

Please note that this is not an official English translation of the original. In the event of divergence in the translated version, the original Dutch text of the "Instellingsbesluit Restitutiecommissie van de Minister van Onderwijs, Cultuur en Wetenschap van 15 april 2021, nr. WJZ/27740278, houdende instelling van de Adviescommissie restitutieverzoeken cultuurgooderen en Tweede Wereldoorlog en de vaststelling van het door deze commissie te hanteren beoordelingskader (Instellingsbesluit Restitutiecommissie)," will prevail.

DECREE ESTABLISHING A RESTITUTIONS COMMITTEE

Effective from 22/04/2021 until further notice.

Decree issued by the Minister for Education, Culture and Science on 15 April 2021, no. WJZ/27740278, establishing an Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War and laying down the assessment framework to be used by that committee (Decree establishing a Restitutions Committee)

The Minister of Education, Culture and Science,

having regard to Section 15(3) of the 1995 Public Records Act,

hereby decrees as follows:

Section 1. Definitions

For the purposes of this Decree, the following definitions shall apply.

Archive records: records as referred to in Section 1c, first paragraph, of the 1995 Public Records Act.

Expertise Centre: the Expertise Centre for the Restitution of Items of Cultural Value and the Second World War at the NIOD Institute for War, Holocaust and Genocide Studies; *binding opinion*: a decision as referred to in Section 900(2) of Book 7 of the Civil Code.

Minister: the Minister of Education, Culture and Science.

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Restitution: the return to the original owner or to their legal heirs under inheritance law of cultural items expropriated involuntarily from the original owner due to circumstances related directly to actions of the Nazi regime.

Restitutions Committee: the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War, as referred to in Section 2.

State: the Dutch state.

Applicant: the person applying for restitution of an item of cultural value.

Section 2. Establishment and tasks of the Restitutions Committee

1. There shall be an Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War, with the following tasks:
 - a. advising the Minister, at the Minister's request, concerning ministerial decisions in respect of applications for restitution insofar as the items of cultural value in question are in the possession of the State; and,
 - b. issuing binding opinions, at the Minister's request, concerning applications for restitution insofar as the items of cultural value in question are in the possession of parties other than

the State.

2. The Minister shall make a request as referred to in subsection 1b only if the applicant and the current possessor request the Minister to do so, by mutual agreement.

Section 3. Composition of the Restitutions Committee

1. The Restitutions Committee shall comprise no more than seven members, including a chair and a deputy chair.
2. The members shall not be employed by the Ministry, nor shall they in any way be otherwise employed under the responsibility of the Minister.
3. The chair and the deputy chair shall be qualified lawyers (“meester in de rechten”).
4. The Restitutions Committee shall include at least one member whose expertise on matters concerning the Second World War constitutes a substantial contribution to the work of the Committee.
5. The Restitutions Committee shall include at least one member whose expertise on matters concerning art history and museums constitutes a substantial contribution to the work of the Committee.
6. The Minister shall appoint the chair, the deputy chair and the other members of the Restitutions Committee for a term not exceeding three years. They may be reappointed once at most, for a further term not exceeding three years.

Section 4. Consideration of applications

1. The Restitutions Committee shall consider applications as referred to in Section 2(1):
 - a. in accordance with the assessment framework appended to this Decree; and,
 - b. in a subcommittee comprising at least three of its members, to be appointed by the chair, and in any case including either the chair or the deputy chair.
2. The Restitutions Committee may hear oral submissions by the parties.
3. The Restitutions Committee may promote an amicable settlement between the parties at any stage.
4. The Restitutions Committee may ask the Expertise Centre to conduct an investigation into the facts of a case.
5. The Restitutions Committee may approach third parties directly in order to obtain information and may hear oral submissions from them.
6. The Restitutions Committee may adopt regulations governing its working methods.

Section 5. Support

1. The Minister shall establish a secretariat to support the Restitutions Committee.
2. The secretariat shall be accountable only to the Restitutions Committee for its work.
3. The Minister shall ensure that the Restitutions Committee has timely and complete access to any and all documents it may require, insofar as these are in the Ministry’s possession.
4. All officials of the Ministry shall comply with any request or invitation submitted to them by the Restitutions Committee.

