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A *lex restitutionis* in Art Restitution?

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ABSTRACT

This paper is about the restitution of art that has been looted, confiscated or was otherwise lost in the context of the Holocaust and the Second World War. Firstly, it analyses the rules around art restitution using the framework of transnational legal orders (TLO). The main research question is whether there is an overarching system of rules for restitution claims. Through historical and legal analysis, this paper explores whether there is a transnational *lex restitutionis*, akin to other orders, such as the *lex mercatoria*. It concludes that there is currently no fully developed TLO in art restitution, although there are some promising approaches and specific areas with established and institutionalized rules. Secondly, the paper describes the inability of the legal system to deal with the problem adequately. Art looted from Jewish owners requires specific legal provisions, different from provisions that are applicable to other chattel. These provisions have not been implemented to the extent necessary. This paper shows previous attempts, taking into account the relevant soft law, including its inherent limitations, ultimately calling for the implementation of enforceable legal provisions.

KEY WORDS

Looted art; transnational legal orders; art restitution; Jewish cultural property, Washington Principles; soft law; lex restitutionis

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A *LEX RESTITUTIONIS* IN ART RESTITUTION?

1. INTRODUCTION

The restitution of Nazi-looted cultural property is hardly a novel academic topic. Much has been written, whether it be from a legal, (art) historical, or ethical viewpoint. The topic has been of particular interest to many jurists because analyzing the restitution of cultural property, they are presented with complex and puzzling interactions between binding law, national and international soft law, professional and academic guidelines, public budgetary law, ethical considerations, moral arguments, and public-political pressure. Referring to Max Weber's typology of legal systems, the system of art restitution has been called a substantive-irrational system.[1] "Substantive" means that the legal system does not draw its criteria of decision from law itself but from other normative systems, such as morality. Irrationality, on the other hand, describes systems that do not rely on a generalized set of norms that are applicable to all like cases, but rather decide on an *ad-hoc* basis.[2] When art restitution is decided by courts, it does not differ substantially from other fields of law and cannot be described as a substantive-irrational system. However, when there is no court battle but rather a process based on negotiation and public pressure, the case may be different: Out-of-court art restitution is not only dependent on law but also on moral argumentation, based chiefly on historical research. Additionally, it is subject to a multitude of guidelines[3], political or economic compromises and soft laws of differing binding force. Since the relationship between these different normative systems is not clear, it can be unpredictable what decision will be reached by the parties of a restitution claim. If out-of-court art restitution is indeed a substantive-irrational system, efforts to identify a *lex restitutionis* must remain fruitless. However, as will be shown, there is reason for hope.

Any practitioner in the field of art restitution when confronted with a specific case must ask herself some of the following questions: What are the relevant (legal) rules? What arguments for or against restitution can be brought forward? What are possible solutions and what are appropriate procedures to get there? And are there any institutions responsible for settling such cases? To answer these questions, she will instinctively look for a normative text or case law because these sources designate a (more or less) generally accepted way forward.

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1 Benjamin Lahusen, 'Vom hard law zum soft law und wieder zurück, Die Rückerstattung nationalsozialistischer Raubkunst seit 1945' (2022) KUR - Kunst und Recht, 24 (3-4), pp. 91–97, at p. 97.

2 David Trubek, 'Max Weber on Law and the Rise of Capitalism' (1972) Wisconsin Law Review, 3, pp. 720-753, at p. 729.

3 Guidelines are issued by museums, by organizations such as ICOM as best-practice for their members, by state institutions, especially for museums owned or supported by the state, and others.

This leads to the question this paper will explore – whether there are any overarching rules concerning the restitution of Nazi-looted cultural property, including cases where looting is suspected or a change in ownership is related to fascist rule and persecution in Germany before and during the Second World War. In other words, the research question is, whether there is a *lex restitutionis.* The terminology is based on other transnational legal orders, in particular the *lex mercatoria.* Research in transnational law has focused on trade, commerce, technology, and the Internet.[4] Other areas include international arbitration, administrative law, or the *lex sportiva.* Art law has not been an area of intense research in this regard.[5] Perhaps surprisingly, considering the international circulation of artworks and the cosmopolitan life of successful artists.[6]
This paper will not focus on any single country but will try to work out *transnational* orders.[7] Due to the area of expertise of the author, examples from Switzerland and Germany will be used comparatively often. The structure and content of the first part of this article are heavily influenced by the concept of Transnational Legal Orders as laid down by Terence C. Halliday and Gregory Shaffer.[8]

2. TRANSNATIONAL LEGAL ORDERS (TLOS)

A transnational legal order (TLO) is "a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions".[9] TLO research "focuses on the settlement and unsettlement of legal norms at different levels of social organization,

4 For some examples see Peer Zumbansen (ed.), The Oxford Handbook of Transnational Law, New York, 2021; Terence C. Halliday and Shaffer Gregory (eds), Transnational Legal Orders, New York, 2015 [hereinafter Halliday/Shaffer, 'Oxford Handbook'].

5 "…[t]here is not yet a field called "transnational art law.", in Vik Kanwar and Jaya Neupaney, 'Transnational Art Law - Maps and Itineraries', in Peer Zumbansen (ed.), *The Oxford Handbook of Transnational Law*, New York, 2021, pp. 647–680, at p. 648; Vadi has proposed a lex administrativa culturalis concerning the protection of cultural heritage, see Valentina Vadi, 'Global Cultural Governance by Investment Arbitral Tribunals: The Making of a Lex Administrativa Culturalis' (2015) *Boston University International Law Journal*, 33, pp. 101–138.

6 Francesca Fiorentini, 'A legal pluralist approach to international trade in cultural objects', in James A. Nafziger and Robert Kirkwood Paterson (eds), *Handbook on the Law of Cultural Heritage and International Trade*, Cheltenham, Northampton, MA, 2014, pp. 589–621, at p. 590.

7 The term "Transnational Law" was coined by Philip C. Jessup and developed further by a multitude of scholars, see Philip C. Jessup, *Transnational Law*, New Haven, 1956; Zumbansen, supra note 4.

8 Halliday Terence C. and Gregory Shaffer, 'Transnational Legal Orders', in Terence C. Halliday and Shaffer Gregory (eds), *Transnational Legal Orders*, New York, 2015, pp. 3–72 [hereinafter Halliday/Shaffer 'TLO'].

9 Ibid., at p. 5.

from the international and transnational to the national and local".[10] By disassembling these definitions some key concepts become apparent.

Transnational refers to normative orders that are not merely national nor international but relate to nation states in multiple dimensions. Transnational rules range from regional to national to international, even to supranational – "above" the state – regulations.[11] TLOs arise from "recursive rounds of lawmaking"[12], meaning that the formulation and implementation of rules continually influence each other, as do the different actors on all levels, from regional to international.[13] Importantly, transnational law includes state law *and* non-state law created by and through private actors.[14]

Transnational *law*, as the name implies, exclusively comprises *legal* rules. Of course, what is law and what is not has been a topic of much debate, especially in the areas of transnational law and legal pluralism. So far, no consensus has been reached.[15] Within TLO theory, three attributes describe transnational law: first, "the norms are produced by, or in conjunction with, a legal organization or network that transcends or spans the nation-state".[16] Second, they "engage legal institutions within multiple nation-states".[17] And third, "norms are produced in recognizable legal form".[18]

Finally, order arises through shared social norms, expectations, and institutions.[19] Normative orders vary in their ability to constrain and guide human behavior. The system most suited to this task is usually considered to be law.[20] Legal orders can

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10 Ibid., at p. 5.

11 Ralf Michaels, 'State Law as a Transnational Legal Order' (2016) *UC Irvine Journal of International, Transnational, and Comparative Law*, 141 (1), pp. 141–160, at p. 143-145.

