"The Russian Bill to Nationalize Trophy Art: An American Perspective"

Thomas R. Kline; Scott Richie, Contributor

The Spoils of War International Newsletter
December 31, 1997

Reprinted with permission from ***THE SPOILS OF WAR INTERNATIONAL NEWSLETTER***, Volume No. 6, February, 1999.

The art world's attention has recently focused on a high-stakes political debate in Russia over whether to nationalize the vast collection of trophy art taken by the Soviet Army during and after the Second World War. Under the banners of rightful restitution and moral indignation, the Russian Parliament has sought to implement legislation that would lay claim to all "cultural artifacts" currently found in Russia as "partial compensation for . . . the plunder and destruction" of Russia's cultural values by Germany and her war allies. A defiant President Yeltsin has twice refused to sign the measure, fearing the likely international repercussions it would have on Russia's efforts to recover its own precious artworks from Germany, and making it virtually impossible for Russia to display the art beyond its own borders.

This article examines the legal underpinnings of Russia's claim to the trophy art, and the extraterritorial effect such nationalization legislation would have in the United States. The article concludes that if such trophy art were to enter the United States, Russia's claim of ownership would be vulnerable to challenge in a U.S. court on the grounds that the initial seizure was plunder in violation of international law, and that neither the continued secretive retention of the trophy art for decades nor the Russian government's belated attempt to retroactively validate its position through nationalization are sufficient to divest the former owners of their rights in the art.(1)

The Russian Claim

It was not until 1990 that Russia first revealed to the world the vast collection of trophy art stored secretly in museums throughout the countries of the former Soviet Union.(2) For many Russians, this immense assemblage of exceptionally valuable art is seen as just compensation for the devastating damage inflicted on their country during the war. The former Soviet Union suffered the loss of over twenty million citizens during the war as well as the systematic looting and destruction of museum collections.(3) However, when the German army began to weaken in November 1943, the Soviets sought retribution.(4) A Soviet "Trophy Commission" scoured Germany and other Axis countries to find hidden treasures and have them shipped back to the Soviet Union.(5) At the time, Soviet officials envisioned that the art would fill a grandiose "Stalin Museum" in Moscow that would be the envy of the world.(6)

Presently, most Russians believe that their government should never return the trophy art. Notwithstanding such strong public sentiment, shortly after the treasures' existence was made known, the Soviet Union and Germany -- which was the primary target of the Soviet Trophy Commission(7) -- signed agreements for the mutual exchange of the art. Among the agreements was the 1990 Good Neighborliness Treaty, which stated that "missing" or "unlawfully transferred" art treasures located in either country's territory "will be returned to their owners or their legal successors."(8) Nevertheless, the countries have exchanged few works since then.(9)

The Russian Bill to Nationalize the Trophy Art

The bill proposed in Russia to nationalize the trophy art declares that all "cultural artifacts" currently found in Russian Federation territory are federal property "irrespective of their actual owner and the circumstances which gave rise to the said ownership."(10) Retention of the artworks is intended to be a "partial compensation for the damage suffered by the cultural property of the Russian Federation . . . ."(11)

Although the Russian bill contains several exceptions, such as for "the property of religious organizations or private charities . . . used exclusively for religious or philanthropic aims" and for cultural artifacts that belonged to individuals who were deprived of their property "on account of their active fight against nazism (fascism),"(12) the proposed process by which the Russian government would entertain claims for these exempted artifacts is complicated and success seems difficult. Only

governments may make formal claims to recover such exempted artifacts, and a separate claim must be made for *each* of the estimated hundreds of thousands of artworks now under Russian control.(13) Even if the government asserting such a claim were to be successful, it would still be responsible for all costs, including the costs of storage, restoration, conveyance and expert examination related to each object recovered.(14)

United States Courts Would Most Likely Not Recognize Russian Claims to the Trophy Art

President Yeltsin is rightly concerned that if the bill became law, Russia would find it difficult to exhibit its trophy art outside the Russian Federation. Indeed, if the nationalization legislation is ultimately enacted and such art were to enter the United States, the original owners (or their successors-in-interest) would have compelling legal grounds for seeking return of the art through the U.S. courts.(15) Based on well-settled property law principles in the United States, the German claimants would appear to have clearly superior rights in the art,(16) subject only to whether or not U.S. courts would recognize the Russian nationalization legislation as a controlling "act of state."

Under the act of state doctrine, courts in the United States normally accord full recognition to the official acts of recognized governments, and will not entertain lawsuits which seek to directly or collaterally challenge those official acts.(17) Nonetheless, the doctrine does have its exceptions and limitations. As customarily applied in cases involving the appropriation of property by a foreign government, the doctrine mandates only that:

the Judiciary Branch will not examine the validity of a taking of property *within its own territory* by a foreign sovereign government . . . recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.(18)

Thus, the act of state doctrine *does not* appear to be operative in situations where either (1) the seizure of property occurred outside the foreign sovereign's borders, or (2) the status of the property is subject to a treaty or "other unambiguous agreement regarding controlling legal principles" or a principle of customary law not in dispute.

