No. 18-____

IN THE

# Supreme Court of the United States

MAREI VON SAHER,

*Petitioner,*

v.

NORTON SIMON MUSEUM OF ART AT PASADENA AND NORTON SIMON ART FOUNDATION,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI


LAWRENCE M. KAYE
HOWARD N. SPIEGLER
DARLENE FAIRMAN
FRANK K. LORD IV
HERRICK, FEINSTEIN LLP
Two Park Avenue
New York, NY 10016

SAMUEL ISSACHAROFF
*Counsel of Record*
40 Washington Square South, 411J
New York, NY 10012
(212) 998-6580
si13@nyu.edu

ALAN DERSHOWITZ
1525 Massachusetts Avenue
Cambridge, MA 02138

*Counsel for Petitioner*


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## QUESTIONS PRESENTED

Where artworks were forcibly confiscated from their Jewish owner by Nazi Reichsmarschall Hermann Göring, then recovered by the Dutch government after WWII, and are now in private hands in the U.S., and their ownership is now disputed between U.S. citizens,

1. May a court invoke the act of state doctrine to refuse to adjudicate true title based on Dutch proceedings when the Netherlands eschews any sovereign interest in the resolution of the dispute? And,
2. May a court invoke the act of state doctrine to refuse to adjudicate true title when such refusal is contrary to the express foreign policy of the United States concerning the recovery of looted Holocaust assets?

## PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner, who was Plaintiff-Appellant in the court below, is Marei von Saher. Petitioner is an individual.

Respondents, who were Defendants-Appellees in the court below, are Norton Simon Museum of Art at Pasadena and Norton Simon Art Foundation. Respondents are both California nonprofit public benefit corporations.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Marei von Saher respectfully petitions for a writ of certiorari to review the judgment below.

## OPINIONS BELOW

The opinion of the court of appeals (Pet.App. 1a-34a) is reported at 897 F.3d 1141. Earlier opinions of the Ninth Circuit Court of Appeals are reported at 578 F.3d 1016, 592 F.3d 954 and 754 F.3d 712 (Pet.App. 35a-74a). The most recent opinion of the district court (Pet.App. 76a-109a) is not reported in F. Supp. 2d and can be found at 2016 WL 7626153. Earlier opinions of the district court can be found at 2007 WL 4302726, 862 F. Supp. 2d 1044 and 2015 WL 12910626.

## JURISDICTION

The judgment of the court of appeals was entered on July 30, 2018. Pet.App. 1a. The court of appeals denied petitioner's timely petition for rehearing and rehearing *en banc* on September 11, 2018. Pet.App. 75a. On November 26, 2018, Justice Elena Kagan extended the time within which to file a petition for a writ of certiorari to and including February 8, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced at Pet.App. 110a-117a.

## INTRODUCTION

The core question presented in this Petition is whether the act of state doctrine bars American courts from adjudicating ownership of artworks looted during the Holocaust, located in the United States, and

claimed exclusively by American citizens. The Ninth Circuit found the fact that there had been earlier proceedings in the Netherlands to be a jurisdictional-style bar to suit, without any assessment of the degree of interest of the Netherlands in this proceeding, or the ultimate policy positions of the United States. It has been nearly three decades since the Court last addressed the act of state doctrine in *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400 (1990). As such, this case presents an excellent vehicle for the Court to resolve uncertainty concerning the application of this doctrine.

In the years since *Kirkpatrick*, lower courts have divided between those that view any foreign involvement in an American dispute as a near jurisdictional bar to consideration of the merits, and those that apply a weighing of the competing interests at stake to determine whether foreign sovereign interests *and* American foreign policy prerogatives demand abstention from the dispute. The court below is of the former camp, deeming the fact that there had been earlier Dutch proceedings as a bar to suit. Other circuits hold to the contrary that the act of state is a rule for processing claims that, as an affirmative defense, must be established by proof that substantial foreign sovereign interests and the formal policies of the United States foreclose suit.

Resolution of this tension in the case law below is particularly compelling in light of substantial clarifications of the law in the years intervening since *Kirkpatrick*. First, in the related doctrine of political question abstention, the Court has ruled that lower courts "cannot avoid their responsibility merely 'because the issues have political implications.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012)

(citing *INS v. Chadha*, 462 U.S. 919, 943 (1983)). That obligation stands even when the matter under consideration might involve "one of the most sensitive issues in American foreign policy, and . . . one of the most delicate issues in current international affairs." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2081 (2015). Indeed, applying *Zivotofsky* would compel adjudication of the disputed art ownership, contrary to the Ninth Circuit's invocation of foreign relations as a categorical bar to suit.

Second, and fully consistent with *Zivotofsky*, the Court has emphasized the importance of not confusing claims processing rules with those that divest federal courts of their subject matter jurisdiction. In other contexts, the Court has noted its "marked desire to curtail such 'drive-by jurisdictional rulings,' which too easily can miss the 'critical difference[s]' between true jurisdictional conditions and nonjurisdictional limitations on causes of action." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010). Thus, in addressing the scope of statutory sovereign immunity, the Court noted that the act of state doctrine is a "substantive defense on the merits," not a "jurisdictional defense." *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004). Further, and central to the present case where the Dutch government has disavowed any interest in the disposition of contested artworks between American citizens, the Court noted that "the act of state doctrine *provides foreign states* with a substantive defense on the merits." *Id.* (emphasis added).

Third, the opinion below bespeaks continued uncertainty over the extent of deference to the views of the Executive on application of the act of state doctrine, particularly where congressional declaration of policy runs to the contrary. *Compare* Restatement (Third) of

Foreign Relations Law § 443 cmt. h (1987) ("To the extent that advice to this court from the Executive Branch expresses national policy concerning the existence of, recognition of, or maintenance of, diplomatic relations with another state, declarations by the Executive *are dispositive*" (internal citations omitted) (emphasis added)) *with* Restatement (Fourth) of Foreign Relations Law § 441 cmt. i (2018) ("The executive does not have any authority to extend the scope of the [act of state] doctrine."). The Ninth Circuit gave determinative weight to its mistaken reading of the views of the Solicitor General in an earlier iteration of this case, even where statutory declarations of policy are to the contrary. Pet.App. 31a-32a.

Finally, there is no escaping the tragic circumstances of the Holocaust that infuse every aspect of this dispute. The paintings in question, two early Renaissance masterpieces by Lucas Cranach the Elder, were part of the collection owned by Petitioner's family business in the Netherlands. When the Nazis invaded in 1940, the family's art was forcibly sold for the private collection of Hermann Göring, as reflected in the documents presented to the courts below. Pet.App. 39a, 118a, 193a-196a. Hundreds of items from this collection have been restored to Petitioner's family through a Dutch restitution process adopted in 2001 in response to international calls for the recovery of Holocaust-looted art by the rightful owners and their heirs. Pet.App. 11a-12a. Two pieces from the Göring confiscation are in the hands of Respondent. Yet the court below deemed the question of rightful ownership non-justiciable as an act of state based on earlier Dutch proceedings that neither the Netherlands nor the United States believe are dispositive.

This Petition presents not only important and timely legal issues for resolution, but it presents them in a context of moral urgency with few, if any, parallels.

## STATEMENT OF THE CASE

### A. Background of the Dispute.

This action commenced over ten years ago when Petitioner sought to recover two extraordinary life-size paintings entitled "Adam" and "Eve" by the 16th Century artist, Lucas Cranach the Elder (the "Cranachs"). The Cranachs, indisputably looted by the notorious Nazi, Reichsmarschall Hermann Göring, from the Kunsthandel J. Goudstikker N.V. (the "Goudstikker Gallery"), Petitioner's predecessor-in-interest, are now in the possession of Respondents. Pet.App. 4a-6a.

Petitioner is the daughter-in-law of Jacques and Dési Goudstikker. Pet.App. 42a-43a. Before World War II, Jacques was the principal shareholder of the Goudstikker Gallery, and purchased the Cranachs at a 1931 auction of artworks consigned by the Soviet Union at Lepke Auction House in Berlin. Pet.App. 38a.

When Nazi troops invaded the Netherlands, Jacques and Dési, who were Jewish, fled for their lives. They left behind the Goudstikker Gallery and most of its assets, which included the Cranachs among some 1,200 other valuable artworks and other property. Jacques died in a shipboard accident on May 16, 1940 while fleeing the Netherlands. Dési continued on, eventually arriving in the United States where she became a naturalized citizen. Pet.App. 42a, 78a.

At the time of his death, Jacques had in his possession a black notebook describing artworks in the

Goudstikker art collection. Pet.App. 38a, 78a. That document listed the Cranachs, chronicled their purchase by Jacques at the Lepke Auction House, and gave their provenance as the Church of the Holy Trinity in Kiev. Pet.App. 38a.

After Jacques' death, the assets of the Goudstikker Gallery, including the Cranachs, were forcibly and involuntarily transferred to Nazi Reichsmarschall Hermann Göring and his collaborator in the theft of Jewish-owned property, Alois Miedl. Pet.App. 78a-79a, 128a, 165a-167a. At the end of World War II, Allied forces in Germany recovered the Cranachs, along with hundreds of other artworks taken by Göring from the Goudstikker Gallery. In accordance with Allied policy, these artworks were sent to the Dutch government. Pet.App. 40-41a, 79a-80a. In or about November 1944, the Dutch government-in-exile in London advised Désí that after liberation one of its primary concerns would be to restore looted works of art to their rightful owners. Beginning in 1946, Désí made several trips to the Netherlands in order to arrange the restitution of the Goudstikker property forcibly transferred to Göring and Miedl. *Id.* Although Désí eventually entered into a settlement agreement with the Dutch government in 1952 and recovered some property that had been taken by Miedl, she did not settle her claims to the artworks taken by Göring. Pet.App. 41a-42a, 155a-156a.

In 1961, George Stroganoff Scherbatoff ("Stroganoff") asserted to the Dutch government that the Cranachs had belonged to his family and asked that the Dutch government transfer them to him. Pet.App. 4a, 44a. The Dutch government rejected the ownership claims of Stroganoff, Pet.App. 203a-210a, who then offered to

purchase the Cranachs instead. The sale was effectuated in 1966. Pet.App. 11a, 74a.

Then, in 1971, the Norton Simon Art Foundation and the Norton Simon Foundation acquired the Cranachs from Stroganoff through his agent. Pet.App. 11a. At the time of sale, the chain of title document clearly showed that the Cranachs had been taken from the Goudstikker Gallery and delivered to Göring. Pet.App. 165a-167a. The Cranachs have been in the possession of the Museum since that time. Pet.App. 11a, 77a-78a.

Petitioner first learned the critical facts concerning the artworks looted from the Goudstikker Gallery in 1997 and began her attempts to recover her family's looted artworks in the custody of the Dutch government through both administrative and judicial proceedings in 1998. In 2000, Marei von Saher discovered that the Cranachs were at the Museum and promptly contacted the Museum. Pet.App. 43a, 45a.

These initial efforts proved unavailing, with first the Dutch State Secretary and then the Dutch Court of Appeals denying her claim. Pet.App. 5a. But in 2001 the Dutch government officially determined that policies regarding the restoration of Nazi-looted property should be changed.[1] In response to the Netherlands'

[1] Among other objectionable features, the Dutch restoration policy then in force required immediate repayment of any funds received for forced-sale art, something beyond the means of many devastated refugees from Nazism. Pet.App. 82a, 225a-228a. As the Dutch Committee reviewing this policy in 2001 concluded, "the Committee holds that the strict application of [requiring repayment] can only be described as extremely cold and unjust, in particular, because many Jewish owners used the proceeds to try to flee the country and because in many cases did

adoption of the Washington Conference Principles on Nazi-Confiscated Art,[2] the Dutch government created the Ekkart Committee to reinvestigate the conduct of the post-war restitution system and provide recommendations going forward. In a subsequent report, the committee found that the Netherlands Art Property Foundation ("SNK"), which was primarily tasked with initial restitution proceedings directly after the war, had been "legalistic, bureaucratic, cold and often even callous." Pet.App. 24a, 219a.

In response, the Netherlands shifted its approach to restitution from a "purely legal approach" to "a more moral policy approach," encouraging claimants to come forward. Pet.App. 24a. In 2004, following this policy change, Petitioner, through the renamed Goudstikker Gallery, submitted a claim for artworks looted from the Goudstikker Gallery to the State Secretary of the Dutch government's Ministry of Education, Culture, and Science, which oversaw the Dutch government's restitution program. In turn, the State Secretary referred the claim to the Dutch Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the

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not actually benefit the owners of the works of art." Pet.App. 225a.

[2] The Washington Conference Principles are a voluntary set of guidelines that encourage "[p]re-War owners and their heirs . . . to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted" and emphasize that governments faced with such claims for art in their control should take steps "expeditiously to achieve a just and fair solution." *See* Washington Conference Principles on Nazi-Confiscated Art (Dec. 3, 1998), U.S. Dep't of State, https://www.state.gov/p/eur/rt/hlcst/270431.htm. Both the United States and the Netherlands are among the 44 signatory nations. Pet.App. 50a, 111a-113a.

Second World War (the "Restitutions Committee"). Pet.App. 25a.

After an intensive review of the historical evidence, the Restitutions Committee determined "that Goudstikker's loss of possession of these paintings was involuntary as a result of circumstances directly related to the Nazi regime," and that "the rights to these works were never waived." Pet.App. 140a, 155a. The Committee then advised the State Secretary to restitute to Petitioner all of the artworks in the custody of the Dutch government that, like the Cranachs, had been taken from the Goudstikker Gallery by Göring. In 2006, the State Secretary adopted this conclusion and determined that all of the works taken by Göring still in the Dutch government's possession should be restituted to Petitioner. Had the Cranachs still been in the custody of the Dutch government in 2006, they too would have been returned. Pet.App. 90a-91a, 155a-156a.

Independent of the Dutch proceedings, Petitioner approached Respondent seeking the return of the Cranachs. Pet.App. 45a. Recognizing the implications of the State Secretary's imminent decision, Respondent sought assurances from the Minister for Education, Culture and Science, on whose behalf the State Secretary speaks, that it had good title to the Cranachs. Pet.App. 91a, 171a-172a. The Ministry declined, indicating it would "refrain from an opinion regarding the two pieces of art." *Id.* The Ministry thereafter confirmed that "the state of the Netherlands is not involved in this dispute. The State is of the opinion that this concerns a dispute between two private parties." Pet.App. 178a-179a.

### B. The Proceedings Below.

Following several years of attempting to regain the possession of the Cranachs through negotiation and mediation, Petitioner filed suit in the United States District Court for the Central District of California in 2007. *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. CV 07-2866-JFW (JTLx), 2007 WL 4302726 (C.D. Cal. 2007). The complaint set forth causes of action for replevin, conversion, damages under Cal. Penal Code § 496, a judgment declaring Petitioner the lawful owner of the Cranachs, and to quiet title. The complaint also alleged that suit was timely under various theories, including the recently enacted statute of limitations for Holocaust claims, Cal. Code Civ. Proc. § 354.3.

The district court granted a motion to dismiss on the ground that § 354.3 was unconstitutional as preempted by the foreign affairs powers of the federal government. *Id.* at *3. The district court also held that, in the absence of § 354.3, Petitioner's predecessor-in-interest had only three years to bring a claim from the time the Museum acquired the Cranachs in 1971. On August 19, 2009, the court of appeals affirmed the decision with respect to the constitutionality of § 354.3, but reversed with respect to the accrual of the generally applicable statute of limitations and remanded with leave to amend to allege timeliness thereunder. A petition for rehearing and rehearing *en banc* was denied, but an amended decision and order was issued. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (9th Cir. 2010) (*"Von Saher I"*). A petition for certiorari was denied. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 564 U.S. 1037 (2011).

In the meantime, the California general statute of limitations was amended to allow "for the specific

recovery of a work of fine art brought against a museum, . . . in the case of an unlawful taking or theft . . . within six years of the actual discovery by the claimant or his or her agent." Cal. Code Civ. Proc. § 338(3)(A). The amendment applied retroactively. Petitioner then filed her first amended complaint setting forth the same causes of action, alleging timeliness pursuant to § 338. Again, the district court granted a motion to dismiss, this time on the grounds that all of Petitioner's claims were preempted by express federal policy. Pet.App. 13a. The court of appeals reversed in what is termed "*Von Saher II*". Pet.App. 59a, 63a. The court held that Petitioner's claims "do not conflict with foreign policy." Pet.App. 59a. This Court again denied certiorari review. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 135 S. Ct. 1158 (2015).

At the conclusion of *Von Saher II*, the Ninth Circuit raised the issue of the act of state doctrine as potentially being implicated in the case. However, because the district court failed to address the act of state arguments made by the parties, the appeals court remanded, directing the district court to determine whether the putative Stroganoff sale comprised an act of state, and if so, whether any exceptions to the act of state doctrine applied. In doing so, the court noted the need for "record development and analysis," and warned that "this remand necessitates caution and prudence." Pet.App. 59a-63a.

Despite the court of appeals' express direction, the district court failed to address this issue and instead granted summary judgment. The court found dispositive that under Dutch law in effect after WWII, artworks forcibly and involuntarily sold by the Goudstikker Gallery to Göring became Göring's property, and that

because Göring was an enemy of the Dutch state, all of his property located in the Netherlands reverted to the Dutch government. Thus, the district court held that the Dutch government owned the artworks, and therefore the Museum had acquired good title. Pet.App. 103a-104a, 108a.

On the latest appeal, the Ninth Circuit affirmed the lower court's decision "not under Dutch law," but instead on a *de novo* theory, "[b]ecause the act of state doctrine deems valid the Dutch government's conveyance to Stroganoff." Pet.App. 5a. The court of appeals concluded that it could not adjudicate ownership of the Nazi-looted art because to do so could require the court "to nullify three official acts of the Dutch government," and thus was barred by the act of state doctrine. *Id.* In doing so, the Ninth Circuit rejected fundamental American policy that Nazi-looted art should be restituted to its rightful owners. A petition for rehearing and rehearing *en banc* was filed and denied. Pet.App. 75a.

### C. The Position of the Solicitor General.

In ruling against Petitioner on the basis of the act of state doctrine, the Ninth Circuit found the views of the Solicitor General dispositive. It accepted as controlling a single sentence of a government brief from a prior phase of this case. Pet.App. 31a–32a. That sentence reads,

> When a foreign nation, like the Netherlands here, has conducted bona fide post-war internal restitution proceedings following the return of Nazi-confiscated art to that nation under the external restitution policy, *the United States has a substantial interest in respecting the outcome of the nation's proceedings*.

Pet.App. 31a (*quoting* Brief for the United States as Amicus Curiae at 19, *Von Saher*, 564 U.S. 1037 (No. 09-1254)).

In fact, the Solicitor General had not expressed any opinion on the capacity of a private citizen to seek restoration of rights in Nazi-looted art. Rather, the Solicitor General's concern was limited to the California statute that provided a special purpose state right of action to any claimant of Holocaust-era art. According to the Solicitor General, the absence of any geographical or residential limitation on the reach of the state statute "belies California's purported interest in protecting its residents and regulating its art trade, and instead 'suggests that California's real purpose was to create a friendly forum for litigating Holocaust restitution claims, open to anyone in the world to sue a museum or gallery located within or without the [S]tate." Brief for the United States as Amicus Curiae, *supra*, at 11 (internal quotation marks omitted). Accordingly, the California statute "impermissibly intrudes upon the foreign affairs authorities of the federal government." *Id.* at 9. The California statute that elicited the Solicitor General's concern played no role in the disposition now at issue.

The Solicitor General agreed that "it is United States policy to support both the just and fair resolution of claims to Nazi-confiscated art on the merits and the return of such art to its rightful owner." *Id.* at 18. With regard to the particular dispute over the Cranachs, the Solicitor General carefully avoided any position on the disposition of the paintings and said only that it is "possible that on remand petitioner's action will be deemed timely" on grounds other than the special California Holocaust statute of limitations. *Id*. at 22. Thus, the brief concludes by citing with

approval "[t]wo courts of appeals [that] have held that application of general state statutes of limitations to claims seeking recovery of Holocaust-era artwork does not impermissibly intrude upon federal foreign affairs authorities." *Id.* at 22 (citing *Museum of Fine Arts v. Seger-Thomschitz*, 623 F.3d 1, 12-13 (1st Cir. 2010), *cert. denied*, 562 U.S. 1271 (2011); and *Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 578–79 (5th Cir. 2010), *cert. denied*, 562 U.S. 1221 (2011)).

## REASONS TO GRANT THE WRIT

### I. The Circuits are Divided on Both the Purpose and the Application of the Act of State Doctrine.

The crux of the holding below is that any action in American courts is barred, of necessity, by the fact that there had been prior legal proceedings in the Netherlands. According to the Ninth Circuit, the act of state doctrine is triggered per se "because 'the relief sought' by Petitioner would necessitate our 'declar[ing] invalid' at least three 'official act[s] of' the Dutch government 'performed within its own territory.'" Pet.App. 17a, (quoting *W.S. Kirkpatrick Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990)). On its face, this holding transgresses the Court's admonition that, "even though the validity of the act of a foreign sovereign within its own territory is called into question, the policies underlying the act of state doctrine may not justify its application." *Kirkpatrick,* 493 U.S. at 409 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964)).

The errors below in the application of the act of state doctrine reflect the broader confusion among the circuits on three different points. First, the above-quoted language from *Sabbatino* requires that the

quality of a foreign state's interest be assessed, not just whether there is an "act of a foreign sovereign within its own territory . . . ." The lower courts are divided over whether the act of state may be invoked without a foreign commitment to the putative act of state. Second, this Court has indicated that the foreign relations interests of the United States should be weighed in the balance. *Sabbatino*, 376 U.S. at 428 ("the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches"). Here, too, the circuits are divided as to whether the Executive may speak unilaterally for the interests of the United States or whether federal policy requires assessing congressional enactments as well. Finally, reflecting the fundamental divisions over the application of the act of state doctrine, lower courts are all over the map in assessing procedural burdens on what this Court has described as an affirmative defense, not an element of proving jurisdictional reach. *See Republic of Austria*, 541 U.S. at 700.

### A. The Act of State Doctrine Should Require Proof of a Sovereign Foreign Interest Substantially at Risk.

This case presents an ideal vehicle to clarify whether a private party may invoke the interests of a foreign sovereign to demand federal court abstention, or whether there must be at a minimum some clear expression of foreign state interest by the foreign sovereign.

Here, it is unmistakable that the Netherlands, in word and deed, has repudiated the three predicate acts of state that were the basis for dismissing Petitioners' claims below. The Netherlands restituted over 200 works of art in 2006 based on a finding that Petitioner

"had suffered involuntary loss of possession, since the rights to these works were never waived." Pet.App. 155a. In 2013, the Dutch government restituted three more paintings from the Göring transaction to Petitioner that were not in its possession at the time of the prior proceeding. Pet.App. 183a-189a. The decision reiterated the 2006 conclusion that the "facts and circumstances surrounding the involuntary loss of possession" as well as "the handling of the case in the early nineteen-fifties" justified restitution. Pet.App. 188a. Finally, the Dutch Minister of Education, Culture, and Science "confirm[ed]" to the parties "the state of the Netherlands is not involved in this dispute. The State is of the opinion that this concerns a dispute between two private parties." Pet.App. 91a-92a, 178a-179a.

The Dutch government's disavowal of interest in the dispute between an American citizen and an American museum over paintings located in this country means there is no risk that merits litigation would "embroil the foreign sovereign in an American lawsuit," as is the central concern for statutory foreign sovereign immunity. *Bolivarian Rep. of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1321 (2017). The decision below forecloses any adjudication of a dispute between American citizens over title to paintings in the United States by treating the existence of any foreign rulings as a de facto bar to suit, in effect collapsing the distinction between the judicially-created act of state doctrine and foreign sovereign immunity. In addition, it gives weight to foreign judgments beyond the comity principles set out in the Fourth Restatement, which places the burden of proof under those principles on the "party seeking recognition of a foreign judgment." Restatement (Fourth) of Foreign Relations Law § 485(1)–(2). The Fourth

Restatement goes even further to endorse the position that "the act of state doctrine does not apply to the judgments of foreign courts." *Id.* at § 441 cmt. c (2018).

Had the stolen Cranachs hung in a museum in New York rather than Los Angeles, the act of state defense would not have served as an obstacle to suit under controlling law in the Second Circuit. In *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 444–47 (2d Cir. 2000), the Second Circuit rejected the defendant's claim that the act of state doctrine precluded review of the 1962 nationalization of Plaintiff's property by the Nasser regime in Egypt – another instance of the use of state authority to seize Jewish-owned assets. Rather than accept the prior formal resolution of property rights in Egypt, the Second Circuit instead relied on a letter sent by the Egyptian Finance Minister in the 1980s declaring the plaintiff to be the rightful owner of the property. *Id.* The court rejected the act of state argument because, as the Dutch government did in the Goudstikker case, the Egyptian government had "repudiated the acts in question and ha[d] sought to have the property or its proceeds returned to the [plaintiff]." *Id.* at 453; *see also Dominicus Americana Bohio v. Gulf & W. Indus.*, 473 F. Supp. 680, 690 (S.D.N.Y. 1979) ("an act that would otherwise be immune from judicial inquiry may lose its privileged status if the government repudiates it"). Indeed, "[a]ny finding of impropriety with respect to Egyptian expropriation of Jewish-owned property in the early 1960's would more likely be consonant, than at odds, with the present position of the Egyptian government." *Bigio*, 239 F.3d at 453. Because the court was "unable to see how any decision that the district court might make would offend the government of Egypt," it concluded the "policies underlying the act of state

doctrine [did] not justify its application." *Id.*at 452. (quoting *Kirkpatrick*, 493 U.S. at 409).

### B. The Act of State Doctrine Should Require Proof that the Foreign Policy of the United States Might Be Abrogated.

#### 1. The Circuits Are Divided on the Deference Owed the Executive.

In *First National City Bank v. Banco Nacional de Cuba*, a plurality of this Court held that "where the Executive Branch . . . expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts." 406 U.S. 759, 768 (1972). Since then, this Court has examined the act of state doctrine only once, at which time this Court "f[ound] it unnecessary" to decide whether there was "an exception [to the act of state doctrine] for cases in which the Executive Branch has represented that it has no objection to denying validity to the foreign sovereign act." *Kirkpatrick*, 493 U.S. at 405. The level of Executive interest in the proceeding remains an important and unsettled question in this area of law. *Compare* Restatement (Third) of Foreign Relations Law § 443 cmt. h (1987) ("To the extent that advice to this court from the Executive Branch expresses national policy concerning the existence of, recognition of, or maintenance of, diplomatic relations with another state, declarations by the Executive *are dispositive*" (internal citations omitted) (emphasis added)) *with* Restatement (Fourth) of Foreign Relations Law § 441 reporter's note 13 (2018) ("The scope, and even the existence, of the executive's branch's authority to override the act of state doctrine remain controversial.").

Before applying the act of state doctrine, a court must consider what the "implications of an issue are for our foreign relations." *Sabbatino*, 376 U.S. at 428. As this Court stated, "the less important the implications of an issue are . . . the weaker the justification for exclusivity in the political branches." *Id.* It is impossible to know what the "implications" on foreign relations might be without examining the Executive's position on the matter. Evidence that judicial review will in fact further American foreign policy should weigh heavily in favor of *not* applying the doctrine.

While this Court has remarked on several occasions that the act of state doctrine is rooted in "separation of powers," *see Sabbatino*, 376 U.S. at 423, 428; *Kirkpatrick*, 493 U.S. at 404, it has not provided clear guidance to the lower courts on whether and how to weigh the interest of the Executive. Some circuits refuse to apply the act of state doctrine if doing so will "circumvent American foreign policy," *United Bank Ltd. v. Cosmic Int'l, Inc.*, 542 F.2d 868, 876 (2d Cir. 1976) ("The act of state doctrine was not intended to permit foreign governments to circumvent American foreign policy"), and place the burden of proof on the defendants to show that further adjudication will "imperil the amicable relations between governments and vex the peace of nations." *See Geophysical Serv., Inc. v. TGS-NOPEC Geophysical Co.*, 850 F.3d 785, 797 (5th Cir. 2017) (internal quotation marks omitted); *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1061 (3d Cir. 1988), *aff'd sub nom.*, *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400 (1990) (holding that the act of state doctrine "[r]equire[s] that a defendant come forward with proof that adjudication of a plaintiff's claim poses a demonstrable, not a speculative, threat to the conduct of foreign relations by the political branches of the

United States government"); *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48, 55 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980) ("Precluding all inquiry into the motivation behind or circumstances surrounding the sovereign act would uselessly thwart legitimate American goals where adjudication would result in no embarrassment to executive department action.").

Other circuits look no further than to determine whether an adjudication in the United States might touch on matters of foreign relations. *Nocula v. UGS Corp.*, 520 F.3d 719, 728–29 (7th Cir. 2008) (application without clear test); *Mezerhane v. Republica Bolivariana de Venezuela*, 785 F.3d 545, 552 (11th Cir. 2015) (same); *Riggs Nat'l Corp. & Subsidiaries v. Comm'r*, 163 F.3d 1363, 1368 (D.C. Cir. 1999) (concluding letter from Brazilian minister interpreting company's tax obligations was act of state without considering underlying policies).

The root of the split is that the Second, Third and Fifth circuits treat the act of state doctrine as a prudential doctrine based on multiple considerations while other circuits view the doctrine as a categorical abstention doctrine that serves as a jurisdictional bar to suit whenever there might be a challenge to foreign government activity. The latter group includes the Seventh, Eleventh and D.C. Circuits, and now the Ninth Circuit as well.

The Ninth Circuit's decision exacerbates this core doctrinal uncertainty. It did not address whether adjudication would hinder or further American foreign policy before applying the doctrine. Instead, the court below held that "[b]ecause it is 'essential to' Von Saher's cause of action that these three official actions of the Dutch government be held invalid, the act of

state doctrine applies." Pet.App. 17a. Missing from the ruling below is any examination of the United States' longstanding policy on Holocaust-looted asset restoration. No effort was made to determine if further litigation "might embarrass the Executive." *Alfred Dunhill of London, Inc., v. Rep. of Cuba,* 425 U.S. 682, 697 (1976); *see also Kirkpatrick*, 493 U.S. at 404 (describing the act of state doctrine "as a consequence of domestic separation of powers"); *Grupo Protexa, S.A. v. All Am. Marine Slip,* 20 F.3d 1224, 1237 (3d Cir. 1994) ("the court must determine whether there is evidence of a potential institutional conflict between the judicial and political branches such that a judicial inquiry into the validity of a foreign state's actions could embarrass the political branches"). Nor could the Ninth Circuit rely on a discussion of United States' policy by the district court, as that court did not even reach the question of the act of state doctrine. Pet.App. 94a-95a, 108a (granting summary judgment only on the ruling that, under Dutch law, Göring obtained good title from the involuntary sale which then transferred to the Dutch government, and then subsequently to Stroganoff and the Museum).

### 2. The Ninth Circuit Misconstrued American Foreign Policy Interests.

Ultimately, the Ninth Circuit placed the cart before the horse: it decided that the act of state doctrine applied, and then cherry-picked a sentence from the State Department and Solicitor General's prior brief that it claimed "confirmed . . . that upholding the Dutch government's actions is important for U.S. foreign policy." Pet.App. 31a. In particular, the court below quoted the Executive Branch as stating that:

> When a foreign nation, like the Netherlands here, has conducted bona fide post-war

> internal restitution proceedings following the return of Nazi-confiscated art to that nation under the external restitution policy, *the United States has a substantial interest in respecting the outcome of the nation's proceedings*.

*Id.* (quoting Brief for the United States as Amicus Curiae, *supra*, at 19). From this statement, the court concluded that "[r]eaching into the Dutch government's post-war restitution system would require making sensitive political judgments that would undermine international comity." Pet.App. 31a-32a.

This mischaracterizes the United States' position not only in its amicus brief, but also over the "last half century" on the restitution of property lost in the Holocaust. *Cf. Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420-21 (2003) ("The issue of restitution for Nazi crimes has in fact been addressed in Executive Branch diplomacy and formalized in treaties and executive agreements over the last half century."). The Washington Conference Principles encourage "[p]re-War owners and their heirs . . . to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted" and emphasize that governments faced with such claims for art in their control should take steps "expeditiously to achieve a just and fair solution." *See* Washington Conference Principles on Nazi-Confiscated Art (Dec. 3, 1998), U.S. Dep't of State, https://www.state.gov/p/eur/rt/hlcst/270431.htm. This is the fundamental policy objective endorsed by Congress in the Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No.

114-308, 130 Stat. 1524 (the "HEAR Act"). Pet.App.110a-113a.[3]

Even had the Solicitor General weighed in as described in the opinion below, the unilateral authority of the Executive cannot stand in the face of express congressional action to the contrary. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . ."). Fundamental American policy is set forth in the HEAR Act which underscores the ongoing, exceptional importance of Holocaust restitution issues. The HEAR Act provides for an extended federal statute of limitations to permit claimants a greater opportunity to bring claims to recover Nazi-looted art without fear

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[3] The United States has reaffirmed the Washington Conference Principles on numerous occasions. In 2000, the United States participated in the Council of Europe in Vilnius, which issued the Vilnius Forum Declaration, asking "all governments to undertake every reasonable effort to achieve the restitution of cultural assets looted during the Holocaust era to the original owners or their heirs." *See* Vilnius Forum Declaration, October 5, 2000, www.lootedart.com/MFV7EE39608 (last visited Jan. 25, 2019). In 2009, the United States met at the Prague Holocaust Era Assets Conference and adopted the Terezin Declaration, which again "urge[d]" the participating nations to make "every effort . . . to rectify the consequences of wrongful property seizures, such as confiscations, forced sales and sales under duress of property." Prague Holocaust Era Assets Conference: Terezin Declaration, U.S. Dep't of State (June 30, 2009), https://www.state.gov/p/eur/rls/or/126162.htm. Courts have recognized this as U.S. policy. *See, e.g., Phillip v. Fed. Rep. of Ger.*, 248 F. Supp. 3d 59, 75-76 (D.C. Cir. 2017), *aff'd & remanded*, 894 F.3d 406 (D.C. Cir. 2018). The Netherlands was also a signatory to the Washington Conference Principles, the Vilnius Forum Declaration and the Terezin Declaration.

of having them dismissed as untimely. By enacting a claimant-favorable federal statute of limitations, the United States demonstrated once again how important it is that Nazi-looted art be returned to victims. Moreover, the HEAR Act expressly states that U.S. policy is "as set forth in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration." Pet.App. 113a.

Compounding this error, the opinion below mischaracterizes the position of the United States in this dispute. In its brief, the Executive Branch emphasized that Petitioner was "correct that it is United States' policy to support both the just and fair resolution of claims to Nazi-confiscated art on the merits and the return of such art to its rightful owner."[4] Brief for the United States as Amicus Curiae, *supra*, at 18. To that end, the government praised "[t]he recent expanded restitution policy in the Netherlands" as "an example of a non-adversarial mechanism developed by a foreign nation in light of the Washington Principles." *Id.* Tellingly, in this submission the Executive does not say that any of its foreign policy interests are at risk by proceeding to a judgment in this case, which is not surprising given the Dutch government's clear disclaimer of any interest in the case at all.

Proper application of the act of state doctrine would have required the Ninth Circuit to weigh the quality of the interest of the United States and determine

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[4] The Solicitor General intervened only over concern that California's special statutory framework for Holocaust cases would create a magnet forum for litigation from anywhere in the world. Brief for the United States as Amicus Curiae, *supra*, at 11. That is irrelevant to a claim over artworks held in California by a California museum.

independently whether the foreign policy interests of the country were truly at risk by proceeding to judgment. *Sabbatino*, 376 U.S. at 428. Its failure to do so conflicts with at least three other circuits—the Second, Third, and Fifth—that at minimum, require defendants to show, and courts to consider, the Executive interests that will be harmed before applying the doctrine.[5]

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[5] There is further confusion over not only how much weight to give statements of the Executive, but over how to assess the interests of the Executive. At a more granular level, the circuits are further divided over what is termed a "Bernstein exception," named after a Second Circuit decision that "allowed adjudication after receiving advice from the Acting Legal Advisor to the State Department" permitting the court to "pass upon the validity of acts of Nazi officials." *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 882 (2d Cir. 1981) (citing *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 173 F.2d 71 (2d. Cir. 1949)). *Compare Banco Nacional de Cuba*, 658 F.2d at 884 (Executive must establish that "adjudication of the claim will interfere with delicate foreign relations") *with Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*, 729 F.2d 422, 424 (6th Cir. 1984) ("The Bernstein exception consists of a letter from the United States Department of State advising a court that foreign relations considerations do not necessitate an application of the act of state doctrine."). A majority of this Court has not "pass[ed] upon the so-called Bernstein exception." *Sabbatino*, 376 U.S. at 420. In *Banco Nacional de Cuba*, only three members of this Court "adopt[ed] and approve[d] the so-called Bernstein exception to the act of state doctrine." *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. at 768 (plurality opinion). In the Second Circuit, for example, courts may consider but not be bound by, "the views of the State Department as communicated in *any* public utterance, whether it be in this case, other litigation, or as a public announcement." *Banco Nacional de Cuba v. Chemical Bank N.Y. Trust Co.*, 594 F. Supp. 1553, 1563–64 (S.D.N.Y. 1984) (emphasis added).

Judging the validity of the acts of a foreign sovereign is squarely within the province of the court when applied to a dispute between American citizens over property held in the United States. While sovereign immunity generally requires courts to "defer[] to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions," *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983), the act of state doctrine "does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state." *Sabbatino,* 376 U.S. at 423.

Adjudicating a title dispute between American citizens does not trigger any "presumption against extraterritoriality" in foreign application of American law, *Morrison v. Nat'l Australian Bank, Ltd.,* 561 U.S. 247, 255 (2010), nor risk extending American standards of liability to "conduct occurring in the territory of a foreign sovereign." *Kiobel v. Royal Dutch Petroleum, Co.,* 569 U.S. 108, 115 (2013). Rather, "when a federal court has jurisdiction, it also has a 'virtually unflagging obligation . . . to exercise' that authority." *Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

### C. Procedural Confusion Abounds.

The court of appeals' decision disregards this Court's emphasis that the act of state doctrine is a "substantive defense on the merits," not a "jurisdictional defense." *Republic of Austria*, 541 U.S. at 700. The Ninth Circuit affirmed summary judgment on the grounds that the act of state doctrine applied, despite the fact that the district court did not engage in any discussion of the doctrine's application, and instead based its decision on its interpretation of Dutch law.

By applying the act of state doctrine as a bar to suit, the Ninth Circuit disregarded this Court's "marked desire to curtail such 'drive-by jurisdictional rulings,' which too easily can miss the 'critical difference[s]' between true jurisdictional conditions and nonjurisdictional limitations on causes of action." *Reed Elsevier*, 559 U.S. at 161 (internal citations omitted).

At the conclusion of *Von Saher II*, the Ninth Circuit recognized that the act of state doctrine might be implicated by litigation of the case. However, because the district court failed to address the parties' act of state arguments in the decision appealed from, the court remanded to the district court to determine an unanswered issue in the case: whether the Stroganoff sale comprised an act of state, and if so, whether any exceptions to the act of state doctrine applied. Pet.App. 59a-63a. In doing so, the court noted the need for "record development and analysis," and warned that "this remand necessitates caution and prudence." Pet.App. 63a.

Despite the express direction, the district court ruled only that under Dutch law in effect after WWII, artwork forcibly and involuntarily sold by the Goudstikker Gallery to Göring became Göring's property, and that because Göring was an enemy of the Dutch State, all of his property located in the Netherlands reverted to the Dutch government. Pet.App. 100a, 108a. This time, instead of remanding the case again with the instruction to address the act of state doctrine, the Ninth Circuit substituted its own judgment, affirming the lower court's decision "not under Dutch law," but instead "[b]ecause the act of state doctrine deems valid the Dutch government's conveyance to Stroganoff." Pet.App. 5a.

By ruling without any finding that U.S. foreign relations were at risk, and with no such evidence in the record, the Ninth Circuit transformed the act of state doctrine from an evidentiary balance to handle claims involving foreign actions, as indicated by *Sabbatino*, into a categorical obstacle to suit akin to a jurisdictional bar. *See Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) (distinguishing "between truly jurisdictional rules, which govern 'a court's adjudicatory authority,' and nonjurisdictional 'claims-processing rules,' which do not").

The circuits vary widely in how to apply the act of state doctrine. Many courts, including the Ninth Circuit in this case, apply the doctrine without any reference to the burden of proof. *See, e.g.*, Pet.App. 16a-33a; *Nocula*, 520 F.3d at 728 (applying doctrine without any reference to the burden on the party invoking it); *Sea Breeze Salt, Inc. v. Mitsubishi Corp.*, 899 F.3d 1064, 1072–74 (9th Cir. 2018) (same); *World Wide Minerals, Ltd. v. Rep. of Kazakhstan*, 296 F.3d 1154, 1164 (D.C. Cir. 2002) (same). Other courts suggest the burden rests with the party asserting the act of state defense, but only in terms of proving that an act of state exists which the suit implicates. *See, e.g.*, *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 952 (D.C. Cir. 2008) ("the burden of providing a factual basis for acts of state rests on [defendant]"); *Honduras Aircraft Registry, Ltd. v. Gov't of Honduras*, 129 F.3d 543, 550 (11th Cir. 1997) ("the burden of proving acts of state rests on the party asserting the application of the doctrine"). By contrast, the Third and Fifth Circuits expressly require clear proof that hearing the case will "imperil the amicable relations between governments and vex the peace of nations." *See Geophysical Serv., Inc.*, 850 F.3d at 797 (internal quotation marks omitted); *Grupo*

*Protexa*, 20 F.3d at 1238 (requiring "proof of a demonstrable, not a speculative, threat to the conduct of foreign relations" prior to application of the doctrine (internal quotation marks omitted)).

## II. Important Public Policy Favors Certiorari Review.

The Ninth Circuit's improper extension of the act of state doctrine to foreign "acts" would prevent the adjudication of this case involving two private American parties disputing the ownership of artworks located in the United States based on "acts" in which the foreign government at issue is uninterested and has, indeed, repudiated. The act of state doctrine fills no obvious void in engagements with foreign relations matters. There are already political question barriers, as addressed in *Zivotofsky,* foreign immunity barriers, as addressed in *Republic of Austria v. Altmann,* not to mention the preemption barriers addressed by the concurrence below. Pet.App. 34a. As this Court has increasingly directed that the act of state doctrine is grounded in separation of powers, *Kirkpatrick,* 493 U.S. at 404, there is little independent role set out for this ill-specified doctrine.

Certainly, the decision below introduces a quasi-jurisdictional barrier to suit in an area that Congress has chosen not to include under foreign sovereign immunity. *See Republic of Austria,* 541 U.S. at 701 (recognizing that application of act of state doctrine is independent of statutory immunity of foreign sovereigns). The result is an untenable doctrine in the Ninth Circuit that a federal court must exercise jurisdiction to resolve an issue as sensitive as that in *Zivotofsky*, and yet might still refuse to engage the merits because of the exact same foreign policy considerations deemed no obstacle to suit in *Zivotofsky*.

