58. *Landgraf v. USI Film Products* 511 U.S. 244 (1994).
59. Dazu *Hess*, Staatenimmunität bei Distanzdelikten (1992), S. 80 f.
60. Aus der Perspektive des deutschen intertemporalen Prozessrechts ist diese Auffassung nicht zu beanstanden: Im Prozessrecht gilt grundsätzlich (d.h. sofern der Gesetzgeber nichts Anderes anordnet) ein sog. Schwebestatut: Danach beurteilt sich die Zuständigkeit des angerufenen Gerichts nach dem zur Zeit der Rechtshängigkeit geltenden Gerichtsstände.
61. Insofern genügt die schlüssige Darstellung einer völkerrechtswidrigen , d.h. entschädigungslosen Enteignung.
62. Das Gericht verwies ausdrücklich auf den Bildband *Natter/Frodl*, Klimt's Women – die entsprechende Seiten sind im Anhang des Urteils des Court of Appeals sogar abgebildet, *Altman v. Republic of Austria*, 317 F. 3d 954 (9th Cir. 2002).
63. Kritisch *Jayme*, in: Globalización y Derecho (Madrid 2003), S. 11, 17 f.
64. Dementsprechend begrüßt *Bazyler*, Holocaust Justice, S. 245 ff., ausdrücklich die Befassung der von U.S. Präsident Clinton ernannten Richterin *Cooper* mit dem Rechtsstreit, die für ihre „pro Holocaust victims"-Haltung bekannt sei.
65. *Altmann v. Austria*, 142 F. Supp2d 1187, 1209 (D.C. Cal. 2000). Diese „Argumente" bedürfen keines Kommentars.
66. *Bazyler*, Holocaust Justice, S. 247.
67. *Bazyler*, Holocaust Justice, S. 248.
68. *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002), rehearing denied, 327 F.3d 1246 (9th Cir. 2003).
69. Damit stützt das Urteil die These von *R. A. Schütze*, dass die US-amerikanischen Gerichte bei der forum non conveniens-Doktrin in Bezug auf die eigenen Staatsangehörigen anders beurteilen als im Verhältnis zu Ausländern, *Schütze*, Prozessführung und –risiken im deutsch-amerikanischen Rechtsverkehr (2004), S. 230, 234 ff.; vorsichtiger *Schlosser*, RdC 284 (2000), 25, 85 ff.
70. Zu dieser Praxis vgl. *Schlosser*, RdC 284 (2000), 25, 66; *ders.* Common Law Undertakings aus deutscher Sicht, RIW 2001, 81 ff.
71. Voraussetzung sind rechtlicher und echter Besitz, § 1460 ABGB, die Ersitzungsfrist beträgt bei beweglichen Sachen 3 Jahre, § 1466 ABGB. Es versteht sich von selbst, dass die Voraussetzungen der Ersitzung, insbesondere Echtheit (§ 1464 ABGB) und Redlichkeit (§ 1463 ABGB), zwischen den Parteien streitig sind.
72. *Republic of Austria v. Maria Altmann*, 539 U.S. 987 (2003).
73. Zu dieser Problematik *Skirinova*, Challenges to establish Jurisdiction over Holocaust Era Claims in Federal Court, 34, Golden Gate University Law Review 159, 176 (2004).
74. Vgl. oben bei Fn 58.
