

COUNTRY REPORTS

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Colonial Loot and Its Restitution – Country Report: Switzerland

Abstract: In Switzerland, the decolonization of ethnological and historical museums and collections is in progress. This is true in practice, especially by federally funded provenance research projects and by single restitutions of human remains and colonial objects. However, provenance research and its goals need to be better understood in Switzerland, and the reluctance towards restitution is still high. There are no regulations or guidelines that would support the decolonization activities and supplement existing cultural heritage law. In practice and by regulation, the goal to strive for should be to implement the international human rights of Indigenous peoples to control or reconstitute their cultural heritage.

Keywords: Switzerland, museum, colonial, provenance research, restitution

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Introduction

The State of Switzerland has never had colonies in territories abroad. Nevertheless, Switzerland was substantially involved in colonization all over the world through its diplomats, foreign legionnaires, missionaries, scientists, traders, artists, and travellers in private missions or on assignment; even Swiss cities and cantons participated in the colonial European expansion.¹ Proof of this involvement can be seen in the manifold publicly- and privately-held collections of ethnological objects in Switzerland which were acquired on colonized territories overseas. The objects generally stem from Indigenous peoples, and are sometimes qualified as colonial loot. The publicly-funded ethnological and historical museums alone – located in, *inter alia*, Bern, Basel, Zurich, St. Gallen, Schaffhausen, Genève, Lausanne, Neuchâtel, and Fribourg; as well as universities' collections – are home to a substantial number of colonial objects. The figure of 320,000 ethnological objects in the Museum der Kulturen Basel² gives an idea of how large these collections can be. However, the discussion about the justification and legality of ethnological holdings is less vibrant in Switzerland than in countries that were formerly direct colonizers. At the same time, the awareness of historical wrongs attached to the objects is steadily rising in Switzerland. The claims for decolonization of collections are becoming pressing, and the time to act is now.³ This article looks into how Switzerland is responding to these claims, both in terms of legislation and practices, and what activities institutions are pursuing to decolonize their collections.

Current Developments in Switzerland

Legislation

No legislation or regulations have yet been enacted in Switzerland specifically addressing the questions surrounding colonial loot. On the federal level, two parliamentarians tried to change this by filing motions. A motion is the political instrument for Parliament to require the Swiss Federal Council to either draft a law or to take appropriate measures.⁴ The first motion, submitted in 2018, requested,

¹ C. Brizon, *Collections coloniales? L'implication de la Suisse dans le processus d'expansion coloniale européen au siècle des Lumières*, "TSANTSA" 2019, Vol. 24, p. 4, <https://tsantsa.ch/article/view/6888> [accessed: 27.07.2022]; R. Fuchs, *Mit der afrikanischen Realität hatte das wenig zu tun*, "Der Bund", 12 November 2019; Verband der Museen der Schweiz, *Provenienzforschung im Museum II. Sammlungen aus kolonialen Kontexten, Grundlagen und Einführung in die Praxis*, Verband der Museen der Schweiz, Zürich 2022, p. 4, https://www.museums.ch/assets/files/dossiers_d/Standards/VMS_Standard_Provenienz_Koloniale%20Sammlungen_D_Web.pdf [accessed: 27.07.2022]; N. Ritzer, *Die koloniale Schweiz? Die postkoloniale Schweiz!* "Didactica Historica" 2020, Vol. 6, p. 8.

² R. Strehle, *Das dunkle Geheimnis der Museen*, "Der Bund", 11 May 2019.

³ For example *ibidem*; N. Ritzer, *op. cit.*, p. 9.

⁴ Die Bundesversammlung – Das Schweizer Parlament, *Motion*, <https://www.parlament.ch/de/%C3%BCber-das-parlament/parlamentsportraet/beratungsgegenstaende-und-parlamentarische-verfahren/parlamentarische-initiativen-standesinitiativen-vorstoesse/motion> [accessed: 27.07.2022].

in short, a federal strategy for colonial loot.⁵ The second motion, submitted in 2020, requested a federal restitution procedure for looted colonial objects.⁶ Twenty-four professors, museum and collection directors, curators, and specialists in the field of colonial loot from all over Switzerland sent a letter to the Federal Office of Culture in support of the motion. However, the parliamentarians withdrew the motions before the voting in Parliament, with the official explanation in the case of the second motion being the lack of its chances of succeeding in Parliament.⁷ Another reason for the withdrawals might have been that nearly 99% of the museums and collections in Switzerland are private institutions or fall under the competence of cantons and municipalities, and not the Federal Government.⁸

