

German Museums and the Specific Issue of the Restitution of Nazi-Looted Art

Matthias Weller*

I. Introduction

The restitution of nazi-looted art is a specific issue for German Museums above all because most of them are public entities and therefore belong to the state that has to assume responsibility for the crimes committed by the Nazi regime including the systematic looting of art. For this reason, the Federal Republic of Germany participated in the Washington Conference on Holocaust Era Assets in 1998¹ and, by signing the Washington Principles, declared its willingness to “look for and identify further Nazi-confiscated cultural property in so far as the legal and factual possibilities allow and, if necessary, take the necessary steps in order to find an equitable and fair solution”,² where earlier indemnification schemes have left deficiencies. My impression is that Germany has taken many steps towards fair and just solutions since 1998 but still has to take certain further steps that mainly relate to the progress in the provenance research, but also to the procedure of restitution decisions. For, the importance of procedure increases the more the substantive criteria for a decision are difficult to assess. Since the Washington Principles only provide for the objective of a “fair and just solution” rather than any more specific criteria how to take decisions,³ proced-

ure becomes crucial in hard cases.⁴ The recent intense controversies in Germany about the decision of the Berlin Senate in July 2006 to restitute *Ernst Ludwig Kirchner's* “Berliner Straßenszene”⁵ from the Berlin Brücke Museum can be interpreted as a sign for deficiencies in the procedure towards a fair and just solution, rather than for deficiencies in the decision as such. In order to further explain this proposition, let me turn to the implementation framework of the Washington Principles first.

II. The Implementation of the Washington Principles in Germany

This implementation proceeded in three major steps: (1) the transformation of Germany's declaration at the Washington Conference into the domestic sphere by the aforementioned joint Statement by the Federal Government, the Laender (federal states) and the national associations of local authorities on the tracing and return of Nazi-confiscated art, especially from Jewish property of 14 December 1999 (henceforth “Common Statement”),⁶ (2) the establishment of the so-called agency for the co-ordination of losses of cultural goods in Magdeburg, Germany, the *Koordinierungsstelle für Kulturgutverluste* (henceforth “Agency”), including its internet database “lostart”,⁷ and (3), perhaps

* Dr. jur. Matthias Weller, Mag.rer.publ., Senior Research Fellow, Institute for international and foreign Private and Commercial Law, University of Heidelberg, and Chair of the German Institute of Art and Law, Heidelberg. The following text is based on the author's presentation “German Museums and the Specific Issue of the Restitution of Nazi-Looted Art” at the International Conference “Collections des musées. aspects juridiques et pratiques / Museum collections Legal and practical issues”, Art Law Centre, Geneva, 1./2. März 2007. The text is updated to that date.

1 For the Proceedings of the Conference see <http://www.state.gov/www/regions/eur/holocaust/heac.html> (1 March 2007); for the Records see <http://www.state.gov/r/pa/ho/hear/> (1 March 2007).
2 See Common Statement by the Federal Government, the Laender (federal states) and the national associations of local authorities on the tracing and return of Nazi-confiscated art, especially from Jewish property of 14 December 1999 (http://www.lostart.de/nn_63782/Webs/EN/Koordinierungsstelle/GemeinsameErklaerung.html?__nnn=true, 1 March 2007).
3 See e.g. *Stuart E. Eizenstat*, Explanation of the Washington Conference Principles on Nazi-Confiscated Art, in Washington Conference on Holocaust-Era Assets, Proceedings, Chapter

3, Delegation Statements, pp. 415 *et seq.* (<http://www.state.gov/www/regions/eur/holocaust/heac3.pdf>, 1 March 2007), commenting on Washington Principle No. 8 at p. 419 without deriving any substantive criterion or guideline to determine whether a solution is to be considered “just and fair”.

4 Procedure is irrelevant if there is clearly one and only one possible “just and fair” solution, see e.g. *Niklas Luhmann*, Legitimität durch Verfahren, Frankfurt/Main, 3rd ed. 1979, p. 60; see also e.g. *Lawrence B. Solum*, Procedural Justice, 78 S. Cal. L. Rev. 181 (2004); *John Thibaut/Laurens Walker*, Procedural Justice as Fairness, 26 Stanford Law Review 1271 (1974).

5 See Matthias Weller, The Return of Ernst Ludwig Kirchner's “Berliner Straßenszene” – A Case Study, Art, Antiquity & Law 2007, Art, Antiquity & Law 2007, 65 – 74 = KunstRSp 2007, 51 – 56 = Aedon – Rivista di Arte e Diritto online 2/2007, www.aedon.mulino.it.

6 See *supra* note 4.

7 Koordinierungsstelle für Kulturgutverluste, see <http://www.lostart.de/stelle/index.php3?lang=english> (19 Feb. 2007).

most important for the purposes of this presentation, the issuing of the so-called handout or manual on the implementation of the Common Statement in February 2001, presently in its fifth edition of 2006 (the "Manual").⁸

