

Foreword

The Harvard Law School Symposium, “Spoils of War v. Cultural Heritage: The Russian Cultural Property Law in Historical Context,” was convened in February 2008 to bring together legal, historical, and other academic experts who might shed some light on the issues raised by Russia’s 1998 law that essentially nationalized and declared Russian ownership of the great many works of art, books, and archives that were taken under orders by the Red Army to the Soviet Union at the end of World War II. The symposium was jointly sponsored by the Commission for Art Recovery, the Foundation for International Cultural Diplomacy, the Harvard Law School Arts and Literature Law Society, the Harvard Law School European Law Research Center, and the Davis Center for Russian and Eurasian Studies of Harvard University.

This volume is based, in large measure, on presentations made at that symposium. Many of the articles, even if not always explicitly, contain an easily understood and accurate overview of international law as of 1945 involving the unilateral seizure of the war trophies as “compensation” for cultural losses. At stake was the legal concept of “restitution in kind” of cultural valuables after armed conflict, as understood by lawyers and historians in Western Europe and the United States of America. We now learn that the victorious Allies discussed the concept during the immediate postwar years but could never enact a viable procedure in Germany to put the concept in operation.

There emerges a consensus from these articles that, at the end of World War II, there was no law or rule that permitted states unilaterally to effect a general program of restitution in kind—“to take from a defeated enemy replacements for cultural and artistic valuables lost or destroyed by that enemy in the course of the war,” so well expressed in the opening article in this issue by Wayne Sandholtz. Nor was there a right to confiscate “enemy” cultural property as reparation for damage and destruction to cultural or other property of states that prevail after armed conflict. Nor was there any condoning of the seizure of cultural “trophy” or “spoils of war”!

Consequently, the assertion by the Soviet Union and later the Russian Federation of a right to “compensatory restitution” (seemingly a blend of the concepts of restitution in kind and reparation for war losses) is determined to have been a post facto domestic political concept in Russia, not a principle of international law.

The Soviet Union effected widespread confiscation of cultural property in territories occupied by the Red Army. It did not account either for what it acquired or for its own losses that might justify "compensatory restitution" in the language of the Russian legislation that eventually would declare Russia's right to ownership of such property. We learn from history that much of this property was taken by "trophy brigades" on government orders and that the existence of the trophies was a state secret until unauthorized disclosure was made a half century after the confiscation. It was only in 1998 that the concept of compensatory restitution was put forward for the first time, in a federal law of the Russian Federation that asserted Russian ownership of all of the government-authorized confiscated property that remained on the territory of the Russian Federation.

How the 1998 Russian law, purportedly based on Allied agreements, treaties, and customary international law, could apply to cultural property that Nazi Germany had first confiscated either from Soviet allies or from victims of the Holocaust (genocide) has never been addressed. While the 1998 Russian law pays lip service to the possibility that some of this property might be returned, no outright restitution to victims has in fact occurred. One case of the return of archives as "family heirlooms" took place, but the recipient effectively had to purchase the valuables in exchange; a sale is hardly restitution. In addition to a great many works of art, vast collections of looted books and archives remain in Russia, often without catalog or only minimal description. In the case of books, many of the millions have hitherto found no use in Russia, and only recently have there been a few notable attempts to identify major collections of provenance, following revelations of scandalous violations of minimal preservation standards. More was done to identify the provenance of captured archives and manuscript treasures, but again often with less than adequate description, while many files representing Holocaust victims remain hostage in Moscow.

At issue today are three main categories of cultural property, some of it taken originally by the Nazis during World War II: (1) property taken from victims of racial and religious persecution; (2) objects taken from museums, libraries, and archives of countries that were allies of the Soviet Union or that fought against Germany, or within Germany against the Nazis; and (3) postwar seizures from wartime enemies of the Soviet Union, especially, Hungary, Romania, and Germany.

An attempt was made, unsuccessfully, to elicit serious Russian participation in the Harvard Symposium. Perhaps the publication of this volume will elicit an authoritative Russian response, which would certainly be welcome and, hopefully, based on international law and history rather than political concepts.

Whether or not a critical response from Russia is forthcoming, however, there remains the question of how to resolve the lingering dispute or, more accurately, the future ownership, control, and use of cultural property now in Russian possession. In a speech to the 1998 Washington Conference on Holocaust-Era Assets, Ambassador Ronald S. Lauder termed those objects "the last prisoners of World War II," echoing words used three years earlier by Russian Minister of Culture

Evgenii Sidorov at the opening of the first exhibition of the long-hidden Koenigs Collection of Master Drawings from the Netherlands at the Pushkin Museum in Moscow in October 1995.

It is not to be expected that there will ever be an agreement on the claimed right of the Soviet Union/Russia to keep the confiscated property that is still in Russian possession some 65 years after Nazi Germany was defeated. There is no court or neutral authority that will decide whether or not the Russian claim is in compliance with international law or that will change the status quo.

Certainly, we would hope, that the property of acknowledged Holocaust victims or their heirs should be returned forthwith without demands for exchange or compensation. The Russian Federation has signed international agreements, such as the Washington Principles (1998) and most recently the Terezin Declaration (2009), advocating such a goal. The Russian Federation and the Soviet Union before it have long upheld the protection of private property from wartime seizure, as legally specified by the Hague Convention as early as 1907, of which the Russian Empire was one of the instigators.

That declared immunity from seizure for cultural property in wartime in the Hague Convention did not prevent seizures during subsequent wars or their aftermath. We all recognize the horrendous destruction of lives and the barbaric destruction and seizure of cultural property on the Eastern Front during the Second World War. But we also know there were vast destruction and seizure of cultural property elsewhere in Europe, some of which is also now in Russia.

A political solution, achieved through cultural diplomacy, might be possible—at least with respect to some of the contested property owned by former enemy states or their major public museums. Perhaps the concepts of ownership or legal rights should be disregarded so that states could focus on concepts of shared use and display. As Professor emeritus Wolfgang Eichwede of Bremen University suggests in our concluding article from Germany, creative, nonconfrontational thinking is called for, not accusations and recrimination. One hopes that everyone ought to be able to agree that cultural property should not be victim to partisan politics and that essential justice as well as preservation of cultural heritage be achieved.

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