Whatever the case may be, the Federal Council opposed the two motions using the arguments (i) that the Federal Government already supports provenance research; (ii) that the Federal Government offers intermediary services in cases of dispute, including through its support of United Nations Educational, Scientific and Cultural Organization (UNESCO), International Council of Museums (ICOM), and World Intellectual Property Organization (WIPO) and their alternative dispute resolutions mechanisms; (iii) that UNESCO would be the right organization for elaborating an internationally coordinated approach; and (iv) that in Switzerland the Federal Act on the International Transfer of Cultural Property (KGTG)⁹ would be a sufficient legal basis for dealing with colonial loot. The Federal Government offered to assist voluntary restitutions¹⁰ and promised a report on its activities concerning colonial loot.¹¹ This report was issued on 2 March 2022 by the Federal Office of Culture.¹²

⁵ Die Bundesversammlung – Das Schweizer Parlament, *Motion 18.4236: Gemeinsame Strategie in Sachen Provenienzforschung und Restitution von Kulturgütern aus dem europäischen Kolonialismus*, 13 December 2018, <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20184236> [accessed: 27.07.2022].

⁶ Die Bundesversammlung – Das Schweizer Parlament, *Motion 20.3754: Beteiligung der Schweizer Museen an der Rückgabe von Kulturgütern, die in der Kolonialzeit weggenommen wurden. Einrichtung eines bundesrechtlichen Verfahrens*, 18 June 2020, <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20203754> [accessed: 27.07.2022].

⁷ C. Sommaruga, *Le retour des biens coloniaux: quel rôle pour la Suisse?* Presentation at the conference “Decolonizing Heritage – The Return of Cultural Object to Africa: An International Law Perspective”, 24 September 2021, Université de Genève, Centre du droit de l’art, recording available at <https://www.art-law.org/en/events/decolonizing/> [accessed: 27.07.2022].

⁸ Bundesamt für Kultur, *Rapport de l’Office fédéral de la culture (OFC) à l’attention de la Commission de la science, de l’éducation et de la culture du Conseil des États. État de travaux de l’OFC sur le traitement des biens culturels issus d’un contexte colonial*, 2 March 2022, p. 1, <https://www.parlament.ch/centers/documents/fr/Bericht%20des%20BAK%20F.pdf> [accessed: 11.10.2022].

⁹ *Bundesgesetz über den internationalen Kulturgütertransfer (KGTG)*, 20 June 2003, SR 444.1.

¹⁰ Die Bundesversammlung – Das Schweizer Parlament, *Motion 20.3754...*

¹¹ Die Bundesversammlung – Das Schweizer Parlament, *Anfrage 21.1032: Rückgabe von Kulturgütern, die in der Kolonialzeit weggenommen wurden. Bericht ohne Anhörung von Expertinnen und Experten?*, 5 May 2021, <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20211032> [accessed: 27.07.2022].

¹² Bundesamt für Kultur, *Rapport...*

COUNTRY REPORTS

Karolina Kuprecht

Despite such opposition, the parliamentary activities continued. A third motion was filed in 2021 of potential relevance to the decolonization processes in Switzerland and finding a path past Parliament. The motion mandates the Federal Council to create an independent commission that makes recommendations for fair and just solutions in cases of Nazi-looted art. Beyond Nazi-looted art, the motion requires the Federal Council to evaluate whether the commission could become active in other fields of cultural property, namely in the field of colonial loot.¹³ In addition, a fourth parliamentary motion was filed in 2022 which requires the Federal Council to coordinate and support a platform in the form of a web-based database for the publication of provenance research results (for more on provenance research, see below). The Federal Council is in favour of this motion and both chambers of Parliament have accepted it.¹⁴

These latest steps forward are interesting, but the question that remains is whether – considering the hundreds of thousands of objects in museums and collections that potentially qualify as colonial loot – a federal commission and a platform for provenance research constitute a sufficient alternative to a regulatory process.

Practice

Notwithstanding the struggles for federal legislation and measures, ethnological museums and collections in Switzerland have reacted to the challenges of colonial loot in a self-determined way. They have developed innovative conciliatory activities, such as exhibitions with colonial loot as a subject of discussion¹⁵ and diverse forms of exchange and cooperation projects with source communities.¹⁶ Worthy of mention is the common Heidelberg statement on decolonization, requiring dialogue, expertise, and support, which was developed jointly by Swiss and German

¹³ Die Bundesversammlung – Das Schweizer Parlament, *Motion 21.4403: Unabhängige Kommission für NS-verfolgungsbedingt entzogene Kulturgüter*, 9 December 2021, <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20214403> [accessed: 11.10.2022].

