

Restitution by Russia of Works of Art Removed from German Territory at the End of the Second World War

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I. Introduction

Towards the end of the Second World War, during the massive bombardments of German cities, priceless art treasures were destroyed. The more precious works from the more important museums, however, and the art treasures which had been plundered from other European countries during six years of war,¹ had been preventively put in safety in depots throughout Germany, which were mostly unused mines or specially-built bunkers.

At the moment of the German surrender, all cultural property found in the various depots was subjected to strict control by the occupying forces. In particular, the depots situated in the American-controlled zone were entrusted to a special military administration, the MFA & A (Monuments, Fine Arts and Archives).² The property whose origin was not certain was taken to special Central Fine Art Collecting Points, the most important of which was established in the ex-Führerbau in Munich, in order to ascertain its origin and ensure its restitution to the legitimate owners.³

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1 The euphemisms '*Kunstschurzableitung*' and '*Sicherstellung*', typical of the Nazi's perversion of language, do nothing to change the facts. See De Jaeger, *The Linz File, Hitler's Plunder of Europe's Art* (1981); Kurz, *Kunstraub im Europa 1938-1945* (1989); Nicholas, *The Rape of Europe* (1994). The removed cultural property was located in more than 1,800 depots, 80% of which were found in the future US-occupied zone.

2 See Hall, 'The Recovery of Cultural Objects Dispersed During World War II', *XXV Department of State Bulletin* (1951) 337 et seq.

3 See *US Military Government Regulations*, Title 18, Part 4 (4 October 1948): 'Protection and Control of Cultural Materials'; Sect. C 'Collecting Points and Depots', Sect. E 'Transfer of German-Owned Cultural Materials to German Custody'. The cultural property confiscated abroad was returned to its legitimate owners, or in the case of death without heirs, to his/her State of citizenship. The property which had been paid for by the Germans was returned to the owners where there was evidence of a forced sale, and, under the condition of the restitution, where possible, of the price. The Central Collecting Point of Munich, from 1946 to 1952, the year of its closure, provided for the restitution of 48,751 objects to legitimate foreign owners. The remaining objects were handed over to the Austrian Government, which deposited them in the Mauerbach

In the first months of occupation the controls by the Allies were not able to prevent the theft and plunder of works of art, even of museum provenance. Two cases are particularly noteworthy. On 27 June 1945, 12 paintings which were part of the art collection of the City of Weimar, disappeared from the Schwarzburg fortress in Rudolstadt, Thuringia (then still occupied by American troops), where they had been temporarily stored. In 1966, two of the more precious paintings, a pair of portraits by Dürer, came to light in the private collection of a New York lawyer, Elicofon, who declared to have bought them *bona fide* from a young soldier for 450 dollars in 1946. The complex and protracted controversy between Elicofon and the *Kunstsammlungen zu Weimar*⁴ was settled by the New York Court of Appeals, on 5 May 1982, which ordered the restitution of the paintings to the city of Weimar.⁵

Only in 1989 did the treasure of the Quedlinburg Cathedral, in Thuringia, reappear in Texas, in the inheritance of a former Lieutenant Meador. The treasure had been transported to a secret depot in the last months of the war, and shortly after 8 May 1945, all traces of it had been lost. It was finally reacquired from the heirs for a sum of three million dollars, by the *Kulturstiftung der Länder*, an institution created in 1988 by the *Länder* Governments for the recovery of German cultural property of special value.⁶

These examples show the opportunity to methodically distinguish the cases of theft of German works of art by private citizens or even individual members of the occupying armed forces, from those of officially ordered removal.

The cases of the former type give rise, apart from the obvious question of the international responsibility of a State for its armed forces and individuals,⁷ to complex problems of international private law, such as the time factor in ascertaining the applicable conflict rule, the opportunity of a special link with the *lex rei sitae* in force at the time of the removal of the property or the admission of the

Convent near Vienna. See Hall, 'The Transfer of Residual Works of Art from Munich to Austria', *XI College Art Journal* (1952) 194 et seq. On the search for the legitimate owners in the last ten years, see Seidl-Hohenveldern, 'Kunstraub im Krieg', *Festschrift Trinkner* (1995) 52 et seq. Around 20,000 objects which had been legally bought abroad by Hitler's emissaries for the future Linz Museum, or by Göring for his private collection in his Karinhall residence, remained the property of the Federal Government, which shared them with the Government of Bavaria. The majority are now displayed in public buildings, mostly embassies, see Kurz, *supra* note 1.

4 The case was initiated in 1972 by the German Federal Government, representing the interests of Germany as a whole (a quiescent subject in international law since 1945), and after the recognition of the DDR by the United States in 1974, was continued by the *Kunstsammlungen zu Weimar*.

5 The judgment of the Eastern District Court of New York of 12 June 1981, is reproduced in 20 *ILM* (1981) 1122 et seq., and that of the Court of Appeals in 21 *ILM* (1982) 773 et seq. On the case, see Killelea, 'Property Law: International Stolen Art', 23 *Harv. Int'l L.J.* (1982) 466 et seq.; Burks, 'Kunstsammlungen zu Weimar v. Elicofon: Theft of Priceless Art Treasures Gives Rise to Protracted International Legal Battle', 19 *Texas Int'l Law Journal* (1984) 189 et seq.; Drobnig, 'Amerikanische Gerichte zum internationalen Sachenrecht auf dem Hintergrund der Teilung Deutschlands', 4 *Praxis des internat. Privat- und Verfahrensrechts* (1984) 61 et seq.

6 Compare Von Schorlemer, *Kulturgüterschutz im Völkerrecht* (1993) 404 and notes 73-4. See also *Die Zeit*, No. 20, 11 May 1990; *FAZ*, 9 July 1990; *Der Spiegel*, 21 January 1991, at 180 et seq.

7 The question of the objective responsibility of the USA for the theft of the paintings from the Weimar Gallery, according to Article 3 of the 1907 Fourth Hague Convention on the Rules of War, was not tackled by the judges in the *Elicofon* case because it was not clear if the paintings were stolen by US military personnel or by a German citizen, a certain Faßbender.

original owner State to bring actions *in rem* based upon its rules of public law.⁸ The latter cases are to be settled exclusively by public international law rules, including such topics as the allowing of the retention of property with the aim of providing war reparation, payment of damages or restitution in kind, adverse possession in the absence of proper title, or inversely, configuration of the fact as an international wrong, and finally extinctive prescription in the case of claims not made within a reasonable period of time.

II. The State of International Law in 1945

A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.⁹

This principle of inter-temporal law leads us to examine the state of international law at the end of the Second World War, in order to verify the existence of a rule which authorized or otherwise the removal of works of art from the vanquished country as a form of reparation.

Article 56 of the Laws and Customs of Land Warfare, encompassed in the Fourth Hague Convention of 1907, stated that all property, including State property, dedicated to, among other things, 'education, the arts and sciences', was to be treated as private property, and hence neither confiscable (Article 46) nor subject to plunder (Article 47) by the occupying forces.¹⁰ Therefore, this provision had the effect of excluding the legitimacy of so called 'war booty', even if scholarship on the issue is not unanimous in regarding the provision as codifying customary international law.¹¹

8 This type of problem is extensively dealt with in my article 'The Fate of the Koenigs Collection', in print in *International Journal of Cultural Property* (1996).

9 *Island of Palmas case (The Netherlands v. USA, 1928)*, 2 *UN Report of Int'l Arbitration Awards (RIAA)* at 829 et seq., 845.

10 Art. 56 reads: '1. The property of communes, of institutions devoted to religious worship, charity, and instructions, or to arts and sciences, even when belonging to the government, shall be treated as private property. 2. Any seizure, destruction, or intentional injury of such institutions, or of historical monuments, or works of art or science is prohibited and should be prosecuted.'