12 Gregory Shaffer and Terence Halliday, 'With, Within, and Beyond the State: The Promise and Limits of Transnational Legal Ordering', in Peer Zumbansen (ed.), *The Oxford Handbook of Transnational Law*, New York, 2021, pp. 987–1005, at p. 1001 [hereinafter Shaffer/Halliday, 'With, Within and Beyond'].

13 Halliday/Shaffer, 'TLO', supra note 8, at pp. 37-39.

14 Shaffer/Halliday, 'With, Within and Beyond', supra note 12, at pp. 989-990.

15 Brian Z. Tamanaha, *A realistic theory of law*, New York: Cambridge University Press, 2017, at pp. 38-40.

16 Halliday/Shaffer 'TLO', supra note 8, at p. 12.

17 Ibid., at p. 13.

18 Ibid., at p. 15; Tim Büthe, 'Institutionalization and Its Consequences: The TLO(s) for Food Safety', in Terence C. Halliday and Shaffer Gregory (eds), *Transnational Legal Orders*, New York, 2015, pp. 258–286, at p. 259; for other approaches to the concept of law in transnational law, see Gregory Shaffer, 'Theorizing Transnational Legal Ordering' (2016) *Annual Review of Law and Social Science*, Vol. 12, pp. 231–253, at pp. 242-246.

19 Halliday/Shaffer, 'TLO', supra note 8, at p. 7.

20 According to Niklas Luhmann, law "stabilizes normative expectations". In other words, it allows people to hold and hold on to expectations concerning human behavior, even when these expectations are not always met. This unique function of law denotes its great authority, see Niklas Luhmann, *Law as a Social System*, Oxford, 2004, at p. 151.

clash with other forms of order such as power relations, politics, or moral considerations.[21]
The TLO framework enables the analysis of normative systems in considerable temporal and material scope. We will focus on the key concepts and their application to art restitution, such as the need for new rules, the nature of the rules, and the degree of institutionalization or the lack thereof.

2.1 FACILITATING CIRCUMSTANCES FOR A TLO

2.1.1 The Perception of a Problem

New rules arise where actors perceive a problem. The perception of a problem can have many different causes.[22] One that might be of particular relevance to the problem of restitution of Nazi-looted art are changes in societal values, resulting in a mismatch between values and the law.[23] The perception of a problem by actors can over time lead to social and political pressure promoting the formation of a TLO.[24] Therefore, the first step is to become aware of the exact societal problem to find out whether and to what extent a legal system has developed in this area.
TLO concepts have been applied predominantly to transnational trade, commerce, and finance. In those works, the mismatch between markets and the law has been identified as a powerful driver of legal change.[25] It stands to reason that the mismatch between societal values or sense of justice and the law can be equally as strong. Additionally, changes (in perception) by powerful actors, such as nation-states but also economic enterprises or international organizations, can trigger further changes in the international community, which can, in turn, lead to changes of the normative structure.[26]

2.1.2 Historical Roots and Development

The Second World War led to a displacement of cultural property on a massive scale.[27] Jews were especially affected. The rampant lootings prompted the Allies to announce in a declaration in 1943 that they reserved the right to declare all transfers

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21 Halliday/Shaffer, 'TLO', supra note 8, at pp. 62-63.

22 Ibid., at pp. 32-35.

23 Ibid., at pp. 7-8.

24 Ibid., at pp. 32-34.

25 Ibid., at pp. 32-33.

26 Ibid., at pp. 33-34; the TLO concept builds upon a legal realist perspective emphasizing outside influences on the law, such as politics or economics., see Ibid., at p. 17.

27 Wayne Sandholtz, 'Plunder, Restitution, and International Law' (2010) *International Journal of Cultural Property*, 17, pp. 147–176, at pp. 159-160.

of property in enemy-occupied territories null and void after the war.[28] The declaration also contained a broad understanding of "problematic" transfers that goes far beyond "looted" or "confiscated" art – mirroring the current framing of the problem that essentially asks whether there is a causal relationship between the Nazi regime and the property transfer.[29] Additionally, it included the intention to coordinate legislation on restitution after the war.[30] After the war, some efforts were indeed made to return stolen artworks, but there was neither a general declaration of nullity nor a broad international harmonization in legislation.[31] In West Germany, the Allies passed statutes that enabled plaintiffs to sue for restitution of their stolen property.[32] Crucially, the statutes shifted the burden of proof: Every change in ownership from a prosecuted person during 1933-1945 was assumed to be illegitimate unless proven otherwise, and the artwork therefore subject to restitution.[33] This rule of evidence and other legal principles from the allied statutes were transplanted into post-war German statutes[34], the Washington Principles, and the *Handreichung*.[35] The number of artworks restituted based on post-war legislation

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28 'Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control', (5 January 1943), available at https://www.lootedartcommission.com/inter-allied-declaration.

29 See pp. 9-10.

30 Article 6 of the Inter-Allied Declaration, supra note 28.

31 Olaf Ossmann, 'Fluchtgut - Der Versuch eines voreingenommenen Vorworts', in Peter Mosimann and Beat Schönenberger (eds), *Fluchtgut - Geschichte, Recht und Moral*, Schriftenreihe Kultur & Recht, Bern, 2015, pp. 7–24, at p. 19.

32 Sabine Rudolph, 'Die Restitution entzogener Kunstwerke: Eine rechtliche und moralische Verpflichtung', in Inka Bertz and Michael Dorrmann (eds), *Raub und Restitution: Kulturgut aus jüdischem Besitz von 1933 bis heute*, Göttingen, 2008, pp. 307–313, at pp. 307-308; Constantin Goschler, 'Zwei Wellen der Restitution: Die Rückgabe jüdischen Eigentums nach 1945 und 1990', in Inka Bertz and Michael Dorrmann (eds), *Raub und Restitution: Kulturgut aus jüdischem Besitz von 1933 bis heute*, Göttingen, 2008, pp. 30–45, at pp. 34-35.

33 British Military Government in Germany, 'Law No. 59, Restitution of identifiable property to victims of Nazi oppression', (Military Government Gazette Germany British Zone of Control, No. 28), Article 3, available at https://dfs.ny.gov/system/files/documents/2019/02/british-military-law-59.pdf; Thomas Finkenauer, 'Die Verjährung bei Kulturgütern - zur geplanten "lex Gurlitt"' (2014) *JuristenZeitung*, 69 (10), pp. 479–488, at p. 480.

34 Bundesgesetz zur Regelung der rückerstattungsrechtlichen Geldverbindlichkeiten des Deutschen Reichs und gleichgestellter Rechtsträger (Bundesrückerstattungsgesetz - BRüG), 19 July 1957, BGBl. I 1042; Bundesgesetz zur Entschädigung für Opfer der nationalsozialistischen Verfolgung (Bundesentschädigungsgesetz - BEG), 18 September 1953, BGBl. I 2250; additionally, some of the German states passed their own statues, see Harald König, 'Grundlagen der Rückerstattung: Das deutsche Wiedergutmachungsrecht' (2006) *Osteuropa*, 56 (1/2), pp. 371–381, at p. 371.

