Art and armed conflicts:

From war booty to the right to restitution

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Executive Summary

The concept of spoils of war, traditionally understood as the appropriation of movable property during armed conflicts, has evolved in international humanitarian law to be limited mainly to military or private property with hostile use. International Humanitarian Law to be limited mainly to military or private property for hostile use. However, the looting of works of art and cultural property has been a historical constant, despite its exclusion from this category because of its lack of military utility.

Faced with the need to protect cultural heritage, international instruments have been developed, such as:

The Hague Convention (1954), which prohibits the seizure and requires the restitution of plundered cultural property.

The Paris Convention (1970), which seeks to prevent illicit trafficking in cultural property.
cultural property.

The Washington Convention (1998), which establishes principles for the restitution of works looted by the Nazis, including the identification of property and fair resolution for victims.

Emblematic cases illustrate the challenges in restitution:

"Rosebushes under the Trees" by Klimt: France restituted the work in 2022 to the heirs of Nora Stiasny, a victim of Nazi plunder, through an exceptional law that went beyond the principle of inalienability of public collections.

"Rue Saint-Honoré" by Pissarro: After decades of litigation, the American courts applied Spanish law, favoring the Thyssen-Bornemisza Museum due to the acquisitive prescription and previous compensation received by the Cassirer family in 1958.

Avances legislativos recientes:

EE.UU.: La Holocaust Expropriated Art Recovery Act (2016) amplía los plazos para reclamar obras expoliadas.
Francia: Las leyes de 2022 y 2023 facilitan la restitución mediante mecanismos administrativos y excepciones a la inalienabilidad.

España: La Ley de Memoria Democrática (2022) inicia la auditoría de bienes incautados durante el franquismo, aunque con limitaciones en la reparación económica.

Recent legislative developments:

USA: The Holocaust Expropriated Art Recovery Act (2016) extends deadlines for reclaiming expropriated works.
France: 2022 and 2023 laws facilitate restitution through administrative mechanisms and exceptions to inalienability.

Spain: The Law of Democratic Memory (2022) initiates the audit of assets seized during Franco's regime, although with limitations on economic reparations.

01 Approach

According to the definition offered by the Diccionario Panhispánico del Español Jurídico, the spoils of war can be defined as the set of movable goods appropriated by the soldiers of the enemy after the battles and that were part of their salary or reward. During the Ancien Régime, part of this booty corresponded to the king. Since the Middle Ages it was fixed at one-fifth, thus being called "Quinto del Botín" (Fifth of the Booty).

In our days, the wide concept of booty, is more delimited in the Customary International Law that circumscribes it (not always) to the military goods and to the private ones used against the winning army. The rule according to which a party to the conflict may confiscate military equipment belonging to an adversary as spoils of war is already established in the classic Lieber Code (1863). According to the Code, the spoils of war belong to the party seizing them and not to the person seizing them.

This same principle is reflected in numerous military manuals. As explained in the Australian Armed Forces Manual, "booty comprises all articles captured along with prisoners of war other than personal effects."Other military manuals define spoils of war as enemy military goods (equipment or property) captured or found on the battlefield. In both cases, the aim is to distinguish military property from personal or private property. In this sense - private property found on the battlefield - the United Kingdom military manual and the United States campaign manual state that, insofar as they are weapons, ammunition, military equipment or documents of a military nature, they can also be confiscated as booty. The most logical interpretation is that non-military property is excluded (inclusio unius exclusio alterius).

The case law of several post-World War II courts and other adjudicated cases confirms the relative protection of private property against confiscation. However, in the Al-Nawar case before the Israeli High Court of Justice in 1985, Judge Shamgar held that all State-owned movable property found on the battlefield may be confiscated by the belligerent captor State as spoils of war, including arms and ammunition, stores of merchandise, machines, instruments and even cash. All private property used for hostile purposes and found on the battlefield or in a combat zone may be confiscated by a belligerent state as spoils of war.

Although exceptional, the definition of booty used by the Israeli judge is not limited to military equipment and is based on the broader definition expressed in Article 53 of the Hague Regulations (the so-called "Law of War" or "Law of Armed Conflict") which includes among the property that can be confiscated in occupied territories: "funds, bonds receivable belonging to the State, arms depots, means of transport, stores and provisions and, in general, any movable property of the State which can be used for military operations". To the extent that these assets can be confiscated, they are effectively spoils of war, even if they are not technically found or obtained on the

battlefield. This connection is also observed in the military manuals of Germany, France and the Netherlands. In the German manual, for example, it is stated that: "public movable property which can be used for military purposes shall be considered as spoils of war". (excerpt from provisions 49 to 51 of Customary International Humanitarian Law Volume 1: Rules. Cambridge University Press and International Committee of the Red Cross, 2005. Available in Spanish version at Customary IHL, Rules - Customary IHL - ICRC, https://ihl-databases.icrc.org/es/customary-ihl/rules

It seems, therefore, that not even accepting a broad definition of confiscable property (military and civilian), in no case could works of art be considered property susceptible to military use. In spite of this, we can sadly affirm that the theft, seizure, confiscation and looting of works of artistic value has always accompanied armed conflicts. The victors have generally and systematically appropriated the valuables of the defeated enemies. If we adopt a global conception, it appears that the preservation of cultural heritage is of great importance for all the peoples of the world, which, in itself, justifies international protection of this heritage. Damage to cultural property belonging to any people constitutes an impairment of the cultural heritage for the whole of humanity, since each people makes its contribution to the world's culture.

Precisely because of this global approach, some international standards specifically aimed at the protection of artistic works should also be considered:

Convention for the Protection of Cultural Property in the Event of Armed Conflict signed in The Hague on May 14, 1954 by 49 Countries and which currently has 136 States parties.

