

2. Assessment of "flight assets" by the Museum and the Kunstkommission

a) Applicability of the Washington Principles

In summary, it can be concluded that there appears to have been little established practice surrounding "flight assets," either in Switzerland or abroad. It is imperative that the Kunstmuseum and the Kunstkommission develop their own position, naturally taking into account the considerations of all the positions and decisions cited in this report. The Kunstkommission and the Kunstmuseum have not, until now, deliberated on a comparable case.

In "flight asset" cases, the reference point must also be the Washington Principles. Their application requires that the work was "confiscated by the Nazis and not subsequently restituted" (Art. 1 Washington Principles). The concept of confiscation contains two elements of injustice. Firstly, the transfer of ownership takes place against the owner's will. Secondly, the owner does not receive the equivalent value of the property that was taken from him or her. There is a financial loss (damage).¹

These forms of injustice may also be present in "flight asset" cases. Selling property in an emergency situation can fall under the Washington Principles. Unlawful action taken by the unjust state to directly effect the dispossession is not required. This accords with the position taken by the Kunstkommission and the Kunstmuseum in the case of Curt Glaser (1873-1934). Curt Glaser financed his emigration to Switzerland and later to the USA by auctioning off a large part of his collection. These considerations clearly speak in favor of the applicability of the Washington Principles.

The Terezín Declaration also points in the same direction.² It speaks of the need to find "just and fair solutions" for "Nazi-confiscated and looted art" and goes somewhat further than the Washington Principles, which only mention "confiscated."³ The introduction to the section on "Nazi-Confiscated and Looted Art," explains that the victims of the National Socialists lost their property in a wide variety of ways: "Recognizing that art and cultural property of victims of

¹ Cf. the *Entscheid der Kunstkommission in Sachen Curt Glaser vom 21.11.2018* [Decision of the Kunstkommission in the Matter of Curt Glaser of November 21, 2018], p. 152 (p. 26, English version), online at <https://kunstmuseumbasel.ch/de/forschung/provenienzforschung/curtglaser> (12/21/2022) (<https://kunstmuseumbasel.ch/en/research/provenance-research/curtglaser> for English version).

² Terezín Declaration on Holocaust Era Assets and Related Issues of 30.06.2009, online at <https://www.state.gov/prague-holocaust-era-assets-conference-terezin-declaration> (12/22/2022).

³ Cf. Item 3 of the chapter on "Nazi-Confiscated and Looted Art" in the Terezín Declaration and Art. 8 of the Washington Principles.

the Holocaust (Shoah) and other victims of Nazi persecution was confiscated, sequestered and spoliated, by the Nazis, the Fascists and their collaborators through various means including theft, coercion and confiscation, and on grounds of relinquishment as well as forced sales and sales under duress...."

A formal approach speaks against the application of the Washington Principles. All legal bases – which also include the Washington Principles in the broader sense – have a temporal (when?) and geographic (where?) scope of application. With regard to the time, this pertains to the rule of the National Socialists from 1933-1945. With regard to place, it pertains to their sphere of influence. The Washington Principles do not state either explicitly, but this is clear from their wording and aims.

In the opinion of the Kunstkommission and the Museum, however, this approach is too narrow. In the Curt Glaser case, the Kommission already left open the question of whether the decision to sell was made before the National Socialists came to power, in which case the temporal scope of application does not pertain at all. "The Kunstkommission proceeds on the assumption that the Washington Principles should be regarded as a flexible source of law in all dimensions. Thus, no sharp boundaries exist with respect to confiscation or persecution-related loss (facts); neither does it seem appropriate to limit the scope of the Washington Principles in terms of time or place. Rather the openness of the legal consequences ("fair and just solution") also indicates openness with respect to both scope and legal consequences. This also distinguishes a moral judgment from a strictly legal subsumption in which, where doubt exists, sharper boundaries are indicated with respect to the facts of the case and the scope of application."⁴

This practice must be adhered to: Purchase of "flight assets" should be assessed in accordance with the Washington Principles. This is also in line with the Strategy for Provenance Research at the Kunstmuseum Basel of September 5, 2022, in which the Kunstmuseum Basel declares that it will seek "just and fair solutions" as intended by the Washington Principles "in cases where the sale of an artwork is clearly caused exclusively by emigration (short-term disposal, no unrestricted access to the proceeds, low purchase price, necessity of sale for

⁴ *Entscheid der Kunstkommission in Sachen Curt Glaser vom 21.11.2018*, p. 151 (p. 25 English version), online at <https://kunstmuseumbasel.ch/de/forschung/provenienzforschung/curtglaser> (12/21/2022).

survival)."⁵ The Washington Principles can therefore also be applied to transfers of ownership in Switzerland and other countries outside the Nazi sphere of influence.

