

# DECISION OF THE KUNSTKOMMISSION IN THE MATTER OF CURT GLASER

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## I. INTRODUCTION

### 1. Press Coverage

In October 2017, the Swiss television channel SRF broadcast a report about the Curt Glaser case on its news program, *Rundschau*. The Regierungsrat (executive council) of the Canton of Basel-Stadt was accused of not being truthful in a 2008 restitution case ("Flunkern mit Madonna" ["Flubbing with Madonna"]).<sup>1</sup> Subsequently, a number of media outlets seized on the story, including the *Basler Zeitung*.

At its meeting on November 21, 2017, the Kunstkommission resolved to examine the matter more thoroughly, not least in light of recent developments in matters of provenance.<sup>2</sup>

### 2. Historical Background (Summary)

The Kunstmuseum Basel acquired 200 drawings and prints at Auction 180 at the Berlin book and art dealer Max Perl on May 18-19, 1933. The best known of these are two lithographs by Edvard Munch (*Self Portrait*<sup>3</sup> and *Madonna*<sup>4</sup>) (see **Appendix 1. Purchases KMB 1933**).

The previous owner of these drawings and prints was Curt Glaser. Glaser was the Director of the Staatliche Kunstbibliothek Berlin. He was suspended from his post on April 5, 1933 and relieved of his position permanently on September 27, 1933. He left Germany in middle of 1933, temporarily settled in Switzerland after a brief stay in Paris and had 14 crates of possessions that had been left in Berlin sent to Ascona. In 1941 he emigrated to the US and died there in 1943.

Curt Glaser's first wife—née Elsa Kolker—died on July 10, 1932. Curt Glaser married his second wife—née Maria Milch—on May 20, 1933.

In 1933, the Kunstkommission and the director of the Kunstmuseum Basel Otto Fischer (1886-1948) knew the origin of the drawings and prints from Max Perl's Auction 180. At the meeting of the Kunstkommission the transacted purchases were described as "cheap" as well as "attractive" and "opportune."<sup>5</sup>

### 3. 2008 Decision of the Basel Government

In 2004, the Kunstmuseum Basel was contacted by the lawyers of Curt Glaser's heirs. In early 2008 the Regierungsrat of the Canton of Basel-Stadt decided against returning the works. The press release from February 19, 2008 justified the decision as follows:

The Kunstmuseum Basel acquired the works at the auction in 1933 in good faith and has been in uncontested possession of them for over 70 years. At the time of the auction, there were absolutely no indications in the auction catalog or other publications that the art works came from the collection of Dr. Curt Glaser. The Perl auction house was based in Berlin. The prices paid for the works were "typical of the time" and conformed to the market. The works were exported from Germany into Switzerland in accordance with procedure. The Kunstmuseum had exercised all requisite care in such cases; there was neither reason nor obligation to make any further inquiries into the identity of the seller. The infamous so-

<sup>1</sup> See the report online at <https://www.srf.ch/news/schweiz/debatte-um-raubkunst-basler-regierungsrat-flunkern-mit-madonna>, accessed 09 November 2018

<sup>2</sup> Minutes of the Kunstkommission of 21 November 2017, Kunstmuseum Basel, Archiv, B1/12 Protokolle der Kunstkommission.

<sup>3</sup> Edvard Munch, *Self Portrait (frontal)*, 1895, chalk and brush lithograph with scraping technique, Kunstmuseum Basel, Kupferstichkabinett, Inv. 1933.213.

<sup>4</sup> Edvard Munch, *Madonna*, 1895/1902, chalk and brush lithograph from three stones, Kunstmuseum Basel, Kupferstichkabinett, Inv. 1933.212.

<sup>5</sup> Minutes of the Kunstkommission of 6 May 1933, Kunstmuseum Basel.

called "Jewish auctions" at which the seized possessions of persecuted Jews were liquidated at rock bottom prices did not take place in Nazi Germany until 1938.<sup>6</sup>

The decision of the Regierungsrat is based on a report by the Department of Education from February 7, 2008. The report presents the statement of facts and legal analysis, including the Washington Principles (see **Ch. V. 2. a. *Washington Principles***).

There was no subsequent court proceeding against the Kunstmuseum Basel or the Canton of Basel-Stadt in the wake of the decision. The representatives of the heirs continued to contact the Kunstmuseum and the government; in a communication from October 15, 2008, they accuse the government of "failing on a human level" and in its rejection of the claim, "minimizing the Holocaust in all of its aspects."

In late 2009, the representatives of the heirs contacted the Anlaufstelle Raubkunst (Contact Bureau on Looted Art) at the Swiss Bundesamt für Kultur (BAK; Federal Office of Culture). The Canton of Basel-Stadt stated through its representative in a communication of February 18, 2010, that it was not interested in mediation through the Bund. In that communication, the Canton referred to its press release of February 19, 2008. It also mentioned the decision of the UK *Spoliation Advisory Panel* of June 24, 2009, which came to the same conclusion with regard to the auction of May 18-19, 1933. Finally, the Canton expressed the view that the October 15, 2008 letter from the lawyers of the heirs was defamatory. Attached to the February 18, 2010 letter from the Canton of Basel-Stadt were various documents, including a certified excerpt from the minutes of the Kunstkommission meeting of June 8, 1933.

The legal representatives of the heirs again contacted the Präsidialdepartement (Department of Presidential Affairs) of Basel-Stadt on November 29, 2017. The Regierungsrat of the Canton of Basel-Stadt decided in a resolution of December 19, 2017 that the Kunstkommission had to address the case before them.

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<sup>6</sup> See the full text of the explanation online at <http://www.medien.bs.ch/nm/2008-02-19-rrbs-005.html>, accessed 19 October 2018).

## **II. PROCEDURE**

### **1. Jurisdiction**

#### **a) *Kunstkommission***

In accordance with § 7 para. 1 i.V.m. § 1 of the act governing the museums of the Canton of Basel-Stadt of June 16, 1999 (Museumsgesetz [Museum Act], SG 451.100), there is a commission ("Kunstkommission") in place for the Basel Public Art Collection—the Kunstmuseum Basel. This commission "monitors, advises, and supports the museum leadership" (§ 7 para. 1 Museumsgesetz). In accordance with § 4 para. 1 lit. a of the provision to the act governing the museums of the Canton of Basel-Stadt of December 19, 2000 (Museum Provision, SG 451.110), the Kunstkommission has decision-making power over, among other things, "purchases for the Museum collection, in so far as the commissions do not delegate this task to the respective leadership."

The purchases of the drawings and prints from Auction 180 at the Max Perl dealership were discussed by the Kunstkommission in 1933 and was expressly welcomed by the members of the Kunstkommission at the time. The current Kunstkommission considers it their responsibility to reflect on the possible consequences of these purchases.

The Kunstkommission encompasses a wide range of historical, artistic and art historical, legal, political, and societal expertise. It considers itself competent to assess the questions before it, particular given that these are not primarily legal, but rather moral in nature (see **Ch. V. 2. A. *Washington Principles***).

#### **b) *Kunstkommission and Regierungsrat***

It must be noted in the present case that the Regierungsrat of the Canton of Basel-Stadt already made a formal decision regarding the claim of the heirs of Curt Glaser in February 2008. The Kunstmuseum Basel is an "agency of the responsible Department" (§ 6 Museumsgesetz) and therefore bound by the decision. Additionally, the Kunstkommission has no authority to alter or rescind the decision of the Regierungsrat from 2008.

As already stated, the Kunstkommission has an advisory function with regard to the Museum. This function can also be exercised with regard to the Regierungsrat. On these grounds, the Kunstkommission will issue a recommendation. Should this differ from the decision of the Regierungsrat of 2008 and endorse restitution, it would mean that the Kommission recommends that the Regierungsrat should reconsider its decision. The Kommission can also recommend to the Regierungsrat that it stand by its decision of 2008.

Due to the 2008 decision and the subsequent instructions of the cognizant division heads at the Kunstmuseum and the legal representatives, the Kunstmuseum and the Kunstkommission cannot enter into any actual negotiations with the representatives of the heirs. This was communicated to the heirs orally and in writing.

It must be noted that the Kunstkommission is empowered with more than just a purely advisory capacity. § 5 of the Museumsgesetz stipulates the *nontransferability of museum objects*. Exceptions require a decision by the Regierungsrat "by joint application from the respective museum leadership, the respective Kunstkommission, and the Rectorate of the University." As the Kunstkommission understands it, the possibility of returning the art works represents a transfer of objects. This is particularly the case given that the return would be grounded not primarily in legal but rather moral considerations. If the Regierungsrat should resolve to reconsider, it could not unilaterally decide to

return the pictures: it would be necessary to have a joint proceeding that included the Kunstmuseum, the Kunstkommission, and the Rectorate of the University as well as the Regierungsrat.

What needs to be assessed presently is not only the possibility of restitution, but also a "just and fair solution" in accordance with the Washington Principles (see **Ch. V. 2. A. Washington Principles**). There is no legal basis that provides any particular competence in this regard.

**c) *Kunstkommission and Kunstmuseum***

On the basis of the above, the decision will be formally made by the Kunstkommission. The Kunstmuseum Basel is closely involved in the decision of the Kunstkommission and the Director has co-signed the present decision. Purchases of works are made at the request of the leadership; a surrender of works also requires a request from the leadership (§ 5 Museumsgesetz). Moreover, the Kunstmuseum possesses a great deal of cultural-historical expertise, without which the members of the Kunstkommission, who serve on a voluntary basis, would hardly be in a position to make the present decision. Accordingly, the Kunstkommission and the Kunstmuseum have worked closely together. This collaboration has proved successful.

**2. Procedural Principles**

**a) *Access to documents and fair hearing***

There are no explicit procedural rules for the present process. The Kunstmuseum as an agency of the canton (§ 6 Museumsgesetz) and the Kunstkommission as the museum's advisory body (§ 7 Museumsgesetz) consider themselves bound by the procedural guarantees of the federal government (Art. 29 ff. BV) and the canton (§ 12 KV). In particular, the heirs have the right to a hearing and to inspect the files. Therefore, the Kunstkommission has heard the heirs' representatives and made the essential documents available to them, insofar as they are in the possession of the Art Museum.

**b) *Independence***

A central procedural guarantee relates to the *independence* of the deciding authority. It should be noted, however, that this guarantee relates primarily to courts (Art. 30 BV; § 12 lit. d KV). In contrast, it is not uncommon for an administrative body (or an instance close to the administration, such as the Kunstkommission here) to make a decision that concerns its sphere of interests. It would be problematic if individuals serving on an official body had personal interest in the outcome of the present decision. There are no indications of this in the present case.

The Kunstkommission is aware that other countries have created national bodies that make recommendations regarding issues of looted art and flight assets. This complies with Art. 10 of the Washington Principles, according to which "[c]ommissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership." Such "balanced membership" does not exist in the case of the Kunstkommission, which is committed to the interests of the museum. The same also applies in the event of a decision by the Regierungsrat. This situation has to do with the allocation of powers in the Swiss Federal Constitution: "The cantons are responsible for the area of culture" (Art. 69 para. 1 of the Swiss Federal Constitution of 18 April 1999). Although the federal government has enacted the Federal Act on the International Transfer of Cultural Property of 20 June 2003 (Kulturgütertransfergesetz [Cultural Property Transfer Act], CPTA, SR 444.1) citing its authority to support cultural endeavors in accordance with Art. 69 para. 2 BV of the Federal Constitution and other economic and foreign trade responsibilities, this is not pertinent to the issues at hand. The cantons are typically responsible for questions of restitution. As a result, each canton, often each individual museum, is responsible for answering such questions.

For this reason, the Kunstkommission has examined whether the establishment of a kind of arbitral tribunal would be possible. However, such an ad hoc appointment appears problematic as well. On the one hand, there is no legal basis for such a procedure. On the other hand, a decision in the Kunstkommission is broadly supported. Further, the Kunstkommission and the Kunstmuseum are concerned with facing up to historical responsibility. "Delegating" the decision to another committee would avoid this responsibility. Finally, the present case concerns questions that must necessarily be decided by the Kunstkommission itself, such as for instance the question of the applicable legal basis (see ch. V. 3. a. *Applicable Sources*).

The Kunstkommission will therefore make a decision itself. It is aware that the preservation of museum objects is one of its legal duties. On the other hand, the Kunstkommission has an interest in maintaining the excellent reputation of the Kunstmuseum Basel. It is also aware of the museum's obligations and has specifically reaffirmed these obligations with the adoption of Principles of Provenance on 26 April 2017. The Kunstkommission therefore considers itself in a position to make an objective and fair assessment.

The Kunstkommission has kept the Department of Presidential Affairs regularly informed of this procedure for the attention of the Regierungsrat. However, the Regierungsrat and the Department of Presidential Affairs have had no influence whatsoever on the substantive content of the present decision. The Kunstkommission made this decision entirely on its own responsibility.

### **3. Process**

#### **a) *Decision-making on the Kunstkommission***

On 22 November 2017, the Kunstkommission made the fundamental decision take up the matter in greater depth. On 30 January 2018, it made further decisions, including the appointment of a three-member subcommittee. The subcommittee prepared the decision on behalf of the Kunstkommission. It heard the heirs and had the authority to call in experts.

For its part, the Kunstmuseum set up a working group on 13 December 2017. In addition to the director and the head of the Kupferstichkabinett (Department of Prints and Drawings), two other members of the Kunstmuseum's staff are also on the working group.

The subcommittee and the working group examined the matter before them in a total of eight joint sessions.

Each session of the Kunstkommission provided an overview of the current status of the process. At its meeting on 26 June 2018, the Kunstkommission reviewed the historical facts. At the meeting on 13 September 2018, a first possible direction for a decision was discussed. The present decision was adopted on 21 November 2018, whereby the subcommittee and working group were delegated the authority to make editorial adjustments. At the meeting on 21 March 2019, the Kunstkommission reviewed the edited version of the decision.

All decisions in the Kunstkommission and in the joint sessions of the subcommittee and working group were made unanimously and without abstentions.

