



# Newsletter

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# Why a “Restatement of Restitution Rules for Nazi-Confiscated Art”?

## Observations on the “weighing of interests” in light of the Kohnstamm Report

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### I. Introduction

To mark its tenth anniversary on Tuesday 27 November 2012, the Dutch Restitutions Committee staged an international symposium at the Peace Palace in The Hague.<sup>1</sup> At this conference, the idea of a restatement of restitution principles and rules was presented for the first time.<sup>2</sup> It took until 2019 to get started<sup>3</sup> with a team of eight research fellows,<sup>4</sup> financed by the Commissioner for Culture and Media of the Federal Government of Germany upon application for a research grant.

Our project is looking at the restitution practice as it has developed since the Washington Principles. From the many decisions and recommendations,<sup>5</sup> recurring principles and rules determining the practice will be “distilled”. Explanations and comments will be added. Selected cases that support or contradict a point will be briefly summarised, including, e.g. outdated positions and new trends. This is a technique well-known from the US-American Restatements of the Law by the highly

esteemed American Law Institute (ALI).<sup>6</sup> Its method perfectly functions in an area of justice outside the patterns of the applicable law as well, in order to make visible the “grammar”<sup>7</sup> of justice in our field, or, to put it in the words of an eminent German legal philosopher and one of the (former) members of the German Advisory Commission, the structure of the relevant “relations of justice” (“*Gerechtigkeitsverhältnisse*”).<sup>8</sup>

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**“One of the central take-aways for our project was that providing insights from an international and comparative perspective helps evaluating and reacting adequately to points of controversy.”**

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Restatements do not produce any binding rules. They are scholarly texts, infused by expertise from practice, as it currently stands. They aim at providing a reliable and persuasive tool for orienting, comparing, evaluating, guiding and further developing the practice.<sup>9</sup> As opposed to model rules that present a set of “best practice” rules (as perceived by their drafters), a restatement takes account of the present state of practice. A restatement does not raise the claim that the current practice lives up to an agreed idea of best practice but its findings about the reality may be taken as a starting point for informed and thus meaningful discussion for normative improvement.

Our restatement project is based on a comparative perspective.<sup>10</sup> It focuses primarily on the practice in five countries. These five countries are Germany, Austria, the Netherlands, France and the United Kingdom. Why these five? Because (only) these five established a commission<sup>11</sup> in the sense of Washington Principles 10 and 11.<sup>12</sup> In addition, our Restatement will include Switzerland, as there is a (limited, and unfortunately only partly public, but still significant) practice of restitution outside state court litigation, and evidently Switzerland lies at the heart of quite a number of cases. Selected cases from elsewhere may be occasionally considered on an ad hoc basis.<sup>13</sup> Other jurisdictions may be included fully and systematically in follow-up editions of the first version.<sup>14</sup> Obviously, a restatement

is never perfect and never finished. Rather, it is “living” and constantly evolving – as practice, theory, positions and opinions underlying and constituting its rules.

## **II. The Talk on the Kohnstamm Report**

Against this background and motivated to better understand the current controversies and developments in the Netherlands, we recently suggested organising a webinar on the Kohnstamm Report.<sup>15</sup> It took place on 3<sup>rd</sup> February 2021, co-hosted by the Forschungsstelle Provenienzforschung, Kunst- und Kulturgutschutz at the Rheinische Friedrich Wilhelms University of Bonn, Germany, and the Center for the History of the Dutch Jewry at the Hebrew University of Jerusalem.<sup>16</sup> Once more our sincere thanks to Alfred Fass and the Center to join in and to co-moderate and co-host our event so perfectly and in such a good spirit.

All of us felt greatly honoured to receive positive responses to our invitations to the chair of the Kohnstamm Committee, Jacob Kohnstamm<sup>17</sup>, and one of its members, Rob Polak, for their key notes, as well as to two further panellists, Gert-Jan van den Bergh<sup>18</sup> and André Boers.<sup>19</sup> More than 300 participants from all over the world followed the

event. Nearly 60 questions were submitted during the discussion in the chat. We were able to answer some of them directly in the session, some others in follow-up communications.<sup>20</sup>

### III. Weighing of interests in a theoretical and comparative context

One of the central take-aways for our project was that providing insights from an international and comparative perspective helps evaluating and reacting adequately to points of controversy. In the following, we will briefly illustrate the merits of such a perspective by reflecting on a point that relates to a core issue in the Kohnstamm Report, the “weighing of interests”.