Further, under the holding below, a court might refuse to engage the merits of a claim for restitution of Nazi-looted art even when engaging the merits would serve the aims of longstanding U.S. foreign policy. This application of the act of state doctrine should command this Court's review.

At the end of the day, but for an accident of geography, this case could have involved a museum in New York and gone forward under the legal standards of the Second Circuit. In New York, a reviewing court would have weighed the non-existence of any Dutch interest in the dispute and the non-existence of any Executive interest in the purported finality of Dutch proceedings that had already been reopened in that country, and would have reached the merits of the claim over the ownership of the Cranachs.

That sort of irreconcilable difference in law between circuits is the customary fare of petitions for certiorari. But this case comes morally freighted with the tragedy of the Holocaust. The undersigned cannot well express the enormity of the public policies at stake in a case that involves the coerced sale of Jewish-owned property to Hermann Göring himself. This Court well understands that "securing private interests [harmed by Nazi crimes] is an express object of diplomacy today, just as it was addressed in agreement soon after the Second World War." *Garamendi*, 539 U.S. at 421. Public policy favors review of the Ninth Circuit's abrupt door-closing exercise on a case that raises such fundamental issues of injustice.

## CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LAWRENCE M. KAYE
HOWARD N. SPIEGLER
DARLENE FAIRMAN
FRANK K. LORD IV
HERRICK, FEINSTEIN LLP
Two Park Avenue
New York, NY 10016

SAMUEL ISSACHAROFF
*Counsel of Record*
40 Washington Square
South, 411J
New York, NY 10012
(212) 998-6580
si13@nyu.edu

ALAN DERSHOWITZ
1525 Massachusetts Avenue
Cambridge, MA 02138

*Counsel for Petitioner*

February 8, 2019

# APPENDIX

**APPENDIX A**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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No. 16-56308
D.C. No. 2:07-cv-02866-JFW-SS

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MAREI VON SAHER,

*Plaintiff-Appellant*,

v.

NORTON SIMON MUSEUM OF ART AT PASADENA;
NORTON SIMON ART FOUNDATION,

*Defendants-Appellees.*

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Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

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Argued and Submitted February 14, 2018
Pasadena, California

Filed July 30, 2018

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OPINION

Before: M. Margaret McKeown and Kim McLane Wardlaw, Circuit Judges, and James Donato,[*] District Judge.

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[*] The Honorable James Donato, United States District Judge for the Northern District of California, sitting by designation.

Opinion by Judge McKeown; Concurrence by Judge Wardlaw

## SUMMARY**

### Act of State Doctrine

The panel affirmed the district court's summary judgment in favor of the Norton Simon Museum of Art at Pasadena in an action by Marei von Saher to recover two oil paintings that were among a group of artworks taken by Nazis in a forced sale from her father-in-law during World War II.

Following the war, the Allied Forces returned the paintings to the Dutch government. In 1966, the Dutch government sold the paintings to George Stroganoff-Sherbatoff, who in turn sold the paintings to the Norton Simon Museum in 1971. In the late 1990s, von Saher sought to recover the paintings from the Dutch Government. The Dutch Court of Appeals denied von Saher's petition for restoration of rights in the paintings.

The panel applied the act of state doctrine, which requires that the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid. The panel held that von Saher's theory would require the court to invalidate official acts of the Dutch government. Specifically, for van Saher to succeed: the Dutch government's conveyance of the paintings to Stroganoff would need to be deemed legally inoperative; and the panel would need to disregard both the Dutch government's 1999 decision not to restore von Saher's rights to the paintings, and its later statement

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

that her claim to the paintings had "been settled." The panel concluded that the Dutch government's transfer of the paintings and its later decisions about the conveyance were "sovereign acts" requiring application of the act of state doctrine.

The panel held that exceptions to the act of state doctrine did not apply. The panel also held that the policies underlying the act of state doctrine supported its application in this case.

Concurring, Judge Wardlaw agreed that the Dutch government's conveyance to Stroganoff was an official act of the Netherlands. Judge Wardlaw wrote that the case should not have been litigated through the summary judgment stage, however, because the district court correctly dismissed the case on preemption grounds in March 2012.

## COUNSEL

Lawrence M. Kaye (argued), Howard N. Spiegler, Frank K. Lord IV, and Darlene B. Fairman, Herrick Feinstein LLP, New York, New York, for Plaintiff-Appellant.

Fred Anthony Rowley Jr. (argued), Justin P. Raphael, Eric P. Tuttle, Mark R. Yohalem, Luis Li, and Ronald L. Olson, Munger Tolles & Olson LLP, Los Angeles, California, for Defendants-Appellees.

Stanley W. Levy, Benjamin G. Shatz, and Connie Lam, Manatt Phelps & Phillips LLP, Los Angeles, California; Michael Bazyler, Dale E. Fowler School of Law, Chapman University, Orange, California; for Amici Curiae The 1939 Society, Bet Tzedek, and Jewish Historical Museum.

Owen C. Pell and Lynn Kaiser, White & Case LLP, New York, New York; Agnes Peresztegi, Of Counsel,

Soffer Avocats, Paris, France; for Amicus Curiae Commission for Art Recovery.

Susan J. Kohlmann, Irene M. Ten Cate, and Ava U. McAlpin, Jenner & Block LLP, New York, New York, for Amicus Curiae Professor Leonard F.M. Besselink.

Thomas R. Kline and L. Eden Burgess, Cultural Heritage Partners PLLC, Washington, D.C., for Amici Curiae Members of Congress E. Engel and J. Nadler and Former Members of Congress M. Levine and R. Wexler.

**OPINION**

McKEOWN, Circuit Judge:

Hanging in the balance are Renaissance masterpieces that have been on display in California for nearly half a century. The dispute over their ownership, however, dates back to World War II, when the Nazis invaded the Netherlands.

Marei von Saher ("von Saher") seeks to recover two oil paintings that were among a group of artworks taken by Nazis in a forced sale from her father-in-law. Following the war, the Allied Forces returned the paintings to the Dutch government, which established a claims process for recouping Nazi-looted property. Von Saher's family, on the advice of counsel, chose not to file a claim on the paintings within the allotted time. In 1966, the Dutch government sold the two paintings to George Stroganoff-Sherbatoff ("Stroganoff") after Stroganoff filed a restitution claim alleging that he was the rightful owner. Stroganoff then sold the paintings in 1971 to the Norton Simon Art Foundation and the Norton Simon Museum of Art at Pasadena (collectively, "the Museum"). The paintings have been on display ever since.

In the late 1990s, von Saher tried to recover from the Dutch government all paintings included in the forced sale. The Dutch Court of Appeals issued a final decision, denying von Saher's petition for restoration of rights in the paintings. A few years later, the Dutch government nonetheless decided to return to von Saher the paintings that were still in its possession, but did not return the two paintings it had sold to Stroganoff because they were in California. Von Saher sued the Museum in federal court soon after.

This marks the third time that we have considered von Saher's case, having most recently remanded for further factual development. The district court granted summary judgment to the Museum, concluding that the Netherlands possessed good title under Dutch law when it sold the paintings to Stroganoff.

We affirm, but not under Dutch law. Because the act of state doctrine deems valid the Dutch government's conveyance to Stroganoff, the Museum has good title. Holding otherwise would require us to nullify three official acts of the Dutch government—a result the doctrine was designed to avoid.

## Background

### THE PAINTINGS

At the center of this controversy are two Renaissance masterworks—"Adam" and "Eve"—painted by Lucas Cranach the Elder ("the paintings" or "the Cranachs"). In 1931, Dutch art dealer Jacques Goudstikker purchased the Cranachs from the Soviet Union at an auction in Berlin called "the Stroganoff Collection."[1] The paintings became the property of the

[1] The district court found that the Stroganoff family "never owned" the Cranachs, a fact contested by the Museum and

art dealership in which Goudstikker was principal shareholder ("the Goudstikker Firm" or "the Firm").

In May 1940, as the Nazis invaded the Netherlands, Goudstikker and his family fled to South America, fearing persecution and leaving behind his gallery of over 1,200 artworks. Tragically, Goudstikker died on the boat trip. His wife Desi, who acquired Goudstikker's shares in the Firm, maintained a black-book listing all the paintings in the gallery, including the Cranachs.

After Goudstikker's death, Nazi Reichsmarschall Hermann Göring and his cohort Alois Miedl "bought" the Goudstikker Firm and its assets through a series of involuntary written agreements with a remaining employee of the Firm.[2] These "forced sales" proceeded in two parts: Miedl acquired the Firm, its showroom, some of its paintings, and the family's villa and castle for 550,000 guilders ("the Miedl transaction"). Göring purchased other artworks, including the Cranachs, for two million guilders—the equivalent of over 20 million current U.S. dollars ("the Göring transaction").

After World War II, the Allied Forces in Germany recovered much of the art collection taken from Goudstikker by Göring, including the Cranachs. The

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muddied by the record evidence. While we need not determine whether the Stroganoff family once owned the Cranachs, the evidence that it even possibly owned the paintings bears on whether Stroganoff's assertion of ownership to the Dutch government in the 1960s presented a colorable restitution claim, and hence prompted an act of state.

[2] At various times until the Netherlands and the Firm reached a settlement agreement in 1952, certain Dutch authorities took the position that the Göring and Miedl transactions were voluntary. That idea has long since been dispelled, and the forced nature of the transaction is uncontested by the parties.

Allies turned the paintings over to the Dutch government in 1946.

**THE DUTCH RESTITUTION SYSTEM**

During and after the war, the Dutch government created systems of restitution and reparations for losses incurred by its citizens at the hands of the Nazis. The pillars of those systems were established in a series of royal decrees. We provide a sketch of those decrees because they bear on our decision to apply the act of state doctrine.

**Royal Decree A6 And The 1947 CORVO Decision**

The Dutch government enacted Royal Decree A6 in June 1940, shortly after the Nazis invaded the Netherlands. The decree prohibited and automatically nullified agreements with the enemy. A6 vested authority in a special committee (*Commissie Rechtsverkeer in Oorlogstijd* or "CORVO") to "revoke the invalidity" of such transactions "by declaring the agreement or act still effective."

In 1947, CORVO revoked the automatic invalidity of agreements with the enemy for property that was recuperated to the Netherlands by the Allies. As CORVO explained, A6 was enacted to protect Dutch property interests from the Nazis. But once property was returned to the Dutch government, "the initial interest of such nullity is eliminated." After property was returned to the Netherlands, the original Dutch owners could petition for a restoration of rights in the property under Royal Decree E100.

**Royal Decree E100**

The Dutch government enacted Royal Decree E100 in 1944. The decree established a Council for Restoration of Rights ("the Council"), with broad and exclusive

authority to declare null and void, modify, or revive "any legal relations that originated or were modified during enemy occupation of the [Netherlands]."

The Council had the exclusive power to order the return of property and to restore property rights to the original Dutch owners. The Council consisted of several departments, including a Judicial Division. The restitution decisions of the other departments were appealable to the Judicial Division, whose judgments were final and non-appealable, and carried the force of a court judgment. Petitioners could bring claims for restoration of rights directly to the Judicial Division, or bring claims to other departments and appeal adverse decisions to the Judicial Division. Upon enactment of E100, the Council supplanted the Dutch common-law courts as the venue for adjudging wartime property rights, as those courts became "incompetent to hear and decide on claims or requests that the Council is competent to handle by virtue of this Decree."

The Dutch government set a July 1, 1951 deadline for claimants to file E100 restoration-of-rights petitions with the Council. After that deadline, the Council could still order restoration of rights of its own accord, but claimants were no longer entitled to demand restitution. Usually, if an original owner received money or other consideration in exchange for property taken by the Nazis, the original owner was required to return the sale price to the Dutch government in order to obtain restitution.

Decree E100 also authorized the Council to dispose of property of "unknown owners": "If the owner has not come forward within a period to be further determined by Us, items that have not yet been sold shall be sold

. . . ." The Dutch government set the deadline for owners "com[ing] forward" at September 30, 1950.

**Royal Decree E133**

The Dutch government enacted Royal Decree E133 in 1944 to expropriate enemy assets in order to compensate the Netherlands for losses it suffered during World War II. Article 3 of E133 provided that within the Netherlands, all "[p]roperty, belonging to an enemy state or to an enemy national, automatically passes in ownership to the State with the entering into force of this decree . . . ." The expropriation of enemy property was automatic and continued until July 1951, when the Netherlands ceased hostilities with Germany.

**VON SAHER'S FAMILY DECLINED TO SEEK RESTORATION OF RIGHTS IN THE CRANACHS**

After the war, the Dutch government seized what previously had been the Goudstikker Firm (now the Miedl Firm) as an enemy asset and appointed new administrators. Goudstikker's widow (and von Saher's mother-in-law) Desi returned to the Netherlands to pursue restitution.

With Desi and new leadership in place, on the strategic advice of its business advisers and legal counsel, the Goudstikker Firm decided not to pursue restitution for the Göring transaction. Specifically, the Firm believed that seeking restitution would have "left [the business] with a large number of works of art that are difficult to sell"; "led to the revival of an art dealership with all pertinent negative consequences," including "find[ing] a suitable person to run such a business"; and "led to a considerable reduction in the [business's] liquid assets." The Firm's attorney Max Meyer laid out his advice in a memorandum to the Firm. A.E.D.

von Saher, who later married Desi, confirmed that "the shareholders still considered to also conduct legal redress with respect to the Goering contract. Mr. Meyer and Mr. Lemberger strongly advised against this."

In 1949, Meyer wrote to the Dutch agency holding the Göring artworks to express that the Firm was releasing any claim it had to those pieces: "I would also like to take this opportunity to confirm that the Art Trade J. Goudstikker LLC waives the right to file for restoration of rights regarding goods acquired by Goering . . . ." The memorandum accompanying that letter showed that Meyer was aware that he could have filed a claim to restore rights in both the Göring and Miedl transactions, because they would have been voidable under E100. In proceedings before the modern Dutch Restitution Committee, Marei von Saher conceded that "Goudstikker made a deliberate and well-considered decision not to seek restoration of rights with respect to the goods that had been acquired by Göring."

By contrast, the Firm decided to pursue restitution for the Miedl transaction, including other artworks and real estate. Just shy of the July 1, 1951 E100 deadline, the Firm filed with the Council a petition for restoration of rights concerning the Miedl transaction only. In August 1952, the Firm and the Dutch government settled the Firm's restitution claims.[3]

[3] The parties dispute whether the 1952 settlement released claims involving *both* the Miedl and the Göring transactions. The district court did not make a factual finding on the issue, and the answer does not affect our resolution of this appeal.

**The Dutch Government Sold the Cranachs to Stroganoff, Who Sold Them to the Museum**

In the 1960s, Stroganoff petitioned the Dutch government, asserting that he was the rightful owner of the Cranachs because the Soviet government had stolen them from him. In 1966, the parties reached an amicable settlement in which Stroganoff bought "back" the paintings from the Netherlands in exchange for dropping his restitution claims.

Through his agent, in 1971 Stroganoff sold the Cranachs to the Museum for $800,000. The Cranachs have been on public display since that time.

**VON SAHER PURSUED RESTITUTION FROM THE DUTCH GOVERNMENT**

In the 1990s, Marei von Saher—the only living heir of Jacques and Desi Goudstikker—began seeking restitution for artworks that the Firm "sold" to Göring. As part of those efforts, von Saher filed an E100 petition for restoration of rights in the Dutch Court of Appeals (the legal successor to the Council for Restoration of Rights) for all paintings acquired by Göring, including the Cranachs. The Court of Appeals denied the petition, concluding that the Firm "made a conscious and well considered decision to refrain from asking for restoration of rights with respect to the Göring transaction." Von Saher appeared to be at a dead end.

But in 2001, the Netherlands reevaluated its "bureaucratic" restitution process, transforming its mission from a "purely legal approach" to "a more moral policy approach." In doing so, the Dutch government created a new Restitution Committee, to advise the State Secretary of Education, Culture and Science on restitution claims for property that was still in

the possession of the Dutch government. Embracing the change in forum, von Saher petitioned the State Secretary for over 200 artworks that the Firm "sold" to Göring and that were still held by the Dutch government. Her claim did not include the Cranachs.

After receiving a non-binding recommendation from the Restitution Committee, the State Secretary ruled that von Saher's claim for the artworks in the Göring transaction had already been "settled" in the 1950s and in the 1999 Dutch Court of Appeals decision. The State Secretary nonetheless decided to return to von Saher all the paintings from the Göring transaction still in possession of the Dutch government. The State Secretary expressly stated that the decision to return the other paintings did not concern the Cranachs.

***VON SAHER I***

Out of options with the Dutch government, in 2007 von Saher filed a federal diversity action against the Museum in the Central District of California, seeking to recover the paintings. The suit alleged state-law claims for replevin, conversion, damages under California Penal Code § 496, quiet title, and declaratory relief. The action alleged timeliness under a California civil-procedure statute that allowed the rightful owners of confiscated Holocaust-era artwork to recover their items from museums or galleries and set a filing deadline of December 31, 2010. Cal. Civ. Proc. Code § 354.3(b), (c).

The district court dismissed the action, finding von Saher's claims untimely and concluding that California's special statute of limitations was unconstitutional. We affirmed, holding the California statute unconstitutional on field preemption grounds as the state was attempting to engage in foreign affairs.

*See Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 965–68 (9th Cir. 2010) ("*Von Saher I*"). But we provided von Saher leave to amend her complaint in case she could allege that she lacked notice such that her claims were timely under California's generic statute of limitations for property actions. *Id.* at 968–70; *see* Cal. Civ. Proc. Code § 338. Von Saher's petition for certiorari to the U.S. Supreme Court was denied. 564 U.S. 1037 (2011).

***VON SAHER II***

Soon after our decision in *Von Saher I*, the California legislature amended its statute of limitations for actions "for the specific recovery of a work of fine art brought against a museum, . . . in the case of an unlawful taking or theft . . . within six years of the actual discovery by the claimant or his or her agent." Cal. Civ. Proc. Code § 338. The legislature made the amendment retroactive and von Saher amended her complaint accordingly.

The Museum again moved to dismiss, this time arguing that von Saher's claims conflicted with federal foreign policy. The district court granted the motion. On appeal, we reversed and remanded, over a dissent from Judge Wardlaw. *See Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712 (9th Cir. 2014) ("*Von Saher II*").

The panel majority held that von Saher's state-law claims did not conflict with federal policy concerning Nazi-stolen art "because the Cranachs were never subject to postwar internal restitution proceedings in the Netherlands." *Id.* at 721. More specifically, von Saher's complaint alleged that "(1) Desi chose not to participate in the initial postwar restitution process, (2) the Dutch government transferred the Cranachs to

Stroganoff before Desi or her heirs could make another claim and (3) Stroganoff's claim likely was not one of internal restitution." *Id.* at 723.[4]

The panel majority refused to afford "serious weight" to an amicus brief filed in the Supreme Court by the U.S. Department of State and the Office of the Solicitor General in *Von Saher I*. *Id.* at 724. The panel noted that the brief went "beyond explaining federal foreign policy and appear[ed] to make factual determinations." *Id.* Namely, the brief suggested that the Cranachs had "been subject (or potentially subject to) bona fide restitution proceedings in the Netherlands," which contradicted the allegations in von Saher's amended complaint. *Id.*

Although the panel posited that this was "a dispute between private parties," it was "mindful that the litigation of this case may implicate the act of state doctrine." *Id.* at 725. The case was remanded for further factual development and to determine whether the doctrine applies to von Saher's claims. *Id.* at 727.

Judge Wardlaw dissented. In her view, the United States, through the amicus brief submitted by the Solicitor General's Office and the State Department, had articulated the foreign policy applicable to conflicts like this one. *Id.* at 728 (Wardlaw, J., dissenting). The brief conveyed that "World War II property claims may not be litigated in U.S. courts if the property was 'subject' or '*potentially subject*' to an adequate internal restitution process in its country of origin." *Id.* The brief further explained that the paintings at issue in

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[4] Importantly, the decision in *Von Saher II* was at the motion-to-dismiss stage, and so von Saher's allegations were assumed to be true. 754 F.3d at 714. As analyzed below, the record on remand does not bear out these allegations.

this appeal "have already been the subject of both external and internal restitution proceedings, including recent proceedings by the Netherlands." *Id.* Those proceedings were "bona fide," according to the brief, and so "their finality must be respected." *Id.* Judge Wardlaw determined that "Von Saher's attempt to recover the Cranachs in U.S. courts directly thwarts the central objective of U.S. foreign policy in this area: to avoid entanglement in ownership disputes over externally restituted property if the victim had an adequate opportunity to recover it in the country of origin." *Id.* at 729. Although Judge Wardlaw did not reach the issue because she concluded the case should be resolved on preemption grounds, she noted that the act of state doctrine may apply. *Id.* at 730 n.2.

The Supreme Court denied the Museum's certiorari petition. 135 S. Ct. 1158 (2015).

**SUMMARY JUDGMENT TO THE MUSEUM ON REMAND**

On remand, after denying the Museum's motion to dismiss on timeliness grounds, the district court conducted over a year of discovery and considered the parties' cross-motions for summary judgment. Applying Dutch law, the district court granted summary judgment to the Museum, concluding that:

> (1) because CORVO revoked the automatic invalidity of the Göring transaction in 1947, that transaction was "effective" and the Cranachs were considered to be the property of Göring; (2) because Göring was an "enemy" within the meaning of Royal Decree E133, his property located in the Netherlands, including the Cranachs, automatically passed in ownership to the Dutch State pursuant to Article 3 of Royal Decree E133; (3) unless

> and until the Council annulled the Göring transaction under Royal Decree E100, the Cranachs remained the property of the Dutch State; and (4) because the Göring transaction was never annulled under Royal Decree E100, the Dutch State owned the Cranachs when it transferred the paintings to Stroganoff in 1966.

Hence, the Dutch government possessed good title to the paintings when it sold them to Stroganoff, who then conveyed good title to the Museum.

**Analysis**

We review de novo summary judgment rulings and questions of foreign law, including whether to apply the act of state doctrine. *See Brunozzi v. Cable Commc'ns, Inc.*, 851 F.3d 990, 995 (9th Cir. 2017); *De Fontbrune v. Wofsy*, 838 F.3d 992, 1000 (9th Cir. 2016); *Liu v. Republic of China*, 892 F.2d 1419, 1424 (9th Cir. 1989).

The act of state doctrine is a "rule of decision" requiring that "the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." *W.S. Kirkpatrick Co. v. Environ. Tectonics Corp., Int'l*, 493 U.S. 400, 405, 409 (1990); *see generally* Born and Rutledge, *International Civil Litigation in United States Courts* 751–55 (2007). "The doctrine reflects the concern that the judiciary, by questioning the validity of sovereign acts taken by foreign states, may interfere with the executive branch's conduct of foreign policy." *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1089 (9th Cir. 2009). We apply the doctrine only when we are "require[d] . . . to declare invalid, and thus ineffective . . . , the official act of a foreign sovereign." *W.S. Kirkpatrick*, 493 U.S. at

405. Hence, we apply the doctrine here, because "the relief sought" by von Saher would necessitate our "declar[ing] invalid" at least three "official act[s] of" the Dutch government "performed within its own territory." *Id.*

## I. VON SAHER'S THEORY WOULD REQUIRE THE COURT TO INVALIDATE OFFICIAL ACTS OF THE DUTCH GOVERNMENT

Von Saher's recovery hinges on whether she—not the Museum—holds good title to the paintings. The Museum's defense, in turn, depends on its having received good title from Stroganoff, who forfeited his own restitution claim to the paintings when he bought them from the Netherlands in 1966. It is therefore a necessary condition of von Saher's success that the Dutch government's conveyance of the paintings to Stroganoff be deemed legally inoperative. For von Saher to succeed, we would also need to disregard both the Dutch government's 1999 decision not to restore von Saher's rights in the Cranachs and its later statement that her claim to the Cranachs had been "settled." Because it is "essential to" von Saher's cause of action that these three official actions of the Dutch government be held invalid, the act of state doctrine applies. *See Marinduque*, 582 F.3d at 1085.[5] We examine these three acts in turn.

### A. THE DUTCH GOVERNMENT'S CONVEYANCE TO STROGANOFF

As we acknowledged in *Von Saher II*, the act of state doctrine may apply to quiet title actions like von Saher's that would require a court to nullify a foreign

[5] Because the act of state doctrine provides a rule of decision that deems valid the Stroganoff conveyance, we do not conduct a choice-of-law analysis.

nation's conveyances. 754 F.3d at 725–26 (citing *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303–04 (1918); *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 310 (1918)). What matters is "whether the conveyance . . . constituted an official act of [the] sovereign." *Von Saher II*, 754 F.3d at 726. There is little doubt that the Dutch government's conveyance to Stroganoff qualifies as an official act of the Netherlands.

We view the conveyance not as a one-off commercial sale, but as the product of the Dutch government's sovereign internal restitution process.[6] Under that process, the Netherlands passed Royal Decrees E133, to expropriate enemy property, and E100, to administer a system through which Dutch nationals filed claims to restore title to lost or looted artworks. Whatever the exact legal effect of those decrees—and irrespective of whether the district court correctly interpreted their meaning under Dutch law—we cannot avoid the conclusion that the post-war Dutch system adjudicated property rights by expropriating certain items from the Nazis and restoring rights to dispossessed Dutch citizens.[7] No one disputes, for

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[6] The post-war governmental processes here contrast sharply with, for example, an employee of a city museum purchasing artworks on the open market like any art dealer could do. *See Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322, 339 (D.D.C. 2007) (finding that the act of state doctrine does not apply in such a case because "there was nothing sovereign about the City's acquisition of the . . . paintings, other than that it was performed by a sovereign entity.").

[7] The Museum submitted a compendium of post-war cases in which the Council for Restoration of Rights held that, under E133, the Dutch government expropriated ships and artwork that Dutch nationals had sold to the Germans during the war but were later recuperated. Although we do not rely on these cases for their substantive holdings, they underscore that the post-war

example, that the Firm successfully availed itself of the post-war system by petitioning for restoration of rights in the artworks it had sold to Miedl.

Expropriation of private property is a uniquely sovereign act. *See, e.g.*, *Oetjen*, 246 U.S. at 303 (applying the act of state doctrine to governmental seizures of property); U.S. Const. amend. V. Whether or not the Netherlands effected an expropriation of the Cranachs under Dutch law, the Dutch government *acted* with authority to convey the paintings after von Saher's predecessors failed to file a claim under E100. Von Saher's expert conceded that the "Netherlands considered itself the lawful owner of the works sold to Goering" and "acted as the[ir] true owner." The Dutch government then unquestionably acted as the owner of the paintings by agreeing to convey them to Stroganoff in exchange for his dropping certain restitution claims. Under the act of state doctrine, "title to the property in this case must be determin[e]d by the result of the action taken by the [Netherlands]." *Ricaud*, 246 U.S. at 309.

In *Von Saher II*, we reasoned that if "the Museum can show that the Netherlands returned the [paintings] to Stroganoff to satisfy some sort of restitution claim, that act could 'constitute a considered policy decision by a government to give effect to its political and public interests . . . and so [would be] . . . the type of sovereign activity that would be of substantial concern to the executive branch in its conduct of international affairs.'" 754 F.3d at 726 (citing *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 406–07 (9th Cir. 1983)).

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Dutch system fixed rights in Nazi-looted property pursuant to official governmental policy—not as purely commercial acts.

But we see no reason why the Museum cannot likewise show that the Netherlands transferred the paintings to Stroganoff as part of a decades-long "considered policy decision" that was inextricably linked to its rights-restoration proceedings under the royal decrees. In order to sell to Stroganoff, the Dutch government must have concluded that its proceedings with respect to the Cranachs and von Saher's family were final. That interpretation is consistent with the position of von Saher's predecessors, who wrote to the Dutch government that they "waive[d] the right to file for restoration of rights regarding [the Cranachs]," and made a strategic, counseled decision not to file a claim on the Göring transaction in order to keep the substantial sale price.[8] The Dutch government clearly understood the Firm to mean what it said; the government began selling unclaimed artworks shortly after the E100 filing deadline, including other works from the Göring transaction. The record on remand is clear.

The Museum also made the showing specifically requested in *Von Saher II*—that the conveyance to Stroganoff was a sovereign act made in consideration of a restitution claim. Stroganoff served a formal petition on the Dutch government, asserting rightful ownership of the Cranachs and a Rembrandt based on a claim that the Soviet government had stolen the artworks. Stroganoff's writ of summons to the Dutch Ministers asserted that "he [wa]s the owner of these

[8] Despite that unequivocal waiver, von Saher argues that the Dutch government nonetheless should have kept the paintings on the off chance one of Goudstikker's legal heirs had a change of heart seventy (or more) years later. That position is based on wishful thinking rather than law or fact and, of course, runs counter to the expectation that post-war restitution systems should "achieve *expeditious*, just and fair outcomes." *Von Saher II*, 754 F.3d at 721 (emphasis added).

paintings," requested that the Dutch government inform him whether it was "willing to return the paintings," and if not, "to inform [him] of the reasons for [its] refusal." At the time, the Dutch government "was not in the business of selling national artworks [such as the paintings] considered to be part of the Dutch cultural patrimony."

After years of negotiations, the Netherlands and Stroganoff decided to "settle the case by means of an amicable arrangement": Stroganoff offered to "buy back" the paintings in exchange for dropping his restitution claims for both the Cranachs and the Rembrandt. The Dutch government entered into the agreement only after carefully considering the public policy ramifications of doing so—the Dutch Minister of Culture initially opposed the proposal because "the two Cranachs are especially important for the Dutch cultural collection." Ultimately, however, the Dutch Minister of Culture considered the settlement to be in "the interest[s] of the country." The Dutch Minister of Finance likewise signed off on the settlement, reinforcing our understanding that the Netherlands entered into the agreement with the careful consideration of high-ranking officials.

Considered holistically, the administration of E100 and E133, the settlement with von Saher's family, and the conveyance of the Cranachs to Stroganoff in consideration of his restitution claim constitute an official act of state that gives effect to the Dutch government's "public interests." *Von Saher II*, 754 F.3d at 726.

### B. THE DUTCH COURT OF APPEALS DECISION NOT TO RESTORE VON SAHER'S RIGHTS TO THE PAINTINGS

Von Saher's theory also would require us to disregard the 1999 Dutch Court of Appeals decision denying the restoration of von Saher's rights in the paintings. This ruling is a second act of state authorizing the transfer of the Cranachs to Stroganoff.

In 1998, von Saher petitioned the Dutch government to surrender all property from the "Goudstikker collection" over which the State had gained control. The Dutch State Secretary rejected the request, advising that "[i]n my opinion, directly after the war—even under present standards—the restoration of rights was conducted carefully."

Von Saher then filed an E100 petition for restoration of rights in the Dutch Court of Appeals (the legal successor to the Council for Restoration of Rights). Von Saher's petition sought relief for all artworks involved in the Göring transaction, including the Cranachs. The Court of Appeals denied the restoration of von Saher's rights in the paintings, noting that "[f]rom the documents submitted it appears that [the Firm] at the time made a conscious and well considered decision to refrain from asking for restoration of rights with respect to the Göring transaction." The Firm had access to legal advisors and was "free . . . to have submitted an application for [E100] restoration of rights with the Council," but "neglected to do so for well-founded reasons." The Court of Appeals also offered an opinion on the process, concluding that "[t]he Netherlands created an adequately guaranteed procedure for handling applications for the restoration

of rights," which was not "in conflict with international law."[9]

Under E100, the Dutch Court of Appeals (succeeding the Council) was the only venue through which von Saher could have received restitution for, and restoration of rights in, the Cranachs. By administering the exclusive postwar remedial scheme for artwork taken by the Nazis, and refusing von Saher's restoration of rights in the paintings, the Dutch Court of Appeals carried out an official action that is particular to sovereigns. *See Clayco*, 712 F.2d at 406. Even if we consider the Court of Appeals decision to be a "foreign court judgment" rather than an agency adjudication, such judgments are treated as acts of state when they "g[i]ve effect to the public interest" of the government. *See In re Philippine Nat'l Bank*, 397 F.3d 768, 773 (9th Cir. 2005); *accord* Restatement (Second) of Foreign Relations of the United States § 41 cmt. d (1965)) ("A judgment of a court may be an act of state."). The Dutch ruling provides an additional act of state that deems valid the transfer to Stroganoff.

### C. THE DUTCH GOVERNMENT'S DECISION THAT THE RIGHTS TO THE CRANACHS HAD BEEN "SETTLED"

Based on government activities after the 1999 Dutch Court of Appeals decision, von Saher contends that the act of state doctrine either does not apply or

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[9] During oral argument, von Saher argued for the first time that the 1999 Dutch Court of Appeals decision is inapposite because it was a "procedural" rather than a "substantive" ruling. Whatever the import of that distinction, it is inaccurate. The record explicitly notes that the Court of Appeals weighed the "substantive" evidence and arguments—many of which were presented here—and found "no serious cause to grant ex oficio restoration of rights."

should operate on her behalf.[10] But rather than aid von Saher, those later activities provide a third official act supporting the legality of the Stroganoff transfer.

Inspired by the 1998 Washington Conference Principles on Nazi-Confiscated Art, the Netherlands departed in 2001 from a "purely legal approach" to restitution in favor of "a more moral policy approach." The Dutch government shifted its paradigm at the recommendation of the "Ekkart Committee," which investigated "a great number of post-war claims" and found that one Dutch restitution agency had been "legalistic, bureaucratic, cold and often even callous" in conducting operations.

The new restitution policy was not an official pronouncement that the previous Dutch policy was invalid, however.[11] Nor was the new policy established to re-examine old cases. Far from it, the new policy categorically did not apply to "settled case[s]," defined as those in which "either the claim for restitution resulted in a conscious and deliberate settlement or the claimant expressly renounced his claim for restitution."

To help administer the new policy, in 2001 the Dutch State Secretary of Education, Culture and Science established a "Restitution Committee" charged with considering new restitution applications. The "main task of the Committee" was to advise the State Secretary on "applications for the restitution of items

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[10] In her opening brief, von Saher appeared to argue that the act of state doctrine is applicable and should deem *invalid* the transfer to Stroganoff. In her reply, she shifted to arguing that the doctrine is "inapplicable."

[11] Von Saher's expert expressed "no doubt" that the prior restitution policy was administered "in good faith."

of cultural value of which the original owners involuntarily lost possession due to circumstances directly related to the Nazi regime *and which are currently in the possession of the State of the Netherlands*." (Emphasis added).

With a new system in place, in 2004 von Saher filed a claim for 267 artworks looted by the Nazis from the Goudstikker Gallery that were still in the possession of the Dutch government. Crucially, the claim did not include the Cranachs. Indeed, von Saher could not have filed a successful claim on the Cranachs without the consent of the Museum: the Restitution Committee only has authority to hear disputes involving property not currently possessed by the Netherlands when both the putative original owner and the current possessor request an opinion. The Dutch State Secretary referred the claim to the Restitution Committee, which issued a non-binding recommendation to the Secretary that the Dutch government return certain of the works to von Saher.

Von Saher asserts that the Restitution Committee's non-binding recommendation to the Secretary was itself an act of state—establishing that von Saher's family "did not abandon its rights in the artworks taken by Göring" by failing to file a timely E100 claim. But that interpretation is incorrect. Advisory recommendations that cannot bind the sovereign are not acts of state. *See In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1471 (9th Cir. 1994); *see also Sharon v. Time, Inc.*, 599 F. Supp. 538, 545 (S.D.N.Y. 1984) (concluding that an advisory commission's findings are not acts of state). The Restitution Committee's recommendation and findings were purely advisory. Within the recommendation, the Committee itself stated that its "job" was

"to provide advice in such a way that, *if the State Secretary accepts the advice*, a situation is achieved that as closely as possible approximates the former situation" before the forced sales. (Emphasis added)[12].

The Dutch State Secretary then issued a *binding* decision on von Saher's restitution claim that accepted in part and rejected in part the Committee's advice. Importantly, the Secretary disavowed the Committee's findings that von Saher's predecessors had not waived their rights to restoration under E100 in the 1950s: "Unlike the Restitution Committee I am of the opinion that in this case it is a matter of restoration of rights which has been settled." The Secretary concluded that the von Saher claim was "settled" by the 1999 "final decision" of the Court of Appeals, in which the Court found that von Saher's predecessors had consciously foregone their restoration rights. Because von Saher's case was "settled," her claim was "not included in the current restitution policy."

Although von Saher's was a settled claim that fell outside the new policy, the Secretary nonetheless decided, *ex gratia*, to return to von Saher the over 200 paintings from the Goudstikker Collection that were still in Dutch possession. The Secretary's action "t[ook] into account the facts and circumstances surrounding the involuntary loss of property and the manner in which the matter was dealt with in the early Fifties."

The Dutch government's decision to return the paintings still in its possession did not disrupt the government's prior, binding acts of state concerning the Cranachs. The State Secretary for Education,

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[12] Nonetheless, the nonbinding recommendations do not support von Saher because they concerned only the specific paintings in her claim, which did not include the Cranachs.

Culture and Science explicitly stated that the Cranachs were "not a part of the claim for which [she] decided on February 6[, 2006] to make the return." Accordingly, she "refrain[ed] from an opinion regarding the two pieces of art under the restitution policy," and refused to "reverse[]" the prior decisions of the State Secretary of Culture and the Dutch Court of Appeals. The Secretary's final determination that rights to the Cranachs had been fully "settled" marks the third act of the Dutch state counseling our application of the doctrine.

## II. EXCEPTIONS TO THE ACT OF STATE DOCTRINE DO NOT APPLY

Having concluded that the Dutch government's transfer of the paintings and its later decisions about the conveyance were "sovereign acts," we still "must determine whether any exception to the act of state doctrine applies." *Von Saher II*, 754 F.3d at 726. None does.[13]

### A. "PURELY COMMERCIAL ACTS"

A plurality of the Supreme Court has recognized a potential exception to the act of state doctrine for "purely commercial acts"—*i.e.* where "foreign governments do not exercise powers peculiar to sovereigns," but rather "exercise only those powers that can also

[13] In addition to the two exceptions we analyze, "the State Department also has restricted the application of th[e] doctrine, freeing courts to 'pass upon the validity of the acts of Nazi officials.'" *Republic of Austria v. Altmann*, 541 U.S. 677, 713–14 (2004) (Breyer, J., concurring) (quoting *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 375–76 (2d Cir. 1954) (per curiam)). However, we do not "pass upon the validity of the acts of Nazi officials"; rather, we "pass upon the validity of the acts of" the Dutch government.

be exercised by private citizens." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 704–05 (1976). The Supreme Court and our court have never decided whether such an exception exists. *See Von Saher II*, 754 F.3d at 727; *Clayco*, 712 F.2d at 408.

Nor must we decide in this case whether such an exception exists. Expropriation, claims processing, and government restitution schemes are not the province of private citizens. Those are "sovereign policy decision[s]" befitting sovereign acts. *See Clayco*, 712 F.2d at 406. Because the Dutch government's administration of E100 and E133 and its settlement of Stroganoff's restitution claim are not "purely commercial acts," we do not decide whether such an exception exists. *See id.* at 408.

### B. THE "SECOND HICKENLOOPER AMENDMENT"

The eponymous "Second Hickenlooper Amendment" restricts application of the act of state doctrine, "but only in respect to 'a confiscation or other taking after January 1, 1959.'" *Republic of Austria v. Altmann*, 541 U.S. 677, 713 (2004) (Scalia, J., concurring) (citing 22 U.S.C. § 2370(e)(2)). In *Von Saher II*, we floated that although the Dutch government kept possession of the paintings after von Saher's predecessors failed to file a claim by 1951, the Dutch government did not transfer the paintings to Stroganoff until 1966, a conveyance that "may constitute a taking or confiscation." 754 F.3d at 727. Yet as the record illustrates, the Dutch government did not take or confiscate anything from von Saher's family in 1966; the family had long since "waive[d] the right to file for restoration of rights" in order to keep the substantial sale price. Any taking, therefore, occurred before the Second Hickenlooper Amendment became effective.

Further, the Amendment bars application of the act of state doctrine only when the governmental action violates "principles of international law." 22 U.S.C. § 2370(e)(2). As von Saher's expert recognized, "international law respects the law as it stood at the time when the decisions were taken." *See* United Nations Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries*, art. 13, U.N. Doc. A/56/10 (2001) ("An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.").

When the Dutch government administered E133 and E100, the United States and other Allies imposed claims-filing deadlines for property taken by the Nazis in occupied German zones. Under these schemes, prospective owners who opted not to file a claim before the deadline were treated as having forfeited their rights to the property. For example, the Court of Restitution Appeals noted that a deadline set in Military Law 59 recognized that "it was imperative to fix a date with finality on which the legal rights of all parties, whether they be individual claimants or successor organizations could be ascertained." *Advisory Opinion No. 1*, 1 Court of Restitution Appeals Reports 489, 492 (Aug. 4, 1950). The Court held that by not filing a timely claim, "[t]he claimant by reason of his default lost his right to restitution under the [provision] when the vesting of the claim in the successor organization took place. He is forever barred from making any claim for the restitution of such property." *Id.*[14] The Dutch system clearly aligned with

[14] Von Saher acknowledges that Military Law 59 transferred unclaimed property to the Jewish Restitution Successor Organization, a charitable group, and that the Organization sold

contemporaneous restitution schemes. Further, the forfeiture by von Saher's predecessors was neither accidental nor ill informed—on the advice of counsel, the family affirmatively chose not to pursue any restoration of rights.

Because the Dutch government did not "confiscate" the paintings from von Saher's family after 1959, and because the conveyance to Stroganoff did not violate international law, the Second Hickenlooper Amendment poses no obstacle to the application of the act of state doctrine.

### III. THE POLICIES UNDERLYING THE ACT OF STATE DOCTRINE SUPPORT ITS APPLICATION HERE

Even where "the validity of the act of a foreign sovereign within its own territory is called into question, the policies underlying the act of state doctrine may not justify its application." *W.S. Kirkpatrick*, 493 U.S. at 409 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964)). The Supreme Court laid out three such policies in *Sabbatino*:

> [1][T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it . . . . [2][T]he less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. [3]The balance of relevant considerations may also be shifted if the government which perpetrated the

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that property in order to raise money for survivors, but "only after the deadline for claims had expired."

> challenged act of state is no longer in existence.

376 U.S. at 428; *see also W.S. Kirkpatrick*, 493 U.S. at 409.

All three of these policies support invocation of the doctrine here. Notably, no one has identified an international consensus regarding the *invalidity* of the Dutch post-war restitution procedures. If anything, the U.S. State Department and Office of the Solicitor General expressed in their amicus brief in *Von Saher I* that post-war restitution proceedings in the Netherlands were "bona fide." *See Von Saher II*, 754 F.3d at 729–30 (Wardlaw, J., dissenting). Second, the State Department and Solicitor General's Office confirmed in their brief that upholding the Dutch government's actions is important for U.S. foreign policy:

> When a foreign nation, like the Netherlands here, has conducted bona fide post-war internal restitution proceedings following the return of Nazi-confiscated art to that nation under the external restitution policy, *the United States has a substantial interest in respecting the outcome of the nation's proceedings*.