In the context of the massive destruction of cultural heritage during World War II, the Convention can be considered the first international treaty with a global vocation dedicated to the protection of cultural heritage in the event of armed conflict. The Convention - and its two Protocols - not only proscribes the seizure of art as a means of preventing the export of cultural property from an occupied territory, but goes further and requires the return of such property to the territory of the State from which it was exported. Thus, both the prohibition of looting and the obligation of restitution appear.

Cultural property, movable or immovable, is considered to be that which is of great importance to the cultural heritage of peoples, such as historical monuments, archaeological sites, works of art, books, and buildings whose main and effective purpose is to contain cultural property.

In order to mitigate the consequences that an armed conflict could have on cultural property, a set of measures is proposed::

- The States Parties shall take safeguarding measures in peacetime, such as preparing inventories, planning emergency measures for protection against fire or collapse of structures, preparing for the removal of movable cultural property or providing adequate in situ protection for such property, and designating competent authorities responsible for the safeguarding of cultural property;

- respect for cultural property situated in their respective territories as well as in the territory of other States Parties, by refraining from using such property, its protection systems and its immediate vicinity for purposes which might expose such property to destruction or damage in the event of armed conflict, and by refraining from any act of hostility towards such property;
- study of the possibility of registering a restricted number of shelters, monumental centers and other immovable cultural property of very great importance in the International Register of Cultural Property under Special Protection with a view to placing such property under special protection;
- study of the possibility of marking certain important buildings and monuments with the distinctive emblem of the Convention;
- establishment of special units of the armed forces responsible for the protection of cultural property;

This first experience was followed by **the adoption of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property**, signed in Paris on November 14, 1970. It currently has 147 States Parties.

It is one of the key instruments developed by UNESCO to protect and safeguard the world's cultural heritage following a steady increase in thefts from museums and other sites from the late 1960s to the early 1970s, especially in the countries of the Southern Cone. These works stolen from countries with a lower degree of economic development, and therefore less capacity for protection, are - despite their illicit origin - marketed to wealthy private collectors with few scruples, but also, much more seriously, to official institutions.

The 1970 Convention delimits in a remarkably broad way the object of protection in works listed below:

- collections and unique specimens of zoology, botany, mineralogy, anatomy, and objects of paleontological interest;
- property relating to history, the history of science and technology, military and social history, the lives of national leaders, thinkers, scholars and artists, and events of national importance;
- the product of excavations - both authorized and clandestine - or archaeological discoveries;
- items resulting from the dismemberment of artistic or historical monuments and sites of archaeological interest;
- antiquities more than 100 years old, such as inscriptions, coins and engraved seals;
- ethnological material;

- goods of artistic interest such as: pictures, paintings and drawings made entirely by hand on any support and on any material, excluding industrial drawings and manufactured articles decorated by hand;
- original productions of statuary art and sculpture in any material;
- original engravings, prints and lithographs;
- original artistic assemblages and montages in any material;
- unique manuscripts and incunabula, books, publications and antique documents of special interest - historical, artistic, scientific, literary, etc. - individually or in collections;
- postage stamps, revenue stamps and similar, individually or in collections;
- archives, including phonographic, photographic and cinematographic archives;
- furniture objects that are more than 100 years old and antique musical instruments;

Once again, the 1970 Convention imposes on States Parties the obligation to act essentially in the establishment of preventive measures such as inventories, the requirement of official export certificates, control measures on dealers in cultural property. Also in the application of penal or administrative sanctions for possible non-compliance, as well as the implementation of information campaigns and the promotion of active cooperation between countries for the proper enforcement of the Convention. All this, however, always under the prism of voluntariness that characterizes public international law.

Given that one of the most blatant and shameless acts of pillage and plundering of works was carried out by the Nazi army in the Second World War, the so-called **Washington Convention** was approved in 1998 between 44 countries and the World Jewish Restitution Organization. (https://wjro.org.il/). The Convention was born of a twofold observation: on the one hand, the reality of the systematic and widespread despoilment of works of art carried out in several European countries by the German army. It is not a question of execrable and punctual acts but of a real policy of collective appropriation.[1] Secondly, experience in the application of international standards to open cases reveals an enormous procedural complexity of the claim and the dysfunction that the disparity of applicable national laws often represents.

The principles[2] of the convention can be summarized as follows:

- **Duty of Identification of Works**: Since one of the main issues may be precisely the disappearance or loss of traceability of the works, steps should be taken to

[1] .- In 2018, the WJRO (World Jewish Restitution Organization) estimated that around 650,000 works of art were stolen during that conflict. Currently, 11,000 pieces of art, with a global value between 10 billion and 30 billion dollars, are still 'missing.'

2 .- PEREZ VAQUERO, C. (2002) 'The Washington Principles on Art Confiscated by the Nazis' in *Albis. Cuadernos de Criminología y Ciencias Forenses*, no. 48, pp. 58-61. Available at https://dialnet.unirioja.es/ejemplar/550023

identify the specific pieces of art that were confiscated by the Nazis and have not been returned. This duty includes the provision of human and material resources responsible for the task.

- **Determination of Ownership of the Works**: Every effort should be made to identify the previous owners before the war or their heirs. This includes investigating possible gaps or ambiguities in their provenance in light of the passage of time and the circumstances of the Holocaust era.
- **International Accessibility**: Relevant records and archives should be open and accessible to researchers in accordance with the International Council on Archives.
- **Unified Central Registry**: Efforts should be made to establish a single registry that consolidates identifying information about the works and their legitimate owners.
- **Institutional Support**: Governments and public administrations should encourage pre-war owners, as well as their heirs, to claim the works of art that were confiscated by the Nazis and to participate in the legal processes until effective restitution or compensation is achieved.
- **Fair and Equitable Resolution:** Despite the indeterminacy of the concepts of equity and justice and their difficult evaluation in each case, measures should be taken to achieve an individual solution that aligns, as far as possible, with these principles.
- **Independence**: Commissions or other bodies established to identify art confiscated by the Nazis and to help address ownership issues should be composed of a balanced representation of the various interests involved and be independent of any instructions or pressure.
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From a diachronic perspective, there is a slow evolution from protective measures (The Hague 1954) to the prohibition of trade (Paris 1970), culminating in the recognition of the obligation of restitution (Washington 1998).