1. Provenance Research

The Manual serves as a guide for museums how to conduct their provenance research and how to identify nazi-looted art.⁹ The provenance research remains entirely within the responsibility of the respective authority. The museums are encouraged to forward their results to the Agency but are not under the obligation to do so. Nor do they find themselves under an obligation to notify a decision to retribute or not to retribute. Therefore, the Federal Government and the Agency do not have reliable comprehensive data about the progress of the implementation. Given this *caveat*, the Commissioner of the Federal Government for Culture and Media Affairs announced, in January 2005, that in the previous five years, around 150 public institutions identified more than 3.500 objects suspected to have been looted, and around 160 paintings and drawings as well as more than 1.000 books have been restituted.¹⁰ In the same press release, the German Government again urged the museums to participate in the implementation of the Washington Principles as suggested in the Manual. Whereas the work of the Government and its Agency, in particular its internet data base, has received positive evaluation by several domestic and foreign experts,¹¹ the overall result reported in the Press Release has been criticized as insufficient: *Stuart E. Eizenstat* at the U.S. House of Representatives in July 2006 pointed out:¹² "Germany is a country with whom I negotiated the slave and forced la-

bor agreements. No country has accepted its wartime responsibilities more fully and faithfully, having paid over \$ 60 billion in Holocaust reparations since the early 1950s (...). I have enormous admiration for Germany. But German museums have performed and published disappointingly little provenance research (...)". At the same time, *Eizenstat* conceded that at least museums directly attributable to the federal level¹³ comply with the Washington Principles such as e.g. the Prussian Cultural Heritage Foundation¹⁴ that administers sixteen museums, the State Library, State Archive and a number of research institutes, all with their origins in the collections and archives of the State of Prussia. Their research work regularly results in decisions to retribute.¹⁵ Given that there is an estimated 600 museums in Germany and in light of Washington Principle no. 3 according to which "resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted" there still seems work to be done – not only on the part of the museums but also on the part of the state and local governments that are called to provide for resources to conduct provenance research and, depending on the legal structure of the particular museum, to directly order research, its publication and decisions on restitution.

2. The procedure towards a „fair and just solution“

In addition to the instructions for the provenance research, the Manual provides for guidelines towards a just and fair solution.

8 Beauftragter der Bundesregierung für Kultur und Medien (ed.), Handreichung zur Umsetzung der „Erklärung der Bundesregierung, der Länder und der kommunalen Spitzenverbände zur Auffindung und zur Rückgabe NS-verfolgungsbedingt entzogenen Kulturguts, insbesondere aus jüdischem Besitz“ vom Dezember 1999, Februar 2001, Berlin, 5th ed. 2006, (<http://www.lostart.de/stelle/handreichung.php3?auflage=5>, 19 Feb. 2007).

9 Handreichung (*supra* note 8), sub „Vorbemerkung“.

10 Beauftragter der Bundesregierung für Kultur und Medien, Appell zur Suche nach NS-verfolgungsbedingt entzogenen Kulturgütern in deutschen Einrichtungen, Press Release of Januar 2005, http://www.lostart.de/nforum/doku_provenienz.php3?name=appell (19 Feb. 2007).

11 Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Günter Nooke, Bernd Neumann (Bremen), Renate Blank, weiterer Abgeordneter und der Fraktion der CDU/CSU, BT-Drucks. 15/4905 of 14 March 2005, Question 8.

12 *Stuart E. Eizenstat*, Testimony on the Status of Art Restitution-Worldwide before the Subcommittee on Domestic and International Monetary Policy, Trade, and Technology, Committee on Financial Services, U.S. House of Representatives, Washington D.C., 27 July 2006, p. 17 (<http://financialservices.house.gov/media/pdf/072706see.pdf> 19 Feb. 2007).

13 The Foundation's highest decision-making body is the Foundation Council (*Stiftungsrat*), composed of representatives from the Federal Government and the sixteen Federal States.

14 Stiftung Preußischer Kulturbesitz, <http://www.hv.spk-berlin.de> (19 Feb. 2007).

15 See e.g. recently the decision to retribute four baroque paintings from the Berlin State Gallery including "The Stoning of St. Stephen" by Giovanni Battista Tiepolo, http://www.hv.spk-berlin.de/deutsch/presse/pdf/060703_Tiepolo.pdf (19 Feb. 2007); see also the report of the Stiftung Preußische Schlösser und Gärten Berlin-Brandenburg about the restitution of 67 paintings as a result of its systematic provenance research, see Press Release of 15 December 2006 of http://www.spsg.de/index_4222_de.html (19 Feb. 2007).

a. No title in law

As a starting point, the Manual observes that claimants regularly do not have any title in law for restitution under German law because time-limits have expired a long time ago:¹⁶ Military Law No 59 on the return of identifiable property in the US Military zone of Germany (the “US-REG”)¹⁷ – a legislation enacted by the Allied Forces that established the legal basis for the return of Jewish property which was followed by equivalent legislation in the French and British occupation zones of Germany – required applicants to file claims for restitution against a particular private individual within a very short time. For example, law No. 59 entered into force on 10 November 1947 and allowed application for restitution only until 31 December 1948¹⁸ – little more than 12 months. Claims for restitution under general private law on the basis of ownership title are usually deemed preempted by the *leges speciales* of the restitution and compensation legislation specifically providing for remedies against unlawful acts committed during the Nazi regime.¹⁹ Even if the general remedies of private law were additionally available in principle, prescription periods would have elapsed, and German law, as United States law (at least in the state of Ohio),²⁰ does not provide for an exception to Holocaust related property claims, not does it compel such an exception for public policy reasons.²¹ Consequently, the Manual merely

provides for non-binding guidelines to achieve a fair and just solution in the individual case outside the sphere of legal claims. Each institution has to exercise its discretion on its own account.²² The Manual has no binding force to the effect that a claimant could derive any subjective rights from it, neither directly nor indirectly via the principles under German administrative law of due exercise of discretion in light of the constitutional guarantee of equal treatment under article 3 (1) Basic Law (*Grundgesetz*).²³

b. Continuity

The Manual expressly makes reference to the definitions and rules concerning the burden of proof introduced by the restitution and compensation legislations of the Allied Forces as interpreted by the special restitution chambers of the German courts shortly after the war. Thus, the Manual expressly intends to provide for continuity in dealing with restitution claims.²⁴ Therefore, even though the Manual does not create any binding law, its non-binding guidelines to achieve a just and fair solution in the individual case endorse the *ratio scripta* of legal norms enacted to deal with similar cases – perhaps the most outstanding particularity of the German implementation of the Washington Principles.