#### 1. Theoretical observations on “justice”

From a theoretical viewpoint, weighing of interests is inherent to any notion of “justice”. Since Aristotle it is generally accepted that justice has to do with equality – “treat like cases alike” – and proportionality – “justice is .. something proportional”.<sup>21</sup> Proportionality requires putting positions and underlying interests into proportion. Washington Principle No. 8 takes this up and tells us that “*just and fair solutions*” include “*recognizing this may vary according to the facts and circumstances surrounding a specific case*”. Stuart Eizenstat explained in the Conference Materials on this very point: “*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 - the subject of the eighth and ninth principle*”.<sup>22</sup> Reconciling competing equities

of ownership is weighing of conflicting interests.<sup>23</sup>

Eizenstat went on as follows: “*We can begin by recognizing this as a moral matter -- we should not apply the ordinary rules designed for commercial transactions of societies that operate under the rule of law to people whose property and very lives were taken by one of the most profoundly illegal regimes the world has ever known. In this regard, the U.S. Government applauds the courageous decision of the Government of Austria to return art held in its federal museums and collections to surviving pre-war owners and their rightful heirs notwithstanding legal defenses. We hope other European governments will follow Austria's example in their own way, so they can complete the restitution process their predecessors left in abeyance after the war.*”

We fully agree. Transcending applicable law towards moral standards in order to produce just and fair solutions represents a weighing of interests, if not the most fundamental weighing of interests involved, in favour of those who would not succeed with their claims under legal standards. Thus, the point of controversy cannot be whether there should be a

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weighing of interests or not. There always is, once we embark on decisions about “justice” as the core issue of any moral matter. Rather, the point must be: how do we do it.

### 2. Observations on the Dutch practice

At the conference “20 years Washington Principles: Roadmap for the Future” in Berlin 2018,<sup>24</sup> Eizenstat criticized the then Dutch practice.<sup>25</sup> This critique reacted to Article 3 of the Regulations of the Restitutions Committee and the practice evolving thereunder.<sup>26</sup> The Regulations were introduced in 2007 for binding opinions on objects held by non-state holders, i.e. all objects outside the NK collection and the “general” state collection, and Article 3 included a balancing of interests and listed a number of aspects to be taken into account. Later, the approach in Article 3 was extended to objects in the state collection (2012) and the NK collection (2015).

The list of relevant aspects for balancing included, *inter alia*, an interest of the museum in keeping its collections.<sup>27</sup> The Kohnstamm Report recommended deleting this aspect.<sup>28</sup> Additionally, the Committee recommended, *inter alia*, deleting the aspect of the significance of the work to the claimant,<sup>29</sup> while other aspects relevant for the assessment of the moral strength of the claim remained in place. According to the Kohnstamm Committee this “streamlined” mode of weighing interests should apply once the Restitutions Committee assessed it to be “highly plausible” that the claimant is the original owner or the heir of that original owner.<sup>30</sup> Further, it must be assessed to be “sufficiently plausible” that the loss of the original ownership was involuntary due to circumstances directly related to the Nazi regime.<sup>31</sup> Obviously, the attributes “sufficient”

and “directly” introduce elements of evaluation and thus an (implicit) weighing of aspects and thereby certain interests of the case at hand (although this is not the kind of weighing of interests that gave rise to the controversies about the Dutch assessment framework). In turn, where there is no high plausibility for ownership or no sufficient plausibility for a loss or where that loss is not sufficiently directly related to the Nazi regime, in the view of the Kohnstamm Committee there is no claim – except “where the specific details of the case provide compelling reasons” “to deviate”, by way of exception, “from one or more elements” of the proposed assessment framework.<sup>32</sup> Obviously, this introduces an overall residual weighing of interests. Finally, “mediatory solutions” as proposed by the Kohnstamm Report in case of good faith acquisitions of objects other than those in the NK collection outside the general state collection contain another element of reconciling or weighing competing interests.

Following the publication of the Kohnstamm Report, the Minister for Education, Culture and Science, in her letter of 12 March 2021, supported the Kohnstamm Committee’s recommendations and stated that the interest of the applicant for the work as well as the interest of the holder and public collection for the work and the extent to which the applicant has made an effort to retrieve the work should not play a role anymore when weighing up interests.<sup>33</sup> However, this statement does not seem to exclude the possibility that other elements still do.

