

International Academic Research Project Strengthening the German Advisory Commission on the return of cultural property lost as a result of Nazi persecution, especially Jewish property
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National Contribution of Switzerland: The Ordinance on the Independent Commission for Historically Problematic Cultural Heritage of November 22, 2023

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I. Background²

1. The Second World War and the Immediate Aftermath

Switzerland was largely spared from the Second World War and was never occupied by Germany. Nevertheless, the Swiss art trade played an important role in relation to looted art: “Well-informed circles knew by 1942 at the latest that looted art from occupied territories was smuggled by middlemen into and through Switzerland via Nazi Germany during the war.”³ The Allies warned against the acquisition of such goods and the wider public was aware of the issue by 1945.⁴

The Federal Council responded with the two so-called *Raubgutbeschlüsse* [looted property decrees] of December 10, 1945 and February 22, 1946, both set to expire December 31, 1947.⁵ The decrees concerned cultural property in German-occupied territories and superseded various provisions of the Swiss Civil Code.⁶ A chamber (the *Raubgutkammer*) was set up at the Swiss *Bundesgericht* [Federal Supreme Court] to assess claims for the restitution of assets seized in war-occupied territories.⁷

Some 70 restitutions were made under the *Raubgutbeschlüsse*,⁸ but there is widespread agreement that, overall, success was modest.⁹ The decrees did not encompass the injustices committed in Germany¹⁰ and the deadline, set for the end of 1947, was simply too short.¹¹ Subsequently, it seems hardly any more restitutions were made.¹²

2. The Bergier Commission

In the wake of discussions concerning the handling of dormant assets¹³ and gold transactions by the Swiss National Bank (SNB), Switzerland came under considerable international pressure.¹⁴ Among Switzerland's responses was the establishment of the so-called Bergier Commission (the Independent Commission of Experts Switzerland – World War II) to shed light on Switzerland's role in the Second World War.¹⁵ A volume of the report was dedicated to the topic of looted assets and was published in

² For a concise overview, cf. WIDMER, p. 86 ff.

³ RITTER, p. 154.

⁴ RASCHÈR, KKR, para. 727; also RASCHÈR, *Schweizer Monatshefte*, p. 25 ff.

⁵ AS [= Amtliche Sammlung des Bundesrechts; Official Compilation of Federal Legislation] 61 (1945) 1052–1056 and AS 62 (1946) 225 ff.; cf. extensive handling in MÜLLER-CHEN, ZSR, p. 129 ff.

⁶ *Ibid.*; on this, cf. Vierzehnter Bericht des Bundesrates an die Bundesversammlung über die auf Grund der ausserordentlichen Vollmachten ergriffenen Massnahmen [Fourteenth report of the Federal Council to the Federal Assembly on the measures taken on the basis of the extraordinary powers], February 19, 1946, BBl 98 I 1946, p. 318; additionally, VISCHER, p. 56; RASCHÈR, *Cultural Goods*, p. 232.

⁷ Cf. Reglement des BGer für das Verfahren betreffend die Klagen auf Rückgabe in kriegsbesetzten Gebieten weggenommener Vermögenswerte [Regulations of the Federal Supreme Court on the procedure concerning claims for the restitution of assets seized in war-occupied territories] of January 15, 1946, repealed on January 1, 1953; further see VISCHER, p. 57.

⁸ See WIDMER, 86 with reference to RASCHÈR, KKR, para. 527. Cf. further the historical newspaper articles in MOSIMANN/RENOLD/RASCHÈR, Appendix 6.4.

⁹ VISCHER, p. 56; cf. also BUOMBERGER, p. 116 ff.

¹⁰ RITTER, p. 154 f.; TISA FRANCINI/HEUSS/KREIS, *Fluchtgut – Raubgut*, p. 26 with references.; RASCHÈR, *Cultural Goods*, p. 232.

¹¹ RITTER, p. 154 with reference to PIGUET, AJP, p. 1529.

¹² RITTER, p. 155.

¹³ On dormant assets and their connection to looted art, cf. ZIEGLER, p. 449; additionally, GIRSBERGER, p. 1 ff.

¹⁴ On the gold transactions of the SNB cf. VISCHER, p. 47 ff.; cf. also SCHWEIZER/BERNET/FANKHAUSER, Art. 69 BV para. 30 with further references.

¹⁵ Bundesbeschluss betreffend die historische und rechtliche Untersuchung des Schicksals der infolge der nationalsozialistischen Herrschaft in die Schweiz gelangten Vermögenswerte [Federal decree on the historical and legal investigation into the fate of assets that came to Switzerland as a result of National Socialist rule], December 13, 1996, AS 1996 3487; WIDMER, p. 89; VISCHER, p. 45.

2001 under the title “Flight Assets – Looted Assets.”¹⁶ The term “flight assets,” understood as goods sold in Switzerland to finance flight or subsistence,¹⁷ was predominantly attributive in nature, but was subsequently deployed in a legal context to deny claims for restitution.¹⁸ Today, such a position is unlikely to be defended in such absolute terms; however, assessment of the circumstances, including the use of the term itself,¹⁹ remains as controversial as ever.²⁰ The Bergier report highlighted various critical cases.²¹

In addition to the Bergier report, the Buomberger report²² commissioned by the Bundesamt für Kultur (Federal Office of Culture, FOC) is also worthy of note. This report accomplished a virtually “Herculean” level of archival work²³ and confirmed the considerable part Switzerland played in the looted asset trade.²⁴

3. The Washington Principles

The process of reclaiming looted art remained intractably difficult. The legal hurdles were considerable, both materially (e.g., acquisitive prescription) and procedurally (e.g., lack of documented proof).²⁵ One well-known response to these challenges was the adoption of the *Washington Conference Principles on Nazi-Confiscated Art* on December 3, 1998 (Washington Principles),²⁶ in the development of which Switzerland played a not insignificant role.²⁷ Switzerland was also involved in the follow-up conferences.²⁸

In the wake of the adoption of the Washington Principles, the *Anlaufstelle Raubkunst* (Contact Bureau on Looted Art) was set up at the federal level on January 26, 1999.²⁹ However, the Confederation had no constitutional authority to issue binding regulations vis-à-vis the Cantons and their institutions. This shortcoming was addressed by the “Declaration of the signatory art museums of Switzerland concerning cultural property stolen during the Nazi Regime of the Second World War.”³⁰ This declaration by the important Swiss art museums is generally understood as a commitment to the Washington Prin-

¹⁶ TISA FRANCINI ESTHER/HEUSS ANJA/KREIS GEORG, *Fluchtgut – Raubgut. Der Transfer von Kulturgütern in und über die Schweiz 1933-1945 und die Frage der Restitution* [Flight Assets – Looted Property. The transfer of cultural property to and via Switzerland 1933-1945 and the question of restitution] (Independent Commission of Experts Switzerland – World War II, vol. 1), Zürich 2001.

¹⁷ *Ibid.*, p. 165; TISA FRANCINI/HEUSS/KREIS, NZZ; further, RASCHÈR, *Cultural Goods*, p. 234, especially p. 238 f.

¹⁸ RASCHÈR, KKR, para. 853 ff.; WELLER, p. 92 ff.; BANDLE, p. 100 ff.; cf. also SCHMIDT-GABAIN, *Anwaltsrevue*, p. 370, which speaks of artworks “lost as a result of Nazi persecution.”

¹⁹ On the topic as a whole, WELLER, p. 92 ff.; MÜLLER-CHEN, ZSR, p. 129 f.

²⁰ RASCHÈR, KKR, para. 853 ff.; RASCHÈR, *Cultural Goods*, p. 238 ff.; WELLER/DEWEY, p. 49 ff.; RITTER, p. 156 f. sees the differentiation between looted property and flight assets as “particularly tricky” from today's perspective. Cf. also JOLLES, p. 137 ff.; SIEHR, p. 52 f.; BSK-ERNST/ZOGG, Art. 934 para. 17.

²¹ TISA FRANCINI/HEUSS/KREIS, *Fluchtgut – Raubgut*, p. 165 ff.

²² THOMAS BUOMBERGER, *Raubkunst – Kunstraub. Die Schweiz und der Handel mit gestohlenen Kulturgütern zur Zeit des Zweiten Weltkriegs* [Looted Art – Art Theft. Switzerland and the trade in stolen cultural property during the Second World War], Zurich 1998.

²³ RITTER, p. 156.

²⁴ BUOMBERGER, p. 383 ff.; cf. WIDMER, p. 88.

²⁵ For an extensive account of impediments to restitution, SCHÖNENBERGER, *Restitution*, p. 105 ff.; also SCHÖNENBERGER, KUR, p. 88 ff. On the legal problem, MÜLLER, AJP, p. 1269 ff.

²⁶ RASCHÈR, AJP, p. 155.

²⁷ RASCHÈR, KKR, para. 743.

²⁸ See BANDLE, p. 101.

²⁹ WIDMER, p. 88. The Confederation has also examined its collections in detail, FEDERAL OFFICE FOR CULTURE, p. 4 ff. Cf. also the overview of Swiss cases 1997-2006 in RITTER, p. 162 ff. The Washington Principles also influence duties of care in the art trade, RASCHÈR /KUPRECHT/FISCHER, p. 511: “Today, no one is prepared to take the risk of acquiring an ethically tainted object.”