11 On the legitimacy of taking works of art as war booty from ancient times at least until the 18th century, see in general Frigo, *La protezione dei beni culturali nel diritto internazionale* (1986) 61 et seq.; Byrne Sutton, *Le trafic international des biens culturels sous l'angle de leur revendication par l'Etat d'origine* (1988) 23 et seq.; Panzera, *La tutela internazionale dei beni culturali in tempo di guerra* (1993) 46 et seq. Of a contrary opinion is Engstler, *Die territoriale Bindung von Kulturgütern im Rahmen des Völkerrechts* (1964) 91, for whom the idea of the legitimacy of plundering works of art had already been abandoned in the 18th century. However, it has been argued that this was merely the expression of 'personal courtesy supposed to be due from one prince to another... The precedents afforded by the eighteenth century are consequently scarcely in point' (Hall, quoted by Fiedler, 'Zur Entwicklung des Völkergewohnheitsrechts im Bereich des internationalen Kulturgüterschutzes', *Festschrift Doehring* (1989) 199 et seq., 212). Scholarship is divided about the period in which the customary rules banning war booty were formed. Doehring, 'War die Universität Heidelberg verpflichtet, die Bibliotheca Palatina dem Vatikan zurückzugeben?', 39 *Ruperto Carola* (1987) 138 et seq., 139, suggests the end of the 19th century (Article 56 of the Land Warfare Regulations would thus not have had a codifying character), while Fiedler, 'Zur Entwicklung...' at 217 tends to place the birth of customary rules protecting cultural property at the beginning of the 19th century. On this point see also Seidl-Hohenveldern,

Even leaving aside this much-debated question, in the period immediately following the Second World War, of the applicability of the Hague Regulations in the case of unconditional surrender and the consequent collapse of government,¹² it is certain that the provisions of the Hague Regulations did not resolve, nor could they have resolved, the problem of whether the cultural property of the vanquished country, could form part of claims for reparations, either within or outside the context of peace treaties.¹³

The treaties which put an end to the First World War threw no light on this question. The Treaty of Versailles contained few articles which imposed obligations on Germany to restitution, hand over, or replace specifically indicated cultural property.

Of the three relevant Articles,¹⁴ only one seems to be connected with the issue of reparations. Article 247 established, in the first paragraph, that Germany should

'Kunstraub im Krieg', *supra* note 3, at 55. The best interpretation is that which traces the awareness of the unlawfulness of taking works of art as war booty back to the end of the Napoleonic Wars. Well known is Canova's contribution as Pope Pious VII's emissary for the recovery of the Vatican's works of art in Paris in 1815, and his sentence: 'Everything which regards the culture of art and science is above all rights of war and victory', see Jayme, 'Antonio Canova, la repubblica delle arti e il diritto internazionale', *RDI* (1992) 889 et seq.

12 See the Potsdam Declaration of 5 June 1945 (UNTS 68, 190 et seq.), by which the four Allied powers 'hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any State, municipal or local government or authority'; see Kelsen, 'The Legal Statute of Germany According to the Declaration of Berlin', *AJIL* (1945) 518 et seq., and recently Ando, *Surrender, Occupation and Private Property in International Law* (1991) 72 et seq. The American Military Tribunal III in Nuremberg held that the Allied Powers in Germany were not bound by the Hague Regulations, see *USA v. Josef Altstoetter and Others*, 3 December 1947, repr. in *Annual Digest* (1947) case 126, at 278. See also the analogous British position in *Dalldorf and Others v. Director of Prosecutions*, British Zone of Germany, Control Commission, Court of Appeals, 31 December 1949, repr. in *Annual Digest* (1949) case 159, at 435. Not surprisingly the majority of German scholarship insists on the application of the Hague Regulations: see Stoedter, *Deutschlands Rechtslage* (1948) 121 et seq., at 152 et seq.; Schweisfurth, 'Germany, Occupation After World War II', 3 *EPIL* 196 et seq. and more recently Fiedler, 'Warum wird um die Kriegsbeute noch immer gestritten', *FAZ*, 4 November 1994, at 42; *id.*, *Kulturgüter als Kriegsbeute?* (1995) 18 et seq. The best argument seems to be that, according to which the Hague rules were not originally designed for cases of 'postsurrender occupations'. However the experiences of war, especially the events after the Second World War, led to the reformulation of the rules, in the 4th 1949 Geneva Convention on the protection of civilians in wartime, which are now regarded as being applicable in all cases of occupation; see Benvenuti, *The International Law of Occupation* (1993) 96. As for the question whether the Hague Regulations applied during the Second World War, in spite of the 'si omnes' rule and because of the non ratification of some belligerents, notably the USSR, the Nuremberg Military Tribunal judged that the Hague Rules were already in 1939 part of the customary law of warfare (IMT, I, at 267).

13 It is interesting to note that the Lieber Code of 1863, while it unconditionally protected works of art during an armed conflict (Art. 35: 'works of art ... must be secured against all avoidable injury'), expressly consented to the utilization of cultural property as war reparations. Art. 36 stated: 'If such works of art ... belonging to a hostile nation or government can be removed without injury, the ruler of the conquering State or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.' For a curious and significant testimony of how the idea of 'spoils of war' still endured after the First World War, even among men of culture, see a letter by Proust (*Corresp. générale IV*, at 82), which reads: 'Puis-je dire que si on demande aux Austro-allemands des tableaux, je préférerais à quelques Watteau de plus, le Vermeer de Dresde et le Vermeer de Vienne?'

14 Article 245 stated that 'the trophies, archives, historical souvenirs or works of art carried away from France by the German authorities in the course of the War 1870-1871 and the First World War' would be returned on the basis of a list drawn up by the French Government. Article 246 concerned the restitution of two objects, whose value was primarily of a religious-historical nature.

provide the University of Leuven with 'manuscripts, incunabula, printed books, maps and objects of collection corresponding in number and value to those destroyed in the burning by Germany of the Library'. The second paragraph of Article 247 added that Germany, within six months of the Treaty coming into effect, should hand over to Belgium the eight lateral panels of the polyptych of the *Mystic Lamb* by the van Eyck brothers, kept in the Bode Museum in Berlin, and which were originally placed in the church of St. Bavo in Ghent, as well as other panels of the triptych of the *Last Supper* by Dierick Bouts, originally placed in the church of St. Peter in Leuven, two of which were kept in the Bode Museum and two in the Alte Pinakothek in Munich.

The first clause gives an example of replacement in kind; the second an example of a specific obligation of reparation. The altar pieces in question had in fact been legitimately purchased in the first half of the 19th century and kept for some time in the museums of Berlin and Munich.¹⁵ It is evident that Article 247 was intended to provide relief for the serious losses suffered by Belgium as a result of German aggression. The phrase 'in order to enable Belgium to reconstitute two great artistic works', inserted almost under the guise of justification in Article 247(2), conveys a further aspect, which was completely innovative in that period and is of particular interest today, that is, the return of works of art to the country of origin with the objective of reintegrating its national historical and artistic heritage.

Also in the Peace Treaties concluded following the Second World War, the question of the admission of the handing over of cultural property as a form of reparation did not receive a unanimous response.

In the Peace Treaties with Italy (Article 75(9)), Hungary (Article 24(3)) and Bulgaria (Article 22(3)), an identical rule exists which provides for the obligation of restitution in kind¹⁶ to the countries of origin of objects of artistic, historical or archaeological value, illegally removed during the war, on the condition that objects which are comparable in value or characteristic are present in the country obliged to

The first was the presumedly original copy of the Koran belonging to Caliph Osman, removed from Medina by the Turkish authorities and given to ex-Emperor Wilhelm II, to be returned to the King of Hedioz. The German delegation objected, however, that the Koran in question had never been given to the Emperor. The other object to be returned to the British Government was the skull of Sultan Mkwawa, chief of the Wahibi tribe, who were hostile to the German colonisers. The Germans were accused of having removed the relic. Also in this case the German delegation objected that the skull had been substituted with another by Mkwawa's followers, when it was still in Africa (see Engstler, *supra* note 11, at 127).

15 See de Visscher, 'La protection internationale des objets d'art et des monuments historiques', XVI *Revue du droit internationale et de législation comparée* (1935) 33 et seq. The lateral panels of the *Mystic Lamb* had been sold to King Fredrick William III by the English collector Solly for 400,000 florins in 1821.

16 The formula 'restitution in kind' has entered into current diplomatic language to designate that which would be more correctly labelled as 'replacement in kind' or 'restitution by replacement', and is thus employed in the present study. It is noteworthy, however, that the formula 'restitution in kind' is also used by the International Law Commission in Art. 7 of the Second Part of its Draft Articles on States Responsibility, in the sense of '*naturalis restitutio*' or '*restitutio in integrum*'. Its special rapporteur Arangio-Ruiz has preferred to avoid the current term of *restitutio in integrum*, given the different meanings which this has in Roman, civil and common law, I Yearbook ILC (1988) 2227 meet., para. 61.

restitute.¹⁷ There is no analogous regulation, however, in the Peace Treaties with Romania and Finland, which limit themselves to imposing a general obligation of restitution of goods which had been illegally removed (Articles 23 and 24 respectively).

It is not easy to place the regulations concerning the restitution in kind of cultural properties within the process of reparations. It is clear that, if the general aim of reparations is to eliminate the consequences of a wrong, in the case of looting of cultural property, reparation should involve its restitution.¹⁸ In the case of the impossibility of restitution, either because the property no longer exists or is missing, there is a dilemma. Is it reasonable to ask for another object which, even if it is equal in value to the lost one, will never replace it in its uniqueness? It is certainly arguable that restitution in kind is not suitable for such objects. On the other hand, is it reasonable to provide for financial compensation for the loss of an object of often priceless value, whose cultural value does not correspond to the mere commercial one? Restitution in kind, with its vague scent of vengeance, may be considered as the only kind of reparation which more fully satisfies the needs of the victim State.