c. Guidelines

On this basis, the Manual encourages any museum confronted with a claim to proceed along the following three questions:

- (1) Was the applicant or his legal predecessor persecuted between 30 January 1933 and 8 May 1945 for racial, political, religious or other reasons relating to his personal convictions?

possessor sine bona fide, for example a thief, alone. However, this “privilege” is the result of a special rule of German substantive law that provides for acquisition of title by adverse possession (*Ersitzung*) after 10 years of bona fide possession. In the absence of this rule, the prescription period of 30 years to the restitution based on property would apply to both the thief and the bona fide purchaser. Hence there is no privilege for the thief in this regulatory framework but a privilege for the bona fide purchaser. In addition, also the bona fide purchaser benefits from the 30-year-period in that he is relieved from the burden to litigate about the grounds of acquisition of title.

16 Handreichung (*supra* note 8), sub V a.

17 Gesetz Nr. 59 über die Rückerstattung feststellbarer Vermögensgegenstände vom 10. November 1947 der US-amerikanischen Militärregierung (USREG); see generally *Karl Loewenstein*, Law and the legislative process in occupied Germany, Yale L.J. 57 (1948), pp. 724 *et seq.* and 994 *et seq.*

18 Article 56 Military Law No. 59.

19 See e.g. German Federal Court of Justice (*Bundesgerichtshof*), judgment of 8 October 1953 – IV ZR 30/53, Neue Juristische Wochenschrift (NJW) 1953, 1909, at 1910; Upper Regional Court (*Oberlandesgericht*) Dresden, judgment of 16 February 2000 – 18 U 2416/99, VIZ 2000, 413; see also e.g. *Walter Schwarz*, in Bundesminister der Finanzen/Walter Schwarz (eds.), Die Wiedergutmachung nationalsozialistischen Unrechts durch die Bundesrepublik Deutschland, Vol. I – Rückerstattung nach den Gesetzen der Alliierten Mächte, Munich 1974, pp. 97 – 99; *Harald König*, Grundlagen der Rückerstattung – Das deutsche Wiedergutmachungsrecht, Kunst im Konflikt – Kriegsfolgen und Kooperationsfelder in Europa, osteuropa ½-2006, pp. 371 *et seq.*, at p. 374; but compare *Sabine Rudolph*, Das Recht kennt einen Anspruch auf Rückgabe, Die Zeit Nr. 46 of 9 November 2006, p. 64.

20 *Toledo Museum of Art v. Ullin*, 477 F.Supp.2d 802, 808 (N.D. Ohio 2006).

21 The German prescription rules have been considered a violation of the public policy of the United Kingdom in the case of *The City of Gotha and Federal Republic of Germany v. Sotheby's and Cobert Finance S.A.*, [1998] 1 WLR 114, on the grounds that its 30-year-period of prescription benefits the

22 Handreichung (*supra* note 8), sub V a.

23 But compare *Jost von Trott zu Solz/Imke Gielen*, Kunstrestitution auf der Grundlage der Beschlüsse der Washingtoner Konferenz vom 3. Dezember 1998 und der Gemeinsamen Erklärung vom Dezember 1999, Zeitschrift für offene Vermögensfragen (ZOV) 2006, 256, at p. 260.

24 Handreichung (*supra* note 8), sub V a.

The applicant has to prove persecution. In the case of Jewish applicants a presumption of persecution (“collective persecution”) applies for the relevant time.²⁵

(2) Did the applicant lose property within the relevant time due to forced sale, expropriation or in a similar way?

In the case of a loss of property by way of a contract of sale, a presumption applies that a forced sale occurred if the transaction took place after 30 January 1933.

(3) In the case of transfer by sales contract, can the presumption of a forced sale be rebutted by proving cumulatively the following three issues, which are

- a. the buyer paid a fair price, and
- b. the seller could freely dispose of the sales price, and, in the case of sales after 15 September 1935²⁶
- c. the conclusion of the transaction would have taken place, in its core conditions, also in the absence of the Nazi regime or the transaction successfully served the financial interests of the persecuted person, as is the case for example, if the buyer assists the seller to transfer assets abroad?

Either party may seek to meet its burdens of proof by submitting evidence of circumstances that typically support the relevant fact if documents directly to the point are not available (*Anscheinsbeweis*).²⁷

d. Dispute Resolution

In case that no agreement can be achieved about what constitutes a fair and just solution, the parties may submit their case to the Advisory Commission on the return of cultural prop-

erty seized as a result of Nazi persecution, especially Jewish property.²⁸ The Advisory Commission consists of personalities of outstanding reputation and includes, *inter alia*, the former President of the Federal Republic of Germany *Richard von Weizsäcker*, the former head of the German Parliament *Rita Süßmuth*, the former head of the Federal Constitutional Court *Jutta Limbach*. Serving as a mediator, the Advisory Commission only takes action if both parties so wish and only renders recommendations without any binding force. Unfortunately, the reasoning for its recommendations are not published, the Federal Government only issues press releases that report about the recommendations and its underlying key considerations.