¹⁴ Die Bundesversammlung – Das Schweizer Parlament, *Motion 22.3023: Plattform für Provenienzforschung bei Kulturgütern in der Schweiz*, 24 February 2022, <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20223023> [accessed: 28.07.2022].

¹⁵ Museum Rietberg, *Ausstellung: Die Frage der Provenienz, Einblicke in die Sammlungsgeschichte*, 1 December 2018 – 29 September 2019, <https://rietberg.ch/ausstellungen/fragederprovenienz> [accessed: 27.07.2022]; Museum der Kulturen Basel, *Ausstellung: Wissensdrang trifft Sammelwut*, 22 March 2019 – 22 November 2020, <https://www.museenbasel.ch/museen/de/agenda/detail/museum-der-kulturen-basel/wissensdrang-trifft-sammelwut.html> [accessed: 27.07.2022].

¹⁶ Völkerkundemuseum der Universität Zürich, *Kooperationsprojekt mit Uganda: Ein mobiles Milch-Museum*, 16 April 2020, https://www.musethno.uzh.ch/de/Ueber_uns/aktuell/Kooperationsprojekt-mit-Uganda-Ein-mobiles-Milch-Museum.html [accessed: 27.07.2022]; Museum der Kulturen Basel, *Basel-Milingimbi und zurück*, <https://www.mkb.ch/de/services/blog/2018/q3/milingimbi.html> [accessed: 28.07.2022]; *Verband der Museen der Schweiz*, op. cit., pp. 12-14.

ethnological museums.¹⁷ Museums and collections are paying increased attention to sensitive objects such as human remains and sacred objects in general, and their collection practices tend to shift from ethnological objects to modern Indigenous peoples' art. Special effort is put into provenance research and restitutions, which will be looked at more closely in the following sections.

Provenance Research

Official understanding and goals

The term “provenance research”, as conducted by museums and collections, is not legally defined in Switzerland. However, there are official positions that seem to understand provenance research as an instrument to find out about illegal transfers and the legal ownership of a cultural object.

The Federal Office of Culture cites on its website Article 2.3 of the *ICOM Code of Ethics*¹⁸ on provenance and due diligence,¹⁹ which reads as follows: “Every effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest, or exchange has not been illegally obtained in, or exported from its country of origin or any intermediate country in which it might have been owned legally (including the museum’s own country) [...]”. In addition, in its guidelines for museums on provenance research,²⁰ the Federal Office of Culture defines, as the first goal of provenance research, a museum’s responsibility to clarify questions of ownership and make its results transparent. The Association of Swiss Museums has taken a similar approach in its recently published guidelines on provenance research and collections by museums with a colonial context. The guidelines refer to the glossary of the *ICOM Code of Ethics*, in which the term “provenance” is defined as follows: “The full history and ownership of an item from the time of its discovery or creation to the present day, through which authenticity and ownership are determined”.

From a Swiss perspective, this official understanding of provenance research is important and convincing. However, from the perspective of source communities and Indigenous peoples, it falls short of facilitating an open and truthful process of decolonization. Concentrating on the chain of transfer of good title perpetuates the “property approach”, and neglects the fact that Western concepts of proper-

¹⁷ *Dekolonisierung erfordert Dialog, Expertise und Unterstützung - Heidelberger Stellungnahme*, 6 May 2019, <https://www.museumbund.de/wp-content/uploads/2019/05/heidelberger-stellungnahme.pdf> [accessed: 27.07.2022].

¹⁸ *ICOM Code of Ethics for Museums*, 2004, <https://icom.museum/en/resources/standards-guidelines/code-of-ethics/> [accessed: 27.07.2022].

¹⁹ Bundesamt für Kultur, *Museumsethik*, <https://www.bak.admin.ch/bak/de/home/kulturerbe/raubkunst/museumsethik.html> [accessed: 17.08.2022].