Section 6. Non-application of access restrictions

Should the Restitutions Committee or employees of the Expertise Centre need to inspect archive records held in a government repository or in the Central State Repository with a view to performing the tasks referred to in Section 2, any restrictions on access as referred to in Section 15(1) of the 1995 Public Records Act shall not apply to them.

Section 7. Annual report

The Restitutions Committee shall report annually to the Minister concerning its performance of its duties.

Section 8. Committee records

The records of the Restitutions Committee shall be transferred to the archives of the Ministry's Directorate for Cultural Heritage and the Arts either upon its dissolution or at such earlier time as may be dictated by circumstances.

Section 9. Transitional provisions – advice and opinions

1. Advice and binding opinions issued by the committee referred to in Section 2 of the Decree establishing the Advisory Committee on the Assessment of Restitution Applications and effective on the day immediately prior to the present Decree entering into force shall be considered to have been issued by the Restitutions Committee.
2. Applications as referred to in Section 2(1) which were submitted to committee referred to in Section 2 of the Decree establishing the Advisory Committee on the Assessment of Restitution Applications, as it was constituted on the day immediately prior to the present Decree entering into force, but in respect of which that committee had yet to issue any advice or binding opinion, shall be deemed to have been submitted to the Restitutions Committee.
3. Notwithstanding the provisions of the present Decree and the regulations adopted pursuant to Section 4(6), applications as referred to in Section 2 of the Decree establishing the Advisory Committee on the Assessment of Restitution Applications are subject to the regulations adopted pursuant to Section 4(2) of that decree, as effective on the day immediately prior to the present Decree entering into force.
4. Notwithstanding subsection 3, the present Decree and the regulations adopted pursuant to Section 4(6) shall apply in full:
 - a. to pending applications as referred to in Section 2(1a), if the applicant so agrees; and,
 - b. to pending applications as referred to in Section 2(1b), if both the applicant and the current possessor so agree.

Section 10. Transitional provisions – appointments

1. Those persons who, on the day immediately prior to the present Decree entering into force, were serving as members of the committee referred to in Section 2 of the Decree establishing the Advisory Committee on the Assessment of Restitution Applications, as it was constituted on that day, shall become members of the Restitutions Committee for the remainder of their existing term of office.
2. Section 3(6) shall apply equally, on the understanding that a member of the committee referred to in Section 2 of the Decree establishing the Advisory Committee on the Assessment of Restitution Applications, as effective on the day immediately prior to the present Decree entering into force, may not be reappointed as a member of the Restitutions Committee.

Section 11. Repeal of previous statute

The previous Decree establishing the Advisory Committee on the Assessment of Restitution Applications, first issued on 16 November 2001, is repealed.

Section 12. Entry into force

This Decree shall enter into force on the day following the date of its publication in the government gazette (*Staatscourant*).

Section 13. Official title

This Decree shall be cited as the Decree establishing a Restitutions Committee.

This Decree and its associated explanatory notes will be published in the government gazette (*Staatscourant*).

The Minister of Education, Culture and Science,

I. K. van Engelshoven

ASSESSMENT FRAMEWORK FOR THE RESTITUTIONS COMMITTEE

This Appendix forms part of Section 4(1) of the Decree establishing a Restitutions Committee.

The advice and binding opinions issued by the Restitutions Committee are intended to achieve a just and fair solution as referred to in Article 8 of the Washington Principles on Nazi-Confiscated Art (hereafter: the Washington Principles). To that end, the committee applies the following assessment criteria.

§1. Admissibility requirements

Assessment criteria

The Restitutions Committee first determines whether the application for restitution:

- a. concerns a case on which the Council for the Restoration of Rights or another court has already issued a substantive ruling;
- b. concerns a case currently pending before a court;
- c. concerns an item the applicant or their legal predecessors have previously renounced any claim to or in respect of which they have already reached a settlement;
- d. concerns a case on which the Restitutions Committee has already issued advice or a binding opinion; or,
- e. in the case of an item not currently in the possession of the State, has not been submitted on behalf of all those with a valid claim to the assets of the original owner.

Decision

If any of the above criteria applies, the Restitutions Committee cannot consider the substance of the application unless there are compelling facts or circumstances which justify that it do so nonetheless.