³⁰ Unpublished, printed in RASCHÈR/MÜNCH, p. 147.

principles – although from a purely legal point of view, such a voluntary commitment is by no means a given.³¹

4. Gurlitt (Bern) – Glaser (Basel) – Bührle (Zurich)

The discussion surrounding the issue of looted art has taken on more public significance primarily in relation to some recent individual cases. On November 24, 2014, the Kunstmuseum Bern accepted the bequest of Cornelius Gurlitt (1932-2014) and reached an agreement with the Federal Republic of Germany and the Free State of Bavaria regarding this difficult legacy. In addition to relying on the Washington Principles, looted art was also assessed under the 2007 version of the “Handreichung zur Umsetzung der Erklärung der Bundesregierung, der Länder und der kommunalen Spitzenverbände zur Auffindung und zur Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes, insbesondere aus jüdischem Besitz vom Dezember 1999” (“Guidelines for the implementation of the Declaration of the Federal Government, Federal States and Municipal Organizations on the tracing and restitution of cultural property lost as a result of Nazi persecution, in particular Jewish property, of December 1999”).³² In Basel, a long-standing dispute of many years with the heirs of Curt Glaser was settled in 2018. Subsequently, the Kunstmuseum Basel published a detailed explanation of the decision and mounted two exhibitions on the subject (Curt Glaser / Degenerate Art).³³ Following the exhibition of works from the Bührle Collection in the new building in October 2021, the Kunsthaus Zürich came under considerable critique in the media, in which the quality of the provenance research carried out by the Bührle Foundation was called into question.³⁴ As a result, a round table was formed, which proposed an expert to the Kunsthaus and its trustees to conduct an evaluation. The results of this investigation should be available in June 2024.³⁵

5. Political Initiatives

Parallel to the public debate, around twenty motions on the subject of looted art have been introduced in the last ten years.³⁶ Many in academic circles have also called for an appropriate law.³⁷ The Bundesrat [Federal Council] has reacted cautiously and has been skeptical about granting additional authority

³¹ UHLMANN, Verantwortung, section “Das Legalitätsprinzip und die Washingtoner Prinzipien”; cf. also SCHÖNENBERGER, Restitution, p. 255 ff.

³² Erklärung der Bundesregierung, der Länder und der kommunalen Spitzenverbände zur Auffindung und zur Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes, insbesondere aus jüdischem Besitz [Declaration of the Federal Government, Federal States and Municipal Organizations on the tracing and restitution of cultural property lost as a result of Nazi persecution, in particular Jewish property], of December 1999, revised in November 2007 (<https://www.bundesregierung.de/resource/blob/974430/780588/56bf6609be00800d172f0b45a0552a15/2009-03-26-handreichung-barrierefrei-data.pdf?download=1>, retrieved on December 20, 2023); comprehensive treatment in MEIER/FELLER/CHRIST, *passim*; cf. further JAYME, p. 127 ff.; BUNDLE, p. 113 ff.

³³ Entscheidung der Kunstkommission in Sachen Curt Glaser [Decision of the Kunstkommission in the Matter of Curt Glaser] of November 21, 2018 (<https://kunstmuseumbasel.ch/de/forschung/provenienzforschung/curtglaser>, retrieved on December 20, 2023); cf. also UHLMANN, Glaser, *passim*.

³⁴ Comprehensive treatment in KELLER, *passim*.

³⁵ Cf. UHLMANN, Bührle.

³⁶ In chronological order: WBK-N of February 24/2022 (22.3023); Pult motion of December 9, 2021 (21.4403); Fivaz question of November 30, 2021 (21.8023); Locher Benguerel request of May 5, 2021 (21.1032); Köppel interpellation of September 21, 2020 (20.4030); Sommaruga motion of June 18, 2020 (20.3754); Sommaruga request of December 14, 2018 (18.1092); Wermuth motion of December 13, 2018 (18.4236); Sommaruga interpellation of September 28, 2018 (18.4067); Leutenegger Oberholzer question of December 6, 2017 (17.5645); Aebischer interpellation of November 30, 2016 (16.3927); Reimann question of March 9, 2015 (15.5110); Aebischer interpellation of March 5, 2015 (15.3067); Comte interpellation of December 11, 2014 (14.4157); question from Graffenried of December 3, 2014 (14.5664); Tschäppät question of December 2, 2014 (14.5602); Tschäppät motion of June 19, 2014 (14.3497); Reynard motion of June 18, 2014 (14.3480); Aubert interpellation of November 27, 2013 (13.4027).

³⁷ MÜLLER-CHEN, ZSR, p. 135 ff.: “Die Schweiz sollte ein Gesetz zur Restitution von Raubgut erlassen” [Switzerland should enact a law on the restitution of looted property]. On the call for a legal basis, cf. PIGUET, p. 1534 f.

to the Contact Bureau on Looted Art³⁸ or strengthening the legal framework: "At a multilateral level, there are currently no known further intergovernmental initiatives to strengthen the binding force of the Washington Guidelines. If this situation changes, the Federal Council is prepared to consider an appropriate proposal. At present, however, it sees no need for Switzerland to go it alone."³⁹ Or: "For these reasons, the Federal Council does not envisage the creation of a legal framework or the provision of additional funds."⁴⁰ Nevertheless, subsequently the Confederation did significantly support provenance research conducted by the cantonal museums, providing substantial financial impetus for the work. In the recent past, there have also been initiatives relating to the colonial context.⁴¹

The motion that succeeded was put forth by Jon Pult on December 9, 2021.⁴² In it, the Federal Council was tasked with "establishing an independent commission to make recommendations for 'just and fair solutions' in cases of cultural property lost as a result of Nazi persecution in accordance with the Washington Conference Principles on Nazi-Confiscated Art of December 3, 1998 (Washington Principles 1998) and the Terezín Declaration on Holocaust Era Assets and Related Issues of June 30, 2009 (Terezin Declaration 2009)." The question of "whether the Commission should also make corresponding recommendations for cultural property in other, namely colonial, contexts" remains to be examined.

The Pult motion was coupled with a demand for "framing conditions" for the Commission's work, namely that it would (1) be constituted as "a completely independent, purely advisory body" and (2) have a balanced membership. (3) "When dealing with disputed cases involving 'cultural property lost as a result of Nazi persecution,' the Commission will not differentiate between 'looted art' and so-called 'flight assets.'" (4) It should provide a recommendation even in the event of a unilateral appeal. (5) The applicable legal bases shall be the Washington Principles and the 2009 Terezin Declaration. And finally, (6) "the Commission shall make recommendations for or against restitution. It may also propose other solutions."

The Federal Council was in favor of the proposal, but resisted committing to the framing conditions, as it stated it could carefully examine these "important issues" itself.⁴³ The Councils went along with this preference – the National Council on May 11, 2022⁴⁴ and the Council of States on September 26, 2022.⁴⁵ To implement this motion, the Federal Council issued the *Verordnung über die unabhängige Kommission für historisch belastetes Kulturerbe* (Ordinance on the Independent Commission for Historically Problematic Cultural Heritage) of November 22, 2023, which is discussed below.

II. The Ordinance on the Independent Commission for Historically Problematic Cultural Heritage of November 22, 2023

1. Basic Foundations

The Ordinance on the Independent Commission for Historically Problematic Cultural Heritage of November 22, 2023 (ICHPCHO)⁴⁶ is supported by Art. 57c para. 2 of the *Regierungs- und Verwaltungsorganisationsgesetzes* (Government and Administration Organization Act) of 21 March 1997

³⁸ Aubert interpellation of November 27, 2013 (13.4027) concerning looted art.

³⁹ Reynard motion of June 18, 2014 on looted art. Strengthening the binding nature of the Washington Guidelines internationally (14.3480).

⁴⁰ Tschäppät motion of June 19, 2014 regarding looted art. Promoting provenance research effectively (14.3497); cf. also Graffenried's question of December 3, 2014 regarding looted art (14.5664).

⁴¹ Sommaruga motion of June 18, 2020 on the participation of Swiss museums in the restitution of cultural property taken during the colonial era. Establishment of a procedure under federal law (20.3754).

⁴² Pult motion of December 9, 2021 regarding an independent commission for cultural property lost as a result of Nazi persecution (21.4403); cf. CATRINA/MÜLLER-CHEN, p. 98 f.; SCHMIDT-GABAIN, *Anwaltsrevue*, p. 372.

⁴³ AB 2022 N 749.

⁴⁴ AB 2022 N 750.

⁴⁵ AB 2022 S 925.

⁴⁶ AS 2023 742; SR [= Systematische Sammlung des Bundesrechts (Classified Compilation of Federal Legislation)] 444.21 [the regulation has not yet been included there at the time of writing].

(GAOA)⁴⁷. Art. 57a ff. GAOA allows the Federal Council to set up extra-parliamentary commissions. The purpose of these is “[to advise] the Federal Council and the Federal Administration on an ongoing basis in the performance of their duties” (Art. 57a para. 1 GAOA). Their appointment is particularly appropriate “when the fulfillment of the tasks [...] requires special expertise that is not represented in the Federal Administration” (Art. 57b lit. a GAOA).⁴⁸

Pursuant to Art. 1 ICHPCHO, the Federal Council establishes the “Independent Commission for Historically Problematic Cultural Heritage (Commission).” In addition to the provisions of the Ordinance on the Independent Commission for Historically Problematic Cultural Heritage (ICHPCHO) itself, the Commission is also governed by the legal provisions for extra-parliamentary commissions at the legislative (Art. 57a ff. GAOA) and ordinance level (Art. 8a ff. Government and Administration Organization Ordinance of November 25, 1998, GAOO).⁴⁹ The provisions at the legislative level (GAOA) take precedence over the ICHPCHO, which, as *lex specialis*, in turn derogates the provisions at the ordinance level (GAOO). The enactment of an ordinance to create extra-parliamentary commissions is not in itself strictly necessary; Art. 8e GAOO provides for the enactment of a decree of appointment: “Extra-parliamentary commissions shall be appointed by decree of the Federal Council” (Art. 8e para. 1 GAOO). It can be assumed that the choice of ordinance is intended more to emphasize the importance of the commission than to derogate the provisions at the level of the GAOO.

Extra-parliamentary commissions differ with regard to whether they are “vested with decision-making powers” (Art. 8a para. 3 GAOA) or whether they merely perform “advisory and consultative functions” (Art. 8a para. 2 GAOO); in the first case, they are referred to as a *Behördenkommission* (executive commission), in the second case as a *Verwaltungskommission* (administrative commission) (Art. 8 GAOO). The Independent Commission for Historically Problematic Cultural Heritage is an administrative commission (Art. 1 ICHPCHO). The power to issue decrees (administrative acts) or other binding decisions would have required establishment at the level of federal law (Art. 57a para. 2 GAOA).