Once having accepted restitution in kind as being applicable also to cultural property, as is the case in many post-war Peace Treaties, there remain some difficulties of interpretation. The 'comparability' criterion is not very clear: is it only

17 The text of Article 75(9) of the Peace Treaty with Italy (Paris, 10 February 1947, 49 UNTS 3) reads: 'If, in particular cases, it is impossible for Italy to make restitution of objects of artistic, historical or archaeological value, belonging to the cultural heritage of the United Nation from whose territory such objects were removed by force or duress by Italian forces, authorities or nationals, Italy shall transfer to the United Nation concerned objects of the same kind as, and of approximately equivalent value to, the objects removed, insofar as such objects are obtainable in Italy.' On Article 75, see Ruini, 'Rilievi sulla interpretazione dell'art. 75 del Trattato di pace', *Foro padano* (1956) 940 et seq. See also Article 12 of the Peace Treaty relating to the restitution of cultural property removed by Italy between 4 November 1918 and 2 March 1924, from the territories assigned to Yugoslavia under the terms of the Treaties of Rapallo (12 November 1920) and Rome (27 January 1924), and in general to the restitution of all public property removed after 4 November 1918, from the territories ceded to Yugoslavia by the Peace Treaty. By the way Italy was allowed by the Allies to recover many items from the Central Collecting Points even before the entry into force of the Peace Treaty. For its part the Italian Government set up a Restitution Commission in order to recover the many works of art removed from Italy by the Nazis especially after 8 September 1943. As chairman of the Commission was appointed Rodolfo Siviero, a fascinating blend of art historian, diplomat, secret agent and *homme des lettres*. On 27 February 1953 an agreement was reached between De Gasperi and Adenauer, by which Italy committed itself to reconstitute to the German Government the German Culture Institutes and some historical libraries sited in Italy (as the Hertziana Library in Rome) on the condition that they not be removed from Italy, in exchange for the German pledge to reconstitute some works of art allegedly purchased by or presented to high Nazi leaders in the years of the alliance with fascist Italy. See Siviero, *L'Arte e il Nazismo* (1984) 171 et seq. The Restitution Delegation was dissolved in 1987 (Siviero had died in 1983), but a Committee was nominated in 1994 by the Italian Foreign Ministry with the aim of tracing the fate of the 1570 works of art still missing (among which was a faun's mask by the young Michelangelo), which had been recorded in a special dossier by Siviero in the seventies.

18 I do not wish here to enter into a diatribe on whether restitution means re-establishment of the pre-existing situation or re-establishment of the situation which would have existed if the wrong had not been committed (see II Yearbook ILC (1989) Part Two, para. 280 et seq.), since in the case of restitution under examination here, the question of *lucrum cessans* is not very relevant.

a general definition, or must the cultural item to be handed over have a connection with the claimant country, similar to that of the country of origin?¹⁹

An argument has been made which attributes an exceptional status to restitution in kind, by making a conceptual distinction between Article 247 of the Treaty of Versailles, which only concerned property destroyed during the hostilities, and the articles concerning restitution in kind in the second post-war peace treaties, which more generally concerned removed property whose restitution was found to be impossible.²⁰

This distinction is artful. It is, in fact, restitution in kind in both cases: the only difference is the extension of the rule.²¹ This also means that it is impossible to extrapolate a general concept of restitution in kind from the relevant regulations of the 1947 Peace Treaties. In conclusion, the fact that restitution in kind for cultural property has been provided for in some, but not all, of the post-war Peace Treaties,²² the indeterminateness of its extent, plus the different attitudes adopted by the Allies in the years 1945-1946 regarding the soundness of using German cultural property for restitution in kind²³ are further elements that demonstrate how the concept did not reach at the time a clear customary law status.

19 Thirty years ago Engstler, *supra* note 11, at 163, sustained the second theory, on the basis of some elements which are inferable from the text of the relevant Peace Treaty articles. The aim of the rules is to integrate 'the cultural heritage of the United Nation from whose territory such objects were removed', which is possible only where the substituted property has a cultural significance which is equal to that of the original, either because they come from the same cultural area or because they are otherwise linked to the requesting country.

More recently Turner, 'Die Zuordnung beweglicher Kulturgüter im Völkerrecht', in Fiedler (ed.), *Internationaler Kulturgüterschutz und deutsche Frage* (1991) 65, expressed scepticism about the soundness of this interpretation. The need for a territorial-cultural link could not be directly drawn from the formula of 'cultural heritage', and besides, Arts. 46 and 56 of the 4th 1907 Hague Convention protect cultural property in itself, without making distinctions based on the particular link with the country in question. The same is true with regard to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, whose Art. 1 extends its protection to all cultural property 'irrespective of its place of origin and the present owner'. For this author the obligation of restitution in kind could only be limited by balancing the cultural interests of the two countries involved. Such criticism is in part pertinent. As a matter of fact, the textual references ('belonging to the cultural heritage', 'insofar as such objects are obtainable'), are not such as to permit only one interpretation. However, Turner's research of an alternative criterion to limit the purport of the obligation does not fully convince.

20 Engstler, *supra* note 11, at 164.

21 See the proposal of the Greek Government to extend restitution in kind in the Peace Treaty with Italy also to cases of destruction or damage 'à la suite d'opérations de guerre ou d'autres actes des forces ou Autorités italiennes', see Vedovato, *Il Trattato di Pace con l'Italia* (1947) 140.

22 See Turner, *supra* note 19, at 64, according to whom at the end of the Second World War the concept of restitution in kind was imposed in significant measure.

23 Beyond providing the aforementioned necessary security measures, the United States Government had previously thought of exploiting German cultural property, not only for restitution in kind, but also to satisfy its own demands for reparations. In the Draft Agreement on Principles Governing Restitution of Cultural Property, presented by the United States Government to the European Advisory Commission in London, on June 1945, Article 8 stated: 'If works of art, books, historic or artistic archives and other artistic or historic property known to have been looted cannot be found within a period of two years after the unconditional surrender or defeat of Germany, there shall be an obligation on Germany to replace such articles by comparable objects from German public or private collections.'

The severity of the provision was hardly softened by the rule which stated: 'Replacement shall be so limited as not altogether to deprive Germany of artistic or historic materials' (Art. 11). As for the question of reparations, Art. 10 of the United States draft suspended the utilization of German

III. The Removal of German Cultural Property by the Soviet Union

During the Nazi aggression against the Soviet Union, many works of art and millions of books were plundered, burnt and destroyed, with the more or less explicit aim of extinguishing the cultural identity of the population of the Soviet Union, considered by Hitler to be *Untermenschen*. The plunder of works of art was performed mainly by units of the SS, using methods so brutal that they draw criticism from Reichsleiter Rosenberg himself. Rosenberg was head of the *Einsatzstab*, the office responsible for the transportation of cultural property from the occupied countries to Germany, in order to 'put them in a safe place'.²⁴

It is an open secret that during the last weeks of fighting special commissions of the Red Army's experts, whose official mission was to look for the cultural property stolen by the Nazis, extended their activity also to the removal and transport to the Soviet Union of German cultural property. Large doubts have always remained over the quantity of such property. For almost fifty years, it was not even known if it had been destroyed, or if it was kept in secret depots in the Soviet Union, although Soviet Governments repeatedly denied such rumours. It was during the last years of the Gorbachev Government, and even more so after the disintegration of the Soviet

cultural property for such purpose 'pending the determination of claims for restitution or replacement in kind'. However, notwithstanding the protests of the US art historians employed in the MFA & A in Germany, the order was made to move 202 works of art from Berlin museums to the United States.

As for the policy of restitution in kind, the USA, against the advice of the French Government and of other minor Allies, sustained a restricted application, limited to properties of great value and rarities, in line with the policy already followed by Great Britain and the Soviet Union. A first confirmation of such orientation was given by the Allied Control Council Directive of 21 January 1946, on the definition of restitution, whose paragraph 3 allowed the restitution in kind only for property of particular importance (unique objects), with decisions to be made on a case-by-case basis. German translation in Schmoller, Maier, Tobler, *Handbuch des Besatzungsrechts* (1957-1) 52, at 23: 'Bei Gütern von einmaligem Charakter, deren Rücklieferung unmöglich ist, wird eine besondere Anweisung die Art von Gütern festsetzen, bei denen ein Ersatz in Frage kommt, die Art dieses Ersatzes und die Bedingungen, unter denen diese Güter durch gleichwertige Gegenstände ersetzt werden können.' The US proposal to limit restitution in kind to five categories of cultural property of exceptional value, was discussed and approved in its outlines during the session of the Allied Control Council on 17 April 1946. However, no formal decision was reached, and restitution in kind was never effected, since the USSR refused to give any indication on German cultural property in its occupation zone that could be used to this aim. Eventually the USA abandoned the project, by refusing to help the technical commissions arranged for the purpose by the English and French. See *Directive to Commander in Chief of US Forces of Occupation Regarding the Military Government of Germany*, JCS 1779, 11 July 1947, V, 17(a): 'You will not consent to any extensive program for the replacement of looted or displaced property which has been destroyed or cannot be located, whenever such replacement can be accomplished only at the expense of ... the cultural heritage of the German people', doc. published in *Germany 1947-1949. The Story in Documents*, Dep. of State Publ. 3556 (1955) 33 et seq., quoted in Engstler, *supra* note 11, at 164. The 202 works of art from Berlin museums, after an itinerant exhibition in various museums of the USA, were restituted to Germany in May 1949.