#### **b) *Inclusion of the heirs of Curt Glaser***

Two meetings were held in Basel with the representatives of the heirs. The Kunstkommission and the Kunstmuseum were represented by the subcommittee and the working group respectively. The first meeting took place on 27 February 2018. Only the heirs' lawyers took part in this meeting. The main



items on the agenda were the mutual presentation of positions and questions of procedure and further proceedings.

The second meeting on 29 August 2018 was also attended by the heirs of Curt Glaser. They described their position from a personal point of view. The heirs and representatives of the heirs then commented on the draft of the facts, which had been prepared by the working group and subcommittee over the summer of 2018. The oral statement at the meeting was supplemented by a written submission from the heirs' representatives dated 31 October 2018.

In conclusion of the second meeting a brief tour of the Kunstmuseum took place. The subcommittee and the working group thanked the heirs and representatives for their constructive assistance in establishing the historical facts.

### **c) *Informing the Public***

The Kunstkommission recognizes the public's interest in the reappraisal of the present case. Therefore, at its meeting on 30 January 2018, it had already expressed its support for the idea that the decision of the Kunstkommission should be thoroughly justified and made accessible to the public. It thus commits itself to transparency, as is also recommended by the Bund regarding questions of provenance.<sup>7</sup>

To the extent that it is authorized to do so, the Kommission is also publishing the relevant sources simultaneously with the decision. It is important to the Kunstkommission that its decision should at least be accepted as broadly as possible with regard to its procedure and justification, if perhaps not in its outcome

The Kunstkommission regrets the sometimes polemical reporting in the media. This form of reporting is not appropriate for difficult historical and moral questions. With the present decision, the Kunstkommission hopes to contribute to making the discussion more objective.

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<sup>7</sup> Cf. *Bericht EDI/EDA über den Stand der Arbeiten des Bundes im Bereich der NS-Raubkunst im Zeitraum von 2011–2016* [Report on the Status of the Bund's Work with Regard to Nazi looted Art in the Period 2011-2016]; accessed online 18 June 2019 at <https://biblio.parlament.ch/e-docs/387980.pdf>.

### III. HISTORICAL CIRCUMSTANCES OF THE CASE

Curt Glaser (1879–1943) was born in Leipzig, the son of a Jewish family. In 1903 he began his studies of art history in Berlin and received his doctorate there in 1907. Most likely in 1903 as well, he married Elsa Kolker (1878-1932). Starting around 1910, with the support and in part at the behest of Glaser's father-in-law, Hugo Kolker, the couple began to build a significant art collection that encompassed, among others, the works of Edvard Munch, Vincent van Gogh, Henri Matisse, Pablo Picasso and Hans Purrmann.

In 1902, Glaser began to be active as an art critic and became one of the most important critics and commentators in Berlin. Starting in 1909, Glaser worked at the Königliches Kupferstichkabinett, where by 1912 at the latest he was significantly expanding the collection of modern and contemporary art and promoting it through numerous exhibitions. During the course of his tenure at the Kupferstichkabinett, Glaser authored his most important scholarly publications: *Zwei Jahrhunderte deutscher Malerei [Two Hundred Years of German Painting]* (1916), *Die Graphik der Neuzeit [Contemporary Graphics]* (1922), and monographs on Lucas Cranach the Elder (1921) and Hans Holbein the Younger (1924). In October 1924, Glaser became the director of the Kunstbibliothek in Berlin. Among his chief tasks, in particular, was to redefine the Kunstbibliothek as an art historical research library. In July 1925, the Glasers moved into a civil service apartment unattached to the director's post, in which their art collection was also exhibited. The Glasers now belonged to Berlin's intellectual elite and throughout the late 1920s held important art salons in their apartment.

In parallel to his professional acquisitions on behalf of the Kupferstichkabinett, Glaser undertakes private purchases and builds up a valuable collection of prints by artists like Honoré Daumier and Adolph von Menzel, but above all by contemporary artists such as Max Liebermann, Lovis Corinth, Erich Heckel, and Ernst Ludwig Kirchner. A significant emphasis is placed on the work of Edvard Munch, a lifelong friend whom Glaser supports. Glaser also collects Flemish and Dutch old master paintings and Japanese prints, which are his specialty. No inventory of his collection has survived, as far as is currently known. In 1932, Glaser's wife Elsa dies after a serious illness at the age of just 54. To commemorate her life as wife, collector, and patron of Munch's work, Glaser donates Munch's painting *Music on Karl Johan Street* (1889) to the Nationalgalerie in Berlin. The gift is an expression of Glaser's commitment to the presence of Munch's work in public collections and an example of the way his collection was continually undergoing transformation through gifts, purchases, and exchange transactions.

Following the seizure of power by the National Socialists in January 1933, the "Law for the Restoration of the Professional Civil Service" is enacted in April 1933, which makes it possible to remove Jews from the civil service and is thus directed as a discriminatory tool against Germany's Jewish population and opponents of the new power. On April 9, 1933, a large number of personnel changes is made public – for art historians, primarily among progressive museum directors. In April 1933, the *Deutsche Zeitung* published a defamatory report about Glaser's suspension, which was also

mentioned by the *Basler Nachrichten* and the *Neue Züricher Zeitung* between April and June 1933. The exact date of Glaser's suspension is not known, since several weeks might have passed between this and its publication. Glaser mentions the loss of his post and his apartment in a letter to Munch of May 19, 1933. The loss of the apartment might have already occurred prior to the loss of Glaser's job due to the confiscation of the entire building complex by the Gestapo in April/May 1933. On June 29, 1933, Hermann Schmitz succeeds Glaser as director of the Kunstbibliothek. On September 27, 1933, Glaser is permanently dismissed from the civil service. Beginning in January 1934, he is awarded a pension amounting to three quarters of what would be paid to an "Aryan" civil servant.

After the death of his first wife and the loss of his apartment and his position, Glaser decides to liquidate his art collection and leave Germany with his future second wife, Maria Milch (1901-1981). It is impossible to determine the exact point at which the decision to sell was made. It is however possible that this decision was not made until late in January 1933 or even early in April. The greater portion of Glaser's art collection and library, as well as his furnishings, is auctioned at the Internationales Kunst- und Auktions-Haus, at auction no. 156 on May 9, 1933 and at the Berlin Buch- und Kunst-Antiquariat Max Perl, at auction no. 180 on May 18-19, 1933. An auction was the option that offered the best price on the free market at this point at time. Contemporary commentary suggests that the appraisal values in the first Glaser auction turned out to be accurate and were exceeded in the case of only a few lots. The same has been found for the second auction of May 18-19, 1933.

Otto Fischer, curator of the Öffentliche Kunstsammlung Basel since 1927, was aware of the catalog of the Max Perl auction in May 1933, whereby he would have also known from the reports in the *Basler Zeitung* and the *Weltkunst* during that same period that Glaser had been relieved of his post. The meeting minutes of the Kunstkommission of May 16, 1933 demonstrate that the Kommission approved of Fischer "seeking to make inexpensive purchases."<sup>8</sup> In addition to expanding the collection of old German masters, Fischer followed a purchasing strategy to establish new collection foci, such as modern art. The further development of the modern collection was bound by the principle of the optimal use of limited means. On June 8, 1933, Fischer gave a report to the Kommission about the auction—at which the prices were "not exactly rock-bottom" but nevertheless "remained at the level of the appraisal prices, which were in themselves low"—and about his acquisitions (among them, Lovis Corinth, Oskar Kokoschka, Henri Matisse). The Kunstkommission approved the "beautiful and inexpensive purchases" at the "Glaser auction in Berlin," thus ensuring the preservation of the largest lot from Glaser's collection, which was scattered all over the world.<sup>9</sup> The final sale amounts at the auction reflect the trend that important pieces attained high prices while less important works remained below expectations. The two prominent lithographs by Munch that were acquired for the Kunstmuseum Basel were bid up above the appraisal (by 29.2% and 8.3%), while the total price of all 200 works acquired for the museum amounted to 10.1% below the appraised value. Existing research,

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<sup>8</sup> Protokoll der Sitzung der Kunstkommission vom 16.05.1933 [Minutes of the meeting of the Kunstkommission of May 16, 1933], Kunstmuseum Basel, Archiv: B1/13-Protokolle der Kunstkommission, p. 51.

<sup>9</sup> Protokoll der Sitzung der Kunstkommission vom 08.06.1933 [Minutes of the meeting of the Kunstkommission of June 8, 1933], Kunstmuseum Basel, Archiv: B1/13-Protokolle der Kunstkommission, p. 58–59.

as well as the Glaser compensation proceeding of 1963, indicates that Glaser lost a considerable portion of his fortune in the auctions. It is difficult to deduce unequivocally what factors influenced these results—the outcomes of the Berlin auctions at the time were affected by the consequences of the world economic crisis, the National Socialists' seizure of power, and an increasing number of auctions of entire collections belonging not only to fleeing Jews but recently impoverished owners as well. According to the research, pricing at public auctions at the time of the Glaser auctions was still based on regulation by supply and demand. The high quality works achieved high prices, as demonstrated by the prices of the Munch lithographs acquired by the Kunstmuseum Basel. While proceeds from auctions by Jewish consignors were already being transferred to blocked accounts during the first years of the Nazi regime, in Glaser's case the research assumes that he received the proceeds of the auctions. It cannot be ascertained whether and to what extent Glaser had access to his salary and bank accounts from abroad in 1933 due to the foreign currency legislation of 1931. Glaser's pension was transferred abroad. After November 1, 1936, however, the Reich Flight Tax introduced by the Nazis was deducted.

Glaser's exposed position at the time of the Nazi assumption of power in 1933 made him a target of the injustice regime. However, it is impossible to determine when he decided to undertake his further emigration. After a stay in Paris in June/July 1933, he wrote in August 1933 from Ascona, Switzerland – where he was temporarily staying with his wife – to give notice that he was giving up his role as an art critic in Berlin. As reasons for his decision, he cites a "constant serious conflict of conscience" as well as "other difficulties" that could "make his activity as a Berlin art critic impossible."<sup>10</sup> In the latter half of 1933, Glaser had 14 crates of goods shipped to him at Ascona for relocation. These contained selected artworks and valuables that he had not auctioned off. Between 1936 and 1938/39, the Glasers stayed repeatedly in Florence with their daughter, who was born in 1936. In the summer of 1938, Glaser applied unsuccessfully for the directorship of the Kunstmuseum Basel. In December 1940, after the Kunsthaus Zürich approached him, Glaser offered to sell them *Music on Karl Johan Strasse* for CHF 15,000 (the painting had been removed from the National Galerie under its new directorship). Glaser expressed regret that he was not in a position to donate the picture to the museum. The painting was ultimately bought for CHF 12,000. In 1940, Glaser had his deposits of Munch paintings collected from the Kunsthaus Zürich and they were later sold. In 1941, the Glasers emigrated to New York with their daughter and moved in 1943 to Lake Placid. Glaser was never professionally active again in the USA either. He died on November 23, 1943 after a protracted illness. The two Munch paintings belonging to Glaser that still remained in Switzerland were deposited at the Kunstmuseum Basel in 1947 by his widow, and in subsequent years either sold by her or returned by the Kunstmuseum to the heirs.

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<sup>10</sup> Letter to Herbert Ihering, of the *Berliner Börsen-Courier*, of August 24, 1933, in: Archiv der Akademie der Bildenden Künste Berlin, NL Herbert Ihering, aus 1336. Quoted in Wolfgang Benz und Angelika Königseder, Gutachten über die historischen Umstände des Verlustes der Kunstsammlung Prof. Dr. Curt Glaser im Jahr 1933 [Report on the historical circumstances of the loss of the art collection Prof. Dr. Curt Glaser in 1933], Zentrum für Antisemitismusforschung an der TU Berlin, May 31, 2010, p. 54.

#### IV. DECISIONS BY OTHER INSTITUTIONS

Since 2007, various German museums, a Dutch museum, as well as two private collections have restituted or financially compensated works from the auctions of May 9, 1933 at the International Art and Auction House (*Internationales Kunst- und Auktions-Haus*) in Berlin and of 18/19 May, 1933 at Max Perl in Berlin to the heirs of Curt Glaser:

- 2007 Niedersächsisches Landesmuseum Hannover<sup>11</sup>
- 2010 Rijksmuseum Amsterdam<sup>12</sup>
- 2012 Kupferstichkabinett, Staatliche Museen zu Berlin, Preussischer Kulturbesitz<sup>13</sup>
- 2013 Bayerische Staatsgemäldesammlungen<sup>14</sup>
- 2013 Germanisches Nationalmuseum Nürnberg<sup>15</sup>
- 2014 Museum Ludwig, Köln<sup>16</sup>
- 2015 Hamburger Kunsthalle (restitution with repurchase)<sup>17</sup>
- 2016 Nationalgalerie and Kunstbibliothek, Staatliche Museen zu Berlin, Preussischer Kulturbesitz<sup>18</sup>
- 2017 two private collections in Germany<sup>19</sup>
- 2018 Museen der Stadt Bamberg<sup>20</sup>
- 2018 Kunsthalle Hamburg<sup>21</sup>

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<sup>11</sup> See the information of the Zentrum für Kulturgutverluste, accessed online on 24 November 2018: [https://www.kulturgutverluste.de/Content/03\\_Forschungsfoerderung/Projekt/Landeshauptstadt-Hannover/Projekt2.html](https://www.kulturgutverluste.de/Content/03_Forschungsfoerderung/Projekt/Landeshauptstadt-Hannover/Projekt2.html).

<sup>12</sup> See the announcement of the Dutch Restitutionskommission, accessed online on 24 November 2018: [https://www.restitutiecommissie.nl/en/recommendations/recommendation\\_199.html](https://www.restitutiecommissie.nl/en/recommendations/recommendation_199.html).

<sup>13</sup> See the press release of the Stiftung Preussischer-Kulturbesitz of 30 November 2012, accessed online on 4 January 2019: <http://www.preussischer-kulturbesitz.de/meldung/article/2012/11/30/pressemeldung-stiftung-preussischer-kulturbesitz-restituiert-vier-werke-von-munch-und-kirchner-an-di.html>.