75. *Rasul v. Bush*, 124 S. Ct. 2686 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).
76. *Sosa v. Alvarez Machain*, 124 S. Ct. 2739 (2004).
77. Das Urteil betraf den Alien Tort Claims Act, 28. U.S.C. § 1350, dazu *Hess* BerDGVR 40 (2003), 107, 180 ff.
78. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2765-2766, insbesondere Fußnote 19; ebenso nunmehr *Ungaro-Benages v. Dresdner Bank AG*, 2004 WL 1725591 (11th Cir. 2004).
79. Oben bei Fn. 59.
80. Deutlich: *In re Nazi Era Cases Against German Defendants*, 129 F. Supp. 2d 370, 376 (D.N.J. 2001); *Anderman v. Austria*, 256 F. Supp. 2d 1098, 113-1114 (C.D. Cal. 2003). Dazu *Hess*, BerDGVR 40 (2003), 107, 200 ff.
81. Auf diese Gefahr weisen die Minderheitenvoten in den Urteilen Sosa und Altmann ausdrücklich hin, vgl. *Republic of Austria v. Maria Altmann*, 124 S. Ct. 2240, 2263 (2004), *Kennedy/Thomas* dissenting.
82. Die Anwendung dieser Doktrin im Fall von 28 U.S.C. § 1605(a)(3) war bisher umstritten. Die ausdrückliche Bejahung ihrer Anwendbarkeit stärkt die Rechtsposition beklagter Staaten nachhaltig.
83. *Republic of Austria v. Maria Altmann*, 124 S. Ct. 2240, 2255 (2004).
84. Zahlreiche Holocaust-Prozesse in den USA wurden unter Berufung auf die political-question-Doktrin beendet, vgl. dazu jüngst *Ungaro-Benages v. Dresdner Bank AG*, 2004 WL 1725591 (11th. Cir. 2004 – Urteil vom 3.8.2004): Vorrang des deutschen Stiftungsgesetzes gegenüber Individualklagen auf Restitution.
85. UNTS 217 (1955), 223. Ausführlich *Simma/Folz*, Restitution und Entschädigung im Völkerrecht (2004), S. 195 ff. (zu Artikel 26 österreichischer StaatsV).
86. ÖBGBl. III 221/2000, dazu *Hess*, RevDGVR 40 (2003), 107, 200.
87. *Republic of Austria v. Altmann*, 124 S. Ct. 2240, 2250.
88. Mangels Verbürgung der Gegenseitigkeit scheidet eine Vollstreckung US-amerikanischer Urteile in Österreich nach § 79 EO aus, *Czernak*, JBl. 2002, 613, 623.
89. Dazu *Muir Watt*, Privatisation du contentieux des droits de l'homme et vocation universelle du juge américain : réflexion à partir des actions en justice des victimes de l'holocauste devant les tribunaux des Etats-Unis, R.I.D.C. 2003, 883 ff. ; *Hess* BerDGVR 40 (2003), 107 ff.
90. Vgl. etwa die Hinweise von *Natter*, in: Natter/Frodl (ed.), Klimt's Women (2000), S. 115, 118. Dort werden Restitutionsverfahren ausdrücklich erwähnt und auch auf die „political-social and cultural debates" im Hinblick auf die Restitutionsforderungen verwiesen.
91. So zutreffend *Jayme*, Die Washingtoner Erklärung zur Restitution von Kunstwerken an Holocaustopfer: Narrative Normen im Kunstrecht, in Gesammelte Schriften Bd. 3 (2003), S. 136, 141.