It follows that, strictly speaking, the Independent Commission for Historically Problematic Cultural Heritage advises neither the public nor the parties in a proceeding, but rather the authorities: “Extra-parliamentary commissions shall advise the Federal Council and the Federal Administration on an ongoing basis in the performance of their duties” (Art. 57 para. 1 GAOA). This presumably explains why the ordinance begins with the tasks of advising “the Federal Council and the Federal Administration on issues relating to historically problematic cultural heritage” (Art. 2 lit. a ICHPCHO) and with “historically problematic cultural heritage” (Art. 2 lit. b ICHPCHO); only in third place does it deal with disputes between claimants and institutions, and here too the initiative formally comes from the Federal Office of Culture: “At the request of the Federal Office of Culture (FOC), it shall draw up non-binding recommendations in individual cases of historically problematic cultural property; in addition to recommending the restitution of cultural property, it may also draw up recommendations of a general nature (Art. 2 lit. c ICHPCHO).

By establishing the commission, the Confederation also indirectly expresses that it actually considers the Commission's tasks to be its own: “Extra-parliamentary commissions shall advise the Federal Council and the Federal Administration on an ongoing basis in the performance of their tasks” (Art. 57 para. 1 GAOA, emphasis added). In view of the federal distribution of powers between the Confederation and the cantons, this attribution is not at all self-evident. Art. 69 para. 1 of the Federal Constitution of April 18, 1999 (BV)⁵⁰ states programmatically (and in fact unnecessarily, since the Confederation only has the powers that the Constitution assigns to it): “The cantons are responsible for the area

⁴⁷ SR 172.010.

⁴⁸ See dispatch on the reorganization of the extra-parliamentary commissions of September 12, 2007, BBI 2007 6641 ff., p. 6644.

⁴⁹ SR 172.010.1.

⁵⁰ SR 101.

of culture.”⁵¹ The question thus arises as to whether the cantons would not actually be responsible for the restitution of “historically problematic cultural property” on the basis of Art. 69 para. 1 BV.⁵² In previous parliamentary motions, the Federal Council has not – as far as can be seen – commented on this question of the division of powers between the Confederation and the cantons.⁵³

2. Scope of Application

The Ordinance consistently refers to “historically problematic cultural property” (general lit. c ICHPCHO), which is also the name of the Commission (Art. 1 ICHPCHO). Cultural property can be historically problematic in many ways. This applies in particular to the colonial context. The text of the ordinance and the history of its development are ambivalent in this regard.

“Historically problematic” suggests a broad material scope for the ordinance and thus also for the Commission's authority. The Federal Council expressed a similar position in its press release of November 22, 2023,⁵⁴ as well. However, if one looks at the applicable legal bases, a restriction to cultural property lost as a result of Nazi persecution seems more fitting: “In its activities, the Commission shall promote fair solutions, taking into account the Washington Conference Principles on Nazi-Confiscated Art of December 3, 1998 and the Terezín Declaration on Holocaust Era Assets and Related Issues of June 30, 2009” (Art. 4 ICHPCHO). These frameworks are not suitable for a colonial context, even if certain principles seem entirely appropriate as a blueprint.⁵⁵ If, on the other hand, we look closer at the working methods, the Commission is to form committees whose composition “shall appropriately take into account the specific historical contexts” (Art. 10 para. 3 ICHPCHO). This again suggests a scope of application that goes beyond cultural property lost as a result of Nazi persecution.

The Pult motion and the Federal Council's response are also ambivalent on this issue. The motion proposes examining “whether the Commission should also make corresponding recommendations for cultural property from other, particularly colonial, contexts.” The Federal Council mentions Nazi-looted art in the same breath as the colonial context. Neither side speaks to the basis on which “colonial contexts” should be assessed.

This makes the scope of the ordinance seem somewhat unclear, although presumably it should be understood in a broad sense. The colonial context would, in my view, be included under the concept of “historically problematic cultural property” and the Federal Council spoke in favor of including it in its response to the Pult motion and in its media release of November 22, 2023; however, when it comes to the applicable basis for a decision, the Commission is then up in the air since it remains unclear what principles the Commission should cite when making its recommendations. The question is obviously relevant and will arise at the latest when it comes to the composition of the Commission. The Commission will also have to decide whether it wants to consider other areas beyond cultural property lost as a result of Nazi persecution and colonial injustice; such as, for instance, dispossession in the former Soviet Union.

The material scope is defined solely by the term “historically problematic cultural property,” not by the persons or institutions that may be confronted with such a claim. It follows that a recommendation can be addressed to any owners of historically problematic cultural property, including private individuals. This is presumably the intention, although such comprehensive authority cannot be taken for granted, at least in view of the competencies of foreign commissions.

⁵¹ SCHWEIZER/BERNET/FANKHAUSER, Art. 69 BV para. 18.

⁵² See CATRINA/MÜLLER-CHEN, p. 112, further, p. 115.

⁵³ Cf. Fn. 36.

⁵⁴ Bundesrat schafft eine unabhängige Kommission für historisch belastetes Kulturerbe [Federal Council creates an independent commission for historically problematic cultural heritage], press release of November 22, 2023 (<https://www.bak.admin.ch/bak/de/home/aktuelles/nsb-news.msg-id-98818.html>, retrieved on December 20, 2023).

⁵⁵ Cf. UHLMANN, Mut.

3. Decisions

According to the margin title of Art. 4 ICHPCHO, the Commission is responsible for “promot[ing] fair solutions.” How exactly the Commission does this – as stated in the Ordinance, it makes a recommendation to the Federal Office of Culture (FOC), which then conveys the recommendation further (Art. 3 para. 3 ICHPCHO) – is not explained in the Ordinance, which mentions only the Washington Principles and the Terezín Declaration in this clause. Incidentally, the citation of these specific sources without the addition of the words “in particular” raises the question of what the Commission should do if new agreements are concluded in further development of the Washington Principles; would their application then first require sanction by the Federal Council by means of an amendment to the Ordinance? At the same time, it begs the question of whether naming these legal sources is intended to exclude other sources, i.e. whether it excludes the German guidelines in particular, as well as what significance the legal system itself is supposed to have.⁵⁶ Presumably, the Ordinance was left open here deliberately.

But back to the decisions.⁵⁷ In this regard, Art. 2 lit. c ICHPCHO states: The Commission “shall draw up non-binding recommendations in individual cases of historically problematic cultural property; in addition to recommending the restitution of cultural property, it may also draw up recommendations of a general nature.” From the second part of the sentence, it follows that the recommendation can address restitution – as well as, of course, non-restitution. This is clear from the function and history of the Commission’s creation. The Pult motion stated: “The Commission shall make recommendations for or against restitution.”⁵⁸ The Ordinance cannot mean otherwise, even if it is stated less explicitly.

Less obvious is what the Commission can recommend aside from restitution or non-restitution. The Pult motion is clear on this point. After the passage quoted above, it continues: “It [i.e. the Commission] may propose other solutions.” The Federal Council has not adopted this wording, but instead states that “in addition to recommending the restitution of cultural property, [the Commission] may also draw up recommendations of a general nature” (Art. 2 lit. c ICHPCHO). This text differs strikingly from what the Pult motion called for (“it may propose other solutions”). The term “of a general nature” raises questions, considering that what is actually at issue is a recommendation for a specific case. What is meant, probably, is taking positions on questions that are generally controversial. Equally uncertain is whether the Commission can urge the parties to negotiate, or undertake further clarifications with regard to the case, etc., i.e. whether it can make *procedural* recommendations. The Pult motion presumably has a substantive recommendation in mind (“propose other solutions”). In the Federal Council's ordinance, the Commission's powers are possibly to be understood more broadly, albeit limited by the addition that the recommendation should be of a “general nature.” On this point, I believe there is a need for further clarification. In my view, the Commission should be able to make differentiated recommendations in individual cases.

4. Requirements for Uptake

The Commission may be called upon by claimants unilaterally when all five of the following conditions specified by the Ordinance are met:

- “A natural or legal person has asked the FOC to request the Commission to draw up a non-binding recommendation” (Art. 3 para. 1 lit. a ICHPCHO).
- “The cultural property is located in Switzerland or the transfer of cultural property occurred in Switzerland” (Art. 3 para. 1 lit. b ICHPCHO).
- “The applicant provides evidence that reasonable efforts have already been made to reach an agreement in the specific case” (Art. 3 para. 1 lit. c ICHPCHO).

⁵⁶ On these issues, cf. UHLMANN, Glaser, p. 182 ff.

⁵⁷ On these issues, cf. also CATRINA/MÜLLER-CHEN, p. 108 ff., 115 f.

⁵⁸ Pult motion of December 9, 2021 regarding an independent commission for cultural property lost as a result of Nazi persecution (21.4403).

- “The applicant provides evidence that reasonable efforts have already been made to investigate the provenance of the cultural property.” (Art. 3 para. 1 lit. d ICHPCHO).
- Negatively, the case cannot be “the subject of ongoing or completed judicial proceedings” (Art. 3 para. 2 ICHPCHO).

Application by a natural or legal person pursuant to Art. 3 para. 1 lit. a ICHPCHO should be understood comprehensively, i.e. the provision enables not only private entities but also public institutions in Switzerland and abroad to apply to the Commission. What remains open is whether the entity making the application must assert claims on their own behalf or whether claims on behalf of third parties are also allowable – i.e. could an organization, for instance, file an application demanding a museum find the heirs in a case of obviously looted property and return the work to them.

It is interesting to look at the introductory sentence of Art. 3 para. 1 ICHPCHO. It states: “The FOC can assign individual cases [...] to the Commission [...]” The FOC is therefore not *obliged* to do so, even if all the following requirements are met. Technically speaking, referral to the Commission is at the discretion of the FOC as the administrative authority. There is no indication in the ordinance as to the circumstances under which the FOC should or should not refrain from forwarding a case.