As a result of the Kohnstamm Report and the Minister’s response, a new Decree Establishing the Restitutions Committee, taking effect from 22 April 2021, replaced the existing Decree.<sup>34</sup> Furthermore, the Restitutions Committee changed its procedure and issued new Regu-

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lations. These Regulations are now applicable for both advices and binding opinions, i.e. for all proceedings before the Committee.<sup>35</sup> As part of these changes, the express mention of a museum’s interest in keeping its collection as a balancing aspect was deleted. The 2021 Decree contains an assessment framework for assessing the moral strength of claims: If the requirements of “original ownership” and “involuntary loss of possession” are met, unconditional restitution takes place with regard to any works from the entire state collection. With regard to binding opinions on objects in non-state collections, the criteria of “acquisition in good faith” must be considered. If the holder of the cultural item did not act in good faith or does not invoke this criteria, the object is to be restituted unconditionally. If the holder did act in good faith, the consequence can still be an unconditional restitution or, alternatively, will be a mediatory solution.

To develop mediatory solutions, the Committee must act within Article 8 of the Washington Principles to “achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case”. Given the broad wording of the provision and the statement of the Restitutions Committee in the press release on 2021 Decree, that „all the circumstances in the case can be taken into account in the case of a mediated solution [...]”<sup>36</sup>, it is clear that there will be still a balancing of interests in the future in these cases. In addition, the Kohnstamm Report’s recommendation to allow for the deviation from the standard restitution

rules in exceptional cases is also reflected in the new assessment framework: Paragraph 5 states that the Committee may deviate from one or more of the procedures in this assessment framework in order to achieve a just and fair solution as referred to in Article 8 of the Washington Principles, if particular circumstances provide substantial reason to do so.

The foregoing assessment of the genesis and current state of the Dutch assessment framework shows much concern and controversy about which aspects should be included in a weighing of interests and which should be excluded. Indeed, the point must be: how do we do it. This leads back to the initial question we posed above: Is weighing of interests as such a unique feature of the Dutch practice and as such to be criticised? Our theoretical position is clear: balancing of interest is an inherent element of any decision on justice.

Our comparative research indicates that all committees embark on weighing of interests in some way. Some do it expressly and according to their assessment frameworks, like the Dutch committee. Likewise the UK committee: section 14 of the Panel’s Terms of Reference reads: “[t]he Panel’s paramount purpose shall be to achieve a solution which is fair and just *both* to the claimant and to the institution”.<sup>37</sup> Some committees do it sometimes expressly but most of the time implicitly (the German committee<sup>38</sup>), some do it in certain areas (the French committee) and some do not do it themselves because their assessment framework has done it for them comprehensively under a codificatory approach (Austrian com-

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mittee). It goes beyond the scope of this brief note to go into details, and of course, the respective approaches can only be fully understood in their respective normative contexts. We will further elaborate on this point in our Restatement. In the following of this text, we will restrict ourselves to some comparative observations on the German committee’s recent practice that we find remarkable, as it appears to be in direct opposition to the latest trends in the Netherlands how to weigh interests:

### **3. Observations on the German practice**

In Germany, the Government laid down some rules for assessing claims in its “Guidelines” (“*Handreichung*”).<sup>39</sup> These Guidelines provide for a nucleus of a framework that elaborates mostly on sales but of course includes takings by state organs. In respect of sales, a presumption of an involuntary loss applies for persecuted persons. This presumption can be rebutted on narrowly defined grounds. Nothing is said about any balancing of interests. According to § 6 (3) lit. b of the Rules of Procedure,<sup>40</sup> the criteria for the Commission’s discussions and recommendations shall be these Guidelines. However, § 6 (4) adds: “*In*

*its discussions and recommendations the Commission shall take particular account of: a. the circumstances resulting in the loss of cultural property, b. the circumstances in which the cultural property was acquired and the research conducted concerning its provenance.”*

Against this somewhat opaque and abstract background, the German Commission, in its recommendation of 1 July 2020,<sup>41</sup> explicitly embarked on a weighing of interests: “*The legal assessment of the facts is clear: the applicants could not lose ownership of the contested painting because they never had absolute ownership [since the painting had been transferred to the persecuted person as collateral to secure a loan of that person to the borrower, i.e. as property that from the outset was destined to be retransferred after repayment of the loan]. From a legal standpoint, restitution of the painting is therefore impossible. Nevertheless, the Advisory Commission in its search for a ‘just and fair solution’ in line with the Washington Principles is not limited to the legal assessment. Rather, it is specifically called upon to consider ethical and moral aspects in order to reach a recommendation that addresses the particulars of each individual case”.*<sup>42</sup>

First of all, it must be observed that original ownership on the part of the claimant as per-