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## Human Rights and Restitution of Nazi-Confiscated Artworks from Public Museums: The Altmann Case as a Model for Uniform Rules ?*

Erik Jayme **

### I. Introduction: The Restitution of Nazi-Confiscated Artworks

The Washington Conference Principles on Nazi-Confiscated Art released in connection with the Washington Conference on Holocaust-Era Assets ( 3 December 1998) constitute a first step to formulate, on an international level, standards for the restitution of artworks to their pre-War owners and their heirs. The Conference developed a consensus on "non-binding principles" recognizing "that among the participating nations there are differing legal systems and that countries act within the context of their own laws"[1]. The principles may – at least in the eyes of some authors[2] – be characterized as "narrative norms" which could be used within the framework of national substantive law. Another effort worth mentioning is the current preparation within UNESCO of a draft Declaration of Principles relating to cultural objects displaced in connection with World War II, which will be submitted to UNESCO's General Conference in 2007. The Principles are meant to provide general guidelines for use in bilateral or multilateral negotiations between States, in order to facilitate the signing of restitution accords for

such objects, and to lay the foundation for any future jurisprudence in this domain.

Many attempts to develop rules of restitution of Nazi-confiscated art have been advanced by national legislatures, particularly in Austria,[3] the Netherlands and in Switzerland.[4] In other States such as Germany, specific registers have been created to facilitate restitution. Public museums have made efforts to trace back the provenance of their collections. Thus, case law on the restitution of artworks formerly belonging to Jewish owners is emerging.[5] Furthermore, legal scholarship has started to address the problem.[6] In respect to Germany, mention should also be made of the issue of "degenerated art" confiscated by the Nazis out of works of modern art regardless of whether the owner was of Jewish origin or not, a practice that has destroyed many public museum collections in Germany.[7]

International legislation on the restitution of stolen or illegally exported artworks also has emerged, such as the 1970 UNESCO-Convention[8] and the 1995 UNIDROIT Convention[9] that represent important steps towards uniformity in that field of the law. These Conventions, however, confine themselves to facts which occurred after their respective entries into force,[10] whereas Holocaust cases of course arise from expropriations during the Nazi period. The rule of non-retro-activity of international treaties raises the question of whether recent case law in Holocaust situations may already have produced internationally acceptable rules or at least uniform principles also in the case of Holocaust victims. In this context the Altmann case,[11] regarding which a final award was made by an arbitration panel in Vienna on 15 January 2006, is of particular interest.[12]

## II. The Altmann case: the Vienna arbitration award of January 15, 2006

Perhaps the most spectacular case, involving the restitution of six paintings by Gustav Klimt held by the Vienna Belvedere Museum, was Maria Altmann v. Republic of Austria. In respect to five of these paintings, the case recently resulted in an arbitration award issued by the Vienna ad hoc arbitration tribunal on whose competence the parties had agreed during the proceedings at the United States Federal Courts in California.[13] The panel decided in favour of the plaintiff in that it held that for five paintings meet the prerequisites of the Austrian restitution law. As to the sixth painting, the portrait of "Amalie Zuckerkandl", the same arbitration tribunal, in a separate award, decided in May 2006 that in light of the specific facts of the case, there had been no confiscation. Thus, the restitution was limited to the five Klimts involved in the first award.

The law allows a certain measure of discretion to the Ministry as to whether restitution should actually be made or not. In light of the arbitration award, the Ministry exercised its discretion in favour of restitution. There was some hope, briefly, that the paintings could be acquired by Austria but, since ultimately no means seemed available, the five Klimts left the Belvedere.[14]

The legal reasoning of the first arbitration award is striking from many points of view. The arbitration agreement concerned the question

*"whether, and in what manner, in the period between 1923 and 1949, or thereafter, Austria acquired ownership of the Arbitrated Paintings, Adele Bloch-Bauer I, Adele Bloch-Bauer II, Appel Tree I, Beech Forrest ( Birch Forrest) and Houses in Unterach am Attersee;"*

and

*"whether, pursuant to section 1 of Austria's Federal Act Regarding the Restitution of Artworks Museums and Collections dated 4th December 1998 ( including the subparts thereof), the requirements are met for restitution of any of the Arbitration Paintings without remuneration to the heirs of Ferdinand Bloch-Bauer".*

The parties further agreed that the arbitration tribunal was to apply Austrian substantive and procedural law. The facts, reported in detail elsewhere[15], may be summarized as follows: the plaintiff, Maria Altmann, was the niece and one of the heirs of Ferdinand Bloch-Bauer who died in Zurich in 1945. Ferdinand was married to Adele Bloch-Bauer who died in 1925. In her will in which she nominated her husband as her universal heir, she had mentioned the Klimts and asked her husband to bequeath the paintings to the Austrian National Gallery after his death. Ferdinand had to leave Austria in 1938. His collections remained in Vienna and were confiscated. After the war, Ferdinand and later his heirs asked for the return of their property including the Klimts and other collections. Since the heirs lived outside Austria, export control statutes required an authorization which, in practice, was given only on condition of donations being made in favour of Austrian public museums.[16] Thus the five Klimts,

some of which were already in the possession of the Belvedere Museum, became state property.

