Restitution of Jewish Property in Austria

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Introduction

Recently, there has been a surge of interest in the legal issues concerning restitution of Jewish property taken during 1938 and 1945 in Austria. It was spurred by a host of litigation in the US against Swiss, German and Austrian banks involving various allegations, the most prominent of which was the non-return of heirless accounts to their rightful, mostly Jewish, owners. The so-called dormant accounts problem[1] is, however, only part of the broader issue of restitution and/or compensation of illegally taken property as a result of Nazi measures. The restitution issue, in turn, is embedded in the larger context of recent attempts to right wrongs committed during the Third Reich period for which no rehabilitation or compensation has been yet provided. This accounts for the simultaneous rise of litigation, in particular in Germany and in the US, concerning compensation for forced/slave labour during World War II.[2]

The current heightened interest in these matters in Austria results from a reappraisal of orthodox views regarding Austria as a victim of Hitler-Germany only. It is also strongly influenced by a re-orientation of historical research on this period in general and on the role of Austrians in particular. The academic discussion among historians, focusing on the so-called "Opfer-Täter/victim-aggressor" debate,[3] is accompanied by an increased public debate of these issues. The scien-

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[1] Cf. St. A. Denburg, Reclaiming their Past: A Survey of Jewish Efforts to Restitute European Property, 18 Boston College Third World Law Journal (1998), 233–261; J. B. Ganz, Heirs Without Assets and Assets without Heirs: Recovering and Reclaiming Dormant Swiss Bank Accounts, 20 Fordham International Law Journal (1997), 1306–1373; D. Girsberger, Private International Law and Unclaimed Assets in Switzerland, Basel – Frankfurt a.M. – The Hague – London – Boston (1997); P. Volcker, Dormant Accounts in Swiss Banks: The Independent Committee of Eminent Persons, 20 Cardozo Law Review (1998), 513–520.

[2] See e.g. K. Barwig/G. Saathoff/N. Weyde (eds.), Entschädigung für NS-Zwangsarbeit, Baden-Baden (1998); Ch. Tomuschat, Rechtsansprüche ehemaliger Zwangsarbeiter gegen die Bundesrepublik Deutschland?, IPRax (1999), 237–240; B. Heß, Entschädigung für Zwangsarbeit im "Dritten Reich", JZ 1993, 606–610; A. Randelzhofer/O. Dörr, Entschädigung für Zwangsarbeit?, Berlin (1994); A. Reinisch, NS-Verbrechen und "political questions": Können deutsche Unternehmen von ehemaligen Zwangsarbeitern vor US-Gerichten angeklagt werden? – Anmerkungen zu *Burger-Fischer et al. v. Degussa* und *Iwanowa v. Ford Motor Company and Ford Werke A.G.*, IPRax (2000), 32–39.

[3] Cf. Th. Albrich, "Es gibt keine jüdische Frage", Zur Aufrechterhaltung des österreichischen Opfermythos, in: R. Steininger (ed.), Der Umgang mit dem Holocaust, Europa-USA-Israel, (Schriften des Instituts für Zeitgeschichte der Universität Innsbruck und des Jüdischen Museums Hohenems, Vol. 1, Vienna – Cologne – Graz (1994), 147–166; B. Bailer, Gleiches Recht für alle?

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tific attention devoted to this matter has been reinforced by external events which have considerably improved the research conditions: The demise of the Berlin Wall which in turn symbolised the fall of the Communist regimes in Europe has facilitated the opening of hitherto secret archives in the East; the expiry of various national provisions governing the secrecy of official documents has simultaneously opened Western governmental archives, and the new consideration given to the recent past – coupled with some public pressure – has also led many financial institutions, banks, insurance companies, and other businesses, to allow access to their company archives.[4]

This in itself reflects an important change of attitudes developed after World War II which were marked by a tendency to forget quickly and – for the sake of (re-)integrating both individual wrongdoers into society as well as the internationally responsible Germany into the Western hemisphere – a willingness not to let restitution claims antagonise the newly won "Western" ally, the Federal Republic of Germany. A similar situation held true with regard to Austria, which – despite its legal status of neutrality – never considered itself ideologically neutral but rather firmly belonged to the Western World. It has been noted that – on the related issue of individual responsibility – the beginning of the Cold War started to hamper the criminal prosecutions both before the Nuremberg Tribunal and before the tribunals of the occupying powers in Germany as well as in Austria, and that it also contributed to bringing the de-nazification efforts in these countries to an end.[5] Part of this Cold War strategy was the suppression of or at least lack of support for attempts to investigate many important aspects of what had happened during the Nazi period in Germany and the territories it controlled. Apparently, the necessity to find new Cold War allies was more important than righting the wrongs committed vis-à-vis individuals, in particular Jews, during the Nazi period.[6]

However, this paper does not intend to address the underlying political aspects of the restitution debate; many of these issues are to be addressed by the so-called Historical Commission ("Historikerkommission") set up by the Austrian Federal Government in 1998.[7] Instead, this paper seeks to clarify some of the legal issues

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Die Behandlung von Opfern und Tätern des Nationalsozialismus durch die Republik Österreich, in: *ibid.*, 183–197; A. Pelinka/E. Weinzierl (eds.), Das große Tabu, Österreichs Umgang mit seiner Vergangenheit, Vienna (1987); E. Weinzierl, Zu wenig Gerechte, Österreicher und Judenverfolgung 1938–1945, Graz (3rd ed., 1986); R. Wodak [*et al.*] (eds.), "Wir sind alle unschuldige Täter", Diskurshistorische Studien zum Nachkriegsantisemitismus, Frankfurt a.M. (1990).

[4] In Austria some corporations established their own Historians' Commissions entrusted with the task of investigating internal corporate archives.

[5] A. Bläsdorf, Zur Konfrontation mit der NS-Vergangenheit in der Bundesrepublik, der DDR und in Österreich, Entnazifizierung und Wiedergutmachungsleistungen, in: Aus Politik und Zeitgeschichte, Beilage zu: Das Parlament, B 16–17/87, 18.4.1987, 3–18, at 9.

[6] Cf. M. Wolffsohn, Globalentschädigung für Israel und die Juden? Adenauer und die Opposition in der Bundesregierung, in: L. Herbst/K. Goschler (eds.), Wiedergutmachung in der Bundesrepublik Deutschland, München (1989), 161–190, at 165.

[7] Cf. Working Program of the Commission available at <http://www.historikerkommission.gv.at/> visited 30 August 2000.

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concerning the restitution of Jewish property by presenting an overview, from both a public international law and a domestic Austrian legal perspective, of the obligations undertaken by Austria to provide for restitution of Jewish property and the steps taken to implement such obligations as well as additional measures adopted by Austria. It will thus focus on the issue of returning property. Problems related to the issue of compensating personal harm suffered as a result of Nazi persecution measures will be addressed only incidentally.

The International Status of Austria Between 1938 and 1945

In order to better understand Austria's restitution legislation as well as its international law-based obligations, it is important to consider the international status of Austria between 1938 and 1945. Austria's role during World War II is particularly controversial among historians. The "victim theory", describing Austria as the first country falling prey to Nazi-Germany by the "Anschluss" on 12 March 1938, was whole-heartedly embraced by Austrian politicians after the defeat of the Third Reich. Some scholars assert that it was instrumentalised in order to remove any responsibility from the Austrian population for the wrongs committed.[8] Historical research has demonstrated that – while the official 99% approval of the "Anschluss" cannot be regarded as representative because of the coercive character of the referendum ordered by the Nazis on 10 April 1938[9] – a large proportion of the population supported the Nazis and the percentage of Austrians involved in the commitment of Nazi atrocities was particularly high.[10] To be fair, however, it should also be mentioned that many leading politicians of post-World War II Austria were in fact individual victims of Nazi persecution. Many subsequent coalition government members first met in various concentration camps. In this respect the victim theory reflected an element of their personal history.[11]

While this underlying historical and political debate is likely to continue and to lead to controversial assessments, it is important to distinguish it from the concomitant legal debate concerning the international status of Austria between "Anschluss" and liberation, which mainly revolves around the correct appraisal of the historic facts in terms of annexation versus occupation.[12] It is, further, most

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[8] G. Bischof, Die Instrumentalisierung der Moskauer Erklärung nach dem 2. Weltkrieg, 20 Zeitgeschichte (1993), 345–366.

[9] See also the conclusion of the International Law Commission which reaffirmed the finding of the International Military Tribunal at Nuremberg that "despite the strong pressure exerted on Austria, consent had not been given", Yearbook ILC (1979), Vol. II (Part Two), 110.