24 Letter from Rosenberg to Hitler of 26 October 1941, quoted in Kurz, *supra* note 1, at 306 et seq. Rosenberg feared above all the 'competition' of other Nazi leaders and of the Supreme Command of the Wehrmacht; see the report of Reichskommissar Kube to Rosenberg on 29 September 1941, where it stated that the value of cultural property destroyed in Belarus alone amounted to millions of marks; see Davidson, *The Trial of the Germans* (1966) 139.

Union, that the art treasures removed from Germany were 'found' in the stores of Russian museums.²⁵

As for the German cultural property whose presence in the Soviet Union had been known about since 1945, the official theory sustained by the various Soviet Governments, especially after the creation of the DDR, was that removal had been necessary to save the works of art from the destruction of the war. This version of the facts does not fully correspond to the truth, since, at the time of their evacuation Germany had already surrendered. Neither is it easily compatible with the name 'Trophy Commissions', which was given to the specialized sections within the Red Army entrusted with the task of organizing the evacuation of art treasures.²⁶

This is the case, for instance, of hundreds of masterpieces from the Dresden Gemäldegalerie, and of the treasure of the Saxon Crown of the renowned Grüne Gewölbe in Dresden, found by the Soviets in the sandstone cave of Groß Cotta near Pirna and in the calcareous cave of Pockau-Lengefeld, 80 kilometres south of Meißen, then taken to the Pillnitz castle near Dresden between 9 and 28 July 1945, and from there transported to the Soviet Union at the end of July 1945. After some years, during which nothing was known of their fate, the paintings were given back, restored, in 1955, as a 'friendly gesture of the Soviet people to the people of Democratic Germany'.²⁷ The jewels of the Grünen Gewölbes found their way back in November 1958, only after the declaration of the USSR Council of Ministers, of 7 January 1957 on the 'restitution of cultural property on reciprocal basis'.²⁸

The German Government has now been trying to get the cultural property removed from Germany at the end of the conflict back from Russia for almost five years.²⁹ Germany is asking for the restitution of almost 200,000 works of art, 2

- 25 Perhaps the most clamorous case was the 'rediscovery' of the treasure of Priamus, the collection of archaeological finds from Troy donated by Schliemann to Germany in 1881, and conserved in the Berliner Museum für Vor- und Frühgeschichte. It had been kept during the war in the anti-aircraft tower (Flakturm) at the Berlin Zoo, and by May 1945 all traces of it had been lost. On the various hypotheses advanced in the eighties about the hiding of the Treasure of Priamus and other works missing from Berlin museums, see Goldmann, Wermusch, *Vernichtet, verschollen, vermarktet* (1992) *passim*. In general Kühnel-Kuntze, 'Bergung-Evakuierung-Rückführung. Die Berliner Museen in den Jahren 1939-1959', *Jahrbuch Preußischer Kulturbesitz*, Sonderband 2 (2nd ed., 1984) 71 et seq.
- 26 On the documented cases of evacuation, see *Bonner Berichte aus Mittel- und Ostdeutschland. Die Verluste der öffentlichen Kunstsammlungen in Mittel- und Ostdeutschland 1943-1946*, published by the Bundesministerium für gesamtdeutsche Fragen (1954).
- 27 For an hagiographic version of the facts see Antonova, 'A Saga of Protection – Dresden's Old Masters at the Pushkin State Museum of Fine Arts, Moscow', in 37 *Museum* (1985) 175 et seq. Alexandra Irina Antonova has been the director of the Pushkin Museum of Moscow for many decades and had participated in 1945 in the placement of German art treasures in the stores of the Pushkin Museum. For years Antonova has categorically denied the existence of secret stores in her museum. Also faithful to the official Soviet version was the then director of the Gemäldegalerie of Dresden, R. Seydewitz, *Die Rettung der Dresdner Kunstschatze. Die große Freundschaftstat des Sowjetvolkes* (1958). A catalogue published in 1963 by the *Staatlichen Kunstsammlungen* concerning the war-related losses of the Gemäldegalerie listed 206 paintings as destroyed and 507 as still missing (of which only 44 have since been recovered).
- 28 See R. and M. Seydewitz, *Die Dresdner Kunstschatze. Zur Geschichte des Grünen Gewölbes und anderer Dresdner Kunstsammlungen* (1960). The documents relating to the restitution of the Dresden art treasures are quoted from Engstler, *supra* note 11, at 171.
- 29 Germany is not the only country asking Russia for the return of works of art. Of particular interest is the request by the Netherlands for the restitution of the famous Koenigs collection drawings,

million books and about 3 kilometres of files. Among them there are priceless objects such as the Treasure of Priamus, about 5,800 as yet not returned ancient volumes from the Gotha library, 362 drawings and prints from the Bremen Kunsthalle, the two examples of the Bible printed in 1454 by Gutenberg and belonging to the Leipzig University library, a conspicuous number of paintings, notable among which are the masterpieces of French impressionists and post-impressionists of the Krebs collection.

After a promising beginning, the negotiations reached a stalemate, due to the opposition of influential Russian political sectors, which are against any hypothesis of restitution. The Parliamentary Commission for Cultural Affairs invited the Government and the President not to return anything until the enactment of a federal law. The Russian Federal Council has worked out a draft law to define the legal status of the property in discussion, which would make any restitution to Germany practically impossible.³⁰ Article 9 of the Draft provides for an exception to the property right of the Russian Federation only as regards cultural items having ascertainably belonged to 'religious or charitable organizations' extraneous to militarism or nazism (fascism), or to individuals who had been dispossessed because of their active opposition to the Nazist (fascist) regime.

On 8 June 1995 the State Duma voted on the draft and failed to endorse it by only some thirty votes.

IV. Prospects for the Restitution of German Cultural Property: Extinction of the Right to Restitution?

The Moscow Treaty of 12 September 1990, on the Final Settlement with Respect to Germany,³¹ formally put an end to the consequences of the Second World War for Germany. Though not formally a peace treaty, the parties involved consider it as a valuable substitute. With the ratification of the treaty the Soviet Union implicitly and definitively renounced any claim against Germany for facts arising from the Second World War.

which were kept in the Boymans Museum in Rotterdam until 1941, when they were bought by Hitler, and later disappeared from Weesenstein Castle near Dresden in May 1945. On this issue see my article, 'The Fate of the Koenigs Collection', *supra* note 8. Hungary also concluded an agreement with the Russian Federation in November 1992, for the reciprocal restitution of cultural property removed during or after the Second World War, see the 1993 *Official Hungarian Law Gazette*, at 7351.

30 This position was confirmed by the 'official' Russian participants (among whom were the interim Minister of Culture Schwydkoj and Irina Antonova) attending the symposium 'The Spoils of War', on the invitation of the 'Bard Graduate Center for Studies in the Decorative Arts', held in New York from 19 to 21 January 1995. See Antonova, 'We Don't Owe Anybody Anything', *The Art Newspaper* No. 40 (1994) 7 (English translation of an article published in the *Nadavya Nazavinaya Gazeta* on 5 May 1994). The intransigence of the director of the Pushkin Museum is also apparent from the title chosen for the exhibition of some of the paintings removed from Germany in 1945 actually on show in Moscow, 'Twice Saved'.