<sup>14</sup> See the press release of the Bayerischen Staatsgemäldesammlungen of 15 May 2013, accessed online on 4 January 2019: [https://www.pinakothek.de/sites/default/files/downloadable/2017-11/PM\\_Restitution%20Behrens%20und%20Glaser.pdf](https://www.pinakothek.de/sites/default/files/downloadable/2017-11/PM_Restitution%20Behrens%20und%20Glaser.pdf)

<sup>15</sup> See the announcement of the Germanischen Nationalmuseums of 3 July 2013, accessed online on 4 January 2019: [https://www.gnm.de/fileadmin/redakteure/Service/Presse/2013/PDF/PM\\_Restitution\\_Curt\\_Glaser.pdf](https://www.gnm.de/fileadmin/redakteure/Service/Presse/2013/PDF/PM_Restitution_Curt_Glaser.pdf)

<sup>16</sup> See the announcement of the city of Köln, accessed online on 7 January 2019: [https://www.stadt-koeln.de/mediaasset/content/pdf-dezernat7/restitution\\_flechtheim\\_glaser.pdf](https://www.stadt-koeln.de/mediaasset/content/pdf-dezernat7/restitution_flechtheim_glaser.pdf); vgl. ebenfalls die Bildliste Restitution Flechtheim / Glaser, accessed online on 4 January 2019): [https://www.museum-ludwig.de/fileadmin/content/07\\_Presse/Bildliste\\_Flechtheim\\_Glaser\\_final.pdf](https://www.museum-ludwig.de/fileadmin/content/07_Presse/Bildliste_Flechtheim_Glaser_final.pdf).

<sup>17</sup> See the press release of the Hamburger Kunsthalle of 10 September 2015, accessed online on 24 November 2018: [https://www.hamburger-kunsthalle.de/sites/default/files/pm\\_aquarell\\_walchensee\\_von\\_l.\\_corinth\\_in\\_hamburger\\_kunsthalle\\_restituiert.pdf](https://www.hamburger-kunsthalle.de/sites/default/files/pm_aquarell_walchensee_von_l._corinth_in_hamburger_kunsthalle_restituiert.pdf)

<sup>18</sup> See the press release of the Stiftung Preussischer Kulturbesitz of 20 April 2016, accessed online on 7 January 2019: <http://www.smb.museum/nachrichten/detail/provenienzforschung-faire-und-gerechte-loesung-mit-den-erben-von-curt-glaser.html>

<sup>19</sup> See the press release of the Law Offices Rowland & Associates, accessed online on 7 January 2019: <https://rowlandlaw.com/wp-content/uploads/2016/07/Press-Release-Corot-English.pdf>), sowie Artikel des Art Newspaper vom 04.10.2017, online unter (7.01.2019): <https://www.theartnewspaper.com/news/christies-to-auction-long-lost-painting-by-mannerist-artist-spranger>.

<sup>20</sup> See the press release of the city of Bamberg, accessed online on 1 February 2018: <https://www.stadt.bamberg.de/B%C3%BCrgerservice/Rathaus-Service/Webadressen/-Faire-und-gerechte-L%C3%B6sung.php?object=&ModID=7&FID=1829.12941.1&NavID=2730.241&La=1>

Year	Collection / Institution	Work/-s Provenance	Decision
2007	Niedersächsisches Landesmuseum Hannover	<b>Painting by Lovis Corinth, <i>Roman Landscape</i></b> <sup>22</sup> (1914)  9.05.1933: Auction 156, Internationales Kunst- und Auktions-Haus, Berlin, No. 264	Restitution to the heirs of Curt Glaser on 24 September 2007. <sup>23</sup>
2010	Rijksmuseum Amsterdam, the Netherlands	<b>Painting by Jan van de Velde II, <i>Winter Landscape</i></b> <sup>24</sup>  9.05.1933: Auction 156, Internationales Kunst- und Auktions-Haus, Berlin, No. 233  The painting entered the collection of the Rijksmuseum as a donation of a private collector in 1935.	The Dutch Restitution Commission recommends that the painting be restituted by the National Collections of the Netherlands. The State Secretary for Education, Culture and Science complies with the recommendation. <sup>25</sup>
2012	Kupferstichkabinett, Staatliche Museen zu Berlin, Preussischer Kulturbesitz	<b>Six prints by Edvard Munch</b>  18./19.05.1933: Auction 180, Max Perl, Berlin, No. 1105; 1086; 1144 Acquisitions by Berlin Kupferstichkabinett <sup>26</sup>  <b>Three prints by Ernst Ludwig Kirchner</b>  Donation to the Berlin Kupferstichkabinett directly after the auction. <sup>27</sup>	The following works were restituted to the heirs: <sup>28</sup> 1. Edvard Munch, <i>Girl on the Beach</i> , mezzotint 2. Edvard Munch, <i>Old Man Praying</i> , woodcut 3. Edvard Munch, <i>Death and the Woman</i> , etching 4. Ernst Ludwig Kirchner,

<sup>21</sup> See the press release of the city of Hamburg, Behörde für Kultur und Medien, of 30 July 2019, accessed online on 7 January 2019: <https://www.hamburg.de/pressearchiv-fhh/11449606/restitution-landschaftsgemaelde-rueckkauf-kunsthalle/>

<sup>22</sup> Lovis Corinth, *Roman Landscape*, 1914, oil on canvas, 71.5 x 96 cm.

<sup>23</sup> See Dormann 2008, p. 60: „Im Dezember 2003 kam es zu einem ersten Kontakt zwischen dem juristischen Vertreter der Erbgemeinschaft Curt Glaser und dem Landesmuseum Hannover. Nach der Erstellung eines unabhängigen Gutachtens befürwortete der Rat der Stadt Hannover im Februar 2007 aufgrund der Washingtoner Grundsätze und der Gemeinsamen Erklärung für die Rückgabe des Gemäldes an die Erben. Mit dieser Resitution sind jedoch vermutlich weder der Fall Glaser noch der Fall Doebbekke abgeschlossen.“

<sup>24</sup> Jan van de Velde II, *Winter Landscape*, wood, 8 x 11 cm.

<sup>25</sup> See the press release of the Dutch Restitutionskommission of 4 October 2010 (accessed online on 4 January 2019: [https://www.restitutiecommissie.nl/en/pressreleases/press\\_release\\_rc\\_199.html](https://www.restitutiecommissie.nl/en/pressreleases/press_release_rc_199.html)): „The painting *Winter Landscape* by Jan van de Velde II in the Rijksmuseum Amsterdam was claimed by the heirs of Curt Glaser, a prominent German art historian of Jewish descent. From 1924, Glaser was director of the *Staatliche Kunstbibliothek* (the State Art Library) in Berlin. In its recommendation, the Committee describes how, soon after the Nazis assumed power in Germany in 1933, Glaser was subject to anti-Jewish measures and persecution. The authorities ordered Glaser to empty and vacate his home, after which the Gestapo established its headquarters there. In addition, Glaser lost his job due to a law that provided for the removal of Jews and political opponents from the civil service. In preparation for his escape from Germany, Glaser sold his extensive art and book collection, which included the Van de Velde II painting. In July 1933, Glaser and his wife managed to flee from Germany to the United States, where he died in 1943. After having moved from one place to another, the painting by Van de Velde II ended up in the Rijksmuseum in 1935, through a donation from a private collector. Since then, it has been part of the Dutch national art collection. Because the painting by Van de Velde II is government property, it comes under the Dutch government's generous restitution policy. The Restitutions Committee is of the opinion that Curt Glaser lost possession of this painting involuntarily in 1933, as a result of the persecution he endured by the Nazi regime. The Committee therefore advises the State Secretary to return the painting to Curt Glaser's heirs.“

<sup>26</sup> See Inventory of the Nationalgalerie FIII, cited after Thielecke 2014, p. 390.

<sup>27</sup> It can no longer be determined today, who the donor was; in the inventory the works were recored as „a donation of an unknown person“, see Inventory of the Nationalgalerie FIII, cited after Thielecke 2014, p. 390.

<sup>28</sup> See the press release of the Stiftung Preussischer Kulturbesitz of 30 November 2012 (accessed online on 7 January 2019: <http://www.preussischer-kulturbesitz.de/meldung/article/2012/11/30/pressemeldung-stiftung-preussischer-kulturbesitz-restituiert-vier-werke-von-munch-und-kirchner-an-di.html>): „In Anerkennung der Verfolgung Prof. Glasers durch das Nazi-Regime und in Würdigung seiner großen Verdienste für die Berliner Museen einigten sich die Stiftung Preußischer

			<i>Farmers in Conversation</i> , woodcut
2013	Bayerische Staatsgemäldesammlungen	<p><b>Two watercolors by Max Pechstein</b>, <i>White House</i> (1919)<sup>29</sup> and <i>Wiesental</i> (1911)<sup>30</sup></p> <p>18./19.05.1933: Auction 180, Max Perl, Berlin, No. 1224, Acquisition by Berliner Nationalgalerie 1937: Confiscation of both watercolors during the campaign „Entartete Kunst“ („Degenerate Art“)</p> <p>1939: Acquisition by Sofie and Emanuel Fohn through exchange</p> <p>1964: Donation together with other works to the Bayerische Staatsgemäldesammlungen.</p>	The restitution claim of the heirs was recognized as justified; both parties contractually agreed that both watercolors by Max Pechstein will remain property of the Bayerische Staatsgemäldesammlungen and the association of heirs will be adequately compensated. <sup>31</sup>
2013	Germanisches Nationalmuseum Nürnberg	<p><b>Painting by Joseph Ignaz Mildorfer</b>, <i>Farewell of the Apostles Peter and Paul</i><sup>32</sup></p> <p><b>Watercolor by Friedrich Brentel the Elder</b>, <i>Landscape with Galathea, Acis and Polyphem</i><sup>33</sup></p> <p><b>Watercolor by an unknown artist, copy after Joseph Heintz d. Ä.</b>, <i>Diana and Actaeon</i><sup>34</sup></p> <p><b>Painting by Johann Wenzel Bergl</b>, <i>Job on a Dunghill</i><sup>35</sup> [at the time attributed to Jan Lys], acquired by Germanisches Nationalmuseum in 1934 from Kunsthaus Kahlert &amp; Sohn, Berlin</p>	By mutual agreement, the association of heirs and the Germanisches Nationalmuseum agreed that the four works from the collection of the Germanisches Nationalmuseum remain in the museum and that the association of heirs will be adequately compensated. <sup>36</sup>

Kulturbesitz und die Erben von Prof. Dr. Curt Glaser im Rahmen einer ‚fairen und gerechten Lösung‘ im Sinne der Washingtoner Prinzipien. Danach werden die Werke von Edvard Munch „Mädchen am Strand“ (Schabkunst), „Gebet eines alten Mannes“ (Holzschnitt) und „Der Tod und die Frau“ (Radierung) sowie ein Holzschnitt von Ernst Ludwig Kirchner „Bauernunterhaltung“ an die Erben von Prof. Curt Glaser zurückgegeben. Die restlichen Werke verbleiben mit Zustimmung der Erbgemeinschaft – nicht zuletzt zur Erinnerung an den ehemaligen Direktor und bedeutenden Wissenschaftler Prof. Dr. Curt Glaser – im Eigentum der Stiftung Preußischer Kulturbesitz.“

<sup>29</sup> Max Pechstein, *White House*, 1910, watercolor and pencil, 14 x 11 cm.

<sup>30</sup> Max Pechstein, *Wiesental*, 1911, watercolor and pencil, 15 x 10 cm.

<sup>31</sup> See the press release of the Bayerischen Staatsgemäldesammlungen of 15 May 2013 (accessed online on 4 January 2019]: [https://www.pinakothek.de/sites/default/files/downloadable/2017-11/PM\\_Restitution%20Behrens%20und%20Glaser.pdf](https://www.pinakothek.de/sites/default/files/downloadable/2017-11/PM_Restitution%20Behrens%20und%20Glaser.pdf)):

„Für die Bayerischen Staatsgemäldesammlungen steht außer Zweifel, dass Prof. Curt Glaser ein Verfolgungsschicksal erlitten hat. Die Verauktionierung seiner Kunstbibliothek und seiner Kunstsammlung auf der vorgenannten Max-Perl-Auktion, darunter auch die beiden Pechstein-Aquarelle, werten die Bayerischen Staatsgemäldesammlungen als verfolgungsbedingten Verlust. Das Restitutionsbegehren der Erben nach Prof. Curt Glaser wird als berechtigt anerkannt. Die Erben haben der Bitte der Bayerischen Staatsgemäldesammlungen nach einem Verbleib der Werke in der Sammlung entsprochen. Gemeinsam wurde vertraglich festgelegt, dass die beiden Aquarelle von Pechstein im Eigentum der Bayerischen Staatsgemäldesammlungen verbleiben und die Erbgemeinschaft im Gegenzug angemessen entschädigt wird.“

<sup>32</sup> Joseph Ignaz Mildorfer, *Farewell of the Apostles Peter and Paul*, canvas, 52 x 33 cm.

<sup>33</sup> Watercolour by Fiedrich Brentel the Elder., *Landscape with Glathea, Acis and Polyphem*, canvas, 10 x 16 cm.

<sup>34</sup> Unknown, Copy after Joseph Heintz d. Ä., *Diana and Actaeon*, 11 x 17 cm.

<sup>35</sup> Johann Wenzel Bergl, *Job on a Dunghill*, canvas, 90 x 70 cm.