²⁰ Bundesamt für Kultur, *Leitfaden für Museen zur Durchführung von Provenienzforschungen*, June 2016, <https://www.bak.admin.ch/bak/de/home/kulturerbe/raubkunst/provenienzforschung-in-der-schweiz.html> [accessed: 11.10.2022].

ty – specifically individual property and ownership of cultural objects – may be foreign to source communities. Instead, the intangible value of objects; the meaning of an object to its community; and the responsibilities tied to the objects are of central importance.²¹ Similar to the reasoning behind the legal concept of *res extra commercium* (meaning non-commercial objects exempted from property law according to Roman law tradition), the cultural manifestations inherent in objects should prevail over aspects of commodification.²² As a consequence, adequate provenance research on Indigenous cultural heritage should mean evaluating, in the first instance, the source communities' values and understanding of objects. Cultural affiliation should be the decisive criterion for defining the correct treatment and place of the object, and not illegal transfers or questionable ownership.²³

In this sense, the provenance research processes have to be decolonized, a need also addressed by the Musée d'ethnographie de Genève in a conference held in 2021.²⁴

Support by the Swiss Federal Government

Since 2016, the Swiss Federal Government has supported provenance research projects for Nazi-looted art in line with the Washington Principles on Nazi-Confiscated Art of 1998.²⁵ Principle 4 requires consideration of unavoidable gaps or ambiguities in the provenance of objects. Principles 5 and 6 require publication and a central registry of provenance research results. These obligations were transferred into Article 10 of the Federal Act on Cultural Promotion,²⁶ which entitles the Federal Government to support museums, collections, and networks of third parties financially in their endeavours to inventory and digitize works of art that are associated with the clarification and publication of provenances.²⁷

From 2018 on, the Swiss Federal Government expanded its provenance research policy to include collections in a colonial context, with actual support

²¹ K. Kuprecht, *Indigenous Peoples' Cultural Property Claims: Repatriation and Beyond*, Springer, Cham 2014, pp. 39-46.

²² *Ibidem*, pp. 103-106.

²³ On the concept of cultural affiliation, see K. Kuprecht, *The Concept of "Cultural Affiliation" in NAGPRA: Its Potential and Limits in the Global Protection of Indigenous Cultural Property Rights*, "International Journal of Cultural Property" 2012, Vol. 19, pp. 33-63.

²⁴ Musée d'ethnographie de Genève, *Décoloniser la recherche de provenance*, 24-25 November 2021, <https://www.meg.ch/fr/recherche-collections/decoloniser-recherche-provenance> [accessed: 30.07.2022].

²⁵ Washington Principles on Nazi-Confiscated Art, 3 December 1998, <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/> [accessed: 16.10.2022].

²⁶ *Bundesgesetz über die Kulturförderung (KFG)*, 11 December 2009, SR 442.1.

²⁷ *Verordnung des EDI über das Förderungskonzept für die Unterstützung von Museen, Sammlungen und Netzwerken Dritter zur Bewahrung des kulturellen Erbes* [EDI Ordinance on the Funding Concept for Supporting Museums, Collections, and Third-Party Networks for the Preservation of Cultural Heritage], 29 November 2016, SR 442.121.1, Art. 3(b).

beginning in 2021. This support at first ran as a subcategory to Nazi-looted art. The responsible authority for the requests is the same Contact Bureau on Looted Art at the Federal Office of Culture, which was set up as a consequence of the Washington Principles. Only the most recent calls for financial requests make a difference between projects concerning Nazi-looted art and projects concerning collections in a colonial context.²⁸

For the future, the Swiss Federal Council announced it will further support museums and collections with provenance research and the inclusion of digitization projects until 2024.²⁹

Practice

Quite some time before federal funding was available, museums and collections in Switzerland autonomously – and with cantonal, communal, or private support – instituted provenance research programs and practices. The Museum Rietberg in Zurich, a cultural institution of the city of Zurich but with substantial private funding, even created a specific provenance research job position. This museum has also taken the lead in what is actually the most prominent provenance research project in a colonial context, i.e. the Swiss Benin initiative. Under the initiative, eight museums are working on research and dialogue with Nigeria on the objects from the kingdom of Benin.³⁰ Alongside this initiative, the Federal Government is now funding separate provenance research projects not only of the Museum Rietberg, but also of the Musée d'art et d'histoire de Genève, the Bernisches Historisches Museum in Bern, the Museum der Kulturen Basel, and the North American Native Museum (NONAM) in Zurich. It has allocated a total of CHF 522,000 in 2021-2022 for these projects.³¹

The projects of this 2021-2022 period seem to have a clear focus on the provenance of objects and collections with a colonial context.³² The NONAM, for exam-

²⁸ Bundesamt für Kultur, *Museen, Sammlungen und Netzwerke Dritter: Projektbeiträge*, <https://www.bak.admin.ch/bak/de/home/kulturerbe/museen--kulturelle-institutionen--sammlungen/museen--sammlungen-und-netzwerke-dritter.html#-1836018405> [accessed: 14.11.2022].