Art. 3 para. 1 lit. b ICHPCHO, according to which the cultural property must be located in Switzerland or the transfer must have taken place in Switzerland, describes a kind of geographic scope of the Commission's powers. Such a connection to place seems on the face of it reasonable, so that not just any random cases from anywhere in the world could be brought before the Commission. However, some weakness could lie in the fact that private individuals in particular could evade a recommendation by the Commission by taking the cultural property out of the country prior to the start of the Commission proceedings, if no other transaction has taken place in Switzerland. It will also have to be clarified whether *any* transfer of ownership in Switzerland is sufficient to establish the connection or whether it must be a transfer that is regarded as critical under the Washington Principles. Finally, it will be interesting to see whether the Commission also considers customs bonded warehouses⁵⁹ to be a linking factor to Switzerland – which, in my view, it should, since Switzerland has, at the least, a moral obligation for these facilities.

This also opens up the discussion concerning flight assets. The Pult motion contains a passage on this issue in which it is uncertain whether the statement refers to jurisdiction (flight assets will also be assessed) or to the substantive assessment (flight assets are to be treated as looted property for evaluation purposes): “When dealing with disputed cases involving ‘cultural property lost as a result of Nazi persecution,’ the Commission does not distinguish between ‘looted art’ and so-called ‘flight assets.’” The Ordinance has nothing to say about this. If one assumes that, in naming the applicable legal bases, the Federal Council deliberately refrained from citing bases in the colonial context, here too it may be assumed that the question should be decided by the Commission itself.

The final prerequisites for a case to be referred to the Commission are “reasonable efforts [...] to reach an agreement in the specific case” (Art. 3 para. 1 lit. c ICHPCHO) and “reasonable efforts [...] to investigate the provenance of the cultural property” (Art. 3 para. 1 lit. d ICHPCHO). In my opinion, to demonstrate reasonable efforts it must suffice that the claimant has made a serious attempt to reach a just and fair solution; the refusal of the owner(s) to engage in any discussion cannot exclude the case from the Commission’s scope. Reasonable efforts to investigate the provenance of cultural property can be particularly challenging for private claimants if they themselves have neither money nor knowledge in these matters. Here, the Ordinance is presumably aimed more at claimants with legal representation. Research efforts should of course be required even from individual laypersons, but the bar for these efforts must not be set too high in their case. This naturally leads to the question of which clarifications the Commission can and must carry out itself. We will come back to this.⁶⁰

⁵⁹ Cf. art. 62 ff. Customs Act of March 18, 2005 (CustA, SR 631.0).

⁶⁰ Cf. section III.2 below.

The Commission may not deal with a case “if it is the subject of ongoing or completed judicial proceedings” (Art. 3 para. 2 ICHPCHO). The probable intention here is that judicial proceedings should not be influenced by the Commission’s recommendation. But was it really the Federal Council’s intent to exclude all proceedings if the claimants have already sought legal redress, possibly even before the Washington Principles were issued? And has it been considered that legal proceedings can be initiated not only by the claimants but also by the potential defendants, for example with the assertion that a certain object belongs to them (negative declaratory action)?⁶¹ The ordinance does not actually leave any leeway here, which means that the FOC cannot refer the case and the Commission cannot deal with it. In my opinion, the wording is too narrow.

Conversely, the ordinance does not rule out the possibility of the Swiss Commission being called upon when a similar commission abroad has already assessed the case or is in the process of assessing it. Such parallel proceedings seem rather undesirable. In such cases, the FOC could make use of its authority to refrain from referring a case (Art. 3 para. 1 ICHPCHO). The Commission itself also has the discretion not to take a case up: “If the Commission considers a recommendation to be appropriate, it shall draw it up and convey it to the FOC” (Art. 3 para. 3 sentence 1 ICHPCHO). As with the FOC, however, the Commission only has discretion in one direction: if the requirements of Art. 3 para. 1 and 2 ICHPCHO are met, it is allowed not to take up the case if it does not consider it to be “appropriate” (Art. 3 para. 3 sentence 1 ICHPCHO). It cannot, however, elect to take up a case if one of the five requirements in Art. 3 para. 1 and 2 of the ICHPCHO is not met.

5. Proceedings

The ordinance contains little guidance regarding how the proceedings before the Commission are to be conducted. As stated, the Commission is responsible for “promoting fair solutions” (Art. 4 ICHPCHO), but how it is to do this, and in particular whether it should seek a discussion with the parties in a controversial case, make proposals to the parties, advise the claimants, etc., remains open.⁶² A reading of Art. 3 para. 3 ICHPCHO gives the impression of a commission that acts only through the mediation of the FOC and is shielded from the parties, so to speak: “If the Commission considers a recommendation to be appropriate, it shall draw it up and convey it to the FOC. The FOC informs the applicant.” However, this can probably be explained more by the Commission’s position as an administrative commission⁶³ than by a deliberate legislative decision to make the FOC the permanent intermediary between the Commission and the parties.

In fact, Art. 11 ICHPCHO provides for outside reference by the Commission, namely through collaboration “with domestic and foreign official bodies, organizations and private individuals” on the one hand (Art. 11 para. 1 ICHPCHO) and on the other, through the involvement of experts: The Commission “may obtain external assessments and reports from third parties to carry out its tasks” (Art. 11 para. 2 ICHPCHO). The consultation of expert opinions is likely to be necessary on a regular basis. Art. 10 para. 1 sentence 2 ICHPCHO goes even further, providing that, in addition to external experts, “interest groups” may also be consulted for the work of the Commission or its working groups. It would be strange if, of all things, contact with the parties to the proceedings were prohibited. This cannot be the intention. Here it will be up to the Commission to issue the necessary regulatory provisions, as provided for in Art. 9 ICHPCHO.⁶⁴

What is clear is that the Commission has no compulsory powers. In contrast to the Bergier Commission – which was granted access to relevant files as a result of an express provision in a parliamentary

⁶¹ On the (increased) requirements for interest in a declaratory judgment in negative declaratory actions as governed by Art. 88 of the Swiss Code of Civil Procedure of December 19, 2008 (Code of Civil Procedure, CCP, SR 272.0), see BSK-WEBER, Art. 88 CCP paras. 9 ff., and 23 ff.

⁶² On these questions prior to the enactment of the Ordinance, cf. CATRINA/MÜLLER-CHEN, p. 110 ff., 116 f.

⁶³ Cf. section Ziff. II.1, above.

⁶⁴ The regulations must be approved by the cognizant department (Art. 9 clause 3 ICHPCHO).

resolution⁶⁵ – cooperation with the Commission is purely voluntary. In the case of private respondents in particular, this is likely to rule out any meaningful recommendation if the facts are unclear and the respondents are not prepared to cooperate.

Art. 10 ICHPCHO regulates the internal working methods of the Commission. “The Commission may form working groups to carry out its tasks” (Art. 10 para. 1 sentence 1 ICHPCHO). Recommendations in individual cases are to be drawn up by “committees[] of at least five members, including the Chairperson” (Art. 10 para. 2 ICHPCHO) and a “new committee shall be formed” for each case, taking into account the “specific historical context” (Art. 10 para. 3 ICHPCHO). As already mentioned, this last requirement suggests that the Commission should also deal with colonial contexts, as the need for such differentiation would be rather unusual (though of course conceivable) for cases of cultural property lost as a result of Nazi persecution.

Art. 10 para. 4 VUK regulates the Commission’s vote on its recommendation: simple majority with a casting vote by the Chairperson.

6. Publication and Communication

The Commission's recommendations are to be published and the Commission decides on the “appropriate[] form” (Art. 12 para. 1 ICHPCHO). The Federal Act on the Freedom on Information in the Administration of December 17, 2004 (Freedom of Information Act, FoIA)⁶⁶ is presumably applicable. It is clear that, according to a recent Federal Supreme Court ruling, extra-parliamentary commissions are considered part of the federal administration and thus the personal scope of the law is opened up (see Art. 2 para. 1 FoIA).⁶⁷ In regards to the substance, however, official documents relating to the following are excluded: civil proceedings (Art. 3 para. 1 (a)(1) FSCA), criminal proceedings (Art. 3 para. 1(a)(2) FoIA), international legal and administrative assistance proceedings (Art. 3 para. 1(a)(3) FoIA), international dispute resolution proceedings (Art. 3 para. 1(a)(4) FoIA), proceedings for the administration of state and administrative justice (Art. 3 para. 1(a)(5) FoIA) and arbitration proceedings (Art. 3 para. 1(a)(2) FoIA), as well as files in first-instance administrative proceedings (Art. 3 para. 1(b) FoIA). For the Federal Arbitration Commission for the Exploitation of Copyrights and Related Rights (Arbitration Commission), the Federal Supreme Court affirmed the applicability of the Freedom of Information Act in the aforementioned judgment, since “the two parties had agreed on a tariff” and thus “the Arbitration Commission did not perform any dispute resolution function in the tariff approval procedure [...]; its function was solely to approve the tariff.”⁶⁸ In general, in this decision the Federal Supreme Court holds: “The core of the judicial process is the resolution of disputes between different parties.”⁶⁹ This applies well to the Independent Commission for Historically Problematic Cultural Heritage insofar as it concerns a dispute between two parties over an object, but not insofar as the term “resolution” is emphasized, as this suggests binding force.⁷⁰ As the Commission lacks this authority to make a binding decision, the exceptions of Art. 3 para. 1 FoIA are unlikely to be relevant and the Freedom of Information Act remains applicable. The Federal Office of Culture (FOC) is of course also covered as the formal recipient of the Commission's recommendations (Art. 3 para. 3 ICHPCHO).

In most cases, the recommendations also contain personal data of third parties who are not parties to the proceedings. Here, the Federal Act on Data Protection of September 25, 2020 (Data Protection

⁶⁵ Cf. Art. 5 (right to inspect) and Art. 9 (penal provisions) Federal Decree of December 13, 1996 concerning the historical and legal investigation of the fate of assets brought into Switzerland as a result of National Socialist rule (AS 1996 3487).

⁶⁶ SR 152.3.

⁶⁷ BGE 148 II 92 ff., 100 E. 5.4.

⁶⁸ *Ibid.*, p. 104 E. 7.4.

⁶⁹ *Ibid.*, p. 103 E. 7.1.

⁷⁰ Cf. only Art. 90 ff. Federal Act on the Federal Supreme Court of June 17, 2005 (Federal Supreme Court Act, FSCA, SR 173.110).