35 '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', (2019), available at https://kulturgutverluste.de/sites/default/files/2023-04/Handreichung.pdf; for information on the restitution statutes (Rückerstattungsgesetze) in Germany, see Goschler, supra note 32, at p. 30; interestingly some of the language can be traced from the Inter-Allied Declaration in London 1943 (supra

in Western Germany was not as high as was hoped, since the claims were subject to relatively short deadlines. [36]

Other European states that were occupied by Germany during World War II passed their own decrees.[37] The Allied and German statutes concerning the restitution of stolen property led to the successful return of some of the artworks, but a considerable number remained in museums or private collections. As a neutral country involved in (art) trade during the war, Switzerland also passed statutes concerning restitution after the war, but they suffered from some of the same shortcomings as their counterparts in Germany and previously occupied states (especially very short deadlines) and remained limited in their effect.[38]

In the Soviet Union and USSR-aligned countries, the socialization of private property posed an ideological hindrance to the restitution of artworks. During the Soviet invasion of Germany, a large number of artworks were removed and transported to destinations in the Soviet Bloc.[39] Some of the stolen works were returned to the German Democratic Republic (GDR) after the war.[40] Other objects were confiscated as war reparations.[41] Russia is a signatory of the Washington Principles, however, it has been slow to implement them. According to Stuart E. Eizenstat, a US diplomat and one of the important minds behind the Washington Principles, Russia has not returned a single piece of Nazi-looted art since the Washington Conference in 1998 (as of 2018).[42]

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note 28) to the allied post-war statutes, to the German restitution statues, to the Washington Principles and finally to the Handreichung.

36 König, supra note 34, at p. 378.

37 Sandholtz, supra note 27, at pp. 160-161.

38 So called "Raubgutbeschlüsse", the laws led to the restitution of 72 artworks, see Swiss Federal Department of Home Affairs, Federal Office of Culture, 'Meilensteine der Aufarbeitung der NS-Raubkunstthematik durch den Bund' (October 2021), at p. 1; Gunnar Schnabel and Monika Tatzkow, *Nazi Looted Art: Handbuch Kunstrestitution weltweit*, Berlin, 2007, at pp. 54-55.

39 Sandholtz, supra note 27, at p. 161; Elena Syssoeva, *Kunst im Krieg: Eine völkerrechtliche Betrachtung der deutsch-russischen Kontroverse um kriegsbedingt verbrachte Kulturgüter*, Berlin, 2004, at pp. 44-51; the exact number remains unclear, but it certainly was a vast displacement: A 1957 survey from the Soviet Ministry of Culture found over 2.5 million objects of German objects of artistic value that were brough to the Soviet Union, see Ibid., at p. 51.

40 Syssoeva, supra note 39, at pp. 51-53.

41 Sandholtz, supra note 27.

42 William D. Cohan, 'Five Countries Slow to Address Nazi-looted Art, U.S. Expert Says', *New York Times* (26 November 2018), available at https://www.nytimes.com/2018/11/26/arts/design/five-countries-slow-to-address-nazi-looted-art-us-expert-says.html; as of 2014, the Conference on Jewish Material Claims Against Germany (Claims Conference) and the World Jewish Restitution Organization (WJRO) believed the Russian Federation to be the country with the largest number of un-restituted art looted from Jews. In the same report, the Russian Federation was classed as a country that has "taken some steps towards implementing the Washington Principles and the Terezin Declaration", see Claims Conference, Wesley A. Fisher and Ruth Weinberger, 'Holocaust-Era Looted Art: A Current World-Wide Overview' (September

This hesitant approach to restitution has meant that a lot of pre-war owners did not have the opportunity to reclaim their property immediately after the War. Below, the question will be, whether claimants can recover their assets through adjudication now, nearly 80 years later.

2.1.3 Limitations of the Law Concerning Nazi-Looted Art

The restitution of stolen property is a basic legal problem, that any advanced legal system needs to provide answers for. Indeed, most legal systems have provided these rules, dating back to roman law (*rei vindicatio*[43]). Naturally, the rules that apply to stolen chattel in general equally apply to cases of Nazi-looted art. Regarding cases of potentially Nazi-looted art, these rules usually protect the current owner, not the former owner or their heirs. The most important legal reasons are (1) the passing of time and (2) severe evidentiary problems. The evidentiary problems also relate to the bad faith of purchasers. In some jurisdictions, previous owners or their heirs need to prove the bad faith of every subsequent possessor.[44] Given the time that has passed and the circumstances under which the artworks were lost, this is a difficult task. In addition, (professional) historical expertise is required to find the necessary documents, provided the relevant archives are accessible at all.[45] Under German law, the action for vindication is time-barred after 30 years, which means that even the purchaser acting in bad faith is legally protected in his acquisition after 30 years.[46] Claimants have the best chances of regaining property in US or UK courts. Common law courts know the *nemo dat* rule, according to which a seller cannot transfer more rights than he has himself, meaning it is impossible to acquire ownership from a

2014), pp. 5 and 38, available at https://art.claimscon.org/wp-content/uploads/2014/11/Worldwide-Overview.pdf.

43 Paul du Plessis, 'Property', in David Johnston (ed), *The Cambridge Companion to Roman Law*, New York, 2015, pp. 175–198, at p. 190.

44 Such as in Switzerland, see Andrea F.G. Raschèr, 'Cultural Goods looted by Nazis or Sold under Duress. The Situation in Switzerland: Status and Ways Forward', in Marc-André Renold and Alessandro Chechi (eds), *Cultural Heritage Law and Ethics: Mapping Recent Developments*, Zurich, 2017, pp. 227–243, at 231-233 [hereinafter Raschèr, 'Cultural Goods']; on the question if good or bad faith can be "inherited" under Swiss law, see Christoph Bauer, 'Unberechtigter Besitz an Fahrnis im Erbgang: Fragen des gutgläubigen Erwerbs, der Ersitzung und der Verantwortlichkeit im Zusammenspiel von Erb- und Sachenrecht' (2016) *Aktuelle Juristische Praxis / Pratique Juridique Actuelle* (6), p. 783–802, at pp. 789-790.

45 Ossmann, supra note 31, at p. 22.

46 BGB 197 (1) Nr. 2; Finkenauer, supra note 33, at pp. 481-482; Beat Schönenberger, 'Der Einfluss des Zeitablaufs auf Restitutionsbegehren', in Peter Mosimann and Beat Schönenberger (eds), *Fluchtgut - Geschichte, Recht und Moral*, Schriftenreihe Kultur & Recht, Bern, 2015, pp. 115–127, at pp. 116-117; this leads to a curious situation, where ownership and possession do not lie with the same person permanently, Ibid.

seller who is acting in bad faith.[47] Additionally, in some *fora,* statutes of limitations favorable to claimants are applied, such as the discovery/due diligence rule or the demand and refusal rule of the state of New York.[48] Finally, US courts have heard cases where there was no close connection between the case and the US. Therefore, claimants might have a *forum* in the US, when they might not necessarily expect to. In summary, it is very difficult for most claimants to reclaim their artwork through legal action, even if it is not entirely impossible under favorable circumstances. The laws that remain in place in some countries and specifically address Nazi-looted art do not fundamentally change this (see Chapter 3.2).

This has led to a lot of discontent, which is reflected in the public discussion, the soft law agreed upon, the institutionalization of alternative dispute resolution (ADR) such as the independent looted art commissions in five European countries, and the ramping up of provenance research in museums and collections. It seems that important actors in the field of art (restitution) agree about the unfair and unethical situation that is the law governing Nazi-looted art and are searching for other means to resolve these conflicts.[49]

However, it is important to understand that the term „Nazi-looted art" is a simplification in this context. The problem as it has been framed by actors concerned with art restitution encompasses cases where art cannot be said to have been "looted" or confiscated; for example, cases of "flight assets" (*Fluchtgut). Fluchtgut* in its original meaning denotes cultural property refugees were able to bring to a relatively safe country, such as Switzerland or the US.[50] Subsequently, they often had to sell artworks to pay for living expenses or their further escape, especially from Europe to the US. Even though the Nazis were not directly involved in those sales, they are still regarded as highly problematic due to the causal relationship between Nazi persecution and the sale.[51] The problem therefore goes beyond what is being addressed by the Washington Principles: "Nazi-confiscated art". It also goes beyond the declarations enacted after the Washington Conference such as the Terezin Declaration, even though it does extend the definition in some respects: The relevant chapter of the Terezin Declaration is called "Nazi-confiscated and looted art". The same terminology is used in Article 2 of the chapter, while the Washington Principles

47 Bert Demarsin, 'Has the Time (of Laches) Come? Recent Nazi-Era Art Litigation in the New York Forum' (2011) *Buffalo Law Review*, 59 (3), pp. 621–691, at p. 632; Schönenberger, supra note 46, at p. 118.

