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Case Marienkirche Window Panels – Germany and Russia, State Hermitage Museum, Pushkin State Museum of Fine Arts

Germany/Allemagne – Russia/Russie – State Hermitage Museum – Pushkin State Museum of Fine Arts – Artwork/œuvre d'art – Spoils of war/butins de guerre – Ownership/propriété – State responsibility/responsabilité internationale des Etats – Diplomatic channel/voie diplomatique – Negotiation/négociation – Settlement agreement/accord transactionnel – Conditional restitution/restitution sous condition

In 1997, 111 panels originally forming a window of the St. Marienkirche (St Mary Church) in Frankfurt-on-the-Oder were located in the Russian State Hermitage Museum. They were brought to Russia by Soviet troops following World War II. In 2001, after difficult negotiations, Russia agreed to return the panels to Germany. In exchange, the German Government offered to finance the reconstruction of the Russian Orthodox Church of the Dormition of the Mother of God located near Novgorod. A second group of 6 panels found in 2005 in the Pushkin State Museum of Fine Arts was returned to Germany in 2008.

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I. Chronology

Spoils of war

- **1946:** Soviet troops took **117 rare 14th century stained-glass window panels** from the New Palace in Potsdam (*Neues Palais*), where they were stored after being disassembled into the **117 panels** for safekeeping¹. The panels originally formed a window of the **Lutheran Church of St Mary in Frankfurt-on-the-Oder** (*St. Marienkirche*)². Believed to be permanently lost, it was only in **1997** that their rediscovery became public. Since the end of the war, the **111 panels** were stored at the Russian **State Hermitage** museum³.
- **October 2000:** The then German State Minister for Media and Culture, Michael Naumann, and the Russian Minister of Culture, Mikhail E. Shvydkoi, visited the 14th century **church in Novgorod**, the Dormition of the Mother of God. The church fell under heavy siege at the time of the 1941 invasion of German bombers⁴. Germany assured to offer financial help for its restoration⁵.
- **August 2001:** The Russian Interagency Council on Questions of Cultural Valuables Displaced as a Result of World War II⁶ **approved the return** of the glass panels. The denationalisation process was lengthy, but the panels were eventually returned.⁷ **In exchange**, Germany agreed to contribute \$ 1.5 million for the **restoration** of the church in Novgorod sponsored by the German energy company *Wintershall*⁸.
- **October 2001:** An Order by the Russian Ministry of Culture⁹ declared the 111 panels to be “unique”, pursuant to one of the exceptions provided by the Russian law that nationalizes

¹ See Susanne Schoen, “Die Rückgabe der kriegsbedingt nach Russland verbrachten Fenster der Marienkirche aus politischer Sicht,” in *Der Antichrist. Die Glasmalereien der Marienkirche in Frankfurt (Oder)*, ed. Ulrich Kniefkamp et al. (Leipzig: Edition Leipzig, 2008), 197.

² The church was completely destroyed during WWII and has been rebuilt since 1985; see John Varoli, “Restoring a Window’s Glow, Healing a War’s Wounds,” *The New York Times*, December 27, 2000, accessed January 9, 2012, <http://www.nytimes.com/2000/12/27/arts/arts-abroad-restoring-a-window-s-glow-healing-a-war-s-wounds.html>.

³ Ibid. Between 2001 and 2002, the Laboratory for Scientific Restoration of Works of Applied Art within the Hermitage Museum completed restoration work on 15 out of 111 panels (see The State Hermitage Museum Website, Hermitage News, Restoration programmes, “The restoration of stained glass from the Marienkirche in Frankfurt an der Oder,” accessed March 12, 2012, http://www.hermitagemuseum.org/html_En/13/hm13_3_006.html).

⁴ See Patricia Kennedy Grimsted, “Legalizing ‘Compensation’ and the Spoils of War: The Russian Law on Displaced Cultural Valuables and the Manipulation of Historical Memory,” *International Journal of Cultural Property* 17 (2010): 241.

⁵ See “Russland gibt historische Fenster zurück,” *Spiegel Online*, February 20, 2001, accessed January 9, 2011, <http://www.spiegel.de/kultur/gesellschaft/0,1518,118600,00.html>.

⁶ The Commission was established in March 2001 by a Government Directive (On implementation of the Federal Law “On cultural valuables displaced to the USSR as a result of Second World War and located on the territory of the Russian Federation”: Decree of the Government of the Russian Federation, 11 March 2001, no. 174.). It was to review all foreign claims on displaced cultural property (see Grimsted, “Legalizing ‘Compensation’ and the Spoils of War,” 233; Grimsted, “Russian Legal Instruments,” 429 and 466).

⁷ See Grimsted, “Russia’s ‘Trophy’ Archives,” 4.

⁸ See Sylvia Hochfield, “The German-Russian Stalemate,” *ARTnews*, February 1, 2011, accessed March 5, 2012, <http://www.artnews.com/2011/02/01/the-german-russian-stalemate/>.

