

# **Statement by Attorney Dr. Jost v. Trott zu Solz Regarding the Restitution of "Berlin Street Scene"**

## **Special Committee on Restitution of the Berlin House of Representatives on June 15, 2007**

Relevant legal regulations, court decisions and official decisions  
regarding the evaluation of the return of the Kirchner painting "Berlin Street Scene"  
applying the "Statement by the Federal Government, the Laender (federal states) and the  
national associations of local authorities on  
the tracing and return of Nazi-confiscated art, especially from Jewish property" of December  
14, 1999.

### **1. The Resolutions of the Washington Conference of December 3, 1998.**

The Principles, on which the 44 states taking part in the Washington Conference decided on  
December 3, 1998, set forth, among others:

- "1. Art confiscated by the Nazis and not subsequently restituted should be identified.
  
  
  
  
  
  
  
  
  
  
8. If the pre-War owners of art confiscated by the Nazis and not subsequently restituted,  
or their heirs, can be identified, steps should be taken expeditiously to achieve a just  
and fair solution, recognizing that the outcome may vary according to the facts and  
circumstances surrounding a specific case."

## **2. Joint Declaration of December 1999.**

The Principles adopted in Washington were implemented in Germany on the basis of the Joint Declaration of the Federal Government, the Federal states and municipalities in December 1999, among others under section I, as follows:

"The Federal Government, the Laender (federal states) and the national associations of local authorities will bring their influence to bear in the responsible bodies of the relevant statutory institutions that works of art that have been identified as Nazi-confiscated property and can be attributed to specific claimants are returned, upon individual examination, to the legitimate former owners or their heirs, respectively. This examination includes a match with material compensation already provided. Such a procedure allows to identify the legitimate owners and avoid duplicate compensation (e.g. by repayment of compensations already paid).

The relevant institutions are recommended to negotiate the extent and procedure of return or other material indemnification (e.g. in the form of permanent loans, financial or material compensation) with the clearly identified legitimate former owners or their heirs, respectively."

## **3. Supplementary Guidelines ("*Handreichung*") of February 2001.**

The supplementary guidelines issued by the Federal Commissioner for Cultural and Media Matters in February 2001 for the purpose of implementing the Joint Declaration include a multi-pronged test for identifying a loss of assets due to Nazi persecution. This multi-pronged test pertains specifically to the respective legal provisions of the Property Claims Act (*Vermögensgesetz - VermG*) applicable in the territory of the former GDR, and the principles of the Federal Restitution Law (*Bundesrückerstattungsrecht*) applicable in the former Federal Republic, respectively, and thus also to the Order of the Allied Commander of Berlin BK/O (49) 108 of July 26, 1949 (REAO). Article 3 (2) and (3) of the BK/O states with regard to a loss of assets due to persecution on the basis of a legal transaction:

- "(2) If no other facts substantiate an illegitimate confiscation within the meaning of Article 2 or argue in favor of such confiscation, the presumption, in the case of a sale in accordance with par. 1a), can be refuted by proving that the seller received an adequate purchase price and was able to freely dispose of it....
- (3) In the case of sales transactions within the framework of para. 1b) of this Article, which took place between September 15, 1935, and May 8, 1945, the presumption resulting from par. 1 can only be refuted on the basis of proof, adequate to satisfy the restitution chamber (Article 57), that, in addition to the prerequisites identified in par. 2,
- a) the legal transaction, in its essence, would also have happened in the absence of the Nazi regime, or
  - b) the acquirer specially and successfully protected the financial interests of the rightful claimant or his legal predecessor, for example, by helping to transfer the sales proceeds to a country outside Germany."

#### **4. Joint Declaration's Further Scope of Application Compared to Washington Principles.**

In the public and before the Committee, critics have argued that the Joint Declaration transcends the scope of the Principles adopted in Washington, unnecessarily and for no good reason. Apart from the fact that the resolutions adopted in Washington accord the federal

government, the federal states and municipalities their own political discretion to include - beyond cases of confiscation - also other expropriations of assets due to Nazi persecution in the desired restitution provisions, these critics also ignore the Federal Republic's continued obligations under international law arising from the so-called "Transition Agreement" (*Überleitungsvertrag*) of 1954 as well as agreements with the three Western Allies in connection with the reunification of Germany on the continued applicability of the restitution provisions arising from this Transition Agreement. A decision of the Federal Administrative Court (*Bundesverwaltungsgericht - BVerwG*) dated December 9, 2004 and concerning a Berlin property in the so-called Lenné triangle, i.e. in the territory of what used to be West Berlin, states:

"This applies all the more as the Federal Republic of Germany also committed to pertinent obligations under international law. If it was initially obligated, on the basis of the provisions of the Transition Agreement (Federal Law Gazette II 1955, page 303, 405 [418 ff]), to provide compensation for injustices committed by the Nazis, it later confirmed, in a treaty with the three Western powers dated September 27/28, 1990 (Federal Law Gazette II, page 1386), that the deletion of the third, fourth and fifth part of the Transition Agreement did not constitute an impediment to the continued validity of the principles set forth therein regarding domestic in kind restitution, compensation for victims of Nazi persecution and reparations, as well as the continued validity of the corresponding provisions under the Federal Restitution Act and the Federal Compensation Act (*Bundesentschädigungsgesetz - BEntschG*) (No. 4c (1))"

- BVerwG ZOV 2005 page 217 (219) -

## **5. Jews Living Abroad are Considered Collectively Persecuted People.**

The public as well as the Committee raised the question whether Jews living outside of Germany, such as Hans Hess who lived in England at the time the Kirchner was sold, could even be considered part of the circle of those collectively persecuted within the meaning of the restitution law. The correct answer to this question was confirmed by the Federal Administrative Court in its decision of July 23, 1999 as follows:

"Federal Administrative Court decisions have clarified that during the period between January 30, 1933 and May 5, 1945, all Jewish citizens were subjected to persecution for racial, political, religious or ideological reasons within the meaning of section 1 IV 1 VermG. Hence, in accordance with Art. 3 I (b) REAO - to which § 1 VI 2 VermG refers - the legal presumption that certain legal transactions were necessitated by persecution also and above all applies to Jewish citizens, because they were part of a circle of individuals which, as a whole, the German Government [at the time] and the NSDAP [the Nazi party] wished to exclude from Germany's cultural and economic life for the aforementioned reasons... As of the day the Nazis took power on January 30, 1933, this collectively persecuted circle of individuals included all men and women of Jewish origin, even if they did not carry a German, but another passport and lived outside of Germany. These individuals, if they owned assets in Germany, had to endure just as many persecution measures in terms of their financial assets as the Jewish citizens residing in Germany. Case law has thus made a clear statement in terms of the former restitution law."

-BVerwG VIZ 2000, page 94 (95) -

## **6. Refutation of the Legal Presumption.**

The allocation of the burden of proof and the provisions regarding the presumption of a loss due to persecution incurred in a legal transaction, mentioned above in section 3 and referred to in Article 3, REAO, cannot be refuted by just any factual claims, assumptions or conclusions, such as, for example, that the "Hess family and the Hess shoe factory had already gone bankrupt in the early thirties". Apart from the fact that the expert opinion authored by Tazkow/Schnabel - that has been presented to the Committee - substantiates that the alleged economic difficulties did not exist to the claimed extent and were in any case remedied in 1933/34 with the consequence that in fact they did not play a further role at the time the Kirchner was sold in 1936, the pertinent allegations are also irrelevant from a legal point of view. This is clarified in a decision of the Federal Administrative Court of April 30, 2003 which states:

"The legal presumption of § 1 (6) sentence 2, VermG, that a loss of assets is due to persecution can only be refuted by the proof intended in Article 3 (2) and (3), REAO.

Beyond that, other rebuttal evidence as a means of vitiating the presumption of persecution, is not admissible."

-BVerwG ZOV 2003, page 266 -

**7. "Other Facts" within the Meaning of Article 3(2), REAO Arguing in Favor of a Loss of Assets due to Persecution.**

Even if the State of Berlin could have proven in the Kirchner restitution claim proceedings that the purchase price agreed at the time corresponded to the painting's fair market value, that Hans Hess was able to freely dispose of it and that the legal transaction would also have happened without the Nazis being in power - all circumstances that were not the case until the time the decision in favor of restitution was made and, as substantiated by the Tatzkow/Schnabel expert opinion, cannot be proven to date - under Article 3 (2) page 1, REAO, the persecuted person could still claim restitution if "other facts" indicate a loss of assets due to persecution. The facts enumerated in the Tatzkow/Schnabel expert opinion, i.e. the historical events illustrated therein, unequivocally demonstrate that the Hess family as a whole, and in particular also Hans Hess, was persecuted by the Nazi regime early on, and that due to such persecution, Hans Hess had to give up his employment and leave Germany as early as in 1933. That such a persecuted person would proceed to sell his assets remaining in Germany from abroad is a rather self-explanatory consequence of the persecution and thus, undisputedly, "another fact" indicating that the assets thus sold were lost as a result of persecution.