[10] Th. Albrich, Holocaust und Schuldabwehr, Vom Judenmord zum kollektiven Opferstatus, in: R. Steininger/M.Gehler (eds.), Österreich im 20. Jahrhundert, Vol. 2, Vienna – Cologne – Weimar (1997), 39–105, at 41.

[11] G. Stourzh, Um Einheit und Freiheit, Staatsvertrag, Neutralität und das Ende der Ost-West-Besetzung Österreichs 1945–1955, Vienna – Cologne – Graz (4th ed., 1998), 26.

[12] R. E. Clute, The International Legal Status of Austria 1938–1955, The Hague (1962); F. Fellner, Die außenpolitische und völkerrechtliche Stellung Österreichs 1938 bis 1945, in: E. Weinzierl/K. Skalnik (eds.), Österreich, Die Zweite Republik, Vol. 1, Graz – Vienna – Cologne (1975), 53–90;

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important to keep in mind that the whole debate on the identity or non-identity of states is based on the basically fictitious nature of the legal notion of states in international law.[13] While international doctrine tends to view states as the "natural" (and initially exclusive) subjects of international law, thereby implying that they somehow precede or even constitute this legal order, it would be erroneous to overlook the inherent fiction which ascribes to certain human behaviour the relevance of state behaviour. In the end, all acts of states are acts of human beings and the important question is one of attributability. This general problem of international law becomes specifically relevant, for example in two very traditional areas: the law of state immunity has to address the issue whether certain natural or legal persons can be regarded as state organs or state instrumentalities which may enjoy immunity from suit before the domestic courts of other states;[14] similarly, the law of state responsibility has to provide answers to the fundamental question which human behaviour can be seen as "acts of state" triggering responsibility on the international level.[15]

It is possible to view the "Anschluss", i.e. the forced incorporation of Austria into the German Reich, as an annexation and thereby as an incident of state succession which was undone by the liberation of Austria in the form of its seceding from Germany after the total defeat of the Reich in 1945.[16] And from a realistic perspective, during the first half of the 1940s, it was apparently hard for many to interpret the "Anschluss" differently.[17] However, the perceived illegality of the

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J. Kunz, Identity of States Under International Law, 49 AJIL (1955), 68–76; A. Merkl, War Österreich von 1938 bis 1945 Bestandteil des Deutschen Reiches?, 82 Archiv des öffentlichen Rechts (1957), 480–498; H. Miehsler/Ch. Schreuer, Austria, in: R. Bernhardt (ed.), Encyclopedia of Public International Law (1990), Instalment 12, 28–33; I. Seidl-Hohenveldern, Die Überleitung von Herrschaftsverhältnissen am Beispiel Österreichs, Vienna – New York (1982) (= ÖZöR Supp. 5); A. Verdross, Die völkerrechtliche Identität von Staaten, in: R. Braun/A. Verdross/ L. Werner (eds.), Festschrift für Heinrich Klang (1950), 18 et seq.; S. Verosta, Die internationale Stellung Österreichs 1938 bis 1947, Vienna (1947); H. Wright, The Legality of the Annexation of Austria by Germany, 38 AJIL (1944), 621–635; H. Wright/W. Plöchl (eds.), The Attitude of the United States Towards Austria, Washington (1943).

[13] W. Fiedler, Continuity, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Vol. I (1992), 806–809; K. Marek, Identity and Continuity of States in Public International Law, Geneva (1954).

[14] H. Steinberger, State Immunity, in: R. Bernhardt (ed.), Encyclopedia of Public International Law (1987), Instalment 10, 428–246.

[15] Cf. in particular Articles 3 to 15 of the ILC draft articles on state responsibility, provisionally adopted on first reading by the International Law Commission of the United Nations, 25 July 1996.

[16] G. Dahm/J. Delbrück/R. Wolfrum, Völkerrecht, Vol. I/1, Berlin – New York (2nd ed., 1989), 144: "Österreich ist im Jahre 1938 im Deutschen Reich aufgegangen, hat sich aber 1945 im Wege der Sezession vom Reiche getrennt und ist als neuer Staat wieder ins Leben getreten, den aber das positive Recht weitgehend mit dem früheren Staat identifiziert." ["In 1938 Austria was integrated into the German Reich. In 1945 – by way of secession – it was separated from the Reich and reappeared as a new state which is largely regarded as being identical with the earlier state as a matter of positive law."]

[17] H. Kelsen, The International Legal Status of Germany to be Established Immediately upon Termination of the War, 38 AJIL (1944), 689–694, at 690. See also G. Bischof, Die Planung und Politik der Alliierten 1940–1954, in: R. Steininger/M. Gehler, Österreich im 20. Jahrhundert, Wien (1997), 107–144, concerning the American and British assessment of the "Anschluss".

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forced incorporation of the Austrian territory, coupled with the resolve of the Stimson doctrine[18] not to recognise any territorial changes brought about by the use of force, leads to what was ultimately the underlying rationale of the occupation theory. This predominant view or interpretation of what – in terms of international law – had happened to Austria holds that Austria continued to exist as a subject of international law between 1938 and 1945. It was only temporarily "incapacitated" in the sense of being deprived of organs that could lawfully act on its behalf.[19] Consequently, the re-establishment of Austria meant that it was not created as a new successor state to the German Reich, but that the state which came into existence after the demise of the Habsburg empire in 1918 continued its legal personality under international law.

These approaches are, of course, not only of academic interest. Rather they are highly important for addressing a number of practical issues concerning state responsibility, in particular, the problem of reparations. Reparations are claims by the victorious state against the defeated state for compensation both for its own damage and that suffered by its nationals.[20] They are generally considered to be of such a "personal" character that legal succession does not apply.[21] In our context that would imply that even if one regarded the re-establishment of Austria as the creation of a new state, this successor state could not even partially be held responsible for the acts of its predecessor, the German Reich. While certain recent developments may lead to a reappraisal of this traditional rule that there is no state succession in state responsibility,[22] the law in force during and immediately after World War II precluded claims made on this basis.[23]

The occupation theory is even more radical in denying any responsibility on the part of Austria because a country lacking any organs which are able to act on its behalf by definition cannot act and therefore cannot incur responsibility.[24] The

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[18] H. Wehberg, Stimson-Doktrin, in: K. Strupp/H.-J. Schlochauer, Wörterbuch des Völkerrechts, Berlin (1962), Vol. 3, 393–396.

[19] See, *inter alia*, the Erklärung des Vorsitzenden des Außenpolitischen Ausschusses des österreichischen Nationalrates, wiedergegeben in: H. Neuhold/W. Hummer/Ch. Schreuer (eds.), Österreichisches Handbuch des Völkerrechts, Vienna (3rd ed., 1997), Vol. 2, Doc. 349.

[20] I. Seidl-Hohenveldern, Reparations, in: R. Bernhardt (ed.), Encyclopedia of Public International Law (1982), Instalment 4, 178.

[21] W. Fiedler, State Succession, in: R. Bernhardt (ed.), Encyclopedia of Public International Law (1987), Instalment 10, 454.

[22] W. Czaplinski, State Succession and State Responsibility, 28 Canadian YBIL (1990), 339–358.

[23] H. J. Cahn, The Responsibility of the Successor State for War Debts, 44 AJIL (1950), 477–487.

[24] An early example of the use of this line of arguments can be found in an internal memorandum of the Austrian State Chancellery, Foreign Affairs Section, from August 1945, on the foreign policy and international law aspects of compensation claims by Jewish Nazi-victims. It reaffirms that "the persecution of the Jews was performed during the occupation of Austria by German troops. The persecutions were ordered by agencies of the German Reich and carried out with their support. Austria which – as a result of being occupied by foreign troops – did not have its own government did not order these measures nor could it have prevented them. According to international law any claim to compensation by Austrian Jews would have to be directed against the German Reich and not against

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Austrian occupation theory was largely accepted – if not offered – by the Allied Powers. In fact it is already firmly rooted in the Moscow Declaration of 1943, which stated that "Austria, the first free country to fall a victim to Hitlerite aggression, shall be liberated from German domination." It was thus only consistent to regard the "annexation imposed upon Austria by Germany on March 15, 1938, as null and void".[25] Historical research has demonstrated that it was one of the major foreign policy goals of liberated Austria to internalise this "Allied-approved" victim status and to use it in fending off any reparation claims by Germany's war enemies, as well as potential claims by political and racial persecutees, in particular by Jews.[26]

However, all this is only indirectly relevant to the issue of returning Jewish property because the restitution of involuntary property transfers is not precisely a problem of reparations. While reparations can be asked from states as a result of their own unlawful behaviour, which triggers state responsibility, restitution concerns the re-establishment of property rights mainly belonging to private individuals. Thus, the victim state of an unlawful incorporation such as the "Anschluss", – after its re-establishment – need not regard restitution as an obligation to compensate for its own wrong-doing, but may rather view it as an exercise of undoing the wrongful acts committed by an aggressor state. Thus, restitution would be an act related to its own re-establishment and rooted in unjust enrichment considerations.

