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The Russian Position: Trophy Art Belongs to Russia As Compensation for World War II Cultural Losses

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A. Curiously, supporters of the Russian Position rely on the same legal precedents that are put forth in support of the "Western Position".

1. In modern European history the French are remembered for Napoleon whose "armies carried out a systematic confiscation of art treasures across Europe" and who shipped back to Paris "convoys laden with Europe's most celebrated masterpieces." Officially authorized and directed, Napoleon's armies, so-called "Representatives of the [French] People" and the notorious Committees of Public Safety and Instruction despoiled artworks and cultural material on a vast scale and deposited them in the Museum of the Republic (later known variously as the Musée Napoleon and the Louvre), in a deliberate effort to make France the capital of art and culture in Europe. "The policy of acquisition of art trophies enjoyed enthusiastic support within France."

2. After Napoleon's defeat at Waterloo in 1815, some States demanded restitution of plundered masterpieces "without any diplomatic negotiations…and [in] disregard [of] any protestations.". The Prussians reclaimed some 300 pieces by force; another 300 paintings were taken by the Austrians from the Louvre who were also offered paintings of equal value to compensate for Austrian losses. The Netherlands, Belgium, Spain, Italy, and the Pope also recovered plundered art. While Russia agreed with France that the return of all plundered art should not be required, the Allies nevertheless demanded the return of looted art treasures even in the absence of any treaty provisions requiring it. Significantly, the Allies "accepted the argument that plunder of cultural treasures was "illegitimate" and, accordingly, <u>they</u> did not loot French collections.

3. Despite this experience, international law "experts" in the first one-half of the

[1] Sandholtz, Wayne, Prohibiting Plunder: How Norms Change, Oxford University Press (2007)

19th Century were not in agreement whether there was a legal obligation to restitute cultural treasures that had been plundered. During the U.S. Civil War a Prussian immigrant to the United States, Francis Lieber, a history and political science professor at Columbia College in the City of New York, was called upon by Henry Wager Halleck, General-in-Chief of the Union Army (who was a lawyer who had published a book on international law),[2] to advise the Army on applicable rules of international law. Lieber drafted a "Code for the Government of Armies in the Field as Authorized by the Laws and Usages of War on Land" which was promulgated by President Lincoln early in 1863.

4. Lieber argued that "the ultimate goal of war is peace, and [that] armies should avoid actions that make peace more difficult to achieve or less durable once attained." His Code therefore specified that during a war all properties are immune from seizure except in the instance of "military necessity", which obviously (and expressly) excluded "works of art [and] libraries" from the category of property that could be confiscated. Thus, cultural treasures could not be appropriated, destroyed or damaged even though, as Lieber acknowledged, plunder might both save cultural treasures and chastise a country that had initiated a wrongful war and had itself wrongfully seized works of art. The Lieber Code would remain in effect in the United States for the next fifty years.

5. The Lieber Code inspired European writers and jurists to attempt to codify rules of war. With Lieber's prodding a non-governmental Institute of International Law was organized in Ghent by international law jurists in 1873 having as its purpose the preparation of a codification of international law on the same subject. [This would eventually appear in 1880 after a meeting of the Institute in Oxford, England as the so-called Oxford Manual ("The Laws of War on Land").]

6. At about the same time Czar Alexander II of Russia convened the Brussels Conference to consider a Russian draft convention on rules of war. In 1874 the Conference adopted the "Brussels Declaration". More restrictive than the Lieber Code, the Declaration prohibited seizure of all private property. Never ratified, the Brussels Declaration was not a treaty and did not reflect customary international law.

7. The first Hague Conference, again convened on a Russian initiative on May 18, 1899, and attended by 26 countries, adopted the "Hague Convention Respecting the Laws of Customs of War on Land". In its Annex and Article 56, which were based on the Brussels Declaration, the Convention would expressly forbid seizure of works of art and science, whether public or private property.