(Emphasis added).[15] This position makes practical sense. Reaching into the Dutch government's post-war

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[15] In *Von Saher II*, we concluded that von Saher's claims against the Museum "do not conflict with foreign policy," and that this case presents, "instead, a dispute between private parties." 754 F.3d at 724. In doing so, we did not give the amicus brief "serious weight." *Id.* Although *Von Saher II* is precedential authority, that decision left open whether the act of state doctrine applies. *Id.* at 725–27. We ought not exclude the State Department's views when considering the doctrine's application, especially when assessing the degree to which our decision will affect

restitution system would require making sensitive political judgments that would undermine international comity. *See W.S. Kirkpatrick*, 493 U.S. at 408 (underscoring that "international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations" are policies behind the doctrine). For example, von Saher asks us to conclude that filing an E100 claim for the Cranachs in the 1950s would have been "futile." So deciding would demand a judgment that the post-war Dutch system was incapable of functioning, a proposition that has not been proven here. Finally, we are dealing with a government that has been in continuous existence since the relevant acts of state. As noted, the decisions of the Dutch Court of Appeals and the State Secretary that deemed the Cranachs a "settled" question are quite recent. Von Saher asks us to do what the Dutch government refused to do in the 1999 Court of Appeals decision—restore her rights to the Cranachs. Second-guessing the Dutch government would violate our "commitment to respect the finality of 'appropriate actions' taken by foreign nations to facilitate the internal restitution of plundered art." *Von Saher II*, 754 F.3d at 721.

Our judiciary created the act of state doctrine for cases like this one. In applying it, we presume the validity of the Dutch government's sensitive policy judgments and avoid embroiling our domestic courts

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foreign policy. We acknowledge that we are not bound by those views. *Cf. Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1869 (2018) (holding that courts "should accord respectful consideration to" a foreign government's amicus brief, but are "not bound to accord conclusive effect to the foreign government's statements").

in re-litigating long-resolved matters entangled with foreign affairs. Without question, the Nazi plunder of artwork was a moral atrocity that compels an appropriate governmental response. But the record on remand reveals an official conveyance from the Dutch government to Stroganoff thrice "settled" by Dutch authorities. For all the reasons the doctrine exists, we decline the invitation to invalidate the official actions of the Netherlands.[16]

**AFFIRMED.**

[16] We thank the parties' counsel and *amici curiae* for submitting extensive and informative briefs detailing the many factual and international law intricacies in this appeal.

WARDLAW, Circuit Judge, concurring:

This case should not have been litigated through the summary judgment stage. The district court correctly dismissed this case on preemption grounds in March 2012. Those grounds did not require any further factual development of the record, and were valid even taking all of the facts in the light most favorable to Von Saher. So here we are in 2018, over a decade from the date Von Saher filed her federal action, reaching an issue we need not have reached, to finally decide that the Cranachs, which have hung in the Norton Simon Museum nearly fifty years, may remain there.

In my 2014 dissenting opinion (attached), I noted that further adjudication of the Netherlands proceedings may implicate the act of state doctrine because "'the outcome' of this inquiry 'turns upon[] the effect of official action by a foreign sovereign.'" *Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712, 730 n.2 (9th Cir. 2014) (Wardlaw, J., dissenting) (citing *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 406 (1990)). Though I did not reach the act of state doctrine, the prior panel could have because all of the historical official acts of the Netherlands were in the record at the time of the motion to dismiss. And, because I agree that "there is little doubt that the Dutch government's conveyance to Stroganoff qualifies as an official act of the Netherlands," Majority Op. at 19, I concur.

**APPENDIX B**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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No. 12-55733
D.C. No. 2:07-CV-02866-JFW-JTL

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MAREI VON SAHER,

*Plaintiff-Appellant*,

v.

NORTON SIMON MUSEUM OF ART AT PASADENA;
NORTON SIMON ART FOUNDATION,

*Defendants-Appellees*.

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Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

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Argued and Submitted
August 22, 2013—Pasadena, California

Filed June 6, 2014

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OPINION

Before: Harry Pregerson, Dorothy W. Nelson, and Kim McLane Wardlaw, Circuit Judges.

Opinion by Judge D.W. Nelson; Dissent by Judge Wardlaw

## SUMMARY*

### Federal Policy Conflict

The panel reversed the district court's Fed. R. Civ. P. 12(b)(6) dismissal of Marei Von Saher's action claiming that she was the rightful owner of two panels painted by Lucas Cranach, *Adam* and *Eve*, which hang in Pasadena's Norton Simon Museum of Art.

Relying on California state law, Von Saher alleged that the Nazis forcibly purchased the panels from her deceased husband's family in the Netherlands during World War II. The district court held that Von Saher's specific claims and the remedies she sought conflicted with the United States' express federal policy on recovered art, and the claims were barred by conflict preemption.

The panel held that Von Saher's claims did not conflict with any federal policy because the Cranachs were never subject to postwar internal restitution proceedings in the Netherlands. The panel held that Von Saher's claims against the museum and the remedies she sought did not conflict with foreign policy, and the dispute was one between private parties. The panel remanded for further development on the issue of whether the case implicated the act of state doctrine.

Dissenting, Judge Wardlaw would affirm the judgment of the district court because Von Saher's state law claims would conflict with federal policy, which respects the finality of the Netherlands' restitution proceedings.

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

## COUNSEL

Lawrence M. Kaye (argued), Herrick, Feinstein LLP, New York, New York; Donald S. Burris, Burris, Schoenberg & Walden, LLP, Los Angeles, for Plaintiff-Appellant.

Fred A. Rowley, Jr. (argued), Munger, Tolles & Olson LLP, Los Angeles, California, for Defendant-Appellee.

Catherine Z. Ysrael, Deputy Attorney General, for Amicus Curiae State of California.

## OPINION

D.W. NELSON, Senior Circuit Judge:

This case concerns the fate of two life-size panels painted by Lucas Cranach the Elder in the sixteenth century. *Adam* and *Eve* (collectively, "the Cranachs" or "the panels") hang today in Pasadena's Norton Simon Museum of Art ("the Museum"). Marei Von Saher claims she is the rightful owner of the panels, which the Nazis forcibly purchased from her deceased husband's family during World War II. The district court dismissed Von Saher's complaint as insufficient to state a claim upon which relief can be granted, and that dismissal is before us on appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we reverse and remand.

### I. Background

In reviewing the district court's decision, we must "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to" Von Saher. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). We therefore hew closely to the allegations in the complaint in describing the facts.

### A. Jacques Goudstikker Acquires the Cranachs

For the 400 years following their creation in 1530, the panels hung in the Church of the Holy Trinity in Kiev, Ukraine. In 1927, Soviet authorities sent the panels to a state-owned museum at a monastery and in 1927 transferred them to the Art Museum at the Ukrainian Academy of Science in Kiev. Soviet authorities then began to arrange to sell state-owned artworks abroad and held an auction in Berlin in 1931 as part of that effort. This auction, titled "The Stroganoff Collection," included artworks previously owned by the Stroganoff family. The collection also included the Cranachs, though Von Saher disputes that the Stroganoffs ever owned the panels. Jacques Goudstikker, who lived in the Netherlands with his wife, Desi, and their only child, Edo, purchased the Cranachs at the 1931 auction.

### B. The Nazis Confiscate the Cranachs

Nearly a decade hence in May 1940, the Nazis invaded the Netherlands. The Goudstikkers, a Jewish family, fled. They left behind their gallery, which contained more than 1,200 artworks—the Cranachs among them. The family boarded the SS Bodegraven, a ship bound for South America. Days into their journey, Jacques accidentally fell to his death through an uncovered hatch in the ship's deck. When he died, Jacques had with him a black notebook, which contained entries describing the artworks in the Goudstikker Collection and which is known by art historians and experts as "the Blackbook." Desi retrieved the Blackbook when Jacques died. It lists the Cranachs as part of the Goudstikker Collection.

Meanwhile, back in the Netherlands, high-level Nazi Reichsmarschall Herman Göring divested the Goudstikker Collection of its assets, including the Cranachs. Jacques' mother, Emilie, had remained in the Netherlands when her son fled to South America with his wife and child. Göring's agent warned Emilie that he intended to confiscate the Goudstikker assets, but if she cooperated in that process, the Nazis would protect her from harm. Thus, Emilie was persuaded to vote her minority block of shares in the Goudstikker Gallery to effectuate a "sale" of the gallery's assets for a fraction of their value.

Employees of the Goudstikker Gallery contacted Desi to obtain her consent to a sale of the majority of the outstanding shares in the gallery, which she had inherited upon Jacques' death. She refused. Nevertheless, the sale went through when two gallery employees, unauthorized to sell its assets, subsequently entered into two illegal contracts. In the first, the "Göring transaction," Göring "purchased" 800 of the most valuable artworks in the Goudstikker collection. Göring then took those pieces, including the Cranachs, from the Netherlands to Germany. He displayed *Adam* and *Eve* in Carinhall, his country estate near Berlin.

In the second illegal contract, the "Miedl transaction," Nazi Alois Miedl took over the Goudstikker business and properties. Miedl began operating an art dealership out of Jacques's gallery with the artwork that Göring left behind. Miedl employed Jacques's former employees as his own and traded on the goodwill of the Goudstikker name in the art world.

### C. The Allies Recover Nazi-Looted Art, Including the Cranachs

In the summer of 1943, the United States, the Netherlands and other nations signed the London Declaration, which "served as a formal warning to all concerned, and in particular persons in neutral countries, that the Allies intended to do their utmost to defeat the methods of dispossession practiced by the governments with which they [were] at war." *Von Saher v. Norton Simon Museum of Art at Pasadena* ("*Von Saher I*"), 592 F.3d 954, 962 (9th Cir. 2010) (internal quotation marks and citation omitted). The Allies "reserved the right to invalidate wartime transfers of property, regardless of whether" those transfers took the form of open looting, plunder or forced sales. *Id.*

When American forces arrived on German soil in the winter of 1944 and 1945, they discovered large caches of Nazi-looted and stolen art hidden in castles, banks, salt mines and caves. *Von Saher I*, 592 F.3d R 962. The United States established collection points for gathering, cataloging and caring for the recovered pieces. *Id.* At a collection point in Munich, Allied forces identified the Cranachs and other items from the Goudstikker Collection.

In order to reunite stolen works of art with their rightful owners, President Truman approved a policy statement setting forth the procedures governing looted artwork found in areas under U.S. control. *Von Saher I*, 592 F.3d at 962. These procedures had two components—external restitution and internal restitution. Under external restitution, nations formerly occupied by the Germans would present to U.S. authorities "consolidated lists of items taken [from their citizens] by the Germans." *Id.* These lists would

include "information about the location and circumstances of the theft." *Id.* American authorities would identify the listed artworks and return them to their country of origin. *Id.* The United States stopped accepting claims for external restitution on September 15, 1948. *Id.* at 963. Under internal restitution, each nation had the responsibility for restoring the externally restituted artworks to their rightful owners. *Id.*

In 1946, the Allied Forces returned the pieces from the Goudstikker Collection to the Dutch government so that the artworks could be held in trust for their lawful owners: Desi, Edo and Emilie.

### D. Desi's Postwar Attempt to Recover the Cranachs

In 1944, the Dutch government issued the Restitution of Legal Rights Decree, which established internal restitution procedures for the Netherlands. As a condition of restitution, people whose artworks were returned to them had to pay back any compensation received in a forced sale.

In 1946, Desi returned to the Netherlands intending to seek internal restitution of her property. Upon her return but before she made an official claim, the Dutch government characterized the Göring and Miedl transactions as voluntary sales undertaken without coercion. Thus, the government determined that it had no obligation to restore the looted property to the Goudstikker family. The government also took the position that if Desi wanted her property returned, she would have to pay for it, and she would not receive compensation for missing property, the loss of goodwill associated with the Goudstikker gallery's name or the profits Miedl made off the gallery during the war.

Desi decided to file a restitution claim for the property sold in the Miedl transaction, so that she could recover her home and some of her personal possessions. In 1952, she entered into a settlement agreement with the Dutch government, under protest, regarding only the Miedl transaction. As part of that settlement, Desi repurchased the property Miedl took from her for an amount she could afford. The agreement stated that Desi acquiesced to the settlement in order to avoid years of expensive litigation and due to her dissatisfaction with the Dutch government's refusal to compensate her for the extraordinary losses the Goudstikker family suffered at the hands of the Nazis during the war.

Given the government's position that the Nazi-era sales were voluntary and because of its refusal to compensate the Goudstikkers for their losses, Desi believed that she would not be successful in a restitution proceeding to recover the artworks Göring had looted. She therefore opted not to file a restitution claim related to the Göring transaction. The Netherlands kept the Göring-looted artworks in the Dutch National Collection. Von Saher alleges that title in these pieces did not pass to the Dutch Government.

In the 1950s, the Dutch government auctioned off at least 63 of the Goudstikker paintings recovered from Göring. These pieces did not include the Cranachs.

### E. Von Saher Recovers Artwork from the Dutch Government

In the meantime, Desi and her son Edo became American citizens, and Desi married August Edward Dimitri Von Saher. When Emilie died in 1954, she left all of her assets, including her share in the Goudstikker Gallery, to her daughter-in-law, Desi,

and her grandson, Edo. Desi then died in February 1996, leaving all of her assets to Edo. Just months later, in July 1996, Edo died and left his entire estate to his wife, Marei Von Saher, the plaintiff-appellant. Thus, Marei is the sole living heir to Jacques Goudstikker.

In 1997, the State Secretary of the Dutch Government's Ministry of Education, Culture and Science (the "State Secretary") announced that the Dutch government had undertaken an investigation into the provenance of artworks recovered in Germany and returned to the Netherlands following Word War II. Related to that investigation, the government began accepting claims for recovered artworks in its custody that had not been restituted after the war.

Around the same time, a Dutch journalist contacted Von Saher and explained to her the circumstances regarding Göring's looting of the Goudstikker gallery, Desi's efforts to obtain restitution and the Dutch government's continued possession of some Goudstikker pieces in its national collection. This conversation was the first time Von Saher learned about these events.

In 1998, Von Saher wrote to the Dutch State Secretary requesting the surrender of all of the property from the Goudstikker collection in the custody of the Dutch government. The State Secretary rejected this request, concluding that the postwar restitution proceedings were conducted carefully and declining to waive the statute of limitations so that Von Saher could submit a claim. Von Saher made various attempts to appeal this decision without success.

While Von Saher pursued various legal challenges, the Dutch government created the Ekkart Committee to investigate the provenance of art in the custody of

the Netherlands. The committee described the handling of restitution in the immediate postwar period as "legalistic, bureaucratic, cold and often even callous." It also criticized many aspects of the internal restitution process, among them employing a narrow definition of "involuntary loss" and requiring owners to return proceeds from forced sales as a condition of restitution.

Upon the recommendation of the Ekkart Committee, the Dutch government created the Origins Unknown project to trace the original owners of the artwork in its custody. The Dutch government also set up the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War ("the Restitutions Committee") to evaluate restitution claims and to provide guidance to the Ministry for Education, Culture and Science on those claims. Between 2002 and 2007, the Restitution Committee received 90 claims.

In 2004, Von Saher made a restitution claim for all of the Goudstikker artwork in the possession of the Netherlands. The Committee recommended that the government grant the application with respect to all of the artworks plundered in the Göring transaction, which the Committee deemed involuntary. The State Secretary adopted the Committee's recommendation.

Unfortunately, the Dutch government no longer had custody of the Cranachs. In 1961, George Stroganoff Scherbatoff ("Stroganoff") claimed that the Soviet Union had wrongly seized the Cranachs from his family and unlawfully sold the paintings to Jacques Goudstikker thirty years earlier at the "Stroganoff Collection" auction in Berlin. Thus, Stroganoff claimed that the Dutch government had no right, title or interest in the panels. In 1966, the Dutch government transferred the Cranachs and a third painting to Stroganoff in

exchange for a monetary payment. The terms of this transaction, including the amount Stroganoff paid for the artworks, are not in the record before us. The Dutch government did not notify Desi or Edo that Stroganoff made a claim to the panels or that the panels were being transferred to him. In 1971, New York art dealer Spencer Samuels acquired the Cranachs from Stroganoff, either as an agent or as a purchaser. Later that year, the Museum acquired the Cranachs and has possessed them ever since.

### F. Von Saher Seeks Recovery From The Museum

In 2000, a Ukranian art historian researching the deaccession of artworks from state-owned museums in Kiev contacted Von Saher. He explained to Von Saher that he happened upon *Adam* and *Eve* when he visited the Museum, and once he researched the origin of the panels, he felt compelled to contact her. Because Cranach the Elder painted 30 similar depictions of *Adam* and *Eve*, Von Saher could not be certain whether the diptychs in the Museum were the ones missing from the Goudstikker collection. She contacted the Museum about the panels, and the parties engaged in a six-year effort to resolve this matter informally, which proved unsuccessful.

In May 2007, Von Saher sued the Museum, relying on California Code of Civil Procedure Section 354.3. That statute allowed the rightful owners of confiscated Holocaust-era artwork to recover their items from museums or galleries and set a filing deadline of December 31, 2010. Cal. Civ. Proc. Code § 354.3(b), (c).

The district court dismissed the action, finding Section 354.3 facially unconstitutional on the basis of

field preemption. The court also found Von Saher's claims untimely.

We affirmed, over Judge Pregerson's dissent, holding Section 354.3 unconstitutional on the basis of field preemption. *Von Saher I*, 592 F.3d at 957. Because it was unclear whether Von Saher could amend her complaint to show lack of reasonable notice to establish compliance with California Code of Civil Procedure Section 338(c), we unanimously remanded. *Id.* at 968–70.

Six weeks after this court issued *Von Saher I*, the California legislature amended Section 338(c) to extend the statute of limitations from three to six years for claims concerning the recovery of fine art from a museum, gallery, auctioneer or dealer. Cal. Civ. Proc. Code § 338(c)(3)(A). In addition, the amendments provided that a claim for the recovery of fine art does not accrue until the actual discovery of both the identity and the whereabouts of the artwork. *Id.* The legislature made these changes explicitly retroactive. *Id.* § 338(c)(3)(B).

Von Saher filed a First Amended Complaint. The Museum moved to dismiss, arguing that Von Saher's specific claims and the remedies she sought—not the amended Section 338 itself—conflicted with the United States' express federal policy on recovered art. The district court agreed. It held that the Solicitor General's ("SG") brief filed in the Supreme Court in connection with Von Saher's petition for writ of certiorari from *Von Saher I*, "clarified the United States' foreign policy as it specifically relates to Plaintiff's claims in this litigation." The district court held "that the United States' policy of external restitution and respect for the outcome and finality of the Netherlands' bona fide restitution proceedings, as clearly expressed

and explained by the SG in his amicus curiae brief, directly conflicts with the relief sought in Plaintiff's action." The court dismissed the complaint with prejudice. Von Saher timely appeals.

## II. Standard of Review

We review de novo the district court's dismissal of Von Saher's complaint. *Manzarek*, 519 F.3d at 1030. As discussed, we must accept the factual allegations in the complaint as true, and we construe the complaint in the light most favorable to Von Saher. *Id.* at 1031.

## III. Discussion

We first must decide whether the district court erred in finding Von Saher's claims barred by conflict preemption. It did.

### A. Applicable Law

"[T]he Constitution allocates the power over foreign affairs to the federal government exclusively, and the power to make and resolve war, including the authority to resolve war claims, is central to the foreign affairs power in the constitutional design." *Deutsch v. Turner Corp.*, 324 F.3d 692, 713–14 (9th Cir. 2003). "In the absence of some specific action that constitutes authorization on the part of the federal government, states are prohibited from exercising foreign affairs powers, including modifying the federal government's resolution of war-related disputes." *Id.* at 714.

"Foreign affairs preemption encompasses two related, but distinct, doctrines: conflict preemption and field preemption." *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1071 (9th Cir. 2012) (en banc). In *Von Saher I*, we found Section 354.3 unconstitutional on the basis of field preemption. 592 F.3d at 965, 968. Here, however, the Museum's argument focuses exclu-

sively on conflict preemption. Specifically, the Museum contends that Von Saher's claims, and the remedies she seeks, are in conflict with federal policy on the restitution of Nazi-stolen art.

"There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964)). "The exercise of the federal executive authority means that state law must give way where . . . there is evidence of a clear conflict between the policies adopted by the two." *Id.* at 421. "[T]he likelihood that state legislation will produce something more than incidental effect in conflict with express foreign policy of the National Government would require preemption of the state law." *Id.* at 420. Similarly, a state law is preempted "where under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of" federal policy. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (internal quotations marks and citations omitted).

Courts have found individual claims, or even entire lawsuits, preempted where a plaintiff relies on a statute of general applicability, as Von Saher does here. *See, e.g.*, *In re: Assicurazioni Generali S.P.A. Holocaust Ins. Litig.*, 340 F. Supp. 2d 494, 501 (S.D.N.Y 2004) (holding *Garamendi* "requires dismissal . . . of the benefits claims arising under generally applicable

state statutes and common law" because "[l]itigation of Holocaust-era insurance claims, no matter the particular source of law under which the claims arise, necessarily conflicts with the executive policy favoring voluntary resolution of claims through [the International Commission on Holocaust Era Insurance Claims]"), *aff'd*, 592 F.3d 113 (2d. Cir. 2010); *see also Mujica v. Occidental Petrol. Corp.*, 381 F. Supp. 2d 1164, 1187–88 (C.D. Cal. 2005) (finding plaintiffs' state law tort claims preempted by the foreign policy interest in the United States' "bilateral relationship with the Columbian government").

The question we must answer is whether Von Saher's claims for replevin and conversion, as well as the remedies she seeks, conflict with federal policy. We conclude that they do not.

### B. Federal Policy on Nazi-Looted Art

We start by looking to federal policy on the restitution of Nazi-looted art. As discussed, the United States signed the London Declaration and subsequently adopted a policy of external restitution based on the principles in that declaration. In *Von Saher I*, we noted that the United States stopped accepting claims for external restitution on September 15, 1948, and accordingly concluded that the United States' policy of external restitution ended that year. 592 F.3d at 963. Thus, we held that California Civil Procedure Code Section 354.3 could not "conflict with or stand as an obstacle to a policy that is no longer in effect." *Id.*

It seems that we misunderstood federal policy. In a 2011 brief filed in the Supreme Court recommending the denial of a petition for writ of certiorari in *Von Saher I*, the United States, via the Solicitor General ("SG"), reaffirmed our nation's continuing and ongoing

commitment to external restitution. The SG explained that external restitution did not end in 1948 with the deadline for submitting restitution claims, as we had concluded in *Von Saher I*. Instead, "[t]he United States established a deadline to ensure prompt submission of claims and achieve finality in the wartime restitution process," and the United States has a "continuing interest in that finality when appropriate actions have been taken by a foreign government concerning the internal restitution of art."

Federal policy also includes the Washington Conference Principles on Nazi Confiscated Art ("the Principles"), produced at the Washington Conference on Holocaust-Era Art Assets in 1998. Though non-binding, the Principles reflect a consensus reached by the representatives of 13 nongovernmental organizations and 44 governments, including both the United States and the Netherlands, to resolve issues related to Nazi-looted art. The Principles provided first that "Art that has been confiscated by the Nazis and not subsequently restituted should be identified" and that "[e]very effort should be made to publicize" this art "in order to locate pre-War owners and their heirs." The signatories agreed that "[p]re-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." The Principles also provided that when such heirs are located, "steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to facts and circumstances surrounding a specific case." Finally, the Principles encouraged nations "to develop national processes to implement these principles," including alternative dispute resolution.

Additionally, in 2009, the United States participated in the Prague Holocaust Era Assets Conference, which produced the "legally non-binding" Terezin Declaration on Holocaust Era Assets and Related Issues, to which the United States and the Netherlands agreed. The signatories reaffirmed their support for the Washington Conference Principles and "encourage[d] all parties[,] *including public and private institutions* and individuals to apply them as well." (emphasis added). "The Participating States urge[d] that every effort be made to rectify the consequences of wrongful property seizures, such as confiscations, forced sales and sales under duress[.]" In addition, the signatories "urge[d] all stakeholders to ensure that their legal systems or alternative processes . . . facilitate just and fair solutions with regard to Nazi-confiscated and looted art and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by the parties."

In sum, U.S. policy on the restitution of Nazi-looted art includes the following tenets: (1) a commitment to respect the finality of "appropriate actions" taken by foreign nations to facilitate the internal restitution of plundered art; (2) a pledge to identify Nazi-looted art that has not been restituted and to publicize those artworks in order to facilitate the identification of prewar owners and their heirs; (3) the encouragement of prewar owners and their heirs to come forward and claim art that has not been restituted; (4) concerted efforts to achieve expeditious, just and fair outcomes when heirs claim ownership to looted art; (5) the encouragement of everyone, including public and private institutions, to follow the Washington Principles; and (6) a recommendation that every effort be made to remedy the consequences of forced sales.

### C. Von Saher's Claims Do Not Conflict with Federal Policy

Von Saher's claims do not conflict with any federal policy because the Cranachs were never subject to post-war internal restitution proceedings in the Netherlands, as noted in the complaint, the district court's order and the opinion of the Court of Appeals of The Hague.

Desi could have brought a claim for restitution as to all of the artworks Göring looted in the immediate postwar period, but she understandably chose not to do so prior to the July 1, 1951 deadline. Per Von Saher, the "[h]istorical literature makes clear that the post-War Dutch Government was concerned that the immediate and automatic return of Jewish property to its original owners would have created chaos in the legal system and damaged the economic recovery of [t]he Netherlands," and "[t]his attitude was reflected in the restitution process." Desi was "met with hostility by the post-War Dutch Government" and "confronted a 'restitution' regime that made it difficult for Jews like [her] to recover their property." In fact, the Dutch government went so far as to take the "astonishing position" that the transaction between Göring and the Goudstikker Gallery was voluntary and taken without coercion. Not surprisingly, Desi decided that she could not achieve a successful result in a sham restitution proceeding to recover the artworks Göring had looted. The Dutch government later admitted as much when the Ekkart Committee described the immediate post-war restitution process as "legalistic, bureaucratic, cold and often even callous."

Moreover, the Dutch government transferred the Cranachs to Stroganoff fourteen years after Desi settled her claim against Miedl. The Museum contends that this conveyance satisfied a restitution claim

Stroganoff made as the rightful heir to the Cranachs, but the record casts doubt on that characterization. As noted, the deadline for filing an internal restitution claim in the Netherlands expired July 1, 1951, and Stroganoff did not assert his claim to the Cranachs until a decade later. In addition, the Restitution of Legal Rights Decree, which governed the Dutch internal restitution process, was established to create "special rules regarding restitution of legal rights and restoration of rights in connection with the liberalization of the [Netherlands]" following World War II. The Decree included provisions addressing the restitution of wrongful acts committed in enemy territory during the war. To the extent that Stroganoff made a claim of restitution, however, it was based on the allegedly wrongful seizure of the paintings by the Soviet Union *before* the Soviets sold the Cranachs to Jacques Goudstikker in 1931—events which predated the war and any wartime seizure of property. Thus, it seems dubious at best to cast Stroganoff's claim as one of internal restitution.

By the time Von Saher requested in 1998 that the Dutch government surrender all of the Goudstikker artworks within state control, the Cranachs had been in the Museum's possession for twenty-seven years. Even if Desi's 1998 request for surrender could be construed as a claim for restitution—made nearly 50 years after the deadline for filing such a claim lapsed—the Cranachs were no longer in possession of the Dutch government and necessarily fell outside that claim.[1]

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[1] The dissent concludes that "the Cranachs were in fact subject to bona fide internal restitution proceedings in the Netherlands in 1998–99 and 2004–06." Dissent at 37; *see also* Dissent at 39 ("Von Saher did seek 'restitution' of the Cranachs, and her filing

Though we recognize that the United States has a continuing interest in respecting the finality of "appropriate actions" taken in a foreign nation to restitute Nazi-confiscated art, the Dutch government itself has acknowledged the "legalistic, bureaucratic, cold and often even callous" nature of the initial postwar restitution system. And the Dutch State Secretary eventually ordered the return of all the Göring-looted artworks possessed by the Netherlands—the very artwork Desi chose not to seek in the postwar restitution process immediately following the war—to Von Saher. These events raise serious questions about whether the initial postwar internal restitution process constitutes an appropriate action taken by the Netherlands.

Nevertheless, we do not even need to go so far as answering that query, nor should we on a motion to dismiss. Based on Von Saher's allegations that (1) Desi chose not to participate in the initial postwar restitution process, (2) the Dutch government transferred the Cranachs to Stroganoff before Desi or her heirs could make another claim and (3) Stroganoff's claim likely was not one of internal restitution, the diptych was never subject to a postwar internal restitution proceeding in the Netherlands. Thus, allowing Von Saher's claim to go forward would not disturb the finality of

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of the claims and the official disposition of those claims do constitute proceedings."). We cannot agree. In both 1998 and 2004, Von Saher sought the return of all the Goudstikker artworks the Dutch government had in its possession. This necessarily excludes the Cranachs because the Netherlands had divested itself of the panels many decades earlier. We therefore cannot conclude that Von Saher's 1998 and 2004 claims included the Cranachs.

any internal restitution proceedings—appropriate or not—in the Netherlands.

Not only do we find an absence of conflict between Von Saher's claims and federal policy, but we believe her claims are in concert with that policy. Von Saher is just the sort of heir that the Washington Principles and Terezin Declaration encouraged to come forward to make claims, again, because the Cranachs were never subject to internal restitution proceedings. Moreover, allowing her lawsuit to proceed would encourage the Museum, a private entity, to follow the Washington Principles, as the Terezin Declaration urged. Perhaps most importantly, this litigation may provide Von Saher an opportunity to achieve a just and fair outcome to rectify the consequences of the forced transaction with Göring during the war, even if such a result is no longer capable of being expeditiously obtained.

Nor is this dispute of the sort found to involve the international problems evident in *American Insurance Association v. Garamendi*. In that case, California passed legislation that deemed the confiscation or frustration of World War II insurance policies for Jewish policy holders an unfair business practice. 539 U.S. at 408–11. California's insurance commissioner then issued administrative subpoenas against several subsidiaries of European insurance companies. *Id.* at 411. Those insurance companies filed suit seeing injunctive relief against the insurance commissioner of California and challenging California's Holocaust-era insurance legislation as unconstitutional. *Id.* at 412. The Supreme Court held the law preempted due to the "clear conflict" between the policies adopted by the federal government and the state of California. *Id.* at 419–21. As part of that holding, the Court noted

that "[v]indicating victims injured by acts and omissions of enemy corporations in wartime is thus within the traditional subject matter of foreign policy in which national, not state, interests are overriding, and which the National Government has addressed." *Id.* at 421.

Here, however, there is no Holocaust-specific legislation at issue. Instead, Von Saher brings claims pursuant to a state statute of general applicability. Also unlike *Garamendi*, Von Saher seeks relief from an American museum that had no connection to the wartime injustices committed against the Goudstikkers. Nor does Von Saher seek relief from the Dutch government itself. In fact, the record contains a 2006 letter from the Dutch Minister for Education, Culture and Science, who confirmed that "the State of the Netherlands is not involved in this dispute" between Von Saher and the Museum. The Minister also opined that this case "concerns a dispute between two private parties."

We are not at all persuaded, as is the dissent, that the Solicitor General's brief requires a different outcome. Certainly, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of [a] case's impact on foreign policy." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004). But there are many reasons why we find that weight unwarranted here.

First, the SG's brief, which urged denying the petition for writ of certiorari in *Von Saher I*, focused on California Code of Civil Procedure Section 354.3. The SG argued that we had correctly invalidated Section 354.3 as "impermissibly intrud[ing] upon the foreign affairs authorities of the federal government." The SG noted that *Von Saher I* did not involve the

application of a state statute of general applicability but "a state statute that is specifically and purposefully directed at claims arising out of transactions and events that occurred in Europe during the Nazi era, that in many cases were addressed in the post-War period by the United States and European Governments[.]" That is an altogether different issue from the one we now decide, which is whether Von Saher's specific claims against the Museum—in just this one case—conflict with foreign policy. This argument is not one the SG considered or addressed when it counseled against granting certiorari in *Von Saher I*, and we decline to read any more into the SG's brief than is there.

It also concerns us that the SG characterizes the facts in a way that conflicts with the complaint, the record before us and the parties' positions. The SG argued that *Von Saher I* "concerns artworks and transactions that, consistent with U.S. policies, have already been the subject of both external and internal restitution proceedings, including recent proceedings by the Netherlands in response to the Washington Principles." As we have discussed, however, the Cranachs were not subject to immediate postwar internal restitution proceedings in the Netherlands, and Von Saher's 1998 and 2004 claims did not include the Cranachs.

This factual discrepancy also makes us wary of giving too much credence to the SG's brief because it demonstrates that the SG goes beyond explaining federal foreign policy and appears to make factual determinations. For instance, the SG's conclusion that the Cranachs have already been subject to both internal and external restitution proceedings is not a statement about our nation's general approach to Nazi-looted art. Instead, the SG concludes that in this

specific case involving these specific parties, external restitution took place as contemplated by the United States. This looks much like a factual finding in a matter in which we must accept the allegations in the complaint as true. While we recognize and respect the SG's role in addressing how a matter may affect foreign policy, we do not believe this extends to making factual findings in conflict with the allegations in the complaint, the record and the parties' arguments.

Most worrisome, the SG admitted that "[t]he United States does not contend that the fact that the Cranachs were returned to the Dutch government pursuant to the external restitution policy would be sufficient on its own force to bar litigation if, for example, the Cranachs had not been subject (or potentially subject to) bona fide restitution proceedings in the Netherlands." And therein lies the most serious and troublesome obstacle to our relying too heavily on the SG's brief. Von Saher alleges, the Museum agrees and the record shows that the Cranachs were never subject to immediate postwar internal restitution proceedings in the Netherlands. Though the paintings were potentially subject to restitution proceedings had Desi opted to participate in the postwar internal restitution process, she chose not to engage in what she felt was an unjust and unfair proceeding. Years later, the Dutch government itself undermined the legitimacy of that restitution process by describing it as "bureaucratic, cold and often even callous," and by eventually restituting to Von Saher all of the artworks Göring had looted that were still held by the Netherlands.

It would make little sense, then, for us to conclude that Von Saher's claims against the Museum cannot go forward just because the United States returned the Cranachs to the Netherlands as part of the exter-

nal restitution process, for we know and we cannot ignore, that the Cranachs were never subject to post-war internal restitution proceedings and that the 1998 and 2004 proceedings excluded the Cranachs. We therefore do not find convincing the SG's position—presented in a brief in a different iteration of this case that raised different arguments, that involved different sources of law and that seems to have misunderstood some of the facts essential to our resolution of this appeal.

Von Saher's claims against the Museum and the remedies she seeks do not conflict with foreign policy. This matter is, instead, a dispute between private parties. The district court erred in concluding otherwise.

**D. Act of State**

We are mindful that the litigation of this case may implicate the act of state doctrine, though we cannot decide that issue definitively on the record before us. We remand for further development of this issue.

"Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). "[T]he act within its own boundaries of one sovereign state cannot become the subject of re-examination and modification in the courts of another. Such action when shown to have been taken, becomes, . . . a rule of decision for the courts of this country." *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 310 (1918).

"In every case in which . . . the act of state doctrine appli[es], the relief sought . . . would have required a court in the United States to declare invalid the official

act of a foreign sovereign performed within its own territory." *W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990). This doctrine is not "inflexible and all-encompassing," *Banco Nacional de Cuba*, 376 U.S. at 428, nor is it "some vague doctrine of abstention but a *principle of decision* binding on federal and state courts alike," *W.S. Kirkpatrick*, 493 U.S. at 406 (internal quotation marks and citation omitted). The justification for invoking the act of state doctrine "depends greatly on the importance of the issue's implications for our foreign policy." *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1047 (9th Cir. 1983).

Von Saher seeks as remedies a declaration that she is the rightful owner of the panels and an order both quieting title in them and directing their immediate delivery to her. According this kind of relief may implicate the act of state doctrine. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 303–04 (1918) (holding act of state doctrine barred American courts from considering the sale of animal hides by the Mexican government); *Ricaud*, 246 U.S. at 310 (holding act of state doctrine prohibited American courts from considering the seizure of an American citizen's property by the Mexican government for military purposes).

Thus, it becomes important to determine whether the conveyance to Stroganoff constituted an official act of a sovereign, which might trigger the act of state doctrine. *W.S. Kirkpatrick*, 493 U.S. at 406 ("Act of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign."). We cannot answer this question because the record is devoid of any information about that transfer. For her part, Von Saher alleges that the Netherlands "wrongfully

delivered the Cranachs to Stroganoff as part of a sale transaction," and for the purpose of this appeal, we must accept the allegations in her complaint as true, *Manzarek*, 519 F.3d at 1031. She also contends that no one ever referred to the transfer of the Cranachs to Stroganoff as attendant to "restitution proceedings" until we described the facts that way in *Von Saher I*. 592 F.3d at 959. In her view, the Museum has since adopted that characterization of the facts. The district court is best-equipped to determine which of these competing characterizations is correct.

If on remand, the Museum can show that the Netherlands returned the Cranachs to Stroganoff to satisfy some sort of restitution claim, that act could "constitute a considered policy decision by a government to give effect to its political and public interests . . . and so [would be] . . . the type of sovereign activity that would be of substantial concern to the executive branch in its conduct of international affairs." *Clayco Petrol. Corp. v. Occidental Petrol. Corp.*, 712 F.2d 404, 406–07 (9th Cir. 1983) (per curiam) (internal quotations and citations omitted); *see also Alfred Dunhill of London, Inc. v. Rep. of Cuba*, 425 U.S. 682, 695 (1976) (noting foreign government had not offered a government "statute, decree, order, or resolution" showing that the government action was undertaken as a "sovereign matter"); *but see id.* at 406–07 (noting the Third Circuit held that the granting of patents by a foreign sovereign would not implicate the act of state doctrine); *Timberlane Lumber Co. v. Bank of Am., N.T. and S.A.*, 549 F.2d 597, 607–08 (9th Cir. 1976) (holding judicial proceedings in another country initiated by a private party were not the sort of sovereign acts that would require deference under the act of state doctrine). On remand, the district court also should consider whether the conveyance of the

Cranachs to Stroganoff met public or private interests. *Clayco*, 712 F.2d at 406 (holding that "without sovereign activity effectuating public rather than private interests, the act of state doctrine does not apply") (internal quotation marks and citation omitted).

Even if the district court finds that the transfer of the Cranachs is a sovereign act, it also must determine whether any exception to the act of state doctrine applies. A plurality of the Supreme Court has noted that an exception may exist for "purely commercial acts" in situations where "foreign governments do not exercise powers peculiar to sovereigns" and instead "exercise only those powers that can be exercised by private citizens." *Alfred Dunhill*, 425 U.S. at 704.

We have not yet decided whether to adopt a commercial exception in our Circuit. *Clayco*, 712 F.2d at 408. When presented with this issue previously, we held that even if a commercial exception to the act of state doctrine existed, it did not apply because a private citizen could not have granted a concession to exploit natural resources—the government action at issue in *Clayco*. *Id.*

On the present record, we are unable to determine whether a commercial exception would apply in this case. Thus, it is unnecessary for us to determine whether our court recognizes a commercial exception to the act of state doctrine.

Other exceptions to the act of state doctrine may apply. For example, the Hickenlooper Amendment provides that the act of state doctrine does not apply to a taking or confiscation (1) after January 1, 1959, (2) by an act of state (3) in violation of international law. 22 U.S.C. § 2370(e)(2). The Dutch government kept possession of the Cranachs in 1951 when Desi

opted not to seek restitution for the artworks Göring had confiscated during the war. Though the government took possession of the pieces before the effective date of the Hickenlooper Amendment, the Dutch government transferred the Cranachs to Stroganoff in 1966. That conveyance may constitute a taking or confiscation from Desi. Again, we cannot determine from the record whether that transaction was a commercial sale or whether the government transferred the Cranachs to Strogranoff to restore his rights in some way. That distinction may bear on whether the Dutch government confiscated the artworks from Desi, via the transfer to Stroganoff, in violation of international law. The district court should consider this issue on remand.

We recognize that this remand puts the district court in a delicate position. The court must use care to "limit[] inquiry which would impugn or question the nobility of a foreign nation's motivation." *Clayco*, 712 F.2d at 407 (internal quotation marks and citation omitted). The court also cannot "resolve issues requiring inquiries . . . into the authenticity and motivation of the acts of foreign sovereigns." *Id.* at 408 (internal quotation marks and citations omitted). Nevertheless, this case comes to us as an appeal from a dismissal for failure to state a valid claim. The Museum has not yet developed its act of state defense, and Von Saher has not had the opportunity to establish the existence of an exception to that doctrine should it apply. Though this remand necessitates caution and prudence, we believe that the required record development and analysis can be accomplished with faithfulness to the limitations imposed by the act of state doctrine.

**REVERSED and REMANDED.**

WARDLAW, Circuit Judge, dissenting:

The United States has determined that the Netherlands afforded the Goudstikker family an adequate opportunity to recover the artwork that is the subject of this litigation. Our nation's foreign policy is to respect the finality of the Netherlands' restitution proceedings and to avoid involvement in any ownership dispute over the Cranachs. Because entertaining Marei Von Saher's state law claims would conflict with this federal policy, I respectfully dissent.

## I.

The United States has articulated the foreign policy applicable to the very artwork and transactions at issue here. When Von Saher petitioned for certiorari from our court's decision rejecting her claims under Cal. Civ. Proc. Code § 354.3 on preemption grounds, the Supreme Court invited the Solicitor General to express the position of the United States on the question there presented. The United States set forth its policy in an amicus curiae brief signed by Harold Hongju Koh, then the Legal Adviser to the Department of State, and Neal Kumar Katyal, then the Acting Solicitor General.

The United States explained that its post-World War II policy of "external restitution" did not end on September 15, 1948, as our court had determined, but remains extant. After World War II, the United States determined that it would return private property expropriated by the Nazis to its country of origin – that is, "externally" – rather than to its private owners. In turn, the country of origin was responsible for returning the property to its lawful owners through "internal" restitution proceedings. A central purpose of this policy was to avoid entangling the United

States in difficult, long-lasting disputes over private ownership. For this reason, the United States expressed its "continuing interest" in the finality of external restitution, "when appropriate actions have been taken by a foreign government concerning the internal restitution of art that was externally restituted to it by the United States following World War II."