III. Restitution Practice in Hard Cases

So far, the Advisory Commission has only been asked twice for its recommendations:

1. The *Julius Freund* case

In its first recommendation of 12 January 2005, the Commission decided upon the following set of facts:²⁹ *Julius Freund* moved his large collection of art including the four objects in question³⁰ to Switzerland in 1933 in order to escape their seizure by the Nazi regime. Due to Nazi persecution, he emigrated to London with his wife in 1939 without any means. After his death in 1941, his widow had to sell the collection at the Gallery Fischer in Luzern. Representatives of the Nazi regime acquired the objects in question with a view to display them at the planned so-called “Führermuseum” in Linz, Austria. After the war, Allied Forces could not attribute the objects to any individual person. The Federal Government of Germany kept possession, loaned them to German Museums, and eventually registered them at the internet data base “lostart” in order to find their rightful owners. The Com-

²⁵ Handreichung (*supra* note 8), Exhibit V a, – Explanations to the Scheme of Examination (*Erläuterungen zum Prüfraster*), Explanation on V b) aa with reference to the decision of the Highest Restitution Court (*Oberstes Rückerstattungsgericht*) Berlin, Neue Juristische Wochenschrift (NJW)/Rechtsprechung zum Wiedergutmachungsrecht (RzW) 1956, p. 210.

²⁶ On 15 September 1935, the Nuremberg Laws, in particular the so-called Act on the Protection of German Blood and German Honour passed the Reichstag, see RGBl. I 1935, S. 1146 f.

²⁷ Handreichung (*supra* note 8), Exhibit V a – Explanations to the Scheme of Examination (*Erläuterungen zum Prüfraster*), Explanation on V b) bb, with reference to case law by the Highest Restitution Court (*Oberstes Rückerstattungsgericht*) Berlin, Rechtsprechung zum Wiedergutmachungsrecht (RzW) 1976, p. 3.

²⁸ Beratende Kommission im Zusammenhang mit der Rückgabe NS-verfolgungsbedingt entzogenen Kulturguts, insbesondere aus jüdischem Besitz (<http://www.lostart.de/stelle/kommission.php3?lang=english>, 19 Feb. 2007). This Commission has been established pursuant to an agreement between the Commissioner of the Federal Government for Culture and Media, the Conference of Ministers of Culture of the federal states and the representatives of local authorities and held its constitutive meeting on 14 July 2003.

²⁹ Federal Government of Germany, Press Release No. 19/05 of 12 January 2005 – Rückgabe NS-verfolgungsbedingt entzogener Kulturgüter – Erste Empfehlung der Beratenden Kommission.

³⁰ Three paintings by Karl Blechen, one drawing by Anselm Feuerbach.

mission recommended the restitution. The press release does not state any reasons or policy considerations for this recommendation. It seems to rely on the guideline of the Manual relating to the presumption of forced sales after 1935 that requires the possessor to prove that the sale would have taken place in the absence of the Nazi regime. Considerations on the question whether Jewish persons outside the sphere of influence of the Nazi regime at the time of the transaction about property outside that sphere still benefit from the presumption of collective persecution and thus from the further presumption of a forced sale³¹ would have been advisable.

2. The Sachs case

The second recommendation of the Commission of 25 January 2007 related to the following facts:³² the dentist *Hans Sachs* gathered a unique collection of 12.500 posters and 18.000 drawings between the years 1896 to 1938. He had to leave Germany in 1938 due to Nazi persecution. At that time, the Gestapo had already seized his collection. After his return to Germany, Hans Sachs claimed for compensation because he believed his collection to be destroyed, and received, in a settlement of 6 March 1961 with the Federal Republic of Germany, a compensation of 225,000 DM. In 1966, Hans Sachs learned that parts of the collection were found at the institution that is known today as the German Historic Museum. Hans Sach's son Peter registered the remaining parts of the collection with the internet data base "lostart" and claimed restitution. The German Historic Museum refused to reconstitute the collection with the argument that Hans Sachs knew about the whereabouts of the remaining parts of the collection since 1966 but never raised a claim for restitution. The Commission recommended not to reconstitute but reminded the museum to fulfill its responsibility to take properly care of the collection. In order to justify its recommendation, the

Commission referred to statements of Hans Sachs according to which he accepted the settlement as fair and the sum of compensation as "utterly respectable".

3 The Hess case

The restitution of *Ernst Ludwig Kirchner's* "Berliner Straßenszene" by the Berlin Senate from the *Brücke Museum* to the grand-daughter and heir of *Alfred Hess, Anita Halpin*, in July 2006 still provokes intense critique in Germany.³³ The Commissioner of the Federal Government for Culture and Media Affairs convened a "crisis summit" in November 2006 in order to assess the necessity to review the Manual's guidelines and is still working on it.³⁴ The Berlin Senator who took the decision to reconstitute the painting found himself under criminal investigation for the misappropriation of public property. The Berlin Senate convened a Parliamentary Commission to investigate the "background" of the restitution and whether the restitution was in conformity with the budgetary law of the State of Berlin.³⁵ It has even been submitted that

31 See Federal Administrative Court (*Bundesverwaltungsgericht*), judgment of 23 July 1999 - 7 B 52/99, *Zeitschrift für offene Vermögensfragen* (ZOV) 1999, 398, extending this presumption to Jewish persons in safe states with property situated in Germany or other states occupied by Germany. The recommendation does not clarify whether the widow of *Julius Freund* still had assets in Germany at the time of the sale of the works of art situated in Switzerland; see also *Jost von Trott zu Solz / Imke Gielen* (*supra* note 23), at p. 259.

32 Federal Government of Germany, Press Release of 25 January 2007 – Zweite Empfehlung der Beratenden Kommission für die Rückgabe NS-verfolgungsbedingt entzogener Kulturgüter.