²⁹ *Botschaft zur Förderung der Kultur in den Jahren 2021-2024 (Kulturbotschaft)* [Message on the Promotion of Culture in the Years 2021-2024], BBl 2020 3131, p. 3210.

³⁰ Museum Rietberg, *Benin Initiative Schweiz: Forschung und Dialog mit Nigeria*, <https://rietberg.ch/forschung/benin-initiative-schweiz> [accessed: 30.07.2022].

³¹ Bundesamt für Kultur, *Übersicht Projektbeiträge BAK an die Provenienzforschung von Museen und Sammlungen Dritter 2021-2022*, January 2021, <https://www.bak.admin.ch/bak/de/home/kulturerbe/museen--kulturelle-institutionen--sammlungen/aktuelles/das-bundesamt-fuer-kultur-unterstuetzt-in-der-periode-2021-2022-achtzehn-neue-provenienzforschungsprojekte-von-museen-und-sammlungen-dritter.html> [accessed: 16.10.2022].

³² Bundesamt für Kultur, *Links Provenienzforschung von Museen und Sammlungen Dritter in der Schweiz*, <https://www.bak.admin.ch/bak/de/home/kulturerbe/raubkunst/provenienzforschung-in-der-schweiz/links-provenienzforschung-von-museen-und-sammlungen-dritter-in-d.html> [accessed: 30.07.2022].

ple, focuses on provenance research on human remains from the Arikara tribe, potentially from the Anton Rygh excavation site in South Dakota. It also takes a closer look at the Gottfried Hotz collection, which contains several sacred objects of various Native American tribes that may qualify for restitution.³³ The provenance research project of the Bernisches Historisches Museum concentrates on those objects which came to the museum under curator Rudolf Zeller between 1904 and 1940, an important period of European colonial expansion. Its goal is to uncover illegitimate transfers of possession.³⁴

Interim conclusions

Ethnological and historical museums in Switzerland have made a good start with their provenance research projects. Federal support is helping them to expand this work. The publication of the research results allows for at least partial public insight into the collections, and guarantees a certain sustainability of the projects.

At the same time however, the provenance research processes should be improved. First, the understanding and aims of provenance research need to be reconsidered by taking into account source communities' perspectives. Provenance processes should make a clear distinction between Nazi-looted art and objects from a colonial context, since the grounds for assessing them are fundamentally different. It would be desirable to make the temporary federal funding practice continuous; and finally, cantons and cities should increase support for provenance research, or even opt for more straightforward decolonization processes.

Restitution

Legal claims?

Private property and cultural property law

There is no information on restitution claims pending in court that involve objects from Indigenous peoples or in a colonial context in Switzerland. From a legal perspective this is not surprising, since neither Swiss property law nor specific cultural property law would in most cases support such claims. Museums and collections generally became either *bona fide* purchasers of objects, or attained *bona fide* prescription, which is the case after 30 years of holding cultural property (Articles 934(1 *bis*)).

³³ Stadt Zürich Kultur, *Sammlung NONAM*, https://www.stadt-zuerich.ch/kultur/de/index/institutionen/nonam_indianer_inuit_kulturen/Sammlung.html [accessed: 03.08.2022]; see also K. Kuprecht, *Lost within Culture: A Legal Abstract about Rights and Duties in a Cultural Property Case Between the Native American Museum of Zurich, Switzerland and the Native Americans*, LLM thesis, University of California, Los Angeles, 2002.