Act, FADP) is applicable.⁷¹ However, one may ask whether the proviso of Art. 2 para. 3 FADP does not apply, which reads as follows: “The applicable procedural law regulates the management of personal data and the rights of the persons concerned in court proceedings and in proceedings under federal procedural regulations. The provisions of this Act shall apply to administrative proceedings of the first instance.” It cannot be ruled out that the proceedings before the Commission qualify as “proceedings under federal procedural regulations.” This would mean that the Commission could deviate from federal data protection law. However, the procedural instructions in the Ordinance appear to be so rudimentary that it is hardly possible to speak of actual rules of procedure. In the absence of specific guidelines on how the process is to be carried out with regard to third-party data, there is much to speak in favor of regarding the provisions of the Data Protection Act as relevant. It is beyond a doubt that the Commission is a “federal body” within the meaning of Art. 2 para. 1 lit. b and Art. 5 lit. i FADP; it is “entrusted with public tasks of the Confederation” (Art. 5 lit. i in conjunction with Art. 2 ICHPCHO and Art. 57 para. 1 GAOA).

In addition to the recommendations, the “regulations and assessments and reports prepared by third parties must also be made available to the public” (Art. 12 para. 2 ICHPCHO). Furthermore, the Commission should also be authorized to make other documents accessible to the public (thesis papers, reform proposals, etc.). For its part, the Federal Office of Culture (FOC) may publish and reuse pertinent documents; the Commission’s copyrights to the documents are restricted in this respect (Art. 13 ICHPCHO).

The fact that the Commission may inform the public directly and does not necessarily have to take the detour via the FOC is indirectly confirmed elsewhere. The Secretariat of the Commission “handles administrative matters and supports the Commission in providing reports and information to the public” (Art. 14 para. 3 ICHPCHO). However, Art. 8^{ter} GAOO must be observed: “Commissions that, in accordance with their order of appointment [here: the Ordinance], communicate without consulting cognizant authorities shall exercise due restraint when informing the public regarding political issues.” The Commission itself will have to decide what this restraint means in individual cases.

7. Appointment and Organization

Art. 6 ICHPCHO stipulates that the “Commission [...] shall be independent in the performance of its duties” (Art. 6 para. 1 ICHPCHO) and that the “members of the Commission [...] shall [carry out] their duties personally and independently” (Art. 6 para. 2 ICHPCHO). It is clear, that the Commission and its members must be able to make their recommendations without external pressure.

“Independence” is however a broad term. A review of the (long) list of extra-parliamentary commissions⁷² reveals some whose members must be completely independent and others whose members can be clearly identified as aligned with certain interest groups. For example, representatives of the trade unions and employers’ associations sit on the Tripartite Commission of the Swiss Confederation in conjunction with concurrent measures for the free movement of persons.⁷³ Directors and producers are well represented on the Expert Commission on Film Promotion.⁷⁴ Obviously, members of commissions are not allowed to favor themselves, but in many cases they were chosen precisely with a particular political background in mind. There is nothing objectionable about this; extra-parliamentary commissions serve, among other things, to “involve the Cantons or other interested parties at an early stage” (Art. 57b lit. b GAOA) and therefore have a democratic function. Vested interests must be disclosed prior to the election (Art. 57f para. 1 GAOA and Art. 8f GAOO). Obviously, members with

⁷¹ SR 235.1.

⁷² Cf. Appendix, “Extra-parliamentary Commissions” in the GAOO.

⁷³ Cf. https://www.admin.ch/ch/d/cf/ko/Gremien_interessenbindung_10554.html, retrieved on December 14, 2023.

⁷⁴ Cf. https://www.admin.ch/ch/d/cf/ko/Gremien_interessenbindung_10581.html, retrieved on December 14, 2023.

clear vested interests may not be elected one-sidedly; rather the committees must be “balanced in terms of gender, language, region, age and interest groups, taking into account their responsibilities” (Art. 57e para. 2 GAOA).⁷⁵

It is more difficult to say what this means for the Independent Commission for Historically Problematic Cultural Heritage. Beyond the independence of the members (Art. 6 para. 2 ICHPCHO), little guidance is found in the Ordinance. With regard to the election of members, Art. 8 ICHPCHO states: “The Federal Council shall issue a profile of requirements for the members of the Commission. It shall select the Chairman and the other members of the Commission.” The term of office is four years (Art. 57c para. 3 GAOA). There are no age limits (Art. 8b para. 2 GAOO), but there are term limits (Art. 8i GAOO). The total size of the committee should be nine to twelve members (Art. 7 ICHPCHO), although this number may be exceeded in exceptional cases (Art. 8d GAOO).

Specifically, the Federal Council will have to answer the question of the extent to which members may have been involved in one way or another in issues relating to the restitution of cultural property, i.e. whether they have taken one side or the other in such proceedings or whether they have otherwise taken a firm position. Should members of the institutions and their associations, such as the Association of Swiss Art Museums,⁷⁶ be considered? Members of victims’ associations? Jewish organizations? Or especially not these? And if they should, then what is a “balanced” composition of interest groups according to Art. 57e para. 2 GAOA? The question is obviously even more difficult in the colonial context (if this can even be referred to at all in the singular). Considering the number of completely independent experts is presumably not infinite, it would probably be a mistake to formulate independence in an excessively strict manner – which then obviously raises the question of balance.

It is also interesting to see whether and to what extent foreign nationals should be considered. As the Commission must strive for acceptance not only in Switzerland, but also – and perhaps especially – abroad, it makes sense to look beyond Switzerland, which also widens the field of potential applicants. Knowledge of German is probably virtually indispensable for questions relating to cultural property lost as a result of Nazi persecution. This is less clear for colonial contexts; knowledge of another national language (French or Italian) is certainly desirable. In my view, no significant restrictions on the appointment of foreign nationals emerge out of the general provisions on extra-parliamentary commissions either.⁷⁷

Finally, it remains to be clarified what competencies should be represented on the commission. Apart from foreign models, the report and recommendation of the Round Table to the City of Zurich, Canton of Zurich and Kunsthau Zurich concerning the evaluation of the provenance research carried out to date on the Emil Bührle Collection, dated January 16, 2023, is here instructive. It was clear to the Round Table that “the questions posed can only be answered on the basis of interdisciplinary knowledge.”⁷⁸ The report continues: “The Round Table discussed the required disciplines on a number of occasions, including when selecting the potential mandatees. Historical knowledge and experience in dealing with provenance issues appear indispensable; a knowledge of law for issues of value judgement is at least desirable.”⁷⁹ For the Independent Commission for Historically Problematic Cul-

⁷⁵ Cf. also the implementing provisions in Art. 8c GAOO (Gender representation) and Art. 8c^{bis} (Representation of the language communities); on the composition of the extra-parliamentary commissions, see also STREBEL, p. 5.

⁷⁶ Cf. <https://www.artmuseums.ch/>, retrieved on December 20, 2023.

⁷⁷ Art. 8b Abs. 1 GAOO states: “Anyone who fulfills the requirements for employment in the Federal Administration may be selected as a member of an extra-parliamentary committee.” Nationality is not typically a prerequisite for appointment.

⁷⁸ *Bericht* [Report], para. 20 (<https://www.ius.uzh.ch/de/staff/professorships/alphabetical/uhlmann/KKR.html>, retrieved on December 20, 2023).

⁷⁹ *Ibid.* In this context, it is perhaps also interesting to note that the Round Table assessed the independence of the expert more stringently than that of the members themselves, thus answering the previously raised question of independence in a differentiated way: “Questions of partiality were also addressed at the first meeting. With a Round Table at which interest groups are represented, the benchmark cannot be the same as later for the mandatee. The Round Table asks questions, but does not answer them itself. This means that there is no actual rule

tural Heritage, legal knowledge can probably be regarded as equally indispensable, since – in contrast to a review of existing provenance research – a large number of procedural questions and assessments arise that go beyond the Bührle mandate.

Administratively, the Commission is affiliated with the Federal Office of Culture (FOC) (Art. 6 para. 3 ICHPCHO), which is appropriate in view of its position as an administrative commission. The Commission has a secretariat, which “reports functionally to the Chairperson of the Commission and administratively to the FOC” (Art. 14 para. 1 ICHPCHO); “supports the Commission in technical matters, maintains contact with domestic and foreign offices and organizations, and acts as a press and information office for the public” (Art. 14 para. 2 ICHPCHO); and “handles administrative matters and supports the Commission in providing reports and information to the public” (Art. 14 para. 3 ICHPCHO).⁸⁰ Disclosure of information to the public has already been discussed.⁸¹

Art. 15 ICHPCHO regulates the compensation of members, whereby it basically references the GAOO (Art. 15 para. 2 ICHPCHO). It will be interesting to see whether the Federal Council will assign the members to the category of the better-paid market-oriented commissions or the lower-paid socially-oriented commissions. Socially-oriented commissions deal “primarily with political and social issues” (Art. 8m lit. a GAOO), while market-oriented commissions “oversee or significantly support the functioning of a market” (Art. 8m lit. a GAOO). The former is more appropriate for the Independent Commission for Historically Problematic Cultural Heritage, but whether this is entirely appropriate in cases where enormous amounts are in dispute remains to be seen. In any case, the amount of compensation is public (Art. 57g para. 2 GAOA).

Art. 15 para. 1 ICHPCHO is interesting: “The financing of the Commission's activities shall be ensured by the FDHA [Federal Department of Home Affairs].” This actually seems self-evident. However, the costs for external expertise can be quite considerable. The review of provenance research in the Bührle matter cost the City of Zurich, the Canton of Zurich, and the *Zürcher Kunstgesellschaft* [Zurich Art Society] CHF 730,000.⁸² The *Kunstmuseum Bern* [Museum of Fine Art Bern] had to sell works from the Gurlitt bequest in order to finance the cost of clarifications and legal fees.⁸³ Decisions can be very extensive; the justification of the *Kunstmuseum Basel's* [Museum of Fine Art Basel] decision of November 21, 2018 in the Curt Glaser case spanned 169 pages.⁸⁴ Discussions regarding the costs of the commission would come as no surprise and the meaning of Art. 15 para. 1 ICHPCHO could still give rise to debate.