One of the legal issues was whether Ferdinand or Adele had been the owners of the paintings, and whether Adele's will had should be interpreted as the expression of a mere wish, without legal consequences, or as an obligation which required her husband to bequeath the paintings to the State Gallery. The panel decided that the paintings were the property of the husband and better arguments militated in favour of a mere wish.

As to the question of potentially emerging uniform principles, it is important to take into consideration that difficult and delicate questions of succession law often appear in Holocaust cases. Even today, succession law is almost by definition grounded in national traditions. In addition, evidence by witnesses who knew the victims is almost never available. The award also illustrates that problems of intertemporal law regularly arise. In order to weigh the arguments in favour of Ferdinand's ownership of the Klimts, the panel resorted to section 1237 ABGB as it was in force at that time and according to which it is presumed, in cases of doubt, that the husband is the owner of any property acquired by the spouses. It is by no means self-evident for a tribunal or court today to apply such a rule since it clearly violates modern understanding of the equality of spouses.[17]

Thus, the award once more shows that Holocaust cases involve facts remote in time which may lead to difficult questions of national law, including intertemporal conflicts issues. It is unlikely that uniform rules of a transnational character will emerge for something like an intertemporal public policy test.

## III. Human Rights and Global Interests

Things look better for other issues in the case, particularly the relevance of human rights. Here, transnational uniform rules are about to appear which are in conformity with global interests in art law. In order to develop such transnational uniform rules, the underlying global interests must be identified.[18] There are at least four main global interests in international art law:[19] public access to artworks,[20] anti-seizure measures for international exhibitions,[21] protection of human rights[22], and keeping of the peace. To find convincing solutions, each of these interests has to be evaluated in a process of balancing and weighing.

In this respect, Altmann tells us: in Holocaust cases, human rights are to be given substantial weight. The United States Supreme Court applied, in Republic of Austria v. Altmann,[23] the Foreign Sovereign Immunities Act of 1976, which expressly exempts from State immunity certain cases involving " rights in property taken in violation of international law", to facts having occurred prior to the enactment of that statute, for example to the 1948 acts of the Austrian State authorities. Expropriations carried out by the Nazi regime and subsequent acts of State immediately linked to such expropriations cannot expect to profit from principles revolving around legal certainty that would usually bar retroactive application of statutory law. Neither reliance on nor expectations of former standards concerning State immunity of a foreign State can justify non-retroactivity in this sphere.[24] Altmann may therefore be interpreted as a landmark case for establishing the international standard of retroactive application of human rights.

As to the other global interests in art law, it may be hoped that public access will nevertheless remain possible in the future.[25] With regard to the peace argument, the case clearly shows that arbitration in the country of origin of the paintings is preferable to State proceedings outside that country.

## IV. Recent Developments

Since Altmann, other claims to paintings in the Belvedere have been raised.[26] At the same time, present-day owners are beginning to take action pro-actively against such claims by Holocaust victims and their heirs: some American Museums have instituted court proceedings to prevent such parties from claiming ownership.[27] In a comparable situation, the German Federal Court, in a case involving a painting by Oscar Schlemmer, ruled in favour of such proactive plaintiff, a private art collector.[28] The defendant, one of the painter's heirs, had written to a publisher indicating that Schlemmer's heirs were the owners of the painting while the parties agreed that the collector had acquired ownership at least bay usucapio.[29] The court decided that the notion of ownership included preventing other persons to question that ownership vis-à-vis third persons, which could be detrimental to the painting's evaluation in the art market. For private collectors at least, bona fide acquisition for some time after World War II remains an important issue. Today, such acquisition should be held invalid on the grounds of lack of good faith, since an art collec-

tor acquiring artworks may easily consult the respective registers to obtain information about the provenance of the work prior to acquisition.