If the application concerns a case on which the committee's predecessor issued advice or a binding opinion before the current Decree establishing the Restitutions Committee came into effect, the committee will consider whether reassessment is possible because the previous advice or binding

opinion:

- a. was based in whole or in part upon Article 3, preamble and paragraph (c), (e), (f) or (g) of the committee regulations as they applied prior to the entry into force of the current Decree; and,
- b. did not conclude that restitution or any other form of legal redress should take place.

§2. Ownership requirement

Assessment criterion

If the Restitutions Committee does deem the application admissible, it then assesses whether it is highly plausible that the applicant is the original owner or their legal heir under inheritance law.

Advice or binding opinion

If that highly plausibility does not exist, the Restitutions Committee advises that the application for restitution be rejected.

§3. Involuntary expropriation requirement

Evaluation criteria

Once the Restitutions Committee has determined that it is highly plausible that the applicant is indeed the original owner or their legal heir under inheritance law, it then assesses whether it is also sufficiently plausible that the original owner had the item in question expropriated involuntarily.

The committee bases this assessment upon criteria 3.1, 3.2 and 3.3.

Criterion 3.1. Private individual belonging to a persecuted group

If the original owner is a private individual belonging to a persecuted group, involuntary expropriation is presumed if it occurred in the Netherlands after 10 May 1940, in Germany after 30 January 1933 or in Austria after 13 March 1938, unless expressly stated otherwise.

Criterion 3.2. Art dealer belonging to a persecuted group

1. If the original owner is an art dealer belonging to a persecuted group, involuntary expropriation is presumed if there are indications which make it sufficiently plausible.
2. Such indications may include, but are not limited, to:
 - a. a post-war official report of the item's theft, confiscation or involuntary sale;
 - b. a direct sale, under threat of reprisal, to a representative of the Nazis or to a person subsequently convicted as a collaborator;
 - c. a sale in which an undertaking to deliver a passport or safe conduct formed part of the transaction;
 - d. a sale at a price significantly below the then market value; or,
 - e. a sale by a Nazi-appointed custodian ("Verwalter"), unless it can be proven that the original owner enjoyed the full monetary benefit of the sale or explicitly waived their rights after the war.
3. In the absence of an official report as referred to in 2a, or in cases in which only the Netherlands Art Property Foundation has filed such a report, involuntary expropriation is presumed if there are indications which make theft or confiscation sufficiently plausible. The threatening general situation is also taken into account.
4. If there are sufficient indications that the item belonged to the dealer's private collection rather

than their stock in trade, criterion 3.1 is applied.

Criterion 3.3. Other cases of involuntary expropriation

Irrespective of the original owner's status and of where and when expropriation occurred, as long as this was after 30 January 1933, it is presumed to be involuntarily if this is sufficiently plausible – for example, because the original owner needed the proceeds to finance their escape from the Nazi regime.

Advice or binding opinion

1. Having applied criteria 3.1-3.3, if involuntary expropriation is not sufficiently plausible, the Restitutions Committee recommends that the application for restitution be rejected.
2. Having applied criteria 3.1-3.3, if involuntary expropriation is sufficiently plausible and the item is in the possession of the State, the Restitutions Committee recommends that it be restituted.
3. Having applied criteria 3.1-3.3, if involuntary expropriation is sufficiently plausible and the item is not in the possession of the State, the Restitutions Committee assesses whether the current possessor acted in good faith with regard to its provenance when acquiring it. If the current possessor waives their right to claim good faith, however, the committee recommends that the item be returned without investigating that aspect.

§4. Acquisition in good faith

Assessment criterion

Good faith is presumed if:

- a. the investigation carried out by the current possessor into the item's provenance prior to its acquisition complied with the standards of the time; and,
- b. in the light of that investigation and the general circumstances, the current possessor did not know and could not reasonably have known at the time of its acquisition that the item had been expropriated involuntarily from a previous owner.

Binding opinion

1. If the current possessor did not act in good faith with regard to the item's provenance when acquiring it, the Restitutions Committee recommends that it be restituted.
2. If the current possessor did act in good faith with regard to the item's provenance when acquiring it, the Restitutions Committee determines the extent to which the application for restitution should be honoured nonetheless, in the form of either:
 - a. unconditional restitution; or,
 - b. an arbitrated solution, provided that this is "just and fair" as stated in Article 8 of the Washington Principles.
3. An arbitrated solution may entail, for example:
 - a. restitution subject to appropriate conditions, including financial ones;
 - b. restitution on the condition that the item remain on public view permanently, temporarily or for certain periods of time;
 - c. non-restitution, but with the current possessor required to pay the applicant appropriate financial compensation; or,
 - d. non-restitution, but with the current possessor required to exhibit the item in public with details of its origin and the name of the original owner.