This position seems reasonable from the point of view of assessment. If the only way refugees can secure a living in emigration is by selling their valuables because Nazi persecution forced them to leave Germany, it seems right to include this type of loss. In law, one speaks of "adequate causation" when examining whether damages are attributable to a harmful act.⁶ This is the case if, in the ordinary course of events in a normal lifespan, such acts would generally be expected to result in a loss of this kind. With regard to the injustice committed by the National Socialists, this can be affirmed: Any state that takes everything away from its citizens must expect that they will have to sell their last possessions abroad to support themselves and must suffer a loss in the process.

b) Special features

The applicability of the Washington Principles is not however sufficient to determine whether "flight asset" cases should, without further consideration, be treated the same way as others. People who sold "flight assets" in Switzerland were typically not in the same life-threatening situation they had been when they were still in territories under Nazi control. The particular element of injustice, namely of threat of physical harm or extermination, is not present, or is at least greatly diminished. This does not exclude a state of exigency, but it is not the same exigency as within the Nazi sphere of influence. In Switzerland, the chances of Jewish refugees receiving help were considerably better (without wishing here to gloss over the harshness of Switzerland's refugee policy at the time). In Germany or the occupied territories, the same person would be putting their life at risk, at best, if they turned to the authorities. The level of exigency (compulsion) is different in Switzerland than in Germany or the occupied territories, where the loss of assets was immediate.

This aspect is related to the fact that a sale is concluded in a location with its own legal system, which must categorically be recognized. Switzerland and its legal system cannot be equated with the National Socialist regime of injustice, the reprehensible normative force of which the Washington Principles seek to counter. Anyone engaged in sales and purchases outside the Nazi sphere of

⁵ *Strategie für die Provenienzforschung am Kunstmuseum Basel vom 05.09.2022*, para. 3, online at <https://kunstmuseumbasel.ch/de/forschung/provenienzforschung/strategie-provenienzforschung> (12/22/2022).

⁶ Cf. Weller/Dewey 2019, p. 173.

influence could categorically rely on the legal system applicable there. There was legal protection against unethical contracts (Art. 20 CO) or over-reach (Art. 21 CO). This does not speak fundamentally against the application of the Washington Principles, but does underline the special nature of these sales.

It therefore stands to reason that "flight asset" cases are assessed more cautiously than other cases. The UK Spoliation Advisory Panel states that "the sale is at the lower end of any scale of gravity for such sales."⁷ In the Alfred Flechtheim case, the German Advisory Commission required "very specific reasons" to recognize the sale of "flight assets" as a loss resulting from Nazi persecution: "If an art dealer and collector persecuted by the Nazis sold a painting on the regular art market or at auction in a safe country abroad, there would have to be very specific reasons to recognize such a sale as a loss of property as the result of Nazi persecution."⁸ As explained above, this assessment is part of a series of decisions from which it is difficult to derive a uniform practice. Nevertheless, the Kunstkommission and the Kunstmuseum consider a specific approach for "flight asset" cases to be appropriate. This does not obviate the obligation under the Washington Principles to consider each case individually in all its details (cf. Chapter IV.3 below), but in view of the importance of these cases and the intense debate surrounding them, somewhat more general considerations appear to be called for.

For the Kunstkommission and the Kunstmuseum, restitution is not ruled out in "flight asset" cases, but is the exception. It is conceivable that a forced sale could reach the severity of a confiscation and only restitution could compensate for the injustice. This would be conceivable, for example, in cases where a purchaser actively collaborated with the Nazis in order to be able to acquire a work despite its comparatively safe location in a third country. A very concrete threat may also arise in individual cases even in a comparatively safe third

⁷ Report of the Spoliation Advisory Panel in respect of fourteen Clocks and Watches now in the Possession of the British Museum, London of 3/7/2012, p. 7, online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/78037/SAP-report-BM-HC1839.pdf (12/21/2022); cf. also Chapter IV.1.b.