The UNIDROIT Convention offers a fair solution to private possessors by granting some compensation to bona fide purchasers.[30] According to Article 4 of the Convention, the "possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object". The burden of proof is shifted to the purchaser. The amount of payment might correspond "to a sum lower, and sometimes very much lower, than the real commercial value of the object or the price paid for it".[31]

## V. Conclusions

Altmann is a landmark case for the settlement of art disputes involving Holocaust victims and their heirs. The history of the case and, particularly, the recent Vienna arbitration award illustrate, however, that such cases raise many legal issues which are linked to the remote past and therefore, to national law. This is true particularly of issues of probate and succession law. The Washington principles, which respect the differences in national laws, offer a convincing solution to that problem. The Altmann case represents a further step towards transnational rules on the intertemporal effects of human rights that may well turn out to be decisive without making the national laws obsolete. The retroactive application of human rights calls for the restitution of Nazi-confiscated artworks held by State-owned museums. As to private collections, the UNIDROIT Convention with its fair treatment of bona fide purchasers might be a model for settling these Holocaust cases.

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1. IPRax 19 (1999), p. 284 s.
2. *Erik Jayme*, „Narrative Normen im Kunstrecht", Festschrift Manfred Rehbinder, München/Bern (2002), 539 s.
3. Bundesgesetz über die Rückstellung über die Rückstellung aus den österreichischen Bundesmuseen und Sammlungen, BGBl. I 1998, 181.
4. See *Kerstin Röhling*, Restitution jüdischer Kulturgüter nach dem Zweiten Weltkrieg – Eine völkerrechtliche Studie, Baden –Baden (2004), p. 116 ss.; Hannes Hartung, Kunstraub in Krieg und Verfolgung, Berlin (2005).
5. See *Marc-André Renold / Pierre Gabus* (eds.), Claims for the Restitution of Looted Art, Geneva (2004).
6. *Norman Palmer*, Museums and the Holocaust, Institute of Art & Law, Leicester (2000).
7. *Erik Jayme*, Entartete Kunst und Internationales Privatrecht, Heidelberg (1994); *Hans Henning Kunze*, Restitution „Entarteter Kunst" – Sachenrecht und Internationales Privatrecht, Berlin / New York (2000).
8. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (14 November 1970).
9. UNIDROIT Convention on Stolen or Illegaly Exported Cultural Objects (24 June 1995); see Bettina Thorn, Internationaler Kulturgüterschutz nach der UNIDROIT-Konvention, Berlin / New York 2005.
10. See Art. 10 of the UNIDROIT Convention; also Art. 7(b)(i) of the UNESCO Convention.
11. See *Burkhard Hess*, „Altmann v. Austria – Ein transatlantischer Rechtsstreit um ein weltberühmtes Gemälde Gustav Klimts im Wiener Belvedere", Festschrift Peter Schlosser, Tübingen (2005), 257 s.
12. For the history of the case see *Rudolf Welser / Christian Rabl*, Der Fall Klimt, Wien (2005); *Heinz Krejci*, Der Klimt-Streit: Fallen die in der Österreichischen Galerie Belvedere befindlichen Gemälde von Gustav Klimt aus dem Nachlass Ferdinand Bloch-Bauers unter das Restitutionsgesetz 1998?, Verlag Österreich (2005).
13. See *Donald S. Burries / E. Randol Schoenberg*, Reflections on Litigating Holocaust Stolen Art Cases, Vanderbilt Journal of Transnational Law 38 (2005), 1041 ss.
14. See the front page of the Viennese newspaper „Kurier": „Adele" listing the prices: Adele Bloch-Bauer I (US$ 100 million), Adele Bloch-Bauer II (US$ 80 million), Der Apfelbaum (US$ 40 million), Häuser in Unterach am Attersee (US$ 40 million), Buchenwald (US$ 40 million).