48 Demarsin, supra note 47, at pp. 639-642, Schönenberger, supra note 46, at pp. 121-122.

49 With criticism: Finkenauer, supra note 33, at p. 487; on the dissatisfaction with the legal regime and possible solutions on human rights grounds, Robert K. Paterson, 'Resolving material culture disputes: human rights, property rights and crimes against humanity' (2006) *Willamette Journal of International Law and Dispute Resolution*, 14 (2), pp. 155–174, at p. 158.

50 Esther Tisa Francini, '13 Jahre "Fluchtgut": Begrifflichkeit, Interpretationen und Fallbeispiele', in Peter Mosimann and Beat Schönenberger (eds), *Fluchtgut - Geschichte, Recht und Moral*, Schriftenreihe Kultur & Recht, Bern, 2015, pp. 25–35, at pp. 26-27.

51 Ibid., at pp. 26-27; Raschèr, 'Cultural Goods', supra note 44, at pp. 238-240.

only speak of "Nazi-confiscated art".[52] Semantically, "confiscated" implies that the seizure is orchestrated or carried it out by an organized entity, usually the state. "Looted" on the other hand emphasizes the violent, uncontrolled aspect of Nazi seizures.

2.2 PRECIPITATING CONDITIONS

Even when actors have identified a problem, often, a catalyst – some form of external trigger – is needed to initiate change. For example, financial crises have often paved the way for stricter regulation of financial markets.[53] It is always easier for regulators to step in if the failure of the system is apparent to everyone, as it is in financial, geopolitical, or health crises. Similarly, domestic political changes in key states can lead to changes internationally.[54]

As outlined above, some efforts have been made to tackle the problem of Nazi-looted art in the years following the war but undeniably, many stolen artworks have not been returned. A clear resurgence of restitution efforts can be identified in the 1990s.[55] The collapse of the communist Bloc and the reunification of Germany led to changes in law and maybe even more importantly, changes in ideology.[56] In 1990, the parliament of the German Democratic Republic (GDR) passed a statute, primarily on the restitution of property nationalized after the war, but it also included property that had been stolen from 1933-1945 for racial, political, religious, or ideological reasons.[57] The law led to restitutions within and from Eastern Germany, which had lagged behind Western Germany in terms of restitution efforts.[58]

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52 The preamble of the Terezin Declaration goes further: "Recognizing that art and cultural property of victims of the Holocaust (Shoah) and other victims of Nazi persecution was confiscated, sequestered and spoliated, by the Nazis, the Fascists and their collaborators through various means including theft, coercion and confiscation, and on grounds of relinquishment as well as forced sales and sales under duress…". This preamble has sometimes been understood to mean that the Terezin Declaration applies to many more types of cases than the Washington Principles. However, one should keep in mind that this is "only" the preamble to a Declaration that deals with many different issues (not just art restitution) and that the chapter dealing with art restitution explicitly speaks of "Nazi-confiscated and looted art".

53 Halliday/Shaffer, 'TLO', supra note 8, at pp. 35-36.

54 Halliday/Shaffer, 'TLO', supra note 8, at p. 37.

55 Goschler, supra note 32, at p. 30; Schnabel/Tatzkow, supra note 38, at pp. 16-17.

56 Dan Diner, 'Restitution: Über die Suche des Eigentums nach seinem Eigentümer', in Inka Bertz and Michael Dorrmann (eds), *Raub und Restitution: Kulturgut aus jüdischem Besitz von 1933 bis heute*, Göttingen, 2008, pp. 16–28, at p. 21; Goschler, supra note 32, at p. 40.

57 Gesetz zur Regelung offener Vermögensfragen (Vermögensgesetz - VermG), 23 September 1990, BGBl. I 882; Bundesfinanzministerium, 'Die Regelung offener Vermögensfragen' (4 April 2022), available at https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Oeffentliche_Finanzen/Vermoegensrecht_und_Entschaedigungen/regelung-offener-vermoegensfragen.html.

58 Goschler, supra note 32, at pp. 40-42.

The intensified historical analysis of Nazi injustice starting in the 1990s took place on many fronts: In the mid-1990s, dormant accounts in Swiss banks, claims against German corporations engaged in slave labor and unpaid insurance claims became the center of discussion.[59] In Switzerland, international and domestic political pressure led to the appointment of the "Bergier Commission"[60], conducting historical research on Switzerland's role in the Second World War, including its role as a market for the transfer of art and cultural property.[61] At the same time, multiple cases were brought before courts, primarily in the US – the most famous leading to the confiscation of two Egon Schiele paintings in New York. The two works had been on loan in the Museum of Modern Art (MoMA) from Austria when the heirs of the previous Jewish owner demanded restitution.[62]
Arguably, the reunification of Germany, the disintegration of the Soviet Union, and the end of the Cold War generated the general momentum in the discussion surrounding the compensation of Holocaust victims that led to the "London Conference on Nazi Gold" in 1997 and finally to the "Washington Conference of Holocaust Era Assets" in 1998.[63] At the Washington Conference, the Washington Principles on Nazi-Confiscated Art were adopted. The question is whether these efforts led to an institutionalized and transnational normative order addressing Nazi-looted art.

2.3 INSTITUTIONALIZATION OF THE LEX RESTITUTIONIS

2.3.1 **Normative Settlement**

Normative settlement describes the process by which rules become stabilized, from the recognition of a problem and legislation to court decisions and finally the practice of officials such as police or litigators.[64] This process ensures that "actors clearly

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59 Michael Allen, 'The Limits of Lex Americana: The Holocaust Restitution Litigation as a Cul-de-Sac of International Human-Rights Law' (2009), available at https://openyls.law.yale.edu/handle/20.500.13051/5700, at pp. 34-48; Michael Bazyler, 'Ein unabgeschlossenes Kapitel der Holocaust-Justiz: Die Holocaust-Restitutionsbewegung und die Nazi-Raubkunst', in Inka Bertz and Michael Dorrmann (eds), *Raub und Restitution: Kulturgut aus jüdischem Besitz von 1933 bis heute*, Göttingen, 2008, pp. 299–306, at p. 301.

60 Independent Commission of Experts Switzerland – Second World War (ICE), https://www.uek.ch/en/index.htm.

61 Anja Heuss, et al., Fluchtgut - Raubgut: Der Transfer von Kulturgütern in und über die Schweiz 1933-1945 und die Frage der Resitution, 2nd edn, Zurich, 2016.