That this was not always the prevailing view in Austria has different reasons.[27] It shows, in any event, that Austria did not view itself as unilaterally burdened by international obligations providing for restitution of property taken by the Nazis.[28] The fact that many restitution measures were actually taken before any international obligation was fixed bears witness to this understanding.

The parallel between the unlawfulness of the "Anschluss" as a "taking" of territory under international law and the unlawfulness of aryanisation measures as takings of property rights under national law is also reflected in the official position of the Allied Powers. The initial illegality of the annexation of Austria led the Allies not only to regard the incorporation of the territory of Austria as unlawful

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Austria" (translated by the authors) reprinted in R. Knight, "Ich bin dafür die Sache in die Länge zu ziehen." Die Wortprotokolle der österreichischen Bundesregierung 1945–52 über die Entschädigung der Juden, Frankfurt a.M. (1988), 105.

[25] Moscow Declaration on Austria, 30 October 1943, 38 AJIL Supp. (1944) at 7. The Moscow Declaration of 1943 also contained a "responsibility clause", according to which "Austria is reminded, however, that she has a responsibility which she cannot evade, for participating in the war on the side of Hitlerite Germany, and that in the final settlement account will inevitably be taken of her own contribution to her liberation." This compromise text which was inserted upon the instigation of the Soviet Union to reserve its rights and to make demands for reparations against Austria at a later stage did not gain much prominence later on and was not included in the text of the 1955 State Treaty.

[26] Cf. Albrich (note 10), at 55.

[27] This has to do with the fact that restitution was linked with the so-called German property issue which implicitly protected certain aryanisers.

[28] See *infra* text at note 36 as to the relevant provisions of the State Treaty 1955.

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and thus void under international law – which corresponded to the Stimson doctrine of 1928.[29] Rather, they developed a far-reaching approach purporting to extinguish even internal, i.e. non-international, property transfers which resulted from the "Anschluss". This idea found expression in the Inter-Allied London Declaration of 1943, wherein the Allies reserved all rights

> "to declare all transfers and transactions in respect of property, rights and interests of any kind they may choose, which are or were in areas under the occupation or the direct or indirect control of governments with which they were at war, or which belong or belonged to persons, including legal entities, who have their residence in such areas, to be invalid. This warning applies to transfers and transactions irrespective of whether they took the form of obvious looting and plunder, or transactions which were apparently legal in form, even if they seem to have been carried out voluntarily [."][30]

In fact, this approach was taken up by the Austrian Annulment Law and subsequent restitution laws.[31]

The Austrian State Treaty 1955

For the purpose of assessing the international obligations of Austria in the context of restitution of Jewish property, it is significant that the most important post-war agreement, the 1955 Austrian State Treaty,[32] confirmed most of the political implications derived from the international legal status of Austria as discussed above. It reaffirmed the occupation theory, it renounced any claims to reparations and it endorsed the Austrian restitution measures.

Reaffirmation of the Occupation Theory

The State Treaty strongly endorses the occupation theory by expressly referring to the Moscow Declaration, which states that "the Governments of the Union of the Soviet Socialist Republics, the United Kingdom and the United States of America declared that they regarded the annexation of Austria by Germany on 13th March, 1938, as null and void and affirmed their wish to see Austria re-established as a free and independent State, and the French committee of National Liberation made a similar declaration on 16th November, 1943."[33] Vis-à-vis the Moscow Declaration the concomitant victim status is underscored in the State Treaty through the omission of any reference to Austria's responsibility for participating in the war.[34]

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[29] See note 18.

[30] Inter-Allied London Declaration Against Expropriation Actions Taken in Areas Under the Occupation or Control of the Enemy, 5 January 1943, reproduced in: St. Verosta, Die internationale Stellung Österreichs 1938 bis 1947, Wien (1947), 48.

[31] See *infra* text at note 41.

[32] State Treaty (with Annexes and Maps) for the Re-Establishment of an Independent and Democratic Austria, Vienna, 15 May 1955, 217 UNTS 223.

[33] *Ibid.*, Preamble paragraph 3.

[34] According to the Austrian legislative materials concerning the State Treaty, the Moscow Declaration's responsibility clause was to be understood as a means of psychological warfare and thus

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The designation Austrian "State Treaty" was, in fact, deliberately chosen in order to confirm the occupation theory, as evidenced by various statements of the Allies. The US Senate Committee on Foreign Relations, for instance, "stresse[d] the fact that the treaty before the Senate is not a peace treaty. This nation was never at war with Austria. This treaty is, rather, the Austrian State Treaty which restores Austria to the status of independence it occupied before the Anschluss."[35]

Renunciation of Reparations

The first provision of Parts IV and V of the State Treaty, entitled "Claims Arising out of the War" and "Property, Rights and Interests", which provide a detailed and comprehensive settlement of property claims, includes the waiver by the Allied Powers, in Article 21, of reparation payments by Austria. This is a logical consequence of the Austrian occupation theory which postulates that under international law Austria was unable to act between 1938 and 1945 – a principle already recognised by the Allies in the Moscow Declaration.

However, in an economic sense reparations were partly extracted from Austria through the specific provisions of the State Treaty concerning the treatment of the so-called German Property and of Yugoslav claims.

Austrian Restitution Obligations

The Allies insisted on restitution of property rights illegally transferred during the German occupation in accordance with the principles of the London Declaration of 5 January 1943.[36] In Articles 25 and 26 of the State Treaty, Austria undertook to return or reinstate the assets of the Allies and their citizens as well as of persons persecuted by the National Socialist regime.

Article 26 is the central provision of the State Treaty concerning restitution of Jewish property. It provides:

> "In so far as such action has not already been taken, Austria undertakes that, in all cases where property, legal rights and interests in Austria have since 13th March, 1938, been subject of forced transfer or measures of sequestration, confiscation or control on account of the racial origin or religion of the owner, the said property shall be returned and the said legal rights and interests shall be restored together with their accessories. Where return or restoration is impossible, compensation shall be granted for losses incurred by reason of such measures to the same extent as is, or may be, given to Austrian nationals generally in respect of war damage.

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obsolete after the war. Erläuternde Bemerkungen der Regierungsvorlage zum Staatsvertrag – II. Besonderer Teil, zu 517 BlgNR VII, GP 1. On a related, but decisively different view regarding the Moscow Declaration's occupation/victim theory as a measure of psychological warfare to instigate Austrian resistance cf. R. H. Keyserlingk, Austria in World War II, Montreal (1988).

[35] The Austrian State Treaty, Senate, Executive Report of the Committee on Foreign Relations, 84th Congress, 1st Session, 8.

[36] See *supra* note 30.

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Austria agrees to take under its control all property, legal rights and interests in Austria of persons, organisations or communities which, individually or as members of groups, were the object of racial, religious or other Nazi measures of persecution where, in the case of persons, such property, rights and interests remain heirless or unclaimed for six months after the coming into force of the present Treaty, or where in the case of organisations or communities such organisations or communities have ceased to exist. Austria shall transfer such property, rights and interests to appropriate agencies or organisations to be designated by the Four Heads of Mission in Vienna by agreement with the Austrian Government to be used for the relief and rehabilitation of victims of persecution by the Axis Powers, it being understood that these provisions do not require Austria to make payments in foreign exchange or other transfers to foreign countries which would constitute a burden on the Austrian economy. Such transfer shall be effected within eighteen months from the coming into force of the present Treaty and shall include property, legal rights and interests required to be restored under paragraph 1 of this Article."

Austrian Legislative Measures

As the introductory clause to Article 26 indicates, when the State Treaty was concluded it was understood that the return of property to persecuted persons had already been made or would be made pursuant to Austrian restitution laws passed since 1946.[37] In accordance with this understanding, the implementation of Article 26 of the State Treaty was carried out by a series of internal Austrian laws. Two groups of measures have been enacted by post-war Austrian legislation: On the one hand, legislation dealt with the restitution of (in the widest sense) confiscated[38] (Jewish) property from its present holders to the original owners. On the other hand, numerous statutes provided for benefits for victims of National Socialism. The latter statutes were enacted mainly on social, political or ethical grounds, but not in order to fulfil any legal obligation of the Republic of Austria itself to provide compensation for damages suffered by the victims. Especially since the 1980s, these benefits have also been granted in the context of Austrian acknowledgement of a "moral responsibility" for what happened to its Jewish citizens after the "Anschluss".[39]

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[37] In its Explanatory Comments to Article 26, the Austrian legislature refers to Article 26's "already perfected implementation by the Austrian restitution legislation". Austrian State Treaty, Legislative Materials, Re 517 Beil Sten Prot NR VII, GP 10.