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secuted person or as heir of the latter is not just a “legal standpoint” but an issue of fundamental relevance to any moral consideration about the legitimacy of a claim for restitution under the Washington Principles and its national implementations.<sup>43</sup>

In its weighing, the German Advisory Commission included the following aspect: “[t]he applicants memorably described the great symbolic significance attributed to the painting by the family”.<sup>44</sup> This aspect strikingly resembles “the significance of the work to the applicant” which was contained in Article 3 lit. e of the former Dutch Regulations. This very aspect, however, is one of those that the Kohnstamm Committee recommended removing as inadequate after long controversies and the Dutch Minister again supported this suggestion.<sup>45</sup>

The German Advisory Commission went on: “The Commission also takes into account that the applicants’ interests are not opposed by equally valid concerns of the respondent. The respondent received the painting as part of a larger purchase. The acquisition ... was thus not based on a deliberate curatorial decision; the painting is not part of the collection rationale and had not previously been exhibited”.<sup>46</sup> This aspect strikingly resembles “the significance of the work to the owner” which was contained in Article 3 lit. f of the former Dutch Regulations. As already discussed,<sup>47</sup> this aspect is another one of those that the Kohnstamm Committee recommended removing as inadequate and the Dutch Minister again supported this suggestion.

Finally, the German Advisory Commission summed up: “... a comprehensive *weighing of all relevant concerns* ultimately prompted the recommendation to return the painting”.<sup>48</sup>

Was the German Commission aware of the opposite direction of the discourse in the

**“Act only according to that maxim whereby you can, at the same time, will that it should become a universal [moral] law”**

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Netherlands on these issues? More importantly, what will be the approach of the German Commission in a future case where there is little or no significance of the artwork to the claimant and a strong significance to the holder? It seems that the German Committee has manoeuvred itself into a difficult position by introducing these criteria outside its assessment framework on an ad hoc basis: theoretically, the Commission would have to use its own criteria in such a case as a matter of equality. Then, however, these criteria would work against the claimant.<sup>49</sup> Alternatively, the Commission would have to ignore its own criteria, as soon as they work against a claimant. Applying or ignoring criteria with a view to one category of parties would mean violating a fundamental principle of morality (and law), which is “reciprocity” or “universalisation”. Be it allowed to remind ourselves of Immanuel Kant’s “categorical imperative” (“*kategorischer Imperativ*”), the central concept of his deontological moral philosophy: “Act only according to that maxim whereby you can, at the same time, will that it should become a universal [moral] law”.<sup>50</sup> “Universality” in this sense means that maxims like “consider the significance of the work for the claimant in a weighing of interests” or “consider the significance of the work for the holder in a weighing of interests” should only guide a commission to the extent that these criteria can be generalised.<sup>51</sup> To put it differently: either we consider a criterion, or we do

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not, but whatever we decide to do, we must do it consistently, reciprocally, in an equal manner.

Equality extends to the international scene. Of course, the Preamble of the Washington Principles "*recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws*". There are indeed significant and legitimate differences amongst the national implementations. However, when it comes to concrete points of evaluation of the moral strength of a claim – e.g. the significance of the work to the claimant, the significance of the work to the museum – a contradictory practice undermines the legitimacy of each conflicting decision. As it seems, the German Commission will be confronted with this challenge soon.<sup>52</sup>

To sum up, we note once more that balancing of interests is everywhere, be it expressly (like in this case, in this respect unique in the German practice and conducted in a questionable way), be it implicitly (like in many other German and international cases handled by the five Commissions). This cannot be a surprise as such balancing is inherent to any kind of decisions on justice. Otherwise, a "justice relation" ("*Gerechtigkeitsverhältnis*") cannot be conceptualised meaningfully,<sup>53</sup> because evidently such a relation, like any "relation", necessarily involves two sides.

Rather, the point must be: how do we do it. In regard to this central point, the new Dutch approach appears more promising than the current German practice.

#### **IV. Conclusion**

"Our first and foremost thoughts must be with the victims of the Holocaust and their families".<sup>54</sup> We want to see justice. Whenever we criticize an aspect of current debate or practice we do it in order to strengthen the overall legitimacy of the claimants' just cause to get to just and fair solutions. Theoretical and comparative research show that justice comes about in assessment frameworks, combined with evaluations for openly framed requirements and a weighing of interests where appropriate, including adequate aspects only, but this weighing must be conducted in a consistent and reciprocal manner. Otherwise, it does not produce justice. Some jurisdictions emphasise the first limb of this formula, the assessment framework, and reduce the second limb, evaluation and weighing in the concrete case, to a minimum, if not to zero (Austria), others are somewhere in between (UK, France, the Netherlands), others are floating ad hoc and without explanation between the two limbs from case to case, partly outside their own assessment framework (Germany).