³⁴ Bernisches Historisches Museum, *Spuren kolonialer Provenienz*, <https://www.bhm.ch/de/provenienz/spuren-kolonialer-provenienz> [accessed: 02.08.2022].

and 728(1 *ter*) of the Swiss Civil Code³⁵). The colonizing processes, and most takings and acquisitions in a colonial context, took place much earlier. Furthermore, proving illegal transfers of objects and prior ownership is often impossible, or at least overly burdensome in view of the long period of time that has elapsed since they were taken. It is also difficult to predict what law a court would apply to situations that occurred in former times.³⁶ Other hurdles are that source communities might lack standing in a court of law and/or have difficulties in defining the right successors. Ultimately, source communities in general, and specifically Indigenous peoples, generally lack options when faced with the complexities and costs of legal disputes.³⁷

For cases concerning objects with a colonial context, the Federal Act on the International Transfer of Cultural Property (KGTG)³⁸ – the Act that transposed the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property³⁹ into Swiss national law – brought no substantial changes to the existing legal options and positions. It is non-retroactive and of relevance only for transfers of cultural property after 2005. New restitution rights created by the Act are limited to the eight States that have so far concluded a bilateral agreement with Switzerland (Articles 7 and 9 KGTG).⁴⁰ These elements alone exclude the Act as an effective instrument to regulate colonial loot.

Legal novelties for colonial loot could be derived from the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.⁴¹ The Convention not only specifically addresses Indigenous peoples' claims and interests,⁴² but it also allows States Parties to apply more favourable rules (Article 9) which, *inter alia*, would enable States to provide the Convention with retroactive effect.⁴³ Switzerland signed, but has not subsequently ratified, the Convention, and there are no visible political efforts to (re-)activate the ratification process. While in its report of 22 March 2022 the Federal Office of Culture mentions the Convention, it however ignores the possibility of more favourable rules and ultimately concludes that the

³⁵ *Schweizerisches Zivilgesetzbuch (ZGB)* [Swiss Civil Code], 10 December 1907, SR 210.

³⁶ For limitations in the law, see K. Kuprecht, *Indigenous Peoples' Cultural Property...*, pp. 115-124.

³⁷ For more on dispute resolutions in Indigenous peoples' restitution claims, see *ibidem*, pp. 132-139.

³⁸ See footnote 9.

³⁹ 14 November 1970, 823 UNTS 231 (ratified by Switzerland on 3 October 2003).

⁴⁰ Bundesamt für Kultur, *Bilaterale Vereinbarungen*, <https://www.bak.admin.ch/bak/de/home/kulturerbe/kulturguetertransfer/bilaterale-vereinbarungen.html> [accessed: 02.08.2022]; on the bilateral agreements in view of Indigenous peoples' interests, see K. Kuprecht, *Indigenous Peoples' Cultural Property...*, pp. 113-114.

⁴¹ 24 June 1995, 2421 UNTS 457.

⁴² K. Kuprecht, *Indigenous Peoples' Cultural Property...*, pp. 95-96.

⁴³ This was the prevailing opinion during the preparatory work on the Convention; see UNIDROIT, *Étude LXX: la protection internationale des biens culturels – travaux préparatoires*, Doc. 18 and 19, Art. 11(c), <https://www.unidroit.org/fr/instruments/biens-culturels/convention-de-1995/travaux-preparatoires/> [accessed: 11.10.2022].

COUNTRY REPORTS

Karolina Kuprecht

Convention is not favourable to bringing forth the issue of colonial loot due to its basic non-retroactivity.⁴⁴

International human rights law

In summary, there are no developments that would advance Switzerland's legal compliance with the international collective human rights of Indigenous peoples.⁴⁵ Such rights include a right of Indigenous peoples to control or reconstitute their cultural heritage based on the right to take part in cultural life contained in Article 15(1)(a) of the UN International Covenant on Economic, Social and Cultural Rights.⁴⁶ Switzerland is a Member State to the Covenant and ratified it in 1992. In its General Comment on Article 15, the UN Committee on Economic, Social and Cultural Rights explicitly refers to Articles 11-13 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and repeats the exact wording of Article 31 UNDRIP.⁴⁷ UNDRIP is the most important, albeit non-binding, international instrument for Indigenous peoples' rights. Switzerland accepted UNDRIP when it was adopted by the General Assembly in 2007.⁴⁸ UNDRIP stresses in Article 12(1) a right to the repatriation of human remains and a right to use and control ceremonial objects. In the second paragraph of the same Article 12, it requires States to enable access to and/or repatriation of ceremonial objects and human remains in their possession. Article 11(2) UNDRIP also considers restitution as one possible measure with respect to Indigenous peoples' cultural, intellectual, religious, and spiritual property taken without their free, prior, and informed consent or in violation of their laws, traditions, and customs. Article 31(1) adds the right of Indigenous peoples to maintain, control, protect, and develop their cultural heritage, and the obligation of States to take effective measures in conjunction with Indigenous peoples to recognize and protect the exercise of these rights.⁴⁹

In its submission of a report of the UN Expert Mechanism on the Right of Indigenous Peoples on Repatriation of Ceremonial Objects, Human Remains, and Intangible Cultural Heritage under UNDRIP, Switzerland made reference to the KGTG and emphasized that some of the bilateral agreements concluded by the Swiss Federal

⁴⁴ Bundesamt für Kultur, *Rapport...*, p. 4.