33 *Friedrich Kiechle*, Rückgabe von Kirchners „Straßenszene“ – Gut gemeint genügt nicht, *Frankfurter Allgemeine Zeitung* No. 32 of 7 February 2007, p. 35; *Peter Raue*, Nicht fair und nicht gerecht – Der Senat hat falsch verhandelt und die Öffentlichkeit ausgeschlossen, *Der Tagesspiegel online* of 24 August 2006, see <http://www.tagesspiegel.de/kultur/archiv/24.08.2006/2730947.asp> (11 December 2006); *Stefan Kirschner*, Kein Verständnis – Berlin verzichtet auf den Rückkauf von Kirchners „Berliner Straßenszene“ und streitet über deren Restitution, *Die Welt* of 29 August 2006, at p. 23; see *Heinrich Wefing*, Rückgabe oder Weiterverkauf? Die Debatte hat begonnen: Der Fall Kirchner und die Restitution von NS-Raubkunst, *Frankfurter Allgemeine Zeitung* of 12 September 2006 Nr. 212, p. 35; *Christoph Stölzl*, Interview by the *Netzeitung* of 17 August 2006: „Kirchner case of utmost danger“, <http://www.netzeitung.de/deutschland/interviews/432907.html> (19 Feb. 2007); Joint Press Release of 14 August 2006 by *Ludwig von Pufendorf*, Förderkreis Brücke-Museum, *Wolfgang Henze*, Ernst-Ludwig-Kirchner Archiv Wichtrach/Bern, and *Bernd Schultz*; see also *Bernd Schultz*, Amputation einer einzigartigen Sammlung – Ernst Ludwig Kirchners Gemälde "Berliner Straßenszene" aus dem Berliner Brücke-Museum ist zu Unrecht als Raubgut eingestuft worden, *Frankfurter Allgemeine Zeitung* of 4 November 2006, Nr. 257, at p. 45.

34 Federal Government, Commissioner for Culture and Media, Press Release no. 445 of 11 December 2006, Kulturstaatsminister Bernd Neumann spricht mit Jewish Claims Conference über Restitution von NS-Raubkunst, http://www.bundesregierung.de/nn_23394/Content/DE/Pressemitteilungen/BPA/2006/12/2006-12-11-bkm.html (19 Feb. 2007); Federal Government, Commissioner for Culture and Media, Press Release no. 410 of 20 November 2006, Erster Konsens bei Gesprächen über NS-Raubkunst, http://www.bundesregierung.de/nn_23394/Content/DE/Pressemitteilungen/BPA/2006/11/2006-11-20-bkm-restitutionsgesprach.html (19 Feb. 2007).

35 Antrag der Fraktion der FDP, Einsetzung eines Untersuchungsausschusses zur Aufklärung der Hintergründe der Rückgabe des Gemäldes „Berliner Straßenszene“ von Ernst

there are grounds to rescind the settlement agreement³⁶ between the State of Berlin and Anita Halpin, the claimant, for fraud.³⁷

a. The facts at the time of the decision to retribute

The Berlin Senate based its decision on the following facts.³⁸ Originally, the painting formed part of the collection of Alfred Hess in Erfurt, Germany. Due to the Great Depression in 1929, his company faced financial difficulties,³⁹ 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 Nationalgalerie*) Berlin turned down once it could present a photo of the buyer's living room in 1930 showing the *Potsdamer Platz* in the background.⁴⁰ When Alfred Hess died in 1931, his son Hans inherited the collection. Shortly after 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.⁴¹ On 4 Septem-

ber 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.⁴² When Hagemann died in 1940, the family donated the painting to the then director of the Frankfurt *Städel Museum*, Ernst Holzinger, and after the latter's death in 1970, his widow eventually sold the painting to the *Brücke Museum* in Berlin in 1980.

b. Doubts

A turning point in the evaluation of the claim for restitution under the guidelines of the Manual is of course the question why exactly the painting returned to Germany in 1936. It has been submitted that Thekla Hess sought to sell the painting in Germany because the works of German expressionists were not appreciated outside Germany at the time and attempts to receive a good price in Switzerland had failed. The Berlin Senate however, relied, *inter alia*, on an affidavit signed by Thekla Hess on 1 April 1958 in the course of the administrative proceedings that her son Hans Hess instituted at the then Berlin Restitution and Compensation Agency in which he eventually received, by decision of 8 July 1961, the highest possible compensation of DM 75,000 on the basis of the German Act on Compensation of Victims of the Nazi Persecution (*Bundesentschädigungsgesetz*).⁴³ In this affidavit, Thekla Hess declared that, on the occasion of her numerous journeys from Switzerland to Germany until 1936, she was coerced under threat against herself and her family members in Germany by agents of the German secret state police, the so-called *Gestapo*, to have the Hess collection returned to Germany.⁴⁴

Ludwig Kirchner aus dem Bestand des Brücke-Museums, Abgeordnetenhauses Berlin, Drucksache 16/0216 of 24 January 2007.

36 For an example of such an agreement see the Manual, Exhibit V d – Vereinbarung zur Regelung von Rückgabeansprüchen.

37 Juliane Huth, Gutachten vom 19. Januar 2007 zur Prüfung der Frage, ob der Abschluss des Vertrags vom 27. August 2006 zwischen der Senatsverwaltung für Wissenschaft, Forschung und Kultur mit Frau Anita Halpin, geb. Hess, (...) rechtlich notwendig war.