[38] The technical term under Austrian law which is translated as "confiscation" in this paper is "Entziehung". It was not part of Austrian legal terminology before the enactment of post-war restitution legislation and does not exactly mean "confiscation" (which would be translated with "Konfiszierung" or "Beschlagnahme"). " The word "Entziehung" just means – in a very broad sense – that something has been taken away from somebody.

[39] Cf. the speech of the Austrian Federal Chancellor Franz Vranitzky before the Hebrew University Jerusalem on 10 June 1993 acknowledging a moral responsibility of certain Austrian citizens during the Nazi period. Der Standard, 11 June 1993, 35.

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The present paper can only give a brief outline of this legislation, as it involves a large number of statutes which contain, at least in part, very complex and detailed provisions. As already mentioned, there has been no overall assessment and evaluation of these measures and their adequacy to date. Such an evaluation seems to be one of the major tasks of the "Historikerkommission", which will have to engage in very detailed research in order to give a conclusive answer to this question.

Legislation for the Restitution of Property

On 10 May 1945 the "Law on the Recording of Aryanised and Other Property Confiscated in Connection with the National Socialist Seizure of Power"[40] was passed. This law required holders of property confiscated from prior owners after 13 March 1938 – whether taken arbitrarily or on the basis of laws or other orders, on racial, national or other grounds, in connection with the National Socialist take-over of power – to register such property with a government office in Vienna. The law further required such property to be provisionally administered pending final determination of its proper ownership.

On 15 May 1946 the Austrian legislature enacted the "Annulment Law"[41], which declared "null and void" all transactions and other legal actions carried out in the course of the financial or political penetration of Austria by the German Reich that resulted in the confiscation of property or property rights with or without payment of compensation. The Annulment Law, however, was only of a declaratory nature. The granting of restitution rights to the owners who had suffered loss was expressly reserved to subsequent legislation, which was passed in the form of a number of Restitution Laws. Between 1946 and 1949, Austria enacted seven separate Restitution Laws each of which was designed to provide procedures for the return of different types of property wrongfully taken from the previous owners of such property in connection with the National Socialist take-over of Austria.[42]

The Restitution Laws consisted of the following: The First Restitution Law[43] concerned restitution of property confiscated by the German Reich itself (and not by private individuals or companies) and which was under the administration of the Republic of Austria or one of its federal states. The Second Restitution Law[44] supplemented the First Restitution Law by dealing with property confiscated and then transferred to ownership of the Republic of Austria after the war on the basis of a forfeiture of property (e.g. when the present holder

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[40] StGBl (State Legal Gazette) 1945/10.

[41] BGBl (Federal Legal Gazette) 1946/106.

[42] W. Kastner, Entziehung und Rückstellung, in: U. Davy [*et al.*] (eds.), Nationalsozialismus und Recht, Vienna (1990), 191 and *G. Klein*, 1938–1968, Dreißig Jahre: Vermögensentziehung und Rückstellung, 24 Österreichische Juristen Zeitung (1969), 57–96, give an outline of this legislation.

[43] Federal Law of 26 July 1946, BGBl 1946/156.

[44] Federal Law of 6 February 1947, BGBl 1947/53.

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was a war criminal or had been a National Socialist Organisation).[45] The Third Restitution Law[46] was a "general" restitution law for the return of property wrongfully taken from its owners and transferred to a private individual or business. Therefore, it was the most important of these statutes.[47] The Fourth Restitution Law[48] concerned the reinstatement of company names that had been changed under National Socialist coercion. The Fifth Restitution Law[49] dealt with the restitution of the rights and interests of shareholders, partners in business partnerships, and members of trading associations and other specific business entities where the entity in which they had an ownership interest had been confiscated and subsequently ceased to exist. The Sixth Restitution Law[50] concerned the restitution of confiscated patent, trade name and pattern rights. Finally, the Seventh Restitution Law[51] provided for restitution of certain employment rights, such as wages, severance payments and pensions.

In conjunction with the Restitution Laws, the Austrian legislature also passed a series of "Restitution Claim Laws" to provide procedures for the assertion and payment of claims made under the Restitution Laws for cases where the entity which would have had the claim had ceased to exist or the property was heirless or dormant. For purposes of this paper, we will discuss only the Fourth Restitution Claim Law.[52]

As already mentioned, the Third Restitution Law is the "general" Restitution Law applicable to the restitution of property which was in the possession of private individuals or businesses after the war. As an underlying principle, it assumes that property taken from persons persecuted by the National Socialists was wrongfully confiscated. Therefore, the owners of such property did not have to prove that the confiscation (in the widest sense, including forced sales or "aryanisations") had a specific connection to the National Socialist seizure of power. The Third Restitution Law thus places the burden on the person who acquired the property to prove that the property had been transferred independent of the seizure of power by the National Socialists. The relevant literature stresses that the assumption of wrongful confiscation applies particularly in the case of Jews because they were subjected to political persecution by National

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[45] It has to be noted that there are special provisions for the restitution of artworks which came into the possession of Austrian public museums and collections. It would go beyond the scope of this paper to deal with this issue. See in this context I. Seidl-Hohenveldern, The Auction of the "Mauerbach Treasure", 6 International Journal of Cultural Property (1997), 247; A. Pelinka/S. Mayr (eds.), Die Entdeckung der Verantwortung, Die Zweite Republik und die vertriebenen Juden, Vienna (1998), 273–275. The most relevant legal sources are the Federal Laws of 27 June 1969, BGBl 1969/294; 13 December 1985, BGBl 1986/2 and 4 December 1998, BGBl I 1998/181.

[46] Federal Law of 6 February 1947, BGBl 1947/54.

[47] It will be discussed in more detail *infra* text at note 53.

[48] Federal Law of 21 May 1947, BGBl 1947/143.

[49] Federal Law of 22 June 1949, BGBl 1949/164.

[50] Federal Law of 30 June 1949, BGBl 1949/199.

[51] Federal Law of 14 July 1949, BGBl 1949/207.

[52] Federal Law of 17 May 1961, BGBl 1961/133.

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Socialism. Therefore, property taken from Jews by third parties in the period after the National Socialists took power – whether by operation of law, contract or other transactions – would be presumed to be "confiscation of property" and subject to the provisions of the Third Restitution Law.[53]

Significantly, the Third Restitution Law defines the concept of "confiscation" of property ("Entziehung")[54] as broadly as possible. Thus, § 1 (1) of the Third Restitution Law provides that the statute is applicable to most types of confiscation, including confiscations carried out on the basis of laws or "other orders," and confiscations which took place on the basis of "transactions and other legal actions." § 3 (1) of the Third Restitution Law then specifies that these confiscations of property are "invalid" and further provides the following: "Unless this Federal Law specifies otherwise, the provisions of civil law in particular with regard to the invalidity of contracts as a result of unfair and substantiated fear are to be applied." The effect of this provision is that the confiscator no longer has title to possession to such property and that the property, under general principles of civil law, is to be restored to the owner who suffered the loss. Various provisions of the Austrian General Civil Code provide for compensation for the wrongful acquisition of property, especially under contract or tort law, under property law, and under the law of unjust enrichment. Accordingly, all such claims are subject to the Third Restitution Law. Indeed, in its decision of 26 July 1947, the Supreme Court of Austria expressly stated that the Third Restitution Law covered all confiscations of property, in the widest sense, in connection with the National Socialist seizure of power.[55]

Therefore, virtually all private claims, of whatever kind, which resulted from a confiscation of property in the course of the National Socialist seizure of power are covered by the Third Restitution Law. Examples of exceptions would be claims for misappropriation of copyright or patent rights, employment claims and claims against public entities, all of which are subject to separate restitution laws. Another major exception which – despite the original intention – was never covered by separate legislation concerned lost tenancy rights.[56] Also, claims on the basis of existing contractual relations, which are not based on "confiscation" in the widest sense, but only seek the performance of such contractual obligations, do not come within the scope of the restitution legislation.

The Third Restitution Law contains some special provisions which to some extent modify and adapt the general provisions of civil law. It would go beyond the scope of this paper to address any details in this regard. Thus, we can only provide a brief summary of the problems involved: Under § 3 (2) of the Third Restitution Law acquisitive prescription could not be taken into account in favour of

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[53] L. V. Heller/W. Rauscher/R. Baumann, Verwaltergesetz, Rückgabegesetz, Zweites und Drittes Rückstellungsgesetz, Vienna (1948), 181.