8. A Second Hague Convention, initially suggested by the U.S. Department of State but actually adopted at a conference convened by Russia in 1907 and attended by 44 countries, ratified the First Hague Convention including its provisions on works of art and science.

9. The Second Hague Convention confirmed that property belonging to States and

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[2] Halleck argued in his work that works of art were legitimate trophies and that forced restitution violated the law of nations. Ibid at p. 74.

institutions devoted to education, the arts and sciences must be treated as private property and that *all seizures of works of art, public or private, are forbidden*.

10. During World War I Germany, while purporting to recognize the principle that the despoliation of art treasures (as distinguished from other State-owned property) was no longer allowed by the law of nations, ignored the Hague Conventions (which it had signed and ratified) and destroyed repositories of artworks, libraries and architectural treasures in Belgium and France. This included, in 1914, the 1663 Library of the University of Louvain (Belgium) and the works of art and science in it, and much of the town of Louvain (Germany claiming that the Library was being used for military purposes). This act of vandalism was highly publicized and caused widespread condemnation of Germany in Europe and the United States.

11. After the War, the Paris Peace Conference considered the issue of plundered and destroyed art. A Commission on Reparation of Damage decided that restitution (i.e., the return of identifiable objects) of looted art was required and Articles 245 and 246 of the Treaty ultimately presented to Germany on May 7, 1919 required restitution of certain art treasures taken by Germany not only in this war but in the much earlier Franco-Prussian War.

12. The Italians proposed that, in the case of destruction of works and objects of art of historical interest by Austria-Hungary, there also should be "restitution in kind", i.e., a transfer of Austrian art objects to Italy as "equivalents" for Italian losses suffered in earlier wars. The French agreed with the Italians and wanted to be allowed to choose art objects in Germany ("equivalents") for its own losses. These proposals for restitution in kind were rejected by the Group of Four. Nevertheless, Article 247, drafted by John Foster Dulles of the United States delegation, did require restitution in kind to Belgium of specific objects in substitution for those destroyed by Germany during the burning of the Library of Louvain including, specifically, a transfer to Belgium of leaves of triptychs which were owned by museums in Berlin and Munich and had been lawfully acquired before the War.

13. Article 195 of the Treaty of Saint-Germain, which followed and concluded peace with Austria-Hungary, authorized restitution claims for treasures taken from Italy, Belgium, Czechoslovakia and Poland during the War and in earlier times (although only Belgium and Czechoslovakia submitted claims).

14. Other examples of agreements providing for very limited "restitution in kind" followed in peace treaties between the Soviet Union and Ukraine, on one hand, and Poland, on the other, which required the Soviet Union to return cultural treasures to Poland ("restitution") unless removal from Russia would compromise the integrity of Russian collections <u>and</u> the parties could agree on an exchange of other objects as equivalents ("restitution in kind").

B. World War II made a mockery of international law conventions, treaties and customs of war. Germany, the Nazi Party, Adolf Hitler, Hermann Göering, Joseph Goebbels, Vichy France, Hungary and other German collaborators and puppet governments together perpetuated the greatest theft of art treasures in history from governments, museums,

private collections and, of course, the Jews when Nazi governments engaged in their programs of genocide. "[T]he Nazis could exploit tools and technologies that Napoleon never imagined." It took tens of thousands of railroad cars to bring the loot back to Germany. The Nazis were obsessed by art and, like Napoleon and the Romans, they took cultural treasures as trophies of conquest.

C. Despoliation of museums, forced sales, extortion and outright confiscation of art owned by Jews was widespread. Hitler ordered, and Goering effected, the looting and, together with Goebbels, they were very effective thieves. Hans Frank, Governor-General of the unincorporated part of Poland governed by Germany after Hitler and Stalin invaded, made it official policy to confiscate all important art treasures found in Polish territory. The Nazi operative Alfred Rosenberg plundered Estonia, Latvia, Lithuania and Russia. Multiple Nazi authorities plundered France, seizing all Jewish art collections they could find, including more than 20,000 items and almost 6,000 paintings and sculptures.