<sup>36</sup> See the press release of the Germanisches Nationalmuseum of 3 July 2013 (accessed online on 7 January 2019] :[https://www.gnm.de/fileadmin/redakteure/Service/Presse/2013/PDF/PM\\_Restitution\\_Curt\\_Glaser.pdf](https://www.gnm.de/fileadmin/redakteure/Service/Presse/2013/PDF/PM_Restitution_Curt_Glaser.pdf)): „Das Germanische Nationalmuseum in Nürnberg und die Erben von Prof. Dr. Curt Glaser haben sich nach umfangreichen historischen Recherchen zu vier Kunstwerken aus der ehemaligen Sammlung von Prof. Curt Glaser auf eine faire und gerechte Lösung gemäß der Prinzipien der Washingtoner Konferenz und in Umsetzung der Gemeinsamen Erklärung der Bundesregierung, der Länder und kommunalen Spitzenverbände zur Auffindung und Rückgabe NS-verfolgungsbedingt entzogenen Kulturguts, insbesondere aus jüdischem Besitz, vom 14. September 1999 verständigt. [...] In Anerkennung des Verfolgungsschicksals von Prof. Curt Glaser und des NS-verfolgungsbedingten Verlustes seiner Kunstwerke haben sich die Erbgemeinschaft und das Germanische Nationalmuseum einvernehmlich darauf geeinigt, dass die vier Kunstwerke im Bestand des Germanischen Nationalmuseums verbleiben und die Erbgemeinschaft im Gegenzug angemessen entschädigt wird.“

		9.05.1933: Auction 156, Internationales Kunst- and Auktions-Haus, Berlin, No. 226; 248; 249; 232	
2014	Museum Ludwig, Köln	<p><b>Five drawings by Erich Heckel, Georges Kars and Ernst Ludwig Kirchner</b></p> <p>Erich Heckel, <i>Dancing Nude</i> (c. 1980/10)<sup>37</sup></p> <p>Georges Kars, <i>Female Nude Sitting</i> (1920)<sup>38</sup></p> <p>Georges Kars, <i>Seated Female Nude, Legs Crossed</i> (1920)<sup>39</sup></p> <p>Ernst Ludwig Kirchner, <i>Three Female Nudes</i> (c. 1911/12)<sup>40</sup></p> <p>Ernst Ludwig Kirchner, <i>Shepherd with two Calves</i> (c. 1920)<sup>41</sup></p> <p>18./19.05.1933: Auction 180, Max Perl, Berlin, No. 880; 950; 958; 956 Acquisition from Dr. Joseph Haubrich, Köln attorney in law 1946: Donation to Wallraf-Richart-Museum (from 1976: Museum Ludwig Köln)</p>	The city of Köln restituted to the heirs of Curt Glaser five drawings from the Museum; those remain after the restitution in the Museum Ludwig. <sup>42</sup>
2015	Hamburger Kunsthalle	<p><b>Watercolor by Lovis Corinth, <i>Walchensee</i></b> (1919)<sup>43</sup></p> <p>18./19.05.1933: Auction 180, Max Perl, Berlin, No. 644 No indication of the buyer at the auction 1949: Acquisition by Hamburger Kunsthalle from a private collector</p>	The watercolor by Lovis Corinth was restituted and remains after a repurchase by the Kunsthalle in the collection of the Hamburger Kunsthalle. <sup>44</sup> The work will be in future labelled with the following addition: „From the collection of Professor Dr. Curt Glaser, restituted to the heirs and repurchased from the heirs in 2015.“

<sup>37</sup> Erich Heckel, *Dancing Nude*, c. 1980/10, chalk on paper, 45 x 35 cm.

<sup>38</sup> Georges Kars, *Female Nude Sitting*, 1920, charcoal, red chalk on paper, 57 x 44.2 cm.

<sup>39</sup> Georges Kars, *Seated Female Nude, Legs Crossed*, 1920, charcoal, red chalk on paper, 54.2 x 43.4 cm.

<sup>40</sup> Ernst Ludwig Kirchner, *Three Female Nudes*, c. 1911/12, pencil on cardboard, 27 x 36.2 cm.

<sup>41</sup> Ernst Ludwig Kirchner, *Shepherd with two Calves*, c. 1920, watercolor and pencil on cardboard, 50.2 x 36.5 cm.

<sup>42</sup> See the announcement of the city of Köln (accessed online on 7 January 2019]: [https://www.stadt-koeln.de/mediaasset/content/pdf-dezernat7/restitution\\_flechtheim\\_glaser.pdf](https://www.stadt-koeln.de/mediaasset/content/pdf-dezernat7/restitution_flechtheim_glaser.pdf)): „Vor diesem historischen Hintergrund wurde seitens des Museums und der Stadt Köln das Restitutionsbegehren der Erbgemeinschaft als berechtigt anerkannt. In einem von Sachverstand, Respekt und Fairness getragenen Verfahren haben sich die Erben von Professor Dr. Curt Glaser und die Stadt Köln auf die Zahlung einer angemessenen Entschädigung geeinigt. Die Erben haben so dem Wunsch des Museum Ludwig auf einen Verbleib dieser Werke in der Sammlung entsprochen.“

<sup>43</sup> Lovis Corinth, *Walchensee*, 1919, oil on plywood, 37.2 x 27.2 cm.

<sup>44</sup> See the press release of the Hamburger Kunsthalle of 10 September 2015 (accessed online on 7 January 2019]: [https://www.hamburger-kunsthalle.de/sites/default/files/pm\\_aquarell\\_walchensee\\_von\\_l\\_corinth\\_in\\_hamburger\\_kunsthalle\\_restituiert.pdf](https://www.hamburger-kunsthalle.de/sites/default/files/pm_aquarell_walchensee_von_l_corinth_in_hamburger_kunsthalle_restituiert.pdf): „Die Hamburger Kunsthalle und die Erben von Prof. Dr. Curt Glaser haben sich nach umfangreichen historischen Forschungen hinsichtlich des Aquarells „Walchensee“ von Lovis Corinth aus der Sammlung von Prof. Dr. Curt Glaser nach einem einvernehmlichen Verfahren und Austausch auf eine gerechte und faire Lösung geeinigt. In Anerkennung der Verfolgung von Prof. Dr. Curt Glaser durch das Nazi-Regime haben sich die Erbgemeinschaft und die Freie und Hansestadt Hamburg darauf verständigt, dass das Aquarell von Lovis Corinth nach erfolgter Restitution von der Kunsthalle zurückgekauft und somit in der Sammlung der Hamburger Kunsthalle verbleibt.“



2016	Nationalgalerie and Kunstbibliothek, Staatliche Museen zu Berlin, Preussischer Kulturbesitz	<b>Two drawings by Christian Bernhard Rode</b> , Two designs for allegorical reliefs, (1796)  <b>26 documentary photographs</b> of artworks from the collection of c. 10'000 photographs that were donated by Glaser to the Deutsches Bildarchiv in der Staatlichen Kunstbibliothek shortly before his emigration. <sup>45</sup>	The heirs and the SPK met an agreement that made it possible for the works to remain in the collections of the Stiftung Preussischer Kulturbesitz (SPK) „against a compensation payment“. <sup>46</sup>
2017	Private collection, Germany	<b>Drawing by Camille Corot, <i>Baroque Portal in Toledo</i></b>  18./19.05.1933: Auction 180, Max Perl, Berlin, No. 840 Arnold Blome, art dealer in Bremen 1938: Exhibition at Kunsthalle Bremen of 1938 Auction 2007: German private collector	<sup>47</sup>
2017	Private collection, Germany	<b>Painting by Bartholomäus Spranger, <i>Mercury Carrying Psyche to Mount Olympus</i></b> (1576) <sup>48</sup>  9.05.1933: Auction 156, Internationales Kunst- und Auktions-Haus, Berlin, No. 231 1933–1965: Wolfgang Gurlitt 18.11.1965: Auction at Lempertz, Köln 1965–2017: private collection Oktober 2017: Restitution to the heirs of Curt Glaser	<sup>49</sup>

<sup>45</sup> The „Bildarchiv“ (photo archive) was founded in 1929 with the view to enable the most comprehensive possible documentation of art, applied arts and architecture in the media of photography, reproductions and printed images. Parts of the holdings of the archive were destroyed in the Second World War. After the closure of the archive its remaining holdings were distributed among various museum collections. It cannot thus be ruled out that more photographs stemming from the collection of Curt Glaser will be identified in future.

<sup>46</sup> See the press release of the Stiftung Preussischer Kulturbesitz of 20 April 2016 (accessed online on 7 January 2019: <https://www.smb.museum/nachrichten/detail/provenienzforschung-faire-und-gerechte-loesung-mit-den-erben-von-curt-glaser.html>): „Im Zuge der systematischen Erforschung der Bestände des Kupferstichkabinetts wurden zwei Zeichnungen identifiziert, die die Nationalgalerie auf einer der beiden Auktionen, bei denen Prof. Glaser seine Kunstsammlung versteigern ließ, erworben hatte. Bei Recherchen in der Kunstbibliothek wurden außerdem 26 Fotografien gefunden, die ebenfalls aus dem Alteigentum Prof. Glasers stammen. Sie gehören zu einem Bestand von ca. 10.000 Fotografien, die er kurz vor seiner Emigration 1933 der Kunstbibliothek schenkte, die jedoch weitgehend als verloren gelten müssen. In Anerkennung der Verfolgung Prof. Glasers durch das Nazi-Regime und in Würdigung seiner großen Verdienste für die Staatlichen Museen zu Berlin einigten sich die SPK und die Erben von Prof. Dr. Curt Glaser im Rahmen einer fairen und gerechten Lösung im Sinne der Washingtoner Prinzipien darauf, dass die Werke gegen Leistung einer Entschädigungszahlung im Eigentum der Stiftung Preußischer Kulturbesitz verbleiben.“

<sup>47</sup> See the announcement of Law Offices Rowland & Associates, accessed online on 7 January 2019: <https://rowlandlaw.com/wp-content/uploads/2016/07/Press-Release-Corot-English.pdf>): „At the auction *Books, Hand Drawings, Paintings/Graphic of the 16th to 20th Century* at the Berlin auction house *Max Perl* the Bremen art dealer and art collector Arnold Blome (1894-1972) acquired four pencil drawings, which were offered for sale in lot 840. One of the pencil drawings was the *Baroque Portal in Toledo*. This drawing, together with other artworks from the collection Arnold Blome, was exhibited at the *Kunsthalle Bremen* from October-November 1938. When the drawing was auctioned off once again in 2007, the auction catalog mentioned the provenance collection Arnold Blome and the exhibition at the *Kunsthalle Bremen* in 1938. The drawing subsequently came in possession of a German private art collection, which remarkably informed the heirs of Professor Glaser about the whereabouts of this drawing. In acknowledgement of this historical background the restitution claim by the heirs of Professor Glaser was recognized. In a proceeding directed by expertise, respect and fairness, the heirs of Professor Glaser and the German art collector agreed to a payment of appropriate compensation. The heirs of Professor Glaser accepted the request that the drawing remains in the private collection.

<sup>48</sup> Bartholomäus Spranger, *Mercury Carrying Psyche to Mount Olympus*, 1576, oil on canvas, 95.3 x 135.4 cm.

<sup>49</sup> See the article in Art Newspaper of 4 October 2017 (accessed online on 7 January 2019: <https://www.theartnewspaper.com/news/christies-to-auction-long-lost-painting-by-mannerist-artist-spranger>): „He died when I was a baby,” says Paul Livant, Curt Glaser’s great-nephew and one of his heirs, a guitarist in New York. “He never fully emotionally recovered from having to flee Germany. My great-aunt was constantly talking about him and his life in Berlin. Curt was a major figure when I was growing up. There was a feeling of loss, but also a sense of what our roots were.” See also lot 13, Auction Christie’s, London, of 7 December 2017, accessed online on 7 January 2019): <http://www.christies.com/lotfinder/Lot/bartholomaeus-spranger-antwerp-1546-1611-prague-mercury-carrying-6117510-details.aspx>.

		7.12.2017: Auction at Christie's, London, No. 201 (estimated price: GBP 400,000 - GBP 600,000; price: GBP 3,368,750 (CHF 4'400'000))	
2018	Museen der Stadt Bamberg	<b>Drawing by Georg Christian Wilde</b> (attributed, signed by C.W.), <i>East Choir of Bamberg Cathedral</i> , 1833, ink and pencil drawing, 21 x 20.5 cm.  18./19.05.1933: Auction 180, Max Perl, Berlin, No. 644 1933–1934: Berliner Antiquariat Altmann 1934: Acquisition by the city of Bamberg	The drawing was restituted by the city of Bamberg and the Museums of the City of Bamberg; both parties agreed on repurchase of the painting. <sup>50</sup>
2018	Hamburger Kunsthalle	<b>Oil painting in the style of the Flemish painter Tobias Verhaecht</b> , <sup>51</sup> <i>Landscape with the Flight to Egypt</i>  <u>Not the property of Curt Glaser, but of his brother-in-law, Hanns Schwager (attorney in law in Berlin, married to the sister of the second wife of Curt Glaser)</u> <sup>52</sup> who handed the painting over to Curt Glaser.  9.05.1933: Auction 156, Internationales Kunst- und Auktions-Haus, Berlin, No. 237	The painting was restituted to the heirs and remains at Hamburger Kunsthalle, which repurchased it. <sup>53</sup>

<sup>50</sup> See the press release of the city of Bamberg of 1 February 2018 (accessed online on 7 January 2019: <https://www.stadt.bamberg.de/B%C3%BCrgerservice/Rathaus-Service/Webadressen/-Faire-und-gerechte-L%C3%B6sung-.php?object=&ModID=7&FID=1829.12941.1&NavID=2730.241&La=1>): „In Anbetracht des NS-verfolgungsbedingten Verlustes des Kunstwerkes wird die Zeichnung an die Erben von Prof. Dr. Curt Glaser restituiert. Da die Stadt Bamberg und die Museen der Stadt Bamberg aufgrund des Sujets am Erhalt der Zeichnung für die Museumssammlung interessiert sind, verständigten sich die Parteien auf einen Rückkauf der Zeichnung. [...] Wie bereits andere Besitzer von Kunstwerken aus der Sammlung Glaser, sowohl öffentliche Einrichtungen und Museen als auch Privatpersonen, suchten die Stadt Bamberg und die Museen der Stadt Bamberg, aufgrund eigener systematischer Erforschungen ihrer Bestände, den Kontakt zu den Erben von Prof. Dr. Curt Glaser und den diese vertretenden Rechtsanwälten.“

<sup>51</sup> Oil painting in the style of the Flemish Painter Tobias Verhaecht, *Landscape with the Flight to Egypt*, oil on wood, 37 x 46 cm.