⁴⁵ For more on the qualification as Indigenous peoples, see K. Kuprecht, *Indigenous Peoples' Cultural Property...*, pp. 23-39.

⁴⁶ 16 December 1966, 993 UNTS 3.

⁴⁷ Committee on Economic, Social and Cultural Rights, *General Comment No. 21: Right of Everyone to Take Part in Cultural Life (Art. 15, Para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, UN Doc. E/C.12/GC/21, paras. 7 and 37.

⁴⁸ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, UN Doc. A/RES/61/295.

⁴⁹ For more on the international human rights standards, see K. Kuprecht, *Indigenous Peoples' Cultural Property...*, pp. 75-91; and eadem, *Die internationalrechtlichen Besonderheiten bei Kulturgüter-Restitutionsforderungen indigener Völker*, "KUR" 2009, Vol. 6.

Government explicitly address human remains.⁵⁰ The report also mentions one voluntary restitution of human remains from Switzerland.⁵¹ Taking into consideration the non-retroactivity of the KGTG and the sizes of collections stored in Switzerland, these statements would seem to be misleading. However, the report contains a clear statement in support of UNDRIP as an instrument that can help to apply regulations to the context of Indigenous peoples and that can guide the assessment of Indigenous peoples' claims and the development of transparent mechanisms for repatriation.⁵²

Practice

Despite the lack of specific regulations on restitution of colonial loot in Switzerland, several important ethnological museums and collections have voluntarily restituted individual objects and human remains. In 2010, the University of Zurich repatriated five Kawésqar ancestors with histories of abduction and forced exhibition in “human zoos” in the 19th century. The human remains were reburied in a traditional Kawésqar ceremony on the island of Karukinká in Tierra del Fuego in Chile.⁵³ The Musée d'ethnographie de Genève restituted a Māori figure in 2011⁵⁴ and a *mokomokai* (the Māori name for a preserved tattooed Māori head) to the Te Papa Museum of Wellington in New Zealand in 2014.⁵⁵ The Museum der Kulturen Basel did the same in 2016, stressing the fact that the Te Papa Museum maintains a consecrated room for those human remains whose provenance is not yet clear.⁵⁶ The Bernisches Historisches Museum returned a small stone sculpture, allegedly representing Ekeko, a deity worshiped in Bolivia. The Museum agreed to a permanent loan to the National Museum of Archaeology in La Paz. In breach of the agreement, the then-president of Bolivia had the sculpture travel around Bolivia before his re-election in 2014. A re-exchange with Bern is difficult to imagine. The case became the prime, but also most problematic, example of restitution of objects in a colonial context from Switzerland.⁵⁷

⁵⁰ Human Rights Council, *Repatriation of Ceremonial Objects, Human Remains and Intangible Cultural Heritage under the United Nations Declaration on the Rights of Indigenous Peoples. Report of the Expert Mechanism on the Rights of Indigenous Peoples*, 21 July 2020, UN Doc. A/HRC/45/35, para. 80.

⁵¹ Ibidem, para. 54.

⁵² Ibidem, para. 7.

⁵³ H. Mülchi, *Calafate Zoológicos Humanos*, 2010, <https://www.youtube.com/watch?v=-8MyDeDpGAs> [accessed: 28.07.2022].

⁵⁴ J. Crawford, *Das koloniale Erbe beschäftigt auch Schweizer Museen*, “SWI swissinfo.ch”, 13 December 2020, https://www.swissinfo.ch/ger/kolonialisierung-und-kulturgueter_das-koloniale-erbe-beschaefigt-auch-schweizer-museen/46195592#:~:text=Viele%20Staaten%20in%20Europa%20arbeiten,Museen%20steuern%20in%20Richtung%20Entkolonialisierung [accessed: 27.07.2022].

⁵⁵ *La longue décolonisation des collections du Musée d'ethnographie*, “Campus” 2020, Vol. 140, <https://www.unige.ch/campus/numeros/140/dossier3/> [accessed: 28.07.2022].