38 See Matthias Weller, The Return of Ernst Ludwig Kirchner's 'Berliner Straßenszene' – A Case Study, Presentation at the Institute of Art and Law's Conference „Non-litigious resolution of Holocaust related art claims“ on 18 October 2006, *Kunstrechtsspiegel (KunstRSp) 2007*, forthcoming = Art, Antiquity & Law 2007, forthcoming; see also Gunnar Schnabel, Nazi Looted Art, Handbuch Kunstrestitution weltweit, Berlin 2007, pp. 257 *et seq.*

39 See Federal Administrative Court (*Bundesverwaltungsgericht*), decision of 28 April 2004 – Case 8 C 12/03, Sammlung der Entscheidungen des Bundesverwaltungsgerichts (BVerwGE) Vol 120, pp. 362-369, at no. 2, dealing with claims of the Conference on Jewish Material Claims against Germany, Inc. in respect to real property originally owned by Alfred Hess's company; see also Christina Feilchenfeldt/Peter Romilly, Die Sammlung Alfred Hess, *Weltkunst* 89 (Oktober 2000), p. 89.

40 See e.g. Anna Blume Huttenlauch, Berlin Street Fight, *artnet Magazine*, <http://www.artnet.com/magazineus/features/huttenlauch/huttenlauch11-7-06.asp> (19 Feb. 2007).

41 Legal Opinion „Rechtliche Würdigung Rückgabeverlangen der Frau Anita Halpin - Ernst Ludwig Kirchner „Berliner Straßenszene““ of 29 September 2005 by Jost von Trott zu Solz, see <http://www.artnet.de/magazine/sonder/pdf/20060906wuerti->

[gung.pdf](http://www.artnet.de/magazine/sonder/pdf/20060906wuerti-gung.pdf) (19 Feb. 2007).

42 See the document „Liste der Gemälde der Sammlung Hagemann“ of 9 March 1947 (<http://www.artnet.de/magazine/pdf/liste090347.pdf>, 19 Feb. 2007), probably compiled by Hagemann's heirs shortly after his death on the basis of his notes, see Henrike Schulte, Hagemanns Liste, *artnet Magazine* of 11 November 2006 (<http://www.artnet.de/magazine/news/schulte/schulte11-10-06.asp>, 19 Feb. 2007).

43 See sections 55(1) Sentence 1, 58 Sentence 1 German Act on Compensation of Victims of the Nazi Persecution (*Bundesentschädigungsgesetz*) limited compensation to DM 75,000; for the background to the German post-war restitution and compensation legislation based on legislation enacted by the Allied Forces see e.g. Harald König, Claims for the Restitution of Holocaust era Cultural Assets and Their Resolution in Germany, Art, Antiquity & Law [#].

44 Barbara Kisseler, State Secretary, Speech of 28 August 2006 at the Berlin Senate's Commission for Cultural Affairs (*Kulturausschuss*), see e.g. <http://www.artnet.de/magazine/sonder/pdf/20060912kisselerufierl.pdf> (19 Feb. 2007); see David

On the basis of the sources publicly available it appears unclear whether this incident took place prior or subsequently to the transport of the *Berliner Straßenszene* to the Cologne Art Society and, if the former was the case, how this work of art then could, in light of the “interest” the *Gestapo* had expressed, be ultimately transferred to and stay with a person, *Carl Hagemann*, who kept distance to the Nazi regime and is known for supporting expressionist art and artists.⁴⁵ It is further unclear how the painting could be sold for a price considered to have been above market value⁴⁶ and be saved from destruction together with other pieces of “degenerate art” hidden in the archives of the Frankfurt *Städel Museum*, why *Ernst Ludwig Kirchner* congratulated Hagemann to his acquisition in February 1937,⁴⁷ and why *Thekla* herself never raised a claim to this painting during her life-time but only her grand-daughter *Anita Halpin* now.

c. The Application of the Guidelines in cases of doubts

Despite these doubts around the evaluation of the affidavit by *Thekla Hess* it appears acceptable to assume that *Thekla Hess* was persecuted and that therefore the presumption of a

forced sale applies. The second turning point of the case therefore is the question what the adequate standards of proof are for the respondent of the claim that seeks to rebut this presumption. The Berlin Senate seemed to have acted under the impression that full evidence of the fact that the money had been received by *Thekla Hess* in Switzerland was necessary, and the Senate was at the end of the day unable to produce a document that evidences the successful transfer of the money to Switzerland – at the same time heavily attacked for not having exhausted all available sources of information.⁴⁸ Arguably, the Senate’s understanding of the standard of burden of proof does not precisely reflect the instructions of the Manual that expressly states: “either party may seek to meet its burdens of proof by submitting evidence of circumstances that typically support the relevant fact if documents directly to the point are not available”.⁴⁹ However, even if the Berlin Senate had made use of this reduced standard of proof to its own benefit, it appears rather doubtful whether anything had changed the picture: the only circumstances currently known that could have supported the fact that *Thekla Hess* did receive the money in Switzerland was that *Carl Hagemann*, the buyer, is described to have been a person of integrity who strongly supported expressionist art and artists and was an experienced businessman with international relations who was, in 1936, presumably capable of successfully transferring 3,000 RM to Switzerland, and that *Thekla Hess* never raised claims herself. These circumstances certainly assume considerable weight. Whether they suffice to meet even the reduced standard of proof is a matter of evaluation.⁵⁰ In weighing the evid-

J. Rowland, Rowland & Associates, Press Release of 18 August 2006, citing from *Thekla Hess*’s affidavit as follows: “In 1936 during the late evening hours two agents of the secret police from Nuremberg, coerced me under threat to have the pictures in the Hess collection being kept at the time at ‘Kunsthaus (Gallery) Zurich’ returned to Germany immediately. Even though I understood fully that this threat could result in the complete loss of the entire collection, I had no choice other than [sic!] to give into the pressure being exerted by this all-powerful agency of the government in the hope that my own life and that of my own family would not be further jeopardized”.