31 II BGBI. (1990) 1317, reproduced in 19 ILM (1990) 1186 et seq.; *ZaöRV* (1991) 494 et seq.

In the new spirit of collaboration and friendship between Germany and the Soviet Union, due to the policies of President Gorbachev, it was finally possible to also face the delicate issue of German cultural property transported to the Soviet Union at the end of the conflict. In the Treaty of Good Neighbourhood and Cooperation between Germany and the Soviet Union of 9 November 1990, Article 16(2) states that the parties 'agree that lost or unlawfully transferred art treasures which are located in their territory will be returned to their owners or their successors'.³²

After the disintegration of the Soviet Union, the German and Russian Governments concluded a new agreement of cultural cooperation, on 16 December 1992, in which Article 15 confirmed the commitment to the restitution of cultural property which was 'lost' or 'unlawfully brought into the territory'.³³

Following the cooperation treaty of 1990 the two Governments each established a national restitution commission. During the first joint session of the bilateral Commission, which took place in Moscow on 23-24 March 1994, the German delegation became aware of the new unexpected interpretation given to Article 16 of the cooperation treaty by the Russian delegation. The property removed soon after the end of the Second World War by the Trophy Commissions would not in fact be considered 'lost', since the Soviet authorities knew of its location in the stores of State museums. Nor would it be considered 'unlawfully transferred', since its removal to the Soviet Union was done for security reasons, while waiting for a definition of its status. The formula adopted by Article 16 would thus refer only to the property which was effectively lost or stolen, not necessarily as a consequence of the events of war.³⁴

Only by overcoming some resistance from the Russian side did the German delegation manage to include in the session's protocol a passage which specifies the objective of the Commission's activity as the restitution of cultural property illegally withdrawn during or after the Second World War. Since then the negotiations seem to have come to a standstill.

At a still unofficial level, many arguments have been advanced in Russia which are in opposition to the unconditional restitution of cultural property to Germany. Before proceeding with this study, it is important to clarify one aspect. Among the works of art kept in Russia there are many that belonged to private collections. The most important is the Krebs collection, which before the war was the biggest

32 See 30 ILM (1991) 504 et seq. The German text of Art. 16 reads: 'Die Bundesrepublik Deutschland und die Union der Sozialistischen Sowjetrepubliken werden sich für die Erhaltung der in ihrem Gebiet befindlichen Kulturgüter der anderen Seite einsetzen. Sie stimmen darin überein, daß verschollene oder unrechtmäßig verbrachte Kunstschätze, die sich auf ihrem Territorium befinden, an den Eigentümer oder seinen Rechtsnachfolger zurückgegeben werden.' II BGBl. (1991) 798.

33 II BGBl. (1993) 1256.

34 The Russian position is reported (and criticized in the light of Art. 31 of the Vienna Convention on the Laws of Treaties, 23 May 1969) in *Die vertraglichen Vereinbarungen zwischen Deutschland und Russland zur Rückführung kriegsbedingt verbrachter Kulturgüter – Die Rechtslage aus deutscher Sicht*, Veröffentlichung des Ausw. Amtes (1994) paras. 13-22.

collection of paintings (about 100) of French impressionism and post-impressionism in Germany. The majority of these paintings were exhibited for the first time in the Hermitage from March to November 1995. In the Hermitage there are also six paintings (among which is the famous *Place de la Concorde* by Degas), which belonged to the Gerstenberg-Scharf collection and others formerly in the Siemens collection.

It appears that, the current debate in Russia is not concerned with the public or private character of the property. The distinction is, however, fundamental. According to the procedure followed at the end of the Second World War, the use of private property as reparations was limited to the liquidation of the enemy's property located abroad – if one excludes the policy of demolition of German industrial structures during the first years of occupation, especially in the Soviet zone, which was at least officially aimed at the demilitarization of the country.³⁵

The retention of private cultural property as reparation for war damages is thus excluded, even as a *sub specie* of restitution in kind.

Among the arguments advanced in Russia to refuse the restitution of private property, are references to the declaration by the Federal Republic itself, confirmed in the signing of the Moscow Treaty on 12 September 1990, that it would consider irreversible the expropriation measures performed between 1945 and 1949 in the zone of Soviet occupation.³⁶ This argument has no foundation. Actually, the joint declaration of the Federal Republic and the DDR Governments of 15 June 1990, referred to the issue of real estate expropriations, and moreover, during the Two + Four negotiations, the Soviet Government had justified the expropriation measures

35 See for example Art. 79(1), of the Peace Treaty with Italy. The legality of such measures was put in doubt, partly by writings, but more significantly by some neutral countries, such as Switzerland, Sweden, Portugal and Spain, who concluded post-war agreements with the Allied powers for the liquidation of German private property situated in their territory only on the condition that indemnity was provided at Germany's expense. The agreements are published in Bohmer, Duden, Janssen, *Deutsches Vermögen im Ausland* (1951-1955) Bd. I, 390 et seq.; Bd. I, 360 et seq., Bd III, 447 et seq., Bd. I, 414 et seq. respectively. With Article 5 of the 6th Part of the Bonn Convention on the Settlement of the questions deriving from the war and the occupation of Germany, of 26 May 1952 (modified by the Paris Protocol of 23 October 1954 and entered into force on 5 May 1955, II BGBl. (1955) 301), the Federal Republic was committed to refund its citizens for expropriations made by the Western Allied powers. The government tried to ignore this commitment for several years. For the government they were damages which were generally attributable to the events of war, comparable to those suffered by the *Vertriebenen*, such as damage caused by bombardment, or the obligation of restitution of property, and indemnifiable under the same criteria adopted by the *Lastenausgleichsgesetz*. For an authoritative opinion (I. Seidl-Hohenveldern, *Entschädigungspflicht der Bundesrepublik für reparationsentzogenes Auslandsvermögen* (1964)) the liquidation was to be regarded as actual war reparations made by private citizens, in place of the government, which ought fully to refund them on the basis of the principles governing expropriation. The *Reparationschädengesetz* was finally enacted on 12 February 1969 (I BGBl. (1969) 105) and provided for a lump-sum indemnity which was limited only to physical persons. The *Bundesverfassungsgericht* confirmed the constitutional legitimacy of the law in its decision of 13 January 1976 (BverfGE 41, 126).

36 The text of the declaration of 15 June 1990 reads: 'Die Enteignungen auf besatzungsrechtlicher bzw. besatzungshoheitlicher Grundlage (1945 bis 1949) sind nicht mehr rückgängig zu machen. Die Regierungen der Sowjetunion und der Deutschen Demokratischen Republik sehen keine Möglichkeit, die damals getroffenen Maßnahmen zu revidieren. Die Regierung der Bundesrepublik Deutschland nimmt dies im Hinblick auf die historische Entwicklung zur Kenntnis.'

carried out soon after the Second World War not as reparations, but as part of the denazification, demilitarization and democratization plan of Germany.³⁷

Before entering into the discussion of the Russian arguments against the restitution *in toto* of the cultural property removed from Germany, it is perhaps opportune to first raise a further issue as yet unbroached by the parties, and ask whether the possible German right to restitution has not been extinguished.

As is well known, the subject of prescription in international law is quite controversial.³⁸ The doctrine supplies generic indications, which, when applied to our case, neutralize each other: on one hand, limitation of actions between States is less rigorous than that for claims of private citizens against a State, but, on the other hand, the limitation of actions in tort is more strict than that for breach of contract.³⁹ Furthermore it is also necessary to keep in mind that the specialist literature tends to consider prescription in the subject of restitution of cultural property inapplicable in the relations between States.⁴⁰

Besides extinctive prescription, the different and broader concept of acquiescence must also be considered, which, under certain conditions, can imply the loss of rights.

While for property belonging to museums and libraries situated in West Germany it is not reasonable to speak of acquiescence by the Federal Government, which was completely unaware of its fate, it is not certain that the same could be said of property belonging to collections or libraries originally situated in eastern Germany.⁴¹

37 Compare *Die vertraglichen Vereinbarungen...*, *supra* note 34, at 9-10.

38 See Fleischhauer, 'Prescription', EPIL 10, at 327 et seq.; *id.*, 'Verjährung', III *Wörterbuch des Völkerrechts* 509 et seq.; Pinto, 'La prescription en droit international', 87 *RdC* (1955) 387 et seq.

39 See Fleischhauer, *supra* note 38, at 329; see also the resolution of the Institut de droit international 'La prescription libératoire en droit international public', 1923 *Annuaire de l'IDI* (1925) 558.

40 Compare Nahlik, 'La protection internationale des biens culturels in cas de conflit armé', 120 *RdC* (1967) 61 et seq., at 100; Frigo, *supra* note 11, at 80, with reference to the relevant rules of the First World War Peace Treaties, for example Annex I to the Treaty of St. Germain-en-Laye of 10 September 1919, which contemplated among other things the obligation of restitution of some art objects which had been forged in Palermo in the 12th century for the Norman kings, then in the XIV century taken to Germany and used for the coronation of the Emperor. Article 159 of the Treaty of St. Germain provided for the establishment of a Commission of experts to settle possible controversies between the parties (see the text in Martens, *Nouveau Recueil Général de Traités*, 3e série, T. II (1923) 754 et seq.). In 1920, however, the Italian Government renounced the claim.