62 Bazyler, supra note 59, at pp. 301-302.

63 Bazyler, supra note 59, at pp. 303-304.

64 Halliday/Shaffer, 'TLO', supra note 8, at p. 43; Susan Block-Lieb and Terence C. Halliday, 'Settling and Concordance: Two Cases in Global Commercial Law', in Terence C. Halliday and Shaffer Gregory (eds), *Transnational Legal Orders*, New York, 2015, pp. 75–113, at p. 89.

understand which norms apply in what situations and which behaviors will be considered in conformity with those norms".[65] Legal norms are fully settled (or "institutionalized") when actors take them for granted.[66] To fully understand the degree of institutionalization of a TLO, one additionally needs to look at issue alignment (see Chapter 2.3.2.).[67]

One area where norms are well settled is the restitution of Nazi-looted art in the strict sense of the word. It is a question of historical research. Where provenance research can clearly show that an artwork was looted or confiscated by the Nazis, artworks are usually restituted to the original owners or their heirs (at least in Western Europe and the US). Usually, this happens based on moral or political considerations, not because institutions can be legally forced to restitute. Here, the normative system is settled – art institutions, heirs of victims of Nazi persecution, and the public agree about what should be done. However, one should not forget how difficult and time-consuming provenance research can be, not to mention the possibilities that current holders have at their disposal to make research difficult or impossible if they intend to. The fact that the normative system is settled does not mean that restitution is easily obtained.

In contrast, no international consensus has been reached on how to handle cases where owners or their heirs can show a causal connection between the Nazis and their loss of property but no looting or confiscation. An important category is again the so-called "flight assets" (*Fluchtgut)*: In these cases, the artworks were not stolen by the Nazis, however, there is a causal connection between Nazi persecution and the sales. Often the collectors suffered economic damages because they had to sell when the art market was low. At the same time, buyers can object that they had paid the market price for goods the owner needed to sell – under normal circumstances, nothing more can be asked of a buyer on legal grounds.[68] However, no one could argue that these sales happened under normal circumstances, since the sellers of the artwork were victims of persecution and genocide. Therefore, legal issues such as profiteering[69] or of an unfair contractual advantage[70] come to mind. While all contractual claims have long become time-barred, there is no clear answer or best-practice to the question, if these considerations should be included in art restitution negotiations today on a moral basis. Some have argued that the lack of consensus in these matters is visible in the decisions on "flight assets" produced by the European looted art commissions.[71] However one should be careful to call for "standardized"

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65 Halliday/Shaffer, 'TLO', supra note 8, at p. 51.

66 Halliday/Shaffer, 'TLO', supra note 8, at p. 44.

67 Halliday/Shaffer, 'TLO', supra note 8, at p. 42.

68 For the ethical considerations in these cases, see Ossmann, supra note 31, at pp. 17-19.

69 E.g. Art. 157 Swiss Criminal Code, 21 December 1937, Status as of 1 January 2024, (StGB; SR 311.0).

70 E.g. Art. 21 Code of Obligations, 30 March 1911, Status as of 1 January 2024, (OR; SR 220).

71 Matthias Weller and Anne Dewey, 'Warum ein "Restatement of Restitution Rules for Nazi-Confiscated Art"?: Das Beispiel "Fluchtgut"' (2019) *KUR - Kunst und Recht*, 21 (6), pp. 170–178, at pp. 172-178.

rulings on certain categories of looted art. There is a fine line between developing clear and defined rules and not taking the specifics of each case into account, which might call for specific answers. The lack of consensus is probably more clearly seen in the seemingly never-ending discussions surrounding collections such as the Emil Bührle collection at the Kunsthaus Zurich.[72]

A wide range of opinions are expressed in (non-academic) media outlets. There seems to be a slight tendency pro restitution. This is a safe position to take, after all, it means advocating for victims of Nazi persecution and the Holocaust. However, the fact that the position is "safe" does not diminish its validity – it is also the position of many professionals in academia, the arts, museums, the law, and also non-professionals, that restitution efforts have not gone far enough. Still, the media discourse can be heated and is often based on moral arguments.[73]

Historically, museums have been skeptical of restitution, since the de-accessioning of objects is subject to various guidelines, and often the "inalienability" of the collection is enshrined in law.[74] If the institutions in question are public, they are also bound by public budgetary law and bear a general responsibility towards the public to

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72 Emil G. Bührle was a Swiss arms manufacturer of German descent who amassed an impressive art collection between 1936 and his death in 1956 (Lukas Gloor, 'Die Sammlung Emil Bührle: Eine Kunstsammlung der Moderne', in Schweizerisches Institut für Kunstwissenschaft (SIK-ISEA) (ed.), *Die Sammlung Emil Bührle: Geschichte, Gesamtkatalog und 70 Meisterwerke*, 2021, pp. 27–308, at p. 91). He made a fortune selling weapons during the Second World War, including to Nazi Germany. The collection has been under intense scrutiny since a possible move to the Zurich art museum (Kunsthaus Zurich) was announced (paradigmatic: Erich Keller, Das kontaminierte Museum, Zurich, 2021). Large parts of the collection are now in the Kunsthaus. Some suspect that the collection still contains Nazi-looted art. The Bührle Foundation's provenance research is currently under review by independent historian Raphael Gross (Stadt Zürich, Medienmitteilung, 'Raphael Gross für Evaluation Provenienzforschung Sammlung Bührle mandatiert ' (12 May 2023), available at https://www.stadt-zuerich.ch/prd/de /index/ueber_das_departement/ medien/medienmitteilungen/2023/mai/230512a.html). This year, the exhibition was reworked to ensure that the history of the collection itself and the viewpoint of previous owner is represented appropriately. A panel of academics was to advise the *Kunsthaus* on the new exhibition. The whole panel resigned before the exhibition even opened its doors, see Catherine Hickley, 'Kunsthaus Zurich advisers quit in conflict over new Bührle exhibition' *The Art Newspaper* (27 October 2023), available at https://www.theartnewspaper.com/2023/10/27/kunsthaus-zurich-advisers-quit-in-conflict-over-new-buhrle-exhibition.

73 Niklas Luhmann understands morality as a form of communication, "which carries with it indications of approval or disapproval", see Niklas Luhmann, 'Paradigm lost: On the ethical reflection of morality' (1991) *Thesis Eleven*, 29 (1), pp. 82–133, at p. 84. Moral communication in Luhmann's view tends to be argumentative and polemic.

74 See, International Council of Museums, 'ICOM Code of Ethics' (2017), at p. 13, available at https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf; under French law, objects in public collections are "inalienable", see Code général de la propriété des personnes publiques, Article L3111-1, available at https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006361404. Until now, restitution has therefore always required an amendment to the law. This was recently changed for NS looted art. The adjudicating body is the CIVS (*Commission pour l'indemnisation des victimes de spoliations*).

preserve their collection.[75] The position the public would take is unclear – Nazi restitution has never been put to a popular vote. In any case, the museums have moved away from a strictly negative view of restitution – today, most museums accept the Washington Principles *in principle.* All this paints a confusing picture of the field of art restitution. Many different stakeholders take many different positions.

2.3.2 **Issue Alignment**

Issue alignment describes the degree of overlap between a problem (as the actors have framed it) and a particular normative system.[76] For example, Nazi-looted art might be construed as a matter of private law, (international) criminal law, human rights law, or as a problem for arbitration. None of the fields of law applies to every possible variation of the overarching problem: art lost due to Nazi persecution.[77] In addition, there are variations of the perceived problem that are not addressed by any field of law. This is where soft law and moral considerations need to help out. Moral considerations can even go against the law when restitution is demanded even though the legal situation clearly protects the current owner. The problem and the normative systems applied to it do not only differ in substance but also in geographical scope: Each country applies its own laws and countries have implemented the Washington Principles to differing extents. This is particularly problematic because art restitution is an inherently international issue. To summarize, the problem of Nazi-looted art is dealt with according to normative systems that are misaligned, only cover parts of the problem, and are competitive among each other.[78]

3. PREVIOUS CHANGES TO THE LEGAL ORDER

3.1 CULTURAL PROPERTY AS A SPECIAL CASE

Looted cultural property, like any looted property, falls within the scope of the law. As has been shown above (Chapter 2.1.3.) the restitution of Nazi-looted art usually cannot be legally enforced. Why is this situation not acceptable to many? Statutes of limitations and evidentiary problems are commonplace in legal battles, and they are generally accepted as an appropriate means of balancing the interests of claimants

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75 The public's position is unclear – restitution of Nazi-looted art has never been put to a popular vote.