III. Assessment

1. The Choice of Establishment by Ordinance

The Federal Council established the Independent Commission for Historically Problematic Cultural Heritage on the basis of an ordinance (and could even have established directly).⁸⁵ It thus decided against a solution at the legislative level. The reason for this is obvious: the usual legislative process in

requiring members to recuse themselves. However, all members (including the Delegate) disclosed their connections to the Commissioning Bodies and the Bührle Foundation” (report, para. 9).

⁸⁰ Cf. additionally Art. 8i^{bis} GAOO (Commission Secretariat).

⁸¹ Cf. section II.6 above.

⁸² Mandate agreement between the City of Zurich, the Canton of Zurich and the *Zürcher Kunstgesellschaft* and Prof. Dr. Raphael Gross regarding the review of the provenance research of the E. G. Bührle Collection Foundation dated May 8/11, 2023, item 6 (https://www.stadt-zuerich.ch/prd/de/index/ueber_das_departement/medien/medienmitteilungen/2023/mai/230512a.html, retrieved on December 20, 2023).

⁸³ Stefan Bühler, *Bern begeht mit dem Verkauf eines Bildes aus dem Gurlitt-Erbe einen Tabubruch?* [Bern is breaking a taboo by selling a painting from the Gurlitt legacy?], NZZ, Sunday, November 9, 2019.

⁸⁴ Decision of the Art Commission in the matter of Curt Glaser of November 21, 2018 (<https://kunstmuseumbasel.ch/de/forschung/provenienzforschung/curtglaser>, retrieved on December 20, 2023).

⁸⁵ Cf. Ziff. II.1 above. On the necessity of a federal law, CATRINA/MÜLLER-CHEN, p. 110 f.

Switzerland usually takes several years. It is in itself a welcome development that a commission could now be created at the ordinance level, which will quickly begin its work. The time was ripe. The Federal Council brought the ordinance into force on January 1, 2024 (Art. 16 ICHPCHO). The process for selecting members will still take some time, but it seems that it is not out of the question that work could begin in the second half of 2024 and the first cases might be handled in 2025.

The gain in time comes at a price, however. The choice of ordinance level means that the Commission cannot issue any binding directives. Its work vis-à-vis the parties and the public is founded solely on its authority by virtue of persuasion. This is no easy burden and a major challenge. Establishment through legislation would have allowed obligations to be imposed on the parties. This applies perhaps less to the decision itself than to the conduct of the proceedings: the Commission cannot oblige anyone to grant it access to records or to cooperate with it in any other way.

By creating the Commission at the ordinance level, the Federal Council is also making a decision regarding its significance. “All important regulatory provisions shall be enacted in the form of federal law,” as Art. 164 para. 1 sentence 1 BV [Federal Constitution] states. Less important provisions can be enacted at ordinance level (Art. 164 para. 2 BV). These now include the provisions on the Independent Commission for Historically Problematic Cultural Heritage. This of course does not strengthen the Commission’s legitimation.

The decision to use standards of lesser importance also stands in some contrast to statements made by the cognizant Federal Councilor in Parliament. In a session of the National Council, Head of Department Alain Berset opposed the concrete provisions of the Jon Pult motion, explaining: “This means that the Federal Council believes that this commission is of great importance and that it is advisable to take the necessary time to study its mode of operation, its composition and the extent of its competencies in detail. This is the reason why the Federal Council proposes to accept the first paragraph of the motion, but to reject all the details of the functioning of this commission. We must leave ourselves a little room to maneuver.”⁸⁶ The Federal Council wanted to take the time necessary to address the important issues, which was echoed by the committee rapporteur in the debate in the Council of States: “We must take the time to examine this carefully; the functioning, composition and competencies of the Commission must also be analyzed in depth. What is equally quite important, and what we have also discussed at length, is the question of whether a commission is needed for cultural assets from other, specifically colonial, contexts. This issue must be examined in conjunction with the implementation of this motion without a pre-determined outcome in mind.”⁸⁷ The Head of Department took up this vote and reiterated that the establishment of the commission requires a stable process: “We therefore believe that, in order to have a process that is stable and solid, it is important to take the time necessary to study in detail the modalities of the functioning of such a commission, to consider its composition and the extent of its competences, also on the basis of the debate that you are currently holding.”⁸⁸

Whether the solution of creating the Commission via an ordinance really does represent such an in-depth process in an important matter may be subjected to some critical scrutiny. A legislative proposal would have necessarily entailed a public debate. Proposals at the legislative level must be submitted for public review (Art. 3 para. 1 lit. b Federal Act on the Consultation Procedure of March 18, 2005, Consultation Procedure Act, CPA),⁸⁹ which typically lasts three months (Art. 7 para. 3 CPA). All comments on the proposal are publicly accessible after the consultation period expires (Art. 9 para. 1 lit. b CPA). The authorities must explain their plans in an accompanying report that meets the requirements for a dispatch to Parliament (Art. 6a CPA).

⁸⁶ AB 2022 N 749.

⁸⁷ Commission spokesman, Benedikt Würth, AB 2022 S 924.

⁸⁸ AB 2022 S 924.

⁸⁹ SR 172.061.

Presumably, the Federal Council weighed these advantages against the loss of time entailed in passing a bill. This is certainly understandable, even if in retrospect it is regrettable that the Federal Council has overwhelmingly rejected the numerous previous initiatives in this area and as long ago as 2014 declared: “For these reasons, the Federal Council does not envisage the creation of a statutory basis [...]”⁹⁰

What seems truly critical to my mind, however, is that the Federal Council has also refrained from submitting the ordinance (with an explanatory report) for consultation. The Consultation Procedure Act stipulates this for “ordinances and other[] undertakings of major political, financial, economic, ecological, social or cultural significance” (Art. 3 para. 1 lit. d CPA). Dispensing with consultation is difficult to reconcile with the Head of Department’s statement in Parliament that he attaches “great importance” to the Commission. The approach here must be seen as not particularly consistent. It is conceivable that the deal was meant to be concluded under the then Head of Department to avoid delays in the event of a change. It is also unfortunate that it was not clear from the cultural dispatch that was distributed for consultation on June 9, 2023 whether or not another consultation would be initiated on the Independent Commission for Historically Problematic Cultural Heritage; the wording in the cultural dispatch was apparently interpreted in various ways.⁹¹

The legitimacy of the Commission is not reinforced by such an “abbreviated procedure.” This is also true of the process of issuing ordinances as a whole. With a consultation procedure, it would have been clear who takes what position on a federal proposal, whereas in the present case it is unclear who spoke to whom and how interest groups were involved in the process. In a consultation process, the institutions, namely the Swiss museums, would also have to (or at least could) show their true colors regarding the introduction of an Independent Commission for Historically Problematic Cultural Heritage; support would have strengthened its legitimacy, while opposition might have brought useful improvements. The same goes for the federal question; the Confederation’s authority in this area is anything but self-evident,⁹² and while broad support from the cantons would not have replaced a possible lack of constitutional basis, it could have mitigated doubts about the Confederation’s authority. The – difficult – decision for or against anchoring the commission at the legislative level would perhaps have been clearer after a consultation procedure. Here, the gain in time seems to stand in a disproportionate relationship to the advantages of a consultation procedure, which the Federal Council has spared itself.⁹³

It remains to be seen whether Parliament will consider the motion as fulfilled. It would be unusual, but not inconceivable, for Parliament to subsequently elevate the Commission to the level of a law. A legal basis could be drafted very narrowly and give the Commission, for example, the important power to demand documents. Regardless of its length, a regulation at the legislative level would necessarily entail a consultation procedure (Art. 3 para. 1(b) CPA), in which the participants could also comment on the Federal Council’s ordinance. The Federal Council itself could propose such a regulation to Parliament (Art. 181 Cst) – whereby it would of course have to explain why, in this case, the ordinance has, as an exception, taken precedence over higher-ranking law. And indeed, the Federal Council now seems to want to go down this path: at its meeting on 1 March 2024, it adopted the Dispatch on the

⁹⁰ Tschäppät motion of June 19, 2014 regarding looted art. Effectively promoting provenance research (14.3497).

⁹¹ The language read: “The establishment of an independent national commission for dealing with Nazi-looted art (Motion 21.4403 Pult) will be the subject of a later, specific request for additional resources (material, operating and personnel expenses)” (Dispatch on the promotion of culture in the years 2025-2028, Culture Dispatch 2025-2028, Explanatory Report for the consultation procedure of June 9, 2023, BBl 2023 1465, p. 92, also cf. p. 56). This led various participants in the consultation to conclude that comments on a federal commission were not welcome because the commission was not the subject of the Culture Dispatch.

⁹² Cf. section II.1. *in fine* above.

⁹³ On the necessity of a formal legal basis, see CATRINA/MÜLLER-CHEN, p. 112.