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Sometimes, criteria are introduced against settled trends in other jurisdictions, criteria that had turned out as problematic with good reasons. It is dissatisfactory if they reappear somewhere else unexpectedly and without any reflection about their fundamental critique.<sup>55</sup> A comparative approach helps avoiding such antinomies and informs each of the jurisdictions involved with valuable input from the experience of other jurisdictions. Commissions should include a comparative perspective in their reasoning. This would considerably strengthen the legitimacy of their recommendations.<sup>56</sup>

The German Commission has done so recently on the issue of good faith with a view to the practice (only) in Austria,<sup>57</sup> but unfortunately did not continue doing so in its latest recommendation on the issue of “Fluchtgut”<sup>58</sup> – despite a number of contradicting recommendations from other European commissions (to say nothing of its own and diametrically opposed recommendations in earlier cases<sup>59</sup>). Justice requires reasoning, thereby producing consistency, thereby producing predictability and, based thereon, reconciling competing equities of ownership or other stakes involved, i.e. an adequate balancing of interests.

## End notes

- 1 See Evelien Campfens (ed.), *Fair and just solutions – Alternatives to litigation in Nazi-looted art disputes: status quo and new developments*, Den Haag 2015.
- 2 Matthias Weller, *Key elements of just and fair solutions – the case for a restatement of restitution principles*, in *id.*, pp. 201 et seq.
- 3 For further information, see the project's website <https://www.jura.uni-bonn.de/professor-prof-dr-weller/research-project-restatement-of-restitution-rules/>.
- 4 Tessa Scheller, the co-author of this text, is one of them. She is responsible for the Netherlands in the project. The other team members are (in alphabetical order): Anne Dewey (Austria), Annika Dorn (UK), Charis Hahne (Germany), Hannah Lehmann (Switzerland), Johannes von Lintig (France), Antonetta Stephany (procedural theory), Leva Wenzel (legal and justice theory). All of them contributed with their respective expertise to this text.
- 5 So far, we have collected around 1.100 cases from publicly available sources and voluntary submissions of material and information to us. Around 500 of these cases come from Germany. Please consider contributing, as so many did already (restatement@jura.uni-bonn.de).
- 6 The American Law Institute (ALI) is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law, <https://www.ali.org/about-ali/>.
- 7 See e.g. Matthias Weller, *20 Jahre Washington Principles: Für eine Grammatik der Restitutionsgründe*, *Bulletin Kunst & Recht* 2018/2 – 2019/1, pp. 34 et seq.
- 8 Dietmar von der Pfordten, *Rechtsethik*, 2nd ed. Munich 2011, pp. 216 et seq. Dietmar von der Pfordten was a Member of the German Commission until recently, but seemed to have stepped down. The Commission's website only lists the current members (and does not seem to track changes in its composition), [https://www.beratende-kommission.de/Webs\\_BK/DE/Mitglieder/Index.html](https://www.beratende-kommission.de/Webs_BK/DE/Mitglieder/Index.html) (8 October 2021). Transparency and thus legitimacy would be increased by providing full information, including the duration of terms of former members of the commissions.
- 9 Continental European jurists are familiar with such works as "commentaries" on the law. Such commentaries take the rules of law and comment on them in light of practice and theory. If there is just practice (like in our field), rules that structure this practice along recurring points of contents must be formulated first. This is the task of our Restatement.
- 10 As the Restatements of the ALI are, when they look at the court practice in the 50 states of the USA under the respective state law, e.g. in matters of contract law.
- 11 See the participating five commissions in the Network of European Restitution Committees.
- 12 No. 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". No. 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."
- 13 As the American Law Institute (ALI) for its US-American Restatements of the Law does it, e.g. in respect to telling Canadian case law to the point in question.
- 14 Follow-up editions are issued by the American Law Institute on a regular basis, see e.g. the Restatement (Third) of Restitution & Unjust Enrichment of 2011, touching quite closely on issues relevant to our matters, but of course from a general and juridical perspective.
- 15 Committee for the Evaluation of the Restitution Policy for Cultural Heritage Objects from the Second World War ("Kohnstamm Committee"), *Striving for Justice*, 7 December 2020 ("Kohnstamm Report"), <https://www.raadvoorcultuur.nl/documenten/adviezen/2020/12/07/striving-for-justice>.
- 16 The event was part of the biannual lecture series "Bonn Talks on Art and Cultural Property Law" that was started in 2018 with a presentation by the chair of the German Beratende Kommission Professor Dr Hans-Jürgen Papier. Since then, the series has covered a number of topics relating to the restitution of Nazi-looted art. The title of the February event was "Striving for justice? The evaluation of the Dutch restitution policy in an international context: A talk about the 'Kohnstamm Report'". The event was moderated by the authors of this text, together with Alfred Fass as the representative of the Center. The Kohnstamm Committee, in the preparation of its Report, had invited both Alfred Fass and Matthias Weller to hearings.
- 17 Jacob Kohnstamm has been appointed Chair of the Dutch Restitutions Committee for a period of three years beginning 28 September 2021, <https://www.restitutiecommissie.nl/en/news/appointment-chair-rc/>.
- 18 Partner at Bergh Stoop & Sanders, Amsterdam.