02 Recent cases with opposing solutions

2.1 Oil painting Rosensträucher unter den Bäumen by Gustav Klimt.

"Rosensträucher unter den Bäumen" Oleo sobre lienzo 110 x 110 cm. Gustav Klimt 1905.

As detailed on the official website of the Musée d'Orsay (https://www.musee-orsay.fr/es/node/412), the oil painting Gustav Klimt created in 1905 belonged to a prominent Austrian Jewish family, the Stiasnys. Nora Stiasny was the niece of the great collectors Viktor and Paula Zuckerkandl, who had acquired the painting in 1911 and gifted it to her. When Nazism arrived in the country, a family friend, the artist Philipp Häusler, joined the National Socialist Party in 1933, and with the annexation of Austria to Germany (Anschluss Österreichs on March 13, 1938), he found the perfect moment to seize the 110 x 110 cm oil painting, then titled *Apfelbaum* (The Apple Tree). He blackmailed Nora Stiasny, who was forced to sell the Klimt painting for a much lower price than its market

value (400 German marks when it was worth around 5,000 in 1938). This forced sale occurred under the threat of their own lives. Despite this, Nora Stiasny was deported and murdered in the extermination camps in Poland in 1942 along with her mother, husband, and son.

In 1980, the painting was acquired at the Peter Nathan Gallery in Zurich (Switzerland), with prior approval from the Artistic Council of the National Museums. At the end of the 1990s, Nora Stiasny's heirs submitted a restitution request to the Belvedere Museum (since 1903 the National Museum of Modern Art of Austria). In 2001, the Advisory Board on Art Restitution recommended that the Austrian government return the Apfelbaum painting to the descendants of Stiasny, believing it to be the painting she had been forced to sell in 1938, the year of Austria's annexation by Nazi Germany. However, in July 2017, the Austrian authorities investigating the painting's provenance concluded that there had been an error in identifying the returned artwork.

Experts determined that the painting originally sold under duress by Stiasny was not Apfelbaum II, but rather Rosen unter Bäumen (Roses under the Trees), another work by Gustav Klimt, which has been housed in the Musée d'Orsay in Paris since 1980.

This critical mistake had two main consequences: (i) the Austrian government's attempt to reclaim the incorrectly returned painting, and (ii) the confirmation of the illicit origins of the work currently in France.

Regarding the first issue, when the error was discovered, the Stiasny family had already sold Apfelbaum II, and the current legitimate owners, in good faith, after years of negotiations, refused to sell or return the painting to the Austrian state, considering the oil painting their private property. To avoid unjust enrichment, the heirs of art collector and Holocaust victim Nora Stiasny were required to pay 11.3 million USD (10.5 million EUR) to Austria for the wrongful return of the Klimt painting. After years of negotiations, in 2023, the Austrian government and Stiasny's heirs reached an agreement(https://www.eleconomista.es/actualidad/noticias/12145098/02/23/Austria-recibe-105-millones-por-la-devolucion-equivocada-de-un-cuadro-de-Klimt.html) , in which the heirs will compensate the state with 10.5 million euros for the incorrect return of the painting.

On the other hand, Andrea Mayer, Austria's Secretary of State for Art and Culture (2020–2024), emphasized in a recent statement that, "although it is painful that the Apfelbaum II painting cannot be returned to Austria," she celebrated that the "long and complicated history" of this restitution case had finally come to an end. She also reminded that both this and other restitution cases "are based on the exclusion, persecution, and systematic murder of countless people during National Socialism."

As for the second aspect, the joint investigation conducted by the Musée d'Orsay, the French Ministry of Culture, the Belvedere Gallery, and representatives of Nora Stiasny's heirs confirmed that the Klimt painting looted from Nora Stiasny was, in fact, Rosen unter Bäumen.

This painting entered the French national collections in 1980 during the restructuring of the Musée d'Orsay and was acquired from the legal art market. Like all acquisitions

made by the state, it was submitted to approval by the French National Museums' Artistic Council, which made its decision based on the information available at the time about the painting, particularly its history.

The complexity of this case is a reminder of the importance of provenance research and the need to clarify the journey of artworks between 1933 and 1945 to ensure that cultural goods currently in public collections have not been subject to the frequent anti-Semitic looting. In 2019, the French Ministry of Culture established a commission dedicated to investigating cultural property looted between 1933 and 1945 to expand the efforts made over the past two decades. The public institutions of the Musée d'Orsay and the Musée de l'Orangerie, along with other national museums, have committed to this in-depth work on the provenance of the works they hold.

Unlike the works listed in the National Museums' Recovery Inventories, which do not belong to the national collections and can therefore be returned if looted, works acquired voluntarily by public institutions, whether for a fee or as a donation, are part of the public domain and protected by legal principles of imprescriptibility and inalienability.

To make the restitution of "Rosen unter Bäumen" to the heirs of Nora Stiasny effective, France opted to require the government to present a bill to authorize the removal of the painting from the national collections, based on the looting that occurred in 1938. This was the *LOI n° 2022-218 du 21 février 2022, relating to the restitution or return of certain cultural property to the heirs of their owners who were victims of anti-Semitic persecution. JORF no. 44 of February 22. (Art. 1: "By way of derogation from the principle of inalienability of goods constituting the collections of French museums belonging to a public entity as set out in article L. 451-5 of the Heritage Code, as of the publication date of this law, the painting by Gustav Klimt titled Rosiers sous les arbres and held in the national collections under the guardianship of the Musée d'Orsay, which is referenced in the annex to this law, ceases to be part of these collections. The administrative authority has, from the same date, one year to return this work to the heirs of Eleonore Stiasny."*).