[54] Cf. *supra* note 38.

[55] Supreme Court, 26 July 1947, 1 Ob 469/47, L. V. Heller/W. Rauscher, Die Rechtsprechung der Rückstellungskommissionen (1949) 385.

[56] See *infra* text at note 108.

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the acquirer of the confiscated assets. §4 – similar to §367 of the Austrian General Civil Code – protects the acquirer in cases in which moveable assets were acquired in a public auction, or in the context of execution or bankruptcy proceedings, or from a businessman entitled to carry out such business, or from somebody to whom the owner himself had entrusted the property for his use, for management or other purposes; in these cases, the assets were only regarded as confiscated if the acquirer knew or must have known about this fact. In addition, this provision protects the acquirer who had bought goods from a Jewish business, unless these goods were sold at an inappropriately low price.

§5 and 6 of the Third Restitution Law contain special rules concerning the reversal of the initial transaction. In the context of losses which occurred between confiscation and restitution, the law contains provisions in favour of the acquirer in cases in which the "rules of honest business" had been followed. In these cases, the acquirer was only liable for such losses if there was a fault on his part. These "rules of honest business" have been interpreted in a series of judgements which are of a rather complex nature and not altogether free of inconsistencies.[57] Basically, these rules were complied with when there was a "proper acquisition". This was the case if the owner had freely chosen the purchaser, the agreed price had been in line with the estimated value of the property and it could be proven that the part of the purchase price which was not deposited on a frozen bank account had been used to the owner's benefit.[58] There was, therefore, no such "proper acquisition" where the acquirer knew or should have known that the terms of the transaction differed from those which were usual under normal circumstances, e.g. when there were objections that the owner was not free to make his own decision, or when the price was not appropriate, or it was doubtful that the payment would actually go to the benefit of the owner.[59] In the latter cases, the acquirer was liable for all losses which would not have occurred without the confiscation, irrespective of his culpability.

In principle, the acquirer also had to restitute all gains from the confiscated assets. §5 (3) and (4) of the Third Restitution Law, however, provided certain counterclaims to the acquirer for appropriate payment based on the managing of the property, the taxes he had paid and all other expenses incurred in connection with the maintenance of the property. If returning gains meant unfair hardship for the acquirer, the Restitution Commission[60] could fix the level of the gains to be returned according to its fair judgement, taking into account all circumstances of the case.

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[57] See in this context G. Graf, Arisierung und keine Wiedergutmachung, in: P. Muhr/P. K. Feyerabend/C. Wegeler (eds.), Philosophie, Psychoanalyse, Emigration: Festschrift für Kurt Rudolf Fischer, Vienna (1992), 65, 70–79; G. Wilhelm, Die Gratwanderung der Gerechtigkeit – das Dritte Rückstellungsgesetz, ecolex 1998, 897.

[58] Supreme Restitution Commission, 11 September 1948, Rkv 104/48, Heller/Rauscher (note 55), 230.

[59] Supreme Restitution Commission, 16 October 1948, Rkv 144/48, Heller/Rauscher (note 55), 328.

[60] For the special procedure in restitution matters see *infra* text following note 63.

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The owner who had suffered the loss only had to return as consideration what he had received for his free disposal of the property, even if the value of money had decreased since then. However, if the aforesaid "rules of fair business" had been followed, it was within the discretion of the Restitution Commission to determine whether the owner also had to pay back a certain part of the purchase price which he actually had not received for his own benefit.[61] It was also in the discretion of the Commission to determine whether and to what extent the owner had to pay interest for the consideration he had received for the confiscated property.[62] In any case, according to §6 (3) of the Third Restitution Law, the confiscated property was to be returned at least with regard to the extent and condition in which it had been on 1 July 1946.

Finally, some provisions deal with rights *in rem* and arising from lease contracts concerning the confiscated property.[63] It should also be noted that under §13 of the Third Restitution Law all arrangements such as settlements, waivers or acknowledgements concerning restitution obligations were only considered valid if they had been performed after the liberation of Austria.

Sections 15 through 27 of the Third Restitution Law contain detailed provisions concerning the establishment of special bodies ("Restitution Commissions") to consider claims under the law and establish the procedures to be followed in the determination of such claims. These commissions were integrated into the court system. There were three instances, the highest of which was the Supreme Restitution Commission at the Austrian Supreme Court which consisted of judges of this court. The procedure before these commissions did not involve an adversarial trial, but rather an alternative which is regularly used for so-called "non-adversarial" cases such as those dealing with child custody. This kind of special procedure provides for a more active (investigative) role by the judge in order to take care of the parties' interests *ex officio* in a more flexible and less formal way. Therefore, it was also one of the major objectives of these procedures to reach a settlement. Significantly, the Restitution Commissions established under the Restitution Laws were given exclusive jurisdiction over all claims relating to the invalidity of property confiscation. Even where such claims had previously been filed in other courts, the courts were required to transfer the proceedings to the Restitution Commissions. The Supreme Court of Austria has held that the Restitution Commissions not only had jurisdiction over claims based exclusively on the Third Restitution Law, but also over all claims resulting from invalidity of confiscations of property which resulted from the occupation of Austria by the National Socialist regime.[64] In addition, claims seeking the restitution of confiscated property which were rejected by ordinary courts (especially before the relevant Restitution Law had came into force), could also be brought before the Restitution Commissions notwithstanding the principle of *res judicata*.

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[61] §6 (1) of the Third Restitution Law.
[62] §6 (2) of the Third Restitution Law.
[63] See §§9 to 12 of the Third Restitution Law.
[64] Supreme Court, 16 July 1947, 1 Ob 469/47, Heller/Rauscher (note 55), 385.

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The Third Restitution Law provides in §14 (2) that claims under the law could be made by any owner who suffered the loss of property in the context of the National Socialist seizure of power or by certain classes of the legal heirs of the owner (including the owner's spouse, children and siblings, other legal heirs who lived with the deceased owner or other persons who had received the owner's restitution rights pursuant to the owner's will or other legal assignment).[65] This statute, like the other Restitution Laws, contains no restrictions with respect to the nationality of claimants. A person could bring a claim pursuant to the Third Restitution Law regardless of his or her nationality or place of residence. Therefore, Jews of foreign nationality who lived abroad during the National Socialist period were subject to political prosecution within the meaning of the Third Restitution Law and any confiscation of their property in Austria was subject to restitution under the law.[66] The obligee with respect to these claims could only be the confiscator (e.g. the so-called "aryaniser") and his successors in interest.

Under §14 (1) of the Third Restitution Law, former owners of confiscated property were required to bring claims for return of property within the time specified by the statute. The deadline for making these claims was initially one year from enactment of the Third Restitution Law, which was a very short period, even if one takes into account that there was a strong public interest to clarify quickly the legal situation in connection with property rights in the post-war period.[67] This deadline was extended a number of times by ministerial order. The last general extension of the deadline for all claims under the Third Restitution Law was made by §2 of the order of the Federal Finance Minister dated 8 October 1953.[68] This order extended the deadline for making claims under the Third Restitution Law until 30 June 1954. Beyond that date, there were a few extensions of the deadline in special cases. The last such extension was made by order of the Federal Finance Ministry on 3 September 1955[69] which extended the deadline for such special cases until 31 July 1956. The Supreme Restitution Commission at the Supreme Court has recently confirmed that restitution claims under the Third Restitution Law could not be made after 31 July 1956, that the deadline for making such claims was not extended by the State Treaty of 15 May 1955[70] and that a re-opening of restitution procedures is also not possible today.[71]

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[65] See for more details Weiss, in: Klang, Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch III, 2nd ed. (1952) 34; H. Sternberg/G. Weidenfeld, Erbrecht und Rückstellungsgesetzgebung, Juristische Blätter (1948), 6.

[66] Supreme Restitution Commission, 21 January 1948, Rkv. 7/48, Heller/Rauscher (note 55), 59. See also K. Wahle, Kollisionsnormen im Rückstellungsrecht, Österreichische Juristenzeitung (1950), 27, at 30, who deals with a number of the very intricate questions in connection with the law of conflicts in restitution matters.

[67] See critical Wilhelm (note 57), 898.

[68] BGBl 1953/167.

[69] BGBl 1955/201.

[70] Supreme Restitution Commission, 1 April 1997 Rkv 1/97; see also Supreme Restitution Commission, 21 September 1956, Rkv 32/56, EvBl 1956/324.