⁸ *Empfehlung der Beratenden Kommission NS-Raubgut in der Sache Erben nach Alfred Flechtheim ./ Stiftung Kunstsammlung Nordrhein-Westfalen vom 21.03.2016* [Recommendation of the Advisory Commission in the matter of the Heirs of Alfred Flechtheim v. Stiftung Kunstsammlung Nordrhein-Westfalen, Düsseldorf], p. 8 (p. 5 in English version), online at <https://www.beratende-kommission.de/de/empfehlungen#s-flechtheim-stiftung-kunstsammlung-nordrhein-westfalen> (12/21/2022).

country. Restitution is also conceivable if the work was acquired specifically in order to transfer it to the possession of the National Socialists.⁹

Assuming restitution is the exception in "flight asset" cases, it remains to be determined whether any consequence can be derived from this for a possible "just and fair solution," subject of course also to the examination of the individual case. With the above approach in mind, the transfer of a work from the previous to the subsequent owner is not the substance of the injustice under consideration. It is less a question of whether the sale of the work was unlawful but rather of the circumstances and conditions of the transaction. In many cases, the sale of "flight assets" will have been a bitter necessity over which the seller and the buyer had no influence. The sale cannot and should not be prevented, but it has to have been "just and fair" to conclude that there is no need for action by the institution – to apply the terminology of the Washington Principles here in a converse sense.

If it can be shown in a specific individual case that the sale was unfair (and that the conditions for exigency as intended by the Washington Principles are otherwise met), this should be the starting point for the search for a "just and fair solution" with any claimants. The consideration of the particular case will return to this.

3. Evaluation of the concrete case

The starting point for any assessment under the Washington Principles must be the specific facts of the case. All details of the case should be examined (Art. 8 Washington Principles: "... a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case"). Starting from this premise, the present case is characterized by the following elements, namely that

a) the sale took place in a third country outside the Nazi sphere of influence;

⁹ Cf. the *Empfehlung der Beratenden Kommission NS-Raubgut in der Sache Erben nach Julius und Clara Freund* [Recommendation of the Advisory Commission on Nazi-looted property in the case of the heirs of Julius and Clara Freund], press release of 1/12/2005: "After Julius Freund's death in 1941, Clara Freund was forced to auction off the collection at the Fischer Gallery in Lucerne in 1942 for financial reasons. The aforementioned artworks were acquired there by Adolf Hitler's special representative, Hans Posse, for the establishment of the so-called 'Führer Museum' in Linz."

- b) despite belonging to the group of collectively persecuted persons, the seller, as a Swiss national, did not have to fear deportation;
- c) the sale would very unlikely have taken place absent Nazi persecution (causality);
- d) the seller was dependent on the sale to cover her living expenses;
- e) the proceeds from the purchase were fully at her disposal;
- f) the sale price was low to unreasonably low.

That the sale took place in Switzerland (item a) is obvious and requires no further clarification. It is also clear that Charlotte von Wesdehlen became a Swiss citizen upon her marriage and therefore could not be deported (item b).

It is evident from the historical facts that Charlotte von Wesdehlen was in need of financial resources and therefore wanted to sell. It is not entirely clear whether she could have also turned to her husband (from whom she lived separately) or whether a viable alternative might have been the sale of her household goods, for the storage of which rent had to be paid (but which might have been tricky given customs regulations). However, such "unavoidable gaps or ambiguities" in the facts of the case (Art. 4 Washington Principles) should only be held against the claimant with caution. The decisive factor is that the responsible persons at the museum and in the Kunstkommission at the time also assumed that there was considerable pressure to sell and unambiguously expressed this. As no other motives for the sale are apparent, it can be assumed that the sale was motivated by Nazi persecution (items c and d).

It is clear, however, that Charlotte von Wesdehlen was free to dispose of the proceeds (item e). The customs situation remains somewhat murky, but does not appear to have been a significant burden, if it was one at all.