§5. Deviation in case of compelling reasons

Should the particular circumstances provide substantial reason to do so, in exceptional cases the Restitutions Committee may deviate from one or more of the procedures in this assessment framework in order to achieve a just and fair solution as referred to in Article 8 of the Washington Principles.

NOTES

General

On 17 December 2019 the Minister of Education, Culture and Science (the Minister) asked the Council for Culture to set up a committee to evaluate the restitution policy and advise about possible policy improvements. On 7 December 2020 the Council for Culture and the Committee for the Evaluation of the Restitution Policy for Cultural Heritage Objects from the Second World War, chaired by Jacob Kohnstamm (the Kohnstamm Committee), published its advice in the report *Streven naar rechtvaardigheid (Striving for Justice)*.¹ In its report, the Kohnstamm Committee recommended, on the basis of a comprehensive analysis, a recalibration and intensification of the restitution policy by, among other things, changing the assessment framework.

On 12 March 2021 the Minister told the Lower House about changing the assessment framework.² The Kohnstamm Committee concluded that the current assessment framework is in line with the Washington Principles and that the more liberal restitutions policy, based on the recommendations of the Ekkart Committee, should remain the basis of the restitution policy. At the same time, however, the Kohnstamm Committee contended that weighing up the importance of the work to the applicant, the importance of the work to the holder and the importance of the work to the public art stock detracts from the objective of obtaining restoration of rights. The Kohnstamm Committee furthermore found that the extent to which the applicant has endeavoured to recover the work should no longer be considered when addressing the question of whether there ought to be restoration of rights. These elements will therefore not play a role when answering the question of whether there should be restoration of rights.

Current holders may invoke acquisition in good faith. Government, however, has a substantial responsibility to rectify injustice, irrespective of the circumstances in which acquisition took place. Invoking acquisition in good faith by the Dutch State is not consistent with the goal of restoration of rights. The Dutch State will therefore never invoke acquisition in good faith. However, the decree does not exclude local and regional authorities invoking good faith. It is up to local and regional authorities to decide whether they invoke acquisition in good faith.

If the original ownership, involuntary loss of possession and acquisition in good faith have been established, the Restitutions Committee recommends unconditional restitution or a mediated solution. This is a solution consistent with principle 8 of the Washington Principles: 'a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case'. In other words, all the circumstances surrounding the case are taken into account. There may not be complete rejection of the restitution application because involuntary loss of possession has been established.

The Kohnstamm Committee recommended inclusion of the new assessment framework in its entirety in the Decree Establishing the Restitutions Committee for all cases (regardless of whether the Dutch State or another party is the current holder). It makes the assessment framework easier for the applicant and the holder to oversee and understand. The decree provides for this. For the sake of clarity, it had been decided to append the assessment framework to the decree. This assessment framework is based on the assessment framework recommended by the Kohnstamm Committee.

It was decided to issue a new Decree Establishing the Restitutions Committee because many changes would have had to be made to the Decree Establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War. Advantage was taken of the opportunity to restructure the Decree and to fine-tune the text of several points as regards technology and formulation. It goes without saying that it is not the intention to dissolve the current committee and to set up a new one. The Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War mentioned in this decree is an uninterrupted continuation of the present committee. Below it is referred to as the Restitutions Committee.

Section by Section

Section 1

Section 1 contains the definitions. Some of the definitions have been taken from this Decree's predecessor, the Decree Establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War. A number of new definitions have been added to those of the earlier decree. The definitions of 'binding opinion' and 'restitution' deserve separate attention.

A 'binding opinion' is a decision within the meaning of article 900, second section, of Book 7 of the Dutch Civil Code. This definition has been added to the decree because in the decree it is stated that, in line with current practice, the Restitutions Committee issues a binding opinion upon request with regard to an item of cultural value held by a party other than the Dutch State (cf. section 2, subsection 1b).