The United States and the international community have also recognized, however, that some countries' internal restitution processes were deficient. Accordingly, pursuant to such non-binding international agreements as the Washington Principles and the Terezin Declaration, the United States supports ongoing efforts to restore expropriated art to Holocaust victims and their heirs. Furthermore, the United States does not categorically insist upon the finality of its postwar external restitution efforts. Our nation maintains a continuing interest in the finality of external restitution only when the country of origin has taken "appropriate" internal restitution measures. The United States has a "substantial interest in respecting the outcome" of "bona fide" proceedings conducted by other countries. Thus, the policy of the United States, as expressed in its Supreme Court brief, is that World War II property claims may not be litigated in U.S. courts if the property was "subject" *or "potentially subject"* to an adequate internal restitution process in its country of origin.

The United States not only set forth these general policy principles in its brief before the Supreme Court, but also explained their application to the very artwork and historical facts presented by this case. According to the United States, the Cranachs "have already been the subject of both external and internal restitution proceedings, including recent proceedings

by the Netherlands in response to the Washington Principles." In the federal government's considered judgment, these proceedings were "bona fide," so their finality must be respected. Because the Cranachs were "subject (or potentially subject) to bona fide internal restitution proceedings in the Netherlands," our nation's ongoing interest in the finality of external restitution "bar[s] litigation" of the Goudstikkers' claims in U.S. courts. Simply put, the United States has clearly stated its foreign policy position that it will not be involved in adjudicating ownership disputes over the Cranachs.

**II.**

The Constitution allocates power over foreign affairs exclusively to the federal government, and the power to resolve private parties' war claims is "central to the foreign affairs power in the constitutional design." *Deutsch v. Turner Corp.*, 324 F.3d 692, 714 (9th Cir. 2003). Federal foreign policy preempts Von Saher's common law claims if "there is evidence of clear conflict" between state law and the policies adopted by the federal Executive. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421 (2003). We must determine whether, "under the circumstances," Von Saher's state law action "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of our national foreign policy concerning the resolution of World War II claims. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (internal quotation marks omitted).

**A.**

In my view, Von Saher's attempt to recover the Cranachs in U.S. courts directly thwarts the central objective of U.S. foreign policy in this area: to avoid

entanglement in ownership disputes over externally restituted property if the victim had an adequate opportunity to recover it in the country of origin. The majority concludes that Von Saher's claims do not conflict with federal policy because the Cranachs were never subject to any restitution proceedings in the Netherlands. As the United States explained in its amicus brief, however, the relevant issue is whether the Cranachs were subject *or potentially subject* to bona fide internal proceedings. The majority fails to acknowledge the Executive's clear determination that the Goudstikkers had an adequate opportunity to assert their claim after the war.

It is beyond dispute that the Cranachs were "potentially subject" to internal restitution proceedings in the Netherlands in the years following World War II. Desi Goudstikker could have filed a claim for the Cranachs with the Dutch government before the 1951 deadline lapsed. She chose not to do so because she believed she would not be treated fairly. As the amicus brief explained:

> In this case, Ms. Goudstikker settled with the Dutch government in 1952, and that settlement did not provide for the return of artworks like the Cranachs that had been acquired by [Hermann] Göring. When petitioner brought a Dutch restitution proceeding in 1998, the State Secretary found that "directly after the war – even under present standards – the restoration of rights was conducted carefully." Petitioner sought review of that decision in the Court of Appeals for the Hague, which found that at the time of the 1952 settlement Ms. Goudstikker "made a conscious and well considered decision to refrain from asking for

> restoration of rights with respect to the Göring transaction."

Thus, the only question is whether the internal restitution proceedings Desi forewent were bona fide.[1] If they were, the United States has an ongoing interest in their finality and in the finality of the Cranachs' external restitution to the Netherlands, and U.S. foreign policy expressly bars Desi's granddaughter-in-law from reviving Desi's unasserted claim six decades later in federal district court.

The United States has determined as a matter of foreign policy that the postwar process in which Desi declined to participate was bona fide. As the United States explained in its brief, "As both the 1998 and 2004 restitution proceedings reflect, the Dutch government has afforded [Von Saher] and her predecessor adequate opportunity to press their claims, both *after the War* and more recently." The majority concludes that this question has not been decisively determined only by finding ways to disavow the State Department's prior representations to the Supreme Court in this case.

But we lack the authority to resurrect Von Saher's claims given the expressed views of the United States. The sufficiency of the Netherlands' 1951 internal restitution process is a quintessential policy judgment committed to the discretion of the Executive. "[I]t is for the political branches, not the Judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments." *Munaf v. Geren*, 553 U.S. 674, 700–01 (2008). Just as we may not

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[1] The majority correctly explains the U.S. government's position that external restitution alone is not "sufficient of its own force" to bar civil litigation in U.S. courts.

"second-guess" the Executive's assessment that a prisoner is unlikely to be tortured if transferred to an Iraqi prison, *id.* at 702, we may not displace the Executive's assessment that the Netherlands' postwar proceedings were adequate. For the federal courts to contradict the State Department on this issue, as is necessary to decide this appeal in Von Saher's favor, would "compromise[] the very capacity of the President to speak for the Nation with one voice in dealing with other governments."[2] *Garamendi*, 539 U.S. at 424 (internal quotation marks omitted).

The majority strongly suggests that the federal courts should determine the bona fides of the Netherlands' 1951 internal restitution process. It acknowledges that the Cranachs were "potentially subject to restitution proceedings" that Desi Goudstikker found unfair. It notes, however, that the Dutch government later "undermined the legitimacy of that restitution process by describing it as 'bureaucratic, cold and often even callous.'" The majority then asserts that it does not "find convincing" the United States' statement of its foreign policy because it was "presented in a brief in a different iteration of this case that raised different arguments, that involved different sources of law and that seems to have misunderstood some of the facts essential to our resolution of this appeal."

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[2] I would not reach the question of whether Von Saher's claims are barred by the act of state doctrine because I would affirm the district court's dismissal of the complaint on the basis that her claims are preempted. I note, however, that adjudicating whether the Netherlands' 1951 proceedings were bona fide may implicate the act of state doctrine because "the outcome" of this inquiry "turns upon[] the effect of official action by a foreign sovereign." *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 406 (1990).

But we are not at liberty to find that the State Department's articulation of U.S. foreign policy is not "convincing." *Cf. Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (finding a question justiciable because "[t]he federal courts are not being asked to supplant a foreign policy decision of the political branches"). And it is immaterial whether the Executive expressed our nation's policy in a Supreme Court amicus brief concerning field preemption, a district court merits brief concerning conflict preemption, an executive agreement unconnected to any litigation, or an official's testimony before Congress. *See Garamendi*, 539 U.S. at 416 ("[V]alid executive agreements are fit to preempt state law . . . ."); *id.* at 421 (quoting Ambassador Randolph M. Bell's statement of U.S. foreign policy in congressional testimony). The majority is correct that we have the discretion to defer, or not, to "the Executive Branch's view of [a] case's impact on foreign policy." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004). We have no authority, however, to decide what U.S. foreign policy is. That is the exclusive responsibility of the political branches. *See Munaf*, 553 U.S. at 700–02. Here, the Executive has clearly expressed its policy judgment that the process in which Desi declined to participate was adequate. That should be the end of the matter.

**B.**

The majority further errs by overlooking that the Cranachs were in fact subject to bona fide internal restitution proceedings in the Netherlands in 1998–99 and 2004–06.

In 1998, unaware that the Netherlands no longer possessed the Cranachs, Von Saher filed a claim to recover all of the Goudstikker artworks still in the Dutch government's possession. The State Secretary found

that Von Saher's claim was untimely and declined to waive the statute of limitations because "directly after the war – even under present standards – the restoration of rights was conducted carefully." A Dutch appellate court determined it had no jurisdiction to entertain an appeal from this decision and declined to exercise its *ex officio* authority to grant relief because Desi had "made a conscious and well considered decision" not to pursue restitution after the war.

In 2004, after the Netherlands revised its restitution policy to adopt a more equitable approach in response to the Washington Principles, Von Saher filed another claim. A governmental advisory committee recommended that the claim be granted, reasoning that the claim was "still admissible" despite the prior decisions by the State Secretary and the appellate court. The State Secretary rejected this reasoning, finding that Von Saher's "restoration of rights" had been "settled" as a legal matter and that her claim fell outside the scope of the Dutch restitution policy. The State Secretary nonetheless decided, as a matter of discretion, to return to Von Saher all of the Goudstikker artworks still in the government's possession. The Netherlands transferred to Von Saher more than two hundred of the 267 artworks she sought – but not the Cranachs, which had long ago been moved to California.[3]

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[3] In 1961, George Stroganoff-Scherbatoff, heir to the Russian Stroganoff dynasty, filed a restitution claim for the Cranachs in the Netherlands. He asserted that the Cranachs had been wrongfully seized from his family by Soviet authorities and then unlawfully auctioned off to the Goudstikkers. The Dutch government transferred the Cranachs to Stroganoff in 1966. Von Saher alleges that these were not restitution proceedings, but simply a sale, and that the Stroganoffs never owned the Cranachs. In

The majority implausibly concludes that these were not restitution proceedings at all because Von Saher's restitution claims were time-barred and because the Cranachs were outside their scope. As an initial matter, the United States has expressly determined that the Cranachs were subject to a "1998 restitution proceeding" and a "2004 restitution proceeding" in the Netherlands, and that our nation "has a substantial interest in respecting the outcome of that nation's proceedings." This policy assessment is probably sufficient to foreclose the majority's contrary view.[4] *See Munaf*, 553 U.S. at 702. Even if it is not, Von Saher did seek "restitution" of the Cranachs, and her filing of claims and the official disposition of those claims do constitute "proceedings." *See* BLACK'S LAW DICTIONARY 1428 (9th ed. 2009) (defining "restitution" as "[r]eturn or restoration of some specific thing to its rightful owner or status"); *id.* at 1324 (defining "proceeding" as "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of

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1971, Stroganoff sold the Cranachs to the Norton Simon Art Foundation.

[4] The majority attempts to draw an unworkable distinction between "explaining federal foreign policy" and "mak[ing] factual determinations." Our foreign policy often relies on factual assumptions inseparable from the policy itself. For instance, the federal foreign policy that "Iran's pursuit of nuclear weapons is unacceptable" entails a factual assumption that Iran is pursuing nuclear weapons. *U.S. Strategic Objectives Towards Iran: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 7 (2011) (statement of Wendy R. Sherman, Under Secretary of State for Political Affairs). Here, the federal foreign policy that the finality of the Netherlands' prior restitution proceedings in this case should be respected entails a factual assumption that those proceedings occurred. Von Saher's attempt to plead to the contrary simply highlights why entertaining her claims would conflict with federal policy.

commencement and the entry of judgment," or "[a]ny procedural means for seeking redress from a tribunal or agency"). That Von Saher did not succeed in obtaining her requested *relief* with respect to the Cranachs does not imply that there were no *proceedings* pertaining to the Cranachs.

Von Saher's state law claims conflict with our nation's "substantial" policy interest in respecting the finality of these two more recent rounds of Dutch proceedings. As the district court explained, these proceedings collectively determined that Von Saher was not entitled to the Cranachs' restitution as of right, but that the Cranachs should nonetheless be returned to her as a matter of discretion if the Netherlands possessed them. Put differently, Dutch authorities finally adjudicated Von Saher's legal claim to the Cranachs on the grounds that it was procedurally defaulted as a matter of Dutch law. As is routinely recognized in other contexts, allowing Von Saher to relitigate these claims in U.S. courts would necessarily undermine the finality of the Netherlands' prior proceedings. *Cf., e.g.*, *Martinez v. Ryan*, 132 S. Ct. 1309, 1316 (2012) (noting that federal litigation concerning claims defaulted in state court undermines the finality of state adjudication). This is precisely what our nation's foreign policy requires us to avoid.

Because the Cranachs were potentially subject to restitution proceedings initiated by Desi in 1951 and actually subject to restitution proceedings initiated by Von Saher in 1998 and 2004, and because we lack the authority to invalidate the United States' policy judgment that all of these proceedings were bona fide, I would conclude that federal foreign policy preempts Von Saher's state law claims.

## III.

During their campaign of atrocities in Europe, the Nazis stole precious cultural heritage as they systematically destroyed millions of innocent human lives. Shortly after the Nazi invasion of the Netherlands in 1940, Hermann Göring expropriated a historically significant artwork from the Goudstikker family. Perhaps as restitution for earlier wrongs by another totalitarian regime, George Stroganoff-Scherbatoff later obtained the artwork from the Dutch government in 1966. An acclaimed Southern California museum then acquired the Cranachs in 1971, presumably at a substantial price. Today, they hang in the gallery of the Norton Simon without the consent of the Goudstikkers' sole heir.

Marei Von Saher and the Museum are both standing on their rights to the Cranachs. Their dispute spans decades and continents, and it cannot be resolved in an action under the laws of California or any other U.S. state. The United States has determined, as a matter of its foreign policy, that its involvement with the Cranachs ended when it returned them to the Netherlands in 1945 and the Dutch government afforded the Goudstikkers an adequate opportunity to reclaim them. This foreign policy decision also binds the federal courts, and it should end our many years of involvement with the Cranachs as well. I would affirm the judgment of the district court.

**APPENDIX C**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

[Filed 09/11/2018]

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No. 16-56308
D.C. No. 2:07-cv-02866-JFW-SS
Central District of California, Los Angeles

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MAREI VON SAHER,

*Plaintiff-Appellant,*

v.

NORTON SIMON MUSEUM OF ART AT PASADENA and NORTON SIMON ART ORDER FOUNDATION,

*Defendants-Appellees.*

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ORDER

Before: McKEOWN and WARDLAW, Circuit Judges, and DONATO,[*] District Judge.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing and rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

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[*] The Honorable James Donato, United States District Judge for the Northern District of California, sitting by designation.

**APPENDIX D**

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

**CIVIL MINUTES – GENERAL**

Case No. **CV 07-2866-JFW (SSx)**

Title: Marei von Saher *-v-* Norton Simon Museum of Art At Pasadena, et al.

Date: August 9, 2016

**PRESENT:**

**HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE**

**Shannon Reilly** **None Present**
**Courtroom Deputy** **Court Reporter**

**ATTORNEYS PRESENT FOR PLAINTIFFS:** None

**ATTORNEYS PRESENT FOR DEFENDANTS:** None

**PROCEEDINGS (IN CHAMBERS):**

**ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [filed 6/13/2016; Docket No. 186];**

**ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO FED. R. CIV. P. 56 [filed 6/13/2016; Docket No. 213]**

On June 13, 2016, Defendants Norton Simon Museum of Art at Pasadena and Norton Simon Art Foundation (collectively, "Defendants" or "Norton Simon") filed a Motion for Summary Judgment [Docket No. 186]. On July 1, 2016, Plaintiff Marei von Saher ("Plaintiff") filed her Opposition [Docket No.

236]. On July 18, 2016, Defendants filed a Reply [Docket No. 308].

On June 13, 2016, Plaintiff filed a Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 56 [Docket No. 213]. On July 1, 2016, Defendants filed their Opposition [Docket No. 256]. On July 18, 2016, Plaintiff filed a Reply [Docket No. 291].

Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found the matters appropriate for submission on the papers without oral argument. The matters were, therefore, removed from the Court's August 1, 2016 hearing calendar and the parties were given advance notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

## I. FACTUAL AND PROCEDURAL BACKGROUND[1]

Plaintiff seeks to recover a pair of sixteenth century oil paintings, entitled "Adam" and "Eve," by Louis Cranach the Elder (the "Cranachs"), which were taken by Nazis during World War II from Plaintiff's father

[1] The Court has elected to provide a brief and succinct statement of the relevant undisputed facts necessary to the Court's decision, and to the extent any of these facts are disputed, they are not material to the disposition of these motions. In addition, to the extent that the Court has relied on evidence to which the parties have objected, the Court has considered and overruled those objections. As to the remaining objections, the Court finds that it is unnecessary to rule on those objections because the disputed evidence was not relied on by the Court. Because much of the evidence was offered in connection with both motions, the Court has elected, for ease of reference, to cite to the exhibits offered in support of, and in opposition to, Norton Simon's Motion for Summary Judgment.

in-law, Jacques Goudstikker, in a forced sale. The Cranachs were acquired by Norton Simon from George Stroganoff-Scherbatoff in 1971 and have remained in Norton Simon's possession ever since. The Cranachs are currently on public display at the Norton Simon Museum of Art in Pasadena, California.

### A. The Paintings and Their History

Before World War II, Jacques Goudstikker ("Jacques") was a prominent Dutch art dealer and the principal shareholder of an Amsterdam art dealership (the "Firm" or the "Goudstikker Firm"). On or about May 11, 1931, Jacques, on the Firm's behalf, purchased the Cranachs from the Soviet Union at the Lepke auction house in Berlin. Although the auction was entitled the "Stroganoff Collection" and featured artworks that the Soviet Union had forcibly seized from the Stroganoff family, it also included other artworks, such as the Cranachs, that were never owned by the Stroganoff family but rather that were seized from churches and other institutions.

In May 1940, Nazi troops invaded the Netherlands. Because he was Jewish, Jacques fled with his wife and son, Desi and Edo, to South America by ship. Although Jacques was forced to leave his art gallery and all of its assets behind, including more than 1200 artworks, Jacques brought with him a black notebook (the "Blackbook") which contained descriptions of the art-works in the Goudstikker Firm's collection at that time. The Cranachs were among the artworks listed in the Blackbook. Unfortunately, Jacques died in a ship-board accident shortly after leaving the Netherlands. Upon Jacques's death, Desi and Edo inherited Jacques's shares in the Firm.

In July 1940, after the Goudstikkers escaped, Nazi Reichsmarschall Herman Göring, and his cohort, Aloïs Miedl, acquired the Firm's assets through two involuntary "forced sales." Miedl acquired the Firm, its showroom, some of its paintings, and the family's castle and villa for 550,000 guilders, and Göring acquired other artworks, including the Cranachs, for 2 million guilders.

After defeating Germany, the Allied Forces recovered much of Göring's collection of looted artworks, including the Cranachs. On July 29, 1945, at the Potsdam Conference, President Truman formally adopted a policy of "external restitution," which governed recovered artworks found within the United States' zone of occupation. Under this policy, the United States determined that recovered artworks should be returned to their countries of origin, not to individual owners. Those countries of origin were then responsible for establishing procedures for restituting the artworks to their lawful owners.

When property was returned by the United States, it was required that the country of origin acknowledge that it received the property. Some of the receipts expressly provided that the country of origin would keep the objects "as custodians pending the determination of the lawful owners thereof," and that the goods "will be returned to their lawful owners." Beginning some time in 1946, the United States ceased using this language, and instead the receipts reflected the possibility that an Allied Restitution Commission would be established that would make determinations about claims. However, such a commission was never established. In the event that the commission was not established, the receipts provided that "the transfer shall be dealt with in accordance

with such procedure as may be established for other deliveries."

Pursuant to the U.S. policy of external restitution, in or about 1946, the Allied Forces returned hundreds of artworks looted from the Goudstikker Firm, including the Cranachs, to the Netherlands. Although some of the receipts for these artworks contained language designating the Netherlands as "custodian," the receipt for the Cranachs did not contain any such language. The Dutch government placed the Cranachs and other recovered artworks in the custody of the *Stichting Nederlands Kunstbezit* (the Netherlands Art Property Foundation, or "SNK") under the supervision of the *Nederlandse Beheersinstituut* (Dutch Custody Institute, or "NBI") pending any claims for restitution under the procedures that the Dutch government established after the war.

### B. The Dutch Government's Legal Framework

During the war, while in exile, the Dutch government enacted several royal decrees, three of which are relevant to this case: Royal Decree A6, Royal Decree E100, and Royal Decree E133. In order to understand the restitution process and the Dutch government's actions following the war, a brief discussion of these decrees is necessary. The Court will analyze the legal effect of these decrees in greater detail *infra*.

**Royal Decree A6**. On June 7, 1940, shortly after the invasion of the Netherlands by Nazi Germany, the Dutch government, in exile, issued Royal Decree A6 in an effort to protect the Dutch State against enemy attempts to damage its economic interests and plunder Dutch assets. Royal Decree A6 prohibited all transactions with Germans and other enemies that

had effects outside the Nazi-occupied Netherlands, unless prior approval was obtained from a special committee, *Commissie Rechtsverkeer in oorlogstijd* ("CORVO"). Such prohibited transactions were automatically void if entered into without CORVO's prior consent, but Decree A6 gave CORVO the power to "revoke the invalidity" of these transactions after the fact "based on special circumstances by declaring the agreement or act still effective."

After the war, on February 5, 1947, CORVO revoked Royal Decree A6's automatic invalidation of all agreements to the extent they related to "recuperated" goods, i.e., goods found in enemy territory and returned to the Netherlands after the war. Its decision stated that it had decided to "sanction all acts and agreements, performed or entered into in violation [of Decree A6, article 6.1], insofar as these acts or agreements related to matters, which were found in enemy territory, after such territory was liberated or occupied by the allied forces, [which] since then have returned to or will have been returned to the Netherlands." CORVO based its decision on the grounds that the invalidation of the transactions, which was intended to prevent harm to the interests of the Dutch State, was no longer important with regard to recuperated goods in light of their return to the Netherlands. Despite the sanctioning of these transactions, CORVO expressly indicated that these transactions could still be declared void under Royal Decree E100.

**Royal Decree E100**. Royal Decree E100 was issued on September 17, 1944 and became effective on September 21, 1944. It established a Council for the Restoration of Rights (the "Council") with broad and exclusive powers to review all wartime transactions and order restitution. Under E100, the Council had

the power to declare totally or partially null and void, or to modify, "any legal relations that originated or were modified during enemy occupation of the [Netherlands]" if (a) "these legal relations exist between persons of whom at least one is an inhabitant of the [Netherlands] or if these legal relations concern an item or a right located within the [Netherlands]," and (b) the Council concluded that "non-intervention would be unreasonable in view of the special circumstances." The Council would presumptively intervene in cases where a transaction occurred under coercion, threat, or improper influence by the enemy, and it had the power to order the return of property to its former owner, subject to appropriate conditions, or to order compensation.

Royal Decree E100 generally required claimants who had received money from the Nazis in forced sales to return that money as a condition of recovering their property. The Dutch Government set a deadline of July 1, 1951 for the filing of claims for restoration of rights under E100. After that deadline, the Council retained the discretionary authority to order restoration of rights "ex officio" (i.e., *sua sponte* or on its own motion). E100 also authorized the Dutch State to sell property of unknown owners who had not come forward by September 30, 1950.

E100 created several divisions of the Council, including an Administration Division (which included the NBI) and an independent Judicial Division. A claimant always had the right to bring a claim before the independent Judicial Division, and decisions by any of the other divisions could be appealed to the Judicial Division. The decisions of the Judicial Division were final and had the force of a court judgment.

**Royal Decree E133**.

Royal Decree E133 was promulgated on October 20, 1944 and became effective on October 21, 1944. This decree facilitated reparations, as opposed to restitution, and expropriated enemy assets in order to compensate the Dutch State for losses that the Netherlands suffered during World War II. Article 3 of Royal Decree E133 decreed that all enemy property within the jurisdiction of the Netherlands automatically passed in ownership to the State on an ongoing basis (until July 1951 when the ongoing expropriating effect as to German assets ended by treaty). However, Decree E133 permitted "enemy" property owners to petition for "de-enemization" so they might regain their property.

### C. The Firm's Post-War Restitution Claim

In 1946, after the war, Desi Goudstikker ("Desi"), Jacques Goudstikker's widow and Plaintiff's mother-in-law, returned to the Netherlands to pursue restitution. After she returned, Desi became one of three directors of the Firm. The other two directors were Max Meyer, a Dutch lawyer who served as the Firm's counsel, and Enrst Lemberger, Jr., a Dutch banker. With advice from their lawyers and consultants, the Firm's directors decided to pursue restitution of the Firm's real estate and other assets that had been "sold" to Miedl, but decided not to pursue restitution of the artworks forcibly "sold" to Göring (which included the Cranachs).

In an October 3, 1950 memorandum, one of the Firm's directors, Max Meyer, documented the Firm's restitution decisions and efforts to that point. He explained that unwinding the Göring transaction could be disadvantageous to the Firm because, *inter*

*alia*, (1) the Firm would be "left with a large number of works of art that are difficult to sell," including many objects "that had proved unmarketable for dozens of years that had been written down to a value of [1 guilder]"; (2) restitution of those artworks would "inevitably have led to the revival of an art dealership" which would be problematic because "it proved impossible to find a suitable person to run such a business and because reliable staff was lacking"; and (3) restitution would have resulted in a "considerable reduction in the [Firm's] liquid assets," with the Firm potentially having to pay back more money each time a new artwork was repatriated. Accordingly, as Meyer stated in the October 3, 1950 memorandum, "[i]n accordance with the recommendations given, it was decided to direct the course of events in such a manner as to prevent inclusion of the Göring transaction in the restoration of rights, also given the unpredictable consequences this would entail." However, Meyer recognized that: "It could not be predicted with certainty whether we would succeed. The [Dutch government] could have made the restoration of rights conditional upon the nullification of the Göring transaction, which was certainly not inconceivable. We therefore had to manoeuver very carefully."

The Dutch government and the Firm attempted to reach an "amicable" resolution regarding the restoration of rights. In late May 1951, when it became clear that a settlement would not be finalized before E100's final July 1, 1951 deadline for requesting restoration of rights, the Dutch government suggested that the Firm file claims with the Council under E100 to preserve its rights while negotiations continued. Shortly thereafter, on June 26, 1951, the Dutch government advised the Firm that it would not approve a settle-

ment which only covered the Miedl transaction, stating: "We kindly wish to inform you with this writing that our Head Office has communicated to us that it cannot cooperate in the establishment of amicable restoration of rights regarding N.V. Goudstikker / Miedl, as it is considered incorrect to lift one transaction out of a complex of deeply intertwined war transactions which should, in fact, be considered a single transaction, and to conclude amicable restoration of rights on this one part only because this part was considered detrimental to the Goudstikker company, while the other transactions, which had been profitable for Goudstikker, are left out of the amicable restoration of rights." However, notwithstanding the Dutch government's position and with full awareness of the impending E100 deadline, on June 27, 1951, the Firm only filed a claim with the Council for restoration of rights under E100 as to the Miedl property, and did not file any claim as to the artworks forcibly "sold" to Göring (the "Göring artworks").

Ultimately, in 1952, the Firm entered into a settlement agreement with the Dutch government covering the Miedl transaction. The settlement agreement expressly stated that Desi had agreed to the settlement because of her frustration with the restitution process, her desire to avoid years of expensive litigation, and her dissatisfaction with the fact that the Dutch government would not compensate her "for the profits made by said Alois Miedl and/or Miedl NV with [the Firm] and for the loss of the goodwill of [the Firm]." The parties dispute whether the settlement agreement released the Firm's claims to the Göring artworks. In any event, it is undisputed that the Firm intentionally allowed E100's final deadline of July 1, 1951 to expire without requesting restitution of the Göring artworks.

### D. Dutch State's Position Re: Ownership of Recuperated Artworks in the 1940s and 1950s

After the war, Dutch officials internally debated whether, and on what basis, the Dutch State could exercise ownership over the recuperated artworks. Some officials and legal experts opined that the State could take the position that it owned recuperated artworks under Royal Decree E133, whereas others opined that it would be more appropriate to take the position that the State acted as a custodian for original owners, but if no original owners asserted a claim or that claim was rejected, then the State acquired ownership under international law. However, the Dutch State recognized that these positions were not beyond doubt or without substantial risk, and that there was "no unchallengeable right of ownership of the State." Exh. 285 at 1766.

In any event, the Dutch State sold many unclaimed recuperated artworks, including former Goudstikker artworks, at public auctions in the 1950s. Other recuperated artworks, including the Cranachs, were transferred to the national art collection.

### E. Stroganoff's Purchase of the Cranachs from the Dutch State in 1966

In 1961, George Stroganoff notified the Dutch government that he claimed four paintings in the possession of the Dutch government –the Cranachs, a Rembrandt, and a Petrus Christus. He claimed that these paintings had belonged to his family and that they had been unlawfully confiscated by the Soviet Union. From 1964 to 1966, the Dutch State and Stroganoff engaged in negotiations regarding his claim.

In 1965, Stroganoff proposed that he would abandon his claim to the Rembrandt if the State would allow him to "buy back" the Cranachs at a price to be determined. The Minister of Culture, Recreation, and Social Work initially rejected Stroganoff's proposal to purchase the Cranachs, explaining: "The sale of paintings from the State's art collection only takes place in exceptional cases, actually only if the interest of the country requires such a sale. At this time, I do not find that any such reason has presented itself." The Minister further noted that the two Cranachs are "especially important for the Dutch cultural collection."

The Dutch State ultimately agreed to Stroganoff's proposal in which Stroganoff would abandon his claim to the Rembrandt if the Dutch State would allow him to purchase the Cranachs and the Petrus Christus. The head of legal affairs for the Ministry of Culture explained the decision in a 1968 Memorandum as follows:

> These paintings had come into the property of the Dutch state after the (Jewish) art dealer Goudstikker from Amsterdam had been forced to sell them to Göring and after the American occupational forces subsequently sent them back to the country of origin where the paintings, pursuant to the Decree of Enemy Assets [E133], fell to the state. The legitimacy of this title of ownership was contested by [Stroganoff], as well as the legitimacy of the title of ownership originally acquired by Goudstikker. Our office at that time advised your predecessor to contest this claim, but your predecessor preferred to come to a settlement with the claimaint. On the one

> hand, he based this preference on the risk of possibly losing the Rembrandt, which was valued at more than one million guilders, and on the other hand on the doubts expressed by the state attorney, who estimated the costs of a possible court case to be approx. *f*. 80,000. Accordingly, a settlement was reached in 1966, in which Stroganoff agreed to waive all his claims on the Rembrandt, while purchasing the other three paintings from the state of the Netherlands for a total sum of *f*. 60,000.

The agreement between the Dutch State and Stroganoff was implemented on or around July 22, 1966, and the Dutch government transferred the Cranachs to Stroganoff. On January 13, 1971, Norton Simon purchased the Cranachs from Stroganoff for $800,000. The Cranachs remain in the possession of Norton Simon and are currently on public display.

### F. Plaintiff's More Recent Restitution Claims

In 1996, Desi and her son Edo both died, leaving Plaintiff as the sole living heir of the shareholders of the Firm. In early 1998, Plaintiff revived the Firm, and filed several requests seeking the return of the artworks forcibly "sold" to Göring.

On January 9, 1998, the Firm petitioned the Dutch Ministry of Education, Culture, and Science to return the Göring artworks still in the Dutch national collection. The Ministry rejected that request in March 1998 concluding that the Firm had deliberately and intentionally decided not to submit a request for restoration of rights as to the Göring transaction.

Following this decision, the Firm, with Plaintiff's involvement, requested restoration of rights under

E100 with respect to the Göring transaction. The Firm submitted a claim to the Court of Appeals in The Hague, which was the successor to the Council for the Restoration of Rights. The Firm sought the return of paintings in the Dutch State's possession, and also amended its claim to seek monetary compensation for any artworks that had been sold by the Dutch State, i.e., the Cranachs. On December 16, 1999, the Court of Appeals in The Hague rejected the Firm's claim as untimely because it had not been submitted prior to the July 1, 1951 deadline. However, it also considered whether to exercise its discretion to grant restoration of rights "ex officio," even though the deadline had expired. The Court of Appeals in The Hague rejected restitution on that basis as well, emphasizing that "nearly 50 years have now elapsed since the last moment that an application for the restoration of rights could be submitted," and that Ms. Goudstikker had made a "conscious and well considered decision to refrain from asking for restoration of rights with respect to the Göring transaction".[2]

In 2001, the Dutch government announced a new policy for handling restitution claims for recovered artworks based on the recommendations of the Ekkart Committee,[3] who described the Dutch government's

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[2] In 2001, the Firm also filed a separate claim against the Dutch State in the District Court in The Hague, seeking *revindication* (similar to common law replevin) of the Göring artworks. The Hague District Court rejected that claim on the ground that E100 was the exclusive recourse for relief related to wartime transactions.

[3] The Ekkart Committee was appointed by the State Secretary of Education, Culture and Sciences in 1997 in order to investigate the provenance of the so-called "NK Collection," i.e. the collection of artworks recuperated after World War II and still under the management of the Dutch State, and to advise the Minister of

handling of restitution in the immediate postwar period as "legalistic, bureaucratic, cold and often even callous." The new policy for handling restitution claims departed from a "purely legal approach to the restitution issue" in favor of "a more policy-oriented approach . . . in which priority is given to moral rather than strictly legal arguments." However, under this new policy, "settled cases", in which "either the claim for restitution resulted in a conscious and deliberate settlement or the claimant expressly renounced his claim for restitution," would not be re-opened. The policy also did not extend to objects, such as the Cranachs, that had been transferred to a third party, unless that party consented. In connection with its new policy, the Dutch government created the Dutch Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War (the "Restitutions Committee") to review claims and advise whether restitution should be made.

In 2004, the Firm submitted a claim under the new policy with the State Secretary of the Dutch Ministry of Education, Culture and Science, seeking return of the artworks in the Dutch State's possession (which did not include the Cranachs). The State Secretary referred the claim to the Restitutions Committee. After an extensive review of the historical evidence and "based more on policy than strict legality," the Restitution Committee concluded that Plaintiff's claim for the works taken by Göring was "still admissible" and recommended the return of the Göring artworks that were still in the Dutch government's possession.

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Education, Culture and Science on a future policy with regard to the return of those artworks. Exh. 275 at 11 (Salomons Expert Report).

On February 6, 2006, the Dutch State Secretary adopted the Restitution Committee's recommendations regarding the return of the Göring artworks, but rejected the Restitution Committee's conclusion that the Goudstikker matter had not been "settled," explaining: "In 1999 the Hague Court of Appeal in its capacity as Restoration of Rights Court gave a final decision in this case. This is why this case is not included in the current restitution policy." Nevertheless, based on "the facts and circumstances surrounding the involuntary loss of property and the manner in which the matter was dealt with in the early Fifties," the Dutch State Secretary concluded that "in this special case there are grounds that justify a restitution in keeping with the recommendations of the Committee."

Concerned by these developments, Norton Simon sent a letter the Dutch State Secretary, asking the Dutch Government to confirm that it lawfully conveyed title to the Cranachs to Stroganoff in 1966. In response, in a letter dated March 31, 2006, the Director of Cultural Heritage, writing on behalf of the State Secretary, refused to express an opinion stating: "The two pieces of art involved here, are not part of the claim for which I have decided on 6 February of this year to make the return. The Restitution Committee did not include the facts and circumstances with respect to the two objects from the Norton Simon Art Foundation in its recommendation. As a result, I refrain from an opinion regarding the two pieces of art under the restitution policy."

Later, in a letter dated December 21, 2006, the Director of Cultural Heritage, again writing on behalf of the State Secretary, advised Plaintiff's counsel (with a copy to Defendant's counsel): "As I understand from

you, there exists a dispute between your client Marei von Saher and the Norton Simon Art Foundation concerning the ownership of two works, namely 'Adam' and 'Eve' by Cranach the Elder, which are currently located in the Norton Simon Museum. I confirm to you that the State of the Netherlands is not involved in this dispute. The State is of the opinion that this concerns a dispute between two private parties."

### G. Plaintiff's First Amended Complaint[4]

On May 1, 2007 Plaintiff commenced this action against Defendants seeking to recover the Cranachs. In her First Amended Complaint filed on November 8, 2011, Plaintiff alleges the following state-law claims for relief: (1) Replevin; (2) Conversion; (3) Damages under California Penal Code § 496; (4) Quiet title; and (5) Declaratory relief. The parties have filed cross-motions for summary judgment.

## II. LEGAL STANDARD

Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Once the moving party meets its burden, a party opposing a properly made and supported motion for summary judgment may not rest upon mere denials but must set out specific facts showing a genuine issue for trial. *Id.* at 250; Fed. R. Civ. P. 56(c), (e); *see also Taylor v. List*,

[4] The protracted history of this action is well known to the parties, and is extensively set forth in the Ninth Circuit's opinions, 592 F.3d 954 (2010) and 754 F.3d 712 (2014), and this Court's prior orders [Docket Nos. 47, 88 and 119].

880 F.2d 1040, 1045 (9th Cir. 1989) ("A summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data."). In particular, when the non-moving party bears the burden of proving an element essential to its case, that party must make a showing sufficient to establish a genuine issue of material fact with respect to the existence of that element or be subject to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "An issue of fact is not enough to defeat summary judgment; there must be a genuine issue of material fact, a dispute capable of affecting the outcome of the case." *American International Group, Inc. v. American International Bank*, 926 F.2d 829, 833 (9th Cir. 1991) (Kozinski, dissenting).

An issue is genuine if evidence is produced that would allow a rational trier of fact to reach a verdict in favor of the non-moving party. *Anderson*, 477 U.S. at 248. "This requires evidence, not speculation." *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1225 (9th Cir. 1999). The Court must assume the truth of direct evidence set forth by the opposing party. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 507 (9th Cir. 1992). However, where circumstantial evidence is presented, the Court may consider the plausibility and reasonableness of inferences arising therefrom. *See Anderson*, 477 U.S. at 249-50; *TW Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631-32 (9th Cir. 1987). Although the party opposing summary judgment is entitled to the benefit of all reasonable inferences, "inferences cannot be drawn from thin air; they must be based on evidence which, if believed, would be sufficient to support a judgment for the nonmoving party." *American International Group*, 926 F.2d at 836-37. In that regard, "a mere 'scintilla' of evidence will not be sufficient to defeat a properly supported

motion for summary judgment; rather, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997).

## III. DISCUSSION

Plaintiff's claims – for replevin, conversion, violation of California Penal Code § 496, quiet title, and declaratory relief – all depend on whether Norton Simon acquired "good title" to the Cranachs. Norton Simon traces its title to the Cranachs through Stroganoff to the Dutch State. The parties agree that if the Dutch State acquired ownership of the Cranachs, then Norton Simon acquired "good title" and is entitled to summary judgment on all of Plaintiff's claims.

Based on the undisputed facts, and as a matter of Dutch law, the Court concludes that the Dutch State acquired ownership of the Cranachs pursuant to Royal Decree E133 and thus that Norton Simon is entitled to summary judgment on all of Plaintiff's claims.[5] The Court finds it unnecessary to address the parties'

[5] Norton Simon argues, under California's conflict of law rules, that Dutch law governs whether the Dutch government acquired ownership of the Cranachs while the Cranachs were in the Netherlands. Plaintiff apparently agrees that Dutch law governs this issue, because she has failed to offer any choice-of-law analysis and generally cites to Dutch law when analyzing this issue. To the extent that there is any dispute, the Court concludes, for the reasons stated in Norton Simon's moving papers, that Dutch law governs this issue. Pursuant to Federal Rule of Civil Procedure 44.1, "[i]n determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law."

remaining arguments because the Court's determination of this issue is dispositive of Plaintiff's claims.

### A. Effect of Royal Decree A6 and the 1947 CORVO Decision

It is undisputed that the forced sale of the Cranachs to Göring in July 1940 was automatically void, at least initially, pursuant to Royal Decree A6. As discussed *supra*, Royal Decree A6 prohibited all transactions with Germans and other enemies that had effects outside the Nazi-occupied Netherlands, unless prior approval was obtained from CORVO. Exh. 60 (Royal Decree A6) at 3. Such prohibited transactions were automatically void if entered into without CORVO's prior consent. *Id.* Because CORVO did not give its prior consent to the Göring transaction, the transaction was automatically void.

However, Decree A6 gave CORVO the power to "revoke the invalidity" of these transactions after the fact "based on special circumstances by declaring the agreement or act still effective." Exh. 60 (Royal Decree A6) at 5. CORVO did exactly that with respect to the Göring transaction in 1947, when it "sanction[ed] all acts and agreements, performed or entered into in violation [of Decree A6, article 6.1], insofar as these acts or agreements related to matters which were found in enemy territory, after such territory was liberated or occupied by the allied forces, [which] since then have returned to or will have been returned to the Netherlands." Exh. 70 (1947 CORVO decision). Accordingly, because the Cranachs had been returned to the Netherlands pursuant to the United States' policy of external restitution, the Göring transaction was no longer automatically void and was "effective" to transfer ownership of the Cranachs to Göring.

Although the Göring transaction was no longer automatically void and now considered "effective," the Firm could still seek to void or nullify the transaction under Royal Decree E100. In other words, the transaction remained voidable.[6] Indeed, in its 1947 decision, CORVO expressly contemplated that former owners could seek to nullify these transactions by filing a claim under Royal Decree E100. *See* Exh. 70 (1947 CORVO decision) ("[B]y elimination of such nullity the question whether pursuant to provisions regarding restitution the goods will return to the person who at the time of the act or agreement was the owner thereof is not prejudged".).

### B. Effect of Royal Decree E100

As discussed *supra*, under Royal Decree E100, the Council had the power to "declare totally or partially null and void, or to modify, any legal relations that originated or were modified during enemy occupation of the [Netherlands]." Exh. 1 at 6 (Royal Decree E100). The Council's power specifically included the power to nullify transactions that occurred "under coercion, threat or improper influencing by or on behalf of the enemy." Exh. 1 at 7 (E100 art. 25). If the Council

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[6] Plaintiff contends that the Göring transaction remained void, not voidable, after the 1947 CORVO decision. However, Plaintiff's contention is belied by both the express language of the 1947 CORVO decision and the language of Royal Decree E100. Indeed, the 1947 CORVO decision clearly "sanctioned" the Göring transaction subject to the Firm obtaining a restoration of rights under E100. Moreover, E100 provided that the Council has the power to "declare totally or partially null and void" transactions that occurred "under coercion, threat or improper influencing by or on behalf of the enemy." Accordingly, the Göring transaction, as a transaction that occurred "under coercion, threat or improper influencing by or on behalf of the enemy," was subject to being declared void (i.e., voidable) and was not automatically void.

declared a transaction null and void, then the former owner of the property was restored as the owner of the property, and the Council could order the property returned to that owner (usually on the condition that she return to the Dutch State any consideration received for it). *Id.* at 6, 7 (E100 art. 20, 27.5).

E100 provided the exclusive recourse for claimants seeking restitution of property lost as a result of wartime transactions. *See id.* at 5 (E100, art. 19.1) ("The common-law court is incompetent to hear and decide on claims or requests that the Council is competent to handle by virtue of this Decree."); Exh. 21 (Vliet Expert Report) at 17-18 & n. 76; Exh. 71 at 6 (Dutch Supreme Court Judgment, NJ 1947/159, Feb. 20, 1947); Exh. 93 at 4 (Dutch Supreme Court Judgment, NJ 1953/465, Nov. 28, 1952); Exh. 123 (Decision of the District Court in The Hague dated Jan. 10, 2001); Exh. 279 at 12 (Salomons Expert Rebuttal Report). Accordingly, unless the Göring transaction was nullified by the Council under E100, the Göring transaction would, and always would, remain "effective."