<sup>52</sup> See the press release of the city of Hamburg, Behörde für Kultur und Medien, of 30 July 2019 (accessed online on 7 January 2019: <https://www.hamburg.de/pressearchiv-fhh/11449606/restitution-landschaftsgemaelde-rueckkauf-kunsthalle/>): „Der Berliner Rechtsanwalt Dr. Hanns Fischer gehörte seit dem 30. Januar 1933 aufgrund seiner ‚jüdischen Abstammung‘ zu dem Personenkreis, der in seiner Gesamtheit von der damaligen deutschen Regierung und der NSDAP aus rassistischen Gründen verfolgt wurde (Kollektivverfolgung). Als niedergelassener Rechtsanwalt und Notar musste er unmittelbar nach Machtergreifung der Nationalsozialisten aufgrund von Boykottmaßnahmen einschneidende Umsatzeinbußen hinnehmen. Dr. Hanns Fischer war der Schwager von Prof. Dr. Curt Glaser, einem Berliner Arzt, Kunsthistoriker und Verfasser zahlreicher bedeutender kunsthistorischer Publikationen, der selbst eine umfangreiche Kunstsammlung besaß. Diesem übergab Fischer das Gemälde *Landschaft mit der Flucht nach Ägypten*. Glaser ließ es zusammen mit seinen Besitztümern auf der Auktion im Internationalen Kunst- und Auktionshaus am 9. Mai 1933 in Berlin versteigern. Wer das Werk auf der Auktion ersteigerte, konnte bisher nicht ermittelt werden. Die Freie und Hansestadt Hamburg erhielt das Gemälde von Max Arnolds, La Tour-de-Peilz (Schweiz), 1972 als Geschenk.“

<sup>53</sup> See the press release of the city of Hamburg Hamburg, Behörde für Kultur und Medien, of 30.07.2019 (accessed online on 7 January 2019: <https://www.hamburg.de/pressearchiv-fhh/11449606/restitution-landschaftsgemaelde-rueckkauf-kunsthalle/>): „Die Hamburger Kunsthalle hat das Ölgemälde *Landschaft mit der Flucht nach Ägypten* von Tobias Verhaecht (1561–1630), Nachfolger – ein namentlich nicht bekannter, in der Nachfolge und Art des flämischen Malers Verhaecht wirkender Künstler – restituiert und zurückgekauft. Die Rückgabe des Werkes an die Erbgemeinschaft nach Dr. Hanns Fischer erfolgte nach umfangreicher Forschung und in Anerkennung der Verfolgung Dr. Hanns Fischers durch das Nazi-Regime. Der Rückkauf des Gemäldes durch die Hamburger Kunsthalle sichert dessen Verbleib in der Sammlung des Museums.“

A memorial plaque was installed in the foyer of the Kunstbibliothek in Berlin, where Curt Glaser worked, to commemorate Curt Glaser. The press release of the **Staatliche Museen zu Berlin (State Museums in Berlin)**, General Directorate, of May 9, 2016 reads as follows:

In 2012 the Prussian Heritage Foundation (Stiftung Preussischer Kulturbesitz) and the heirs of Professor Dr Curt Glaser agreed on the return of four prints by Evarud Munch and Ernst Ludwig Kirchner to the heirs a part of a „fair and just“ solution in accordance with the Washington Principles. The Department of Prints and Drawings (Kupferstichkabinett) had acquired these high-quality prints from the Glaser collection at one of the two auctions in 1933. Five other works in the Kupferstichkabinett and in the Kunstbibliothek from Curt Glaser's earlier possessions remained with the approval of the association of the heirs the property of the Staatliche Museen zu Berlin. In 2016 the SPK and the heirs of Professor Curt Glaser again reached an agreement for a few other works that were identified in the collections of the Staatliche Museen zu Berlin as the belonging to Curt Glaser. Both solutions were found in recognition of the persecution of Professor Glaser by the Nazi regime and in recognition of his great service to the Staatliche Museen zu Berlin.<sup>54</sup>

Until now, the rejections of claims of the Glaser heirs in Basel in 2008 by the Canton of Basel-Stadt<sup>55</sup> and in London on June 24, 2009 by the **UK Spoliation Advisory Panel**<sup>56</sup> are publicly known. The **Museum of Fine Arts in Boston**, USA, suggests on its website that the heirs of Curt Glaser claimed a restitution of the painting by Joachim Anthoniesz Wtewael with the provenance of „Curt Glaser Collection“ that had been auctioned in the auctions in May 1933 without precising the particular actions by the heirs. The museums explicitly refers to the decision of the UK Spoliation Advisory Panel and thus to the rejection in London: „The heirs of Curt Glaser have sought restitution of the works of art auctioned in May, 1933, alleging that the sales were due to Nazi persecution and therefore forced. In 2009, the United Kingdom's Spoliation Advisory Panel issued a report regarding eight drawings that were auctioned in May, 1933. The Advisory Panel found that Glaser's decision to sell the bulk of his collection was due to a number of factors and that the prices attained at auction were fair. The panel concluded that the claim was not sufficiently strong to recommend restitution of the drawings.”<sup>57</sup>

<sup>54</sup> See the announcement, accessed online on 24 November 2018: <https://www.smb.museum/nachrichten/detail/provenienzforschung-faire-und-gerechte-loesung-mit-den-erben-von-curt-glaser.html>.

<sup>55</sup> See the press release of the Regierungsrat Basel-Stadt of 19 February 2008, accessed online on 19 October 2018: <http://www.medien.bs.ch/nm/2008-02-19-rrbs-005.html>.

<sup>56</sup> See *Report Courtauld Institute of Art 2009 24.06.2009*, accessed online on 4 January 2019: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/248231/0757.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248231/0757.pdf)

<sup>57</sup> See the announcement, accessed online on 13 November 2018: <https://www.mfa.org/collections/object/actaeon-watching-diana-and-her-nymphs-bathing-33583>.

## V. LEGAL SOURCES

### 1. Law and Morality

Based on the exchange with the representatives of the heirs, the Kunstkommission is proceeding on the assumption that the Canton of Basel-Stadt is not being confronted with an actual *legal claim* that could be enforced in court. The legal assessment made by the legal representative in 2008 supports this assessment. The representatives of the heirs rely heavily on sources commonly referred to as "soft law" (or "non-binding principles"). These sources primarily make a moral claim. The Kunstkommission therefore is not making a decision in the legal sense. In the event of any future legal proceedings, the statements of the Kunstkommission would be unprejudicial in every respect.

The contradistinction between the law and morality should not be overemphasized. The legal system is an expression of valid moral precepts, as is clearly evident in concepts such as "good faith" (Art. 2 para. 1 ZGB<sup>58</sup> and Art. 3 ZGB) and "immorality" (Art. 19 para. 2 OR).<sup>59</sup> Legal considerations guide moral judgment. For its part, the law is open to moral values, as these are manifest in the Washington Principles and other declarations; open concepts of law are capable of absorbing moral notions and, in individual cases, make them into law. Finally, it should be noted that the Kunstmuseum Basel has expressly committed itself to the Washington Principles (see **following chapter**). Such a self-imposed commitment binds the museum to make a decision that aligns with the corresponding declaration.

### 2. Legal sources in detail

#### a) *Washington Principles*

The "Washington Conference Principles on Nazi-Confiscated Art" ("Washington Principles") of 3 December 1998 were adopted under the aegis of the "Washington Conference on Holocaust-Era Assets." The text in full is as follows:

In developing a consensus on non-binding principles to assist in resolving issues relating to Nazi-confiscated art, the Conference recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws.

1. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.
2. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.
3. 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.
4. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.
5. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.
6. Efforts should be made to establish a central registry of such information.
7. Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.
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.
9. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, cannot be identified, steps should be taken expeditiously to achieve a just and fair solution.

<sup>58</sup> Schweizerisches Zivilgesetzbuch of 10 December 1907 (SR 210), accessed online on 19 October 2018 at <https://www.admin.ch/opc/de/classified-compilation/19070042/index.html>.

<sup>59</sup> Federal Act on the Supplement to the Swiss Civil Code (Part Five: Code of Obligations) of 30 March 1911 (SR 220) accessed online on 19 October 2018 at <https://www.admin.ch/opc/de/classified-compilation/19110009/index.html>.

10. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.
11. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.<sup>60</sup>

Most relevant here is Art. 8. In the case of artworks "[that] have been confiscated by the Nazis and not subsequently restituted," requisite steps should be taken quickly "to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case."

The question of whether "confiscated" encompasses not just confiscation but also "flight assets" (a term used in the Bergier Report) and "divestiture due to persecution" (see **ch. V. 2. e. *Handreichung der deutschen Bundesregierung***) is controversial, but tends to be rejected in Switzerland.<sup>61</sup> The "just and fair solution" opens up a broad spectrum of possible solutions; anything is conceivable—from the mere recognition of the circumstances surrounding the acquisition of a work of art to its return.<sup>62</sup>

The Washington Principles explicitly declare themselves to be "non-binding." In 1998, the Kunstmuseum Basel, together with other Swiss art museums, signed a declaration in line with the Washington Principles.<sup>63</sup> In this declaration, the Kunstmuseum commits itself "with regard to the assertion of claims of ownership relating to the time in question, to examine such applications thoroughly and in the case of justifiable claims to contribute constructively to a joint solution " (No. 3). The museums "principally disapprove of the unlawful appropriation of cultural property and support efforts to either return such objects to their rightful owners or heirs or to find a solution that is appropriate for both sides."

## **b) ICOM**

The Kunstmuseum Basel is bound by the ICOM Code of Ethics for Museums.<sup>64</sup> Its Art. 2.2 and 2.3 state as follows:

### **2. 2 Valid Title**

No object or specimen should be acquired by purchase, gift, loan, bequest, or exchange unless the acquiring museum is satisfied that a valid title is held. Evidence of lawful ownership in a country is not necessarily valid title.

### **2. 3 Provenance and Due Diligence**

Every effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest, or exchange has not been illegally obtained in, or exported from its country of origin or any intermediate country in which it might have been owned legally (including the museum's own country). Due diligence in this regard should establish the full history of the item since discovery or production.

The provisions do not explicitly address the return of works of art, but are a clear commitment to stringent research of the provenance. They rule out the possibility that the Kunstmuseum may retain works of art with dubious provenance in its holdings. Nothing can be inferred from the guidelines regarding where to draw the line between looted art and flight assets.

<sup>60</sup> Accessed online on 19 October 2018 at <https://www.state.gov/p/eur/rt/hlcst/270431.htm>.

<sup>61</sup> Cf. the views of Peter Mosimann und Beat Schönenberger (eds.), *Fluchtgut – Geschichte, Recht und Moral*, Bern 2015.

<sup>62</sup> Cf. the BAK/EDI brochure, "Factors Contributing to Just and Fair Solutions," March 2019, p. 1. Accessed online on 18 June 2019 at <https://www.bak.admin.ch/bak/de/home/kulturerbe/raubkunst/gerechte-und-faire-loesungen.html>

<sup>63</sup> Printed in Peter Mosimann, Marc-André Renold and Andrea Raschèr (eds.), *Kultur – Kunst – Recht*, Schweizerisches und Internationales Recht, Basel 2009, Appendix 6.3.

<sup>64</sup> Accessed online on 19 October 18 at [http://icom.museum/fileadmin/user\\_upload/pdf/Codes/code\\_ethics2013\\_eng.pdf](http://icom.museum/fileadmin/user_upload/pdf/Codes/code_ethics2013_eng.pdf).

**c) Swiss Civil Code (ZGB)**

The Swiss Civil Code (ZGB)<sup>65</sup> defines the concept of good faith in Art. 3 para. 2 ZGB. Notwithstanding the question of the direct, legal applicability of this provision to the present case, Art. 3 para. 2 of the Swiss Civil Code provides a general measure for the degree of care that a buyer of a work of art must take. Thus the Federal Supreme Court in BGE 139 III 305 ff., 308 f. E. 3.2.2, states the following<sup>66</sup>:

The degree of attentiveness that may be required of the purchaser depends on the circumstances. What this means in any specific case is largely a matter of individual judgment [...] What must particularly be considered is the relevant sector's prevailing practice of proceeding, whereby ordinary lack of attention, in any case, cannot lead to a reduction in the required due diligence [...] According to the settled case-law of the Federal Court, there is no general obligation on the purchaser to ascertain whether the seller has the power of disposal; only if there are concrete grounds for suspicion do the exact circumstances need to be clarified [...] Higher requirements must be placed on those branches of business that are especially exposed to offers of goods of dubious origin and consequently to defects of title, as is the case with trade in second-hand goods of all kinds [...] Even if this does not stipulate a general obligation to investigate, in these cases there is an obligation to clarify or enquire about the seller's right to dispose not only upon concrete suspicion of the defect of title, but whenever there is cause for distrust due to the circumstances [...] These increased due diligence requirements are not limited to the dealers in commercial transactions; the decisive factor is rather the acquirer's familiarity with the sector [...].

The Kunstmuseum applies these higher standards of due diligence in the acquisition of art works and considers itself bound by them.

**d) The Terezin Declaration**

The declaration of the Washington Principles was followed by two further conference in Vilnius (2000) and Terezin (2009). The Terezin Declaration strengthens the Washington Principles.<sup>67</sup> Its choice of words speaks less exclusively of "confiscation." Point 2 of the Declaration states:

Noting the importance of restituting communal and individual immovable property that belonged to the victims of the Holocaust (Shoah) and other victims of Nazi persecution, the Participating States urge that every effort be made to rectify the consequences of wrongful property seizures, such as confiscations, forced sales and sales under duress of property, which were part of the persecution of these innocent people and groups, the vast majority of whom died heirless.

