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Assessment Framework for examining and deciding on the treatment of Nazi-looted cultural property

Preamble

Bearing in mind the horrors of the Nazi regime and the lasting impacts of its vast and immeasurable injustice, Germany acknowledges its historical responsibility to ensure justice for the victims and subsequent generations.

In this spirit, Germany committed in a Common Statement in 1999 to implementing the Washington Principles of 1998, which name the art theft of the Nazi regime and call for the identification of Nazi-looted cultural property and for just and fair solutions. More than a quarter-century after the landmark decision to end the Nazi looting of cultural property by returning such property to its rightful owners, and in recognition of what the Federation, the *Länder* and the national associations of local authorities have so far achieved, a legal procedural framework will now counter the injustice of the Nazi looting of cultural property. This framework also respects the Best Practices for the Washington Conference Principles on Nazi-confiscated Art. This binding Assessment Framework replaces the non-binding "Guidelines" for implementing the Common Statement. The arbitration panel and institutions holding cultural property are required to apply this Framework as the basis for all of their examinations and understandable, justified decisions. The Framework constitutes the material basis for the arbitration proceedings, which may be initiated by unilateral appeals and the decisions of which are binding.

The injustice of National Socialism emanated from an unjust state which turned against those whom it was obligated to protect as its citizens. That is why the state and its institutions today have a special obligation to acknowledge this injustice committed by the state and to remedy it with just and fair solutions. Private owners of cultural property who commit to the principles and procedures set out in the Common Statement and this Assessment Framework accept this historical responsibility for the community. Private individuals and institutions organised under private law are encouraged and called on to join in committing to the principles and procedures set out in the Common Statement and this Assessment Framework.

Acknowledging injustice, ensuring compensation and achieving *Rechtsfrieden* are the guiding principles of every examination and decision.

Chapter I – General provisions

1 – Scope of application

1.1 This Assessment Framework applies to cases in which the loss of cultural property between 30 January 1933 and 8 May 1945 as the result of persecution under the Nazi regime on racial, political, religious or ideological grounds or as a victim on grounds of sexual orientation is claimed.

1.2 This Assessment Framework is independent of the location where the loss of the cultural property occurred if the cultural property is located in Germany when the arbitration proceedings are initiated.

1.3 This Assessment Framework is the basis for arbitration proceedings in accordance with the Administrative Agreement establishing the "Court of Arbitration for Nazi-looted Cultural Property" of the Federation, the *Länder* and the national associations of local authorities. The version of the Assessment Framework in force at the time of decision applies.

2 – Provision of evidence and reduction of the burden of proof

2.1 Unless otherwise specified, the parties bear the burden of proof for providing the facts in their favour. Both parties must give each other full access to the documents and sources available to them.

2.2 When clarifying the conditions for a just and fair solution, consideration is to be given to the fact referred to in no. 4 of the Washington Principles that gaps or ambiguities in the provenance are unavoidable in light of the passage of time and the circumstances of the Holocaust era. This means in particular that

1. indirect forms of evidence have a special significance. In particular, the parties may present possible scenarios, may rely on circumstantial evidence and attempt to reconstruct a course of events which cannot be proved in detail by referring to the historical context;
2. parties may use prima facie evidence. Prima facie evidence depends on the existence of undisputed or proven facts and historical information indicating that a certain course of events was typical in such cases;
3. statutory declaration in lieu of an oath are admissible;
4. to be convincing, certainty is not required if it has been determined that a high level of probability suffices.

2.3 For the purposes of this Assessment Framework,

1. "certainty" means a degree of assurance which is usable for practical purposes and silences doubts without fully ruling them out;
2. "high level of probability" means a lesser degree of assurance than certainty. This degree of assurance requires that, taken together, the facts, circumstantial evidence and hypotheses, despite remaining gaps or doubts, speak convincingly in favour of accepting the particular historical facts of the case. This degree of assurance arises out of the comparison of all possible constellations, the consideration of the facts presented on the basis of historical sources, research findings and known or typical historical processes as well as circumstantial or prima facie evidence in the course of selecting the most likely scenario.

3 – Formal entitlement to apply for arbitration

3.1 A just and fair solution may be requested by a natural or legal person who claims that cultural property was lost between 30 January 1933 and 8 May 1945 as the result of persecution under the Nazi regime on racial, political, religious or ideological grounds or as a victim on grounds of sexual orientation. The same applies if

1. the application is made by a sole successor in title mortis causa;
2. the application is made jointly by all members of an undivided community of heirs;
3. the application is made by a single member of an undivided community of heirs on behalf of the members of an undivided community of heirs, if all members have agreed on this. Evidence of such an agreement is to be provided. This applies accordingly to persons entitled to shares of an enterprise;
4. the application is made jointly by all persons entitled to shares of a legal person under private law or a partnership which pursued primarily economic purposes (enterprise).