41 The treasure of Priamus is a case in point. According to recently published, although indirect, testimonies (Unverzagt, 'Materialien zur Geschichte des Staatlichen Museums für Vor- und Frühgeschichte zu Berlin während des Zweiten Weltkrieges - zu seinen Bergungsaktionen und seinen Verlusten', XXV *Jahrbuch Preussischer Kulturbesitz* (1988) 313 et seq. 349 et seq.), the then director of the Museum für Vor- und Frühgeschichte, Prof. Wilhelm Unverzagt, had personally given the three chests containing the precious treasure to officers of the Soviet Army in May 1945. Yet in 1958, when the Soviet Government officially returned 'all' the treasures from Berlin's museums (among which the altar of Pergamon) to the DDR Government, the absence of the three chests was not reported. It is certainly possible that Prof. Unverzagt hid his disappointment. It is similarly possible, however, that the DDR authorities had been put in the picture. It could also be only a coincidence that exactly one year later Prof. Unverzagt was awarded an high honour by the DDR. Keeping in mind the noted position of the Soviets regarding restitution on a reciprocal basis, it certainly was not a coincidence, however, that leaders of the Stasi (DDR secret police) for decades used expensive resources and manpower on futile searches for the Amber Room. The Amber Hall was composed of 22 six-metre-high amber panels and 150

If the knowledge by the DDR Government organs of the existence in the Soviet Union of some art treasures removed from Germany after the Second World War could be proven, it should be questioned whether their disagreement with such action, and/or their acceptance of the Soviet point of view (*taciturnitas et patientia*), could now be objected to by the Federal Republic.

This issue is very complex, not only because of the exact determination of the DDR's behaviour (tacit agreement, unilateral act, factual circumstance) and subsequent legal consequences, but also for the further complication caused by the fact that until 1972 the Federal Republic made the claim for exclusive representation (*Alleinvertretung*) of German rights and interests as a whole.⁴²

Since our case deals with acquiescence, it is necessary to clarify an important aspect of such a phenomenon, which is not always made precise in scholarly work, that is, its distinction from tacit consent. Certain discourse, while recognizing that acquiescence is translated into a plurality of legal situations, places acquiescence in the scheme of tacit or implicit consensus. The consequence is that acquiescence is admitted only regarding those claims the existence of which is actually brought to the knowledge of the State against which the claim is to be made. The presumption of consent can be overturned by the demonstration of a contrary will.⁴³ Another strand of argumentation, however, correctly highlights the distinction between the concepts of acquiescence and tacit agreement. Since it is a factual circumstance, acquiescence is definitive. The demonstration of the reasons for which a State did not object or remained passive in a certain situation, as for instance its concern not to disturb its good relations with another State, is irrelevant.⁴⁴

amber slabs, artistically worked with figurations, heraldic bearings and garlands, presented by Friedrich Wilhelm I of Prussia to Tsar Peter I in 1716, and assembled by Catherine the Great in 1755 in her palace of Zarskoje Selo near St. Petersburg. The amber covering, the mirrors and the gilding had been removed by the Germans in the summer of 1941 and then taken to Königsberg. From there all traces of it were lost at the beginning of 1945. Among the various suppositions advanced regarding the destiny of the *Amber Hall*, the most probable is that the chests containing the panels sank in the Baltic Sea together with the passengers of the Wilhelm Gustloff, which set sail from Königsberg on one of the last days of the war.

42 Even if this attitude had been shared for some time by most western States for obvious political reasons, it was clearly untenable. In any event the legal situation would be unequivocal only in the unlikely hypothesis of an agreement having been made between the DDR and the USSR after 1972. In this case Article 12 of the Treaty on German reunification, of 31 August 1990, would undoubtedly be applied (reproduced in 30 ILM (1991) 463 et seq.), with the consequence of conditioning the Treaty's destiny to its acceptance by the Federal Republic and the bilateral negotiations with the opposite party.

43 Mac Gibbon, 'The Scope of Acquiescence in International Law', 30 *BYIL* (1954) 143 et seq., at 182; *id.*, 'Customary International Law and Acquiescence', 33 *BYIL* (1957) 115 et seq.

44 Sperduti, 'Prescrizione, consuetudine e acquiescenza in diritto internazionale', *RDI* (1961) 3 et seq., at 8. The exception of estoppel by silence or estoppel by inaction can not be excluded in Russia's favour too. However, it calls for stricter requirements than those necessary for acquiescence, such as the reliance, in good faith, by the State pleading the estoppel to 'clear and unequivocal representations' of the other State, see Bowett, 'Estoppel Before International Tribunals and Its Relations to Acquiescence', 33 *BYIL* (1957) 176 et seq.

V. The Application of Restitution in Kind

Returning to the arguments circulating in Russia and keeping in mind that they are not clearly distinguishable from each other, it can be said that the starting point is the legitimacy of the removal to the Soviet Union of German cultural property after the Second World War.

This basic persuasion can take on more or less sophisticated shapes. Nationalistic conservative groups became very vocal in maintaining the right of the Russian people to German cultural property as indemnity for the 30 million dead and for all the suffering and atrocities Russia had to endure through Nazi aggression. A more subtle and flexible approach, which leaves the Russian Government more room to negotiate, is promoted by the Russian delegation in the multi-party Commission on restitution, and by some academics. It views the German cultural property as 'pledge' against the restitution of Russian cultural property dispersed during the war. It holds Article 16 of the cooperation Treaty of 1990 not to be an impediment in itself to the application of the principle of restitution in kind, in the case that the restitution of cultural property withdrawn by the Nazis from Soviet territory should prove to be impossible. As an alternative to the retention of the German cultural property, the advocates of the 'pledge' theory suggest that the Russian Government should ask for substantial monetary compensation from Germany in exchange for restitution. Still another argument hides the unwillingness to settle the controversy under the standards of international law, by arguing that the solution must come from the Russian Parliament, duly expressed in a statute, pending which every decision is premature.

To anticipate my conclusions, I am of the opinion that the Russian position can not be accepted. To begin with the last argument, the enactment of a domestic statute, holding that all cultural property belongs to the Russian people and is inalienable, would of course create a formidable hurdle or even render restitution impossible, but it could not solve the question of the interpretation of Article 16 of the Russian-German cooperation treaty. The international controversy would still exist. Even if the view were to prevail that a subsequent domestic statute supersedes a previous international agreement, still the question would remain of whether the retention of cultural property of the defeated country as a form of war reparation is permissible under international law.

But this is precisely the core of the matter and the Russian argument that such retention is perfectly legitimate can not be casually dismissed. Its refutation calls for a thorough analysis.

Even if soon after the Second World War there was no concordance of views among the Allied States regarding the use of German cultural property as reparations, all were in favour of some application of the principle of restitution in kind.⁴⁵ In the event of a hypothetical Soviet claim for ownership of all German

45 See *supra* section III.

property removed, it would not be possible to object that restitution in kind only applies to property coming from the same cultural-territorial area. Such requirement, as we have seen,⁴⁶ is implicitly called for in the Peace Treaties of 1947, but it has also been seen that they only offer one of the possible expressions of the concept of restitution in kind.

At the same time it would not be possible to raise the objection that only a peace treaty could settle the subject of restitution in kind. The question of the need or otherwise of a peace treaty to regulate the consequences of the conflict at the expense of the defeated State is too complex to be exhaustively examined here. However one can observe that in the case of a war of aggression, now generally qualifiable as an international crime, the offended States are entitled to make wide-ranging sanctions against the responsible State. Furthermore, that the conclusion of a peace treaty is not in itself necessary in order to establish a legal obligation of reparations for the responsible country, as the example of Germany after 1945 clearly shows.⁴⁷

Quite paradoxically, the major obstacle to a recognition of the claim of legitimate ownership of the removed property derives from the very attitude held by the Soviet Government for almost fifty years. The complete secrecy maintained about the existence of special depots, together with the repeated denials by official authorities of the presence of German cultural items in the Soviet Union, is not easily reconciled with the current will to regard the removed German cultural property as legitimately owned as reparations.⁴⁸ The very idea of 'secret spoils' does not make any sense.

On the other hand, a refutation of the 'pledge' theory is more complex. It is not possible to deny, *prima facie*, some semblance of legitimacy in this position.

First, the Russian position has its roots in the past: we have seen that the theory which was in favour of restitution in kind for property of exceptional value was in fact proposed by the Soviet Union at the end of the war and that the principle of restitution of German cultural property still present in Soviet territory was approved by the Cabinet in 1957, but only 'on a reciprocal basis'. Also the efforts by various

46 See *supra* section II.

47 On this point see Gattini, 'La riparazione dei danni di guerra causati dall'Iraq', *RDI* (1993) 1000 et seq., at 1013 et seq. A partly contrary opinion is maintained by the German Federal Constitutional Tribunal in its decision of 13 January 1976, where it is stated that 'zur Begründung einer Reparationsschuld ist eine (friedens-)vertragliche Vereinbarung zwischen den beteiligten Staaten oder wenigstens die Anerkennung der Reparationsforderung durch den verantwortlichen Staat erforderlich.'