According to Roselyn Bachelot-Narquin (French Minister of Culture, 2020-2022), "Rosen unter den Bäumen was the only painting by Gustav Klimt that France held. Now, it is also being relinquished, but for a logical and legitimate reason: to make history right. After confirming that the painting was looted by the Nazis from its original owners, a Jewish family from Austria, in 1938, France decided to return the piece to its rightful owners. It was a "difficult but just" decision, as "it involves removing a masterpiece, the only Klimt in France's collection." Nevertheless, she acknowledged that "it was a necessary, indispensable decision. Eighty-three years after the forced sale of the painting, this is an act of justice."

The Stiasny case demonstrates the importance of ensuring traceability within the art trade. A final example, also involving Gustav Klimt, can be found in the recent auction of the canvas "Portrait of Miss Lieser" (1917), sold for 30 million euros at the Viennese auction house Im Kinsky, far exceeding the most valued piece at an Austrian auction to date (April 24, 2024).

As journalist David Granda explains, “The artistic and commercial value of Klimt's painting was compounded by mystery and drama. The painting, which remains intact, emerged from the shadows in January unexpectedly. Until then, experts only knew of its existence from a black-and-white photograph in an exhibition archive at the Neue Galerie in Vienna in 1925, where it was never displayed. What occurred to the artwork between that date and the 1960s is unknown. There is no evidence that it was seized or confiscated (stolen) by the Nazis following the annexation of Austria to the Third Reich. However, its possible owner, Henriette Lilly Lieser, was deported and killed in the Riga ghetto in 1942 (other sources record that she was gassed at Auschwitz in 1943). Lilly Lieser was a prominent patron of the avant-gardes, a sensitive Jewish intellectual who mentored composers Arnold Schönberg and Alban Berg in their dodecaphonic revolution. Nevertheless, much of her family's property was quickly looted by the Nazis.

The investigation by the local newspaper Der Standard indicated that during the world war the canvas came into the hands of an individual named Adolf Hagenauer, a little-known shopkeeper who had been a committed member of the Nazi Party since 1933, when being a Nazi was still prohibited in Austria. It is speculated, but not proven, that he acquired the painting in exchange for food or protection, but Hagenauer, like all of Vienna, was aware that Lilly had been murdered.

In the absence of legal documents to substantiate the movements of this work, the fact that a Jewish family had lost a Klimt during World War II prevented the new owners from making it public. “There is a void in those years and the whereabouts of the work is unprovable,” asserted Ernst Ploil, co-founder of the auction house Im Kinsky.

A year and a half ago, the current owner, a member of the third generation of the family that has inherited the painting since the 1960s, presented the work on the first floor of the Palais Kinsky, where the auction house is located in Vienna, a proud aristocratic palace from 1719 in a square surrounded by other aristocratic palaces. The revenue of Im Kinsky is modest compared to the large firms in London and New York, but their choice was more than a geographical anecdote. The owner of the Klimt sought artistic and legal expertise in handling cases of art looted during the Nazi era.

The sale stemmed from a private restitution agreement between the painting's owner and the heirs of Klimt's former clients, namely Adolf Lieser or Lilly Lieser. “There is no evidence that the work was looted, stolen, or illegally confiscated before or during World War II, but we had to cover all possibilities,” insists Ploil. The agreement included the stipulation that, should a collector buy it internationally, it would guarantee that the Federal Office of Monuments could issue an export permit.” (https://elpais.com/cultura/2024-04-24/el-cuadro-de-klimt-perdido-durante-un-siglo-subastado-por-30-millones-mucho-menos-de-lo-esperado.html)

2.2 The Painting by Camille Pissarro Claimed by the Cassirer Family.

Rue Sant Honoré por la tarde. Efecto Lluvia. Óleo sobre lienzo 81 x 65 cm. Camile Pissarro.

In 1909, Paul Cassirer, a member of a prominent family of Jewish art dealers and publishers, purchased the painting from the agent of the Impressionist painter Camille Pissarro. Lilly Cassirer inherited the painting from her father and kept it in her home in Berlin. After years of intense persecution against German Jews, Lilly decided in 1939 that she had to do everything possible to escape Germany. To obtain an exit visa to England, where her grandson Claude Cassirer had already moved, she handed the painting over to the Nazis. In 1939, Lilly Cassirer Neubauer (her married name by her second marriage) sold the painting for far less than its market value to Jakob Scheidwimmer, a dealer and Nazi Party member, in order to leave the country and avoid extermination camps. She received only 900 marks, which was deposited into a blocked account. The painting was later acquired by another Jew, Julius Sulzbacher, who also had it confiscated by the Gestapo while trying to flee to Brazil in 1941.

After the war, the family began the search for the painting. As later revealed, in 1951 the painting was purchased at the Frank Perls Gallery in Beverly Hills (Los Angeles) by American collector Sydney Brody. A year later, the artwork was put up for sale at the Knoedler Gallery in New York. That same year, it was acquired by a prominent collector from Missouri, Sydney Schoenberg, heir to a department store fortune, who would be its rightful owner from 1952 until 1976.

In 1976, Baron Hans Heinrich Thyssen-Bornemisza (descendant of the founder of the German steel empire) bought the painting from the Stephen Hahn Gallery in New York for $360,000 and brought it to Europe. "Rue Saint-Honoré" hung in the baron's Swiss residence until the early 1990s, when in 1993, he sold much of his art collection, including "Rue Saint-Honoré," to the Thyssen-Bornemisza Collection Foundation, an entity created by the Kingdom of Spain through Royal Decree-Law 11/1993, of June 18, relating to regulatory measures for the acquisition contract for the Thyssen-Bornemisza collection.