[71] See Supreme Restitution Commission, 30 June 1998, Rkv 1/98, ecolex 1998, 833 (with case-note P. Oberhammer) = Juristische Blätter 1998, 713 (with case-note Th. Klicka).

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Legislation Concerning Heirless Property

Austria also made legal provisions for restitution with respect to heirless or "dormant" property. These provisions were already planned immediately after the war but were finally enacted as a consequence of the obligation under Article 26, para. 2 of the State Treaty of 1955.

Austria fulfilled this obligation by enacting the Collection Agencies Law of 1957[72] and the Fourth Restitution Claim Law.[73] Under the Collection Agencies Law, two "Collection Points" were created. All property and rights confiscated by the National Socialist regime in Austria not returned to owners or their heirs were transferred to these Collection Points. An amendment to the Collection Agencies Law[74] granted the Collection Agencies the right to assert claims on the basis of the First, Second and Third Restitution Laws in cases where an application had not been made by the owner within the applicable deadline, or when no claim could be made due to §14 of the Third Restitution Law, which (as already mentioned above) provided that only certain legal heirs of the owner of confiscated property could assert restitution claims. In addition, according to the Fourth Restitution Claims Law, the right of the Collection Points to assert such claims was extended to claims under the Fifth and Seventh Restitution Laws. The right of Collection Points to assert such claims was subject to certain limitation periods which ended on 30 June 1962, at the latest. §7 of the Fourth Restitution Claims Law provided for a final opportunity to claim "dormant" property from a Collection Point. Such applications had to be made within one year after the Fourth Restitution Claims Law came into force, at the latest.

It was therefore the task of the Collection Points to collect and realise assets confiscated during the National Socialist period which had not been claimed after the war in accordance with the provisions of the Restitution Laws. Collection Point A was responsible for the property of Jews and received 80% of the proceeds from the sale of "dormant" or heirless property. The proceeds from sale of this property were used to provide compensation to Jewish victims of National Socialism or to Jewish charity organisations.[75]

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[72] Federal Law of 13 March 1957, BGBl 1957/73.

[73] Federal Law of 17 May 1961, BGBl 1961/133.

[74] Federal Law of 16 December 1958, BGBl 1958/285.

[75] It is reported that the Collection Points' income as of 31 December 1967 totalled about ATS 320 million. On 9 May 1962, the "Kuratoren" (managing trustees) of the Collection Points enacted provisions for distribution of funds collected. Collection Point A, responsible for Jewish victims, was authorized to distribute 72% of its funds as compensation to Jews persecuted by National Socialism under a distribution plan that gave higher levels of compensation to older persecutees. 28% of the funds collected were to be used for social purposes. These funds went to Israel, the United States and the Jewish communities in Austria. It has been reported that these funds were used to build an old persons' home for the Jewish religious community in Vienna, another in Tel Aviv, and for similar purposes in the United States. See D. Walch, Die Jüdischen Bemühungen um die materielle Wiedergutmachung durch die Republik Österreich, Vienna (1971), 136–138; H. Knötzl, Wiedergutgemacht, soweit das möglich ist? (1995, unpublished MBA thesis, Vienna Business Univ.), 57.

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The Restitution Laws were further supplemented by the Compensation Fund Law.[76] Under this statute the Federal Finance Ministry was authorised to place the Austrian Schilling equivalent of US $ 6 million (plus an additional 10% for administrative expenses) into a fund to compensate property losses of persons who had been politically persecuted. The purpose of the Fund was to make payments to persons who had been subject to forcible transfer of property or confiscation measures because of their racial origin or religion, or in the context of other measures of National Socialist persecution, and who had not obtained the return of their property or other restitution. Under §1 (3) of the Compensation Fund Law, the Fund was specially empowered to pay compensation for the loss of balances in bank accounts, securities, cash, mortgage claims and payment of discriminatory taxes. According to §1 (4) of this statute, there was no legal entitlement to the payments; rather, the award of compensation was at the Fund's discretion.

The "Kuratorium" (Board of Trustees) that managed the fund included both Christian and Jewish representatives, including Simon Wiesenthal.[77] The Fund conducted an advertising campaign throughout the world to advise people who had suffered losses in Austria during the National Socialist era of the opportunity of applying for compensation from the Fund. From 1 September 1961 through 31 August 1962, a total of 10,666 applications for compensation were received and examined by the Fund.[78] The Fund carried out extensive investigations of these claims, in particular by examining the archives of the Collection Points which had been put at the Fund's disposal. The Fund strove to add to the facts presented by individual applications in order to deal fairly with each application.[79]

Other Measures in Favour of Victims

In addition to the laws described above, Austria implemented other measures which, in different ways, were concerned with benefits for the victims of National Socialism. These laws are not measures to compensate persons who suffered property loss during the time of National Socialism. Rather, they provide for payments to different groups of victims based on ethical, political and social grounds. It would go far beyond the scope of this paper to deal with all these measures in detail. The following discussion only lists the most prominent ones.

One of the most important of these laws is the Victims Assistance Law of 1947[80], which – as amended numerous times – remains in force today. The Vic-

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[76] Federal Law of 22 March 1961, BGBl 1961/100.

[77] Walch (note 75), 197.

[78] *Ibid.*, 198–205.

[79] *Ibid.*, 201–205. This author reports that the only claims which could not be dealt with were those where the applicant could provide no factual information whatsoever about a confiscation of property.

[80] Federal Law of 4 July 1947, BGBl 1947/183; see for details on the development of the Victims Assistance legislation from the historical perspective B. Bailer, Wiedergutmachung kein Thema (1993).

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tims Assistance Law provides benefits to many classes of people who were citizens or residents of Austria at the time of National Socialism, including people who resisted National Socialism by fighting for a free and democratic Austria, and persons who suffered "considerable loss" on political grounds by reason of racial origin, religion or nationality, or as a result of unjust actions by the courts, police or other authorities, or by action of the National Socialist German Workers Party. "Considerable loss" within the meaning of this law includes, among other things: loss of life; loss of liberty for at least three months; injury to health which reduces earning ability by at least 50 %; loss of at least 50 % of prior income over a period of three and a half years; forced emigration after the age of six that lasted at least three and a half years; termination or interruption for three and a half years of study or professional training; and forced wearing of the "Jewish star" for at least six months. Subject to certain conditions, family members and relatives of victims who died under National Socialism are also entitled to make claims under this law.

Three basic types of compensation have been provided for under the Victims Assistance Law: privileges, assistance measures and indemnity measures. Privileges accorded under the law include such things as accident and pension insurance, health care, concessions under state monopolies, awards of homes and land, tax benefits, and rebates or reductions on study and examination fees. Social assistance measures include payments for pension, convalescence and child assistance. Indemnity measures include payments as compensation for imprisonment on political grounds or on grounds of origin, religion or nationality, as well as payments for other deprivations of liberty, including compulsory residence in a ghetto or other specified locality.

The Assistance Fund Law[81] set up a fund "to provide assistance to political persecutees who have their domicile and permanent place of residence abroad." The purpose of this fund was to provide benefits to victims of National Socialism who had not otherwise received benefits under the Victims Assistance Law. Applications for payments under this fund were solicited through advertising campaigns abroad. By July 1961, the Austrian government paid out the entire ATS 550 million originally allocated to the Fund. In all, financial benefits under the Fund were paid to several thousand applicants by the mid-1960s.[82] In 1976, an additional amount of ATS 440 million was added to the Fund pursuant to the Federal Law of 13 December 1976.[83]

The Law on Material Damage Resulting from War and Persecution[84] gave compensation to persons who lost or suffered damage to household property or property necessary to carry out a job within Austria as a result of the war or persecution by National Socialism. Such compensation was calculated according to a complicated points system and was not limited to Austrian citizens.

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[81] Federal Law of 18 January 1956, BGBl 1956/25.

[82] Walch (note 75) 73, 99, 101, 109; G. Jellinek, Die Geschichte der österreichischen Wiedergutmachung, in: J. Fraenkel (ed.), The Jews of Austria, London (1967), 415.

[83] BGBl 1976/714.

[84] Federal Law of 25 June 1958, BGBl 1958/127.

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The Federal Law of 26 October 1960[85] provided compensation to the Austrian Jewish community to support religious activities. This law provided for a one-time payment of ATS 30 million in 1960 and annual allowances since then.

Payments to Austrian victims of National Socialism have also been made as a result of the Treaty Between the Republic of Austria and the Federal Republic of Germany of 27 November 1961 (the Kreuznach Treaty).[86] Under the Kreuznach Treaty, the Federal Republic of Germany bore a share of the costs of benefits to be paid under the 12th Amendment to the Victims Assistance Law,[87] the Compensation Fund Law, and the Assistance Fund Law, amounting in total to 95 million German Marks.