The Dutch Government set a deadline of July 1, 1951 for the filing of claims for restoration of rights under Royal Decree E100. The Firm did not seek to nullify the Göring transaction prior to the July 1, 1951 deadline. Although the Council retained the discretionary authority to order restoration of rights "ex officio", the Firm had no right to request relief under E100 after the deadline. *See* Exh. 7 (Decision of the Court of Appeals in the Hague dated December 16, 1999) at 15 ("[I]t was determined that such claims must have been submitted prior to July 1, 1951. . . . The claim submitted to the Court of Appeals on August 19, 1998, therefore, was not submitted on time, so that in principle a ruling of inadmissibility must follow on

this ground."); Exh. 22 (Vliet Expert Rebuttal Report) at 5 n.8. In any event, in 1999, the Court of Appeals in The Hague, as successor to the Council, held that the Firm was not entitled to such "ex officio" relief. Exh. 7 at 7-8 (Decision of the Court of the Appeals in The Hague dated December 16, 1999). As a result, because the transaction was never nullified under Royal Decree E100, the Göring transaction remained "effective." *See* Exh. 21 (Vliet Expert Report) at 25.

### C. Effect of Royal Decree E133

Because the Göring transaction was considered "effective" unless and until it was declared null and void under Royal Decree E100, the Cranachs were automatically expropriated pursuant to Royal Decree E133 as enemy property.

As discussed *supra*, Royal Decree E133 facilitated reparations, as opposed to restitution, and expropriated enemy assets in order to compensate the Dutch State for losses that the Netherlands suffered during World War II. *See* Exh. 21 at 19 (Vliet Expert Report). Article 3 of Royal Decree E133 decreed that all enemy property located within the Netherlands or belonging to the "legal sphere" of the Netherlands automatically passed in ownership to the State on an ongoing basis (until July 1951 when the ongoing expropriating effect as to German assets ended by treaty). *See* Exh. 2 at 2-3 (E133, arts. 3, 1.8); Exh. 21 at 19 n.80, 21 nn.93, 94 (Vliet Expert Report). The Court concludes, and the parties and their experts agree, that this provision of Royal Decree E133 applied to enemy property recuperated to the Netherlands after the war.[7] *See*

[7] Although Plaintiff's expert Professor Salomons acknowledges that Royal Decree E133 applied to enemy property recuperated to the Netherlands after the war, he attempts to carve out an

Exh. 19 at 10 (Hartkamp Report); Exh. 21 at 25-26 (Vliet Expert Report); Exh. 91 at 1 (Judgment of the Judicial Division in the Rebholz-Schröter v. NBI case, dated July 9, 1951) (holding that recuperated painting was expropriated under E133, art. 3); Exh. 94 at 1 (Judgment of the Judicial Division in the Rebholz-Schröter v. NBI case, dated Nov. 23, 1953) ("[N]ot to be discussed is the question raised by the petitioners whether or not the painting, as long as it was in Germany, fell under Decree E 133, because petitioners have acknowledged that the painting, once returned to the Netherlands, definitely falls under that decree . . . ."); Exh. 170 (Schrage Dep. 49:6-50:16); Exh. 156 at 9-10 (Salomons Expert Report); Plaintiff's Motion at 19 n. 6.

As the Dutch Supreme Court held in 1955, Royal Decree E133 made the Dutch State the full owner of the covered assets, as opposed to a mere fiduciary for another owner. Exh. 95 at 3 (Dutch Supreme Court Judgment, NJ 1955/357, Apr. 6, 1955). In so holding, the Dutch Supreme Court noted that, although the Dutch State may possibly be required to return the property expropriated under E133 (if, for example, the "enemy" successfully petitions for de-enemization), "the possibility of a return and the powers allotted with this in mind do not automatically mean that the

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exception for recuperated goods that had been "returned for restitution to the Netherlands for their previous Dutch owners." Exh. 274 at 7 (Salomons Expert Report). However, Royal Decree E133 contains no such exception or distinction: "[i]t applies to all assets owned by the enemy . . . without regard to what supposed purpose motivated their return to the Netherlands." Exh. 20 at 3 (Hartkamp Expert Rebuttal Report); *see also* Exh.22 at 3-4 (Vliet Expert Rebuttal Report) ("This exception cannot be found in Decree E133, which applies to all property owned by the enemy.").

State, as long as the return has not been realized, is not the owner." *Id.* at 5.

It is undisputed that Göring qualified as an enemy under Royal Decree E133,[8] and that the Cranachs were returned to the Netherlands in 1946. Accordingly, based on its application of the relevant law, the Court concludes that the Dutch State acquired ownership of the Cranachs pursuant to Royal Decree E133. Specifically, the Court concludes that: (1) because CORVO revoked the automatic invalidity of the Göring transaction in 1947, that transaction was "effective" and the Cranachs were considered to be the property of Göring; (2) because Göring was an "enemy" within the meaning of Royal Decree E133, his property located in the Netherlands, including the Cranachs, automatically passed in ownership to the Dutch State pursuant to Article 3 of Royal Decree E133; (3) unless and until the Council annulled the Göring transaction under Royal Decree E100, the Cranachs remained the property of the Dutch State; and (4) because the Göring transaction was never annulled under Royal Decree E100, the Dutch State owned the Cranachs when it transferred the paintings to Stroganoff in 1966. *See* Exh. 21 at 22-33 (Vliet Expert Report); Exh. 19 at 10-16 (Hartkamp Expert Report).

### D. The *Rebholz* Decisions

The Court's conclusion that the Dutch State acquired ownership of the Crananchs pursuant to Royal Decree E133 is entirely consistent with, and

[8] The definition of enemy included all natural persons who were nationals of Germany or Japan at any time after May 10, 1940. Exh. 2 at 1-2 (Royal Decree E133, arts. 1 & 2). Göring, as a leader of Nazi Germany and a German national, clearly met this definition.

supported by, the Council's decisions in the *Rebholz* case. *See* Exhs. 91 and 94.

The *Rebholz* case concerned a painting which, at the beginning of World War II, belonged to H. Kohn, who fled to England in May 1940. The painting was seized by the Germans, and then sold at auction. Erna Rebholz, who qualified as an enemy under Royal Decree E133, purchased the painting on July 1, 1941 at the price of *f* 58,500. The painting was thereafter seized by the Allies in Germany, and returned to the Netherlands. The Dutch State returned the painting to Kohn, its former owner, even though he had not obtained restoration of rights under E100. The Rebholzs challenged the Dutch State's actions. In its Judgment dated July 9, 1951, the Judicial Division of the Council held that the Rehbolzs were enemies within the meaning of Article 2 of Royal Decree E133, and "that, therefore the ownership of their estate has been transferred to the State by operation of law, pursuant to article 3" of Royal Decree E133. Because the Rebholzs had failed to submit an application for de-enemization, the Council ruled that their appeal was "inadmissible." *See* Exh. 91 at 1-2.

The Rebholzs then petitioned the Council for reconsideration on the ground that they had, in fact, petitioned for de-enemization. *See* Exh. 92. The Rebholzs did not challenge the Council's holding that ownership of the painting had been transferred to the Dutch State pursuant to Royal Decree E133. *See id.* at 2 ("[F]or these proceedings the petitioner, without prejudice to all her other rights, wishes to accept that this painting which was not in the Netherlands at the moment the Decree on Enemy Assets entered into effect, is deemed to be subject to the forfeiture or transfer of ownership, pursuant to article 3 of the

Decree on Enemy Assets, despite the territorial scope of the Decree on Enemy Assets . . . ."). Accordingly, the Council, upon reconsideration, did not disturb the prior holding. Indeed, in its Judgment dated November 23, 1953, the Council stated: "[N]ot to be discussed is the question raised by the petitioners whether or not the painting, as long as it was in Germany fell under the Decree E 133, because petitioners have acknowledged that the painting, once returned to the Netherlands, definitely falls under that decree, since Mrs. Rebholz although she might also have Dutch nationality, is a person as mentioned in Article 2 of the Decree E133." Exh. 94 at 1.

Because the Rebholzs had petitioned for de-enemization and thus the Dutch State's expropriation under Royal Decree E133 could be set aside,[9] the Council then analyzed whether the Dutch State could have acquired ownership of the painting on a different basis - under "Law 52" or "Law 63." Exh. 94 at 1-2. Laws 52 and 63 were promulgated by Allied authorities in Allied-occupied Germany. The Council concluded that the Dutch State did not acquire ownership of the painting under Laws 52 or 63, but rather that it received the painting as a custodian, stating, in relevant part: "[T]he Council . . . considers the aforementioned Laws to be exclusively aimed at returning the goods in question to the jurisdiction of the State from which said goods were removed and for that purpose aimed at bringing these goods under the factual power of the State that will keep them and will secure their

[9] "In law the State had full ownership under E 133, but because that ownership might be undone through the pending de-enemization procedure, in practical terms it was akin to custodianship (until de-enemization was finally rejected)." Exh. 21 at 31 n.129 (Vliet Expert Report).

return to the estate of the person that may be shown to have a right to them, which is why the Foundation, which can here be equated with the State, received the painting as custodian for the rightholder." Exh. 94 at 2. In rejecting the Dutch State's claim that it acquired ownership under Law 52 and Law 63, the Council also noted that "the aforementioned laws [Law 52 and Law 63] have territorial application, meaning they only apply to the German territories occupied by the allies and that these statutes cannot affect the relationships of people residing outside those territories vis-à-vis the goods found in those territories." Exh. 94 at 2.

Accordingly, because Mrs. Rebholz was an "enemy" and the painting belonged to Mrs. Rebholz's estate "as she had acquired ownership of it through purchase," the Council concluded that the painting should have been given to the NBI as "manager of Mrs. Rebholz's estate" pursuant to Royal Decree E133.[10] Exh. 94 at 2. The Council further held that the Dutch State erred by treating "the original owner Kohn as the rightholder to the painting" and returning the painting to him when his rights had not been restored by the Council under Royal Decree E100. Exh. 94 at 2.

The Court concludes that the *Rebholz* decisions confirm the following principles: (1) artworks recuperated from Germany after the war that had been purchased by an enemy (like Rebholz or Göring) constituted enemy property that was expropriated by the Dutch State under Royal Decree E133; (2) contrary to Plaintiff's argument, this principle applies even when

[10] Article 10 of Royal Decree E133 provides that "[p]roperty of an enemy state or of an enemy national, the ownership of which has been transferred to the State as a result of the provision in Article 3, will be managed by the [NBI] for the benefit of the State." Exh. 2 at 7 (Royal Decree E133).

the former Dutch owner (like Kohn or the Goudstikker Firm) had been deprived of his rights involuntarily; (3) if the former Dutch owner wished to recover the artwork, he had to seek restoration of rights from the Council under Royal Decree E100; and (4) the Dutch State, despite being the owner of the works under Royal Decree E133, had to properly follow the procedures of Royal Decrees E100 and E133 because its ownership was defeasible. *See* Norton Simon's Motion [Docket No. 186] at 33.

Accordingly, the *Rebholz* decisions support the Court's conclusion that, because the Göring transaction was never annulled under Royal Decree E100 (and because Göring never filed a petition for de-enemization, which certainly would have been denied), the Dutch State owned the Cranachs pursuant to Royal Decree E133.

**E. Plaintiff's Arguments**

Plaintiff argues that the Dutch State did not become the owner of unclaimed recuperated property, like the Cranachs, but rather was a permanent or perpetual custodian (or "detentor") of the property pending its return to its lawful pre-war owner. Specifically, Plaintiff argues that "[p]ursuant to Allied policy, assets looted by the Nazis were returned to the [Dutch government] for it to act as custodian (or *detentor*), locate the pre-War owners, and return assets to them." Plaintiff's Reply [Docket No. 291] at 3. She claims that, pursuant to that policy, the Dutch government "was obligated to construct a restitution process under which the artworks would be returned to Goudstikker, who throughout remained the lawful owner." Plaintiff's Opposition [Docket No. 236] at 9.

The Court disagrees with Plaintiff's argument that the Allies' post-war restitution policy required the Dutch State to act as a permanent or perpetual custodian of the Cranachs. As pointed out by Norton Simon, absent a treaty, executive agreement, or other pact, the Allies' postwar restitution policy cannot be binding on a sovereign state such as the Netherlands. Moreover, even assuming that the Allies' post-war restitution policy could bind the Netherlands, there is nothing in that policy that requires the Netherlands to act as a custodian in perpetuity. Indeed, Plaintiff's theory of perpetual custodianship is belied by the United States' own actions after the war. Military Law 59, which was enacted for U.S.-occupied Germany, provided that if a former owner failed to file a restitution claim before the deadline, that former owner "lost his right to restitution" and was "forever barred from making any claim for restitution of that such property." Exh. 11 at 30-31 (Taft Expert Report); Exh. 132 at 3-5 (Advisory Opinion No. 1, 1 Court of Restitution Appeals Reports 489, 492 (Aug. 4, 1950). Upon expiration of the deadline, "all the right, title, and interest to the claim and to the restitutable property became vested by operation of law" in the Jewish Restitution Successor Organization ("JSRO"), a third party charitable organization appointed by the U.S. Government. Exh. 132 at 3-5.

In support of her argument, Plaintiff heavily relies on the language of certain receipts for recuperated property in which the Dutch State acknowledged that it accepted the property "as custodians pending the determination of the lawful owners thereof" and that the property "will be returned to their lawful owners." However, it is undisputed that the United States ceased using the quoted language in 1946, and that the receipt for the Crananchs did not include such

language. Moreover, even if the receipts for the Cranachs did include that language, Plaintiff fails to adequately explain how that language foreclosed the Dutch government from taking ownership of the Cranachs when the Firm did not seek to nullify the transaction with Göring prior to the July 1, 1951 deadline. Indeed, based on the plain text of Royal Decree E100, the Firm did not qualify as the "lawful owner" unless and until the Göring transaction was declared null and void by the Council. Because the Göring transaction was never declared null and void by the Council, the Dutch State, pursuant to Royal Decree E133, was the "lawful owner" of the Cranachs.

Plaintiff also relies on the *Rebholz* decisions as support for her theory that the Dutch State was a perpetual custodian of the Cranachs. However, rather than support her theory, the *Rebholz* decisions refute it. Although the Council held that the Dutch State received the painting at issue as custodian under Laws 52 and 63, it also held that those laws only have "territorial application, meaning they only apply to the German territories occupied by the allies and that these statutes cannot affect the relationships of people residing outside those territories vis-à-vis the goods found in those territories." Exh. 94 at 2. Moreover, the Council in *Rebholz* confirmed that Royal Decree E133 applied to enemy property recuperated to the Netherlands after the war and, as such, *could* be expropriated by the Dutch State.

In addition, Plaintiff cites to, and relies on, various reports and statements by Dutch committees and officials which express the view that the Dutch State did not acquire ownership of recuperated artworks pursuant to Royal Decree E133. Those reports and statements do not alter the Court's conclusion. The

Court notes that, in many other documents not cited by Plaintiff, Dutch officials opined that the Dutch State *could* exercise ownership of recuperated property under Royal Decree E133. *See* Exh 144 at 1; Exh. 96 at 2; Exh. 105; Exh. 113. More importantly, none of the reports and statements cited by Plaintiff can supersede the express language of the Royal Decrees and the cases interpreting those decrees.[11]

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[11] Indeed, Plaintiff's heavy reliance on a report by the "Dutch Committee for Recovered Property" is entirely misplaced in light of the subsequent *Rebholz* decisions. In that report, the Committee expressed the view that it was "very debatable" whether the Dutch State could acquire ownership of recuperated artworks pursuant to Royal Decree E133 given the territorial limits imposed under Article 1.8. Exh. 284 at 1743. Specifically, Article 1.8 limited the application of E133 to property that is "located within the territory of the [Netherlands], belonging to the legal sphere of the [Netherlands] . . . , or - regardless where they are located . . . belong to Dutch people, Dutch nationals or persons who have their place of residence within the [Netherlands] or are located there . . . .". Exh. 2 at 2 (Royal Decree E133). Based on this language (and the official Dutch government's explanatory notes to E133), it was believed that Royal Decree E133 may not apply to recuperated goods because "property belonging to persons other than residents . . . situated outside of these borders did not belong to the Dutch legal sphere and so [could not] be enemy capital within the meaning of Royal Decree No. E. 133." Exh. 284 at 1743. However, as discussed, the Council terminated this debate with its *Rebholz* decisions, concluding that Royal Decree E133 applied to recuperated property once that property was returned to the Netherlands. *See* Exh. 91 at 1 (Judgment of the Judicial Division in the Rebholz-Schröter v. NBI case, dated July 9, 1951) (holding that recuperated painting was expropriated under E133, art. 3); *see also* Exh. 94 at 1 (Judgment of the Judicial Division in the Rebholz-Schröter v. NBI case, dated Nov. 23, 1953) ("[N]ot to be discussed is the question raised by the petitioners whether or not the painting, as long as it was in Germany, fell under Decree E 133, because petitioners

Finally, Plaintiff argues that the Restitution Committee's recommendations and the State Secretary's decision to return the Göring artworks in the Dutch Government's possession in 2006 demonstrate that "nothing in the post-War restitution regime, including Decrees E100 and E133, bestowed title on the [Dutch Government]" and that the Dutch State remained a custodian even after the July 1, 1951 deadline. *See* Plaintiff's Opposition [Docket No. 236] at 15. However, the Committee's recommendations and the State Secretary's decision were based on a new policy adopted by the Dutch government which departed from a "purely legal approach to the restitution issue" in favor of "a more policy-oriented approach . . . in which priority is given to moral rather than strictly legal arguments." Exh. 124 at 4. That policy is inapplicable to artworks, such as the Cranachs, that have been transferred to a third party. Exh. 125 at 1, 5. Unlike the Dutch government and Restitution Committee, this Court is required to apply a "strictly legal" approach, as opposed to one that is based on policy or moral principles. That "strictly legal approach" compels the conclusion that the Dutch State acquired ownership of the Cranachs, which necessarily resolves this action as a matter of law in favor of Norton Simon.

## IV. CONCLUSION

For all of the foregoing reasons, the Court concludes that the Dutch State acquired ownership of the Cranachs pursuant to Royal Decree E133, and thus that Norton Simon has "good title" to the Cranachs. Accordingly, Norton Simon's Motion for Summary Judgment is **GRANTED** and Plaintiff's Motion for

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have acknowledged that the painting, once returned to the Netherlands, definitely falls under that decree . . . .").

Summary Judgment Pursuant to Fed. R. Civ. P. 56 is **DENIED**.

The parties are ordered to meet and confer and prepare a joint proposed Judgment which is consistent with this Order. The parties shall lodge the joint proposed Judgment with the Court on or before **August 15, 2016**.

IT IS SO ORDERED.

# APPENDIX E

## HOLOCAUST EXPROPRIATED ART RECOVERY ACT OF 2016

### Public Law 114-308 114th Congress

An Act

To provide the victims of Holocaust-era persecution and their heirs a fair opportunity to recover works of art confiscated or misappropriated by the Nazis.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "Holocaust Expropriated Art Recovery Act of 2016".

**SEC. 2. FINDINGS.**

Congress finds the following:

(1) It is estimated that the Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe as part of their genocidal campaign against the Jewish people and other persecuted groups. This has been described as the "greatest displacement of art in human history".

(2) Following World War II, the United States and its allies attempted to return the stolen artworks to their countries of origin. Despite these efforts, many works of art were never reunited with their owners. Some of the art has since been discovered in the United States.

(3) In 1998, the United States convened a conference with 43 other nations in Washington, DC,

known as the Washington Conference, which produced Principles on Nazi-Confiscated Art. One of these principles is that "steps should be taken expeditiously to achieve a just and fair solution" to claims involving such art that has not been restituted if the owners or their heirs can be identified.

(4) The same year, Congress enacted the Holocaust Victims Redress Act (Public Law 105-158, 112 Stat. 15), which expressed the sense of Congress that "all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.".

(5) In 2009, the United States participated in a Holocaust Era Assets Conference in Prague, Czech Republic, with 45 other nations. At the conclusion of this conference, the participating nations issued the Terezin Declaration, which reaffirmed the 1998 Washington Conference Principles on Nazi-Confiscated Art and urged all participants "to ensure that their legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties.". The Declaration also urged participants to "consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property, in order to achieve just

and fair solutions, as well as alternative dispute resolution, where appropriate under law.".

(6) Victims of Nazi persecution and their heirs have taken legal action in the United States to recover Nazi-confiscated art. These lawsuits face significant procedural obstacles partly due to State statutes of limitations, which typically bar claims within some limited number of years from either the date of the loss or the date that the claim should have been discovered. In some cases, this means that the claims expired before World War II even ended. (See, e.g., Detroit Institute of Arts v. Ullin, No. 06-10333, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007).) The unique and horrific circumstances of World War II and the Holocaust make statutes of limitations especially burdensome to the victims and their heirs. Those seeking recovery of Nazi-confiscated art must painstakingly piece together their cases from a fragmentary historical record ravaged by persecution, war, and genocide. This costly process often cannot be done within the time constraints imposed by existing law.

(7) Federal legislation is needed because the only court that has considered the question held that the Constitution prohibits States from making exceptions to their statutes of limitations to accommodate claims involving the recovery of Nazi-confiscated art. In Von Saher v. Norton Simon Museum of Art, 592 F.3d 954 (9th Cir. 2009), the United States Court of Appeals for the Ninth Circuit invalidated a California law that extended the State statute of limitations for claims seeking recovery of Holocaust-era artwork. The Court held that the law was an unconstitutional infringement of the Federal Government's exclusive authority over foreign affairs,

which includes the resolution of war-related disputes. In light of this precedent, the enactment of a Federal law is necessary to ensure that claims to Nazi-confiscated art are adjudicated in accordance with United States policy as expressed in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration.

(8) While litigation may be used to resolve claims to recover Nazi-confiscated art, it is the sense of Congress that the private resolution of claims by parties involved, on the merits and through the use of alternative dispute resolution such as mediation panels established for this purpose with the aid of experts in provenance research and history, will yield just and fair resolutions in a more efficient and predictable manner.

**SEC. 3. PURPOSES.**

The purposes of this Act are the following:

(1) To ensure that laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration.

(2) To ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner.

**SEC. 4. DEFINITIONS.**

In this Act:

(1) ACTUAL DISCOVERY.—The term "actual discovery" means knowledge.

(2) ARTWORK OR OTHER PROPERTY.—The term "artwork or other property" means—

(A) pictures, paintings, and drawings;

(B) statuary art and sculpture;

(C) engravings, prints, lithographs, and works of graphic art;

(D) applied art and original artistic assemblages and montages;

(E) books, archives, musical objects and manuscripts (including musical manuscripts and sheets), and sound, photographic, and cinematographic archives and mediums; and

(F) sacred and ceremonial objects and Judaica.

(3) COVERED PERIOD.—The term "covered period" means the period beginning on January 1, 1933, and ending on December 31, 1945.

(4) KNOWLEDGE.—The term "knowledge" means having actual knowledge of a fact or circumstance or sufficient information with regard to a relevant fact or circumstance to amount to actual knowledge thereof.

(5) NAZI PERSECUTION.—The term "Nazi persecution" means any persecution of a specific group of individuals based on Nazi ideology by the Government of Germany, its allies or agents, members of the Nazi Party, or their agents or associates, during the covered period.

**SEC. 5. STATUTE OF LIMITATIONS.**

(a) IN GENERAL.—Notwithstanding any other provision of Federal or State law or any defense at law relating to the passage of time, and except as

otherwise provided in this section, a civil claim or cause of action against a defendant to recover any artwork or other property that was lost during the covered period because of Nazi persecution may be commenced not later than 6 years after the actual discovery by the claimant or the agent of the claimant of—

(1) the identity and location of the artwork or other property; and

(2) a possessory interest of the claimant in the artwork or other property.

(b) POSSIBLE MISIDENTIFICATION.—For purposes of subsection (a)(1), in a case in which the artwork or other property is one of a group of substantially similar multiple artworks or other property, actual discovery of the identity and location of the artwork or other property shall be deemed to occur on the date on which there are facts sufficient to form a substantial basis to believe that the artwork or other property is the artwork or other property that was lost.

(c) PREEXISTING CLAIMS.—Except as provided in subsection (e), a civil claim or cause of action described in subsection (a) shall be deemed to have been actually discovered on the date of enactment of this Act if—

(1) before the date of enactment of this Act—

(A) a claimant had knowledge of the elements set forth in subsection (a); and

(B) the civil claim or cause of action was barred by a Federal or State statute of limitations; or

(2)(A) before the date of enactment of this Act, a claimant had knowledge of the elements set forth in subsection (a); and

(B) on the date of enactment of this Act, the civil claim or cause of action was not barred by a Federal or State statute of limitations.

(d) APPLICABILITY.—Subsection (a) shall apply to any civil claim or cause of action that is—

(1) pending in any court on the date of enactment of this Act, including any civil claim or cause of action that is pending on appeal or for which the time to file an appeal has not expired; or

(2) filed during the period beginning on the date of enactment of this Act and ending on December 31, 2026.

(e) EXCEPTION.—Subsection (a) shall not apply to any civil claim or cause of action barred on the day before the date of enactment of this Act by a Federal or State statute of limitations if—

(1) the claimant or a predecessor-in-interest of the claimant had knowledge of the elements set forth in subsection (a) on or after January 1, 1999; and

(2) not less than 6 years have passed from the date such claimant or predecessor-in-interest acquired such knowledge and during which time the civil claim or cause of action was not barred by a Federal or State statute of limitations.

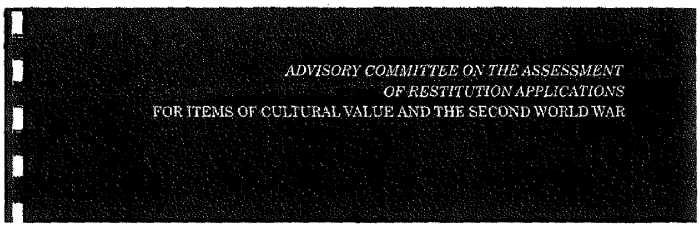
(f) RULE OF CONSTRUCTION.—Nothing in this Act shall be construed to create a civil claim or cause of action under Federal or State law.

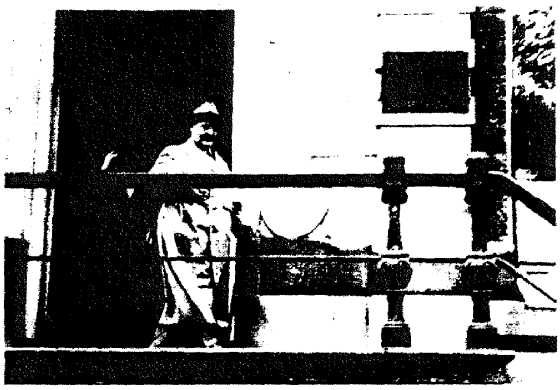
(g) SUNSET.—This Act shall cease to have effect on January 1, 2027, except that this Act shall continue to apply to any civil claim or cause of action described in subsection (a) that is pending on January 1, 2027. Any civil claim or cause of action commenced on or

after that date to recover artwork or other property described in this Act shall be subject to any applicable Federal or State statute of limitations or any other Federal or State defense at law relating to the passage of time.

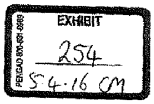
Approved December 16, 2016.

**APPENDIX F**



Advice concerning Goudstikker
(RC 1.15)

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**Advice concerning Goudstikker**
**(RC 1.15)**

Cover illustration: Hermann Göring leaving the J. Goudstikker gallery located at Herengracht 458 in Amsterdam

**Recommendation Regarding the Application by Amsterdamse Negotiatie Compagnie NV in Liquidation for the Restitution of 267 Works of Art from the Dutch National Art Collection**

***(Case number RC 1.15)***

In letters dated 10 June 2004 and 20 September 2005, the State Secretary for Culture, Education and Science asked the Restitutions Committee to issue a recommendation regarding the decision to be taken concerning an initial application and additional application by Amsterdamse Negotiatie Compagnie NV in liquidation for the restitution of the works of art which are currently in the possession of the State of the Netherlands and that were part of the trading stock of the gallery Kunsthandel J. Goudstikker NV, as it existed on 10 May 1940.

**The Proceedings**

On 26 April 2004, Amsterdamse Negotiatie Compagnie NV in liquidation (referred to below as 'the Applicant') filed a substantiated application with the State Secretary for Culture, Education and Science (referred to below as 'the State Secretary') for the restitution of 241 itemised art objects described in the application as *the goods that the State of the Netherlands has in its custodianship and that were part of the Goudstikker Collection'*. The State Secretary submitted this application to the Restitutions Committee (referred to below as 'the Committee') for its advice in a letter dated 10 June 2004. In a letter of 31 July to the State Secretary and letters of 8 January 2005 and 31 July 2005 to the Committee, the Applicant revised the list of 241 art objects enclosed with the letter of 26 April 2004, expanding it to a list of 267 art objects.

According to a statement in the first application, the application is 'supported' by Marei von Saher-Langenbein (referred to below as 'von Saher-Langenbein'), the widow of Eduard von Saher, Jacques Goudstikker's only son. At the request of the Committee, the authorised representatives explained the meaning of this support in a letter of 8 January 2005. This was provided *'in case goods were included among the reclaimed art objects that belonged to the private assets of Mr Jacques Goudstikker and/or Mrs Desi Goudstikker-von Halban.'* Because this was not the case, the Committee regards Amsterdamse Negotiatie Compagnie NV in liquidation as the sole applicant. Amsterdamse Negotiatie Compagnie NV has been the new name of Kunsthandel J. Goudstikker NV (referred to below as 'Goudstikker') since a 1952 resolution. The liquidation of assets of the company wound up as from 14 December 1955, which was concluded on 28 February 1960, was reopened on 31 March 1998 by order of the Amsterdam District Court.

R.O.N. van Holthe tot. Echten, Master of Laws, and Prof. H.M.N. Schonis, Master of Laws, are acting in the proceedings before the Committee as the authorised representatives of the Applicant and of von Saher-Langenbein.

The Committee has reviewed all the written documents submitted in this case, specifically including the applications and explanatory notes filed with the State Secretary on behalf of the Applicant on 26 April 2004 and 31 July 2005, the reply dated 8 January 2005 from the Applicant's authorised representatives to the Committee's questions and the response of 31 July 2005 to the draft investigatory report compiled by the Committee. For the State Secretary's part, the

Committee has read a letter with appendices of 30 September 2004 from deputy State Advocate H.C. Grootveld, Master of Laws, to the director of the Cultural Heritage Department of the Ministry of Culture, Education and Science with respect to the status of judicial cases pending before the court in which the State of the Netherlands and the Applicant are involved.

During a hearing on 12 September 2005 organised by the Committee, the Applicant provided a verbal explanation of its application. Besides the authorised representatives Van Holthe tot Echten and Schonis, the following persons attended on behalf of the Applicant: Von Saher-Langenbein (the Applicant's liquidator as well as the 'supporter' of the application), Charlene von Saher (Jacques Goudstikker's granddaughter), A. Bursky (the Applicant's liquidator), L.M. Kaye, Esq. (Von Saher-Langenbein's counsel), Prof. I. Lipschits (the Applicant's advisor), Mr C. Toussaint (the Applicant's art history advisor), R. Smakman (colleague of authorised representative Van Holthe tot Echten), as well as the interpreters Van den Berg and Cillekens. A transcript was drafted of the hearing, which the Committee sent to the authorised representatives in a letter dated 13 October 2005.

In response to the requests for advice it has received, the Committee instituted a fact-finding investigation, the results of which are documented in a draft report dated 25 April 2005 that was sent to the Applicant on 4 May 2005. In a letter of 31 July 2005, the Applicant sent its response to the Committee's draft report. Subsequently, points of the draft report were revised. This response has been appended to the documentary report (referred to below as 'the Report') adopted by

the Committee on 19 December 2005. The Report is deemed to comprise part of this recommendation.

**General Considerations (regarding art dealers)**

a) The Committee has drawn up its opinion with due regard for the relevant (lines of) policy issued by the Ekkart Committee and the government.

b) The Committee asked itself whether it is acceptable that an opinion to be issued is influenced by its potential consequences for decisions in subsequent cases. The Committee resolved that such influence cannot be accepted, save in cases where special circumstances apply, since allowing such influence would be impossible to justify to the Applicant concerned.

c) The Committee then asked itself how to deal with the circumstance that certain facts can no longer be ascertained, that certain information has been lost or has not been recovered, or that evidence can no longer be otherwise compiled. On this issue the Committee believes that, if the problems that have arisen can be attributed at least in part to the lapse of time, the associated risk should be borne by the government, save in cases where exceptional circumstances apply.

d) Finally, the Committee believes that insights and circumstances which, according to generally accepted views, have evidently changed since the Second World War should be granted the status of new facts.

e) Involuntary loss of possession is also understood to mean sale without the art dealer's consent by 'Verwalters' [Nazi-appointed caretakers who took over management of firms owned by Jews] or other

custodians not appointed by the owner of items from the old trading stock under their custodianship, in so far as the original owner or his heirs did not receive all the profits of the transaction, or in so far as the owner did not expressly waive his rights after the war.

**Special Considerations**

A few basic assumptions are first explained below under Section I. Section II addresses the loss of possession during the first months of the war in 1940, the period during which Jacques Goudstikker, sole managing director and principal shareholder of Goudstikker, had already fled the Netherlands, and some of his employees had sold the immovable and movable property of his gallery, mainly to Alois Miedl and Hermann Göring. Section III discusses previous applications for the restoration of Goudstikker's rights, namely:

- the negotiations with the Dutch rights restoration authorities conducted after the war that ultimately, on 1 August 1952, resulted in a settlement agreement in respect of the art objects, and
- a restitution application filed with the State Secretary by Jacques Goudstikker's heirs in 1998, which, following its rejection, was brought before the Court of Appeals of The Hague.

In Section IV, the Committee provides its judgement of the works of art delivered in 1940 to Miedl and Göring, respectively. In Section V, the Committee then sets out its position on the other art objects included in this restitution application Finally, in Section VI, the Committee discusses the consequences of possible restitution.

*I. Basic Assumptions*

The Facts

1. For the facts serving as the basis of this recommendation, the Committee refers the reader to the Committee's Report, deemed to comprise an integral part of this recommendation.

The Committee's Decision-Making Framework

2. Under Article 2 of the Decree of 16 November 2001 establishing its tasks and responsibilities, the Committee has the task of advising the State Secretary on decisions to be taken concerning applications for the restitution of items of cultural value of which the original owners involuntarily lost possession due to circumstances directly related to the Nazi regime. The Committee must observe relevant government policy.

Items of Cultural Value Concerned

3. The Applicant seeks the restitution of 267 works of art, mainly paintings, from the Dutch National Art Collection that are claimed to have been part of Goudstikker's trading stock, as stated in List I appended to this recommendation, After the war, the State of the Netherlands recovered these works of art primarily from Germany and they were subsequently incorporated into the National Art Collection. As of 2005, a large portion of the works of art is on loan to various Dutch museums and government agencies under Netherlands Art Property *(NK)* inventory numbers.

The Committee has determined that the majority of the art objects whose restitution is requested (227 in number) were the property of Goudstikker when in May 1940, Jacques Goudstikker was forced to leave

the gallery behind, although some of the paintings were co-owned by Goudstikker and others. In Jacques Goudstikker's papers and below, these paintings (21 in number) are called the 'meta-paintings'. The Committee's recommendation regarding the meta-paintings can be found under 14.

4. It is certain or likely that a total of 40 of the 267 works of art whose restitution is requested were not part of Goudstikker's property on 10 May 1940. It is true that the provenance of some of the works of art front this category *may not* be entirely conclusive, but it is not likely that they belonged to Goudstikker's old trading stock. Three of the paintings were present in the gallery on 10 May 1940 owing to consignment or commission. As for the other works of art from this category, some may have been part of Goudstikker's trading stock at one time or another, but not during the period that is relevant to this application.

As these 40 art objects cannot be regarded as Goudstikker's former property, the Committee concludes that there are no grounds whatsoever for granting the restitution application in respect of these paintings. The considerations provided below do not pertain to these works of art, which are specified in List II appended to this recommendation.

*II. Involuntary Loss of Possession during the War*

5. The foremost question the Committee feels it must address is whether Goudstikker's loss of possession should be regarded as involuntary. The Committee deems the following events relevant to answering this question.

When the war broke out on 14 May 1940, Jacques Goudstikker, principal shareholder and sole managing

director of Goudstikker, managed to flee the Netherlands by boat with his wife Désirée Goudstikker-von Halban and son Eduard. During the journey, Jacques Goudstikker lost his life in an accident; Désirée and Eduard ultimately reached the United States. The gallery, with a trading stock of 1,113 (inventoried) works of art, was left behind without management, as Jacques Goudstikker's authorised agent also died suddenly in early May 1940. Two of Goudstikker's employees, A.A. ten Broek and J. Dik, Sr., took on the management of the gallery, and Ten Broek was subsequently named company director during an extraordinary general meeting of shareholders held on 4 June 1940. Almost immediately after the capitulation of the Netherlands, Alois Miedl, a German banker and businessman living in the Netherlands, joined the art business and took over the actual management.

In a contract dated 1 July 1940, Miedl purchased all of Goudstikker's assets, including the trading name of the gallery. This contract was then amended shortly thereafter in connection with the concurrent interest of General Field Marshal Hermann Göring in the gallery. On 13 July 1940, two purchase agreements were subsequently concluded between Goudstikker, represented by Ten Broek, and Miedl and Göring, respectively:

– Under the agreement with Miedl, Miedl acquired from Goudstikker, for an amount of NLG 550,000, the co-ownership of the metapaintings, the right to the trade name 'J. Goudstikker' and the immovable property, Le. Nijenrode castle in Breukelen, the building in which the gallery was located on the Herengracht in Amsterdam, and 'Oostermeer', the country house in Ouderkerk aan de Amstel;

– Under the agreement with Göring, Göring acquired, for an amount of NLG 2,000,000, the rights to all art objects that belonged to Goudstikker on 26 June 1940 and that were located in the Netherlands. Göring acquired a right of first refusal to the meta-paintings which right was exercised, resulting in Göring's acquisition of several meta-paintings.

Although both agreements stipulated that *'as accurate a list as possible would be drawn up as soon as possible',* no such list was ever compiled. For their part in arranging the sale, the gallery's personnel received from Miedl a combined sum of NLG 400,000. In addition, at the time the agreement was concluded, Mrs Goudstikker-Sellisberger, Jacques Goudstikker's mother who had stayed behind in Amsterdam, was said to have been granted the protection of Miedl or Göring.

Désirée Goudstikker – heir of Jacques Goudstikker and representing 334 of the 600 shares partly on behalf of her underage son – refused to grant permission for the sale as requested of her by Ten Brock.

On 14 September 1940, Alois Miedl founded 'Kunsthandel voorheen J. Goudstikker NV' [Gallery formerly known as J. Goudstikker NV] (referred to below as: 'Miedl NV'), The decision to wind up Goudstikker was made on 2 October 1940, and the company was thus wound up. This winding-up was reversed with retroactive effect on 26 February 1947. Of the purchase price of NLG 2,550,000 involved in the sale to Miedl and Göring, an amount of NLG 1,363,752.33 (also see Part VII) was left for Goudstikker after the war.

6. The Committee feels that the loss of possession as described above can be considered involuntary under the current restitution policy.

This conclusion is legitimised by the mere circumstance that Jacques Goudstikker's widow refused permission for the transactions and that there is doubt about the authority of those who sold the works of art on behalf of Goudstikker. The Committee also takes into consideration that the possible legal validity of the transactions resulting in loss of possession could only have occurred because of the appointment as director of the gallery of an employee who was sympathetic towards the German buyers (Ten Broek), and that this appointment occurred during an extraordinary general meeting of shareholders on 4 June 1940 that was convened in a manner that rendered decision-making invalid.

Contributing to this opinion is also the fact that both buyers purchased works of art on a large scale immediately after the capitulation of the Netherlands, a situation in which Göring could – and undoubtedly did – use the influence of his high rank in the Nazi hierarchy. In respect of Miedl, it cannot be ruled out and so it must be assumed (see the general consideration under c) that sales to him, as a friend of Göring's, were involuntary. It is true that Miedl helped Jewish families during World War II and he himself was married to a Jewish woman, but he also had clear Nazi sympathies. He profited from the war by deriving sizable profits from trade with Germans, working particularly to amass the art collections of Göring and Hitler. It is known that even in an early phase of the occupation, Miedl pressured Jewish art owners in an attempt to sway them to sell to Göring via him.

In the years shortly after the war, the Council for the Restoration of Rights also established that the transaction, in which Miedl purchased the Goudstikker gallery should be labelled as involuntary, as evident from the considerations dedicated to the matter by the Council for the Restoration of Rights, judicial division, Chamber of Amsterdam on 21 April 1949, in which involuntariness was determined even '*if the sale were to have occurred at a normal purchase price*'.

The Committee would also like to mention, perhaps superfluously, the recommendations of the Ekkart Committee made in January 2003 in respect of the gallery, to the effect that: *'in any case, threats of reprisal and promises of the provision of passports or safe-conducts as a component of the transaction should be considered among the indications of involuntary sale'*.

The Committee's judgement in respect of art objects obtained during the war by others besides Göring or Miedl will be addressed in section 15 below.

*III. Previous Applications for Restitution*

7. The next question the Committee feels it must answer is whether the application to return the works of art should be regarded as a matter that has been conclusively settled based on a previous settlement. The result of this would be that the current application would no longer qualify as admissible. In its memorandum of 14 July 2000, the government formulated its position regarding restitution and recovery of items of cultural value, stating that an application can only be taken into consideration if:

– *it is* a *new application*, *i.e. not an application that was already settled by a decision of a*

*competent judicial body for the restoration of rights or by amicable restoration of rights –*

– *it is an application already settled as part of a restoration of rights in respect of which new, relevant facts have subsequently become available.*

The Ekkart Committee proposed the following additions to this in its recommendations to the government in 2001:

– *The Committee advises restricting the concept of 'settled cases' to those cases in which the Council for the Restoration of Rights or another competent court has handed down a verdict or in which a formal settlement between entitled parties and the agencies that supersede the SNK [Netherlands Art Property Foundation] has been reached;*

– *The Committee advises interpreting the concept of new facts more broadly than has been customary in policy thus far and to also include deviations in respect of the rulings handed down by the Council for the Restoration of Rights as well as the results of changed (historical) insight in respect of the justice and consequence of the policy pursued at the time.*

On 29 June 2001, the government also refined the concept of a 'settled case' as follows:

*The government is consequently willing to follow the Committee in its recommendation but feels that the concept of an official settlement' can lead to uncertainly. In the government's opinion, a case will be considered settled if the claim for restitution has intentionally and deliberately resulted in a*

*settlement or the claimant has explicitly withdrawn the claim for restitution*

Pursuant to the recommendations of the Ekkart Committee of 28 January 2003 regarding the art trade and a written clarification thereof by its chairman Prof. R.E.O. Ekkart, the cited recommendations apply integrally to this application.