15. See *Rudolf Welser*, Der Fall Klimt/Bloch-Bauer, Österreichische Juristenzeitung (2005), 689; *Heinz Krejci*, Zum „Fall Klimt/Bloch-Bauer", Österreichische Juristenzeitung (2005), 733; Rudolf *Welser*, *Kreicis* „Klimt-Streit" und das Erbrecht – Eine Erwiderung, ÖJZ 2005, p. 817.
16. See *Birgit Schwarz*, Rauben durch schützen – Der Fall der Klimt-Gemälde hat eine lange Vorgeschichte, Frankfurter Allgemeine Zeitung (25 January 2006), 35.
17. The award gives the following reasons: „Diese Vermutung ist zwar durch das Eherechtsänderungsgesetz 1978 aufgehoben worden, entsprach aber im Zeitpunkt der Testamentserrichtung und der Erklärung in der Verlassenschaftsabhandlung dem geltenden Recht und stand daher auch den Beteiligten mit hoher Wahrscheinlichkeit vor Augen. Sie ist auch aus heutiger Sicht nicht als derart anstößig zu bewerten, daß eine Berufung darauf heute gar nicht mehr in Betracht käme." (This presumption was abolished by the 1978 statute on the reform of the law of marriage; it corresponded, however, to the law in force at the time of the making of the will and the declaratory act in the probate procedure and most probably is what the parties had in mind. The presumption, from the viewpoint of present-day standards, should not be considered so striking that its invocation would be completely excluded today).
18. See *Erik Jayme*, Globalization in Art Law: Clash of Interests and International Tendencies, Vanderbilt Journal of Transnational Law 38 (2005), 928 ss.; see generally *Francesco Galgano*, La globalizzazione nello specchio del diritto, Bologna (2005).
19. See also *Erik Jayme / Matthias Weller*, Die internationale Dimension des Kunstrechts, IPRax 25 (2005), 391 s.
20. See *Joseph L. Sax*, Imaginative Public: The English Experience of Art as Heritage Property, Vanderbilt Journal of Transnational Law 38 (2005), 1097 s.
21. *Matthias Weller*, Immunity for Artworks on Loan? A Review of International Customary Law and Municipal Anti-Seizure Statutes in Light of the Liechtenstein Litigation, Vanderbilt Journal of Transnational Law 38 (2005), 997 s.
22. See *Axel Halfmeier*, Menschenrechte und internationales Privatrecht im Kontext der Globalisierung, Rabels Zeitschrift für ausländisches und internationales Privatrecht 68 (2004), 653 s.

23. 541 U.S. 677 (2004).
24. Republic of Austria v. Altmann, 541 U.S. 677, 711 (2004), Justice Brenner, with whom Justice Souter joins, concurring.
25. See also *Hess*, supra note 3, 273.
26. Marina Mahler, Gustav Mahler's granddaughter, has asked fort he restitution of a painting by Munch, now in the Belvedere, which belonged to Alma Mahler-Werfel, see Daniela Gregori, Mein Munch – Kunst-Krimi: Marina Mahler fordert die Rückgabe eines Bildes, Frankfurter Allgemeine Zeitung (2 March 2006), 37.
27. The Detroit Institute of Arts and the Toledo Museum of Arts, see Jordan Meijas, Jetzt klagen die Museen – Erbfälle: Neuer Streit um Gemälde aus jüdischem Besitz, Frankfurter Allgemeine Zeitung (28 Jan. 2006, 37.
28. German Federal Court (Bundesgerichtshof), 24.10.2005, Neue Juristische Wochenschrift 2006, 689.
29. See *Christian Baldus*, Internationaler Kulturgüterschutz: Renaissance der Ersitzung, in Klaus Grupp/Ulrich Hufeld (eds.), Recht, Kultur, Finanzen, Festschrift Mußgnug (2005), 525 s.
30. *Dieter Krimphove*, Das europäische Sachenrecht – Eine rechtsvergleichende Analyse nach der Komparativen Institutionenökonomik, Lohmar-Köln (2006), 381, favours such flexible compensation solutions from the standpoint of a comparative economic analysis of law.
31. UNIDROIT Convention, Explanatory Report, in Acts and Proceedings of the Diplomatic Conference fort he Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegaly Exported Cultural Objects, Presidenza del Consiglio die Ministri, Dipartimento per l'informazione e l'editoria, Roma (1996), 30.