This leaves the question of the appropriateness of the purchase price (item f). Estimates of historical value are generally difficult. In the present case, however, it is clear from the negotiations that all parties involved assumed the price was low. Georg Schmidt could not have expressed this any more clearly: "Everyone involved knows that this is basically a shamefully low price for this painting, which is one of Rousseau's classic masterpieces" (cf. Chapter II). This assessment is also confirmed by the fact that the works sold by Charlotte von Wesdehlen later commanded comparatively higher prices, although they were

much smaller and less valuable. In any case, the Kunstkommission and the Museum consider it an established fact that the sale price was low to inappropriately low (item f).

V. "A just and fair solution"

As explained above, restitution in "flight asset" cases is the exception (see Chapter IV.2). The case for exception in the present instance is neither self-evident nor demonstrated.

On the other side of the spectrum of just and fair solutions, it goes without saying that the Museum is making efforts to reappraise and present the history of Charlotte von Wesdehlen.¹⁰ This includes the present decision with a detailed account of the facts. The case has already been considered by the Bergier Commission (formerly the Independent Commission of Experts Switzerland – World War II).¹¹ Nevertheless, the museum will do more to raise public awareness of it.

This leaves the question of financial compensation. "With regard to value, financial compensation lies in between advocating and rejecting restitution; it is a "gray area" that is possible under the Washington Principles, where necessary, in order to do justice to the conflicting interests of the parties involved."¹² It is appropriate here because the sale was demonstrated to be due to the persecution of Charlotte von Wesdehlen; her livelihood in Switzerland was dependent on the proceeds; and the sale price was low to unreasonably low. Of the two unjust elements of confiscation, namely lack of volition and financial loss (see above), the latter is predominant in view of the special characteristics of "flight assets."

The following two aspects should further be considered in the search for a "just and fair solution":

In the Museum's favor, the baseline situation under civil law can be brought into play here, of course with all due reserve: "This should not be the decisive factor under the Washington Principles – it is precisely the fundamental idea of the

¹⁰ On historical reappraisal as a part of a just and fair solution, see Gesa Jeuthe, "Kunstwerke im Exil – Das sogenannte "Fluchtgut" als Zeugnis von Verfolgung, Vertreibung und Verlust," in: Asmus et al. (eds.), *Archive und Museen des Exils*, Berlin 2019, p. 143.

¹¹ Tisa Francini/Heuss/Kreis 2001, pp. 218–221.

¹² *Entscheid der Kunstkommission in Sachen Curt Glaser vom 21.11.2018*, p. 163-164 (p. 35 English edition), online at <https://kunstmuseumbasel.ch/de/forschung/provenienzforschung/curtglaser> (12/21/2022).

Washington Principles to create a standard of assessment that is independent of the legal system. Nevertheless, the legal situation must be taken into consideration for a just and fair solution since, as explained above, it is also an expression of ethical decision-making."¹³ In the present case, ownership by the Museum and the canton is undisputed under civil law. Even if there had been over-reach under Art. 21 CO, the one-year statute of limitation for recovery would have long since expired. Charlotte von Wesdehlen never took any action in this direction during her lifetime, not even after the subsequent sales, which would have allowed her to take legal action.

To the Museum's detriment, the attitude of the responsible authorities in the Kunstkommission and the Museum at the time must be taken into account. Granted, it is always risky to evaluate the behavior of predecessors after more than 80 years have passed, and certain statements in the correspondence may not have been intended the way readers today might interpret them. However, one cannot help but register an alarming degree of disrespect toward the person of Charlotte von Wesdehlen and a considerable cold-bloodedness in dealings with her. This point, too, should not be overestimated in the search for a "just and fair solution." But it is part of the history of the Kunstmuseum Basel that should be noted here.

VI. Dispositif

1. The Kunstkommission rejects the restitution of the work *La muse inspirant le poète/Apollinaire et sa muse* (1909) by Henri Rousseau (1844–1910). It will not be submitting an application to the Cantonal Council for restitution to the claimant.
2. The Kunstmuseum Basel will honor the history of the work in an appropriate form and, to the extent possible and in consultation with the claimant, in the memory of Charlotte von Wesdehlen.
3. Die Kunstkommission is in favor of negotiations with the claimant regarding financial compensation in an appropriate amount.
4. The decision (including the reasoning) of the Kunstkommission will be published.

¹³ *Entscheid der Kunstkommission in Sachen Curt Glaser vom 21.11.2018*, p. 162, p. 34 English online at <https://kunstmuseumbasel.ch/de/forschung/provenienzforschung/curtglaser> (12/21/2022).