D. The Allies regarded Nazi depredations of art treasures as illegal plunder from the outset and during the War studied post-World War I restitution precedents. British and American agencies agreed that that all seizures of such property violated Article 56 of the Hague Convention and observed that restitution had been required by the victorious countries after the Napoleon Wars and World War I. "The general policy of restitution was never in question."

E. A general restitution policy was announced in January 1943, incorporated into the Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control signed by 16 countries, including the Soviet Union, and reaffirmed at the Bretton Woods Conference in July 1944.

F. When the War ended, however, there was disagreement both in the U.S. and among the Allies over how restitution should be effected and "the issue of restitution in kind was bitterly divisive."

G. Various post-war treaties would eventually require restitution. France, Belgium and Luxembourg argued that whenever looted items could not be located "they should be replaced by equivalent pieces from German collections", i.e., restitution in kind. The Soviets, in agreement with Britain and the U.S, "favored restitution in kind only for unique cultural treasures."

H. In practice, however, and this is significant, "the Soviets had settled on the notion that Soviet losses should be compensated by replacements of equivalent value from German museums and collections" and "obstructed restitution in kind by refusing to provide inventories of German owned cultural properties" that had been discovered in Soviet occupied areas and by surreptitiously "removing large quantities" of cultural assets to the Soviet Union. As a result, no steps were taken by the remaining Allies to require or effect a program of restitution in kind. Also, following World War II precedents, none of them plundered German museums or collections.

I. “Soviet planning developed as a mirror image of much that the Germans had done.” The Soviets first described their removal of cultural treasures from Germany as the taking of war trophies by authorized “Trophy Brigades” that traveled with the Red Army and confiscated vast quantities of art treasures, libraries and archives. The Pushkin Museum alone received almost 3,000 crates of art.

J. Because the Soviet Union had ratified the 1907 Hague Convention and was well aware of the other Allies’ view (not to speak of its own publicly stated position) that there should only be limited restitution in kind, the Soviet confiscations were kept secret. When, 46 years later, the secret was revealed in the Western press, many Russian politicians and others took the position that Russia was entitled to keep the trophies as compensation for Russian cultural losses, i.e., Russia had the right to claim them pursuant to a general program of restitution in kind, in replacement for massive (but as then undocumented) losses of art treasures sustained during the War (without the necessity of any accounting of item-by-item equivalency).

K. Moreover, the Russians insisted that the Allies had agreed to this concept. This was not true although, as already noted, there was general support among the Allies for restitution in kind of equivalents for unique cultural treasures. In fact, no attempt to acquire equivalents was ever carried out because the Soviet’s refusal to identify its own losses, to reveal its confiscation of German cultural treasures or to match unique objects lost by the Soviets with cultural objects that they confiscated in Germany. Interestingly, neither the Soviets nor the Russians would ever claim any right to take art treasures as spoils of war.

L. Since the Allies had never reached a consensus on when restitution in kind was acceptable, and no restitution in kind program was ever adopted or effected the Allies (other than the Soviet Union) decided to return all cultural treasures in their possession to the countries from which they had been taken as well as occupied Germany. This, of course, precluded use of these cultural treasures for restitution in kind.

M. The result of all of this is that Soviet Union alone, among the Allies, claimed that it had the right confiscate the cultural treasures of its enemies that were found in areas that it occupied as compensation for its losses of cultural treasures. Russia, after a moment of uncertainty, followed suit.

N. Germany has formally advised Russia that it disagrees with the Russian position and that it does not recognize the legality of Soviet confiscation of its cultural treasures. Nazi victims (from whom many of the cultural treasures had been taken by the Nazis) also have protested but, like Germany, they have had no redress for their losses. In their view, the cultural treasures now held by Russia are the last hostages of World War II.

O. As a practical matter, there has been no way to resolve the dispute. Germany has relied on diplomacy which, so far, has been ineffective. Nazi victims have made claims through the countries in which they came to reside or the Russian courts but these, also, have been ineffective.