3.2 The successor organisation of a legal person or an association of persons not primarily oriented on economic purposes which was dissolved or was forced to dissolve may request a just and fair solution if the organisation's statutes conform to those of its predecessor, the organisation performs the functions or tasks of its predecessor or pursues its purposes as specified in the statutes of its predecessor.

Chapter II – General requirements

4 – Definition of cultural property; identity of the object

4.1 The movable object claimed must constitute cultural property. To constitute cultural property, an object or collection of objects must today be assessed as possessing artistic, historical, archaeological, scientific, religious or general cultural value. This object must be the same object whose loss between 30 January 1933 and 8 May 1945 is claimed (identity of the object).

4.2 There must at least be a high level of probability that the object is the same object whose loss is claimed. The other party must assist in investigating the object's identity.

5 – Ownership

5.1 The cultural property must, at the time of its loss between 30 January 1933 and 8 May 1945, have been the property of the party entitled to apply for arbitration or of her or his predecessor in title.

5.2 If, at the time of its loss between 30 January 1933 and 8 May 1945, the cultural property was in the possession of the party entitled to apply for arbitration or of her or his predecessor in title, their ownership of the cultural property is presumed. If they were in possession before 30 January 1933, possession is presumed to have continued within the time period referred to in sentence 1 unless there are circumstances indicative of its loss. The continuance of possession is presumed in particular if the loss occurred not long after the latest (demonstrated) possession prior to 30 January 1933.

The other party may disprove this. The presumption does not apply to merchandise among the commercial assets of a dealer.

5.3 There must be at least a high level of probability that ownership existed.

5.4 The provisions of the applicable law may be referred to in order to clarify ownership status at the time of loss.

5a – Special cases of ownership

5a.1 If an object of cultural property was transferred as security, as a rule the guarantor is to be treated as the owner if, due to persecution, she or he was, with a high level of probability, prevented in law or in fact from servicing a secured debt and lost the collateral for this reason. If only the person who transferred the object of cultural property as security was persecuted, as a rule she or he is to be treated as the owner if she or he was unable due to persecution to claim her or his rights under the security agreement. In both cases, special circumstances may justify a different assessment.

5a.2 Goods on commission of a dealer are not to be treated as the property of the dealer but rather of the person who consigned them. Merchandise among the commercial assets of a dealer is to be considered the equivalent of private property.

5a.3 If, at the time of its loss, the cultural property was the property of a legal person or a partnership, this legal person or partnership is to be treated as the owner of the cultural property.

6 – Entitlement to a just and fair solution

6.1 The previous owner of the cultural property is entitled to a just and fair solution. The same applies

1. to a person who claims the succession in title mortis causa of the previous owner;
2. to a person who claims entitlement to shares in an enterprise; and
3. to a successor organisation of a legal person or an association of persons not primarily oriented on economic purposes which was dissolved or was forced to dissolve if the organisation's statutes conform to those of its predecessor, the organisation performs the functions or tasks of its predecessor or pursues its purposes as specified in the statutes of its predecessor.

6.2 Succession in title mortis causa is to be proven. The requirement to present certificates of inheritance is to be waived if succession in title mortis causa can be proved by other means. The same applies accordingly to persons entitled to shares of a legal person or a partnership. When applying for arbitration, the provisions of the applicable law may be referred to in order to clarify succession in title mortis causa.

Chapter III – Special requirements

7 – Persecution as a result of the Nazi regime

7.1 The person entitled to apply for arbitration or her or his predecessor in title must have been persecuted between 30 January 1933 and 8 May 1945 on racial, political, religious or ideological grounds or as a victim on grounds of sexual orientation.

7.2 For the period between 30 January 1933 and 8 May 1945, the assumption of collective persecution applies to persons who, under Nazi law, were persecuted as Jews or as "half-breeds in the first degree" (*Mischling 1. Grades*) and to members of the Sinti and Roma ethnic groups. The same applies to their

spouses who were not persecuted, as long as the marriage existed as a community of shared fate and persecution or the couple's children needed to be cared for. The assumption that spouses who did not belong to the groups subjected to collective persecution were persecuted may be disproved by the other party by means of special circumstances in the individual case.

7.3 Evidence of individual persecution is to be provided.

8 – Forms of loss; sufficiently close connection (*hinreichend enger Zusammenhang*)

8.1 The person entitled to apply for arbitration or her or his predecessor in title must have suffered the loss of cultural property as the result of action by government bodies or by private third parties or as the result of a legal transaction in the period between 30 January 1933 and 8 May 1945. A sufficiently close connection between the loss and the persecution as a result of the Nazi regime is required.