The sale was conducted after due diligence on the legitimacy of the sellers' title to sell the collection. This due diligence found no irregularities concerning ownership. The purchase by the Foundation based on this sale contract — for which the amount of $350 million was paid — is thus fully valid, effective, and unassailable under Spanish law, which is the applicable law for the transaction. At no point was the title of Baron Thyssen or his good faith in acquiring the painting questioned.

In 2002, twenty-six years after the baron's acquisition, the Cassirer family claimed restitution of the painting for the first time. In 2005, Claude Cassirer filed a lawsuit in a Los Angeles court against the Thyssen-Bornemisza Foundation. In 2010, Claude Cassirer passed away at the age of 89, and his children, David and Ava, continued the litigation with support from the United Jewish Federation. Ava died in 2018.

After 19 years of legal proceedings, a ruling was issued in what appeared to be the final judgment on the matter (California Court of Appeal ruling of January 9, 2024), ultimately siding with the ownership of the Spanish state.

In summary, the legal doctrine that emerged includes the following points:

(i) Even though this is a lawsuit against an instrumental entity of a sovereign state (a public museum), the applicable law in the underlying ownership dispute must be the same as would be in any lawsuit between private individuals. The previous ruling from the Supreme Court dated April 21, 2022, established that "in a case involving the application of the Foreign Sovereign Immunities Act (FSIA) to a non-federal claim against a foreign state or an instrumental entity of that state, the court must determine substantive law applying the same conflict rule it would apply in a similar lawsuit involving a private party. This means applying state law, not a federal legal norm."

The Supreme Court reasoned that if we consider two lawsuits seeking to recover a painting — one against a public state museum and another against a private museum — if the conflict rule with respect to the two cases differs, the substantive law selected would also differ. If the substantive law differs, so would the outcome of the lawsuit, which would create an unjust distinction. Since the state cannot enjoy the privilege of sovereign immunity, it must comply with the same rules as private individuals. In short: "A foreign state or instrumentality in an FSIA suit is liable just as a private party would be."

(ii) Once jurisdiction is established, regarding the substantive law applicable to the issue, there are fundamentally two options: federal law (which recognizes Spanish law) or state law (California). When applying federal jurisdiction (FSIA), the defendant's claim (Thyssen Foundation) to apply Spanish law was naturally supported. This choice is highly relevant to the litigated painting: federal law recognizes the application of the law of the petitioning state. According to Spanish law, ownership can be acquired through the legal institute of adverse possession (usucapion as per Article 1955 of the Civil Code), with good faith, just title, and a lapse of six years in the case of movable goods. In contrast, if California law is applied, acquisition by possession against the rights of the original owner would not be possible, regardless of the good faith of the purchaser.

In the final ruling of 2024, the California Court utilized the doctrine of "comparative impairment," weighing which jurisdiction would be more adversely affected by the multiplicity of applicable rights. The ruling stated that there exists a true conflict of laws since each jurisdiction has a "real and legitimate interest in having its laws applied under the present circumstances." According to the Appeals Court, both Spanish property laws and Californian laws serve legitimate interests of their respective jurisdictions. For Spanish law, the regulation seeks to ensure that Spanish residents' property title is assured after having possessed the property in good faith over a specific period, while California law aims to deter theft, facilitate recovery of property for those who have been victims of illegal deprivation, and avoid creating the expectation that a good-faith purchaser of movable property traced back to someone who committed the illegal deprivation can consolidate ownership of that property.

It is noteworthy that the judicial ruling does not determine which law is better concerning a certain goal (restorative justice) but rather assesses which interests are more adversely affected. There is a California interest in maintaining its restitution law, as well as a Spanish interest in preserving legal stability. While the comparison might be disputable, both interests are recognized as legitimate.

The lack of relevant developments regarding the painting's status in California ultimately means that the state's interest in this case is merely based on the coincidental fact that Claude Cassirer relocated to California in 1980. The absolute application of California law would indeed be quite forced. This painting is by a Franco-Danish artist, purchased by a German citizen in Berlin, and subsequently looted by the Nazi regime. The owners had to flee first to Oxford and then New York. Lilly Cassirer passed away in 1962 in Cleveland (Ohio). The family moved to San Diego when David Cassirer retired as a musician. The painting was sold in New York to Baron Thyssen-Bornemisza (a Swiss citizen with Hungarian noble titles and legal residency in the Principality of Monaco) in 1976, who kept it in his Swiss residence until its acquisition by the Spanish state in 1993. Ultimately, the only connection to California law is the current residence of the claimant, which leads to the conclusion that Spanish law must prevail.

One might easily wonder why the "fair and equitable" solution to the two presented cases ("Roses under the Trees" by G. Klimt and "Rue Saint-Honoré" by C. Pissarro) is diametrically opposed. In 1958, Lilly and her grandson Claude, who had moved from

England to the United States, initiated litigation in Germany, unaware that the painting was in close proximity to them in the United States. After being declared the legal owner, Lilly Cassirer agreed in 1958 to accept compensation from the Federal Republic of Germany (120,000 German marks, around $30,000, equivalent to approximately $280,000 today). This amount represented the market value of the painting at the time. From that sum, she paid 14,000 German marks to Sulzbacher's heir. This agreement effectively concluded all claims between the parties and partially restored the painting to the legal art market.

Additionally, it should be noted that between the baron's purchase of the painting in 1976 and the first claim in 2002, there was no action taken by the family. The painting passed through a public auction in Switzerland; its possession by the new buyer was both known and notorious, and it was later sold as part of the collection purchased by the Spanish state in 1993. The lack of action from the family over a span of 26 years significantly affects the outcome of the case.