76 Halliday/Shaffer, 'TLO', supra note 8, at pp. 46-47.

77 On the extent of the problem, as it has been framed by actors, see above.

78 For the concepts of partition, misalignment, and competitive alignment between a problem and a TLO, see Halliday/Shaffer, 'TLO', supra note 8, at pp 46-51.

and defendants.[79] Additionally, restitution touches on fundamental principles of law including human rights. Legal instruments such as the rules on ownership, (adverse) possession, protection of *bona fide* purchasers or rules of evidence are not merely contingent. In terms of human rights, restitution infringes on the right to property of the current possessor, which is enshrined in international conventions such as Article 21 American Convention on Human Rights (ACHR), Article 1 European Convention on Human Rights (ECHR) Protocol I, and on a national level as well (e.g., Article 26 Swiss Constitution and Article 14 German *Grundgesetz*).[80] Adverse possession and the protection of *bona fide* purchasers create legal certainty after a period of time has passed. We believe these rules to be convincing and we believe that they lead to acceptable outcomes. At the same time, in questions of art restitution, they seem to lead to inadequate and unfair outcomes. What is special about cultural property that justifies special treatment?

In many jurisdictions cultural property is treated differently from other chattel such as a car or an expensive watch.[81] Additionally, there are various international treaties aiming to promote and protect cultural property and artworks such as the 1970 UNESCO Convention [82] or the 1954 Hague Convention. [83] The restrictions or differences in the treatment range from export controls to higher time limits for adverse possessors to the declaration of cultural property as *res extra commercium*.[84] Various reasons for this "special" treatment have been proposed. Cultural property and art contain the history, the stories, the culture, and knowledge of a person or a community.[85] People feel more strongly connected to cultural property than to other forms of chattel.

If different treatment is important for cultural property in general, it is even more important for Jewish cultural property lost during the Holocaust. Genocide is aimed

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79 Florian Schmidt-Gabain, 'Restitutionsdebatten - Über die Notwendigkeit sowie das Suchen und Finden gerechter und fairer Lösungen' (2023) *Anwaltsrevue/Revue de l'Avocat* (9), pp. 369–375, at pp. 371-372.

80 See also, Beratende Kommission NS-Raubgut, 'Memorandum Beratende Kommission NS-Raubgut' (4 September 2023), available at https://www.beratende-kommission.de/de/kommission.

81 For an overview, see James A. Nafziger and Robert Kirkwood Paterson (eds), *Handbook on the Law of Cultural Heritage and International Trade*, Cheltenham, Northampton, MA, 2014.

82 'Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property' (14 November 1970), available at https://en.unesco.org/about-us/legal-affairs/convention-means-prohibiting-and-preventing-illicit-import-export-and; especially the protection of indigenous cultural property is subject to international efforts, for an overview, see Christoph B. Graber, et al. (eds), *International Trade in Indigenous Cultural Heritage*, Cheltenham, Northampton MA, 2012.

83 '1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict', available at https://en.unesco.org/protecting-heritage/convention-and-protocols/1954-convention.

84 Article 728 (1ter) Swiss Civil Code, 10 December 1907, status as of 1 January 2024, (ZGB; SR 210); Amalie Weidner, *Kulturgüter als res extra commercium im internationalen Sachenrecht*, Schriften zum Kulturgüterschutz/Cultural Property Studies, Berlin, New York, 2001.

85 Andrea F.G. Raschèr, 'Kulturgütertransfer: Grundlagen', in Peter Mosimann, et al. (eds), *Kultur Kunst Recht: Schweizerisches und internationales Recht*, 2nd edn, Basel, 2020, pp. 383–416.Kultur Kunst Recht, at p. 383.

at erasing a certain group of people including their culture.[86] Re-establishing the connection between victims of Nazi persecution and their cultural property should be one of the most central aspects of dealing with the consequences of the Holocaust. This applies to Judaica and Jewish religious property as well as to artworks with no connection to the Jewish religion. The underlying issue is that the looting of Jewish cultural property has never been addressed with an effort adequate to the size of the problem – therefore it lingers.[87]

3.2 NAZI-LOOTED ART AS A SPECIAL CASE

Since the resurgence of restitution efforts in the 1990s, there have been a few changes to the law that make it easier for victims of Nazi prosecution or their heirs to regain their property. In 2016, the Holocaust Expropriated Art Recovery (HEAR) Act was passed in the US. It abolished the statute of limitations for Holocaust expropriated art and it provides for a new limitation period of six years from the actual discovery of a stolen work of art.[88] The act is initially in force until 2026. In addition to a legal situation that is more claimant-friendly than in Europe, the US courts also interpret their competence broadly.[89]

There have also been legislative changes in Europe. For example, the UK's Holocaust (Return of Cultural Objects) Act 2009 allowed for the deaccessioning of objects from British museums and established the UK Spoliation Advisory Panel.[90] Most of the other European looted art commissions are also based on legislation. Austria passed the *Kunstrückgabegesetz*[91] in 1998, aimed at the restitution of art in federal possession. Similarly, the French CIVS[92] is based on legislation from 1999.[93] France has also

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86 Leora Bilsky, Rachel Klagsbrun, 'The Return of Cultural Genocide?' (2018) *European Journal of International Law*, 29 (2), pp. 373-396.

87 Sidney Zabludoff, 'Restitution of Holocaust-Era Assets: Promises and Reality' (2007) *Jewish Political Studies Review*, 19 (1/2), pp. 3–14, at p. 3; see also Ossmann, supra note 31, at p. 20.

88 Holocaust Expropriated Art Recovery Act of 2016, 114-308, 114th Congress, (2016), available at https://www.congress.gov/114/plaws/publ308/PLAW-114publ308.pdf; Julian P. Rapp, 'Vergangenheitsbewältigung vor Gericht – rechtsvergleichende Überlegungen zum Umgang mit NS-Raubkunst' (2021) *JuristenZeitung*, 76 (15-16), pp. 752–761, at p. 753.

89 Rapp, supra note 88, at pp. 753-754.

90 The act came into force in 2010 and was to expire after 10 years. It was recently extended with the Holocaust (Return of Cultural Objects) (Amendment) Act 2019 by repealing the sunset provision, available athttps://www.legislation.gov.uk/ukpga/2009/16/pdfs/ukpga_20090016_en.pdfand https://www.legislation.gov.uk/ukpga/2019/20/contents/enacted/data.htm.

91 Kunstrückgabegesetz, BGBl. I Nr. 181/1998, (KRG), English translation available at https://www.provenienzforschung.gv.at/wp-content/uploads/Art-Restitution-Act_2009-.pdf.

92 Commission pour l'indemnisation des victimes de spoliations intervenues du fait des législations antisémites en vigueur pendant l'Occupation, see https://www.civs.gouv.fr/home/.

recently passed legislation facilitating the restitution of artworks in the possession of the state. The exception is the German *Beratende Kommission* (*Limbach Kommission*): It is not based on legislation, instead, it is based on an "agreement" ("*Absprache")* between the federal government, the states, and the municipalities.[94] The German commission can only give non-binding recommendations and it can only do so if the claimant and the defendant agree on it. However, in March 2024, major changes to the commission have been announced in a declaration from the German federal government, the governments of the Laender and the representatives of the German Municipalities.[95] While the details of the changes are unclear, we can outline some of the most important changes: The commission will be replaced by an arbitration panel whose findings will be legally binding. Unlike other arbitration panels, it will be able to decide on a matter, even if the defendant has not agreed to the proceedings, provided the claimants have tried to come to an agreement bilaterally with the defendant and have not succeeded.[96] As has been pointed out by *Weller*, mandatory arbitration is highly problematic, since it can undermine the constitutionally guaranteed right to a court trial.[97] In this case, this criticism is mitigated by the fact that the arbitration award will be subject to an appeal (quite possibly to a state court).[98] Still, according to *Weller*, legislation by the German parliament will be needed, since constitutionally guaranteed property rights are at issue.[99] This novel approach to Nazi-looted art commissions does have great potential and may spark changes in other countries as well.