45 See e.g. *Eva Mongi-Vollmer*, Von der Kunst des Sammelns: Carl Hagemann – ein Sammler seiner Zeit, in *Das Städel/Museum Folkwang Essen* (eds.), *Künstler der Brücke in der Sammlung Hagemann: Kirchner, Heckel, Schmidt-Rottluff, Nolde, Ostfildern 2004*, pp. 45 *et seq.*, at p. 47; *Hans Delf*, Carl Hagemann – Eine biographische Skizze, in *Das Städel/Museum Folkwang Essen* (eds.), *Künstler der Brücke in der Sammlung Hagemann: Kirchner, Heckel, Schmidt-Rottluff, Nolde, Ostfildern 2004*, pp. 169 *et seq.*, at p. 175.

46 See *Arnold Budczies*, art collector and Carl Hagemann’s friend, Letter of 25 March 1937, as cited in *Bernd Schultz*, Letter to the Berlin Senator of Science, Research and Culture of 10 August 2006 (<http://www.artnet.de/magazine/sonder/pdf/KIRCHNER-SKANDAL11aug2006.pdf> (19 Feb. 2007), to Carl Hagemann, commenting on the acquisition of the “Berliner Straßenszene”: “(...) freilich ist der Preis sehr hoch [yet, the price is very high]”.

47 *Christoph Stölzl*, Interview by the *Netzeitung* of 17 August 2006: “Kirchner case of utmost danger”, <http://www.netzeitung.de/deutschland/interviews/432907.html> (19 Feb. 2007), citing Kirchner “Nun hat es doch in Deutschland seinen guten Platz gefunden”.

48 See in particular *Bernd Schultz*, Letter to the Senator of Science, Research and Culture of 10 August 2006, p. 4 (<http://www.artnet.de/magazine/sonder/pdf/KIRCHNER-SKANDAL11aug2006.pdf>, 19 Feb. 2006) who rightly criticizes that the Senate did not consult the Ernst-Ludwig-Kirchner Archive Wichtrach/Berne in Switzerland.

49 *Handreichung* (supra note 8), Exhibit V a – Explanations to the Scheme of Examination (*Erläuterungen zum Prüfraster*), Explanation on V b) bb, with reference to case law by the Highest Restitution Court (Oberstes Rückerstattungsgericht) Berlin, Rechtsprechung zum Wiedergutmachungsrecht (RzW) 1976, p. 3.

50 Had the matter been decided by a German court under the standards of proof of the German Code of Civil Procedure (*Zivilprozessordnung*), the mere fact that the debtor is undoubtedly considered a person of integrity without any apparent motive to withhold payment would not have sufficed to discharge his burden of proof for the payment on a particular debt. To the contrary, had the court inferred from the aforementioned circumstances alone that payment in fact took place it would have made an error in (evidentiary) law, see

ence available, it appears to me to be better acceptable to hold that the *Brücke* museum did not rebut the presumption of a forced sale.

IV Legitimacy by Procedure

Where there is only one just and fair solution to a case and where this solution can be identified, procedure is irrelevant.⁵¹ However, the “delicate process of reconciling competing equities of ownership”⁵² that the Washington Principles⁵³ calls the signatory states to undertake will often not result in only one identifiable just and fair solution. Therefore, procedure matters, and the more substantive criteria are absent, the more procedure matters.⁵⁴ The Washington Principles do not offer any substantive criterion that could guide the Signatory States. Indeed, it would have been difficult to include substantive principles of justice, but some perhaps universal but also very abstract guidelines can be identified, in particular the principle of *neminem laedere*⁵⁵ and the principle of indemnification, but also the principle of proportionality and equality⁵⁶ that are closely linked to the prohibition of arbitrariness. With respect to Holocaust related claims for the restitution of works or art, these principles may be condensed to the guideline for museums to precisely assess the damage suffered by claimants and to precisely indemnify this damages, no less, no more. To give works of art away overreadily

does not serve the purposes of justice even if the party that inflicted the damage upon the other party is concerned because the principles of indemnification and proportionality as well as equality are violated, and the Washington Principles do not seek to install a system of punishment, but a system of compensation of wrongs still uncompensated. Proportionate compensation has to rely on precise provenance research and such research therefore remains absolutely crucial. However, even such a condensed guideline does evidently not result in one and only one just and fair solution, and it is common ground that the clash of competing equities never do, but leave the decision-maker with more than one well-justifiable solution within a certain margin.⁵⁷ Each of them qualifies as a just and fair solution. Critique against one of these solutions in favour of another, preferred solution within the given margin misunderstands the functioning of the principles of substantive justice invoked by the Washington Principles instead of a comprehensive set of rules to be applied by the decision-maker.⁵⁸ The same applies to rules created in order to reconcile the competing equities involved such as the rules of evidence in the Manual even if these rules conjure up the danger of opportunistic behaviour by claimants who seek to unduly profit from the burden of proof on the part of the museums. The probably few cases of undue profit can be tolerated for the benefit of claimants who cannot furnish evidence of their property or forced loss thereof as a consequence of the wrong they suffered. However, the inevitable uncertainty about the ultimate decision about a restitution claim, the danger of undue profits, and, in general terms, the uncertainty about the relation and the weighing of equities involved must be compensated by a stabilizing mechanism in order to avoid a loss of legitimacy – a procedure. From a strictly sociological point of view in the context of system theory and under a strictly sociological definition of legitimacy as a willingness to accept decisions within a certain margin irrespective of its ultimate content,⁵⁹ a procedure does not as such aim at justice or

e.g. *Reinhard Greger*, in Zöller, Zivilprozessordnung, Cologne, 26th ed. 2006, pre section 284 no. 29: mere probability does not suffice in order to establish evidence based on circumstances (*Anscheinsbeweis*).