48 Moreover, the officially maintained assertion of the Soviet Union on the occasion of returning cultural property to East Germany in the fifties was always that of 'temporary custody' in the Soviet Union for its protection and conservation. It is easy to understand the reasons for this fact. In the first weeks of occupation, the Soviet military administration made no mystery of the transport to the Soviet Union of cultural property found in Nazi depots, and that this was to be for reparations. Soon, however, the Soviet awareness of an ever increasing hostility to this type of use within the Allied High Command, and the ever more remote possibility of agreeing on a common policy with the United States and the other western ex-Allies regarding Germany, were the cause of the removed art treasures becoming a state secret for the Soviet Union. The fact that the provenance of the major part of the removed property was from museums or archives within the territory of the DDR made the situation even more embarrassing.

Soviet Governments to rediscover some of the works of art stolen by the Nazis, in particular the *Amber Hall* of Zarskoje Selo, never ceased in these fifty years.⁴⁹

What matters more is that, even in its current state, international law reveals a peculiar uncertainty on the question of restitution in kind of cultural property.

The Hague Convention of 14 May 1954, on the Protection of Cultural Property in the Event of Armed Conflict, is concerned with the fate of such property *pendente bello*, but not once the hostilities have ceased. Article 4 of the Convention commits the Contracting States among other things to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. Article 1(3) of the Protocol of the Convention, signed on the same day, provides that cultural property taken from occupied territories contrary to Article 1(1), may not be retained as war reparations at the cessation of hostilities.⁵⁰

It should be observed that, in spite of appearances, Article 1 Protocol does not go far beyond that which was already provided for in Article 56 of the Hague Rules of 1907. In the first place, Article 1(1), Protocol, prohibits the 'exportation' of cultural property from occupied countries. By this language it is not at all clear if the provision intends to ban all types of removal or only the cases of exportation possibly contrary to internal restrictive laws.⁵¹ Even taken in its broadest meaning, the provision does not provide for the different case of evacuation of cultural

49 In this connexion, it is important to remember that the claim by the Soviet Union (now the Russian Federation) for the recovery of works of art removed by the Nazis, is not barred by any limitation, as is made clear by Article 1 of the Convention of December 16, 1968, on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (UN Doc. A/Res. 2391 (XXIII), 9 December 1968, also reproduced in 8 ILM (1969) 68 et seq.). On 30 September 1994, 39 countries had ratified the Convention. The concept of war crimes employed by the Convention is led from the Statute of the International Military Tribunal of Nuremberg of 8 August 1945 ('Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis', 82 UNTS 279). There, in Article 6(b), the plunder of private and public property was also enunciated. It was also on the application of the said article that Rosenberg was condemned to death in Nuremberg (see *Der Prozeß gegen die Hauptkriegsverbrecher vor dem internationalen Militärgerichtshof* (1947-I) 332 on the passing of the sentence relating to Rosenberg: 'Rosenberg ist für ein System organisierter Plünderung öffentlichen und privaten Eigentums in allen überfallenen Ländern Europas verantwortlich.' The German Foreign Ministry complains that the qualification of the removal of cultural property as a war crime is interpreted one-sidedly by the Russians. The argument, vulgarized by the German press, does not take into account the substantial difference between the two cases of Nazi plunder and Soviet removal, i.e. the fact that the Soviet conduct can be put into the frame of the debate on war reparations.

50 In order to accurately interpret this and other articles of the Protocol, one should keep in mind the fact that the Protocol is optional and that the reason for this choice was in fact due to the opposition of certain countries to accept binding regulations on the subject of restitution. Furthermore, it is useful to remember that the Convention does not apply to events which occurred prior to its entering into force. In fact, the reason for the exclusion of a section on restitution in the Hague Convention was an opinion of UNIDROIT circulated at the time of the negotiation of the Convention, which had made clear that all matters of private law should be excluded from the draft Convention, because the national private law on this matter differed too much to permit a common solution.

51 The text of Article 1(1), Protocol reads: 'Each High Contracting Party undertakes to prevent the *exportation*, from a territory occupied by it during an armed conflict, of cultural property...' (emphasis by the Author).

property to the territory of the occupying State for the safeguarding and custody of the property itself.⁵²

In the second place, and more importantly, both Protocol and the Convention leave the basic question unresolved, that is whether cultural property can in general make up part of reparations, for example by assigning it to a State under the title of restitution in kind within peace treaties, as happened in the Second World War period.

The 1977 additional Protocols to the Geneva Human Rights Convention of 1949, do not make any further contribution. Article 53 of the first Protocol confirms the prohibition on committing any acts of hostility towards historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of the people, and also the ban on using such objects as support for military efforts and on exercising retaliation upon them.⁵³

International customary law does not present a uniform picture either. This is due to the fact that, first, the attention to the protection of cultural property by international law is a relatively recent phenomenon, and second, the practice of countries in the first half of this century was uncertain, as we have previously illustrated. Nonetheless we may wonder if, in the decades following the Second World War, an *opinio juris* has been found which by now excludes the retention or handing over of cultural property for reparations in any form, in consideration of a more general principle of territorial connection between cultural property and country of origin.

In the seventies an increased sensitivity and attention to the international protection of cultural property was developed by the international community. This was stimulated by the Conventions promoted by UNESCO; that of 14 November 1970, on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,⁵⁴ and that of 16 November 1972, on the Protection of the World's Cultural and Natural Heritage.⁵⁵ The need to value and safeguard national cultural heritage, felt especially by developing countries, which has been echoed by the United Nations' General Assembly⁵⁶ and by UNESCO,⁵⁷ contributed to the spreading and reinforcing of the idea of an international recognition and protection of a link between cultural property and a determined

52 For Engstler, *supra* note 11, at 219, evacuation from the territory of the occupied country would not be prohibited *per se*, when it can be shown that it is a 'protective' measure.

53 Compare von Schorlemer, *supra* note 6, at 281 et seq., 288; Solf, 'Cultural Property, Protection in Armed Conflict', 9 EPIL 64 et seq.

54 Reproduced in 10 ILM (1971) 289.

55 Reproduced in 11 ILM (1972) 1358.

56 See Res. 34764 of 27 November 1979, 'Return or Restitution of Cultural Property to the Countries of Origin' and resolutions of the same title in following years; see Frigo, *supra* note 11, at 240 in note 99.

57 See 'Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation' established by UNESCO in 1978; on the activity of such see Prott, 'Restitutionspolitik der UNESCO in Zusammenarbeit mit Museen', in Reichelt (ed.), *Internationaler Kulturguterschutz* (1992) 157 et seq.

country.⁵⁸ This trend has sometimes strained international relations and has been condemned by some as 'exasperated cultural nationalism'.⁵⁹

In my opinion, it is still premature to argue that the concept of protection of national cultural heritage has been recognized with such force in international law as to prevail over all other considerations, such as, the subject of reparations for international wrongs.⁶⁰ One would search in vain in the work of the International Law Commission on States Responsibility, with reference to the draft articles concerning reparations, for the trace of a debate on the matter. Article 7 of the Second Part, titled 'restitution in kind',⁶¹ excludes restitution, among other things, to the extent that this is 'materially impossible'. In the comment of the Drafting Committee,⁶² an exception is referred to for cases in which the object withdrawn from the territory of the victim State is destroyed, damaged or irreparable. No mention is made of restitution by replacement. The question has not even been tackled by any member of the ILC.⁶³ One could infer that the International Law Commission wanted to implicitly exclude the legitimacy of restitution by replacement in any context. However, one passage of the pertinent report by Arangio-Ruiz leads us rather to the conclusion that the members of the Commission, in all probability influenced by the opinion of the Rapporteur,⁶⁴ simply forgot to investigate the matter.

58 See above all Merryman, 'Two Ways of Thinking about Cultural Property', 80 *AJIL* (1986) 831 et seq.; on the difference between an 'internationalist' and a 'nationalist' approach in the protection of cultural property in international law see also Rudolf, 'Über den internationalen Schutz von Kulturgütern', in *Festschrift Doebling* (1989) 853 et seq., 868.

59 Compare in particular Art. 4 of the 1970 UNESCO Convention: 'The States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State: (a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory; (b) cultural property found within the national territory; (c) cultural property acquired by archaeological, ethnological or natural science missions, with the consent of the competent authorities of the country of origin of such property; (d) cultural property which has been the subject of a freely agreed exchange; (e) cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property.' On the concept of the nationality of cultural property see Jayme, 'Die Nationalität des Kunstwerks als Rechtsfrage', in Reichelt (ed.), *supra* note 57, at 7 et seq., and for an historical precedent of 'territorial link' of works of art, see the note by Lord Castlereagh at the Paris Conference on 11 September 1815, (quoted by de Martens, *Nouveau Recueil Général de Traités 1808-1815* (1818) 632, Doc. 58, at 642: 'The principle of property regulated by the claims of the territories from whence these works were taken, is the surest and only guide to justice').