Applying these principles to Russia's nationalization legislation, it is apparent that the act of state doctrine would not prohibit U.S. courts from favorably considering recovery claims brought by the original German owners of the trophy art. First, the Soviet armies seized the art beyond the borders of the Soviet Union, in the occupied territory of Germany, Hungary and other former Axis countries. Second, the Soviets' seizure and continued retention of the art violate several international treaties.(19) In particular, Russia and, later, the Soviet Union were parties to several treaties which condemned pillage or plunder as compensation for losses suffered in war. For example, each of the three Hague Conventions protects cultural property.(20) Specifically, Article 53 of the 1899 Hague Convention on the Laws and Customs of War provides that an army of occupation may only confiscate property which may be used for military operations.(21) Additionally, Article 56 requires that public property such as artworks and religious property are to be treated as private property and not intentionally destroyed or damaged.(22)

The Hague Convention of 1907 contains similar provisions and specifically states that [a]n army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.(23)

Likewise, the 1954 Hague Convention seeks to prevent the use of cultural property as war reparations.(24) The preamble states that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind . . . ."(25) Among the Convention's provisions, Article 4 requires the signatory conventions to have respect for the cultural property of other sovereign nations.(26) Upon the invasion of a country, the invader must take the same measures to protect the cultural property of the invaded nation as the nation itself should have taken.(27)

The continued retention of the trophy art also appears to violate the principles of the 1970 UNESCO Convention.(28) The Soviet Union was a signatory to the UNESCO Convention which prohibits the importation of cultural property illegally exported or stolen from a foreign nation. Cultural property is defined as "property which is of importance to the fields of

archeology, prehistory, history, literature, art, or science."(29) Germany has specifically declared that the art seized by the Soviet army was part of its cultural heritage, and the same can undoubtedly be said of trophy art seized from other former Axis countries. Thus, the restitution provision of the Convention requires Russia, as the importing country and the successor to the treaty obligations of the Soviet Union, to take steps to return such cultural property to the appropriate country of origin.(30)

The notion that the act of state doctrine would not be an impediment to adjudicating claims to trophy art in the United States is further supported by statutory provisions recently enacted by the U.S. Congress. Under a statute known as the "Hickenlooper" or "Sabbatino" Amendment, Congress expressly provided that the act of state doctrine does not apply in cases involving a claim by any party, including a foreign state, to property: (1) that is physically before the court, (2) that was confiscated by a foreign state after January 1, 1959, and (3) that was taken contrary to international law, unless otherwise determined by the President of the United States. 22 U.S.C.A. § 2370(e)(2) (1990). Arguably, the Russian parliament's current attempt to retroactively legitimize the country's illegal seizure of trophy art during World War II could be considered a "confiscation after January 1, 1959" under the statute, thus, providing the court with an additional basis for finding the act of state doctrine inapplicable and entertaining a suit for recovery of the art.

CONCLUSION

If a court in the United States were to examine the issue of ownership of the trophy art, it could be expected to conclude that the art's initial seizure and subsequent nationalization by Russia were not protected by the act of state doctrine. Rather, the seizure of the art would likely be considered illegal plunder and, Russia's retention and nationalization of the trophy art would be deemed a violation of international law as set forth in the Hague Conventions and the UNESCO Convention.

Thomas R. Kline, Lawyer, Andrews & Kurth L.L.P., Washington, D.C.

1. The author wishes to thank Scott Richie and Sheila Rock for their assistance with this article.

2. Yury Buida, *Letting Trophy Art Go*, Moscow Times, April 10, 1997.

3. Sylvia L. Depta, *Twice Saved or Twice Stolen?: The Trophy Art Tug-of War Between Russia and Germany*, 10 Temp. Int'l & Comp. L.J. 371 (Fall 1996).

4. *Id.* at 375.

5. The Soviets' so-called Trophy Commission compiled remarkably detailed lists of objects (and their specific locations) in the museum collections of Germany, Austria, Italy, Hungary, Romania, and Finland, which were to be targeted by Soviet troops. Konstantin Akinsha & Grigorii Kozlov, *The Discovery of the Secret Repositories*, The Spoils of War (Abrams 1997), at 163. The pillage of art undertaken by the Trophy Commission was only stopped by the institution of special units of American and English soldiers known as the "monuments men," who accompanied the Allied troops through Europe, protecting monuments, fine arts, archives and other cultural values. Depta, *supra* note 3, at 376.

6. Akinsha, *supra* note 5, at 164.

7. The German government claims that approximately two hundred fifty thousand works of art that were taken from Germany are still in the possession of Russia, along with two million rare books and tons of archives. Dmitry Zaks, *Parliament Defies Yeltsen on War Art*, The Moscow Times, May 14, 1997.

8. *Treaty on Good Neighbourliness, Partnership and Cooperation*, Nov. 9, 1990, F.R.G.-U.S.S.R., 30 I.L.M. 504. *See also*, S. Shawn Stephens, *The Hermitage and Pushkin Exhibits: An Analysis of the Ownership Rights to Cultural Properties Removed from Occupied Germany*, 18 Hous. J. Int'l L. 59, 80 (Fall, 1995). The treaty was reaffirmed by the parties in the German-Russian Cultural Agreement of 1992. *Id.*

9. Although Boris Yeltsin recently made a symbolic return of some art to Germany, the author is not aware of a single object claimed by a private entity or family that has been returned.