8.2 A sufficiently close connection is presumed in the case of loss resulting from a legal transaction by a person subjected to collective persecution. A sufficiently close connection is presumed in the case of a legal transaction by a person subjected to individual persecution if the legal transaction occurred during the period of persecution. The presumption of a sufficiently close connection applies as well to legal transactions between persons subjected to persecution. This presumption may be disproved subject to the requirements in the cases of 8b to 8d.

8.3 In the case of legal transactions by dealers, a sufficiently close connection is presumed if a consideration of all the circumstances does not provide any indication of the orderly continuation of ordinary business transactions. Orderly business transactions ceased at the latest when the dealer was permanently expelled from the Reich Chamber of Visual Arts (*Reichskammer der bildenden Künste*).

8.4 In case of a person subjected to persecution who did not permanently flee Nazi-controlled territory and who sold cultural property outside of Nazi-controlled territory, as a rule a fair purchase price and the ability to freely dispose of the purchase price as desired is assumed.

8a – Loss as the result of action by state bodies or by private third parties

8a.1 In the case of cultural property lost as the result of action by state bodies in the period between 30 January 1933 and 8 May 1945, as a rule a sufficiently close connection exists between the loss and persecution as a result of the Nazi regime. The general rule on the distribution of the burden of proof therefore plays a subordinate role.

8a.2 In exceptional cases, a sufficiently close connection between the loss and persecution as a result of the Nazi regime may not exist. This may be shown by the following indicators in particular:

1. restrictions pursuant to the government ordinance on the export of artworks of 11 December 1919 (*Verordnung über die Ausfuhr von Kunstwerken*, Reich Law Gazette p. 1961), if this ordinance was not applied in a discriminatory way in the individual case;
2. compulsory sales by public auction, if these were not connected to the persecution of the owner of the cultural property; or
3. loans of cultural property seized by government bodies as part of the "Entartete Kunst" ("degenerate art") campaign. This does not apply if, due to persecution, the owner was denied the possibility of restitution or compensation that owners who were not persecuted sometimes

received.

8a.3 In the case of cultural property lost as the result of action by private third parties, a sufficiently close connection between the loss and persecution as a result of the Nazi regime exists if the loss was enabled or facilitated by the persecution of the owner. The same applies to cultural property lost in other ways.

8b – Sale prior to 15 September 1935

8b.1 In the case of cultural property lost as a result of a sale prior to 15 September 1935, the presumption of a sufficiently close connection between the loss and persecution as a result of the Nazi regime may be disproved if the person subjected to persecution

1. received a fair purchase price and
2. was free to dispose of the purchase price as desired.

8b.2 The purchase price is in principle fair if it corresponds to the value that the cultural property would have had at the time of sale if it had been sold by a person not subjected to persecution (objective market value). The approximate objective market value is to be determined with the help of comparable values from legal transactions by persons who were not subjected to persecution and involving comparable cultural property under comparable market conditions such as place, time and type of sale.

8b.3 The ability to freely dispose of the purchase price as desired must have existed at the time the legal transaction was concluded and completed. This ability is lacking in particular if the purchase price had to be used to pay special discriminatory fees, or if access to the seller's bank account was blocked as the result of discriminatory regulations. People persecuted as Jews under Nazi law lost the ability to freely dispose as a rule after 14 May 1938.

8b.4 The other party bears the burden of proof for disproving the presumption of a sufficiently close connection between the loss of cultural property and persecution as a result of the Nazi regime. If this presumption is disproved, the person entitled to apply for arbitration may present facts which nonetheless indicate a sufficiently close connection. This presentation may rely in particular on evidence that the seller agreed to the legal transaction due to coercion in the individual case or to a wrongful act in connection with the persecution.

8c – Sale after 15 September 1935 by a person subjected to collective persecution

8c.1 In the case of cultural property lost as a result of a sale on or after 15 September 1935 by a person subjected to collective persecution, the presumption of a sufficiently close connection between the loss and persecution as a result of the Nazi regime may be disproved if the person

1. received a fair purchase price and was able to freely dispose of the purchase price as desired, and
2. the main substance of the legal transaction would have been concluded even if the Nazi regime had not existed, or if
3. the buyer successfully demonstrated a special respect for the seller's property interest.

8c.2 The main substance of the legal transaction would have been concluded even if the Nazi regime had not existed, provided that the persecution had no effect on the decision to sell, on the purchase price or on the choice of a particular means of payment. This may be indicated in particular by the following:

1. the seller had seriously considered selling the cultural property already before 30 January 1933, or
2. the sale was part of the distribution of an estate.

8c.3 The successful demonstration of special respect for the seller's property interest requires exceptional good faith on the part of the buyer. This can be assumed in particular if the transfer of assets took place abroad and the seller received payment despite foreign exchange regulations. The payment of a fair purchase price alone is not a sufficient demonstration.