8. In respect of the art objects delivered to Miedl in 1940, it is important to note here that a settlement agreement was signed by Goudstikker on 1 August 1952, and in respect of the works of art delivered to Göring in 1940, a ruling was handed down by the Court of Appeals of The Hague on 16 December 1999.

Settlement Agreement of 1 August 1952

After World War II, Goudstikker sought restoration of rights in respect of the so-called 'Miedl transaction'. For years starting in 1947, Désirée Goudstikker negotiated the matter with the administrators who were appointed on behalf of the Netherlands Property Administration institute. (NBI) for Miedl's assets and the gallery Miedl NV he had founded. The NBI represented the Dutch state in these negotiations. The negotiations on the restoration of rights ultimately, on 1 August 1952, resulted in a settlement agreement in respect of the works of art. This firstly arranged for the (re-)purchase by Goudstikker of more than three hundred art objects from the assets of Miedl that had been put under administration, as well as the termination of the pending lawsuit Goudstikker had brought before the Judicial Division of the Council for the Restoration of Rights. In this agreement. Goudstikker also waived the ownership rights to the other art objects delivered to Miedl NV during the war:

*(Art. 1.4)In respect of the Party of the one part [in summary: the State], the Party of the other part [i.e. Goudstikker] waives all rights it could invoke towards anyone whomsoever in respect of paintings and art objects and shares in paintings and art objects that were delivered by GOUDSTIKKER NV to MIEDL NV between May of nineteen hundred and forty and May of nineteen hundred and forty-five, regardless of whether these have since been recovered from foreign countries or are located in foreign countries, as well as proceeds that in the event of sale have been or will be in lieu thereof*

Unlike in a previous draft of the settlement agreement, in the final agreement. Goudstikker did not waive rights to the items that were delivered to Göring during the war.

Application for Restitution to the State Secretary and Ruling by the Court of The Hague of 16 December 1999

On 9 January 1998, Von Saher-Langenbein requested that the State Secretary return the 'Goudstikker collection'. The State Secretary rejected this application, ruling that in his view, even according to current standards, the restoration of rights had been carefully settled after the war, and that he saw no reason to reconsider the matter. The Applicant and Von Saher-Langenbein subsequently appealed this decision before the Court of Appeals of The Hague, at which time they also submitted an application for the restoration of rights for the 'Göring transaction' on the basis of post-war legislation on the restoration of rights (Decree on Restoration of Legal Transactions, E 100 from 1944). The court found this application inadmissible, given that the period from the post-war arrangement had expired on 1 July 1951 and the

application was thus submitted too late. In addition, the court also examined whether there was a 'compelling reason' to officially grant restoration of rights, giving consideration to the following:

*The court first of all takes into consideration that nearly 50 years have passed since the time when the last applications for restoration of rights could be submitted.*

*Also of significance is the following.*

*It is evident from the documents that the Company intentionally and deliberately decided against seeking restoration of rights in respect of the Göring transaction at the time. The court cites the Memorandum from M. Meyer, Master of Law., of 10 November 1949, as well as the report by A.E.D von Saher, Master of Laws of April 1952 (…)*

*Goudstikker now avers that the Company decided against requesting restoration of rights in respect of the Göring transaction under the sway of the position of the State (or its bodies), purporting that the Göring transaction occurred voluntarily, and because Désirée Goudstikker-Halban was misled by the then director of the SNK, Dr A.B. de Vries with respect to the value of the paintings that comprised part of this transaction.*

*In the court's opinion, regardless of any position the SNK, the NBI or other State bodies may have taken in the matter at any time after the war, the Company was free to submit an application for restoration of rights to the Council. The Company had expert legal advisors who could have argued the involuntariness of the Göring transaction during proceedings before the Council, yet this was not done for the Company's own reasons.*

*Goudstikker's assertion that De Vries misled Désirée Goudstikker-Halban with respect to the value of the paintings does not carry sufficient weight. If this were the case – which the State refutes – then, the court feels, it should have been up to the Company or its advisors Meyer and Lemberger, since the SNK was (in a certain sense) its counterparty, to have one or more independent experts make (counter) assessments of the value of the paintings.*

*IV. Judgment of the Committee regarding the Works of Art delivered to Miedl and Göring, respectively*

Works of Art delivered to Miedl

9. As for the validity of the settlement, the Committee's first consideration is that it has not been convinced by legal arguments that the agreement should not be deemed valid. The Applicant's authorised representatives have claimed that the settlement is null and void because it came about under coercion and deception. It is certain, as documented in the settlement itself, that Jacques Goudstikker's widow was very disappointed with the content of the agreement that was reached after many years. The circumstance that she signed the settlement despite this disappointment indicates that she opted for the lesser of (what she considered to be) two evils. In legal terms, this cannot be termed coercion, and no compelling arguments to support the accusation of deception have been submitted nor found by the Committee. The Committee will not address the issue that the legal nullity or voidableness of the settlement was not invoked on time. In the Committee's opinion, the settlement is thus legally valid.

10. The Committee also answers the question of whether, as a result of the validity of the settlement, this category of works of art can be regarded as a conclusively settled case in the affirmative.

In the Committee's view, a valid settlement is distinct from a valid legal ruling in that the former contains an individual statement by the parties who had previously been in disagreement but who have now met in the middle by reaching a settlement, whereas the legal ruling creates a situation imposed from above with which the losing party will generally disagree and remain in disagreement.

In this case, in the settlement, Goudstikker waived ownership rights to the benefit of the Dutch State and opted to put an end to the lawsuit brought before the Council for the Restoration of Rights. The Committee, citing the general considerations under *e*, is of the opinion that *waiving ownership rights*, as Goudstikker has done, unlike *deciding against submitting an application for the restoration of rights*, is of such a definitive nature, that, despite the broad concept of new facts, it cannot be applied here.

In conclusion, the Committee has arrived at the judgement that, even by present-day standards, by signing the settlement agreement in 1952, Goudstikker unconditionally waived the ownership rights to the art objects delivered to Miedl, on the basis of which the Committee cannot advise the State Secretary to return these art objects.

11. The Committee has considered what is known as the Elte Report as definitive when it comes to categorising the individual art objects covered by the settlement. This is an accountant's report written by J. Elte for Miedl NV in 1942, shedding light on the

performance of the July 1940 agreements between Goudstikker and Miedl and Göring, respectively. In the Committee's view and according to the Elte list, among the category of works of art covered by the settlement are also some paintings that Göring purchased under contract but that were actually delivered to Miedl.

The Committee is consequently of the opinion that the works of art stated in LIST III under A are covered by the settlement, whereas the works of art that ware delivered to Göring stated on LIST III under B, are *not* covered by the settlement.

Works of art delivered to Göring

12. It has been established that Goudstikker involuntarily lost the other art objects in LIST III under B and that they were not covered by the settlement. Given those circumstances, these works of art should be returned to the Applicant, unless the case should be deemed to have already been conclusively settled. The government policy which the Committee is bound to observe stipulates that the restoration of rights must not be reiterated.

In its first recommendation to the government, the Ekkart Committee advises restricting the concept of a 'settled case' to those cases in which the Council for the Restoration of Rights or another competent court has handed down a ruling or in which a formal settlement between entitled parties and agencies that supersede the Netherlands Art Property Foundation [SNK] has been reached. The government evidently agreed with this recommendation, according to a government statement of 29 June 2001, on the understanding that they refined the concept as follows: *'A case will be considered settled if the claim for*

*restitution has resulted intentionally and deliberately in a settlement or the claimant has explicitly withdrawn the claim for restitution.'* With this addition, the government has apparently sought continuity with the wording of the court's ruling (as the legal successor of the Council for the Restoration of Rights) of 16 December 1999, in which the court decided that there were no substantial reasons to officially grant restoration of rights to applicants, because at the time, applicants had intentionally and deliberately decided against requesting the restoration of rights in respect of the Göring transaction.

Although the Committee cannot ignore this determination by the court, that does not automatically mean that by deciding against asking for the restoration of rights, the Applicant's actual *rights* to the Göring collection have been surrendered. Goudstikker could have had various reasons at the time for deciding against seeking restoration of rights that in no way suggest the surrender of ownership rights to the Göring collection. One example that can be cited is that the authorities responsible for restoration of rights or their agents wrongfully created the impression that Goudstikker's loss of possession of the trading stock did not occur involuntarily. As another indication that Goudstikker did not want to surrender the rights to the Göring collection in 1952, the Committee would like to point out the deliberate omission of this category of works of art from the final revision of Article 1.4 of the aforementioned settlement.

Added to that is the fact that in 1999, the court could not take into consideration the expanded restitution policy the government formulated after that, which renders the Committee able and imposes an obligation

on the Committee to issue a recommendation is based more on policy than strict legality. This expanded policy and the resulting expanded framework for assessment, representing generally accepted new insights, causes the Committee to decide that the Applicant's current application is still admissible, despite the court's precious handling of the application.

13. Based on the above and given the involuntary nature of the loss of possession, the Committee concludes that the application for restitution of the works of art delivered to Göring in 1940 as specified in appendix III-B, which are not covered by the waiver of rights in the settlement agreement of 1 August 1952, should be granted.

The Committee's opinion in respect of the meta-paintings that were delivered to Göring follows below under 14.

The meta-paintings

14. Of the 21 meta-paintings – the paintings Goudstikker co-owned with others – specified in List IV appended to the recommendation, the thirteen paintings listed under B on that list belong to the 'Göring collection'. The remaining eight meth-paintings, under A of this list, belong to the works of art delivered to Miedl.

Goudstikker involuntarily lost possession of these thirteen meta-paintings, as was the case with the other works of art that Göring obtained, and the rights to these paintings were not waived either. The only reason that might stand in the way of restitution is thus the co-ownership of those paintings by third parties, largely art dealers. Evidently, those third parties did not have any objection whatsoever at the

time to leaving these paintings – which were, after all, intended for sale – in Goudstikker's physical possession. The Committee sees no reason why it should now rule any differently. The object of such an arrangement is to obtain the highest possible sale price, and apparently the co-owners had great confidence in that respect in the skills and renown of Goudstikker, who, incidentally, was not allowed to sell these paintings below the purchase price without the co-owners' consent and who would not be allowed to do so after their restitution either.

As it is the Committee's job to provide advice in such a way that, if the State Secretary accepts the advice, a situation is achieved that as closely as possible approximates the former situation of 10 May 1940, it recommends returning the paintings listed in LIST IV under B as meta-paintings to the Applicant, who should, if possible, notify the co-owners after the restitution is effected.

*V. Other Art Objects*

The 'Ostermann Paintings'

15. The twelve paintings designated in the first application and the Committee's Report as the 'Ostermann paintings' (numbers 1 to 12 on LIST V appended to this recommendation) comprised part of Goudstikker's trading stock at the time that Jacques Goudstikker was forced to leave his gallery behind in May 1940. In all likelihood, they were sold with the assistance of Goudstikker's staff to the German W. Lüpps in May 1940, before Miedl took over the gallery. E.J. Ostermann, a German who became a naturalised Dutch citizen in 1919, acted as the agent, receiving a sum of NLG 20,000 from Miedl. It is very likely that Goudstikker never received the purchase price of NLG

400,000. The circumstances of the loss of possession are otherwise the same as outlined above under 5 and 6.

Given these circumstances, it can be assumed that Goudstikker's loss of possession of these paintings was involuntary as a result of circumstances directly related to the Nazi regime. As the paintings do not fall under the ambit of the settlement of 1 August 1952 nor were the subject of any other application for the restoration of rights, the Committee's recommendation shall consequently be that these paintings should be returned to the Applicant. This is only partially possible, however, as will become evident below under consideration 17.

*VI. Consequences of Restitution*

Consideration in exchange for restitution

16. Another question that must be addressed is whether, in exchange for the restitution of a portion of the art objects to the Applicant, as considered above, there should be a repayment of the consideration received at the time for the sale.

At the recommendation of the Ekkart Committee, government policy states in this respect that restitution of the proceeds of sale should only be raised in the case if and in so far as the former seller or his heirs did actually receive the free disposal of those proceeds. In cases of doubt, the Applicant shall be given the benefit of the doubt.

As far as possible, the Committee has attempted to gain an impression of the amounts involved in the loss of possession of the works of art by Goudstikker. Stating the caveat that the Committee had information to go on that was collected during and after the

war, information that does not always match up, an overview is provided below.

After the war, an amount of NLG 1,363,752.33 remained for Goudstikker from the amount of NLG 2,500,000 that was paid by Miedl and Göring for the sale of the gallery, as a result primarily of costs involved in sales transactions and disbursements of amounts connected with Goudstikker's winding up. In exchange for repossession of the immovable property and more than three hundred art objects as part of the amicable restoration of rights after the war, Goudstikker then had to pay the authorities responsible for restoration of rights a sum of NLG 483,389.47. Accordingly, the amount of sales proceeds that was at the free disposal of Goudstikker can be set at NLG 880,362.86.

On the other hand, besides losing the trading stock of 1,113 inventoried works of art, Goudstikker was confronted with other sizeable losses. The loss of the gallery's goodwill and the loss of a large number of non-inventoried works of art and other goods can be designated as the largest, unsettled loss items. The second spouse of the widow Goudstikker, A.E.D. von Saher, Master of Laws, has estimated the value of just the non-inventoried works of art alone at between NLG 610,000 and NLG 810,000.

The Committee has determined that, after so many years, it is not possible to gain an accurate idea of Goudstikker's financial consequences of losing the gallery. In view of the following facts:

(a) that Goudstikker suffered heavy losses during and because of the war and occupation of such a nature that a significant, if not the most

significant, gallery of the Netherlands ceased to exist after the war;

(b) that at least 63 paintings from Goudstikker's trading stock were sold by the Dutch State in the fifties and that the proceeds from that sale were channelled into state coffers and, in any case, were not allocated to Goudstikker;

(c) that the Dutch State has enjoyed a right of usufruct to the paintings for a period of nearly six decades without paying any consideration in exchange;

(d) and that, as proposed below under 17 of this recommendation, no compensation will be paid for the four paintings that have gone missing;

the Committee recommends that restitution should not involve any financial obligation on the part of the Applicant.

Missing and Stolen Works of Art

17. Two of the paintings belonging to the Göring transaction (NK 1437 and NK 1545) have been reported missing, while two paintings that are part of the Ostermann category (NK 1887 and NK 1889, numbers 9 and 10 on LIST V) are registered as stolen.

It must be established in respect of these four paintings that they cannot be returned (at this time), although they do qualify for restitution according to the Committee's opinion as set out above, Consequently, the Committee does not consider it unreasonable for the Applicant to be indemnified for them. However, now that it has been established that Goudstikker did receive the amounts from the transaction with Göring, whereas the recommendation

under 16 is not to require the obligation for any (re)payment in exchange for the restitution of numerous art objects, the Committee feels that that compensation need not occur. If one or more of these paintings should return to the custodianship of the State of the Netherlands, this must result, the Committee feels, in the restitution thereof to the Applicant.

Public Interest

18. In conclusion of this recommendation, the Committee has asked itself whether there are weighty considerations, besides those mentioned above, that could impact the recommendation to return the art. In this framework, the question has been raised of whether there could be a public interest that should be weighed as part of this recommendation. After all, the restitution concerns a large number of works, including some that are very significant in terms of art history, some of which have already been on display in the permanent exhibitions of Dutch museums for years.

Pursuant to the criteria of the Cultural Heritage Protection Act (referred to below as 'the WBC'), if a work of art has such significance in terms of cultural history or science that it should be kept for the Netherlands, there can be a case of a public interest to keep a collection or individual objects permanently for the cultural assets of the Netherlands, Article 2 of the WBC states that this concerns works of art that are irreplaceable and indispensable: irreplaceable, if no equivalent or similar objects in good condition are present in the Netherlands, and indispensable, if they have symbolic value for Dutch history, play a linking role in the exercise of research in a broad sense and/or represent comparative value in that they make a

substantial contribution to the research or knowledge of other important objects of art and science.

The Committee considers that, in establishing a public interest, it matters whether this determination was applicable to the situation immediately prior to the loss of possession, or whether the understanding of the irreplaceability and indispensability arose in the period after recovery, while the works were under the custodianship of the Dutch state. In that respect, it can be observed that in 1940 there was as yet no protection of Dutch cultural assets, as the WBC aims to do. The Committee also feels that any post-war shift in the appreciation of the works of art cannot and should not have any influence on the recommendation to restore the art to the Applicant.

Regardless of the application of the WBC after effectuation of the restitution of the art, the Committee concludes that, in this case, no public interest is deemed present that could impede restitution to the Applicant.

**Conclusion**

The Committee advises the State Secretary:

1. to reject the application to return the works of art specified under consideration 4, in respect of which it has been established that Goudstikker cannot be designated as the original owner (List II);
2. to reject the application to return the paintings that were delivered to Miedl during the war and that are subject to the provisions of Article 1.4 of the settlement agreement of 1 August 1952 (List III-A);
3. to grant the application in respect of the works of art that are part of the Göring transaction (List III-

B), with the exception of NK 1437 and NK 1545 that have gone missing, while the meta-paintings included there are to be returned in their capacity as meta-paintings (and in List IV-B);

4. to grant the application in respect of the works of art belonging to the 'Ostermann paintings', with the exception of NK 1886 and NK 1887 which have been stolen (List V).

Adopted in the meeting of 19 December 2005.

B.J. Asscher (chair)

J.Th.M. Bank

J.C.M Leijten

P.J.N. van Os

E.J. van Straaten

H.M. Verrijn Stuart

I.C. van der Vlies

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ONDERZOEKSINSTITUUR NET SCHAP

Oostwaard
T.a.v. R.O.N. van Holthe tot Echten
Postbus 3
3633 ZT Vreeland

Den Haag: 06 FEB. 2006
Ons kenmerk: DCE/06/5645
Uw brieven van: 26-04-04 en 31-07-05

Onderwerp
Teruggaveverzoek collectie Goudstikker

Geachte heer Van Holthe tot Echten,

Bij brieven van 26 april 2004 en 31 juli 2005 heeft u namens uw cliënt de Amsterdamse Negotie Compagnie N.V. in liquidatie verzocht om teruggave van de kunstwerken die het Rijk in zijn bezit heeft en die deel uitmaakten van de handelsvoorraad van Kunsthandel J. Goudstikker NV, zoals die bestond op 10 mei 1940. Dit betreft een verzoek tot teruggave van in totaal 267 kunstvoorwerpen.

U bent door mij per brieven van 10 juni 2004 en 20 september 2005 op de hoogte gesteld van het feit dat ik de Restitutiecommissie heb verzocht mij te adviseren betreffende uw verzoek. In haar vergadering van 19 december 2005 heeft de commissie haar advies met betrekking tot uw verzoek vastgesteld (Bijlage I). Dat advies heeft mij op 2 januari 2006 bereikt. Hierbij treft u een afschrift van het door de leden getekende advies aan.

**Advies Restitutiecommissie**
De Commissie is van mening dat in onderhavig geval geen sprake is van afgehandeld rechtsherstel en heeft mij ten aanzien van de teruggave als volgt geadviseerd:
- af te wijzen het verzoek tot teruggave van 40 van de 267 kunstwerken waarvan vast staat of waarschijnlijk is dat deze op 10 mei 1940 niet in eigendom toebehoorden aan Goudstikker. Nu deze werken op 10 mei 1940 niet in eigendom aan Goudstikker toebehoorden ontbreekt enige grondslag voor toewijzing van het restitutieverzoek;
- af te wijzen het verzoek tot teruggave van de schilderijen die tijdens de oorlog aan Miedl zijn geleverd en onder de bepaling van artikel 1.4 van de overeenkomst van dading van 1 augustus 1952 vallen;
- toe te wijzen het verzoek ten aanzien van de kunstwerken die behoren tot de Göring-transactie, met uitzondering van NK 1437 en NK 1545 die worden vermist, terwijl de hierin opgenomen metaschilderijen worden teruggegeven in hun hoedanigheid van metaschilderijen;
- toe te wijzen het verzoek ten aanzien van de kunstwerken die behoren tot de Ostermann-schilderijen, met uitzondering van NK 1886 en NK 1887 die zijn gestolen.

In de bijzondere overwegingen die de Restitutiecommissie hebben geleid tot bovenstaand advies strekken enkele passages tot nadere precisering. Zo geeft de commissie in haar overwegingen aan onder metaschilderijen te verstaan de schilderijen die Goudstikker in mede-eigendom had met anderen.

MVS0044010

Het advies van de commissie tot toewijzing van het verzoek tot teruggave van de metaschilderijen die behoren tot de Göring-transactie strekt ertoe deze werken in hun hoedanigheid van metaschilderij terug te geven. Daarbij ligt het op de weg van verzoekster zo mogelijk na gerealiseerde teruggave, de mede-eigenaren daarvan op de hoogte te stellen.

Aan de consequenties van de teruggave van een deel van de kunstwerken wijdt de commissie eveneens enkele overwegingen. De Restitutiecommissie adviseert met betrekking tot de destijds bij de verkoop ontvangen tegenprestatie niet de verplichting tot enige terugbetaling te stellen maar die te verevenen met de eventuele financiële aansprakan van verzoekers op de Staat. De commissie voert vier argumenten aan voor een verevening:
-een aantal schilderijen is in het ongerede geraakt en daarvan stelt de commissie het in principe niet onredelijk te vinden als verzoekster daarvoor schadeloos zou worden gesteld;
-Goudstikker heeft in en door de oorlog en bezetting zware verliezen geleden;
-tenminste 63 schilderijen uit de handelsvoorraad van Goudstikker zijn in de jaren vijftig door de Nederlandse Staat geveild;
-de Nederlandse Staat heeft gedurende bijna zes decennia het gebruiksrecht van de schilderijen uitgeoefend zonder tegenprestatie te leveren.

Van een mogelijk publiek belang dat in de weg zou kunnen staan aan de daadwerkelijke teruggave van kunstwerken acht de Restitutiecommissie geen sprake. De commissie geeft daarnaast aan daarmee geen uitspraak te willen doen over een eventuele toepassing van de Wet tot behoud van Cultuurbezit na gerealiseerde teruggave.

**Conclusie**
Zoals hierboven aangegeven spreekt de Restitutiecommissie zich in haar advies zowel uit over de te restitueren kunstwerken als over de afwikkeling van de feitelijke teruggave, door de commissie 'consequenties van teruggave' genoemd.

Verzoek tot teruggave
Anders dan de Restitutiecommissie ben ik van mening dat er in het onderhavige geval sprake is van afgehandeld rechtsherstel. Het Gerechtshof Den Haag heeft in 1999 als rechtsherstelrechter definitief in deze zaak beslist. Daarom valt de zaak op deze grond buiten de kaders van het geldende restitutiebeleid.

Ik acht niettemin in dit bijzondere geval gronden aanwezig om overeenkomstig het advies van de commissie tot teruggave over te gaan. Daarbij let ik vooral op de feiten en omstandigheden rond het onvrijwillig bezitsverlies en op de afwikkeling van deze zaak begin jaren vijftig zoals de commissie die naar voren heeft gebracht in haar omvangrijke onderzoek.

Van 40 van de kunstwerken waarop het teruggave verzoek betrekking heeft concludeert de commissie dat vast staat of waarschijnlijk is dat deze op 10 mei 1940 niet in eigendom toebehoorden aan Goudstikker. Om die reden adviseert de Restitutiecommissie tot afwijzing van het verzoek tot teruggave. Ik volg dit advies.

Ten aanzien van de zogenaamde Miedl-transactie adviseert de commissie eveneens het verzoek tot teruggave af te wijzen omdat naar het oordeel van de commissie "Goudstikker met de ondertekening van de akte van dading van 1952 ook naar de huidige maatstaven onvoorwaardelijk afstand heeft gedaan van de eigendomsrechten van de aan Miedl geleverde kunstwerken". Ik neem dit advies over.

Inzake de zogenaamde Göring-transactie komt de Restitutiecommissie tot de conclusie dat hier sprake is geweest van onvrijwillig bezitsverlies van Goudstikker terwijl geen afstand van recht is gedaan nu deze transactie niet onder de dading van 1952 valt. Het advies van de commissie ten aanzien van deze kunstwerken is dan ook het verzoek tot teruggave toe te wijzen. Dit advies neem ik over.

MVS0044011

Van de in het verzoek tot teruggave als Ostermann-schilderijen omschreven kunstwerken concludeert de commissie eveneens dat Goudstikker daarvan het bezit onvrijwillig heeft verloren. Deze kunstwerken hebben evenmin onderdeel uitgemaakt van de deling van 1952 en zijn ook niet op enige andere wijze onderwerp geweest van rechtsherstel. Voor deze werken adviseert de commissie tot teruggave over te gaan. Ik neem dit advies over.
Indien één of meer van de vermiste werken terugkeren in het beheer van de Staat zal ik tot teruggave van die werken overgaan.

Voor de individuele NK-nummers van de werken verwijs ik graag naar het advies van de commissie.

Consequenties van teruggave
Voor wat de feitelijke afwikkeling betreft ben ik bereid de lijn van de commissie te volgen.

De commissie stelt voor de verplichting tot terugbetaling van de destijds bij de verkoop door Goudstikker ontvangen tegenprestatie waarover Goudstikker de vrije beschikking heeft genoten, weg te laten vallen tegenover financiële aanspraken van verzoekers op de Staat.
Ik kan mij vinden in een dergelijke aanpak zij het dat ik niet alle argumenten die de commissie daarvoor aanvoert, onderschrijf. Ik licht dat graag hieronder toe en loop daarbij de vier door de Restitutiecommissie gebezigde argumenten langs.

De commissie acht het "in principe niet onredelijk" geen financiële verplichting aan de teruggave te verbinden onder gelijktijdig afzien van de betaling van schadeloosstelling aan verzoekster door de Staat voor de vermiste werken. Deze redenering onderschrijf ik en dit argument neem ik dan ook over.

Ik constateer echter dat de overige drie argumenten die de Restitutiecommissie aanvoert om tot verevening te komen in strijd zijn met het huidige restitutiebeleid. Dat beleid is gebaseerd op de aanbevelingen van een onafhankelijke commissie, de Commissie Ekkart, en is na afweging van alle belangen door de regering vastgesteld. In de argumenten van de Restitutiecommissie vind ik geen aanleiding van dit zorgvuldig tot stand gekomen beleid af te wijken.

De financiële verliezen van kunsthandel Goudstikker ten gevolge van de oorlog kunnen op grond van het huidige beleid de Nederlandse Staat niet worden aangerekend. In een brief met het regeringsstandpunt Tegoeden Tweede Wereldoorlog van 21 maart 2000 wordt geen algemene verantwoordelijkheid aanvaard voor schade door de Duitse bezetter aangebracht. De regering zegt in zijn brief wel met het ter beschikking stellen van een bedrag finaal recht te willen doen aan de kritiek op de bejegening van de betrokken vervolgingsslachtoffers in het rechtsherstel. Afwenteling van de zware verliezen van Goudstikker in en door de oorlog en bezetting op de Staat valt met dit beleid niet te rijmen.

Ten aanzien van de veilingen die in de jaren vijftig hebben plaatsgevonden heeft de Commissie Ekkart in haar slotaanbevelingen geadviseerd te komen tot een *algemene* regeling die behelst dat een geïndexeerd percentage van de opbrengsten van die veilingen beschikbaar wordt gesteld aan een joods cultureel doel. Volgens de Commissie Ekkart wordt zo de schijn van verrijking van de Staat voorkomen, al is een nauwkeurige vaststelling welke kunstwerken het betrof niet meer te geven. Deze aanbeveling is overgenomen door de regering. Nu sprake is van een algemene regeling voor de in het begin van de jaren vijftig geveilde werken, ligt het niet voor de hand de Staat in dit individuele geval wederom op mogelijke verrijking aan te spreken.

Van een geldelijke vergoeding voor het gebruik door de Nederlandse Staat van de Goudstikker kunstwerken is binnen het huidige beleid geen sprake. Immers tegenover het mogelijke gebruiksgenot dat de Staat van deze werken heeft genoten staan de kosten van onderhoud, bewaring en in veel gevallen de aanzienlijke kosten van restauratie die de Staat voor zijn rekening heeft genomen.

ONDERWIJS CULTUUR EN WETENSCHAP

in eerdere gevallen waarbij teruggave heeft plaatsgevonden is van een dergelijke vergoeding ook geen sprake geweest.

**Tot slot**
Ten aanzien van de (gerechtelijke) procedures die ten tijde van het indienen van onderhavige verzoeken tot teruggave aanhangig waren is door u indertijd in overleg met de landsadvocaat besloten deze aan te houden in afwachting van het advies van de Restitutiecommissie en mijn besluit terzake. Gezien de inhoud van mijn besluit ga ik ervan uit dat het belang aan voort procederen is komen te vervallen. Ik zal de landsadvocaat opdracht geven met u contact op te nemen over een afsluitende overeenkomst over onderhavig verzoek tot teruggave.

Ik zal de beheerder van de NK-collectie, het Instituut Collectie Nederland (ICN), opdracht gegeven in overleg met u te komen tot uitvoering van de feitelijke restitutie. Het ICN verwacht dat de feitelijke overdracht van de werken ongeveer een jaar zal duren.

De Restitutiecommissie wijst in haar advies ook nog op een mogelijk publiek belang dat in het geding zou kunnen zijn bij teruggave. Met de commissie ben ik van mening dat er geen publiek belang is dat in casu aan de teruggave in de weg staat. Dit laat onverlet dat ik mij bewust ben van het cultuurhistorische belang van de kunstwerken en hun mogelijke onvervangbaarheid voor het Nederlands cultuurbezit. Ik treed graag met u in gesprek over de mogelijkheden die er zijn om bepaalde kunstwerken voor het Nederlandse publiek toegankelijk te houden.

De staatssecretaris van Onderwijs, Cultuur en Wetenschap,

mr. Medy C. van der Laan

MVS0044013

Sworn translation from Dutch to English of "Letter re. Application for restitution of Goudstikker collection" sent by the Dutch Minister for Education Culture and Science to Mr Van Holthe tot Echten, dated 06 February 2006

Leiden, 09 August 2007

Translator's declaration

I hereby certify that I am competent to translate from Dutch into English and that the attached translation is a full, complete and accurate translation into English of the Dutch original, also attached.

[SEAL] A.J.B BURROUGH Sworn Translator English

Alex Burrough
Sworn Translator before the District Court of The Hague (The Netherlands)
Hogewoerd 94
2311 HS Leiden
The Netherlands

Attached:

1) "Letter re. Application for restitution of Goudstikker collection" sent by the Dutch Minister for Education Culture and Science to Mr Van Holthe tot Echten, dated 06 February 2006" (English translation, 4 pages)
2) Dutch original of said letter (4 pages)

[Logo of Netherlands Ministry for Education, Culture and Science]

Oostwaard
attn. R.O.N, van Hoithe tot Echten
P.O. Box 3
3633 ZT Vreeland

The Hague
06 Feb 2006

Our ref.
DCE/06/5645

Your letters of
26 April 2004 and 31 July 2005

Re:
Application for restitution of Goudstikker collection

Dear Mr Van Holthe tot Echten,

By letters of 26 April 2004 and 31 July 2005, acting on behalf of your client Amsterdamse Negotie Compagnie NV, you applied for the restitution of the works of art in the possession of the State of the Netherlands that were part of the trading stock of the gallery Kunsthandel J. Goudstikker NV as it existed on 10 May 1940. This application for restitution relates to 267 art objects in total.

By letters of 10 June 2004 and 20 September 2005, I informed you that I had asked the Restitutions Committee to issue a recommendation on your application. At its meeting of 19 December 2005, the committee adopted such a recommendation (Annexe I), which I received on 2 January 2006. Please find enclosed a copy of the recommendation, signed by the committee members.

**Recommendation of the Restitutions Committee**

The Restitutions Committee takes the view that the case in question has not been settled with regard to the restitution of legal rights and advises me:

- to reject the application for the return of the 40 of the 267 works which certainly or probably were not Goudstikker's property on 10 May 1940. As these works were not Goudstikker's property on 10 May 1940, there are no grounds whatsoever for granting this application for restitution.

- to reject the application for the return of the paintings that were delivered to Miedl during the war and that are subject to the provisions of Article 1.4 of the settlement agreement of 1 August 1952.

- to grant the application in respect of the works of art that were part of the Göring transaction, with the exception of NK 1437 and NK 1545, which are missing. The meta-paintings included in this group will be returned as meta-paintings.

- to grant the application in respect of the works of art that are among the Ostermann paintings, with the exception of NK 1886 and 1887, which have been stolen.

Certain passages in the special considerations that led the Restitutions Committee to make the above recommendation serve to clarify its advice. For example, in its considerations the committee explains that the term 'meta-paintings' is taken to mean paintings that Goudstikker co-owned with others.

The committee's advice to grant the application for the return of the meta-paintings that were part of the Göring transaction specifies that these works should

be returned as meta-paintings. The applicant should therefore, if possible, notify the co-owners after restitution is effected.

The committee also devotes a section of its considerations to the consequences of returning a proportion of the works of art. The Restitutions Committee advises me not to require any repayment of the consideration received at the time of the sale, but to offset it against any financial claims from the Applicant against the State. The Committee gives four reasons for this recommendation:

- A number of paintings are missing. The Restitutions Committee concludes that it would not in principle be unreasonable to indemnify the Applicant for these paintings.

- Goudstikker incurred heavy losses during and because of the war and occupation.

- At least 63 paintings from Goudstikker's trading stock were auctioned off by the State of the Netherlands in the 1950s.

- The State of the Netherlands has exercised the right to use the paintings for almost six decades for no consideration.

The Restitutions Committee deems no public interest to exist that could impede the restitution of works of art to the Applicant, while noting that this has no bearing on the applicability of the Cultural Heritage Protection Act [*Wet tot behoud van cultuurbezit]* after the restitution of the works of art.

**Conclusion**

As indicated above, the Restitutions Committee's recommendation addresses both the works of art to be returned and the handling of the return itself. It refers

to this latter topic using the phrase 'consequences of restitution'.

Application for restitution

Contrary to the view taken by the Restitutions Committee, I consider that the case in question has been settled with regard to the restitution of legal rights. The Court of Appeal of The Hague made a final decision on this case in 1999. The case therefore falls outside the scope of the policy on restitution.

Nevertheless, I consider that grounds for restitution exist in this particular case in accordance with the committee's recommendation. In so doing I am especially mindful of the facts and circumstances relating to the involuntary loss of property and the settlement of this case in the early 1950s as highlighted by the committee in its extensive investigation.

With regard to 40 of the works of art whose return has been requested, the committee concludes that it is certain or probable that they were not Goudstikker's property on 10 May 1940. It therefore recommends that the application for the return of these works be rejected. I hereby adopt this recommendation.

With regard to the 'Miedl transaction', the committee likewise recommends that the application for return be rejected, because, in its opinion, 'even by present-day standards, by signing the settlement agreement in 1952, Goudstikker unconditionally waived ownership rights to the art objects delivered to Miedl'. I hereby adopt this recommendation.

With regard to the 'Goring transaction', the Restitutions Committee concludes that Goudstikker had suffered involuntary loss of possession, since the rights to these works were never waived as they were

not covered by the 1952 settlement. Accordingly, it recommends that the application for restitution be granted. I hereby adopt this recommendation.

The committee similarly concludes that Goudstikker had involuntarily lost possession of the works of art described as 'Ostermann paintings' in the application for restitution. These works were not covered by the 1952 settlement either, and they have not been the subject of any other application for the restitution of legal rights. The Restitutions Committee advises that they be returned. I hereby adopt this recommendation.

If one or more of the missing works comes back into the hands of the State, I will have them returned.

Please see the committee's recommendation for the individual NK numbers of the works.

Consequences of restitution

As regards the handling of the return itself, I am willing to follow the line taken by the committee.

The committee recommends setting off the obligation to repay the consideration that Goudstikker received at the time of sale, of which they were able to dispose freely, against financial claims from the Applicant against the State.

This approach is acceptable to me, though I do not agree with all of the Restitutions Committee's supporting arguments. In explaining why, I will run through the four arguments presented by the Restitutions Committee.

The committee regards it as in principle not unreasonable not to attach any financial obligation to the return of the works of art at the same time as not requiring the State to pay compensation to the

Applicant for the missing works. I accept this line of reasoning and therefore adopt this argument.

I must observe, however, that the other three arguments put forward by the Restitutions Committee are at odds with current policy on restitution, which is based on the recommendations of an independent committee, the Ekkart Committee, and was adopted by the Government after careful consideration of all the interests at stake. In its arguments, the Restitutions Committee shows no reason to diverge from this carefully constructed policy.

The current policy does not allow the State of the Netherlands to be held responsible for Goudstikker's financial losses resulting from the war. In a letter of 21 March 2000 presenting the Government's position on Second World War assets, no general responsibility was accepted for damage caused by the German occupiers. In that same letter, however, the Government did express its intention to pay a sum of money as a final acknowledgement of the criticisms of the treatment of persecutees during the process of restitution of legal rights, it would be incompatible with this policy to hold the State liable for the heavy losses incurred by Goudstikker during and because of the war and occupation.

In its final recommendations, the Ekkart Committee recommended a general arrangement relating to the auctions that took place in the 1950s: an indexed percentage of the proceeds were to be donated to a good cause in the area of Jewish culture. While it is no longer possible to say precisely what works were sold at the auctions, the Ekkart Committee believed that this arrangement would prevent any appearance that the State was out to line its own coffers. This recommendation was adopted by the Government.

Given the existence of this general arrangement for the works auctioned off in the early 1950s, it makes little sense to raise the issue of financial gain for the State in this individual case.

There is no scope within the current policy to pay a monetary consideration for the use of the Goudstikker art objects by the State of the Netherlands. After all, against any benefits the State may have enjoyed in respect of these works must be set the costs of maintenance and custodianship and in many cases considerable restoration costs that have been met by the State.

No such consideration was paid in earlier cases where works were returned either.

**Conclusion**

When you submitted the application for restitution in question, you decided in consultation with the State Advocate to suspend the court proceedings that were in progress, pending the Restitutions Committee's recommendation and my decision on the matter. Given the nature of my decision, I assume that you no longer have an interest in moving forward with these proceedings. I have instructed the State Advocate to contact you with a view to reaching a conclusive agreement on the present application for restitution.

I will instruct the administrator of the NK collection, the Netherlands Institute for Cultural Heritage (ICN), to carry out the actual restitution in consultation with you. The ICN expects that the restitution of the works itself will take about a year.

In its recommendation, the Restitutions Committee also remarks that the public interest could be at stake in the decision about returning the works of art. I

agree with the Restitutions Committee's view that no public interest exists which could impede restitution to the Applicant in this case. This does not alter the fact that I am aware of the significance of the works of art involved, in terms of cultural history, and the possibility that they are irreplaceable elements of the Dutch cultural heritage. I would like to discuss with you possible ways of keeping certain works accessible to the Dutch public.

[signature]

Medy C. van der Laan
State Secretary for Education, Culture and Science

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ONDERZOEKSTUURMANSCHAP

Oostwaard
T.a.v. R.O.N. van Holthe tot Echten
Postbus 3
3633 ZT Vreeland

Den Haag: 06 FEB. 2006
Ons kenmerk: DCE/06/5645
Uw brieven van: 26-04-04 en 31-07-05

Onderwerp
Teruggaveverzoek collectie Goudstikker

A.J.B. BURROUGH Sworn Translator English

Geachte heer Van Holthe tot Echten,

Bij brieven van 26 april 2004 en 31 juli 2005 heeft u namens uw cliënt de Amsterdamse Negotie Compagnie N.V. in liquidatie verzocht om teruggave van de kunstwerken die het Rijk in zijn bezit heeft en die deel uitmaakten van de handelsvoorraad van Kunsthandel J. Goudstikker NV, zoals die bestond op 10 mei 1940. Dit betreft een verzoek tot teruggave van in totaal 267 kunstvoorwerpen.

U bent door mij per brieven van 10 juni 2004 en 20 september 2005 op de hoogte gesteld van het feit dat ik de Restitutiecommissie heb verzocht mij te adviseren betreffende uw verzoek. In haar vergadering van 19 december 2005 heeft de commissie haar advies met betrekking tot uw verzoek vastgesteld (Bijlage I). Dat advies heeft mij op 2 januari 2006 bereikt. Hierbij treft u een afschrift van het door de leden getekende advies aan.

**Advies Restitutiecommissie**
De Commissie is van mening dat in onderhavig geval geen sprake is van afgehandeld rechtsherstel en heeft mij ten aanzien van de teruggave als volgt geadviseerd:
- af te wijzen het verzoek tot teruggave van 40 van de 267 kunstwerken waarvan vast staat of waarschijnlijk is dat deze op 10 mei 1940 niet in eigendom toebehoorden aan Goudstikker. Nu deze werken op 10 mei 1940 niet in eigendom aan Goudstikker toebehoorden ontbreekt enige grondslag voor toewijzing van het restitutieverzoek;
- af te wijzen het verzoek tot teruggave van de schilderijen die tijdens de oorlog aan Miedl zijn geleverd en onder de bepaling van artikel 1.4 van de overeenkomst van dading van 1 augustus 1952 vallen;
- toe te wijzen het verzoek ten aanzien van de kunstwerken die behoren tot de Göring-transactie, met uitzondering van NK 1437 en NK 1545 die worden vermist, terwijl de hierin opgenomen metaschilderijen worden teruggegeven in hun hoedanigheid van metaschilderijen;
- toe te wijzen het verzoek ten aanzien van de kunstwerken die behoren tot de Ostermann-schilderijen, met uitzondering van NK 1886 en NK 1887 die zijn gestolen.

In de bijzondere overwegingen die de Restitutiecommissie hebben geleid tot bovenstaand advies strekken enkele passages tot nadere precisering. Zo geeft de commissie in haar overwegingen aan onder metaschilderijen te verstaan de schilderijen die Goudstikker in mede-eigendom had met anderen.

MVS0046628

ONDERSCHAP
CULTUURNEMING

Het advies van de commissie tot toewijzing van het verzoek tot teruggave van de metaschilderijen die behoren tot de Göring-transactie strekt ertoe deze werken in hun hoedanigheid van metaschilderij terug te geven. Daarbij ligt het op de weg van verzoekster zo mogelijk na gerealiseerde teruggave, de mede-eigenaren daarvan op de hoogte te stellen.

Aan de consequenties van de teruggave van een deel van de kunstwerken wijdt de commissie eveneens enkele overwegingen. De Restitutiecommissie adviseert met betrekking tot de destijds bij de verkoop ontvangen tegenprestatie niet de verplichting tot enige terugbetaling te stellen maar die te verevenen met de eventuele financiële aanspraken van verzoekers op de Staat. De commissie voert vier argumenten aan voor een verevening:
-een aantal schilderijen is in het ongerede geraakt en daarvan stelt de commissie het in principe niet onredelijk te vinden als verzoekster daarvoor schadeloos zou worden gesteld;
-Goudstikker heeft in en door de oorlog en bezetting zware verliezen geleden;
-tenminste 63 schilderijen uit de handelsvoorraad van Goudstikker zijn in de jaren vijftig door de Nederlandse Staat geveild;
-de Nederlandse Staat heeft gedurende bijna zes decennia het gebruiksrecht van de schilderijen uitgeoefend zonder tegenprestatie te leveren.