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- 19 Chairman, Center for the History of the Dutch Jewry at the Hebrew University of Jerusalem.
- 20 The event was recorded and made publicly available at the youtube channel “Bonn Talks on Art and Cultural Property Law”, <https://www.youtube.com/watch?v=AjJsd9JfgSI&t=385s>.
- 21 Aristotle, Nicomachean Ethics, Book V, Chapter 5, p. 106, para 20 (1131a), translations from the German edition of Eugen Rolfes as edited by Günter Bien, Hamburg, 4th ed. 1985.
- 22 Stuart E. Eizenstat, Under Secretary for Economic and Business Affairs, In Support of Principles on Nazi-Confiscated Art, Presentation at the Washington Conference on Holocaust-Era Assets, Washington, DC, December 3, 1998, [https://1997-2001.state.gov/policy\\_remarks/1998/981203\\_eizenstat\\_heac\\_art.html](https://1997-2001.state.gov/policy_remarks/1998/981203_eizenstat_heac_art.html) (8 October 2021).
- 23 See also Kohnstamm Report, p. 27: „The balancing of interests applied by the committee is rooted in the Washington Principles“.
- 24 German Lost Art Foundation, 20 Years Washington Principles: Roadmap for the Future, 26 to 28 November 2018, [https://www.kulturgutverluste.de/Content/01\\_Stiftung/EN/Event-review/2018/Program-20-Years-Washington-Principles-Roadmap-to-the-Future.pdf;jsessionid=A9E-30E53B520D5D4DF9B9E1689AC8F3F.m0?\\_\\_blob=publicationFile&v=2](https://www.kulturgutverluste.de/Content/01_Stiftung/EN/Event-review/2018/Program-20-Years-Washington-Principles-Roadmap-to-the-Future.pdf;jsessionid=A9E-30E53B520D5D4DF9B9E1689AC8F3F.m0?__blob=publicationFile&v=2) (8 October 2021).
- 25 The transcript provided to the authors by claimants’ representatives reads: “The recent introduction of the ‘balance of interests’ is totally contrary to the Washington Principles. It is not sufficient to say that where there is a confiscation the balance will always be in the favour of the claimant. The whole point is that ‘just and fair solutions’ was not intended to focus on the interest of the museum in keeping collections. It was entirely to focus on the claimants’ just solutions.” This statement appears stricter in its approach than the explanations in the Conference Materials cited above at note 22 but this is not the point here. Rather, the point is which aspects should be relevant to balance interests adequately, as it is shown in the following of the main text.
- 26 On an insightful analysis (on a comparative basis) see Tabitha Oost, Oost, From “Leader to Pariah”? On the Dutch Restitutions Committee and the inclusion of the public interest in assessing Nazi-spoliated art claims, in: International Journal of Cultural Property, Volume 28, 2021, pp. 55 et seq.
- 27 Article 3 of the Regulations for opinion procedure under article 2, paragraph 2 and article 4, paragraph 2 of the Decree Establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War, Version 2019, <https://www.restitutiecommissie.nl/en/system/files/Regulations2019.pdf> (8 October 2021).
- 28 Id., at p. 28 et seq.
- 29 Id.
- 30 Kohnstamm Report, p. 35, Assessment Framework no. 2; see also Recommendations of the Ekkart Committee, April 2001, Recommendation no. 8, available at: [https://www.restitutiecommissie.nl/en/system/files/aanbevelingen%20Ekkart2001-ENG\\_0.pdf](https://www.restitutiecommissie.nl/en/system/files/aanbevelingen%20Ekkart2001-ENG_0.pdf) (8 October 2021).
- 31 For further fine-tuning of justice, the following presumption applied: sales of works of art by Jewish private persons in the Netherlands from 10 May 1940 onwards are treated as forced sales, unless there is express evidence to the contrary. The same principle applied in respect of sales by Jewish private persons in Germany and Austria from 1933 and 1938 onwards, respectively, Recommendations of the Ekkart Committee, April 2001, Recommendation no. 3, [https://www.restitutiecommissie.nl/en/system/files/aanbevelingen%20Ekkart2001-ENG\\_0.pdf](https://www.restitutiecommissie.nl/en/system/files/aanbevelingen%20Ekkart2001-ENG_0.pdf) (8 October 2021); see also Kohnstamm Report, p. 33, Assessment Framework no. 4; in the new Decree Establishing the Restitutions Committee, taking effect from 22 April 2021, this was even further extended to include all categories of loss.
- 32 Kohnstamm Report, p. 35.
- 33 Letter of the Ministry for Education, Culture and Science of 12 March 2021 to the Speaker of the Lower House, Reference 27221050 p. 4, [https://www.lootedart.com/web\\_images/pdf2021/Ministry%20for%20Education,%20Culture%20and%20Science%20letter%2010.3.2021.pdf](https://www.lootedart.com/web_images/pdf2021/Ministry%20for%20Education,%20Culture%20and%20Science%20letter%2010.3.2021.pdf) (8 October 2021).
- 34 Decree establishing a Restitutions Committee, 22 April 2021, available at: <https://www.restitutiecommissie.nl/wp-content/uploads/2021/07/Decree-RC-per22April2021.pdf>
- 35 Restitutions Committee Procedural Regulations 2021, 22 April 2021, available at: <https://www.restitutiecommissie.nl/wp-content/uploads/2021/07/RC-Regulations-per15July2021.pdf>.