51 *Niklas Luhmann* (*supra* note 4), p. 60.

52 *Stuart E. Eizenstat* (*supra* note 3), at p. 418.

53 Washington Principle no. 8: “If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case”.

54 *Niklas Luhmann* (*supra* note 4), pp. 60 *et seq.*

55 *Ulpian*, Dig. 1,1,10: *lustritia est constans et perpetua voluntas ius suum cuique tribuendi. Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.*

56 See *Aristotle*, *Nicomachean Ethics*, Book 5, Chapter 6, 1132a 1: “[t]he law looks only at the nature of damage, treating the parties as equal, and merely asking whether one has done and the other suffered injustice, whether one inflicted and the other has sustained damage. Hence the unjust being here the unequal, the judge endeavors to equalize it: inasmuch as when one man has received and the other has inflicted a blow, or one has killed and the other been killed, the line representing the suffering and doing of the deed is divided into unequal parts, but the judge endeavors to make them equal by the penalty or loss he imposes, taking away the gain”; see *Aristotle* in 23 Volumes, Vol. 19, translated by H. Rackham, Cambridge 1934.

57 See e.g. *Robert Alexy*, *Theorie der juristischen Argumentation – Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung*, Frankfurt/Main 1983, pp. 255 *et seq.*

58 *Stuart E. Eizenstat* (*supra* note 3), at p. 418: “We can begin by recognizing that as a moral matter, we should not apply 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”.

fairness in terms of contents. Rather, it serves its purpose of stabilization best if, after conclusion of the procedure, the losing party will find itself socially isolated with his objection that the outcome was wrong.⁶⁰ Irrespective of whether the losing party accepts internally the solution as just and fair, an effective procedure bars any further debate about the correctness of the outcome.⁶¹ In order to achieve the purely factual result of such an absorption of critique, a procedure must have certain components:⁶² the procedure must be made autonomous by a set of specific norms relating to the organization and the conduct of the procedure, the agents, in particular the decision-maker, must assume roles that have to be reliably displayed and integrated in a symbolic “drama” under the eyes of the public, a drama that symbolizes justice and fairness, the decision-maker should decide according to norms of a conditional structure rather than a final structure, these norms should be designed by someone else, and society should obtain the possibility to develop a generalized trust in the decision-making system. Measured against these criteria, the procedure of the restitution of the *Straßenszene* was condemned to fail its function to absorb critique: the decision-maker was identical with one of the parties in the dispute, the procedure did not take place in public, but the decision was simply handed down after years of secret negotiations, the reasoning of the decision came weeks later and was incomplete,⁶³ the only form of symbolic

drama available, the submission of the case to the Advisory Commission, was ignored. The society is deprived of the possibility to develop a generalized trust in the decision-making system because of the lack of reasoning and the absence of an emerging “case law”.

V. Conclusion

The intense critique from the public in Germany can be interpreted as an inevitable reaction to deficiencies in the (lack of) procedure that produced the decision to reconstitute *Ernst Ludwig Kirchner's* “Berliner Straßenszene”, rather than in the decision as such. Museums should protect themselves against procedural disasters of this kind: In hard cases, the public should be involved in the procedure after passing a certain stage of negotiations without result. The decision should be taken by a third party with the highest possible reputation. Weaknesses of the claimant’s position should be openly addressed and be transformed into results in the negotiations. The act of restitution should take place in a symbolic setting that allows the public to develop trust in the decision-making process. Legitimacy by procedure is crucial because the application of principles like the Washington Principles instead of precise rules will regularly result in more than one “fair and just solution” in a particular case. To put it in short: German museums should focus on provenance research and procedure in order to deal with the specific issue of the restitution of Nazi-looted art.

59 Niklas Luhmann (*supra* note 4), p. 28; for a critical assessment of this theory see e.g. Stefan Machura, Niklas Luhmanns “Legitimation durch Verfahren” im Spiegel der Kritik, *Zeitschrift für Rechtssoziologie* 14 (1993), pp. 97 *et seq.*; see also Johannes Weiß, Legitimationsbegriff und Legitimationsleistung der Systemtheorie Niklas Luhmanns, *Politische Vierteljahresschrift* 18 (1977), pp. 76 *et seq.*

60 Niklas Luhmann (*supra* note 4), pp. 111 *et seq.*

61 Niklas Luhmann (*supra* note 4), p. 118.

62 Niklas Luhmann (*supra* note 4), p. 120.

63 The Berlin Senate presented a reasoning of its decision to return the painting only weeks later, after years of confidential

negotiations, by a first press release of 17 August 2006, Senatsverwaltung für Wissenschaft, Forschung und Kultur, Pressemitteilung of 17 August 2006: „Kirchner zurecht zurückgegeben“, when the public discussion had already reached its climax, and only the Senate’s State Secretary Barbara Kissler (see *supra* note 44) referred to the affidavit in a second press release of 28 August 2006, and never made available to the public a copy of this affidavit even though the document, according to State Secretary’s speech, must be part of the files of the administrative proceedings for compensation of Hans Hess and therefore should be in the archives of the competent Berlin authorities.