According to this definition, "wrongful property seizures" include "confiscations, forced sales and sales under duress of property" (in the German translation, "Beschlagnahme, Zwangsverkauf und Verkauf in einer Zwangslage").<sup>68</sup>

Swiss museums have not made any discernable statement thus far regarding the applicability of the Terezin Declaration.<sup>69</sup>

The Confederation took part in both of the conferences that followed Washington (Vilnius, Terezin) and co-approved the declarations. In response to Interpellation No. 13.4027 by Josiane Aubert of 27 November 2013, the Federal Council made the following comments:

<sup>65</sup> Swiss Civil Code of 10 December 1907 (SR 210), accessed online on 19 October 2018 at <https://www.admin.ch/opc/de/classified-compilation/19070042/index.html>.

<sup>66</sup> For extensive treatment, see also Peter Mosimann, Provenienzforschung der Museen als Rechtserfordernis, in Mosimann/Schönenberger 2015, p. 103ff.

<sup>67</sup> Accessed online on 19 October 2018 at <http://www.holocausteraassets.eu/program/conference-proceedings/declarations/>.

<sup>68</sup> Accessed online on 19 October 2018 at <http://www-temp.bak.admin.ch/kulturerbe/04402/04712/index.html?lang=de>.

<sup>69</sup> Cf. the EDI/EDA report on the state of the work of the Swiss Confederation in regard to Nazi-looted art from 2011–2016 of 19 October 2016, Bern 2016, p. 1 (accessed online on 19 October 2018 at <https://biblio.parlament.ch/e-docs/387980.pdf>).

In 2009, Switzerland and 45 other countries adopted the Terezin Declaration, which reaffirms the Washington guidelines. At the federal level, Switzerland implements the Washington Principles.

[...]

The Washington Principles serve as an important signal for private individuals to find fair and equitable solutions and are regarded as international best practice.<sup>70</sup>

The Federal Council made similar statements with regard to further inquiries:<sup>71</sup> In each case the Council always refers to the Terezin Declaration as a "confirmation" or an "affirmation" of the Washington Principles, but in its subsequent material considerations makes reference exclusively to the Washington Principles. The differences in content are not taken up.

### **e) Guidelines of the German Federal Government**

In December 1999, the German Federal Government, the German Bundesländer, and the national associations of local authorities issued a statement on the implementation of the Washington Principles, which is itself in turn fleshed out in the "Guidelines for implementing the Statement by the Federal Government, the *Länder* and the national associations of local authorities on the tracing and return of Nazi-confiscated art, especially Jewish property" (*Handreichung zur Umsetzung der "Erklärung der Bundesregierung, der Länder und der kommunalen Spitzenverbände zur Auffindung und zur Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes, insbesondere aus jüdischem Besitz"*) (February 2001, revised in November 2007; so-called *Handreichung*).<sup>72</sup> In addition to the Washington Principles, the *Handreichung* is based on the Allied restitution regulations.<sup>73</sup> The corresponding legal basis and case law of the restitution courts is referenced in the "Comments on the Guidelines" (cf. *Handreichung*, p. 92 ff.).

The inclusion of dispossession due to persecution is already evident in the original German title of the *Handreichung* (which uses the phrase "*Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes*" – "return of cultural objects taken as a result of Nazi persecution"). To examine the question of persecution-related loss, the *Handreichung* provides the following guidelines (*Handreichung*, p. 29):

1. Were the claimant or his/her legal predecessor persecuted on racial, political, religious or ideological grounds between 30 January 1933 and 8 May 1945?
2. Did the claimant or his/her legal predecessor sustain a loss of property through forced sales, expropriation or in any other form? Who has to bear the onus of proof, i.e. who has to provide evidence showing that the loss was due to persecution by the Nazi regime?
3. Can the statutory presumption according to which losses that resulted from legal transactions should basically be considered cases of Nazi-confiscated property, be disproved by showing
  - that the seller received a fair purchase price
  - and
  - that he was free to dispose of the purchase price as he pleased [...]

In addition to the material provisions, it is particularly significant from a practical point of view that the application of the guidelines results in a reversal of the burden of proof. For Jewish victims, the presumption of collective persecution exists for the period from 30 January 1933 (*Handreichung*, p. 92). With regard to an appropriate purchase price, the *Handreichung* (p. 95) states:

<sup>70</sup> Accessed online on 19 October 2018 at <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaef?AffairId=20134027>.

<sup>71</sup> Question session, No. 14.5664, Alec von Graffenried on 8 December 2014, accessed online on 19 October 2018 at <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaef?AffairId=20145664>; Motion No. 14.3480 by Mathias Reynard on 18 June 2014, accessed online on 19.10.2018 at <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaef?AffairId=20143480>.

<sup>72</sup> Accessed online on 19 October 2018 at [http://www.lostart.de/Content/01\\_LostArt/DE/Downloads/Handreichung.pdf?\\_\\_blob=publicationFile&v=4](http://www.lostart.de/Content/01_LostArt/DE/Downloads/Handreichung.pdf?__blob=publicationFile&v=4); English version: [https://www.lootedart.com/web\\_images/pdf/English%20handreichung.pdf](https://www.lootedart.com/web_images/pdf/English%20handreichung.pdf), accessed 24 November 2018

<sup>73</sup> See Sheila Heidt, *Restitutionsbegehren bei NS-Raubkunst. Praxis Leitfaden*, Berlin 2017, p. 28 ff.

The appropriateness of the purchase price is fundamentally to be determined by the objective market value that the object would have had at the time of sale among persons who were not persecuted. In the case of direct sales of works of art, it would depend on whether a market price can be ascertained for similar works by the artist, for instance through auction catalogues from around the same period. For art auctions, due to private consignment, it must be left to the discretion of the institution concerned whether to always regard the proceeds of the auction as an appropriate 'market price' or to assume in favor of the claimant in individual cases that at the time of the loss of assets, due to increasing persecution measures and the concomitant large number of sales, the price level was 'too low' in general.

In Switzerland, the *Handreichung* was first applied with regard to the Gurlitt Collection, which was bequeathed to the Kunstmuseum Bern. As a component of German administrative practice, the *Handreichung* was declared to be applicable in the contract between the Kunstmuseum Bern and the German government. Other Swiss museums have, as far as can be seen, not expressed an opinion on the applicability of the handbook in Switzerland.

In connection with Interpellation No. 14.4157 by Raphaël Comte of 11 December 2014,<sup>74</sup> the Federal Council has held:

The Agreement [i.S. Gurlitt] refers explicitly to the Washington Principles. The substantive interpretation of these is stipulated to be the "Statement by the Federal Government, the *Länder* and the national associations of local authorities on the tracing and return of Nazi-confiscated art, especially Jewish property." This statement provides an additional legal basis to the Washington Principles and was established by the Federal Republic of Germany for its territory in view of its historical connections.

Such a contractually agreed interpretation binds exclusively the Foundation Kunstmuseum Bern, the Federal Republic of Germany and the Free State of Bavaria with regard to the works of art in the Gurlitt estate and not third parties, such as other museums in Switzerland or the Confederation.

The formulation does not specify whether the Federal Council considers the application of the *Handreichung* to other cases desirable; the wording seems rather to indicate some reservations.

### **3. Legal sources for assessing the present case**

#### **a) Applicable sources**

The Kunstmuseum Basel has expressly committed itself to the Washington Principles. It is also bound by the ICOM Code of Ethics for Museums and applies the due diligence standards of the Swiss Civil Code when making acquisitions. These legal sources apply without restriction.

The Terezin Declaration and the German *Handreichung* appear less unambiguously applicable as legal sources. Although the Swiss Confederation signed the Terezin Declaration, the Federal Council continues to cite the Washington Principles as the basis for restitution cases.

The Kunstkommission doubts that a strictly literal understanding of the Washington Principles, and thus a strict handling only in cases of actual confiscations by the National Socialists, is appropriate. As a flexible instrument, the Washington Principles are designed to be developed further within the international community. They contain a dynamic that must be adequately taken into account in their application. This is also laid out the Bergier Report of 2001.<sup>75</sup>

This understanding is in line with the Terezin Declaration, which is conceived as a confirmation of the Washington Principles, but at the same time departs from the narrow definition of confiscation. The Terezin Declaration can be understood as a kind of "proposed interpretation" for the Washington Principles.

<sup>74</sup> Accessed online on 19 October 2018 at <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20144157>.

<sup>75</sup> Cf. Francini/Heuss/Kreis 2001, p. 387.



More restraint appears to be indicated with a regard to the German *Handreichung*. In addition to relying on the Washington Principles, the *Handreichung* is based on the specific restitution practice in Germany and the Allied restitution regulations. The Kunstkommission doubts whether a wholesale adoption is appropriate for Switzerland. However, the German *Handreichung* can be consulted selectively where in regard to a specific issue it conveys additional insights that also seem appropriate under the Washington Principles and the Terezin Declaration.

In this view, the Washington Principles remain the decisive starting point for any assessment. The Washington Principles cannot, and do not aim to, compensate for every injustice. At their core, they are directed at the confiscation of art objects by the National Socialists. Confiscation is a grave injustice because those affected lose something against their will and without compensation.

The central substance of the injustice of the confiscation must guide the decision of the Kunstkommission. For the assessment of the individual case, however, the Terezin Declaration as well as the German *Handreichung*, where appropriate, can and should be taken into account. In the opinion of the Kunstkommission, they represent an important, but not in every case binding, clarification of the Washington Principles.

**b) *Openness of the Washington Principles with regard to fact, legal consequences, and scope***

With regard to their outcome—or in juridical terms, their legal consequence—the Washington Principles appear to be very open. What is required is a "fair and just solution." It is less clear whether the same openness also applies toward the circumstances to be assessed under the Washington Principles (or legally: statement of facts). The same applies to the question of the scope of application.

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.

## VI. ASSESSMENT

### 1. Key questions and methodology

The legal sources presented here operate with open concepts. There is no consensus on how to concretize them. Even in specific decisions, which particular aspects of the case were actually decisive for the decision of the Kunstkommission is indicated only in part. There is therefore no established practice on which the Kunstkommission can base its decision.

The causuistic approach of the Washington Principles is understandable insofar as each case must be considered individually and in the light of all the circumstances.<sup>76</sup> The Kunstkommission considers this approach to be correct. A consideration of the individual case also corresponds best to the requirements of a fair and just solution.

In applying the Washington Principles, many decisions have followed this basic idea. But this also gives rise to challenges and difficulties. In the present case, it is not easy to obtain a *distillate of fair decision-making* from the various individual decisions. From the point of view of the Kunstkommission, it is rightly argued that an actual "grammar of the basis for just and fair solutions" is currently lacking.<sup>77</sup> The Kunstkommission therefore details extensively which criteria it considers to be essential and how it has assessed and weighed them in the present case.

It must also be noted that in their legal consequences the Washington Principles are very open. A "just and fair solution" opens up a wide range of possible consequences. The affirmation of a case under the Washington Principles does not automatically mean returning the works. In contrast to a civil court, which largely has to make a binary decision regarding the question of ownership, a decision under the Washington Principles can represent all the shades of gray between black and white.

### 2. Circumstances of the transfer of ownership as main criterion

The scope of the Washington Principles applies to works of art "confiscated by the Nazis." The term confiscation contains *two elements of injustice*. First, the transfer of ownership takes place against the will of the owner. Secondly, the owner does not receive the equivalent value of the object that was taken away from him or her. Thus, there is a financial loss.

These two elements can also be found in other documents, such as the Terezin Declaration. The facts mentioned there are "confiscations, forced sales and sales under duress." The German *Handreichung* defines its scope of application as "loss due to persecution." "Due to persecution" stands in contrast to voluntary divestiture. As in the case of confiscation, the owner was not free to decide whether to sell or otherwise give away an art object. The persecution must therefore be marked by National Socialism.

The second element is expressed in the term "loss." "Loss" means that the expropriated person is not "fully compensated."<sup>78</sup> The previous owner received either no or insufficient value.<sup>79</sup>

<sup>76</sup> Cf. the *Leitfaden für Museen zur Durchführung von Provenienzrecherchen* des BAK/EDI of June 2016, p. 2. Accessed online on 18 June 2019 at <https://biblio.parlament.ch/e-docs/387980.pdf>, p. 43.

<sup>77</sup> Matthias Weller, Gedanken zur Reform der Limbach-Kommission, in *KUR. Journal für Kunstrecht, Urheberrecht und Kulturpolitik*, Vol. 19/No. 5–6 (2017) p. 136 ff., 141.

<sup>78</sup> In this regard, cf. Article 22 of the Swiss Federal Constitution on the Guarantee of Ownership.

<sup>79</sup> In this regard, cf. *Bericht EDI/EDA über den Stand der Arbeiten des Bundes im Bereich der NS-Raubkunst im Zeitraum von 2011–2016* [Report on the Status of the Bund's Work with Regard to Nazi looted Art in the Period 2011–2016], p. 24–25;

The application of the concept of "flight assets" in a judiciary judgment seems questionable and must not be considered decisive here.<sup>80</sup> What is decisive is whether or not a change of ownership in the period 1933-1944 was confiscatory in its effect.<sup>81</sup>

The Kunstkommission is of the opinion that the two elements—involuntariness and loss—must be at the center of the assessment of the present case. At the conclusion, it will also comment on possible ancillary criteria (see **Ch. VI. 4. Extent of financial losses and availability of equivalent value**).

### **3. Involuntariness**

#### **a) Timing of decision to sell**

A key question in the present case concerns the *timing* of when Curt Glaser made the decision to sell the works acquired by the Kunstmuseum Basel at Auction 180 on 18-19 May 1933. Not only the clarification of the historical details is difficult, but also the conclusions to be drawn from them.

The first question to be asked is what is considered to be the relevant point in time at which conditions of persecution have to exist. The Kunstkommission assumes that for an assessment based on the Washington Principles and other legal sources, it is not the *time of the sale* (May 1933), but rather the *time of the decision to sell* that must be the decisive point. This understanding results from the concept *verfolgungsbedingt* ("due to persecution") in the German *Handreichung*. "Due to persecution" posits a strong causal relationship between persecution and sale; the sale is a consequence of external pressure, therefore it is "contingent" (*bedingt*) in the sense of the terminology of the German *Handreichung*. Thus, for an assessment, it is not primarily the time of the sale - May 1933, when Curt Glaser had already lost his job - but the time of the decision to sell that is a determining factor.