P. There are two questions: Was restitution in kind a remedy recognized by customary international law in 1945?[3] If it was, did the Soviet removal and Russian retention of confiscated cultural treasures effect lawful restitution in kind?

√The Russian law of 1998 nationalizing the confiscated artworks (and the Russian Constitutional Court that upheld it in an amended forum) assumed that, in 1945, international law recognized a principle of general ("compensatory") restitution or blanket, i.e., non-specific, restitution in kind. The Western Position, eventually supported by all countries other than Russia, is that neither an item-by-item nor a blanket exchange of cultural treasures was authorized by customary international law existed in 1945.

√Since the Russian law, as administered, also nationalizes artworks taken by the Soviets in Germany, Hungary and other defeated Axis countries even though Nazis and their allies had unlawfully taken such artworks from victims of racial and religious persecution as well as from museums and collections of occupied countries it seems clear that, even if international law supported the Russian Position, the nationalization of such property cannot be justified either as restitution in kind or an exercise of any right to recover reparations ("compensatory restitution") from enemy countries.

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[3] Article 38 (1) of the Statute of the International Court of Justice ("ICJ"), which is considered the authoritative statement as to the sources of international law, provides that ICJ applies:

"(a) international conventions …

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) … judicial decisions and the teachings of the most highly qualified publicists of the various nations …"

"The difficult functions overlap to a great extent so that in many cases treaties (or countries) merely reiterate accepted rules of customary law …" "The essence of custom … is that it should constitute "evidence of a general practice accepted as law …" which includes "the belief by a state that behaved in a certain way that it was under a legal obligation to act that way." The ICJ has "declared that a customary rule must be "in accordance with a constant and uniform usage practiced by the States in question …." and that "some degree of uniformity amongst state practices was essential …" Indeed, state practice has to be "both extensive and virtually uniform." Thus, "an unsubstantiated claim cannot be accepted" and if "a proposition meets with a great deal of opposition then it would be an undesirable fiction to ignore this and talk of an established rule." Therefore, "One can conclude by stating that for a custom to be accepted and recognized it must have the concurrence of the major powers in that particular field." And, "Customary law is thus established by virtue of a pattern of claim, absence of protest by states particularly interested in the matter at hand and acquiescence by other states." Malcolm N. Shaw, International Law, Cambridge Univ. Press (2003) at pp. 67, 70- 84.

1. If the Western Position is correct, then the Soviets engaged in looting of cultural treasures in violation of the Hague Conventions. The artworks were taken by Soviet Trophy Brigades and Military Authorities authorized to acquire assets for the great art museum that Stalin planned just as the Nazis had plundered cultural treasures earlier for the "Linz" or "Fuhrer Museum" that Hitler had planned. Artworks were taken indiscriminately along with factories and just about every other valuable item of movable property found by the Red Army in Germany, but under Article 56 of the Hague Convention the confiscation of artworks was plunder.

2. The removal of cultural treasures by the Red Army was undertaken in secrecy and without authorization of the Allied Control Council or any other Allied authority. No public accounting of removed property was ever offered by the Soviets. No list of artworks that had been lost by the Soviet Union was put forth. No determination of unique character of losses was made. No item by item equivalency was attempted or established.

3. Significantly, for 45 years after the War neither the Soviet Union nor Russia even admitted to the confiscation of artworks. Most of the artworks were held in secrecy until an unauthorized (and officially condemned) disclosure was made in 1991.[4]

a) When the Soviet Union returned many artworks to museums in East Germany and a few other Soviet-block countries through diplomatic channels, the Soviets said that the artworks had been "temporarily situated in the USSR". Presumably, then, they had not been taken as compensation for anything.

b) Russia eventually agreed with the Federal Republic of Germany to return "illegally exported treasures" although, to Germany's astonishment, Russia later took the position that most everything that the Soviet Army (as distinguished from individual soldiers) had confiscated had been taken "legally".