On the 50th anniversary of the occupation of Austria, the Federal Law of 23 March 1988[88] was passed which provided for honorary bequests and one-time payments to resistance fighters and victims of political persecution in Austria. Pursuant to Section I of the law, certain victims of the National Socialist regime received honorary bequests as a symbolic gesture. Most significantly, Section II of this law established a new assistance fund, the recipients of which included those who fought for an independent and democratic Austria, people who were persecuted on political grounds or on grounds of origin, religion or nationality, and those who emigrated to escape persecution on these grounds. The Republic of Austria committed itself to making a one-time allocation of ATS 255 million. In addition, any amount left over from the ATS 50 million designated for honorary gifts was to be contributed.

In connection with the 50th anniversary of the end of World War II, Austria enacted the Federal Law on the "Republic of Austria's National Fund for Victims of National Socialism".[89] This statute created a fund which provides benefits to people who were persecuted by the National Socialist regime on political grounds, on grounds of origin, religion, nationality or sexual orientation, on the basis of physical or mental handicap, or on the basis of the accusation of so-called a-sociality; it also provides for those who in other ways became victims of National Socialist wrongdoing or who left the country to avoid such persecution. The Fund makes payments to victims of National Socialism in lump sum amounts ranging from ATS 70,000 to ATS 210,000. As of 28 April 1997, the Fund had paid basic compensation amounts of ATS 70,000 each to 12,610 claimants. 1,114 claims were turned down. The majority of payments went to people in the United States, with

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[85] BGBl 1960/222.

[86] BGBl 1962/283.

[87] BGBl 1961/101.

[88] BGBl 1988/197.

[89] BGBl 1995/432. On the legislative background of the National Fund Law see H. Wohnout, Eine "Geste" gegenüber den Opfern? Der Nationalfonds für Opfer des Nationalsozialismus und der schwierige Umgang Österreichs mit den Überlebenden nationalsozialistischer Verfolgung, in: Th. Angerer/B. Bader-Zaar/M. Grandner (eds.), Geschichte und Recht. FS Gerald Stourzh zum 70. Geburtstag, Vienna – Cologne – Weimar (1999), 247.

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a smaller number of payments going to people residing in Israel, Austria and Great Britain.[90]

In 1998 the Fund received additional money from two different sources: Firstly, it was allocated the remaining profits from the public auction of artworks looted during the National Socialist period which came into the possession of Austria after the war and which were not claimed by their owners.[91] Secondly, the Austrian share of the final distribution of the gold pool of the Tripartite Gold Commission (approximately ATS 102 million) was given to the International Fund for Victims of National Socialism, which is an account with the Federal Reserve Bank of New York established by the governments of the UK and the USA. The amount allocated by this Fund to Austria will be distributed by the National Fund.[92] This additional funding may be used not only for individual victims, but also for projects offering help to victims or to communities severely affected by National Socialist persecution.[93]

Disputes Concerning Austrian Restitution Efforts and Their Settlement

As already mentioned, it would be beyond the scope of this paper to assess the adequacy of the Austrian restitution laws and other legislative measures in favour of victims of National Socialist persecution. However, it should be noted that the Austrian legislation in this field from its very beginning became a matter of international scrutiny – not only because of its intrinsic importance, but also as a result of its relation to certain international obligations undertaken in the State Treaty of 1955. To some extent, the Austrian legislation described above can be better understood – at least in part – as a response to such external factors.

Negotiations with the Western Allied Powers, 1956–1959

The question of whether the Austrian measures described here adequately fulfilled the obligations under international law ensuing from Article 26 of the State Treaty of 1955 soon became controversial. In identically worded aide-mémoires of 18 June 1956 the American, British and French governments stated that the existing Austrian restitution laws could not be regarded as adequate and appropriate compliance with the provisions of the State Treaty. In their opinion this concerned in particular the following claims:[94]

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[90] Pelinka/Mayr (note 45), 259–262.

[91] See §2 of the Federal Law of 4 December 1998, BGBl I 1998/181 and §2 a (1) of the National Fund Law, as amended by the Federal Law of 4 December 1998, BGBl I 1998/183.

[92] See the Federal Law of 4 December 1998, BGBl I 1998/182 and §2 a (1) and (3) of the National Fund Law, as amended by the Federal Law of 4 December 1998, BGBl I 1998/183.

[93] See §2 a (2) of the National Fund Law, as amended by the Federal Law of 4 December 1998, BGBl I 1998/183.

[94] Cited in US-Austria Exchange of notes constituting an agreement relating to the settlement of certain claims under Article 26 of the Austrian State Treaty of 15 May 1955, Vienna, 8, 15 and 22 May 1959, 347 UNTS 3, at 4.

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"1) pensions, 2) insurance policies, 3) bank accounts, 4) discriminatory taxes and charges; 5) losses of money; 6) mortgages; 7) securities; 8) tenancy rights; [as well as] 9) claims for compensation in connection with restitution clams for agricultural lands in accordance with Section 23, paragraph 4 of the Third Restitution Law ... and 10) claims derived from Article 26 of the State Treaty in connection with the War and Persecution Property Damage Law ..."

After protracted negotiations, this dispute about the interpretation and execution of Article 26 of the State Treaty was settled in three exchanges of notes with the Western Allies in 1959.[95] In Part A of the notes, Austria undertook, *inter alia*, to set up a fund – the subsequently established Compensation Fund[96] – to which it would allocate the equivalent of US $ 6 million. Payments would be made from this fund to persons who suffered loss during the National Socialist period on the basis of religious, racial or political persecution by the confiscation of 1) bank accounts, 2) securities, 3) cash, 4) mortgages or 5) the imposition of discriminatory taxes.

In return, the Allied Treaty partners promised in Part B:

a) that after the fund had been set up and the other action envisaged taken, no other claims of persecuted persons against Austria based on Article 26 of the State Treaty would be made or supported by diplomatic means; and

b) that as far as they knew, the claims expressly mentioned in the exchange of notes "comprised all still unsettled categories of claims for the return or reinstatement of property, legal rights and interests of persecutees in Austria" which were subject to coercive measures in the NS period.

Negotiations with the Jewish Claims Committee

Austria held negotiations with the Claims Committee starting in 1953. The "Committee for Jewish Claims on Austria" was made up of 23 Jewish organisations (including B'nai B'rith, World Jewish Congress, etc.).[97] In regard to its composition and objectives the Claims Committee to a large extent corresponded to the Claims Conference (Conference on Jewish Material Claims against Germany) which in 1951/52 – parallel to the German-Israeli negotiations on a global indem-

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[95] Austria-UK Exchange of notes (with annex) constituting an agreement regarding certain claims in connection with Article 26 of the State Treaty for the re-establishment of an independent and democratic Austria of 15 May 1955, Vienna, 8 and 15 May 1959, 344 UNTS 9; US-Austria Exchange of notes constituting an agreement relating to the settlement of certain claims under Article 26 of the Austrian State Treaty of 15 May 1955, Vienna, 8, 15 and 22 May 1959, 347 UNTS 3; Austria-France Exchange of letters relating to the settlement of certain categories of claims presented by the French Government under Article 26 of the State Treaty of 15 May 1955, General Collection of French Treaties, R. Pinto/H. Rollet (eds.), Recueil général des Traités de la France. Accords bilatéraux non publiés 1958–1964, 1st Vol. (1976), 59.

[96] See *supra* text at note 76.

[97] On the precise composition of the Claims Committee see Walch (note 75), 12, Footnote 1.

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nity agreement – made individual demands and claims for heirless property.[98] The Committee's main concern was the elimination of the legal disadvantage under the victims assistance legislation to Jews living abroad as well as problems of heirless property and individual property indemnity. Its demands for complete fulfilment of Article 26 of the State Treaty to a large extent coincided with the claims included in the exchanges of notes with the Western Allies of May 1959.[99] A solution was finally reached with the setting up of the Compensation Fund, the increase in the Assistance Fund, and the 12th amendment to the Victims Assistance Law. These measures were to a large extent determined by the Federal Republic of Germany's willingness to make contributions to the necessary funds as expressed in the Kreuznach Agreement.[100]

In a letter dated 19 December 1961 (the so-called waiver declaration), the Chairman of the Committee for Jewish Claims on Austria, Dr. Nahum Goldmann, declared to the Austrian Finance Minister, Dr. Josef Klaus, that after the 1961 legislative measures came into force "the Committee will take no action against the Austrian government to demand further legislative measures in favour of Jewish victims persecuted by the Nazi regime in Austria."[101]

Recent Restitution Issues

As already mentioned,[102] class actions brought before US courts have resulted in significant renewed interest in the legal aspects of restitution of Jewish property taken by Nazi measures in the territory of Austria between 1938 and 1945.