On the 1 January 2024, the Swiss Federal Council appointed the Independent Commission for Historically Tainted Cultural Heritage (*Unabhängige Kommision für historisch belastetes Kulturerbe)*.[100] It advises the federal administration on the handling of historically tainted cultural heritage and can, at the request of the Federal Office

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93 Décret n°99-778 du 10 septembre 1999 instituant une commission pour l'indemnisation des victimes de spoliations intervenues du fait des législations antisémites en vigueur pendant l'Occupation, available at https://www.legifrance.gouv.fr/loda/id/LEGITEXT000005628500.

94 https://www.beratende-kommission.de/de/kommission#s-beratende-kommission-ns-raubgut.

95 https://www.kmk.org/aktuelles/artikelansicht/beratende-kommission-entscheidende-weichen-fuer-reform-gestellt.html.

96 Beschlusspapier zur Reform der Beratenden Kommission, 13.03.2024, https://www.kmk.org/fileadmin/pdf/PresseUndAktuelles/2024/2024_03_13_20_KuPoSpG_BeratendeKommission_Beschlussvorschlag.pdf, Art. 3.

97 https://www.jura.uni-bonn.de/fileadmin/Fachbereich_Rechtswissenschaft/Einrichtungen/Lehrstuehle/Weller/Weller_Comment_on_German_Governments_Decision_to_Reform_the_German_Advisory_Commission-19-03-24__1_.pdf, at p. 2.

98 Supra note 96, Art. 2.

99 Supra note 97, p. 3.

100 Bundesrat, Medienmitteilung, 'Bundesrat schafft eine unabhängige Kommission für historisch belastetes Kulturerbe'(22 November 2023), available at https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen/bundesrat.msg-id-98818.html.

for Culture, provide non-binding recommendations concerning the restitution of cultural heritage. It can recommend restitution of an artwork but also give recommendations "of a general nature".[101] It is not yet clear, how the commission will handle this provision and what kind of recommendations it will give. However, the regulation is in line with the Washington Principles that do not prescribe a one-for-all solution but recognize, that just and fair solutions may vary "according to the facts and circumstances surrounding a specific case." (Article 8 of the Washington Principles).

Access to the commission is regulated by the Federal Office for Culture. It *can* refer cases to the commission if the conditions of Art. 3 in the decree are met, however it does not *have to*.[102] It will be interesting to see if the Federal Office for Culture confines itself to assessing the requirements of Art. 3 of the decree or whether it develops its own additional criteria. The commission "promotes" fair solutions on the basis of the Washington Principles and the Terezin Declaration.[103] While the decree only names these two normative guidelines (that exclusively apply to Nazi-looted art), the commission is not confined to issuing recommendations in that context. Subject matter jurisdiction is determined by the term "*historisch belastetes Kulturgut*" (historically tainted cultural heritage [unofficial translation]). The commission will focus on Nazi-looted art and cultural property from a colonial context.[104] The commission is independent – administratively it is a part of the Federal Office of Culture[105] and it reports yearly to the Federal Department of Home Affairs.[106] Members of the commission are appointed by the Federal Council.[107]

It will be interesting to observe the effect of the commission on the Swiss discussion surrounding cultural heritage. Crucially, the recommendations are non-binding. As can be seen from the other European looted art commissions, recommendations, while formally non-binding, can *de facto* exert considerable force. Some have argued, given the importance of such a commission, that a formal statute should be enacted by Parliament.[108] However, Parliament itself instructed the Federal Council to set up

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101 'Verordnung über die unabhängige Kommission für historisch belastetes Kulturerbe', Article 2, available at https://www.newsd.admin.ch/newsd/message/attachments/84302.pdf.

102 See Article 3, supra note 101.

103 Article 4, supra note 101.

104 Bundesamt für Kultur, 'Erläuterungen zur Verordnung über die unabhängige Kommission für historisch belastetes Kulturgut '(22 November 2023), available at https://www.fedlex.admin.ch/filestore/fedlex.data.admin.ch/eli/oe/2023/89/de/pdf/fedlex-data-admin-ch-eli-oe-2023-89-de-pdf.pdf.

105 Article 6, supra note 101.

106 Article 5, supra note 101.

107 Article 8, supra note 101.

108 Ramona Catrina and Markus Müller-Chen, 'Unabhängige Eidgenössische Kommission für während des Nationalsozialismus gestohlene resp. verfolgungsbedingt entzogene Kulturgüter?', in Peter Mosimann and Beat Schönenberger (eds), *Kunst & Recht 2022 / Art & Law 2022: Referate zur gleichnamigen Veranstaltung der*

the commission and refrained from drawing up a law itself or asking the Federal Council to submit a legislative proposal.[109]

While some of the existing looted art commissions can hear cases where private collections or collectors are the defendants, their verdicts are either not binding, or the commission can only render a verdict where both parties agree to bring the case before the commission. The proposed changes to the German commission will make it the first to change this, at least in regard to private museums and collectors. Most of the commissions have developed quasi-legal procedures to find appropriate solutions. They all implicitly or explicitly include in their assessment the relevant soft law such as the Washington Principles (1998), the Vilnius Declaration (2000), and the Terezin Declaration (2009). The commissions have done a commendable job in establishing normative guidelines. However, they cannot rival the civil law rules governing possession, ownership, etc. in terms of scope or precision. While these commissions have facilitated the restitution of many restitutions, there is a distinct lack of authority: either by lack of jurisdiction and binding force or by lack of precise rules.

Other legal changes concerning the restitution of Nazi-looted art are efforts to strengthen provenance research or the tying of subsidies to certain commitments from museums or collections. Examples from Switzerland include the financial support of provenance research at private museums and collections, or the recent subsidy agreement between the city of Zurich and the art museum Kunsthaus Zurich.[110] The new subsidy agreement now includes the commitment to an up-to-date (*zeitgemäss)* implementation of the relevant soft law.[111] Both of these measures

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Juristischen Fakultät der Universität Basel vom 17. Juni 2022, Schriftenreihe für Kultur & Recht, Bern, 2023, pp. 97–120, at p. 112.

109 Motion 21.4403 Pult, 'Unabhängige Kommission für NS-verfolgungsbedingt entzogene Kulturgüter' (9 December 2021), available at https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20214403.

110 Provenance research is supported on the basis of Article 10 Kulturförderungsgesetz vom 11. Dezember 2009, Stand am 1. Januar 2022 (KFG; SR. 442.1).

111 Including "der Begriff «NS-verfolgungsbedingt entzogene Kulturgüter» im Sinne der Erklärung von Terezin" ("the term «cultural property lost due to Nazi-persecution» in the sense of the Terezin Declaration» [unofficial translation]) see Subventionsvertrag zwischen der Stadt Zürich und der Zürcher Kunstgesellschaft, Article 5 lit. a. The wording here is probably unprecise. The term «NS-verfolgungsbedingt entzogenes Kulturgut» does not stem from the Terezin Declaration. Rather it was first used in the German "Gemeinsame Erklärung" and subsequently for the Handreichung and the German translation of the Terezin Declaration. The Swiss translation uses "von den Nazis beschlagnahmte und geraubte Kunst". The authoritative version of the Terezin Declaration is in English and uses the term "Nazi-Confiscated and Looted Art". Therefore, the wording in the subsidy agreement is unprecise unless the authors really meant to interpret the term from the German discussion on the basis of the Terezin Declaration. It seems more likely that the authors actually meant to expand the definition of NS-looted art by implementing the German term "NS-verfolgungsbedingt" and not limit it to the definition of the Terezin Declaration, which is substantially the same as in the Washington Principles.

can potentially lead to more restitutions, but they are limited in scope and do not directly afford new rights to claimants.