Despite these compelling arguments, one of the judges on the case (Consuelo Callahan) acknowledged in her concurring opinion that *"she agreed with the result, but it was at odds with her moral compass, and Spain should have voluntarily relinquished the painting."*

03 Some recent legislative developments

3.1. The Holocaust Expropriated Art Recovery Act of 2016.

In 2016, the United States Congress passed the Holocaust Expropriated Art Recovery Act (HEAR), which expands **the statute of limitations for recovering works of art lost or stolen** due to Nazi persecution. [3] Despite the existence of some regulatory precedents (the Holocaust Victims Redress Act of 1998), lawmakers highlight that victims face numerous procedural obstacles since most state laws limit actions to a specific number of years from the events or the discovery of the current ownership of the artworks. As articulated in the law, "the unique and terrible circumstances of World War II and the Holocaust make statutes of limitations especially burdensome for victims and their heirs. Those seeking to recover art confiscated by the Nazis must meticulously

[3] .- Available text at https://www.congress.gov/bill/114th-congress/house-bill/6130/text

reconstruct their cases from a fragmented historical record devastated by persecution, war, and genocide."

According to the statute, "*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.*"

In summary, the HEAR law aims to ensure that claims regarding artworks confiscated by the Nazis are not unjustly hampered by restrictive state laws but can be resolved fairly based on the substance of the matter and its circumstances. It establishes a uniform six-year statute of limitations for all cases involving works of art lost due to persecution during the Nazi era. Additionally, the law interestingly extends the timeline for actual discovery of the facts (identity and location of the artwork) as relevant information for initiating the statute of limitations for potential claims. The law also retroactively applies to reopen all previous cases that were dismissed due to the expiration of the statute of limitations and for which no definitive judgment had been rendered.

Thus, the American Congress seeks to faithfully comply with the requirements of the Washington Conference, although it cannot be overlooked that the establishment of uniform statutes of limitations cannot be considered a significant advance in line with the international principles established in Washington at the end of the last century.

3.2 French Restitution Laws

The French legislative assembly approved the pioneering Law 2022-218 of February 21, 2022, regarding the restitution or return of certain cultural goods to rightful heirs of their owners who were victims of antisemitic persecutions. *(**LOI n° 2022-218 du 21 février 2022 relative à la restitution ou la remise de certains biens culturels aux ayants droit de leurs propriétaires victimes de persécutions antisémites. JORF de 22 de février de 2022**)*.[4]

This law stands in the context wherein, in recent years, the French Ministry of Culture has created a commission to investigate the matter of restitution of looted goods

[4] .- Available text at https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000045197692

between 1933 and 1945. (*Décrets n°2018-829 et n°2019-328, et l'arrêté du 16 avril 2019 portant création de la mission de recherche et de restitution des biens culturels spoliés entre 1933 et 1945)*. This initiative aimed to address the significant losses experienced during that period, particularly due to the systemic plundering of cultural properties directed by the Nazi regime and facilitated by the collaboration of various factions within occupied countries.During the fall of 1940, the primary instrument of this policy was the *Einsatzstab Reichsleiter Rosenberg* (ERR), which specifically sought to appropriate cultural assets belonging to Jewish families and other targeted groups. France experienced massive losses of artworks, both through looting and through substantial purchases made by German museums and private citizens who unscrupulously exploited the situation created by military occupation.

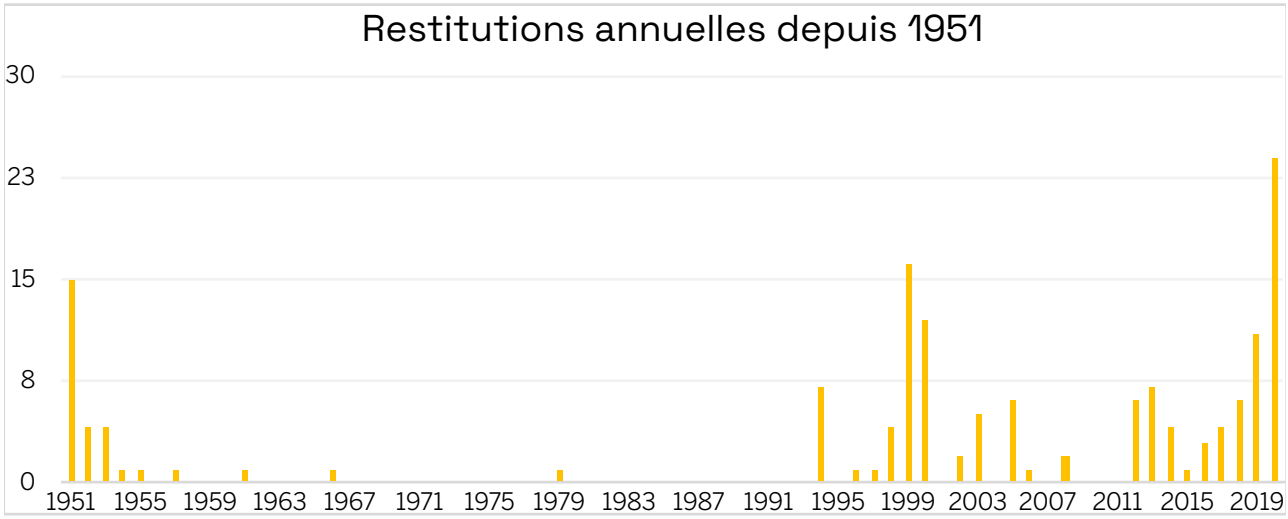
Partial restitution was carried out by the French administration after the war through the *Commission de Récupération Artistique* (CRA) and compensation provided under the war damage law of 1946. Germany also enacted legislation via the BRüG German Federal Law on the Regulation of Refund Rights related to the German Reich and equivalent legal entities, which regulated financial liabilities in restitution matters.(*Bundesgesetz zur Regelung der rückerstattungsrechtlichen Geldverbindlichkeiten des Deutschen Reichs und gleichgestellter Rechtsträger, 1957*). Of the estimated 100,000 looted artworks, the CRA returned around 45,000 works between 1944 and 1949, while also requiring the sale of over 12,000 others. The Selection Commission (1949-1953) retained 2,143 works classified as "MNR" (*Musée Nationaux Récupération*), which were entrusted to the custody of French museums. Among these were some that had been looted, others purchased under dubious circumstances by German and Austrian museums, or acquired through coercion or blackmail as a means to escape deportations or capital punishment. In 1999, the *Commission pour l'indemnisation des victimes de spoliations* (CIVS) was created to address claims.