10. Federal Law on Cultural Values That Have Been Displaced to the U.S.S.R. As A Result of World War II and Are To Be Found In The Russian Federation Territory, Chapter I, Article 3 and Chapter II, Article 6.

11. *Id.* at Preamble.

12. *Id.* at Chapter II, Article 8 (2) and (3).

13. *Id.* at Article 18.

14. *Id.*

15. As a practical matter, neither Russia nor a state-sponsored institution would even contemplate exhibiting such art in the United States unless formal assurances of legal protection could be obtained from the U.S. government. Such protection would be necessary for Russia because the immunity from suit that foreign states are customarily accorded is no longer available under the Foreign Sovereign Immunities Act for cases "in which rights in property taken in violation of international law are in issue and that property . . . is present in the United States." 28 U.S.C. § 1605(a)(3). Nevertheless, it is not entirely far-fetched that artworks seized from institutions or individuals by the former Soviet Union could have since fallen into private hands and, if they were to appear on the U.S. art market, claims for their return could be made by the original owners. In such instances, the possibility could arise that either: (1) the current possessors would claim that official seizure by the Soviet government, or later acts by that government or successor governments, divested the original owners of their rights; or (2) Russia could intervene in the litigation, and seek to have the property returned to it, rather than the other claimants. Indeed, virtually identical arguments -- from the context of a different war and different countries -- were raised in a U.S. court in *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278 (7th Cir. 1990). The original owner of the disputed artifacts, represented by the author, prevailed in that case.

16. Under fundamental principles of international law, as recognized by U.S. courts, only "booty" (which is defined as "property necessary and indispensable for the conduct of war, such as food, means of transportation, and means of communication") may lawfully be taken by an occupying force during times of war. *Menzel v. List*, 267 N.Y.S.2d 804, 810 (Sup. Ct. 1966). Theft of artwork is "pillage" or "plunder," which "is the taking of private property not necessary for the immediate prosecution of war effort, and is unlawful." *Id.* at 811. Good title to such illegally obtained property cannot, under U.S. law, be transferred to another -- even a good faith purchaser for value -- because "[o]nly the true owner's own conduct, or the operation of law . . . can act to divest that true owner of title in his property . . . ." *Federal Republic of Germany v. Elicofon*, 536 F. Supp. 813, 833 (E.D.N.Y. 1978). Thus, both the original taking of the trophy art by the Soviet Union and any subsequent transfer of the stolen items would be void under U.S. law.

17. The act of state doctrine reflects the general concern of U.S. courts about the competency of the judiciary to decide questions in the area of foreign relations. Under this doctrine, a U.S. court may refuse to sit in judgment on the legitimacy of a foreign sovereign's public acts, even if those acts are offensive to the public policy of the United States. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964).

18. *Sabbatino*, 376 U.S. at 428, 84 S. Ct. at 940, 11 L. Ed. 2d at 823-24.

19. To the extent that the United States is a signatory to such international treaties, they are deemed by U.S. courts to be a binding and enforceable part of U.S. domestic law. In addition, a court in the United States may examine and apply principles of international law which the court considers to be reflective of the public policies of this country. 9 James Wm. Moore, moore's federal Practice § 44.1.04[2] (3d ed. 1997).

20. John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 Am. J. Int'l L. 831, 835 (Oct. 1986). The Russian Federation informed the U.S. government in 1992 that it would continue to honor the obligations undertaken by the Soviet Union through international agreements. Stephens, *supra* note 2, at 84.

21. Stephens, *supra* note 2, at 77.

22. *Id.*

23. *Convention Respecting the Laws and Customs of War on Land*, Oct. 18, 1907, art. 56, 36 Stat. 2277. Both the United States and Russia are signatories of this Convention.

24. *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, May 14, 1954, 249 U.N.T.S. 240. *See also*, Stephens, *supra* note 2, at 78.

25. Merryman, *supra* note 18, at 836.

26. Hans Kennon, *Take a Picture, It May Last Longer if Guggenheim Becomes the Law of the Land: The Repatriation of Fine Art*, 8 St. Thomas L. Rev. 373, 385 (Winter, 1996).

27. *Id.* Although the United States was not a signatory to the 1954 Convention, at least one court has suggested that the Convention articulates U.S. public policy concerning the protection of cultural property. *See Goldberg*, 917 F.2d at 295-96.

28. *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, Nov. 14, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289.

29. Stephens, *supra* note 2, at 85.

30. Kennon, *supra* note 24, at 387. The UNESCO Convention was adopted by the United States in 1983 and thus applies only to thefts occurring after that date. *Church of Cyprus*, 917 F.2d at 297. However, the United States Court of Appeals, Seventh Circuit has also indicated that the UNESCO Convention embodies U.S. policy of protecting cultural property. *Id.*