated Art, an academic research project that has started in April 2019 and aims at distilling rules from the practice of restitution in the jurisdictions of the five commissions presented here.<sup>23</sup> The idea of a restatement similar to the US-American “Restatements of the Law” by the American Law Institute (ALI) was developed in a presentation at the first of the conferences of the five

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[https://www.kulturgutverluste.de/Content/06\\_Kommission/EN/Empfehlungen/19-03-26-Recommendation-Advisory-Commission-Emden-Germany.pdf?\\_\\_blob=publicationFile&v=5](https://www.kulturgutverluste.de/Content/06_Kommission/EN/Empfehlungen/19-03-26-Recommendation-Advisory-Commission-Emden-Germany.pdf?__blob=publicationFile&v=5) (last accessed on 21/09/2019).

<sup>23</sup> For further information see <https://www.jura.uni-bonn.de/professur-prof-dr-weller/research-project-restatement-of-restitution-rules/> or contact us: [restatement@jura.uni-bonn.de](mailto:restatement@jura.uni-bonn.de). For an account of the project’s concept see Matthias Weller/Anne Dewey, *Warum ein “Restatement of Restitution for Nazi-Confiscated Art”?*, *Kunst und Recht (KUR)* 2019, pp. 170 et seq.

commissions at The Hague in 2012.<sup>24</sup> It seems to fit perfectly in the findings of the 2017 London conference of the five commissions “70 Years and Counting: The Final Opportunity?”

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

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

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<sup>24</sup> Matthias Weller, Key elements of just and fair solutions – the Case for a Restatement of Restitution Principles, in: Evelien Campfens (ed.), “Fair and just solutions? Alternatives to litigation in Nazi looted art disputes: status quo and new developments”, Den Haag 2015, pp. 201 et seq.