The complexity of reconstructing the history of artworks often requires consulting various sources. In France, primary resources for this research include the archives of the *Office des Biens et Intérêts Privés* (OBIP) and the *Commission de Récuperation Artistique* CRA, as well as records from French museums, the National Archives, and the Departmental Archives of Paris. Abroad, relevant documents can be found in the BRüG legal funds in Germany and multiple archives in the United States, Austria, the Netherlands, Great Britain, and others.

In the absence of tangible proof from their own investigations, the Commission often bases its decisions on documents or testimonies provided by the claimants. At times, it relies on circumstantial evidence suggesting the existence of works belonging to the victims (based on lifestyle, ties to identified intellectual and artistic circles, etc.). The Commission adjudicates in equity based on submitted documents, period testimonies, the presence of the works within systematic cataloging efforts or inventories, and can propose four different solutions:

1. **Restitution.** In cases where the claimed goods are listed among MNR (*Musée Nationaux Récupération*) works in collections custodied by national museums, their restitution to rightful owners is required.
2. **Economic Compensation**. For artworks that cannot be located, monetary compensation is provided based on the estimated current value of the work at the time of the looting. This assessment relies on documents and testimonies from claimants, data found in archives, and published works documenting sales and auction results from artists during the 1935-1955 period. Valuing compensation for artworks is delicate and complex as determining the value of a painting necessitates more than merely attributing it to an artist; one must consider its condition, format, theme, artistic quality, and its market standing.
3. **Supplement to German BRüG Compensation.** If the claimed works have been compensated under the German BRüG law, the amounts of compensation are typically about 50% of the estimated damage. The Commission's practice is to augment these reductions to reach the level of (fair economic compensation).
4. **Dismissal**. If there is a complete lack of credibility or serious indications concerning the possession of the claimed goods, the case may be dismissed.

The pace of restitution has notably accelerated in recent years.



The *Loi 2022-218* can be viewed as a unique legislation with just four articles and an annex, resolving the fate of 15 artworks displayed in major national museums in France. It is noteworthy that this law is not of a general nature but rather specific for four heirs and 15 artworks, thus representing a legislative avenue for return, a novel approach that joins the existing judicial and administrative restitutions. However, there remains a long way to go, as only a total of 125 artworks have been returned, which accounts for less than 5% of estimates — a fact that does not detract from the symbolic significance of the change in position regarding restitution.

More recently, the law No. 2023-650 of July 22, 2023, titled **loi relative à la restitution des biens culturels ayant fait l'objet de spoliations dans le contexte des**

persécutions antisémites perpétrées entre 1933 et 1945.[5] was also approved. Unlike the previous legislation, this new law represents a general approach to public policy favor ing restitution. It aims not just to address a specific legislative restitution effort, as in 2022, but to establish a general mechanism for the restitution of cultural property.

Under this framework, the government must undertake necessary actions to contribute to the investigation of the provenance of cultural goods in public museum collections belonging to private legal entities that may have been looted during the antisemitic persecutions perpetrated between January 30, 1933, and May 8, 1945. This is not merely about compiling a list or inventory; it also involves initiating actions to return these items to their rightful owners or pursue alternative forms of reparations.

In this regard, the law exempts the rule of inalienability from the Public Heritage Code (Article 115.2) specifically for the restitution of looted cultural assets. An administrative authority will decide on restitution measures in relation to artworks that were looted between January 30, 1933, and May 8, 1945, in the context of antisemitic persecutions perpetrated by Nazi Germany and its collaborators, including the French state between July 10, 1940, and August 24, 1944. This article also applies to properties acquired through donations and bequests to the collections of French public museums.

A commission accountable to the Prime Minister will determine the measures that the administrative authority must adopt to facilitate restitution. The public entity and the owner or their beneficiaries may mutually agree on reparations terms that differ from the restitution of the goods.

3.3 Spain

On March 17, 2006, the Parliamentary Assembly of the Council of Europe issued a recommendation condemning the "serious violations of Human Rights committed in Spain by the Franco regime," while urging the adoption of legislative measures aimed at ensuring recognition and reparations.[6] Following this, the Spanish Parliament passed Law 52/2007 on December 26, which recognizes and expands rights and establishes measures for those who suffered persecution or violence during the Civil War or the dictatorship.

Law 52/2007 marked the first significant step (over 30 years after the dictatorship) in the process of institutionalizing public policies focused on democratic memory in Spain. The law was enacted in the context of a historical debt that weighed heavily on the Spanish legal system: the need to rectify the injustices endured by the victims of the civil war and the following Franco regime. In this sense, the significant value of Law 52/2007

[5] .- Available text at https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000047874541.

[6] .-"Recommendation 1736 (2006) of the Parliamentary Assembly of the Council of Europe. Available at https://pace.coe.int/en/files/17417. Cf. SÁNCHEZ-MORENO, M. (2020) 'Democratic memory policies in Spain: between impunity and international obligations,' in *Cuadernos de Gobierno y Administración Pública* 7-1, 41-52."

lies in its commitment to placing personal and familial memories within the democratic citizenship framework, through the general acknowledgment of victims, their individual and collective right to reparations, and the declaration of the illegitimacy of the repressive organs of the Franco regime.