8c.4 The other party bears the burden of proof for disproving the presumption of a sufficiently close connection between the loss of cultural property and persecution as a result of the Nazi regime.

8d – Loss by means of donation and other legal transactions

8d.1 The presumption of a sufficiently close connection between the loss of the cultural property and persecution as a result of the Nazi regime generally applies to donations as well. This presumption does not apply if the personal relationship between the parties gives reason to believe that the cultural property was given away as a donation for decency (*Anstandsschenkung*). The other party has the option of demonstrating that there was no connection between the donation and the persecution as a result of the Nazi regime.

8d.2 The same applies accordingly to the loss of cultural property by means of other legal transactions.

9 – Loss due to sale outside of Nazi-controlled territory

9.1 In the case of cultural property sold outside of Nazi-controlled territory by a person subjected to collective persecution who permanently fled Nazi-controlled territory, a direct connection between the loss and persecution as a result of the Nazi regime is required. This connection is not presumed. Nazi-controlled territory is the territory of the German Reich on or after 30 January 1933, of Austria on or after 12 March 1938, of the annexed areas of Czechoslovakia on or after 1 October 1938, of the Memel territory on or after 23 March 1939 and of countries occupied by German forces after the Second World War began on 1 September 1939. Nazi-controlled territory also includes territory which was not occupied by German forces but was under Nazi influence, as was recognised in the Federal Act for the Compensation of the Victims of National Socialist Persecution (*Bundesentschädigungsgesetz*, BEG).

9.2 The direct connection is to be determined by evaluating all of the circumstances of the sale. This evaluation of all of the circumstances should in particular consider the following:

1. whether there was a direct temporal connection (by 8 May 1945 at the latest) between the loss resulting from a sale and flight as a result of persecution, and
2. whether the seller was unable to receive a fair purchase price and/or to freely dispose of the purchase price as desired due to flight as a result of persecution. Denial of permission to work or a precarious residence permit in particular may be relevant factors which prevented the seller from participating in the market on equal terms. With regard to the ability to freely dispose of the purchase price as desired, it may be necessary to consider the seller's need to use the proceeds of the sale to secure her or his own refugee status.

Chapter IV – Decision

10 – Grounds for precluding a just and fair solution

A just and fair solution may be ruled out if the person entitled to apply for arbitration or her or his predecessor in title reached a private settlement on the basis of the Allies' restitution laws which allowed the cultural property to remain in the possession of the possessor in exchange for payment or other compensation. A private settlement does not constitute grounds for precluding a just and fair solution if the settlement appears to be blatantly inequitable.

11 – Just and fair solution

11.1 If the requirements under Chapter II and Chapter III for a just and fair solution are met, returning the cultural property to the person entitled to apply for arbitration takes precedence.

11.2 Particularly in the case of incomplete facts, a just and fair solution may consist in the following:

1. the cultural property is sold and the proceeds are divided; or
2. the cultural property remains in the possession of its current possessor or owner and is only displayed in public together with an explanation of its provenance and the circumstances of its loss.

A just and fair solution may also consist in a modification, addition to or combination of nos. 1 and 2. Solutions consisting in a direct monetary payment are ruled out. Such solutions may nonetheless be allowed if the parties agree in an amicable settlement before the arbitration panel on a consensual resolution of the dispute.

11.3 If, at the time of its loss, the cultural property was the property of an enterprise, the just and fair solution may be brought about

1. in the event of additional liquidation, vis-à-vis the enterprise in liquidation, or
2. vis-à-vis joint ownership to the successors in title of the former shareholders.

In the case of shares in a legal person or a partnership, a just and fair solution must consider the shared entitlements according to the applicable company law.

11.4 If the same cultural property was lost more than once in temporal succession in connection with persecution as a result of the Nazi regime, only the first person who suffered the loss is to be considered in a just and fair solution (principle of priority).

11.5 If the requirements for a just and fair solution are not met, the application for arbitration is to be denied. If the application is denied, the general fate of the person subjected to persecution that has come to light is to be recorded and honoured.

12 – Other provisions

12.1 If the just and fair solution involves returning the cultural property to the person entitled to apply for arbitration, this solution is to be checked against material restitution already paid according to the Federal Act for the Settlement of the Monetary Restitution Liabilities of the German Reich and Legal Entities of Equal Legal Status (*Bundesrückerstattungsgesetz*, BRüG). In order to avoid duplicate

compensation, an enquiry should be directed to the Federal Office for Central Services and Unresolved Property Issues (BADV). If the BADV files a claim for repayment on behalf of the Federation, this claim is to be considered in reaching a just and fair solution.

12.2 Monetary payments and other compensation based on private settlements are to be considered as well. By way of exception, significant expenses by the other party may be considered.

12.3 The German Lost Art Foundation (DZK) is to be informed of every just and fair solution for entry in its database of restitution reports.