Van een mogelijk publiek belang dat in de weg zou kunnen staan aan de daadwerkelijke teruggave van kunstwerken acht de Restitutiecommissie geen sprake. De commissie geeft daarnaast aan daarmee geen uitspraak te willen doen over een eventuele toepassing van de Wet tot behoud van Cultuurbezit na gerealiseerde teruggave.

**Conclusie**
Zoals hierboven aangegeven spreekt de Restitutiecommissie zich in haar advies zowel uit over de te restitueren kunstwerken als over de afwikkeling van de feitelijke teruggave, door de commissie 'consequenties van teruggave' genoemd.

Verzoek tot teruggave
Anders dan de Restitutiecommissie ben ik van mening dat er in het onderhavige geval sprake is van afgehandeld rechtsherstel. Het Gerechtshof Den Haag heeft in 1999 als rechtsherstelrechter definitief in deze zaak beslist. Daarom valt de zaak op deze grond buiten de kaders van het geldende restitutiebeleid.

Ik acht niettemin in dit bijzondere geval gronden aanwezig om overeenkomstig het advies van de commissie tot teruggave over te gaan. Daarbij let ik vooral op de feiten en omstandigheden rond het onvrijwillig bezitsverlies en op de afwikkeling van deze zaak begin jaren vijftig zoals de commissie die naar voren heeft gebracht in haar omvangrijke onderzoek.

Van 40 van de kunstwerken waarop het teruggave verzoek betrekking heeft concludeert de commissie dat vast staat of waarschijnlijk is dat deze op 10 mei 1940 niet in eigendom toebehoorden aan Goudstikker. Om die reden adviseert de Restitutiecommissie tot afwijzing van het verzoek tot teruggave. Ik volg dit advies.

Ten aanzien van de zogenaamde Miedl-transactie adviseert de commissie eveneens het verzoek tot teruggave af te wijzen omdat naar het oordeel van de commissie "Goudstikker met de ondertekening van de akte van dading van 1952 ook naar de huidige maatstaven onvoorwaardelijk afstand heeft gedaan van de eigendomsrechten van de aan Miedl geleverde kunstwerken". Ik neem dit advies over.

Inzake de zogenaamde Göring-transactie komt de Restitutiecommissie tot de conclusie dat hier sprake is geweest van onvrijwillig bezitsverlies van Goudstikker terwijl geen afstand van recht is gedaan nu deze transactie niet onder de dading van 1952 valt. Het advies van de commissie ten aanzien van deze kunstwerken is dan ook het verzoek tot teruggave toe te wijzen. Dit advies neem ik over.

MVS0046629

ONDERNEMINGSKAMER

Van de in het verzoek tot teruggave als Ostermann-schilderijen omschreven kunstwerken concludeert de commissie eveneens dat Goudstikker daarvan het bezit onvrijwillig heeft verloren. Deze kunstwerken hebben evenmin onderdeel uitgemaakt van de deding van 1952 en zijn ook niet op enige andere wijze onderwerp geweest van rechtsherstel. Voor deze werken adviseert de commissie tot teruggave over te gaan. Ik neem dit advies over.
Indien één of meer van de vermiste werken terugkeren in het beheer van de Staat zal ik tot teruggave van die werken overgaan.

Voor de individuele NK-nummers van de werken verwijs ik graag naar het advies van de commissie.

Consequenties van teruggave
Voor wat de feitelijke afwikkeling betreft ben ik bereid de lijn van de commissie te volgen.

De commissie stelt voor de verplichting tot terugbetaling van de destijds bij de verkoop door Goudstikker ontvangen tegenprestatie waarover Goudstikker de vrije beschikking heeft genoten, weg te laten vallen tegenover financiële aanspraken van verzoekers op de Staat.
Ik kan mij vinden in een dergelijke aanpak zij het dat ik niet alle argumenten die de commissie daarvoor aanvoert, onderschrijf. Ik licht dat graag hieronder toe en loop daarbij de vier door de Restitutiecommissie gebezigde argumenten langs.

De commissie acht het "in principe niet onredelijk" geen financiële verplichting aan de teruggave te verbinden onder gelijktijdig afzien van de betaling van schadeloosstelling aan verzoekster door de Staat voor de vermiste werken. Deze redenering onderschrijf ik en dit argument neem ik dan ook over.

Ik constateer echter dat de overige drie argumenten die de Restitutiecommissie aanvoert om tot verevening te komen in strijd zijn met het huidige restitutiebeleid. Dat beleid is gebaseerd op de aanbevelingen van een onafhankelijke commissie, de Commissie Ekkart, en is na afweging van alle belangen door de regering vastgesteld. In de argumenten van de Restitutiecommissie vind ik geen aanleiding van dit zorgvuldig tot stand gekomen beleid af te wijken.

De financiële verliezen van kunsthandel Goudstikker ten gevolge van de oorlog kunnen op grond van het huidige beleid de Nederlandse Staat niet worden aangerekend. In een brief met het regeringsstandpunt Tegoeden Tweede Wereldoorlog van 21 maart 2000 wordt geen algemene verantwoordelijkheid aanvaard voor schade door de Duitse bezetter aangebracht. De regering zegt in zijn brief wel met het ter beschikking stellen van een bedrag finaal recht te willen doen aan de kritiek op de bejegening van de betrokken vervolgingsslachtoffers in het rechtsherstel. Afwenteling van de zware verliezen van Goudstikker in en door de oorlog en bezetting op de Staat valt met dit beleid niet te rijmen.

Ten aanzien van de veilingen die in de jaren vijftig hebben plaatsgevonden heeft de Commissie Ekkart in haar slotaanbevelingen geadviseerd te komen tot een *algemene* regeling die behelst dat een geïndexeerd percentage van de opbrengsten van die veilingen beschikbaar wordt gesteld aan een joods cultureel doel. Volgens de Commissie Ekkart wordt zo de schijn van verrijking van de Staat voorkomen, al is een nauwkeurige vaststelling welke kunstwerken het betrof niet meer te geven. Deze aanbeveling is overgenomen door de regering. Nu sprake is van een algemene regeling voor de in het begin van de jaren vijftig geveilde werken, ligt het niet voor de hand de Staat in dit individuele geval wederom op mogelijke verrijking aan te spreken.

Van een geldelijke vergoeding voor het gebruik door de Nederlandse Staat van de Goudstikker kunstwerken is binnen het huidige beleid geen sprake. Immers tegenover het mogelijke gebruiksgenot dat de Staat van deze werken heeft genoten staan de kosten van onderhoud, bewaring en in veel gevallen de aanzienlijke kosten van restauratie die de Staat voor zijn rekening heeft genomen.

MVS0046630

ONDERWIJS CULTUUR EN WETENSCHAP

In eerdere gevallen waarbij teruggave heeft plaatsgevonden is van een dergelijke vergoeding ook geen sprake geweest.

**Tot slot**
Ten aanzien van de (gerechtelijke) procedures die ten tijde van het indienen van onderhavige verzoeken tot teruggave aanhangig waren is door u indertijd in overleg met de landsadvocaat besloten deze aan te houden in afwachting van het advies van de Restitutiecommissie en mijn besluit terzake. Gezien de inhoud van mijn besluit ga ik ervan uit dat het belang aan voort procederen is komen te vervallen. Ik zal de landsadvocaat opdracht geven met u contact op te nemen over een afsluitende overeenkomst over onderhavig verzoek tot teruggave.

Ik zal de beheerder van de NK-collectie, het Instituut Collectie Nederland (ICN), opdracht gegeven in overleg met u te komen tot uitvoering van de feitelijke restitutie. Het ICN verwacht dat de feitelijke overdracht van de werken ongeveer een jaar zal duren.

De Restitutiecommissie wijst in haar advies ook nog op een mogelijk publiek belang dat in het geding zou kunnen zijn bij teruggave. Met de commissie ben ik van mening dat er geen publiek belang is dat in casu aan de teruggave in de weg staat. Dit laat onverlet dat ik mij bewust ben van het cultuurhistorische belang van de kunstwerken en hun mogelijke onvervangbaarheid voor het Nederlands cultuurbezit. Ik treed graag met u in gesprek over de mogelijkheden die er zijn om bepaalde kunstwerken voor het Nederlandse publiek toegankelijk te houden.

De staatssecretaris van Onderwijs, Cultuur en Wetenschap,

mr. Medy C. van der Laan

A.J.B. BURROUGH Sworn Translator English

MVS0046631

**APPENDIX H**

**EXHIBIT 239**

SPENCER A. SAMUELS & COMPANY, LTD.
18 EAST 76TH STREET
NEW YORK, N.Y. 10021
YUKON B-4556

CABLE ADDRESS: SPENCARTS

WORKS OF ART — PAINTINGS
CONSULTANTS — SCULPTURE

March 9, 1970

Norton Simon Foundation
1645 West Valencia Drive
Fullerton, California

Att: Mrs. Barbara Roberts

Gentlemen:

I am shipping to you tomorrow, via TWA, passenger flight no. 9 leaving from JFK at 1:00 PM, the paintings "Adam" and "Eve", by Lucas Cranach the Elder. We have insured them until their arrival at the museum. While there, I assume they will be insured by the Foundation. I am enclosing a memorandum bill for your records.

Commander Stroganoff Scherbatoff has agreed to allow the Foundation to examine the paintings, in order to decide whether it wishes to acquire them or not, until March 27th.

I have discussed with Mr. Simon the possibility of accepting a painting as part payment. If the Foundation wishes to acquire the paintings, not all for cash, it would be advisable to inform me of this as promptly as possible, and I will fly to California to

examine the paintings offered, and discuss their value. I repeat that the transaction must be finalized by March 27th.

Permission is granted to make limited test cleanings on the panels, but these test areas must be restored to the original condition if the paintings are not purchased.

Sincerely yours,

/s/ Spencer A. Samuels
Spencer A. Samuels

SAS/nr

SPENCER A. SAMUELS & COMPANY, LTD.
18 EAST 76TH STREET
NEW YORK, N.Y. 10021

PAINTINGS
SCULPTURE

CABLE ADDRESS: SPENCARTS
TELEPHONE YUKON B-4556

March 9, 1970

Norton Simon Foundation
1645 West Valencia Drive
Fullerton, California

ON SALE OR RETURN

LUCAS CRANACH THE ELDER (1472-1553)

"ADAM" and "EVE"

H. 6'3" x W. 27 1/2"
oil on panel
signed

Provenance:

Court Paul Stroganoff
Soviet Government
Sold by Lepke, Berlin 1931
J. Goudstikker, Amsterdam
Hermann Goering
Commander George Stroganoff Scherbatoff

Literature:

Max J. Friedlander and Jakob Rosenberg, Die Garnalde von Lucas Cranach, Berlin, 1932, page 60, No. 164, illustrated.

Pantheon, Adam and Eva von Cranach, by James A. Schmidt, Germany, 1931, pages 194-195, illustrated.

$800,000.00

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ONDERWIJS CULTUUR EN WETENSCHAP

Loyens & Loeff
T.a.v. de heer T.L. Claassen
Postbus 2888
3000 CW Rotterdam

Den Haag
31 MAART 2006

Ons kenmerk
DCE/06/14867

Uw kenmerk
TLC/cg-70034067

Onderwerp
Teruggave RC 1.13 d.d. 6 februari 2006

Bijlage(n)
Brief Tweede Kamer d.d. 6 februari 2006

Geachte heer Claassen,

Naar aanleiding van uw correspondentie van 6 en 13 februari jl. verzoekt u om een onderhoud met u en uw cliënt, de Norton Simon Art Foundation in Californië. Dit naar aanleiding van de zorgen van uw cliënt voor twee kunstwerken uit diens collectie, als gevolg van de teruggave van de collectie 'Goudstikker' van 6 februari jl. Hieronder ga ik in op de achterliggende vragen, maar niet voordat ik mij heb verontschuldigd voor mijn late reactie op uw brieven.

In uw brief van 6 februari jl. gaat u in op het advies van de Restitutiecommissie inzake 'Goudstikker' en op mijn bereidheid tot teruggave van de collectie Goudstikker aan de verzoeker, de Amsterdamse Negotiatie Compagnie in liquidatie N.V.
Naar aanleiding van uw eerste verzoek om uw argumentatie mee te nemen in het besluit op het restitutieverzoek 'Goudstikker' kan ik u niet anders laten weten dan dat de beslissing tot teruggave over te gaan reeds een feit is. Dit is gebeurd conform de afspraken met de Tweede Kamer (Handelingen TK, 2000-2001, 25 839, nr. 28) waarin de werkwijze rond restitutieverzoeken is afgesproken. In mijn brief aan de Tweede Kamer vindt u specifieke informatie over de teruggave in de zaak Goudstikker (Kamerstukken TK, 2005-2006, 25839, nr. 38).

Vervolgens stelt u twee andere punten in uw brief van 6 februari jl. aan de orde: u ziet graag dat het Norton Simon Art Foundation een schriftelijke bevestiging ontvangt dat het in de jaren vijftig een rechtsgeldige titel op de twee werken heeft verkregen en dat het eerdere besluit van mijn voorganger Staatssecretaris van Cultuur Aad Nuis uit 1998 alsmede de uitspraak van het Haagse hof op dit punt niet worden teruggedraaid. De twee kunstwerken waar het hier om gaat maken geen deel uit van de claim waarover ik op 6 februari jl. tot teruggave heb besloten. De Restitutiecommissie heeft de feiten

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Rijnstraat 50, Postbus 16375, 2500 BJ Den Haag T +31-70-412 3456 F +31-70-412 3450 W www.minocw.nl
Contactpersoon: P.A.F. Kotterman, T +31-70-4124350 IPC 3200

claim waarover ik op 6 februari jl. tot teruggave heb besloten. De Restitutiecommissie heeft de feiten en omstandigheden ten aanzien van de twee objecten uit de Norton Simon Art Foundation niet bij haar advies betrokken. Ik onthoud mij dan ook van een beoordeling van de twee kunstwerken in het kader van het restitutiebeleid.

Ik ga er van uit dat met deze beantwoording van uw brieven ook u en uw cliënt een onderhoud niet meer opportuun achten.

De staatssecretaris van Onderwijs, Cultuur en Wetenschap,
mr. Medy C. van der Laan,
namens deze,

Ir. A.P.M. Bersee
Directeur Cultureel Erfgoed

*CC. Ministerie van Financiën*

Loyens & Loeff
Att.: Mr. T.L. Claassen (Postbus 2888)
3000 CW Rotterdam

The Hague
March 31, 2006

Our reference
DCE/06/14867

Your reference
TLC/cg-70034067

Subject: Return RC 1.15 dated February 6, 2006

Attachment(s) Letter, Second Chamber
dated February 6, 2006

Dear Mr. Claassen:

In connection with your correspondence dated February 6 and 13 of this year, requesting a meeting with you and your client, the Norton Simon Art Foundation in California. This is in connection with your client's concerns about two pieces of his art collection, as a result of the return of the "Goudstikker" collection on February 6, of this year. Below, I will expand on the related questions, but not before I have apologized for my late response to your letters.

In your letter of February 6, you are referring to the recommendation of the Restitution Commission regarding "Goudstikker" and my readiness to return the Goudstikker collection to the requesting party, the Amsterdam Negotiatie Compagnie in liquidation NV.

In connection with your first request to include your argumentation in the decision to the Goudstikker restitution request, the only thing that I can tell you is that the decision to proceed with the return is a

fact already. This took place in accordance with the arrangements with the Second Chamber [TK Handelingen, 2000-2001, 25839, No. 28] in which the manner of working involving restitution requests is agreed. In my letter to the Second Chamber, you will find specific information about the return in the Goudstikker matter [Chamber documents TK, 2006-2006, 25839, No. 38].

Subsequently, you are raising two other points in your letter of February 6 of this year: you would like the Norton Simon Art Foundation to receive a written confirmation to the effect that in the fifties, it received a legally valid title to two works and that the earlier decision of my predecessor, State Secretary of Culture, Aad Nuis, from 1998 as well as the judgment of the Court of the Hague regarding this point are not reversed. The two pieces of art involved here, are not a part of the claim for which I have decided on February 6 of this year to make the return. The Restitution Committee did not include the facts and circumstances with respect to the two objects from the Norton Simon

Art Foundation in its recommendation. As a result, I refrain from an opinion regarding the two pieces of art under the restitution policy.

I assume that with this response also applies to your letters, that you and your client are no longer interested in a meeting.

The State Secretary for Education, Culture and Science Mr. Medy C. van der Laan

On his behalf

[signed]

A.P.M. Bersee, eng.

Director of Cultural Heritage

cc Ministry of Finance

Ministry of Education, Culture and Science

Rijstraat 50. Postbus 16375, 2500 BJ The Hague Phone +31 70412 9456 Fax: +31 70412 3450 Web: www.minocw.ul

Contact person: P.A.F. Kotterman, Phone: +31 70 4124550 1PC 3200

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CERTIFICATE OF ACCURACY

This is to certify that the Dutch to English translation for the Loyens & Loeff letter dated March 31, 2006 (Global Word Job No, 5776) has been translated by staff members of the Global Word, Inc. and is, to the best of our knowledge, ability and belief, a true and accurate translation.

/s/ Michael Fundaro
Foreign Language Manager
2/8/2012
Michael Fundaro

63 Grand Avenue, River Edge, New Jersey 07661
Voice: (201)343-0015 Fax: (201) 343-4155
Toll Free (800) 841-5965
Website: www.globalword.com Email:
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ONDERNEMERSCHAP

Loyens & Loeff
T.a.v. de heer T.L. Claassen
Postbus 2888
3000 CW Rotterdam

Den Haag
31 MAART 2006

Ons kenmerk
DCE/06/14867

Uw kenmerk
TLC/cg-70034067

Onderwerp
Teruggave RC 1.15 d.d. 6 februari 2006

Bijlage(n)
Brief Tweede Kamer d.d. 6 februari 2006

Geachte heer Claassen,

Naar aanleiding van uw correspondentie van 6 en 13 februari jl. verzoekt u om een onderhoud met u en uw cliënt, de Norton Simon Art Foundation in Californië. Dit naar aanleiding van de zorgen van uw cliënt voor twee kunstwerken uit diens collectie, als gevolg van de teruggave van de collectie 'Goudstikker' van 6 februari jl. Hieronder ga ik in op de achterliggende vragen, maar niet voordat ik mij heb verontschuldigd voor mijn late reactie op uw brieven.

In uw brief van 6 februari jl. gaat u in op het advies van de Restitutiecommissie inzake 'Goudstikker' en op mijn bereidheid tot teruggave van de collectie Goudstikker aan de verzoeker, de Amsterdamse Negotiatie Compagnie in liquidatie N.V.
Naar aanleiding van uw eerste verzoek om uw argumentatie mee te nemen in het besluit op het restitutieverzoek 'Goudstikker' kan ik u niet anders laten weten dan dat de beslissing tot teruggave over te gaan reeds een feit is. Dit is gebeurd conform de afspraken met de Tweede Kamer (Handelingen TK, 2000-2001, 25 839, nr. 28) waarin de werkwijze rond restitutieverzoeken is afgesproken. In mijn brief aan de Tweede Kamer vindt u specifieke informatie over de teruggave in de zaak Goudstikker (Kamerstukken TK, 2005-2006, 25839, nr. 38).

Vervolgens stelt u twee andere punten in uw brief van 6 februari jl. aan de orde: u ziet graag dat het Norton Simon Art Foundation een schriftelijke bevestiging ontvangt dat het in de jaren vijftig een rechtsgeldige titel op de twee werken heeft verkregen en dat het eerdere besluit van mijn voorganger Staatssecretaris van Cultuur Aad Nuis uit 1998 alsmede de uitspraak van het Haagse hof op dit punt niet worden teruggedraaid. De twee kunstwerken waar het hier om gaat maken geen deel uit van de claim waarover ik op 6 februari jl. tot teruggave heb besloten. De Restitutiecommissie heeft de feiten

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A-12

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claim waarover ik op 6 februari jl. tot teruggave heb besloten. De Restitutiecommissie heeft de feiten en omstandigheden ten aanzien van de twee objecten uit de Norton Simon Art Foundation niet bij haar advies betrokken. Ik onthoud mij dan ook van een beoordeling van de twee kunstwerken in het kader van het restitutiebeleid.

Ik van ga er van uit dat met deze beantwoording van uw brieven ook u en uw cliënt een onderhoud niet meer opportuun achten.

De staatssecretaris van Onderwijs, Cultuur en Wetenschap,
mr. Medy C. van der Laan,
namens deze,

Ir. A.P.M. Bersee
Directeur Cultureel Erfgoed

*CC. Ministerie van Financiën*

A-13

**APPENDIX J**

**EXHIBIT 248**

Sworn translation from Dutch to English of "Letter re. Von Saher/Norton Simon Art Foundation" sent by the Dutch Ministry, for Education Culture and Science to Mr R.W. Polak of De Brauw Blackstone Westbroek on 20 December 2006

Leiden, 07 August 2007

Translator's declaration

I hereby certify that I am competent to translate from Dutch into English and that the attached translation is a full, complete and accurate translation into English of the Dutch original, also attached.

[SEAL] Alex Burrough.

Sworn Translator before the District Court of The Hague (The Netherlands)

Hogewoerd 94
2311 HS Leiden
The Netherlands

Attached

1) "Letter re. Von Saher/Norton Simon Art Foundation" sent by the Dutch Ministry for Education Culture and Science to Mr R.W. Polak of De Brauw Blackstone Westbroek on 20 December 2006 (English translation. 1 page)

2) Dutch original of the letter (1 page)

[Logo of Netherlands Ministry for
Education Culture and Science]

De Brauw Blackstone Westbroek
Attn. Mr. R.W. Polak
P.O. Box 90851
2509 LW The Hague

[stamp received 21 December 2006]

The Hague

20 DEC 2006

Our reference

DCE/06/50221

Re

Von Saher/ Norton Simon Art Foundation

Dear Mr Polak,

As I have already let you know, Mr Claassens, the Dutch lawyer of the Norton Simon Art Foundation, does not agree to having copies sent to you of his letters to State Secretary Van der Laan of 6 February 2006 and 13 February 2006. In light of this, I inform you that the ministry cannot simply send the copies to you. Should you wish to maintain your request, you may file a written request for this with the Ministry of Education Culture and Science.

As I understand from you, there exists a dispute between your client Marei von Saher and the Norton Simon Art Foundation concerning the ownership of two works, namely "Adam" and "Eve by Cranach the Elder, which are currently located in the Norton Simon Museum. I confirm to you that the State of the Netherlands is not involved in this dispute. The State

is of the opinion that this concerns a dispute between two private parties.

The Minister for Education, Culture and Science, On whose behalf,

Director of the Cultural Heritage Directorate.

[signature]

[SEAL]

A.P.M. Bersee

CC: Loyens & Loeff, Mr. J Claassens

Ministry of Education Culture and Science

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ONDERWIJS CULTUUR WETENSCHAP

De Brauw Blackstone Westbroek
T.a.v. de weledelgestrenge heer Mr. R.W. Polak
Postbus 90851
2509 LW Den Haag

ONTVANGEN
21 DEC. 2006

Den Haag
20 DEC. 2006

Ons kenmerk
DCE/06/50221

Onderwerp
Von Saher/ Norton Simon Art Foundation

Geachte heer Polak,

Zoals ik u reeds heb laten weten, stemt Mr. Claassens, de Nederlandse raadsman van de Norton Simon Art Foundation, niet in met toezending aan u van kopieën van zijn brieven aan Staatssecretaris Van der Laan van 6 februari 2006 en 13 februari 2006. In het licht hiervan, laat ik u weten dat het ministerie niet zonder meer kan overgaan tot toezending van die kopieën. Mocht u uw verzoek willen handhaven, kunt u hiertoe een schriftelijk verzoek bij het ministerie van OCW indienen.

Naar ik van u begrijp bestaat er tussen uw cliënte Marei von Saher en het Norton Simon Art Foundation een geschil over de eigendom van twee werken, namelijk "Adam" en "Eva" van de hand van Cronach de Oudere, die zich op dit moment in het Norton Simon Museum bevinden. Ik bevestig tegenover u dat de Staat der Nederlanden niet betrokken is bij dit geschil. De Staat is van oordeel dat dit een geschil betreft tussen twee private partijen.

De minister van Onderwijs, Cultuur en Wetenschap,
namens deze,
de directeur Directie Cultureel Erfgoed,

Ir. A.P.M. Bersee

A.J.B. BURROUGH
Sworn Translator English

CC: Loyens & Loeff, de heer Mr. T. Claassens

Ministerie van Onderwijs, Cultuur en Wetenschap
Rijnstraat 50, Postbus 16375, 2500 BJ Den Haag T +31-70-412 3456 F +31-70-412 7450 W www.minocw.nl
Contactpersoon: P.A.F. Kottenhagen T +31-70-412 3456 (PC 1300)

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## APPENDIX K

## EXHIBIT 294

**9. Recommendation regarding Goudstikker-Kummerlé (*case number RC 1.134*)**

In a letter dated 21 June 2012, the State Secretary for Education, Culture and Science (hereinafter referred to as OCW) asked the Restitutions Committee for advice about the application of 30 May 2012 from Marei von Saher-Langenbein of New York, United States, (hereinafter also referred to as the applicant) for the restitution of the following three paintings from the Netherlands Art Property Collection (hereinafter referred to as the NK collection):

NK 3749 - Philips Wouwerman, *Two Men with a Horse on the Beach*;

NK 3750 - Dominicus van Tol, *Boy with* a Dog;

NK 3751 - Hendrik Gerritsz. Pot, *A Man with a Glass of Wine.*

These works of art were returned from Germany to the Netherlands on 4 March 2012, after which they became part of the NK collection.

**The procedure**

The Committee investigated the facts as a result of the request for advice. This included making use of the information and results of the investigation in the Goudstikker case (RC 1.15), in which the State Secretary for OCW decided on 6 February 2006 to restitute 202 works of art.

The results of the investigation are recorded in a draft investigation report dated 3 June 2013. The draft report, together with a letter dated 13 June 2013, was sent for comment to the applicant and, together with

a letter of the same date, to the Minister of OCW for additional information. Both the applicant and the Minister let it be known in writing that they had no comments on the draft report. The draft report was subsequently adopted on 2 September 2013. The Committee refers to the report concerned for the facts in this case.

The applicant appointed the lawyer Lawrence M. Kaye of New York, United States, to represent her during the procedure before the Committee.

**Considerations:**

1. The applicant is the widow of Eduard von Saher, the only son of the Jewish art dealer Jacques Goudstikker (1897-1940). When the Second World War started, the latter was the major shareholder and managing director of the Amsterdam gallery J. Goudstikker NV (hereinafter referred to as the Goudstikker gallery), After the war the name of the gallery concerned was changed to the Amsterdamse Negotiatie Compagnie NV (hereinafter referred to as the ANC). The initial liquidation of the ANC, which was dissolved as of 14 December 1955, was terminated on 28 February 1960 and then reopened on 31 March 1998 by order of the district court in Amsterdam. The liquidation of the ANC was completed on 3 July 2007. The applicant stated that she was the only registered shareholder in the company at that moment. On the grounds of documents that have come to the attention of the Committee in this regard, the Committee concludes that the applicant is entitled to any subsequent assets of the ANC.

2. The applicant requests the restitution of three paintings that were returned to the Netherlands from Germany on 4 March 2012 and since then have been

part of the NK Collection in the custody of the Dutch government under inventory numbers NK 3749, NK 3750 and NK 3751. The applicant stated that the paintings concerned '*were looted from Jacques Goudstikker's collection by Reichsmarschall Hermann Göring through an involuntary sale in 1940*'. She also stated that '*the Paintings were recently returned to the Netherlands from Germany and, thus, not included in my prior applications to the Restitutions Committee. All three were part* of a *group of paintings delivered to Göring and, pursuant to the State Secretary's February 6, 2006 decision (...), should be restituted to me.*'

3. The Committee refers to the investigation report for a description of the fate of the Goudstikker gallery during and after the Second World War. The following summary is sufficient here.

Jacques Goudstikker, together with his family, fled the Netherlands by ship on 14 May 1940. During this journey he died in an accident. His wife Désirée and son Eduard reached the United States. The gallery in Amsterdam was left behind unmanaged because at the beginning of May 1940 Jacques Goudstikker's authorized representative also died suddenly. Two of Goudstikker's staff, A.A. ten Broek and J. Dik Sr, took over the management of the gallery, after which Ten Broek was appointed managing director of the company during an extraordinary general meeting of shareholders on 4 June 1940. Virtually immediately after the capitulation of the Netherlands, Alois Miedl, a German banker and businessman living in the Netherlands, joined the gallery and took over the actual management. Under an agreement dated 1 July 1940, Miedl purchased all the assets of the Goudstikker gallery, including the firm's trading name. Shortly afterwards this agreement was amended in connection with the

simultaneous interest of Field Marshal Hermann Göring in the gallery. Then, on 13 July 1940, two purchase agreements were entered into between the Goudstikker gallery, represented by Ten Broek, and Miedl and Göring:

- for a sum of NLG 550,000 Miedl acquired co-ownership of the Goudstikker gallery in so-called meta-paintings, the right to the trading name J. Goudstikker, and the gallery's immovable property;
- for a sum NLG 2,000,000 Göring acquired the rights to all the works of art in so far as they were the property of the Goudstikker gallery on 26 June 1940 and were in the Netherlands. Göring acquired a preferential right with regard to the meta-paintings.

Désirée Goudstikker, the heir of Jacques Goudstikker, who represented 334 of the 600 shares, some on behalf of her underage son, refused to give Ten Broek the permission he requested for the sales. The gallery's staff received commission of NLG 400,000 from Miedl for bringing about the sales. Furthermore, upon entering into the agreement an undertaking would be made that Mrs Goudstikker-Sellisberger, Jacques Goudstikker's mother, who had remained behind in Amsterdam, could count on protection from Miedl or Göring. On 14 September 1940 Alois Miedl founded the company Kunsthandel voorheen J. Goudstikker NV and on 2 October 1940 it was decided to dissolve the original gallery, as a result of which it went into liquidation. This liquidation of the Goudstikker gallery was cancelled retroactively on 26 February 1947. Of the purchase price of NLG 2,550,000 that was entailed in the sales to Miedl and Göring, a sum of NLG

1,363,752.33 remained for the Goudstikker gallery after the war.

4. The Committee acquired insight into the execution of the agreements referred to above between the Goudstikker gallery and Miedl and Göring thanks to a report with inventories, found during the investigation, that was compiled on Miedl's instructions by the accountant J. Elte (hereinafter referred to as the Elte report). It emerges from the Elte report that Göring was not interested in all the works of art that he had bought in accordance with the purchase agreement of 13 July 1940. Göring left many objects behind in Amsterdam, which were therefore actually delivered to Miedl.

The Committee observes that only a few hundred paintings out of the inventoried 1,113 works of art in the trading stock of the Goudstikker gallery were actually delivered to Göring (hereinafter referred to as the Göring transaction). What is more, after the initial delivery Göring and Miedl exchanged paintings that originally came from the Goudstikker gallery's trading stock with each other.

5. It emerges from the Committee's investigation that the three paintings now being claimed were part of the Göring transaction—the batch of works of art that were sold and delivered to Göring in 1940. Afterwards Miedl bought the three present paintings from Göring. During the 1940-1942 period Miedl sold and auctioned the three works, as a result of which they ended up in the possession of the German art collector Kummerlé. At some point thereafter the paintings became part of the *Museum der Bildenden Künste* collection in Leipzig. After claims to the works by the State of the Netherlands, they were subse-

quently handed over to the State of the Netherlands by Germany on 4 March 2012.

6. During the 2004-2006 period, the paintings from the Goudstikker gallery's trading stock that were part of the Göring transaction in 1940 and that were returned in the years immediately after the war were part of an earlier application for restitution with regard to Goudstikker (RC 1.15). In that case the State Secretary for OCW decided on 6 February 2006 to grant the application for the restitution of the works in the Göring transaction. In a letter to the Lower House of the same date, the State Secretary explained the reasons behind her decision. The State Secretary stated that she deemed grounds to be present 'in this special case' to decide to restitute. 'The most important consideration concerns the facts and circumstances surrounding the involuntary loss of possession and the handling of this case in the early nineteen-fifties, as brought up by the Committee in its extensive investigation.'

7. The Committee concludes that the works NK 3749, NK 3750 and NK 3751 that are now being claimed were part of the same Göring transaction in 1940, but they had not yet become part of the NK collection during the 2004-2006 period, as is result of which they could not be included in the earlier application for restitution with regard to Goudstikker (RC 1.15) and therefore were not restituted at the time. Since the three claimed works of art became part of the NK collection on 4 March 2012 and were claimed by the applicant thereafter, the Committee advises the Minister to restitute them. In this regard the Committee refers to the decision of the State Secretary fur OCW of 6 February 2006 quoted under consideration 6.

**Conclusion**

With reference to the decision of the State Secretary for OCW of 6 February 2006, the Restitutions Committee advises the Minister to grant the application for restitution of the paintings NK 3749, NK 3750 and NK 3751.

Adopted at the meeting of 2 September 2013 by W.J.M. Davids (chair), J.T.M. Bank, R. Herrmann, P.J.N. van Os, E.J. van Straaten, I.C. van der Vlies (vice-chair), and signed by the chairman and the director.

(W.J.M. Davids. chairman)

(E. Campfens, director)

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13 juli 1940

#OUDSTIKKER.

OVEREENKOMST tussen A.A. ten Broek en Walter Andreas Hofer voor H. Goering inzake verkoop en koop van de schilderijen en kunstvoorwerpen tegen een koopprijs van f. 2.000.000.-.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

De Ondergeteekenden;

1. de Heer Arie Albertus ten Broek, wonende te Breukelen-Nijenrode, als directeur der te Amsterdam gevestigde naamlooze vennootschap; Kunsthandel J. Goudstikker N.V., en als zoodanig ten deze alleen optredende en haar directie verbindende, in verband met de ontstentenis van den eenigen mede-directeur dier Vennootschap, den Heer Jacques Goudstikker;

2. de Heer Walter Andreas Hofer, kunsthandelaar, wonende te Berlijn W.50, Augsburgerstrasse 68, ten deze handelende als lasthebber van den Heer Generaal-Veldmaarschalk Hermann Göring, wonende te Berlijn,

VERKLAREN te zijn overeengekomen, dat genoemde naamlooze vennootschap bij deze verkoopt aan genoemden Generaal-Veldmaarschalk Göring, voor wien voornoemde Heer Hofer verklaart te koopen;

1. alle schilderijen, teekeningen, antiquiteiten en verdere kunstvoorwerpen, welke zich op 26 Juni 1940 in Nederland bevonden en toen eigendom waren van gemelde naamlooze vennootschap, verklarende de ondergeteekende sub 1 dat al die goederen thans nog eigendom zijn van die naamlooze vennootschap met uitzondering van die welke reeds aan den Heer Generaal-Veldmaarschalk Göring geleverd zijn;

2. drie plafondstukken van Gerard de Lairesse zich bevindende in de zoldering van de groote achterzaal van de parterre van het perceel Heerengracht 458 te Amsterdam.

Die plafondstukken zullen op kosten van de verkoopster uit het plafond worden gesloopt. De kooper zal zorg dragen dat de benoodigde vergunning voor het verwijderen dier plafondstukken overeenkomstig de Monumentenwet wordt verleend.

In den verkoop zijn niet begrepen;

a. aandeelen van de vennootschap in voorwerpen waarin derden participaties hebben, doch indien kooper die goederen of een deel daarvan wil koopen, dan heeft hij de voorkeur.

b. de goederen welke na 26 Juni 1940 zijn aangekocht;

c. al hetgeen aard- of nagelvast is verbonden aan de perceelen waarin zij zich bevinden, met uitzondering van gemelde plafondstukken. De dessus de porte en de schoorsteenstukken worden beschouwd als niet aard- of nagelvast en zijn dus in den verkoop begrepen.

De certificaten en verdere bescheiden op de verkochte goederen betrekking hebbende, zullen voor zoover in het bezit van voormelde naamlooze vennootschap op 26 Juni 1940 met die goederen worden geleverd.

Van den verkoop zijn voorts uitgesloten de voorwerpen die blijken eigendom te zijn van derden.

Partijen verklaren ermede bekend te zijn, dat verschillende inboedelgoederen en andere voorwerpen eigendom zijn van den Heer en/of Mevrouw Jacques Goudstikker-von Halban Kurz, dat eenige beelden op Kasteel Nijenrode behooren aan de Firma B. Katz te Dieren en eenige tuinornamenten aan Dr. Heilbronner te Parijs.

Van de verkochte goederen zal ten spoedigste een zoo nauwkeurig mogelijke lijst worden opgemaakt en door beide partijen onderteekend. Aan de hand der boeken en bescheiden van de voormelde naamlooze vennootschap zal worden vastgesteld wat tot het bij deze verkochte behoort. Bedoelde naamlooze vennootschap verbindt zich alle mogelijk medewerking te verleenen tot die vaststelling.

De levering van het verkochte, voor zoover thans nog niet geschied, zal plaats hebben zoodra de koopsom geheel zal zijn betaald.

Het verkochte wordt geleverd ter plaatse waar de voorwerpen zich ten tijde der levering bevinden.

Deze verkoop en koop is geschied voor een koopprijs van twee millioen gulden, waarvan op heden betaald een som van een millioen vijfhonderd duizend gulden, waarvoor kwitantie bij deze, terwijl het restant ad vijfhonderd duizend gulden zal worden betaald binnen veertien dagen na heden, met dien verstande echter dat indien de hiervoor bedoelde lijst van verkochte goederen dan nog niet is geteekend de betaling dier resteerende vijfhonderd duizend gulden eerst kan worden gevorderd nadat is komen vast te staan welke voorwerpen aan kooper in deze zijn verkocht.

In tweevoud geteekend te Amsterdam, 13 Juli 1940.

Sales price
fl. 2 000 000
fl. 1 500 000 paid
fl. 500 000

w.g. A.A. ten Broek

w.g. Walter Andreas Hofer.

Afschrift: 7 Maart 1952.

July 13, 1940

GOUDSTIKKER.

AGREEMENT between A.A. ten Broek and Walter Andreas Hofer H. Goering on the sale and purchase of paintings and artifacts at a purchase price of 2,000,000 florins.-.

The undersigned:

1. Sir Albert Arie ten Broek, residing in Breukelen-Nijenrode, director of the public limited company established in Amsterdam; Kunsthandel J. Goudstikker LLC, and acting as manager, due to the absence of the only co-director of the company, Mr. Jacques Goudstikker;

2. Sir Walter Andreas Hofer, an art dealer, living in Berlin w. 50, Augsburgerstrasse 68, acting as agent for Mr. General Field Marshal Hermann Goering, residing in Berlin,

DECLARE to have agreed that the said public limited company will sell to such persons, General Field Marshal Goering, for whom the aforementioned Mr. Hofer states the intent to purchase:

1. All paintings, drawings, antiques and other artifacts that were in the Netherlands on June 26, 1940 and at that time owned by said company, stating that all those goods are presently owned by the aforementioned company apart from those already sold to Mr. General Field Marshal Goering;

2. Three ceiling pieces of Gerard de Lairesse located in the attic of the large back room on the ground floor of the premises at Herengracht 458, Amsterdam.

The ceiling pieces which will be removed from the ceiling at the expense of the Vendor. The purchaser

will ensure that the necessary permit to remove the ceiling pieces is granted.

This sale does not include:

a. shares in the company in which third party investors are involved, unless the buyer wants to purchase the goods or a portion thereof f, then he is preferred buyer.

b. goods purchased after June 26, 1940;

c. all that is permanently attached or nailed down in the premises in which they are located, with the exception of reported ceiling pieces. The dessus de porte and chimney pieces are not considered to be permanently attached or nailed down and are therefore included in the sale.

The certificates and other documents related to the goods sold will be in the possession of the aforementioned limited company on June 26, 1940 and are to be delivered with the goods.

Also excluded from the sale are the objects that appear to be owned by third parties.

The parties declare to be aware that various goods and other items owned by Mrs. Jacques Goudstikker Von Halban Kurz and that some images in Castle Nyenrode belong to Company B. Katz and some garden ornaments to Dr. Heilbronner Paris.

An accurate list of goods sold will be made available as soon as possible t and will be signed by both parties. On the basis of the books and records of the aforementioned public private company, they will identify what is sold and to whom it belongs. The company will grant all possible assistance to these efforts.

The delivery of the products sold has not taken place yet; it will take place as soon as the purchase price is paid in full.

The sale will take place at the time of delivery where the objects are located.

This sale and purchase was made for a sales price of two million guilders, of which a sum of one million five hundred thousand guilders was paid today while the remaining amount five hundred thousand guilders will be paid within another ten days from now; however, if the aforementioned list of goods is sold or has not yet been signed for, the payment of the remaining five hundred thousand guilders may be claimed only after it is established that a purchaser has been found for these objects.

Signed in duplicate in Amsterdam, July 13, 1940.

[handwritten:]

*Sales price*

*Fl. 2,000,000*

*Fl. 1,500,00 – paid*

*Fl. 500,000*

Truthfully AA. ten Broek

Truthfully Walter Andreas Hofer

Signed: March 07, 1952

City of New York, State of New York,
County of New York

I, Wendy Poon, hereby certify that the document "Agreement between Broek and Goering dated July 13, 1940" is to the best of my knowledge and belief, a true and accurate translation from Dutch into English.

/s/ Wendy Poon
Wendy Poon

Sworn to before me this
April 29, 2016

/s/ Alitasha Younger
Signature, Notary Public

[Alitasha Younger
Notary Public – State of New York
No. 01YO6335137
Qualified in KING County
Commission Expires Dec 28, 2019]

Stamp, Notary Public

Behoort bij nota 04.91 .J.Z.
d.d. 2-11-1964.
onderwerp:aanspraken op schilde-
rijen George Stroganoff-Scherbatoff.

Hedepar. C.K. .

De Heer Staatssecretaris drs.V.d.Laar.

1. Voorgeschiedenis.

Op 10 mei 1961 is ten verzoeke van George STROGANOFF-SCHERBATOFF (geboren in 1898 te Londen; wonende in U.S.A., Amerikaanse nationaliteit) een exploit aan de Staat betekend (Financiën, OKW), teneinde de Staat op wettige wijze in kennis te stellen van het hierondervolgende en tot stuiting van verjaring.

Bij schrijven van 9 juli 1964 heeft mr. F. Baron van der Feltz, advocaat te Amsterdam, zich tot het ministerie gewend met enige nadere gegevens betreffende het reeds in het exploit van 1961 gestelde.