Q. When the Russian nationalization law was first proposed in 1997 it included, within its scope, all displaced artworks, including those which had never lawfully belonged to any of the Axis countries. This included major collections of art treasures taken from victims of genocide (determined to be a war crime and a crime against humanity by the Nuremberg Tribunal, of which the Soviet Union was a member). Because the first President of the Russian Federation had concluded that the proposed nationalization violated international law, he vetoed the measure. The Russian Constitutional Court then assumed, without serious analysis, the existence of a right to blanket "compensatory restitution" although it required some redress for Nazi victims whose property had been stolen. Accordingly, the Duma, as an afterthought, added a provision which appeared to allow claims by Nazi victims. The Western view, based substantially on the same precedents relied upon by the Constitutional Court to justify the Russian Position, is that

[4] Perhaps the most important principle, underpinning many international legal rules, is that of good faith." Ibid. at p. 97

in 1945 neither “compensatory restitution” nor “restitution in kind” was authorized by any convention nor accepted as customary international law.

1. The amended Russian nationalization law allows claims by other States for:

a) artworks taken by Nazi Germany from victim States and institutions;

b) artworks belonging originally to Holocaust victims and those who opposed fascism; and

c) family treasures.

2. No administrative procedures were authorized for such claims. Direct claims by Nazi victims of countries that had been Axis powers (e.g., Hungary and Italy) were not authorized.

3. Claims could not be made if any compensation had been paid by Germany for cultural treasures, even if the compensation was partial and, under German law, repayment would be accepted by Germany if and when the artworks were discovered and returned to their original owners.

4. The Russian government was not even authorized to return such property. The law requires Duma approval in each instance which, probably, would not have been true if the law had never been enacted.

5. The actual practices followed by Russia make it amply clear that the few provisions allowing for the return of confiscated artworks from Nazi victims were mere window dressing for an intended blanket nationalization.

a) In ten years, no artworks have been returned to Holocaust victims.[5] The Rothschild family was required to purchase its archives from the Russian government. Nevertheless, a “sale” by Russia or “purchase” by the Rothschilds does not constitute restitution.

b) The procedure suggested for obtaining government endorsement of a claim for Holocaust loot is a sham. No claim by a victim of Nazi persecution (other than the Rothschild family) has been honored.

c) Indeed, the likelihood of obtaining the required Duma approval of any claim for plundered art treasures appears remote unless it accords with a Russian diplomatic initiative (e.g., a 2006 return of books to Hungary for the Library of Sáraspotak College of the Hungarian Reform Church).

6. The prototype claim made in the Russian courts by a Hungarian Holocaust victim for artworks has been pending for 8 years. The government first seemed to approve the claim

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[5] Archives have been returned from time to time to various countries including items taken from Holocaust victims.

which had been made by an individual (rather than a State), but this position was soon abandoned. The government would contest the right of the claimant to relief for lack of proof that she was the rightful owner --- despite the fact (a) that Hungary (the country authorized to make a claim on her behalf) and its courts acknowledge that she is the sole heir of the original collector entitled to claim the artworks, (b) that all other descendents of the original art collector have agreed that she is the owner and, (c) that Hungarian and U.S. probate authorities recognize her claim of inheritance. The government also has raised every other conceivable obstacle to the claim. In almost a decade, the case has gone nowhere while the claimant, who is 84 years old, has incurred huge legal and research costs.

Conclusion: The Trophy Art remains in Russia even though the world community has since concluded, by a convention promulgated more than 100 years ago, that plunder of cultural treasures is an effective way to encourage demands for revenge and promote conflict and, therefore, violates international law. No resolution of the dispute is in sight. The cultural treasures , after all, remain the last hostages of World War II.

Annex

Russian Law on Cultural Valuables Displaced to the USSR as a Result of the Second World War (1998/2000)

Bibliography

For a comprehensive list of literature on the issue of “restitution in kind” see:
www.commartrecovery.org - Events-Harvard Law School February 2008 and Sandholtz, supra, at p. 273.