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- 36 Press Release of the Dutch Restitutions Committee “New Decree Establishing the Restitutions Committee and Restitutions Committee Regulations”, 22 April 2021, available at: <https://www.restitutiecommissie.nl/en/news/new-decree-rc/>
- 37 Underlining added. See also Charlotte Woodhead, *Nazi Era Spoliation: Establishing Procedural and Substantive Principles*, *Art Antiquity and Law* 18 (2013), p. 167, at p. 176. See also e.g. *Spoliation Advisory Panel, Report HC 1839 of 7 March 2012 – Netter/British Museum*, para. 21: „Having concluded on balance that this was a forced sale, the Panel, nonetheless, considers that the sale is at the lower end of any scale of gravity for such sales“.
- 38 For further details see below.
- 39 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, Revised Version 2019, [https://www.kulturgutverluste.de/Content/08\\_Downloads/EN/BasicPrinciples/Guidelines/Guidelines.pdf?\\_\\_blob=publicationFile&v=8](https://www.kulturgutverluste.de/Content/08_Downloads/EN/BasicPrinciples/Guidelines/Guidelines.pdf?__blob=publicationFile&v=8) (8 October 2021). For a critical assessment see e.g. Matthias Weller, *Restitution nationalsozialistischer Raubkunst: Das deutsche Zurechnungsmodell unter der Lupe*, in: Peifer et al. (eds.), *Kultur, Kunst und Persönlichkeit – Festschrift für Haimo Schack zum 70. Geburtstag*, Tübingen, Mohr Siebeck, 2022, forthcoming.
- 40 Rules of Procedure of the Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property, as of 2 November 2016, [https://www.beratende-kommission.de/Webs\\_BK/EN/Rules-of-Procedure/Index.html](https://www.beratende-kommission.de/Webs_BK/EN/Rules-of-Procedure/Index.html) (8 October 2021).
- 41 Recommendation of the German Advisory Commission in the case of Heirs of A. B. ./. Bavarian State Painting Collections, 1st July 2020, available at: [https://www.beratende-kommission.de/Content/06\\_Kommission/EN/Empfehlungen/20-07-01-Recommendation-Advisory-Commission-B-BayerischeStaatsgemaeldesammlung.pdf?\\_\\_blob=publicationFile&v=3](https://www.beratende-kommission.de/Content/06_Kommission/EN/Empfehlungen/20-07-01-Recommendation-Advisory-Commission-B-BayerischeStaatsgemaeldesammlung.pdf?__blob=publicationFile&v=3) (8 October 2021).
- 42 Recommendation of the German Advisory Commission (note 40), at p. 4.
- 43 See e.g. Guidelines (“Handreichung”), p. 35: “necessary to provide evidence” (mitigated, of course, in light of Washington Principle No. 4, id.); Kohnstamm Report, p. 31: one of two “absolute requirements for restitution: the applicant must be the original owner or heir of the original owner”, mitigated, of course, in light of Washington Principle No. 4 to a reduced standard of “high plausibility”, see above. The other absolute requirement is involuntary dispossession, id. See also Matthias Weller, *Antinomien und andere Auffälligkeiten in der Spruchpraxis der Beratenden Kommission zur Restitution nationalsozialistischer Raubkunst* In: Nolte et al. (eds.), *Gestaltung der Informationsordnung – Festschrift für Thomas Dreier zum 65. Geburtstag*, Baden-Baden 2022, forthcoming.
- 44 Recommendation of the German Advisory Commission (note 40), at p. 4.
- 45 See above at note 28 and accompanying text.
- 46 Recommendation of the German Advisory Commission (note 40), at p. 4.
- 47 See above at note 27 and accompanying text.
- 48 Recommendation of the German Advisory Commission (note 40), at p. 5 (underlying added).
- 49 See above at note 21 on Aristotle’s paradigm of justice as equality.
- 50 Immanuel Kant, *Grundlegung zur Metaphysik der Sitten*, 1785, AA IV, p. 421, lines 7 and 8 (translation provided by the authors of this text).
- 51 See, for an adapted version integrated in his „discourse theory“ by e.g. Jürgen Habermas, *Moralbewusstsein und kommunikatives Handeln*, Frankfurt 1983, p. 77.
- 52 According to the press, a “German” version of the Lewenstein case will come up soon, <https://www.sueddeutsche.de/kultur/raubkunst-kommission-als-das-leben-noch-bunt-war-1.4845045> (8 October 2021).
- 53 See once more Dietmar von der Pfordten, *Rechtsethik*, 2nd ed. Munich 2011, pp. 216 et seq.
- 54 Matthias Weller, *Cross-border restitution claims of works of art and cultural goods looted in armed conflicts and wars*, Hearing on looted arts, European Parliament, 3 December 2019, <https://multimedia.europarl.europa.eu/en/webstreaming?d=20191203&lv=ALL> (8 October 2021).
- 55 See Matthias Weller, *Antinomien und andere Auffälligkeiten in der Spruchpraxis der Beratenden Kommission zur Restitution nationalsozialistischer Raubkunst* In: Nolte et al. (eds.), *Gestaltung der Informationsordnung – Festschrift für Thomas Dreier zum 65. Geburtstag*, Baden-Baden 2022, forthcoming.