In het exploit van 1961 en het schrijven van 9 juli 1964 wordt het volgende, voor zover van belang gesteld.

1. Requirant's oom, graaf SERGE STROGANOFF, die sedert 1897 in Frankrijk woonde, was eigenaar onder meer van een verzameling kunstvoorwerpen algemeen bekend als de collectie STROGANOFF (ondergebracht in het STROGANOFF-paleis te Petersburg, thans Leningrad).

2. In 1918 of 1919 heeft de Sowjet-regering zich zonder enige schadevergoeding meester gemaakt van de collectie.

3. In mei 1923 overlijdt graaf SERGE STROGANOFF in Frankrijk.

4. Requirant is, althans na het overlijden van zijn moeder in 1944 in Frankrijk, opvolger onder algemene titel in de rechten van zijn oom, Graaf SERGE STROGANOFF. (Uit het exploit komen de familie-verhoudingen niet duidelijk naar voren, maar die spelen - althans in dit stadium - geen rol van betekenis voor wat de thans aan de orde zijnde kwestie betreft).

5. Door internationale gebeurtenissen in Duitsland en in de gehele wereld daartoe niet eerder in staat, ontdekte requirant eerst onlangs (+ 1961), dat enige schilderijen van de oorspronkelijke collectie STROGANOFF zich in handen van de Staat der Nederlanden bevinden.

6. Het betreft de volgende schilderijen :

a. Rembrandt van Rijn - Titus
b. Lucas Cranach - Eva
c. Lucas Cranach - Adam
d. Petrus Christus - Maria met dem Kinde.

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7. Titus met monnikskap.

Volgens het schrijven van de advocaat van Stroganoff were de Titus (thans aanwezig in het Rijksmuseum)omstreeks 1933 door de Staat der Nederlanden "na langdurige onderhandelingen met de toen nog niet door Nederland erkende Sowjet-Regering van die Regering, zonder dat die Regering beschikkingsbevoegd was" gekocht.

8. De beide Cranach's (verblijfplaats: Dienst Rijks Verspreide Kunstvoorwerpen, Kazernestraat 3, den Haag) en Petrus Christus (Instituut voor Kunstgeschiedenis, Drift 25, Utrecht).

Volgens Stroganoff heeft de Sowjet Regering deze schilderijen in mei 1931 publiekelijk verkocht door middel van Rudolph Lepke's Kunst Auctions-Haus te Berlijn. Requirant of althans diens moeder heeft formeel geprotesteerd tegen deze veiling. Dit protest is niet alleen openbaar gemaakt in verschillende kranten, maar ook onmiddellijk vóór de veiling ter kennis gebracht aan alle eventuele kopers. Het protest was gegrond op de confiscatoire aard van de maatregel en op het feit, dat de wet, waarop de Sowjet-Regering zich beriep, niet toepasselijk zou zijn op de STROGANOFF's.
Verschillende voorwerpen van hoge waarde werden tegen lage prijzen verkocht in verband met het risico van een revindicatie door de erfgenamen. De schilderijen zouden zijn gekocht door de Kunsthandel v/h Goudstikker N.V. te Amsterdam, die ze op haar beurt tijdens de bezetting verkocht aan Göring. Na de bevrijding zijn deze schilderijen door recuperatie in het bezit van de Staat der Nederlanden gekomen, zonder dat gedepossedeerden aanspraak hebben gemaakt op teruggave, aldus het schrijven van 1954 van mr.v.d.Feltz.

9. In het exploit van 1961 wordt ook het schilderij Rembrandt van Rijn - Christus und die Samaritanin am Brunnen vermeld. Het ~~heeft~~ evenals de Cranachs en de Petrus Christus in de veilingcatalogus van Rudolph Lepke's Kunst Auctions-Haus te Berlijn vermeld. STROGANOFF is er evenwel niet in geslaagd ook de verblijfplaats van dit schilderij te ontdekken. Het exploit betreft ook dit schilderij indien de Staat thans de feitelijke macht daarover heeft. De brief van de advocaat van 1960 vermeldt dit schilderij niet.

10. Requirant meent thans als enige wettige opvolger van de oorspronkelijke eigenaar van de schilderijen zijn vermeende aanspraken geldend te maken. Het de stelling, dat de tegenwoordige houders, die allen met de herkomst van de schilderijen bekend waren - althans bekend hadden kunnen en moeten zijn - nimmer eigenaar zijn geworden, omdat voorzover is van een niet-eigenaar en van een bezit te goe-

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een trouw evenals sprake is geweest, besluit het schrijven van de advocaat. Uw Excellentie wordt gevraagd, mede te willen delen of de Staat genegen is de "eigendom" van de SCHÖLARDT's terug te geven.

II. Opmerkingen en conclusies.

Titus met wonnikskap.

a. De Titus zou gekocht zijn van de toen nog niet door Nederland erkende Sowjet-Regering. Vrij algemeen wordt aangenomen dat de vraag van het al dan niet erkend zijn van een staat niet terzake doet. Volgens Hof Amsterdam 4-11-'42 N.J.1943, 49o raakt de niet-erkenning van de Sowjet-Regering publiek door Nederland op zichzelf de openbare orde hier te lande niet. Alleen al om deze reden behoeft derhalve aan deze omstandigheid - mede in verband met het volgende - geen verdere aandacht te worden geschonken.

b. De Sowjet-Regering zou beschikkingsonbevoegd zijn geweest.

Deze kwestie is voor de Titus van ~~minder~~ belang. Uit het hieronder gestelde zal echter blijken, dat ook als de Titus rechtstreeks door de Sowjet-Regering aan de Nederkandse Staat zou zijn verkocht, hieruit niet zonder meer zou volgen, dat de Nederlandse Staat niet rechtsgeldig eigenaar is geworden.

c. Uit het schrijven van de advocaat lees ik, dat de Titus door de Nederlandse Staat door bemiddeling van de Vereniging Rembrandt rechtstreeks van de Sowjet-Regering is gekocht. Bij de onderhandelingen door de Ver.Rembrandt met het ministerie is grote voorzichtigheid betracht, omdat men bevreesd was, dat de Kunstwereld, indien zij van de plannen op de hoogte zou komen, de Staat de loef af zou steken. Daarnaast vormde de financiering in een tijd van malaise een groot probleem en tevens gold de vraag of niet verantwoord was uit de beperkte middelen die beschikbaar waren een flink bedrag te besteden voor de aankoop van schilderijen en aan deze problemen wordt in het dossier de meeste aandacht besteed. Op de juridische vragen, die met de eigendomsverkrijging samenhangen is minder gelet. Toch meen ik, dat uit het dossier valt op te maken, dat de Sowjet-Regering niet rechtstreeks aan de Nederlandse Staat verkocht. In het schrijven van 18 april 1933 betreffende het concept-contract wordt weliswaar gesteld, dat de schilderijen geen eigendom van de Vereniging zijn doch slechts door haar zijn gekocht, maar het officiële tussen Staat en Vereniging opgemaakte contract (26-4-1933) vermeldt dat de Vereniging verkoopt en in eigendom overdraagt aan de Staat,

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die in koop aanneemt de thans eigendom van de Vereniging zijnde schilderijen, etc.. Uit een notitie op genoemd schrijven maak ik op, dat de Vereniging van een Engelsman kocht. Of deze Engelsman als tussenpersoon optrad of niet, is in verband met het rookgordijn om de gehele transactie niet meer te achterhalen, maar de zaak is ook van weinig belang.
Ook indien de Vereniging Rembrandt niet beschikkingsbevoegd zou zijn geweest - quod non - moet worden aangenomen, dat de Staat eigenaar is geworden. De heersende leer van 2014 B... vraagt voor een beroep op bescherming in de zin van dat artikel, dat de zaak van een beschikkings-onbevoegde te goeder trouw door traditie om baat is verkregen op basis van een rechtsgeldige titel (= verbintenis tot levering). Zolang de kwade trouw i.c. van de Staat niet is bewezen, zal de goede trouw moeten worden aangenomen.
Als de Sowjet-Regering rechtstreeks aan Nederland zou hebben verkocht, ligt de zaak iets ingewikkelder;omdat mag worden aangenomen, dat dit niet juist is, behoeft op deze vraag niet al te diep te worden ingegaan.
Zonder evenwel in details af te dalen kan worden gesteld, dat de confiscatie van goederen, die tijdens de confiscatie in het confiscerende land waren, erkend wordt, ook als deze goederen later in het buitenland komen. Of de rechter - indien het tot een procedure zou komen - van oordeel zou zijn, dat een beroep op de openbare orde zou slagen, of met andere woorden a) de rechter de Russische regeling als zodanig intact laat, maar b) tevens weigert aan die maatregel voor Nederland rechtsgevolgen te verbinden, omdat de openbare orde zich daartegen zou verzetten, is niet met alle zekerheid te zeggen. De jurisprudentie is niet duidelijk, maar zoals uit het bovenstaande blijkt, zal de rechter in een eventuele door STROGANOFF ingestelde rechtsvordering vermoedelijk niet tot behandeling van deze vraag behoeven te komen.

De drie andere schilderijen.

Maar met voorkomt, behoeft geen misverstand te worden bestaan aan de verschillende fasen in eigendomsovergang, die plaats vonden vóórdat de recuperatie na de oorlog plaats vond.
Het besluit Vijandelijk vermogen (K.B.van 20 oktober 1944, E 13) bepaalt, dat vermogen, behorend aan een vijandelijk onderdaan, van rechtswege in eigendom overgaat op de Staat der Nederlanden (art. 3). Het besluit laat de mogelijkheid open, dat rechten of aanspraken van derden op gerecupereerd vijandelijk vermogen alsnog worden erkend (art. 20), maar die derde zou in het voorliggend geval alleen de fa Gouwstikker N.V.te Amsterdam kunnen zijn (voorzover

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er sprake is geweest van een gedwongen verkoop aan Bring), in ieder geval niet de heer STROGANOFF.

Het lijkt mij, dat om deze reden thans ook niet dieper behoeft te worden ingegaan op de verschillende juridische vragen, die in samenhang met het besluit Vijandelijk vermogen zouden kunnen rijzen in de zaak STROGANOFF.

CONCLUSIE. Aan de advocaat van de heer STROGANOFF ware in een voorzichtig geformuleerd schrijven (zie de bijgevoegde minute) mede te delen, dat uit de gerefereerde gebeurtenissen geen aanspraak voor de heer STROGANOFF kan worden afgeleid op teruggave van de schildereijen. In moge er nog op wijzen, dat in het schrijven van mr.v.d.Feltz ten minste één onjuistheid voorkomt, t.w. die betreffende de wijze waarop de Staat is eigendom van de Titus verwierf. In dit verband diene, dat het niet ondenkbaar is, dat de heer v.d.Feltz hoopt, dat het schrijven van Uwe Excellentie gegevens zal bevatten, of aanknopingspunten zal bieden, waarvan hij voor zijn cliënt een gebruik zal kunnen maken. Vandaar mijn voorkeur voor een kort schrijven, waaruit alleen te lezen valt, dat de Staat niet tot de conclusie komt, die de heer STROGANOFF wenselijk acht.

2-11-64

De chef van de afdeling
Wetgeving en Juridische
Zaken,

2/11

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Belongs with memo 64.317 W.J.Z. (Legislation and Legal Affairs Division)

Dated November 2, 1964

Subject: Claim with respect to paintings George Stroganoff-Scherbatoff Subpar. O.K...

State Secretary Mr. V.d. Laar.

I. Previous history

On May 10, 1961, at the request of George STROGANOFF-SCHERBATOFF (born in 1898 in London: resident in the U.S.A. with U.S. nationality) a process was served on the State (Finance, OKW) in order to legally inform the State of the following and to interrupt the period of limitation.

In his letter of July 9, 1964, Mr. F. Baron Van der Feltz, a lawyer in Amsterdam provided the Ministry with some further information regarding the conditions already specified in the process of 1961.

In the 1961 process and the letter of July 9, 1964, the following, is stated, insofar as it is relevant.

1. The Petitioner's uncle, Count SERGE STROGANOFF, who had been living in France since 1897, was the owner of, amongst others, a collection of works of art generally known as the STROGANOFF collection (housed in the STROGANOFF palace in St. Petersburg, now Leningrad).
2. In 1918 or 1919, the Soviet Government took possession of the collection without compensation.
3. In May 1923, Count SERGE STROGANOFF died in France.

4. The Petitioner is, at least after the death of his mother in 1944 in France, the universal successor to the rights of his uncle, Count SERGE STROGANOFF. (The process does not clearly indicate the family relationships, but these do not play a meaningful role at least not at this stage – in relation to the current question.)

5. Unable to do so earlier due to international events, in Germany and throughout the world, the Petitioner first recently discovered (± 1961) that several paintings of the original STROGANOFF collection are now in the possession of the State of Netherlands.

6. It concerns the following paintings:

   a. Rembrandt van Rijn — Titus

   b. Lucas Cranach — Eva

   c. Lucas Cranach — Adam

   d. Petrus Christus — Maria mit dem Kinde

7. Titus with the Monk's Hood

   According to the letter from Stroganoff's lawyer, around 1933, the State of the Netherlands purchased the Titus (currently housed in the Rijksmuseum) "after lengthy negotiations with the Soviet Government which was then not yet recognized by the Netherlands, from that Government, without that Government having the authority to dispose of property".

8. Both of the Cranachs (currently housed at the State Agency for the Distribution of Works of Art. Kazernestraat 3. The Hague) and Petrus Christus (Institute for Art History, Drift 255, Utrecht).

According to Stroganoff, the Soviet Government sold these paintings publicly in May 1931 through Rudolph Lepke's Art Auction House in Berlin. The Petitioner, or at any rate his mother, lodged a formal protest against this auction. Not only was this protest made public in various newspapers, it was also made known to all eventual buyers immediately prior to the auction. The protest was based on the confiscatory nature of the measure and on the fact that the law which the Soviet Government invoked should not have been applicable to the STROGANOFFS. A number of objects assessed to have a high value were sold at a low price because of the risk of recovery by the heirs. The paintings were said to be purchased by Art Dealers of Goudstikker N.V. in Amsterdam which, in turn, sold the paintings to Göring during the Occupation. Following the Liberation, these paintings came into the possession of the State of the Netherlands by means of recuperation without those who were dispossessed having made any claim for their return according to Mr. v.d. Feltz's letter of 1964.

9. In the 1962 process, the painting Rembrandt van Rijn *Christus and die Samariterin am Brunnen* (Christ and the Samaritan woman at the well) was also specified. Like the Cranachs and the Petrus Christus it was also included in the auction catalog of Rudolph Lepke's Art Auction House in Berlin. STROGANOFF was nonetheless not successful in discovering the location of this painting. The process also includes this painting in the event that the State currently has actual control over it. The 1964 letter from the lawyer does not mention this painting.

10. As the only legal successor to the original owner of the paintings, the Petitioner now wishes to make his claims enforceable at law. With the argument that the present holders who were all familiar with the origins of the paintings – at least could have and should have been familiar with them – never became their owners because the paintings were obtained from a non-owner, nor did it involve possession in good faith, the letter from the lawyer concludes. Your Excellency is requested to declare whether the State is willing to return "ownership- to the STROGANOFFs.

11. Remarks and conclusions

    Titus with the Monk's Hood.

    a. The Titus is said to have been purchased by the Soviet Government which was then not yet recognized by the Netherlands. It quite generally accepted that the question of the recognition or non-recognition of a state is not relevant. According to the Court of Amsterdam November 4, 1942, Dutch Law Reports (*NJ. Nederlandse Jurisprudentie*) 1943, 496, the public non- recognition of the Soviet Government by the Netherlands does not in itself affect public order in this country. Just for this reason alone – and also partly in relation to the following – no further attention need therefore be paid to this circumstance.

    b. It is said that the Soviet Government had no authority to dispose of property.

       For the Titus, this question is not important. (*Handwritten correction in the text – original text is of less importance".)*

The arguments below will show however that even if the Titus had been sold directly to the State of the Netherlands by the Soviet Government it would not automatically follow that the State of the Netherlands did not become the legal owner.

c. In the letter from the lawyer, I read that the Titus was purchased by the State of the Netherlands directly from the Soviet Government through the intermediation of the Rembrandt Association. In the negotiations held by the Rembrandt Association with the Ministry, great caution was exercised because it was feared that the art world, if it should discover the plans, would steal a march on the State. In addition the funding was a major problem at a time of great malaise and there was also the question of whether it was responsible to spend a large amount of the limited available resources on the purchase of paintings, and these problems are paid the most attention in the dossier. Less attention is paid in the dossier to the legal questions associated with the acquisition of ownership. Nonetheless, I believe that it can be concluded from the dossier that the Soviet Government did not make the sale directly to the Dutch State. True, the document of April 18, 1933 with respect to the draft contract does indeed state that the paintings are not the property of the Association and have only been purchased by it, but the contract officially drawn up between the State and the Association (April 26, 1935)

states that the Association is making the sale and transferring ownership to the State, which is receiving in purchase the paintings that are currently the property of the Association, etc. I deduce from a memo to the said document that the Association made the purchase from an Englishman. It cannot be ascertained whether this Englishman acted as an intermediary or not because of the smoke screen around the entire transaction, but this matter is of little consequence.

Moreover, even if the Rembrandt Association did not have the authority to dispose of properly - quod non - it must be assumed that the State became the owner. The dominant doctrine of 2014 of the Civil Code requires, for an invocation for protection in the sense of that article, that the item has been obtained from a person with no authority to dispose of property in good faith by tradition for a consideration on the basis of a legally valid transfer or property (obligation to transfer title). As long as the bad faith – in this ease, of the State – has not been proved, good Faith will have to be assumed.

The issue is more complicated if the Soviet Government had made the sale directly to the State of the Netherlands; because it may be assumed that this is not correct, it is not necessary to delve too deeply into this question here. However, without getting bogged down in details it can be stated that the confiscation of goods, which were located

in the confiscating country during the confiscation, is recognized even if these goods later appear in a foreign country. Whether the Court – if it should come to a trial – were of the view that an invocation of the public order would succeed, or, in other words, a) the Court were to leave the Russian regulation intact as such, but b) also refused to attach legal consequences to that enactment for the Netherlands because public order would resist it cannot be stated with all certainty. The jurisprudence is not clear but as is evident from the above, in any legal action initiated by STROGANOFF the Court will probably not need to handle this question.

<u>The three other paintings</u>

It looks as if no attention needs to be paid to the various phases in the transfer of ownership that took place prior to recuperation after the war.

The Enemy Property Decree (Royal decree of October 20, 1944. E 133) stipulates that property belonging to an enemy citizen is transferred by law to the State of the Netherlands (Art. 3). The decree leaves the opportunity open for rights or claims of third parties to recuperated enemy property to still be recognized (Art. 26), but in the case in question that third party could only be the Goudstikker Company N.V. in Amsterdam (insofar as the sale to (Göring was enforced), and in any case not Mr. STROGANOFF.

It seems to me that for this reason it is at present not necessary to delve deeper into the various legal questions that could arise in the STROGANOFF case in association with the Enemy Property Decree.

CONCLUSION

To inform Mr. STROGANOFF's lawyer in a carefully formulated letter (see the enclosed minute) that no claim for Mr. STROGANOFF can be derived from the above events for the return of the paintings. I may also point out that there is at least one inaccuracy in Mr. Van der Feltz's letter – that is, regarding the way the State obtained ownership of the Titus. In this context, it is not unthinkable that Mr. Van der Feltz hopes that the letter from Your Excellency contains information or shall provide clues which he will be able to use on behalf of his client. This is the reason for my preference for a short letter, which makes it clear that the State does not arrive at the conclusion that Mr. STROGANOFF deems desirable.

*Handwritten initials and date: November 2, 1964*

The Head of the Legislation
and Legal Affairs Division

*Handwritten initials and date: November 3, 1964*

[LOGO] THE TEXT GENERATION

The Text Generation
Prins Berhardstraat 59
1211 GJ Hilversum
The Netherlands
+31 (0)35 77 21 915
www.thetextgeneration.nl
info@thetextgeneration.nl

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/s/ Karen Drake
Karen Drake

Date: June 5, 2016

Prins Bernhardstraat 59

1211 GJ Hilversum

The Netherlands

+31 (0)35 77 21 915

www.thetextgeneration.nl

info@thetextgeneration.nl

VAT: NL-854201798.B01

Register: 61091391

**APPENDIX N**

**EXHIBIT 242**

**Origins Unknown**

**Recommendations**
**Ekkart Committee**

**April 2001**

Supervisory Committee Origins Unknown/Herkomst Gezocht
Prins Willem Alexanderhof 20
NL - 2595 BE's Gravenhage
00 31 (0)70 - 3717200
00 31 (0)70 - 3852958

www.herkomstgezocht.nl
www.originsunknown.org.

**Appendix 2**

## RECOMMENDATIONS REGARDING THE RESTITUTION OF WORKS OF ART

Recommendations:

1. The committee recommends that the notion of "settled cases" be restricted to those cases in which the Council for the Restoration of Property Rights or another competent court has pronounced judgment or in which a formal settlement was made between the lawful owners and the bodies which in hierarchy rank above the SNK.

2. The committee recommends that the notion of *new facts* be given a broader interpretation than has been the usual policy so far and that the notion be extended to include any differences compared to judgments pronounced by the Council for the Restoration of Property Rights as well as the results of changed

(historic) views of justice and the consequences of the policy conducted at the time.

3. The Committee recommends that sales of works of art by Jewish private persons in the Netherlands from 10 May 1940 onwards be treated as forced sales, unless there is express evidence to the contrary. The same principle should be applied in respect of sales by Jewish private persons in Germany and Austria from 1933 and 1938 onwards, respectively.

4. The Committee recommends that the sales proceeds be brought into the discussion only if and to the extent that the then seller or his heirs actually obtained the free disposal of said proceeds.

5. The Committee recommends that for the purposes of applying this rule the rightful claimants be given the benefit of the doubt whenever it is uncertain whether the seller actually enjoyed the proceeds.

6. The Committee recommends that whenever it is necessary to couple a restitution to the partial or full repayment of the sales proceeds, the amount involved be indexed in accordance with the general price-index figure.

7. The Committee recommends that the authorities, when restituting works of art, refrain from passing on the administration costs fixed by the SNK at the time.

8. The Committee recommends that a work of art be restituted if the title thereto has been proved with a high degree of probability and there are no indications of the contrary.

9. The Committee recommends that owners who did not use an earlier opportunity of repurchasing works of art be reafforded such opportunity, at any rate insofar as the works of art do not qualify for restitution

without any financial compensation according to other applicable criterions.

## RECOMMENDATIONS REGARDING THE RESTITUTION OF WORKS OF ART

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## RECOMMENDATIONS FOR THE RESTITUTION OF WORKS OF ART

### 1. Introduction

The primary task of the supervisory committee: *Origins Unknown*, usually designated as the Ekkart Committee, is to instigate investigations into the provenance of what is known as the NK collection, which consists of the works of art repatriated from Germany after World War II that are still in the custody of the State. In addition, the committee has been assigned the task of investigating the working methods of the Netherlands Art Property Foundation ( abbreviated as "SNK") which in the years 1945-1952 was responsible for the recovery and restitution of works of art; and the task of making recommendations to the Dutch government, based on the insights gained by the research, for

the policy to be pursued on the restitution of works of art of the NK collection.

The investigations into the provenance of the individual works of art were initiated in September 1998. Research is carried out under the substantive responsibility of the Committee by the project bureau *Origins Unknown,* which comes under the jurisdiction of Cultural Heritage Inspectorate. In the mean time two subreports (dated October 1999 and October 2000) have been published, recording the traced provenance information of approximately 1000 items. As from the end of April 2001 the information contained in the subreports will also be available on the Internet in two languages. The provenance research will be completed in the autumn of 2002. The historical inquiry into the carried out by two researchers of the same project bureau, has also been taken in hand and will be completed in the autumn of 2001.

Initially, the intention was to include the restitution policy recommendations to the government in the Committee's final report, which is expected in the fourth quarter of 2002 after the completion of the provenance investigations. The Committee believes, however, that it is extremely desirable to speed up the restitution policy advisory process, provided that this does not harm the carefulness with which the process is carried out. The Committee is confirmed in its view by the concern, appearing from the questions asked by several parliamentary parties in February of this year, that the restitution process will be seriously hampered if a revised restitution policy is too long in forthcoming. In spite of the fact that the investigations into the provenance of the works of art of the NK collection are still in full progress, as is the historical inquiry into the working method of the SNK that is partially based

on these investigations, the Committee has decided to submit part of its recommendations ahead of its final report and to bring forward its report on those interrelated aspects of the restitution policy that have already been sufficiently clarified by the research done so far. This phased presentation of recommendations is aimed at giving the government the opportunity to adopt a new policy for immediate implementation, allowing at least part of the restitution cases to be settled in the near future based on the wider criterions which are considered advisable.

It is true that at the present stage of the investigations it is not yet feasible to present balanced and unambiguous policy recommendations regarding certain elements of the restitution policy, for instance with respect to the Jewish art shops that were placed under the supervision of Verwalters; yet thanks to the work done so far we now do have a clear picture of the policies to be followed with respect to private Jewish art property which got out of the owners' possession during the war years. Since the Ekkart Committee holds the opinion that precisely this aspect is a matter of the greatest urgency, this first set of its recommendations is devoted to this aspect. The designation private art property is used here to include all art works owned for non-commercial purposes, whether held as purely private property or with legal title vested in the collector's family business.

We state emphatically that the fact that we are not yet making any recommendations about other aspects must not have the effect of postponing decisions on cases which already qualify for restitution under the policy that has been followed so far by the government, as set forth in the letter dated 14 July 2000 from the State Secretary of Education, Culture and Science to

the Speaker of the Lower Chamber of Parliament. It is only in the case of claims belonging to a category on which the Committee has not yet made any recommendations and falling outside the scope of the restitution policy currently followed by the government, that it may be advisable for the State Secretary to defer his decision until a revised policy has been adopted in respect of the category in question as well. This applies in particular, therefore, to claims concerning works of art sold in the war years by Jewish art dealers.

**2. General research Findings**

In general, the research work done since September 1998 in implementation of the project *Origins Unknown* confirms the conclusions laid down in the pilot study report of April 1998. Meticulous provenance research often makes it possible to recover information concerning the history of works of art that was unknown to the SNK and in some cases such new information will produce evidence of property having been lost involuntarily while the rightful owners did not submit a claim for such loss after the war. In some cases it also turns out to be possible after all to establish a link between objects still present and objects whose involuntarily loss was reported by the original owners but which were not recognised at the time. In such cases the concepts of *new claim* and *new facts* used in the current government restitution policy may serve to initiate a restitution procedure.

As was already observed in the pilot study report, apart from the items referred to above there are many items whose origin can be traced with certainty and which came into German hands for instance because they were sold voluntarily by Dutch persons not belonging to the persecuted population groups and

which therefore came and remained in the custody of the Dutch State quite lawfully after their recuperation. The investigations also confirm the finding that there is a large number of works of art from the NK collection for which it is impossible to reconstruct a full provenance history, so that only reactions to the publication of the information that is now available may cause evidence of the possible involuntary loss of the property to emerge. For this reason the full publication of the research that has been done so far in reports including publication via the Internet must still be considered an important instrument for discovering cases of looting, confiscation and forced sale. The fact that the investigations occasionally make it possible to unearth unknown and/or unidentified information which may lead to restitutions makes it clear that these investigations must be continued and completed in conformity with the project plan. At the same time. moreover, the investigations are producing a lot of information about the methods used for the restitution of works of art in the years 1945-1952 and thus provide material for formulating recommendations to the government on the policy to be conducted henceforth.

The findings are entirely in agreement with those of other government committees that have tackled the issues of war losses and restoration of property rights. In general, the finding of the Scholten Committee that in several respects the system of legal restitution was characterised by a strictly bureaucratic approach without any flexibility and turning a blind eye on the exceptional position and interests of the victims, is very much applicable to the conduct of the Netherlands Art Property Foundation (hereinafter referred to as the SNK). The remarks of the Kordes Committee about the formal and businesslike approach

taken by the authorities and others are fully applicable to the SNK, while the critical comments of the same committee about the fact that the administration costs of the system for the restoration of property rights were charged to Jewish estates are directly applicable to the guidelines adopted by the SNK for charging the costs of the art restitution process to the rightful owners when restituting works of art.

Based on our examination of the documents relating to a great number of post-war claims we must describe the way in which the Netherlands Art Property Foundation generally dealt with the problems of restitution as legalistic, bureaucratic, cold and often even callous.

### 3. Private art property: basic principles

The current restitution policy of the Dutch government in respect of items from the NK collection is based on the principle that a claim may be submitted only if it is a *new claim* or if *new facts* have become available in respect of a claim already dealt with before. Another condition is that the rightful owner must have lost the property *involuntarily*. Of these requirements only the notion of *new claim* is capable of unambiguous and systematic application. Different views may be held of the concept of *new facts*, while different interpretations of the concept of *involuntary loss of the property* were already used as early as in the period 1945-1952.

The general government position on World War II Assets dated 21 March 2000 is based on the principle that the process of restoring property rights will not as such be repeated. It follows that *settled cases* will not be reopened. Since there may be serious uncertainty about the question what must be considered to fall

within the category of settled cases, the committee, having examined a large number of files, recommends that the term "settled case" be restricted to the two categories regarding which a general consensus does exist, namely judicial decisions and formal settlements made between the bodies which in hierarchy rank above the SNK (Council for the Restoration of Property Rights and the Netherlands Custodian Office) and claimants and signed by both parties. Formal settlements made at a later date with the Kingdom of the Netherlands likewise belong to the category of settled cases. According to this view a decision taken by the SNK does not make a case a settled case, and even less does an unsigned note made by an SNK official on a document stating that the case has been (officially) settled. On the same principle decisions of the SNK followed by a letter from the claimants communicating that under the conditions stipulated by the SNK they have decided not to accept restitution, likewise do not fall within the category of formal settlements.

It has been found that in only a few cases claims refused by the SNK were eventually submitted to the court, in this ease the Judicial Division of the Council for the Restoration of Property. This happened mainly in a period in which the SNK already considered most cases as closed. It is the opinion of the committee that the judgments given in these cases must be viewed as containing criterions for reviewing the assessments by the SNK that were never submitted to the court by the claimants concerned. The resulting differences between judicial judgments and SNK decisions must be considered to constitute *new facts* in any claims that may be submitted. A judgment like the one given in the Gutmann case (1952), for instance, expresses a clearly broader interpretation of the notion of involun-

tary loss of the property than was usually given to the notion by the SNK. This is expressed in the finding that a sale "under the influence of the special circumstances of the war" also qualifies for annulment. Although the other judicial judgments may operate less directly as precedents, they do make it clear that the courts took a more lenient view of the matter than the SNK (see e.g. the judgment in the case of Rebholtz, 1953, which annulled the decisions of the SNK and the Netherlands Custodian Office). Whenever a claim is submitted by a claimant who invokes such a judgment and makes a reasonable case for the view that the application of the norms used in that judgment might have resulted in a different decision than the one taken by the SNK, such claim should qualify for consideration on these grounds.

The concept of *new facts* must likewise be given a broader interpretation than has been customary so far since at present only new, hard facts about the history of the work of art, i.e. new information obtained from the provenance research, are considered to be *new facts*.

Although we must take great care that the application of new norms does not result in legal inequality in comparison to cases fully disposed of at the time, it must also be examined whether according to our present-day sense of justice the methods used by the SNK at the time are sufficiently in agreement with the then existing legal principles as laid down in Royal Decree E 100. There is no need to call into question these basic principles of the restitution policy, but we should examine their implementation by the SNK. In this connection it is important to point out that the ministries involved never gave the draft guidelines set up in late 1946 by the SNK based on the informal 1945

guidelines to help establish the foundation's actual procedure, the official status of instructions to the SNK. It is clear, moreover, that these draft guidelines, which the SNK by all appearances used in practice as rules of conduct, also left much room for different interpretations.

Summarising, it may be stated that the criterions used by the government for not pleading the statute of limitation in respect of claims are practicable, but that the notions of *settled case* and *new facts* need to be given a broader interpretation.

In addition the committee would like to make recommendations for the following points:

- the interpretation of the term forced sale (§ 4)
- the need to repay the sales price (§ 5)
- the use of the concept of proof (§ 6).

Furthermore, a recommendation will be made in respect of a rule which is not laid down anywhere but which the investigations show the SNK to have applied in practice, viz. that where the SNK was willing to restitute an object, the right to "repurchase" the object was valid only for a short period (§ 7).

**Recommendations:**

- **The committee recommends that the notion of "settled cases" be restricted to those cases in which the Council for the Restoration of Property Rights or another competent court has pronounced judgement or in which a formal settlement was made between the lawful owners and the bodies which in hierarchy rank above the SNK.**

- **The committee recommends that the notion of *new facts* be given a broader interpretation than has been the usual policy so far and that the notion be extended to include any differences compared to judgements pronounced by the Council for the Restoration of Property Rights as well as the results of changed (historic) views of justice and the consequences of the policy adopted at the time.**

**4. Forced sale**

Article 11 of the last draft of the *General Policy Guidelines for the Netherlands Art Property Foundation* of 1946 formulates as a condition for restitution that "there must be no doubt as to the involuntary nature of the loss of the property". In explanation hereof the same article 11 adds:

> "Involuntary loss of the property will be basically defined as cases in which the original owners did not lend their co-operation to the loss of the work or works of art belonging to them. Cases will also be included in which such co-operation was given, but where it can be demonstrated to the satisfaction of the Foundation that this took place under force, duress or improper influence, direct or indirect, of the enemy. If in the opinion of the Foundation the conditions stated here have not been satisfied, no restitution shall be made for as long as the claims of the applicants have not been recognised by the competent court."

In carrying out its activities the SNK seems to have acted in accordance with this rather narrow definition of the term "involuntary loss of the property".

It must also be recalled, moreover, that a very high number of registration forms about war-time sales of works of art were filled out by the SNK itself by way of "internal registration forms" and that consequently the only significance that may be attached to the designation *free sale* on such forms is that this was the view taken by the SNK.

It was already pointed out before that only very few cases were eventually submitted to the courts, but there is at least one judgement which makes it clear that the courts took a broader position in this matter than the SNK. This is the judgement given on 1 July 1952 by the Council for the Restoration of Property Rights in the Gutmann case. In this judgement the Council reversed the judgement of the SNK that sales made in 1941 and in the first quarter of 1942 could not have been forced sales. In reaching its decision the Council took the ground that even though the buyers of the works of art may not have used any direct coercion, the special circumstances might nevertheless warrant the plea of forced sale.

This judgement provides an unambiguous basis for a policy principle to the effect that the characterisation of forced sale may be applied to all sales of works of art by Dutch Jews from 10 May 1940 onwards, unless there is express evidence to the contrary. For the fact is that often the driving motives for selling off works of art consisted of existing or imminent measures of the occupying forces ordering the surrender of works of art to an occupation agency and the fact that possessions left behind be a person fleeing to save his life would be confiscated. So in this respect it is immaterial whether the initiative for the sale came from the buyer or from the seller and likewise immaterial whether the buyer must be deemed to have been

acting in good faith or in bad faith. Sales by Jewish owners in Germany and Austria from 1933 and 1938 onwards, respectively, can also be deemed to have been forced sales except for proof to the contrary.

In the case of other private persons the current principle, viz, that it must be proved that a sale was definitely or in all probability made involuntarily, will continue to apply.

**Recommendation:**

- **The Committee recommends that sales of works of art by Jewish private persons in the Netherlands from 10 May 1940 onwards be treated as forced sales, unless there is express evidence to the contrary. The same principle should be applied in respect of sales by Jewish private persons in Germany and Austria from 1933 and 1938 onwards, respectively.**

**5. Repayment of sales proceeds**

As already stated, one of the features of the SNK policy was that in the case of works of art that had been sold, the owner had to refund the price paid therefor if he wanted to repossess the works of art sold involuntarily. The Committee holds that the strict application of this principle can only be described as extremely cold and unjust, in particular because many Jewish owners used the proceeds exclusively to try and flee the country and because in many cases the proceeds did not actually benefit the owners of the works of art.

Although it would seem to be a simple solution just to refrain from demanding any repayment, in the opinion of the Committee this would conflict with the principles of equality before the law, since in the years

after 1945 some owners of works of art did in fact repay the asked price and since it was precisely the requirement of repayment which in many cases presented an obstacle that frustrated the actual restitution of works of art. Entirely declining all repayments would therefore be diametrically opposed to the principles of the restoration of property rights applying at the time and would stamp with pointlessness the efforts of rightful claimants who in those days scraped together money, often clearly at very great pains, to buy back works of art. It is however necessary to relax the implementation of the repayment rule considerably. The basic principle governing this point should be that repayment of the sales proceeds is required only if it can be proved that the then owners or their heirs received money which they were free to spend, including any sums used in repayment of prior, normal debts or loans. There are no grounds for requiring any repayment in all cases in which the money received was probably spent solely on attempts, whether or not successful, to leave the country or to go into hiding. Likewise, no repayment should be demanded if the sales proceeds never directly reached the persons entitled (payment into an inaccessible account).

Such a relaxation of the rules is entirely within the policy lines established after the war, since article 27(5) of Royal Decree E 100 (Restitution of Legal Rights Decree) provides expressly that the Council for the Restoration of Property Rights "*may* direct that the sales price must be transferred in part or in full to the State (. . .)", contrary to an earlier wording of this article which provided for the compulsory reclamation of the sales price.

Under the rules of such a policy, only sums received in connection with forced sales that actually accrued to the seller's capital as well as sums received after the war by the entitled parties by way of payment of blocked accounts would have to be repaid, at any rate to the extent that there is any certainty on these points. In deciding whether there are grounds for demanding repayment, the rightful claimants should, where necessary, always be given the benefit of the doubt: if there are sufficient grounds to doubt whether the party concerned actually made some money out of a sale at the time, no repayment should be required.

If the inquiry results in the conclusion that it is justified to require partial or full repayment of the sales price, such repayment should be indexed in conformity with the general price-index figure. Such indexation is necessary for the sake of equality before the law compared to those who did buy hack their property in the after-war years and will moreover prevent extra profits being gained now by those who at the time very consciously opted for money instead of restitution of works of art. The Committee is aware that for some rightful claimants changes in the market value of the individual works of art concerned may bring either a profit or a loss, but it sees no possible way of also incorporating this factor, which varies from one object to the next, in a general policy,

Any sums still to be paid should be appropriated to a specific cause, which may be identified at a later stage. In the opinion of the Committee these sums must not be added to the general public fund in order to avoid even the semblance of any profit coming to the State from the sufferings of war.

The Ekkart Committee, like the Kordes Committee, takes an extremely critical attitude toward passing on

the costs of the restitution machinery to the rightful claimants, as the SNK did in the years 1945-1952 because the Dutch government expected the foundation to be self-supporting in the matter of costs. Whenever a restitution is made, whether or not coupled to repayment of the sales price, the authorities should always refrain from charging any such costs.

**Recommendations:**

- **The Committee recommends that the sales proceeds be brought into the discussion only if and to the extent that the then seller or his heirs actually obtained the free disposal of said proceeds.**
- **The Committee recommends that for the purposes of applying this rule the rightful claimants be given the benefit of the doubt whenever it is uncertain whether the seller actually enjoyed the proceeds.**
- **The Committee recommends that whenever it is necessary to couple a restitution to the partial or full repayment of the sales proceeds, the amount involved be indexed in accordance with the general price-index figure.**
- **The Committee recommends that the authorities, when restituting works of art, refrain from passing on the administration costs fixed by the SNK at the time.**

### 6. Proof of title

It is clear that it will often be difficult to produce conclusive evidence of title and of the truth of the facts stated by the former owners concerning the loss of the property, among other things because in many cases

the relative documentary evidence will have been lost due to the war situation. In assessing the evidence the benefit of the doubt should be given to the private person and not to the State. When it is proved that a claim is probably valid and there are no indications of the contrary, the claim should not meet with a blunt refusal. In this type of cases the judgement given by the Council for the Restoration of Property Rights in the Rebholtz judgement of 23 November 1953 may be taken as a precedent; one of the grounds taken in this judgement reads as follows: "Whereas with respect to this issue: in the first place the Council holds that the applicants have produced sufficient prima facie evidence that the painting at issue was the property of Mrs Rebholtz, while it is not possible to infer sufficient indications of the contrary from the exhibits submitted in evidence by the State after the oral hearing; furthermore . . . .".

Nevertheless, a more lenient interpretation of the concept of "proof" must leave fully intact one basic principle that was quite rightly applied by the SNK, namely that "there must be no mutually inconsistent claims submitted and there should be no reason to suppose that such claims will be entered in the future" (draft Guidelines SNK, article 11(b). This basic principle led to the requirement, which was also applied by the SNK, that the restitution of a work of art must be preceded by a careful examination whether there is sufficient certainty that the claim does in fact relate to the designated work of art. Based on the present research it may be added that it must also be examined, perhaps more thoroughly than was done by the SNK, whether the work of art in question may not have changed hands involuntarily a second time during the war. Cases of conflicting claims should be submitted to the regular courts or to arbitration.

**Recommendation:**

- **The Committee recommends that a work of art be restituted if the title thereto has been proved with a high degree of probability and there are no indications of the contrary.**

### 7. Period allowed for repurchasing

The research done so far has revealed a number of cases in which the SNK recognised claims to recovered items and gave the rightful claimants the opportunity to "repurchase" these items, which items were however never actually restituted. In some cases there is a letter from or on behalf of the owners saying that they have decided not to make use of the opportunity offered them in view of the conditions attached thereto, sometimes there are only indirect indications that the owners renounced their rights.

In some cases owners who initially did not have sufficient funds to repurchase their property, subsequently still tried to do so on the conditions stated on the earlier occasion. In 1958 the application of Wassermann was refused over the telephone following an opinion of the State Inspector that restitution would create a precedent (Subreport of October 2000, p. 109) and the applications of Busch were likewise refused in 1965 and in 1973, in 1965 among other things based on an opinion of the State Inspector that "it is desirable for the painting of Floris van Schooten to be retained in the possession of the State" (Subreport of October 2000, p. 71).

If the policy criterions are revised in conformity with the recommendation set forth in § 5, it is probable that in some of such cases the condition of repayment of the sales price would no longer apply. Where such a condition would still apply, it is advisable in

accordance with the above recommendations to allow the rightful claimants an ample period, to be determined at a later stage, in which they may still repurchase the works of art in all those cases in which the owners were given the opportunity of repurchasing works of art and in which no formal settlement was made but the owners merely acquiesced in the fact that they were forced to decide not to use the opportunity offered by the SNK. For this purpose, moreover, the recommendations for price indexation and not passing on administration costs set forth in § 5 must also be taken into account.

**Recommendation:**

- **The Committee recommends that owners who did not use an earlier opportunity of repurchasing works of art be reafforded such opportunity, at any rate insofar as the works of art do not qualify for restitution without any financial compensation according to other applicable criterions.**