Starting with law-suits against Austrian banks and insurance companies basically alleging non-return of dormant accounts and non-payment on pre-1938 insurance contracts, individual firms as well as the Republic of Austria itself were more recently also named as defendants in claims broadly asserting non-restitution of property rights and interests of persons persecuted by the Nazis as well as profiting from forced/slave labour programs. While only a minor fraction of these claims seems to have been settled,[103] most class actions are still pending. As a strict legal matter, they are not very likely to be successful in court. The act of state as well as political questions doctrines, lack of jurisdiction, *forum non-conveniens*, statutes of limitation, evidentiary difficulties, etc. all militate against the

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[98] Cf. N. Sagi, Die Rolle der jüdischen Organisationen in den USA und die Claims Conference, in: L. Herbst/K. Goschler (eds.), Wiedergutmachung in der Bundesrepublik Deutschland, Munich (1989), 108.

[99] See *supra* note 95.

[100] See *supra* note 86.

[101] Reproduced in Walch (note 75), Appendix II.

[102] See *supra* text at note 1.

[103] Cf. U.S. District Court for the Southern District of New York: *In Re Austrian and German Bank Holocaust Litigation*, 98 Civ. 3938, 6 January 2000, available at <http://www.nysd.uscourts.gov/courtweb/> visited 30 August 2000.

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adjudication of such claims by US courts.[104] Nevertheless, these actions have created a considerable pressure on the defendants, who have to be concerned about their US market operations. Furthermore, the Swiss and German solutions of providing for a general settlement and creating special funds to compensate Nazi wrongs were hard to ignore.[105]

The Austrian government initially tried to keep a low profile in these matters. In October 1998, it agreed to establish a Historical Commission with the explicit mandate "to investigate and report on the whole complex of expropriations in Austria during the Nazi era and on restitution and/or compensation (including other financial or social benefits) after 1945 by the Republic of Austria."[106] It is expected that this commission will render an interim report in the autumn of 2000 and will conclude its research and present its findings by 2002/2003.

Meanwhile, however, the pressure initiated by the various class actions has led to a more pro-active role by the government in trying to find solutions for as yet uncompensated wrongs. At first, the problem of slave/forced labour gained attention. In February 2000, Dr. Maria Schaumayer, a former Austrian National Bank President, was appointed as Special Representative of the Austrian government to deal with the various claims put forward by mostly Eastern European slave/forced labourers in a comprehensive manner. Within a few months she managed to strike an agreement with the US Special Envoy of the Department of State on Property Restitution in Central and Eastern Europe, Stuart E. Eizenstat, on the modalities of compensation. This led to the adoption of the Reconciliation Foundation Law by the Austrian Parliament in the summer of 2000.[107] This federal law provides for voluntary payments to individual former slave/forced labourers or their heirs ranging between 20,000 and 105,000 ATS. The Austrian "Foundation for Reconciliation, Peace and Cooperation" is to be financed by contributions by the federal government, the provincial states and the private economic sector up to a total amount of ATS 6 billion. In exchange, the US agreed to issue a "statement of interest" urging courts to decline to exercise jurisdiction over presently

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[104] Not only the approval of the class action settlement by the U.S. District Court of the SDNY in the *Austrian and German Bank Holocaust Litigation* (see note 103) but also the *Ford/Degussa* case (U.S. District Court for the District of New Jersey: *Burger-Fischer v. Degussa AG*, No. 98–3958, 13 September 1999 available at <http://www.lawlibrary.rutgers.edu/fed/html/ca98–3958–1.html> visited 30 August 2000) aptly demonstrate the multifaceted litigation problems faced by the class action plaintiffs.

[105] The U.S.-German Agreement concerning the Foundation "Remembrance, Responsibility and the Future" was signed in Berlin on 17 July 2000. The text of the agreements plus its annexes is available under <http://www.state.gov/www/regions/eur/holocaust/000717_agreement.html> visited 30 August 2000. The settlement between Holocaust victims and the Swiss banks was approved by a US Court in July 2000. U.S. District Court for the Eastern District of New York: *In re Holocaust Victim Assets Litigation*, 96 Civ. 4849 (ERK) (MDG) (Consolidated with 99 Civ. 5161 and 97 Civ. 461), 26 July 2000. Both the memorandum and order as well as the settlement are available under <http://www.swissbankclaims.com> visited 30 August 2000.

[106] Cf. the mandate of the Commission available at <http://www.historikerkommission.gv.at/> visited 30 August 2000.

[107] Federal Law of 8 August 2000, BGBl I 2000/74.

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pending and future slave/forced labour class actions. These executive agreements, of course, raise again a number of legal issues. Most prominent among them is whether the "statement of interest" given by the US government will be considered binding by US courts and thus whether one of the central goals of the agreement, to reach an "all-embracing and enduring legal peace", was achieved.

In May 2000, Austrian diplomat Dr. Ernst Sucharipa was named Special Envoy for Restitution Issues. It is his task to review the existing legislation and practice of restitution – a mandate partly overlapping with the assignment of the Historical Commission – and, if possible, to contribute to a negotiated settlement concerning outstanding claims. The issue of compensation for lost tenancy rights (concerning the aryanization of roughly 65,000 to 70,000 rented apartments in Austria after 1938) is expected to be one of the first aspects to be addressed. Given the fact that this issue – although originally intended to be regulated in a special restitution law[108] – was never addressed by Austrian legislation, it is very likely that no provision will be made for *restitutio in integrum*, but rather a compensation fund will be created.[109]

On a more general level, it appears obvious that the public international law and Austrian domestic law issues discussed in this paper will receive utmost attention in the course of the negotiations to be conducted by the Special Envoy.

Summary

According to prevailing legal opinion, Austria upon its forced "Anschluss" into Germany did not cease to exist as a subject of international law. Rather, the illegal attempt to incorporate Austria into Germany was regarded as ineffective as a matter of international law. Thus, Austria being "occupied" by the Third Reich during 1938–1945 continued to exist and was re-established after World War II. Since it did not effectively form part of the German Reich, Austria did not incur any international responsibility to provide reparations to victims of Nazy persecution. This explains why Austria has always refused to make comprehensive payments to Nazi victims in the sense of the "Wiedergutmachung" (redress) legislation implemented by the Federal Republic of Germany. Instead, Austria only implemented legislation which provided for the restitution of property from the present possessors, be it the state or private individuals to the former – mostly Jewish – owners. It was always stressed that other measures which were taken in favour of Nazi victims were adopted not in order to comply with international legal obligations, but on social, political and ethical grounds.

Post-World War II Austrian legislation included a detailed scheme of measures to provide for the restitution of property confiscated after the National Socialist take-over of power in Austria. The core of this legislation consists of seven separate Restitution Laws, each of which dealt with different types of property or different post-war situations in relation to the confiscated property. These statutes were accompanied by a number of

[108] See § 30 Third Restitution Law.

[109] Cf. interview with Dr. Ernst Sucharipa, in: Die Presse, 5 July 2000.

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other legislative acts dealing with restitution issues under substantive and procedural law. The most prominent statute in this context is the Third Restitution Law which was generally applicable to cases of aryanization where the post-war holder of the property was a private individual or business. This statute – as in the case of the other Restitution Laws – was exclusively applicable to restitution claims and provided for special judicial bodies with exclusive jurisdiction over such cases. Applications had to be made until 1956 at the latest.

Also as a consequence of the State Treaty of 1955, Austria enacted special provisions to handle the issue of heirless or dormant property, i.e. confiscated Jewish property which remained unclaimed under the Restitution Laws. Under this legislation, special agencies were empowered to claim such property from the present holder and to use the restituted assets for payment to individual victims and victims organisations. Similar payments were also made under a number of other statutes providing for different types of benefits for victims of National Socialism.

Under the parameters of the "occupation" theory, Austria adopted a fairly comprehensive approach towards restitution in order to comply with its international law obligations. However, it is also evident that, with a rather legalistic interpretation of its own past, Austria is still confronted with the charge that it did not fully live up to its "moral responsibility" to undo the extensive wrongs inflicted upon Nazi victims – an obligation arising, *inter alia*, from the participation of a large number of Austrians in Nazi atrocities.

The present discussion among politicians, lawyers and historians has been widely covered by the media and has, therefore, also become a subject of public attention. It is most likely that this fact will lead to a reconsideration of the public's view of Austria's role with regard to the issues presented in this paper – at least to a certain degree. And this role is worth thinking about, indeed.

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