The definition of 'restitution' is taken from article 2, first paragraph, of the Decree Establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War. Restitution is defined as the 'return to the original owner or their legal successors pursuant to inheritance law of items of cultural value that the original owner involuntarily lost possession of due to circumstances directly related to the Nazi regime'. This contains no substantive changes compared with the earlier decree.

Section 2

The Restitutions Committee's tasks are described in section 2. A distinction is made between the task of advising the Minister if the items of cultural value concerned are held by the Dutch State and the task of issuing a binding opinion if the items of cultural value concerned are held by a party other than the Dutch state. It follows from the subsection 2 that the Minister only submits a request to the Restitutions Committee for a binding opinion if both the parties involved agree. Contrary to article 2 of the Decree Establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War, section 2 no longer makes any distinction between items of cultural value in the NK Collection and other items of cultural value held by the Dutch State. That distinction is no longer necessary because, on the grounds of this decree, the same assessment framework applies to all items of cultural value held by the Dutch State. The Dutch State will not in any circumstances invoke acquisition in good faith of the item of cultural value concerned. Article 2, eighth paragraph, of the Decree Establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War has not been included. This does not affect the Minister's option in certain cases to ask the Expertise Centre to launch an investigation into the facts if no restitution application has been submitted to the Restitutions Committee. In such cases, intervention by the Restitutions Committee is not necessary.

Section 3

Section 3 concerns the composition and the appointment of members of the Restitutions Committee. The substance of the section is similar to article 3 of the earlier Decree Establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War.

Section 4

Section 4 relates to the handling of applications by the Restitutions Committee. It follows from the first subsection that the Restitutions Committee handles applications on the basis of the assessment framework, which is appended to the decree. It elaborates on the Kohnstamm Committee's recommendation to include an unambiguous assessment framework in the Decree Establishing the Restitutions Committee (see also the general part of these notes). The other subsections of section 4 are an amalgamation of articles 4 and 6, first and second paragraphs, of the earlier Decree Establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War. It is moreover stated that the Restitutions Committee may promote a settlement between the parties at any stage.

Sections 5 to 8

Sections 5 to 8 have been taken over more or less unchanged from the Decree Establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War. Section 5 concerns the support the Minister gives to the Restitutions Committee. It is an amalgamation of articles 5 and 6, third and fourth paragraphs, of the Decree Establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War.

Section 6 is based on article 6, fifth paragraph, of the Decree Establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War. Editorial changes to the text have been made with the intention of not altering the substance. Section 7 stipulates that the Restitutions Committee shall issue an annual report to the Minister about the execution of its tasks. Apart from editorial changes, the section is the same as article 7, first paragraph, of the Decree Establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War. Finally, section 8 is based on article 9 of the Decree Establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War. A small improvement has been made. The Restitutions Committee's records will be transferred to the Directorate for Cultural Heritage and the Arts.

Section 9

Section 9 contains transitional arrangements for applications that were under consideration by the Restitutions Committee before this decree came into effect, but in regard to which the Restitutions Committee has not yet issued advice or a binding ruling. In principle these applications are handled in accordance with the earlier Decree Establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War and the regulations adopted on the basis of article 4, second paragraph, in it. Upon request, the Restitutions Committee can apply the new decree (including the associated assessment framework) and the new regulations to cases already under consideration. If the applications concern items of cultural value held by the Dutch State, it is sufficient if the applicant agrees. Applications relating to items of cultural value held by a party other than the Dutch State require agreement of both the applicant and the holder.

Section 10

As stated in the general part of these notes, the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War referred to in this decree is an uninterrupted continuation of the present committee. Section 10 provides for transitional arrangements in order to prevent confusion about the validity of the appointments of the current members of the committee. It follows from this that – prior to this decree coming into effect – members of the committee appointed on the grounds of the Decree Establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War shall continue as members for the remaining term of their appointments. These members can be reappointed once on the grounds of subsection 2 unless they have already been reappointed previously on the grounds of the Decree Establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War.

*The Minister of Education, Culture and Science
I.K. van Engelshoven*

- 1 Parliamentary Papers 2020/2021, 25 839, 47.
- 2 Parliamentary Papers 2020/2021, 25 839, 48.