From this starting point, public authorities assumed a series of obligations aimed at recognizing the truth regarding the events that transpired in Spain during the Civil War and the dictatorship, locating and identifying the disappeared, eliminating any form of glorification of the dictatorship in public spaces, and facilitating access to public and private archives. However, this initial memory law in Spain completely overlooked any mechanism for the identification and restitution of artistically valuable goods unlawfully expropriated.

Several years later, Law 1/2017 was also passed on April 18, regarding the restitution of cultural goods that have left Spain illegally or from other EU member states, thereby incorporating the European Parliament and Council Directive 2014/60/EU of May 15, 2014, into Spanish law, although the real impact of this law has been modest..[7]

However, it is only very recently that **Law 20/2022, of October 19, on Democratic Memory** was enacted (BOE No. 252, October 20, 2022). Article 31 of this law (concerning the seizure of goods) recognizes the right to redress for property seized and economic sanctions imposed for political, ideological, conscientious, or religious belief reasons during the Civil War and the dictatorship, under terms legally established and in subsequent regulations.

This undoubtedly represents a first step toward recognizing the right to restitution. However, the General Administration of the State is only now beginning to be obligated to promote necessary initiatives to investigate the seizures made for political, ideological, conscientious, or religious belief reasons during the Civil War and the dictatorship. What began in France with the *Commission de Récupération Artistique* years ago is now opening the process for a complete audit of looted properties in Spain, including works of art, currency, or other fiduciary signs deposited by Francoist authorities. This audit is set to include an inventory of seized goods and rights and will cover immovable property and rights held by types of organizations such as cultural centers, cooperatives, and similar entities. The Museo Nacional del Prado is preparing an inventory that can be consulted at https://www.museodelprado.es/obras-incautadas.

However, somewhat disappointingly and diametrically opposed to the French approach, upon completion of the audit, the right to restitution is limited under Article 5.4, which states that "(the annul ment of the legal resolutions) cannot produce effects regarding the recognition of the patrimonial responsibility of the State, any public administration, or individuals, nor lead to any economic effect, reparation, or compensation." The

[7] .-The Spanish judgments database (CENDOJ) does not report any trial in which any provision of the Law has been applied. Cf. ELVIRA BENAYAS, M. J. (2018). 'Transposition into the Spanish legal system of Directive 2014/60/EU on the restitution of goods that have been illegally removed from a Member State through Law 1/2017.' ***Revista Española De Derecho Internacional,*** 70(1), 181–200. Recovered from https://www.revista-redi.es/redi/article/view/629.

reference in Article 31.3 to Article 5.4 implies treating the annulment of illegitimate judicial resolutions similarly to expropriations, forced contracts, or fictitious sales.

While the law advances in highly sensitive issues such as the exhumation of victims, searching for the disappeared, the removal of symbols, deprivation of subsidies, and the suppression of noble titles, it does significantly less in terms of the restitution of looted art.

A recent example illustrating the challenges in Spain involves the De la Sota family. Ramón de la Sota y Llano (1857–1936), a ship owner and member of the Basque Nationalist Party, was one of the wealthiest individuals of his time. He died shortly after the onset of the Civil War. His son, Ramón de la Sota y Aburto, fled to Biarritz, France, in 1937, where he died in 1978. The family owned two paintings: "Portrait of a Gentleman," attributed to Frans Pourbus the Younger (1569-1622), and "Portrait of Queen Maria Cristina of Bourbon," by Vicente López Portaña (1772-1850), which were part of their private collection.

These artworks were requisitioned by the Francoist army, and a few years ago, Ramón de la Sota Chalbaud, the great-great-grandson, identified both works in a catalog concerning the art collection of the National Paradores, discovering they were displayed on the walls of the Parador de Almagro. This initiated a restitution claim process, which, after a favorable report from the State Attorney General, led to the return of the paintings to the heirs. The artworks can currently be seen at the Museum of Fine Arts in Bilbao. However, this case remains an exceptional instance within Spain's broader landscape.As of today, there is still no regulatory development regarding the “recognition pathways for affected individuals” outlined in Section 3 of Article 31 of the Law, as mandated by its own text.

04 Conclusiones

Over time, the illegal appropriation of goods in armed conflicts has transformed from a natural issue or a right of the victors to an awareness of the illegality of looting or forced sales. Cultural heritage thus becomes another victim of armed conflicts. In this regard, the European century of wars has been a paradigmatic example of this.

Despite this notable change and the approval of certain international standards, it remains difficult to approach all cases with a general legal framework. According to the Washington Convention (1998), the resolution of restitution cases must seek to be fair and equitable. This inevitably implies a degree of casuistry. Each case must be resolved by examining the circumstances surrounding the change of ownership.

For this, it is very important to strike a balance between the right to restitution and the principles of legal certainty and the passage of time. And this issue is more of a political-moral nature than a normative one. In the case of the Klimt painting, the determined push by the French government in favor of restitution overcame the difficulties of the case and the many gaps, resulting in the return of the work 83 years later. In contrast, in the case of the Pissarro and the Thyssen Foundation, the fact that the family had already

received public compensation from Germany in 1958, coupled with the inaction of the heirs for more than four decades, frustrated the claim.

In general, the cases exhibit a notable degree of uncertainty regarding the applicable jurisdiction and law. Lawsuits are often long and very complex. It is also not uncommon to be unable to reconstruct the various transactions that may have occurred over the years, and the alleged good faith of buyers and dealers is often claimed. The French Minister of Culture, in the Klimt case, bases her exemplary restitution decision on "the realization of an act of justice." Likewise, the opinion of California judge Consuelo Callahan in the Pissarro case acknowledges that the solution of non-restitution creates a "discrepancy between the legal solution and the moral obligation." For all these reasons, the individual solution will depend strongly on meta-legal aspects such as justice or morality.

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