Determining this point in time has proved difficult. The Kunstkommission is of the opinion that the sale was carefully prepared. Curt Glaser had divided his furniture, library, and art collection into two auctions in different auction houses. The catalogue of Auction 180 of 18-19 May 1933 is detailed, although some lot numbers are missing and works are in part grouped together in sets. The preparations for such extensive auctions could have easily taken several months. Time would be needed not only for the selection, but also for the printing and dissemination of the catalogue. Although it is conceivable that the auctions were prepared faster than usual, due to the volume of sales alone, it still does not seem plausible that the decision had not already been made prior to April. The documents of the auction house are no longer available, as far as is presently known.

If one were to assume the decision to sell was made before the National Socialists seized power, it would appear questionable whether the Washington Principles and other sources of law would apply at all. Legally speaking, the question of *temporal scope* arises. The Kunstkommission is however of the opinion that the Washington Principles have no such "sharp boundaries" (see **Ch. V. 3. b. Openness of the Washington Principles with regard to fact, legal consequences, and scope**). A formal approach does not appear appropriate. Thus, we can leave open the question of whether Curt Glaser had already been persecuted before the National Socialists seized power or had already found himself under duress. The Kunstkommission therefore comes to the interim conclusion that the present case is

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accessed online 18 June 2019 at <https://biblio.parlament.ch/e-docs/387980.pdf>.

<sup>80</sup> Cf. *Glossar NS-Raubkunst [Glossary of Nazi Looted Art]* of the BAK/EDI of April 2018, p. 2–3, as well as the *Leitfaden für Museen zur Durchführung von Provenienzrecherchen* of the BAK/EDI of June 2016, p. 2, accessed online on 18 June 2019 at <https://biblio.parlament.ch/e-docs/387980.pdf>, p. 51–52, 43.

<sup>81</sup> Cf. *Glossar NS-Raubkunst [Glossary of Nazi Looted Art]* of the BAK/EDI of April 2018, p. 2–3, as well as the *Leitfaden für Museen zur Durchführung von Provenienzrecherchen* of the BAK/EDI of June 2016, p. 2, accessed online on 18 June 2019 at <https://biblio.parlament.ch/e-docs/387980.pdf>, p. 51–52, 43.

to be examined under the Washington Principles, irrespective of the exact time of Curt Glaser made the decision to sell.

**b) *Motives for the sale***

Curt Glaser had brought up the sale of his art collection, particularly in his correspondence with Edvard Munch. From the point of view of the Kunstkommission, the relevant passages do not appear clear. They might refer either to his personal situation (the death of the wife) or to the political situation in Germany. Both motivations may also be relevant. The report of the Spoliation Advisory Panel of the United Kingdom speaks of "mixed motives."<sup>82</sup>

It is clear to the Kunstkommission that Curt Glaser must be regarded as a victim of National Socialism. He held an exposed position at the time the National Socialists seized power and was the target of the injustice regime. There is no evidence that Curt Glaser was already personally in fear for his life and limb at the time of his emigration. From the point of view of the Kunstkommission, however, this is irrelevant, since his decision to emigrate was undoubtedly justified by objective circumstances. He recognized the signs of the times earlier than others.

Due to the clear presence of persecution, it is irrelevant to the Kunstkommission whether the decision to sell might also be based on other motives. The Kunstkommission does not overlook the fact that Curt Glaser's statements, especially in the letters to Edvard Munch, do indeed appear somewhat ambiguous. Nor can it be ruled out that the death of his first wife, with whom he built up his collection, as well as his marriage to his second wife, played a role, especially considering that he had to give up his large apartment. Ultimately, however, these possibilities do not form a solid basis for explaining the sale of Curt Glaser's household goods and collection. They must not be held against the heirs. This is also supported by the logical application of Art. 4 of the Washington Principles, according to which "unavoidable gaps or ambiguities in the provenance" should not be interpreted to the detriment of those affected. For the Kunstkommission, persecution therefore stands front and center. It is the reason why Curt Glaser emigrated and prior to this, on 18-19 May 1933, auctioned off a considerable part of his art collection, 200 drawings and prints of which the Kunstmuseum Basel acquired.<sup>83</sup>

**c) *Export as alternative?***

It is undisputed that after he provisionally settled in Ticino in 1933, Curt Glaser shipped a considerable amount of goods to Switzerland (see **Ch. III. 3. e. Timing of decision to sell**) and was able to bring several paintings by Edvard Munch to Switzerland in later years as well.<sup>84</sup> In 1933, Curt Glaser did not have to pay any Reich Flight Tax. Mobile consumer goods could still be transferred abroad in 1933 relatively freely. Finally, Curt Glaser's dismissal did not affect his civil servant's salary, which he continued to be entitled to for three months (October to December 1933).<sup>85</sup> However, "in accordance with the Withholding Ordinance of 8 June 1932 (GS.S.199), in the period from 1 July 1932 up to and including 31 December 1933, 5 percent of [Curt Glaser's] salary, a total of 1,029.21

<sup>82</sup> Cf. Report, Courtauld Institute of Art 2009, p. 6, item 34.

<sup>83</sup> The majority of the furnishings and the library were sold at the first auction on 9 May 1933 at the Internationales Kunst- und Auktionshaus, Berlin.

<sup>84</sup> For instance, *Music on Karl Johan Street*, 1899; see <http://www.kunsthau.ch/de/sammlung/provenienzen/fallbeispiele/drei-verdachtsfaelle/musik-auf-der-karl-johan-strassevon-edvard-munch/>, accessed 13 November 2018 (see **ch. III. 5. b. Relationship to his own art collection**).

<sup>85</sup> Cf. the letter from the Prussian Minister of Science, Art, and Education to the General Director of the Staatlichen Museen in Berlin of 23 December 1933, in LAB, APr.Br. Rep. 042 Nr. 9773, sheet 1.

RM, was withheld."<sup>86</sup> Starting in January 1934 he provisionally received three quarters of his pension (see **Chapter III. 4. a. Financial situation**).

Thus, at the time of his emigration, Curt Glaser had a comparatively great deal of freedom to sell certain works of art and keep others. To a certain extent, he was therefore able to determine the scope of the sale and select works of art that he did not want to sell. The extent to which Curt Glaser made use of this option and how many works of art he took with him to Switzerland cannot be determined with certainty. There are 14 large crates of household effects known to contain "works of art, silver, precious porcelain, carpets and all kinds of valuables."<sup>87</sup> He was apparently able to keep a certain number of drawings of Old Masters, which he bequeathed to Maria Glaser-Ash, until he emigrated to the USA (see **Ch. III. 5. b. Relationship to his own art collection**).

The Kunstkommission does not thereby fundamentally question that a situation of duress existed. But the extent of the duress, i.e., as a counterpart to the extent of involuntariness, is in Curt Glaser's case less than in others, not least due to Curt Glaser's foresightedness. This last point will be taken into account below in the discussion of the purchase price.

#### **4. Extent of financial losses and availability of equivalent value**

##### **a) Appropriateness of purchase price in light of market situation**

The appropriate purchase price is considered to be "the objective market value at the time of the sale."<sup>88</sup> The standard measure should be the price "that any buyer or seller would have paid without regard to personal circumstances."<sup>89</sup> The determining factor is the market situation among persons not suffering from persecution (see *Handreichung*, p. 95).

The Kunstkommission proceeds on the assumption that Curt Glaser carefully prepared the sale of his works. This is supported by his professional relationship to the art market as well as the choice to sell at auction, which always defines the best possible price at a given time. Curt Glaser's collection was not static; he had repeatedly sold and then acquired new works prior to 1933, and he was also an expert on the current market due to his profession.

On the whole, the auction did not attain the price levels hoped for by Curt Glaser, which is not surprising given the generally poor market situation. The sum of the auction proceeds for the collection of prints by Edvard Munch was around 90% of the estimated prices. For the collection of 200 prints by various artists acquired by the Kunstmuseum Basel, the prices paid were approx. 10% below the estimated price. For the two prominent Munch lithographs, however, the Kunstmuseum paid significantly more than the estimated prices, namely, 29.1% more for the *Madonna* and 8.3% more for the *Self Portrait* (see **Ch. III. 3rd a. Auction No. 180 at Max Perl**).

It is, however, difficult to determine whether the sales actually attained a "market price." Neither is it possible, on the basis of the existing scholarly literature, to make a (definitive) claim regarding the extent to which the comparatively low prices in May 1933 were a result of National Socialist persecution or a consequence of the global economic crisis. Nevertheless, the result of Auction 180 at

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<sup>86</sup> Letter from the acting General Director of the Staatlichen Museen to the Prussian Building and Finance Department of 5 January 1934, in LAB, APr.Br. Rep. 042 No. 9773, sheet 1RS as well as the letter of the letter from the Prussian Building and Finance Department of 19 January 1934, in LAB, APr.Br. Rep. 042 No. 9773, sheet 2.

<sup>87</sup> Maria Glaser-Ash, affidavit of 22 December 1962, LAB Entschädigungsakte Dr. Curt Glaser, Reg.Nr. 52785.

<sup>88</sup> Heidt 2017, p. 168.

<sup>89</sup> Heidt 2017, p. 168 with reference to a decision by the OLG Karlsruhe of 24 November 1949.

Max Perl's was certainly disappointing for Curt Glaser. "Best possible" - under the given circumstances - cannot be equated with "good."

**b) *Appropriateness of purchase price in the judgment of the Kunstmuseum Basel***

The minutes of the Kunstkommission reveal that the Kunstmuseum considered the prices paid to be "cheap" or "favorable."<sup>90</sup> However, from the perspective of the Kunstkommission today, these comments should not be overestimated. Museums always strive to buy only when prices are "low" or "favorable," so that as much as possible can be purchased with the limited - here public - funds. One might criticize such a strategy, but it undoubtedly corresponds to the practice of all the larger institutions at the time and in the present. No director would recommend the purchase of a work to the cognizant committee if its price cannot be described at least as "acceptable." In this light, the purchases of Curt Glaser's works do not represent a special case. It cannot therefore be inferred from the corresponding comments in the minutes of the Kunstkommission that the director at the time, Otto Fischer, and the Kunstkommission were of the opinion that the works could be acquired at "rock-bottom prices."<sup>91</sup>

**c) *Appropriateness of purchase price in the compensation proceedings of 1963***

In 1963, on the basis of a settlement with the Entschädigungsamt Berlin and in accordance with § 56 of the Bundesentschädigungsgesetz (Federal Compensation Act), the widow Maria Glaser-Ash received DM 5,000 as capital compensation for "*Verschleuderungsschaden*" (monetary loss due to discounted divestiture of assets) in connection with "the particularly valuable objects offered for sale" in the two auctions of 1933. The total compensation, which amounted to DM 7,100, also included the payment of a Reich Flight Tax (DM 1,800), which had been demanded of Curt Glaser as of November 1, 1936, and emigration costs (travel and transport costs; DM 300).<sup>92</sup> However, the investigations appear to be less detailed than those of the Kunstmuseum Basel. In addition, the term "*Verschleuderungsschaden*" referred more to the household effects and the library and graphic art than to the paintings, so that the compensation proceeding does not seem conclusive. The compensation paid in 1963 does not, however, in principle conflict with the claims of Curt Glaser's heirs.

**d) *Present value***

The Kunstkommission believes that while the current value of the artworks might be relevant to the question of the amount of any compensation under the Washington Principles, it can hardly be relevant to the question of the restitution of the artworks or the question of *whether* a just and fair solution can be found at all.

**e) *Accessibility of purchase price***

The Kunstkommission assumes that Curt Glaser received the equivalent value from Auction 180 of 18-19 May 1933. The contrary is not evident in the documents, was not the subject of the compensation applications made by Maria Glaser-Ash, and is not asserted by the heirs today. A Reich Flight Tax was not levied on Curt Glaser when he left the country in 1933 as a result of the sales.

<sup>90</sup> Minutes of the Kunstkommission of 8 June 1933, Kunstmuseum Basel, Archiv, B1\_12\_Protokolle\_1932\_11-1934\_04\_p. 58-59.

<sup>31</sup> Ibid.

<sup>92</sup> The claimants proposed on 21 February 1963 to settle the "claim for damages to property and assets as follows: (1) Reich Flight Tax, DM 1,800; (2) emigration costs, DM 1,000; (3) damages from discount divestment of property, DM 10,000 (see **Ch. III. 3. b. Appropriateness of the purchase price**).

## **5. Ancillary criteria**

### **a) *Lawfulness or illegality of the transaction***

The assessment of the present case is primarily based on the Washington Principles and subsequent sources. The Kunstkommission notes that, as far as it can tell, the ownership of the drawings and prints is not in question, or has already been considered to be virtually incontestable in the investigations carried out in 2008.

The legal status is not a decisive factor for the assessment under the Washington Principles. As an expression of a valid moral position, however, it appears appropriate. It argues against restitution of the works or compensation of the heirs, but should not be overestimated in light of the basic idea of the Washington Principles.

### **b) *Knowledge of the Kunstmuseum Basel at time of purchase***

The Kunstmuseum Basel had been aware in 1933 that the art objects offered for sale at Auction 180 at Max Perl on 18-19 May 1933 belonged to Curt Glaser. The political situation in Germany may be assumed to have been known in Basel.

The knowledge of the Kunstmuseum in 1933 appears to be a useful ancillary criterion for an assessment under the Washington Principles. On the one hand, it offers some indication of the appropriateness of the purchase price (**see Ch. VI. 4. a/b. Extent of financial loss and availability of equivalent value**). On the other hand, any consciousness of injustice on the part of the Kunstmuseum in 1933 would indicate that the transfer of ownership was already viewed critically at the time by contemporaries.

The available documents show that the prices were regarded as "cheap" - not, however, as "rock-bottom," which might have been considered problematic. In this light, the assessment of the Kunstmuseum and the Kunstkommission at the time does not appear unethical. In the opinion of the Kunstkommission, the heirs cannot derive their claim from the knowledge of the Kunstmuseum at the time. However, the Kunstmuseum cannot derive anything in its favor from the committee minutes either. It cannot argue that the origin of the drawings and prints was unknown. Similarly, it may be assumed that an institution such as the Kunstkommission was aware of the conditions in Germany.