⁵⁶ Museum der Kulturen Basel, *Geweihter Raum*, <https://www.mkb.ch/de/services/blog/2019/q1/wts2-raum.html> [accessed: 02.08.2022].

⁵⁷ R. Strehle, op. cit.

COUNTRY REPORTS

Karolina Kuprecht

Apart from such restitutions, museum representatives in Switzerland have declared their readiness for restitutions of objects. In practice, however, they remain reluctant to carry them out and do not generally participate in restitution projects more widely. This became clear when the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) conducted a two-year project from 2018 to 2020 to facilitate and secure the return of Aboriginal and Torres Strait Islander cultural heritage held overseas. None of the museums and collections in Switzerland which were contacted indicated any willingness to consider such repatriation requests.⁵⁸

Interim conclusions

In Switzerland, claims for restitution of colonial loot are difficult, if not impossible, to legally enforce. There exists neither any specific law nor any soft-law guidelines, standard procedures, or measures like the ones developed in other European countries.⁵⁹ The only point of reference for restitutions by museums and collections in Switzerland are the ICOM codes.⁶⁰ These codes remain quite general, however, and leave museums with the risk of violating rules of competences when restituting. This lack of rules is not only in breach of international human rights standards; it also stands in contrast to the willingness of museums and collections to retribute and might even be the reason for their reluctance to transform their willingness into practice.

Concluding Remarks

There is an awareness of the pressing nature of the issues of colonial loot in ethnological and historical museums and collections in Switzerland. Institutions have begun a cautious process towards their decolonization. They are pursuing a variety

⁵⁸ Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), *Return of Cultural Heritage Project 2018-20*, 2020, p. 66, https://aiatsis.gov.au/sites/default/files/2020-09/return-cultural-heritage-20182020-report_0.pdf [accessed: 02.08.2022].

⁵⁹ See, e.g., Germany: Deutscher Museumsbund e.V. (ed.), *Leitfaden zum Umgang mit Sammlungsgut aus kolonialen Kontexten*, 3rd ed., 2021, pp. 159-163, <https://www.museumsbund.de/wp-content/uploads/2021/02/leitfaden-zum-umgang-mit-sammlungsgut-aus-kolonialen-kontexten-web.pdf> [accessed: 27.07.2022]; on the restitution part of these guidelines, see K. Kuprecht, *Kulturgüter aus der Kolonialzeit und Restitution: Änderungen ohne Änderungen*, in: M. Weller et al. (eds.), *Raubkunst und Restitution – Zwischen Kolonialzeit und Washington Principles*, Nomos, Baden Baden 2020, pp. 163-164; The Netherlands: Nationaal Museum van Wereldculturen, *Return of Cultural Objects: Principles and Process*, <https://www.tropenmuseum.nl/en/about-tropenmuseum/return-cultural-objects-principles-and-process#>, [accessed: 02.08.2022]; on the restitution part of these principles, see K. Kuprecht, *Kulturgüter...*, pp. 162-163.

⁶⁰ *ICOM Code of Ethics for Museums; ICOM Guidelines on Deaccessioning of the International Council of Museums*, 2019, <https://icom.museum/wp-content/uploads/2019/10/Guidelines-on-Deaccessioning-of-the-International-Council-of-Museums.pdf> [accessed: 27.07.2022]; *ICOM Code of Ethics for Natural History Museums*, 2013, https://icom.museum/wp-content/uploads/2018/07/nathcode_ethics_en.pdf [accessed: 27.07.2022].

of activities, with a focus on provenance research, and some voluntary restitutions have taken place. Since 2021, the Swiss Federal Government is funding provenance research in colonial contexts, and two parliamentary motions adopted on a federal level might bring the decolonization processes forward.

However, there is still some way to go. Provenance research should be refined, human rights standards should be implemented, and guidelines for restitution projects should be established, thereby creating a situation where neither legal hurdles nor governmental hierarchies will hold back museums and collections from their participation in decolonization and restitution projects. Authorities should delegate competences and provide support, albeit without interfering with the processes. Projects carried out on a low-level, i.e. taking place directly between museum professionals and the persons or groups culturally affiliated, are less susceptible to political, institutional, or personal promotion abuses. And finally, there must be awareness that even if restitution becomes the norm, there is no reason to fear the emptying of Swiss museums.⁶¹

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⁶¹ See K. Kuprecht, *Indigenous Peoples' Cultural Property...*, pp. 55-73.

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Karolina Kuprecht

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Karolina Kuprecht

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