## The Return of Ernst Ludwig Kirchner's Berliner Straßenszene – A Case Study*

Matthias Weller**

### I. Introduction

The Berliner Straßenszene (street scene) of 1913, one of the leading paintings of the famous German group of expressionist artists Die Brücke (the bridge) including Ernst Ludwig Kirchner,[1] heralds – and mirrors in its painting technique – a new modern, bustling way of city life in Berlin at the eve of the First World War and, to a certain extent, represents Berlin as such as well as presumably one of the most important contributions to modern art of German origin. The Brücke Museum in Berlin acquired the painting in 1980 for 1.9 million DM after all Berlin Museums had agreed to abstain from any other acquisitions for the period of two years in order to raise the necessary money. The decision of the Berlin Senate at the end of July 2006[2] to return the painting to Anita Halpin, grand-daughter and heir of the former Jewish owner Alfred Hess, has rightly been deplored as an "amputation"[3] of the "unique collection" of the Brücke Museum and an inestimable loss for Berlin and probably even the work of art itself, since a painting of a "Berliner Straßenszene" will not assume the same charisma outside Berlin. Most notably, however, the Berlin Senate's decision has faced severe criticism, and many commentators held it to be wrong and far from constituting a "fair and just solution"[4] in the sense of the Washington Principles.[5] The strongly controversial public debate and the fact that Anita Halpin raised further claims for the return of paintings of the Hess collection from German museums[6] convinced the German Government to convene a "crisis summit" of art law as well as art market and museum experts whose first part took place on 20 November, the second on on 11 December 2006 at the Chancellor's Office in Berlin in order to learn the lesson from the Kirchner case.[7] What could this lesson possibly be? Any evaluation has to start from the underlying facts of the dispute. On the basis of the information available to the public, these facts are the following:

### II. Provenance of the Painting

Originally, the painting formed part of the probably most important collection of German expressionists at the time including seven paintings by Ernst Ludwig Kirchner, the collection of the Jewish shoe manufacturer and entrepreneur Alfred Hess in Erfurt, Germany. Due to the Great Depression in 1929, his company faced financial difficulties,[8] and the family was forced to sell pieces of the collection for their living, for example another Kirchner painting, the Potsdamer Platz that Anita Halpin also recently claimed for restitution – a claim the New National Gallerie (Neue Nationalgallerie) Berlin turned down once it could present a photo of the buyer's living room in 1930 including the Potsdamer Platz.[9] When Alfred Hess died in 1931, his son Hans inherited the collection. Shortly after the so-called Machtergreifung on 30 January 1933, he left Germany for Great Britain, and his mother Thekla, Alfred's wife, administered the collection. She could relocate parts of it to Switzerland, and the Berliner Straßenszene was displayed at the Kunsthalle Basel in 1933 as well as at the Kunsthaus Zurich in 1934 for sale for the price of 2,500 RM.[10] On 4 September 1936, the Kunsthaus Zurich, acting on behalf of Thekla Hess, sent the painting to the Cologne Art Society (Kölnischer Kunstverein) from where it was sold to Carl Hagemann for the price of 3,000 RM.[11]