### **c) *Behavior of the parties after the transfer of property***

As far as can be seen, during his stay in Switzerland, Curt Glaser was not critical of the Kunstmuseum as the purchaser of part of his art collection. His relationship with the Kunstmuseum does not appear to be disturbed in any way. Conversely, after the war, the Kunstmuseum Basel stored paintings for Mrs. Maria Glaser-Ash at no charge.

The Kunstkommission is however of the opinion that the behavior of the parties after the transfer of ownership can only be taken into account to a limited extent, if at all. It may be true that the legal system normally stipulates time limits within which the party concerned must dispute the lawfulness of the transfer of ownership once specific conditions of duress cease to exist (see Art. 21 and Art. 31 OR) and Curt Glaser did not do this during his stay in Switzerland. However, for an assessment under the Washington Principles, which primarily follow the moral attitudes of today, this point appears to be of only minor importance.

**d) *Personal circumstances of the affected parties***

The Kunstkommission has examined the question of whether or not the economic and personal circumstances of the affected individual are relevant for an assessment under the Washington Principles. The issue to be considered is whether a claim should be judged all the more generously, the worse the National Socialist persecution has affected the persons concerned and potentially their family.

In the view of the Kunstkommission, this factor can be of significance at most in individual cases, but not in the present case. Professional success could hardly be held against an aggrieved person. Conversely, any expulsion from the home country appears degrading. After emigrating to Switzerland and later to the USA, Curt Glaser could no longer gain a professional foothold.

**e) *Proximity of the heirs***

From a purely legal point of view, the proximity of the heirs to the testator is irrelevant. The question does arise, however, whether the same holds true for the application of the Washington Principles. In other words, it must be asked whether it matters in the present case that the heirs are not direct descendants or blood relatives of Curt Glaser.

From the point of view of the Kunstkommission, the issue is irrelevant for answering the present question. It may be that in individual cases a direct experience of blood relatives with the art objects of the aggrieved party deserves special attention; the relatively distant relationship to Curt Glaser, however, must not be considered to the detriment of the heirs. This assessment is also supported by the consideration that the passage of time would otherwise work against the heirs (because the distance to the testator increases over time). This is not in the spirit of the Washington Principles.

**f) *Assessment of the situation by other institutions***

The Kunstkommission has taken note of the various assessments made by other institutions (see **Ch. IV. Decisions of other institutions**). In the case of Curt Glaser, German, Dutch and English institutions have made different decisions in comparable cases. German institutions in particular have spoken out in favor of restitution or compensation, as has the Dutch Restitution Commission. The UK Spoliation Advisory Panel decided otherwise, as did the Government Council of the Canton of Basel-Stadt in 2008. The Museum of Fine Arts, Boston, USA, refers on the homepage of a painting sold at the Glaser Auction of 9 May 1933 at the International Art and Auction House in Berlin to the fact that Curt Glaser's heirs demanded the restitution of works auctioned in the May auctions of 1933. The museum explicitly refers to the decision of the UK Spoliation Advisory Panel.<sup>93</sup>

The Kunstkommission notes that museums in Germany have recently made restitutions (see **Ch. IV. Decisions of other institutions**). These decisions are put into perspective somewhat by the fact that only brief justifications are provided, at least in the official announcements. These do not make it clear to what extent the museums have also dealt with the circumstances that speak against restitution. It also remains unclear whether the museums have fulfilled the asserted claims completely or only partially. This is in the nature of the relevant negotiations, but it makes it more difficult to assess the present case.

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<sup>93</sup> Accessed online on 13 November 2018 at <https://www.mfa.org/collections/object/actaeon-watching-diana-and-her-nymphs-bathing-33583>: "The heirs of Curt Glaser have sought restitution of the works of art auctioned in May, 1933, alleging that the sales were due to Nazi persecution and therefore forced. In 2009, the United Kingdom's Spoliation Advisory Panel issued a report regarding eight drawings that were auctioned in May, 1933. The Advisory Panel found that Glaser's decision to sell the bulk of his collection was due to a number of factors and that the prices attained at auction were fair. The panel concluded that the claim was not sufficiently strong to recommend restitution of the drawings."



It should also be taken into account that the heirs have not disclosed which institutions, aside from the aforementioned, have *completely rejected* the claims of the heirs of Curt Glaser or where negotiations are currently still being conducted. Of course, the heirs are not obliged to do so. However, the existing prejudices must also be qualified from this perspective, since not all cases are known to the Kunstkommission. No clear, unambiguous position of other institutions ("practice") is available in this regard.

## **6. Summation and Overall assessment**

### **a) Curt Glaser as victim of National Socialism**

Curt Glaser is a victim of National Socialism. He held an exposed position at the time the National Socialists seized power and was the target of the unjust regime. There is no evidence that Curt Glaser was personally in fear for his life and limb at the time of his emigration. From the point of view of the Kunstkommission, however, this is irrelevant, since his decision to emigrate was undoubtedly justified by objective circumstances.

The Kunstkommission also finds the precise point of the decision to sell irrelevant. That Curt Glaser recognized the signs of the times earlier than others should not be a disadvantage. His far-sightedness must not be held against him. Accordingly, this question can be left open. In the assessment of the Kunstkommission, subject to the surfacing of new documents, it is not possible to clarify the exact timing of the decision to sell any further.

Finally, it seems irrelevant whether other motives for the sale played a role for Curt Glaser in addition to the persecution. His statements, especially in letters to Edvard Munch, do indeed appear somewhat ambiguous. Nor can it be ruled out that the death of his first wife, with whom he built up his collection, and the marriage to his second wife played a role, especially considering that he had to give up his apartment. Ultimately, however, these possibilities do not constitute a viable basis for explaining Curt Glaser's emigration. They must not be held against the heirs. The logical application of Art. 4 of the Washington Principles, according to which "unavoidable gaps or ambiguities in the provenance" should not be interpreted to the detriment of those affected, also speaks in favor of this. For the Kunstkommission, persecution is therefore primary. It is the reason why Curt Glaser emigrated and on 18-19 May 1933 auctioned off a considerable portion of his artworks, 200 drawings and prints of which the Kunstmuseum Basel acquired.

Accordingly, the case of Curt Glaser can and should be assessed under the Washington Principles.

### **b) Question of Restitution**

The Washington Principles demand a just and fair solution. This can encompass everything from the return of the art objects to mere acknowledgment of persecution. The just and fair solution can be material or intangible.

The restitution of a work of art represents the *unconditional recognition* of a claim under the Washington Principles. In such a case, the acquisition constitutes a fundamental injustice, which can only be compensated by the return of the work. From the point of view of the Kunstkommission, the restitution of the pictures would not represent a just and fair solution, as shall be justified below. Both questions of the transfer of ownership and other accompanying circumstances must be taken into account.

Regarding the circumstances of the auction: At the time of his emigration, Curt Glaser had a comparatively large degree of freedom to sell certain works of art and to keep others. How many works of art Curt Glaser took with him to Switzerland cannot be determined with certainty. Fourteen

large crates of goods were reported. At the time of the auction, Curt Glaser was also not subject to the Reich Flight Tax, and until the end of 1933 he drew the salary he had been paid prior to his dismissal. This in no way relativizes his persecution, but the extent of the duress to divest himself under unfavorable conditions is doubtless less in Curt Glaser's case than in others, not least because of Curt Glaser's far-sightedness.

The Kunstkommission is also of the opinion that under the circumstances the sale of the works in May 1933 had proceeded nearly as well as possible. Curt Glaser was an expert on his art collection and the rest of the property. He divided his sales between two auctions in two auction houses, selecting what he wanted to retain. The auction catalogue is on the whole carefully compiled, even though certain errors have crept in in the form of gaps in the lots and works of graphic art have been subsumed in bundles. The fact that, as the best connoisseur of his own collection and also a professional observer of the market, he was in the best position to be able to estimate the prices is shown, for example, by the fact that the 200 prints purchased at the auction by the Kunstmuseum Basel deviated only by about 10% from the estimated price (and the Kunstmuseum paid considerably more than the estimated price for the two most valuable prints). A (definitive) statement regarding the extent to which the comparatively low prices in May 1933 can be explained as a result of National Socialist persecution or the extent to which the consequences of the global economic crisis were to blame - or how the two factors interacted - cannot be made on the basis of the existing scholarly literature either. There are no indications that the proceeds of the auction were not accessible to Curt Glaser. Nevertheless, the result of the auction was certainly disappointing for Curt Glaser. "Best possible" - under the given circumstances - cannot be equated with "good."

The status quo under civil law speaks against restitution as well. This should not be the decisive factor under the Washington Principles - it is precisely the fundamental idea of the 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. The ownership of the works by the Kunstmuseum is undisputed; at least the heirs have not put forward any legal arguments and there is no other reason to deviate from the Canton's legal assessment of 2008.

The Kunstkommission is also of the opinion that the Kunstmuseum did not engage in any wrongdoing when it acquired Curt Glaser's pictures in 1933. The purchase was undoubtedly favorable - but at that time, works owned by non-persecuted persons would also have been sold at favorable prices. In addition, the museum generally endeavored to make purchase only when prices were "low" or "favorable" so that as much as possible could be bought with the limited funds. One might criticize such a strategy, but it undoubtedly corresponds to the practice of all the larger institutions at that time and today. No director would recommend to the cognizant committee the purchase of a work whose price could not be described at least as "acceptable." In this light, the purchases of Curt Glaser's works do not constitute a special case. It cannot therefore be inferred from the corresponding comments in the minutes of the Kunstkommission that then-director Otto Fischer and the Kunstkommission were of the opinion that the works could be acquired at "rock-bottom prices."

It is certainly not decisive, but it is telling that Curt Glaser's relationship to the museum was not damaged after the purchase of the works by the Kunstmuseum. The museum was entrusted with works from Curt Glaser's collection, which the museum kept for the heirs and actively sought to return. The facts of the case are certainly fragmentary in this respect, but, as stated, not essential for the decision of the Kunstkommission in any case. Finally, it must be remembered that Curt Glaser was a man of the museum. His collection was largely destroyed by the sale in 1933. The Kunstmuseum has acquired a substantial part of it and is legally obliged to preserve these works (§ 5 Museumsgesetz). This is not a decisive point either, but it tends to speak against the return of works.

It follows from the foregoing that, from the point of view of the Kunstkommission, restitution of the drawings and prints is not an appropriate solution under the Washington Principles. It would be too one-sided. The Kunstmuseum Basel did not act wrongfully when it acquired the works of Curt Glaser. But it has taken on a responsibility that it must face today.

**c) *Acknowledgment and initiation of negotiations***

The Kunstmuseum has a responsibility to the heirs of Curt Glaser. This decision is an attempt to accept this responsibility. The Kunstmuseum and the Kunstkommission have endeavored to provide the most comprehensive possible reassessment of the historical facts and circumstances that can meet scholarly standards. This is part of a fair and just solution.

Curt Glaser was a man of art and of the museum. The Kunstmuseum Basel intends to honor him in the form of a mid-size exhibition. The aim of the exhibition would be a historical examination of Curt Glaser's role as a collector, art historian, art critic and museum director, based on the holdings that came from his collection into the Kunstmuseum Basel. The case is of great interest in terms of institutional history and programmatic in terms of prioritizing provenance research in the Kunstmuseum. Wherever possible, the exhibition should be planned in consultation with the heirs of Curt Glaser. From the museum's point of view, this is the form of tribute that, under the Washington Principles, is particularly appropriate to Curt Glaser as a person and to the present case under the Washington Principles.

The question of financial compensation remains. 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. The Kunstkommission is of the opinion that it and the Kunstmuseum should face up to their responsibility in this matter as well. Curt Glaser is a victim of National Socialism and some of his works have come into the possession of the Canton. Accordingly, the Kunstkommission is in favor of opening up negotiations with the heirs in order to achieve a just and fair solution in financial terms.

The Kunstkommission is of the opinion that an attempt should be made to reach a financial solution that is mutually satisfactory. Such negotiations are also advisable because the heirs have incurred costs for travel to Switzerland, and possibly also attorney's fees. This will have to be taken into account in the negotiations.<sup>94</sup>

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<sup>94</sup> Although in a state liability case, the Federal Supreme Court rejected the claim of a Jewish refugee who was turned away at the Swiss border in 1942, it found a very generous solution within the framework of compensation of expenses. (See BGE 126 II 145 ff., 169 f. E. 5b/bb).

## **VII. RECOMMENDED MEASURES**

1. The Kunstkommission reaffirms the applicability of the Washington Principles to the deliberations of the Kunstmuseum Basel. The Terezin Declaration has been taken into consideration for the decision as well. The so-called *Handreichung* of the German government has been selectively consulted.
2. The Kunstkommission recognizes that Curt Glaser was a victim of National Socialism. His case must be assessed under the Washington Principles.
3. The Kunstkommission rejects any restitution of the works of Curt Glaser. It does not make any application to the Regierungsrat for the return of the works to the heirs.
4. The Kunstmuseum Basel will honor the history of Curt Glaser's drawings in an appropriate form and where possible in consultation with the heirs.
5. The Kunstkommission is in favor of entering into negotiations with the heirs regarding financial compensation.
6. The recommendation of the Kunstkommission (including its justification) will be made public.

cc:                   - representatives of the heirs for the attention of the heirs of Curt Glaser  
                          - Department of Presidential Affairs for the attention of the Regierungsrat

Basel, date 21 November 2018

Felix Uhlmann, President, Kunstkommission

Josef Helfenstein, Director, Kunstmuseum Basel

## **VIII. ATTACHMENTS**

1. List of purchases by the Kunstmuseum Basel at Auction 180 of 18-19 May 1933 at Max Perl
2. Transcript of the annotations in the catalog of Auction 180 of 18-19 May 1933 at Max Perl
3. Price comparisons
4. Comparative cases of the timing of decision to sell

## **IX. LITERATURE CITED**