3.3 SOFT LAW AND ITS LIMITATIONS

When binding (inter-)national legislation is impossible to achieve, soft law can be a viable alternative. However, non-binding international agreements and other forms of global governance come with some limitations: Critics raise fundamental objections such as the lack of legitimacy and suspect a hegemonic project driven by powerful nation-states.[112] The legitimacy of legislation usually stems from a democratic consensus. Indeed, soft law usually does not have the same level of democratic legitimacy as binding legislation. This is apparent in political systems with direct-democratic elements such as Switzerland. In Switzerland, a referendum can be held on any law (Article 141 Swiss Constitution). This does not extend to non-binding soft law which does also not need to be ratified by parliament (Article 184 (2) Swiss Constitution). Moreover, since foreign policy is the domain of the executive, it is usually not subject to parliamentary debates and revisions, in contrast to legislation (Article 184 (1) Swiss Constitution).
Some have argued that the parties' consent is an equally strong form of legitimacy.[113] This is an interesting thought in the context of Nazi-looted art. Nation-states were the signatories of the Washington Principles. They agreed to the principles, but the signatory states' executive branches cannot bind private or even public actors at will. Luckily (from a democratic standpoint), the soft law nature of the declaration allows parties to ignore it. Still, many institutions have explicitly agreed to the relevant soft law – either on their own initiative or through legally binding instruments, such as subsidy agreements with state institutions. Therefore, where institutions have agreed to apply the soft law, there does not seem to be a problem of legitimacy. This is true at least from the perspective of the parties immediately involved. The perception may change where public institutions or heavily subsidized institutions are involved. These institutions have a duty to the public – in terms of protecting their collections and in financial terms.
Soft law does have distinct upsides as well. Some authors have proposed to measure the "softness" of law on three axes: (1) obligation, (2) precision, and (3) delegation (of authority to interpret and implement law).[114] The distinction between hard and soft

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112 Zumbansen, supra note 4, at pp. 7-10.

113 Shaffer, supra note 18, at p. 5 with further annotations.

114 Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) *International Organization*, 54 (3), pp. 421–456; expanded by Abbott/Snidal, Hard and Soft Law in International Governance. Expanded by Gregory Shaffer and Mark Pollack, 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance' (2009) *Minnesota Legal Studies Research Paper Series*, pp. 706–799, at p. 714.

law is understood as a continuum rather than a binary one.[115] A lowering of the standards on any of these axes (e.g. by not stipulating concrete obligations in a declaration of intent, using unprecise language, or by excluding enforcement mechanisms) allows states to not commit themselves fully in politically sensitive areas or where there might be uncertainties. This can be an advantage because it leads to some degree of commitment, where otherwise there would have been none. Additionally, soft law is usually quicker and easier to negotiate.[116] Some have even argued that the Washington Principles' "moral authority" is more effective than the threat of litigation.[117]

Still, from the perspective of democratic legitimacy the restitution of Nazi-looted art is undoubtedly important enough that Parliament should have its say in the matter.[118] Aside from legitimacy, "hard" law comes with another quite obvious advantage. The issue at hand is more likely to be changed by "hard" law than it is by soft law. "Hard" law signifies a strong commitment, and the political costs of a deviation are higher.[119] Additionally, "hard" law can manage conflicts through adjudication, either internationally or domestically.[120] As an aside, it should be said that it is rather cynical to call on claimants to submit their claims (Article 7 Washington Principles), but at the same time not to create the legal basis that would render a solution possible.[121]

4. SUMMARY

One of the research questions of this working paper is whether there is a transnational legal order in art restitution related to the Holocaust. One could call it *lex restitutionis* – analogous to the *lex mercatoria* in international commerce.

This paper has tried to show that the TLO framework is helpful in analyzing the normative systems around art restitution. It is particularly illuminating to trace the development of rules within this framework. At the outset, there are facilitating conditions which lay the groundwork for normative changes and raise the actors' awareness of a problem. In this case, the large-scale looting of cultural property by the Nazis, and particularly the inadequate response (in terms of restitution *in rem* or

115 Shaffer/Pollack, supra note 114, at pp. 715-717.

116 Shaffer/Pollack, supra note 114, at p. 719.

117 Bazyler, supra note 59, at p. 305.

118 Rapp, supra note 88, at p. 758.

119 Shaffer/Pollack, supra note 114, at pp. 717-718.

120 Abbott/Snidal, supra note 114, at p. 427.

121 Ossmann, supra note 31, at p. 23. Ossmann calls for a legal basis for claims and a financial backing by states where restitution is appropriate, see pp. 23-24. He points out, that it is not about assigning blame to the current owners, but about dealing with historical injustice, which is why not (only) the current owners should be financially damaged.

financial compensation) after the war, has been identified as the fundamental problem.

In the case of TLOs, this is often followed by a trigger (precipitating conditions) that "crystalizes" the discontent and leads to the formation of (binding) rules. In the restitution of Nazi-looted art, a clear increase in restitution efforts can be seen, starting in the early 1990s. Certainly, the end of the Cold war, the disintegration of the USSR, and the reunification of Germany were important factors for this increase. They led to a change in ideology, allowed for changes in law and opened archives for historical research.

In Chapter 2.3 the degree of settlement of rules concerning art restitution was analyzed. In other words, it was examined whether there are clear rules that are generally observed by everyone and that govern the entirety of the problem, as it has been framed by actors. We have seen that there is a widely accepted approach to cases where claimants can show that Jewish cultural property was looted or confiscated by the Nazi regime – here, the only solution is restitution *in rem.* However, where the historical facts are not entirely established, the approach is unclear. Similarly, there is no generally accepted procedure on how to deal with cases where artworks were not looted or confiscated, but there is a causal relation between the Nazi regime and the change of hands in question. Here, the normative order is not settled. This paper has largely avoided the question of whether the (incipient[122]) normative order in art restitution is a *legal* one (as is implied by the term transnational legal order). For the purposes of this paper, it is sufficient to apply a functional approach and look at what is *actually* being done and which solutions are found by relevant actors.[123]

The second part of this paper showed that cultural property, especially Nazi-looted cultural property, requires special legal treatment and that it, as of now, has not received it to the extent needed. Since private law does not usually allow for the restitution of Nazi-looted art, there have been various other approaches to the problem. There have been changes to the law in different jurisdictions that exclusively apply to Nazi-looted art. Additionally, looted art commissions have been appointed in five European countries (soon to be six, see Chapter 3.2). These efforts have led to some changes, but they cannot address the problem as a whole. There have also been many attempts to change art restitution through soft law. Soft law has various advantages, e.g. it is easier to negotiate and adopt and it can initiate considerable change, partly through its "moral authority".[124] However, it suffers from a lack of legitimacy and enforceability.

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122 Büthe, supra note 18, at p. 261.

123 After much research, the definition of a legal order is still unclear, see Tamanaha, Brian Z. Tamanaha, *Legal Pluralism Explained: History, Theory, Consequences*, New York, 2021. On the view of law in TLO theory, see Halliday/Shaffer, 'TLO', supra note 8, at pp. 11-18.

124 Bazyler, supra note 59, at p. 305.