**8. The Loss of Other Assets of the Hess Family due to Persecution.**

The following decisions substantiate the fact that the persecuted Hess family - despite the much cited and alleged economic difficulties of the family itself and the shoe factory which

it partly owned - lost its assets due to persecution within the meaning of the cited regulations and court decisions:

- a) Sale of equity interests by the former Hess Schuhfabrik AG in 1937.

In its decision dated August 8, 2002 the Gera Administrative Court states the following regarding the sale of a shareholding in the former Hess Schuhfabrik AG:

"The presumption resulting from the aforementioned legal provisions that the equity interests were sold due to Nazi persecution can also not be undermined by the circumstance that the sale resulting from the real estate company's economic difficulties occurred for adequate consideration. The fact remains that the transaction represents a sale taking place after 1935 which, according to the aforementioned regulations, can only be refuted on the basis of increased proof. The defendant and the interested parties were unable to offer such proof. On the contrary: the presumption is supported on the basis of the documents presented by the plaintiff - page 151 ff of the court file in the proceedings - 5 K 1136/97 GE. These documents show that in 1936 the companies - Grundstücksaktiengesellschaft M. Strasse and H. Schuhfabrik AG - attracted the attention of the NSDAP regional economic office. This authority was investigating whether employees, functionaries and supervisory board/board of directors members were Jewish. A letter directed to the office of the regional economic advisor dated February 5, 1936 listed the Jewish employees etc. of the two companies and notified the office that negotiations were pending on the transfer of ownership of all shares of Grundstücksengesellschaft M. Strasse to the creditor consortium; as a result the supervisory board, too, would have a different composition. This makes clear that the NSDAP regional economic office intended not only to remove Jewish employees and members of the board of directors and supervisory board of both companies, but, by transferring the shares to Aryan owners, to aryanize the companies."

- VG Gera ZOV 2006, page 321 (324) -

- b) Confirmation of the Federal Administrative Court decision.

The presumption of a loss due to persecution in connection with the former Hess Schuhfabrik AG in the aforementioned decision of the Administrative Court in Gera was confirmed as follows:

"The administrative court (in Gera) did not violate § 1(6) VermG, when it presumed that at the time of the sale of the shares of H. Schuhfabrik in 1937, the Grundstücks AG was to be regarded as a Jewish-owned company and was collectively persecuted, and that the presumption regulations of § 1 (6), page 2 VermG applied to the sale of the shares."

-BVerwG ZOV 2004, 192 (193) -

- c) Restitution of the property at Ida-Hoff-Strasse 25 in Erfurt to the Hess community of owners.

The fact that the Hess family, including Hans Hess, as the heir of his father, Alfred Hess - irrespective of alleged economic difficulties of the Alfred Hess estate - lost assets due to persecution has also been confirmed by the decision of the Property Claims Office (*Amt zur Regelung offener Vermögensfragen*) in Erfurt dated June 19, 1997. On the basis of this decision the above-cited property was restituted to the Jewish Claims Conference because it was lost to the Hess family co-owners - including Hans Hess as the heir of his father, Alfred - in a sale and purchase transaction on March 9, 1935 due to persecution.

Thus, the decisions of competent courts and authorities clearly show that the Hess family asset losses which occurred through legal transactions were due to persecution as defined by the law and that the alleged economic difficulties of the Hess family - in particular of



Hans Hess - do not play any role in evaluating the circumstances of the losses, neither in terms of the law, nor on the basis of the actual facts.

**9. Conclusion.**

Thus it has to be concluded that, in applying the pertinent restitution law provisions, to which the Joint Declaration makes reference, and considering all pertinent court and official decisions, the sale of the Kirchner painting "Berlin Street Scene" was due to persecution as defined by the law and therefore the return of the painting to the Hess heir was in accordance with these regulations.

Berlin, June 14, 2007

Signed Dr. von Trott

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