Promotion of Culture in the Years 2025-2028.⁹⁴ In it, it proposes an amendment to the Federal Act on the International Transfer of Cultural Property (Cultural Property Transfer Act, CPTA).⁹⁵ Historically encumbered cultural heritage should be "the totality of cultural property whose provenance or ownership raises questions due to legal transfers in the context of National Socialism or colonialism" (Art. 2 para. 2^{bis} CPTA).⁹⁶ Art. 18a CPTA gives the Federal Council the mandate to establish the Commission (Art. 18a para. 1 CPTA), regulates its tasks in accordance with the (pre-emptive) ordinance (Art. 18a para. 2 CPTA), regulates data protection (Art. 18a para. 3 CPTA) and authorises the Commission to issue its procedural regulations (Art. 18a para. 4 CPTA).⁹⁷ Of course, one flaw remains: with this unusual approach, a consultation procedure has never taken place – and never will.⁹⁸

2. Substantive Questions

The decision to establish the Commission on the basis of an ordinance necessarily entails that certain substantive issues have also been decided. For purely legal reasons, the Commission's decisions can only be non-binding recommendations and the Commission has no compulsory powers vis-à-vis the parties in the case or third parties. Nevertheless, the impact of a Commission recommendation should not be underestimated. If it characterized an object as "historically problematic," it is to be expected that this object would lose considerable value and may no longer be tradable. This must at least be regarded as a "de facto" encroachment on the guarantee of ownership – which, *ceterum censeo*, raises the question of a legal basis.⁹⁹

The Federal Council has refrained from providing the commission with many guidelines – which on the one hand is fitting, as it resisted substantive guidelines in Parliament, but on the other hand the promise to "study in detail the modalities of the functioning of such a commission, to consider its composition and the extent of its competences"¹⁰⁰ does not appear to have been fully (or as yet) fulfilled by the ordinance. The Federal Council has, to the extent possible, refrained from taking a position on the controversial issue of dealing with flight assets, as the Pult motion calls for: "When dealing with disputed cases involving 'cultural property lost as a result of Nazi persecution,' the Commission will not differentiate between 'looted art' and so-called 'flight assets.'"¹⁰¹ The Federal Council cited only the Washington Principles and the Terezín Declaration as applicable legal bases, making no mention of any other sources.¹⁰² The Ordinance remains very vague with regard to the composition of the members of the Commission,¹⁰³ and what the Commission can recommend beyond restitution or non-restitution is not readily apparent from the provisions alone.¹⁰⁴ The Commission will need to develop the procedural law largely on its own.¹⁰⁵

⁹⁴ At the time of finalising this article, only the provisional version of the dispatch has been published. The publication date for the final version has not yet been set. Cf. Dispatch on the Promotion of Culture in the Years 2025-2028 (Dispatch on Culture 2025-2028) of [publication date] BBl 2024 1.

⁹⁵ *Ibid.*, p. 107 ff.

⁹⁶ *Ibid.*, p. 139.

⁹⁷ *Ibid.*, p. 139 f.

⁹⁸ Cf. Federal Department of Home Affairs, Dispatch on the Promotion of Culture in the Years 2025-2028 (Dispatch on Culture). Report on the Results of the Consultation (<https://www.bak.admin.ch/bak/de/home/aktuelles/nsb-news.msg-id-100259.html>, accessed on 11 March 2024), which does not comment on the amendment of the Federal Act on the International Transfer of Cultural Property.

⁹⁹ Cf. Art. 36 para. 1 Cst; foundational in this regard, BGE 118 Ia 305 E. 2a.

¹⁰⁰ Cf. Fn. 88 above.

¹⁰¹ Pult motion of December 9, 2021 regarding an independent commission for cultural assets lost as a result of Nazi persecution (21.4403).

¹⁰² Section II.2 above.

¹⁰³ Section II.7 above.

¹⁰⁴ Section II.3 above.

¹⁰⁵ Section II.5 above.

Nevertheless, the Federal Council has taken important steps. Perhaps most importantly, the Commission can be called upon unilaterally,¹⁰⁶ which is in line with one of the postulations of the Pult motion.¹⁰⁷ In addition to cultural property lost as a result of Nazi persecution, the Commission also assesses cases in colonial contexts, which was also a matter of concern in the Pult motion,¹⁰⁸ even if there are some slight doubts here regarding the applicability of the cited principles (Washington Principles and Terezín Declaration).¹⁰⁹ The Commission should take ongoing court proceedings into consideration.¹¹⁰ The members must be independent.¹¹¹

Switzerland's solution is thus – as so often – very pragmatic. It may well prove wise that the Commission was not burdened with regulatory ballast. It can develop an appropriate process itself and has barely any restrictions in its search for just and fair solutions, which seems virtually indispensable for making recommendations in colonial contexts especially. The commission can develop its own legitimacy through its decisions instead of having to formally derive it from the law. The creation of an Independent Commission for Historically Problematic Cultural Heritage represents a great opportunity.

The commission's strengths are simultaneously its weaknesses. If its decisions are not accepted, or in the worst-case scenario, if the current owners of historically problematic cultural assets do not agree to engage in the proceedings at all, there is no legal safety net. The decisions of the Commission sink into insignificance – if the Commission is called upon at all. Experience shows that subsequent legal rectifications would take years and be thorny, because it will be much more difficult than it is today to find majorities for a solution at the legislative level.

These risks are no reason not to unreservedly welcome the creation of the Independent Commission for Historically Problematic Cultural Heritage. The creation of such a commission was – perhaps long – overdue, as we must self-critically recognize. The Commission is an opportunity. We wish it every success for the victims of the Nazi regime and their descendants, but also for Switzerland and the way it deals with the past.

¹⁰⁶ Section II.4 above.

¹⁰⁷ Cf. Pult motion of December 9, 2021 regarding an independent commission for cultural assets lost as a result of Nazi persecution (21.4403).

¹⁰⁸ *Ibid.*

¹⁰⁹ Section II.2 above.

¹¹⁰ Art. 3 Abs. 2 ICHPCHO; cf. section II.4. *in fine* above.

¹¹¹ Section II.7 above.

Literaturverzeichnis

- BANDLE ANNE LAURE, Fair und gerecht? Bilanz und Lösungsansätze bezüglich der Restitution von Raubkunst in der Schweiz, in: Peter Mosimann/Beat Schönenberger (eds), Kunst & Recht 2018 / Art & Law 2018, Zurich 2018, p. 97 ff.
- BERGIER JEAN-FRANÇOIS et al., Schlussbericht der Unabhängigen Expertenkommission Schweiz – Zweiter Weltkrieg, Zürich 2002 (cit. Bergier report)
- BOURGEOIS DANIEL, Business Helvétique et Troisième Reich. Milieux d'affaires, politique étrangère, antisémitisme, Lausanne 1998
- FEDERAL OFFICE OF CULTURE, Kulturgüter im Eigentum der Eidgenossenschaft. Untersuchung zum Zeitraum 1933 bis 1945. Bericht der Arbeitsgruppe des Bundesamtes für Kultur, Bern 1998
- BUOMBERGER THOMAS, Raubkunst -- Kunstraub. Die Schweiz und der Handel mit gestohlenen Kulturgütern zur Zeit des Zweiten Weltkriegs, Zürich 1998
- CAMPFENS EVELIEN, Cross-border title claims to cultural objects: property or heritage?, Leiden 2021
- CATRINA RAMONA/MÜLLER-CHEN MARKUS, Unabhängige Eidgenössische Kommission für während des Nationalsozialismus gestohlene resp. verfolgungsbedingt entzogene Kulturgüter?, in: Peter Mosimann, Beat Schönenberger (eds), Kunst & Recht 2022 / Art & Law 2022, Zurich 2022, p. 97 ff.
- CHECHI ALESSANDRO, The Role of Domestic Courts in Resolving Restitution Cases: Unveiling Judicial Strategies for Culture-Sensitive Settlements, in: Marc-André Renold/Alessandro Chechi/Anne Laure Bandle (eds), Resolving Disputes in Cultural Property / La résolution des litiges en matière de biens culturels, Zurich 2012, p. 145 ff.
- DOMINICÉ ANTOINETTE MAGET, Chancen der Proviensforschung: Versäumtes nachholen, Neue Zürcher Zeitung, November 9, 2017
- ERNST WOLFGANG/ZOGG SAMUEL, Art. 934 ZGB, in: Geiser Thomas/Wolf Stephan (eds), Basler Kommentar zum Zivilgesetzbuch, 7th edn, Basel 2023
- GIRSBERGER DANIEL, Das internationale Privatrecht der nachrichtenlosen Vermögen in der Schweiz, Basel 1997
- GRELL BORIS T., Entartete Kunst: Rechtsprobleme der Erfassung und des späteren Schicksals der sogenannten Entarteten Kunst, Zurich 1999
- HÄNNI PETER/LISCHER JUDITH, Die Schweiz und der internationale Kulturgüterschutz, ZBl 1999, p. 345 ff.
- JAYME ERIK, Der Gurlitt-Fall – Grundfragen des Kunstrechts, in: Peter Mosimann/Beat Schönenberger (eds), Kunst & Recht 2014 / Art & Law 2014, Zurich 2014, p. 127 ff.
- JOLLES ALEXANDER, Gurlitt ist nicht Himmler, Neue Zürcher Zeitung, February 11, 2016
- JOLLES ALEXANDER, Fluchtkunst ist nicht Raubkunst – schweizerische Rechtslage bei Fluchtkunst, in: Peter Mosimann/Beat Schönenberger (eds), Fluchtgut – Geschichte, Recht und Moral, Bern 2015, p. 137 ff.
- Keller Erich, Das kontaminierte Museum. Das Kunsthaus Zürich und die Sammlung Bührle, Zurich 2021
- KRIESI KATHRIN, Filme (12): Monuments Men – Restitution von Raubkunst, AJP 2019, p. 674 ff.
- MEIER OLIVER/FELLER MICHAEL/CHRIST STEFANIE, Der Gurlitt-Komplex, Bern und die Raubkunst, Zurich 2017

Mosimann Peter/Renold, Marc-André/Raschèr Andrea F.G. (eds), Kultur Kunst Recht – Schweizerisches und internationales Recht, 2nd edn, Basel 2020

MÜLLER-CHEN MARKUS, Die Crux mit dem Eigentum an Kunst, AJP 2003, p. 1267 ff. (cit. MÜLLER-CHEN, AJP)

MÜLLER-CHEN MARKUS, Grundlagen und ausgewählte Fragen des Kunstrechts, ZSR 2/2010, p. 5 ff. (cit. MÜLLER-CHEN, ZSR)

PETERS EMMA H., Fair and Just Decolonial Solutions: Adaptation of the Washington Principles to the Context of Disputed Colonial Cultural Objects, Case Western Reserve Journal of International Law 1/2023, p. 617 ff.

PIGUET CYRILLE, Les spoliations d'oeuvres d'art pendant la deuxième guerre mondiale: revendication et restitution Etat de la situation à la lumière d'affaires récentes, AJP 2000, p. 1526 ff.

RASCHÈR ANDREA F. G./KUPRECHT KAROLINA/FISCHER YVES, Drum prüfe, wer sich bindet! – «Compliance» im Kulturgüterhandel?, AJP 2003, p. 507 ff.