60 Some experts of international cultural law are explicitly in favour of the use of cultural property as restitution by replacement. Arguing from the principle of an unconditional obligation of restitution of cultural property following a conflict, Nahlik (*supra* note 40, at 148) reaches the conclusion that, in the case of the impossibility of restitution due to the destruction or loss of the property, the offended country has the right to receive 'en revanche un autre objet du même genre et de la même valeur'. On the same line Frigo, *supra* note 11, at 93-4.

61 On the terminology see *supra* note 16.

62 See A/CN.4/SR 2288 of 20 July 1992 (reissued for technical reasons on 12 August), at 14.

63 See I Yearbook of ILC (1989) Summary Records Meetings 2102-2105, 2123, 2127.

64 On concluding his observations on the exception of 'physical or material impossibility', the special Rapporteur in fact says that 'this is perhaps the only hypothesis in which doctrine, international tribunals and the practice of the States are totally concordant in holding that restitution in kind must be set aside and replaced by other remedies, notably reparation by equivalent' (by which is meant pecuniary compensation) (Arangio-Ruiz, 'Preliminary Report on State Responsibility', I Yearbook of ILC (1988) Part One, at 40, para. 123). Curiously, however, the doctrinal opinions

It must therefore be admitted that the question of the general admissibility of restitution by replacement, or inversely of its exclusion in specific contexts, has not yet been subjected to an adequate theoretical investigation. One can only make the general observation that international law has for some time clearly been moving towards the recognition of the principle of unconditional protection of national cultural heritage.

But what is extremely detrimental to the 'pledge' theory in the present context is the history of the behaviour of past Soviet Governments. In the Protocol of 22 August 1953, the Soviet Government declared that all its reparation claims toward Germany 'as a whole' had been settled. If the Soviet Government believed at that time that it had not yet acquired full ownership of the German cultural items as war reparations, and that it only held them in pledge in order to reach a satisfactory settlement of the issue of the plundered Russian cultural property, it would have been its duty and in its interest to clearly state its position. On the contrary, it was the very secrecy of the Soviets which made any settlement impossible.

VI. Conclusions

The position assumed by the German Government in the present controversy with the Russian Federation reflects the new trends in international law on the subject of the protection of cultural property. In the German note⁶⁵ it is stated that the commitment undertaken by both sides in 1990 and again in 1992 to reciprocally and without limitations respect their respective cultural identities, requires the formula 'unlawfully transferred art treasures' to be interpreted, despite any incompatibility with the international law of 1945, in the sense that the permanence of the dislocation of the property constitutes today a situation which is contrary to the law.

This position, which is sensibly oriented towards the future, has its merits. However, the German note takes for granted one aspect, which deserves critical investigation. To what extent does the cultural property removed by the Soviet Union from German territory form part of the German 'national cultural heritage'? This is undoubtedly valid for the copies of the Bible printed by Gutenberg, but is it equally valid for the treasure of Priamus? And how can it be maintained that a collection of French impressionist paintings 'historically symbolizes the identity of the German people'?⁶⁶

quoted, as well as being scant, say different things. Thus Jimenez de Arechaga ('International Responsibility', Sorensen (ed.), *Manual of Public International Law* (1968) 566), for whom 'it is evident that no restitution in kind may be granted if, for instance, an unlawfully seized vessel has been sunk', and Salvioli ('La responsabilité des Etats et la fixation des dommages-intérêts par les tribunaux internationaux', 28 *RdC* (1929-III) 231 et seq., 237), who on the other hand adds the significant words 'if there are no others of the same kind' (the original text reads 'et il n'y en a pas d'autres de la même espèce').

65 See *Die vertraglichen Vereinbarungen...*, *supra* note 34, para. 22.

66 With this type of argumentation, 'historische Leistung eines Volkes und eines Staates', 'innere Verbindung zu dem Volk', Fiedler denies that cultural property can be the object of reparations

In a recent essay, Seidl-Hohenveldern warns of an excessive reliance on the notion of national heritage, which was hurriedly invoked to resolve all of the questions of cultural property plundered during conflicts. The author shows how, relying only on this criterion, the ownership of the treasure of Priamus would become fairly controversial: in particular, a possible claim by Turkey could in the last resort be opposed only on the exception of prescription.⁶⁷

Rather than demagogically referring to a fashionable slogan of uncertain legal soundness, it would be preferable to focus attention on the attribution of a special legal status to, and a distinctive international protection of, cultural property in itself, whatever its origin. This status would hold in times of war and of peace. It would not be a sign of bad politics if the parties finally arrived at a compromise in which Germany, in exchange for the restitution of most items,⁶⁸ offered some tangible signs of its commitment to the protection of cultural heritage in itself. It could contribute for example, to the financing of the restoration of Russian monuments or the institution of Russo-German cultural centres. Unfortunately this ideal solution does not seem currently to have much chance of success. The means considered by which Germany might force the Russian Government into a less intransigent position must therefore be considered.

First of all, Germany can take precautions to discourage a possible sale of the cultural property by Russia, the possibility of which the Russian Government has always denied, but which can not be excluded *per se*.⁶⁹ The range of measures could include the legal seizure of cultural property, in the case of its being brought into German territory, or the conclusion of international agreements with other States to this end, and to the imposition of sanctions against international auctioneers whose branches cooperate with the sale.

Direct retaliation against Russia is more problematic. Obviously Germany could suspend the application of the Treaty of Cultural Cooperation of 1992 and also other clauses of the Treaty of Cooperation and Good Neighbourhood of 1990. However, it is evident that in such cases, above all if it lead to a cooling of economic ties and military cooperation, the political tension between the two countries would rise to an intolerable level for the German Government.

Regarding, however, private art collections, the option remains open to the legal heirs, as an alternative to diplomatic protection from the German Government,⁷⁰ of

(‘Warum wird um die Kriegsbeute immer noch gestritten?’, in *FAZ*, 4 November 1994, at 45, English translation in *The Art Newspaper* No. 44, January 1995, at 18 et seq.)

67 Seidl-Hohenveldern, *supra* note 3, at 53. In particular, Art. 4 litt (c) of the 1970 UNESCO Convention would not be applicable, since the majority of the archaeological finds discovered by Schliemann were taken out of Ottoman territory in violation of rules of law, *ibid*.

68 For some of them a formula of long-term loans to museums properly equipped for their maintenance, could be considered.

69 Rumours of a possible auction of some of the art treasures held by Russia circulated after an unexpected visit by functionaries of Sotheby’s to the stores of the Hermitage; see *The Art Newspaper* No. 42, November 1994, at 2.

70 This route has been chosen by the heirs of the Siemens and the Köhler collections, which were removed by Berlin from the Red Army in 1945.

legal action against the Russian Government before a German court.⁷¹ The rules on the immunity from jurisdiction should not present an obstacle to the international competence of the German judges, dealing with a 'tort exception' case.⁷² It is not sure, however, that judges from third-party countries (for example, the State of situation in the case of the sale of a painting by Russia) would not arrive at different conclusions, for example qualifying the Soviet conduct as an Act of State or adhering to the assertion of war reparations maintained by Russia.

Even in the case of a positive result of the legal process, however, the private citizen would encounter daunting difficulties in obtaining a specific enforcement. Furthermore, they equally would not be satisfiable by other cultural property belonging to Russia.⁷³ What would remain as an option would be the granting of a sum of money: a solution which, besides being unsatisfactory *per se*, could give rise to further difficulties if the private property in question were ever discovered. In conclusion it seems that the most profitable option for the private citizen would be the reaching of an amicable settlement with the Russian Government.⁷⁴

- 71 This is not the place to take a position on the merit of the matter, which is currently an issue of academic debate, whether a transaction between States may be put into discussion by a private citizen claiming in a domestic court not to have been completely satisfied. For a contrary position see the Resolution of the Institut de Droit International on 'Contemporary Problems Concerning the Jurisdictional Immunity of States' (64 *Annuaire de l'IDI* (1991) Vol. II, at 214 et seq.), whose Art. 3, para. 4 litt (c) reads: 'The organs of the forum state should not assume competence in respect of issues the resolution of which has been allocated to another remedial context.'
- 72 See Art. 12 of the draft codification of the ILC on the subject of the jurisdictional immunity of States, reproduced in 30 *ILM* (1991) 1554.
- 73 See Art. 19 litt (d) and litt (e) of the draft codification of the ILC on the subject of the jurisdictional immunity of States, see *supra* note 72.
- 74 According to Mr. Shvidkoi, Russian deputy Minister of Culture, the Scharf brothers, Gerstenberg's grandsons and heirs, made an agreement two years ago with Mr. Piotrovsky, director of the Hermitage, and the then Russian Culture Minister Sidorov, under the terms of which the Hermitage would keep back half of the pictures and reconstitute the other half to the Scharf, see *Artnews* (1995) 48.