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- 56 See e.g. Annika Dorn, Why comparing with others can be a good thing, Network of Restitution Commissions Newsletter 10 (June 2021), pp. 27 et seq.
- 57 Recommendation of the German Advisory Commission, in the case of the heirs of Heinrich Rieger v. The City of Cologne, [https://www.beratende-kommission.de/Content/06\\_Kommission/EN/Empfehlungen/21-02-08-Recommendation-Advisory-Commission-Rieger-CityOfCologne.pdf?blob=publicationFile&v=3](https://www.beratende-kommission.de/Content/06_Kommission/EN/Empfehlungen/21-02-08-Recommendation-Advisory-Commission-Rieger-CityOfCologne.pdf?blob=publicationFile&v=3) (8 October 2021).
- 58 Recommendation of the Advisory Commission in the case of the heirs of Kurt and Else Grawi vs. Landeshauptstadt Düsseldorf, [https://www.beratende-kommission.de/Content/06\\_Kommission/EN/Empfehlungen/21-03-26-Recommendation-Advisory-Commission-Grawi-LandeshauptstadtDuesseldorf.pdf?blob=publicationFile&v=5](https://www.beratende-kommission.de/Content/06_Kommission/EN/Empfehlungen/21-03-26-Recommendation-Advisory-Commission-Grawi-LandeshauptstadtDuesseldorf.pdf?blob=publicationFile&v=5) (8 October 2021).
- 59 See in particular Recommendation of the Advisory Commission regarding the painting “Three Graces” by Lovis Corinth, [https://www.beratende-kommission.de/Content/06\\_Kommission/EN/Empfehlungen/14-08-21-Recommendation-Advisory-Commission-Levy-BayerischeStaatsgemaeldesammlung.pdf?blob=publicationFile&v=7](https://www.beratende-kommission.de/Content/06_Kommission/EN/Empfehlungen/14-08-21-Recommendation-Advisory-Commission-Levy-BayerischeStaatsgemaeldesammlung.pdf?blob=publicationFile&v=7) (8 October 2021).