RASCHÈR ANDREA F. G./SCHMIDT-GABAIN FLORIAN, Besserer Schutz für den internationalen Leihverkehr unter Museen? Die "Rückgabegarantie" im Kulturgütertransfergesetz, AJP 2005, p. 686 ff.

RASCHÈR ANDREA F.G., 6. Kapitel: Kulturgütertransfer, § 10: Raubkunst, in: Mosimann Peter/Renold, Marc-André/Raschèr Andrea F.G. (eds), Kultur Kunst Recht – Schweizerisches und internationales Recht, 2nd edn, Basel 2020, p. 581 ff. (cit. RASCHÈR, KKR)

RASCHÈR ANDREA F.G., Cultural Goods Looted by Nazis or Sold under Duress. The Situation in Switzerland: Status and Ways Forward, in: Alessandro Chechi/Marc-André Renold (eds), Cultural Heritage Law and Ethics: Mapping Recent Developments, Zurich 2017, p. 227 ff. (cit. RASCHÈR, Cultural Goods)

RASCHÈR ANDREA F.G., Raubkunst in Schweizer Sammlungen, Schweizer Monatshefte, Zeitschrift für Politik, Wirtschaft und Kultur 3–4/2005, p. 25 ff. (cit. RASCHÈR, Schweizer Monatshefte)

RASCHÈR ANDREA F.G., Richtlinien im Umgang mit Raubkunst. Die Washingtoner Konferenz über Vermögenswerte aus der Zeit des Holocaust (30. November bis 3. Dezember 1998), AJP 1999, p. 155 ff. (cit. RASCHÈR, AJP)

RASCHÈR ANDREA F.G./MÜNCH ANDREAS, Die Schweiz und die Raubkunst: Aufarbeitung und Ausblick, in: Marc-André Renold, Pierre Gabus (eds), Claims for the Restitution of Looted Art, Genf 2004, p. 12 ff.

RASCHÈR ANDREA F.G./NIKOLA DOLL, Provenienzforschung – Mut zur Lücke, Neue Zürcher Zeitung, Oktober 7, 2022

RAUE PETER, Die Kritik an den Neuerungen des deutschen Kulturgutschutzgesetzes, in: Peter Mosimann/Beat Schönenberger (eds), Kunst & Recht 2018 / Art & Law 2018, Zurich 2018, p. 61 ff.

RITTER ANDREAS, Raubkunst (Begehrlichkeiten, Wiedergutmachung, Mediation), in: Ivo Schwander/Peter Studer (eds), Neuigkeiten im Kunstrecht. Referate der Tagung des IRP-HSG und des Schweizerischen Kunstvereins vom 19.10.2007 im Kunsthaus Zürich, St. Gallen 2008, p. 151 ff.

ROSEBROCK TESSA, „[...] wird mir der in der Schweiz befindliche Kunstbesitz genommen, bin ich völlig mittellos.“ Die Sammlung Carl Sachs in Zürich, Basel und Luzern, transfer – Zeitschrift für Provenienzforschung und Sammlungsgeschichte 2/2023, S. 74 ff.

SAVANOVIC IVANA/EICHENBERGER LUKAS, Know the provenance – Die Tücken der Annahme (potenziell) kontaminierter Kunst aus Sicht des Stiftungsrats, ius.full 2/2022, p. 38 ff.

SCHMIDT-GABAIN FLORIAN, Die Schweiz braucht eine unabhängige Kommission, die sich Streitfällen um potenzielle Raubkunst annimmt, Schweiz am Wochenende, November 21, 2021

SCHMIDT-GABAIN FLORIAN, Koloniale Vergangenheit, gemeinsame Zukunft – der Umgang mit entwendetem Kulturgut, Neue Zürcher Zeitung, March 12, 2019

SCHMIDT-GABAIN FLORIAN, Restitutionsdebatten – Über die Notwendigkeit sowie das Suchen und Finden gerechter und fairer Lösungen, Anwaltsrevue 9/2023, p. 369 ff.

SCHMIDT-GABAIN FLORIAN, Verkaufen verboten! Bemerkungen zu den zivilrechtlichen Folgen des Art. 16 Abs. 1 KGTG, AJP 2007, p. 575 ff.

SCHÖNENBERGER BEAT, Restitution von Kulturgut. Anspruchsgrundlagen, Restitutionshindernisse, Entwicklung, Habil. Basel, Bern 2009 (cit. SCHÖNENBERGER, Restitution)

SCHÖNENBERGER BEAT, Schweiz ohne Unidroit-Konvention – Rückgabe gestohlener Kulturgüter, KUR 3-4/2008, p. 86 ff. (cit. SCHÖNENBERGER, KUR)

SCHWEIZER RAINER J./BERNET STEPHANIE ANDREA/FANKHAUSER KIM, Art. 69 BV, in: Bernhard Ehrenzeller et al. (eds), St. Galler Kommentar zur Schweizerischen Bundesverfassung, 4th ed., St. Gallen 2023

SIEHR KURT, Internationaler Rechtsschutz von Kulturgütern Schutz der bildenden Kunst in Vergangenheit, Gegenwart und Zukunft, SZIER 15/2005, p. 53 ff.

STREBEL FELIX, Was bringen beratende Kommissionen der Exekutive? Evaluation der ausserparlamentarischen Verwaltungskommissionen auf Bundesebene, LeGes 34 (2023) 2

STUTZER BEAT, Ein Fallbeispiel in der Schweiz: Zur Restitution eines Max Liebermann-Gemäldes durch das Bündner Kunstmuseum, KUR 3-4/2009, p. 105 ff.

TISA FRANCINI ESTHER/HEUSS ANJA/KREIS GEORG, Fluchtgut – ein sinnvoller Begriff, Neue Zürcher Zeitung November 23, 2016 (zit. TISA FRANCINI/HEUSS/KREISS, NZZ)

TISA FRANCINI ESTHER/HEUSS ANJA/KREIS GEORG, Fluchtgut – Raubgut. Der Transfer von Kulturgütern in und über die Schweiz 1933-1945 und die Frage der Restitution (Unabhängige Expertenkommission Schweiz - Zweiter Weltkrieg Bd. 1), Zurich 2001 (cit. TISA FRANCINI/HEUSS/KREISS, Fluchtgut – Raubgut)

UBL RALPH, Aneignung und Rückerstattung. Kunsthistorische Beobachtungen zum «Rapport» von Bénédicte Savoy und Felwine Sarr, in: Peter Mosimann, Beat Schönenberger (eds), Kunst & Recht 2019 / Art & Law 2019, Zurich 2019, p. 65 ff.

UHLMANN FELIX, «Es braucht den Mut, eine Entscheidung ungeachtet aller Pressionen zu fällen» - Warum dürfen Museen Sammlungsgut an die Ursprungsländer zurückgeben? Interview, Tagesanzeiger, April 25, 2023 (cit. UHLMANN, Mut)

UHLMANN FELIX, Bericht und Empfehlung des Runden Tisches zuhänden Stadt Zürich, Kanton Zürich und Kunsthaus Zürich betreffend Evaluation der bisher geleisteten Provenienzforschung zur Sammlung Emil Bührle vom 16. Januar 2023 (abrufbar in dt. und engl. unter <https://www.ius.uzh.ch/de/staff/professorships/alphabetical/uhlmann/KKR.html>, cit. UHLMANN, Bührle)

UHLMANN FELIX, Der Fall Curt Glaser und die Herausforderung der Schweizer Museen unter den Washington Principles in: Deutscher Kunstverlag / Kunstmuseum Basel (eds), Der Sammler Curt Glaser - Vom Verfechter der Moderne zum Verfolgten, Basel 2023, p. 156 ff. (cit. UHLMANN, Glaser)

UHLMANN FELIX, Die Washingtoner Prinzipien und die Erklärung von Terezín – Möglichkeiten und /Herausforderungen für das öffentliche Recht, in: Nikola Doll (eds), Museen in der Verantwortung – Positionen im Umgang mit Raubkunst, im Erscheinen, Zurich 2024 (cit. UHLMANN, Verantwortung)

VISCHER FRANK, Rechtliche Aspekte des Washingtoner Abkommens und der nachrichtenlosen Vermögen, in: Philipp Sarasin/Regina Wecker (eds): Raubgold, Reduit, Flüchtlinge. Zur Geschichte der Schweiz im Zweiten Weltkrieg, Zurich 1998, p. 45 ff.

VON BRÜHL FRIEDERIKE, «Deutsches Fluchtgut» als Rechtsproblem: das Beispiel George Grosz, in: Peter Mosimann/Beat Schönenberger (eds), Fluchtgut – Geschichte, Recht und Moral, Bern 2015, p. 149 ff.

WEBER MARC, Art. 88 ZPO, in: Spühler Karl/Tenchio Luca/Infanger Dominik (Hrsg.), Basler Kommentar zur Schweizerischen Zivilprozessordnung, 3. Aufl., Basel 2017

WELLER MATTHIAS (Rez.), Beat Schönenberger, Restitution von Kulturgut: Anspruchsgrundlagen - Restitutionshindernisse – Entwicklung, Kunsrechtsspiegel 4/2009, p. 167 ff.

WELLER MATTHIAS, 20 Jahre «Washington Principles»: Zeit für ein Restatement of Restitution Principles?, in: Peter Mosimann/Beat Schönenberger (eds), Kunst & Recht 2018 / Art & Law 2018, Zurich 2018, p. 83 ff.

WELLER MATTHIAS/DEWEY ANNE, Warum ein „Restatement of Restitution Rules for Nazi-Confiscated Art“? Das Beispiel «Fluchtgut», KUR 6/2019, p. 170 ff.

WIDMER BENNO, Die Richtlinien der Washingtoner Konferenz in Bezug auf Kunstwerke, die von den Nazis konfisziert wurden. Anwendung in der Schweizerischen Eidgenossenschaft, KUR 3-4/2009, p. 86 ff.

ZIEGLER ANDREAS R., Die Rolle des Völkerrechts in aussenpolitischen Krisen der Schweiz, ZSR 2019, p. 429 ff.