⁹ Order of the Ministry of Culture, 16 October 2001, no. 1044 (see Grimsted, “Russian Legal Instruments,” 483).

- “Cultural Valuables Displaced to the U.S.S.R. as a Result of World War II”¹⁰ (hereinafter Cultural Valuables Law), hence allowing for their return.
- **April 2002:** Just before the delivery of the panels to Germany, the State Hermitage decided to organize an exhibition including 15 of the panels: “Marienkirche Stained Glass”¹¹.
 - **On 5 April 2002:** The Duma enacted with reticence a **State law enabling the return** of a first group of 111 panels, which was approved by the Federation Council¹².
 - **May 2002:** Negotiations between the State Hermitage and representatives of Germany’s Federal Ministry of Culture took place to arrange the return of the panels. The details of the return were set out with an order of the Ministry of Culture¹³. The panels arrived in Germany in **June 2002**¹⁴. Considering their advanced state of deterioration (some were destroyed up to 50%), the panels were restored by German specialists. The German Ministry of Culture paid around € 2 million for restoration costs¹⁵.
 - **2005:** The **6 other panels were found in the A. S. Pushkin State Museum of Fine Arts.**
 - **June 2006:** As was the first group of panels, the second group was also declared to be “unique” cultural valuables by an Order of the Russian Ministry of Culture¹⁶. The required Federal law enabling their return was enacted in **April 2008**¹⁷.
 - **November 2008:** The second group of **6 panels was returned** to Germany following lengthy negotiations. The then German State Minister for Media and Culture (Bernd Neumann), delivered the panels in Frankfurt-on-the-Oder¹⁸. Following their restitution, the restoration of the Marienkirche began. The three windows were reassembled and the restoration works completed in **October 2009**¹⁹.

¹⁰ Russian Federal Law on Cultural Valuables Displaced to the U.S.S.R. as a Result of World War II and Located on the Territory of the Russian Federation, N 64-FZ, April 15, 1998, transl. by Konstantin Akinsha and Lynn Visson, “Project for Documentation on Wartime Cultural Losses,” accessed August 8, 2011, <http://docproj.loyola.edu/rlaw/r2.html>. Another translation can be found in Wilfried Fiedler, “Documents - Russian Federal Law of 13 May 1997 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,” *International Journal of Cultural Property* 7 No. 2 (1998): 514 – 525.

¹¹ “A Treasure Returns to Germany,” DW, accessed April 12, 2012, <http://www.dw.de/dw/article/0,,493244,00.html>.

¹² On the transfer to the Federal Republic of Germany stained-glass windows from the Church of Saint Mary (Marienkirche) in Frankfurt on Oder, displaced to the Union of Soviet Socialist Republic as a result of the Second World War and held in the State Hermitage: Federal Law, 17 April 2002, no. 37-FZ.

¹³ Order of the Ministry of Culture, 15 May 2002, no. 779.

¹⁴ See “Grosse Fenster mit kleinen Sprüngen,” *Innovation* 20 (8/2008), 50, accessed January 9, 2012, [http://www.zeiss.de/C1257173002D0F60/0/15744E34D8F4FC3BC12574A6003142DE/\\$File/innovation_20_46.pdf](http://www.zeiss.de/C1257173002D0F60/0/15744E34D8F4FC3BC12574A6003142DE/$File/innovation_20_46.pdf)

¹⁵ German Ministry of Culture Press Release, “Bernd Neumann übergab sechs Kirchenfenster an Marienkirche in Frankfurt (Oder) nach Rückgabe aus Russland,” November 17, 2008.

¹⁶ On the designation of stained-glass windows from the Church of Saint Mary (Marienkirche) as unique cultural valuables: Order of the Federal Agency for Culture and Cinematography, 16 June 2006, no. 256.

¹⁷ On the designation of stained-glass windows from the Church of Saint Mary (Marienkirche) in Frankfurt on Oder, displaced to the Union of Soviet Socialist Republic as a result of Second World War and held in the A.S. Pushkin State Museum of Fine Arts: Federal Law, 3 April 2008, no. 42-FZ.

¹⁸ See German Federal Government Press Release, “Chorfenster der Frankfurter Marienkirche vollständig restauriert,” October 28, 2009, accessed March 12, 2012, <http://www.bundesregierung.de/Content/DE/Artikel/2009/10/2009-10-28-chorfenster-marienkirche.html>.

¹⁹ Ibid.

II. Dispute Resolution Process

Negotiation – Diplomatic channel – Settlement agreement

- The settlement reached by Russia and Germany was the result of long diplomatic negotiations which had to be carefully conducted in order to satisfy both parties. With the development of Russia as a new nation, the country's politics hardened in the mid 1990s. It considered "trophy art" to be rightful compensation for the harm caused to the country during World War II. Notwithstanding the bilateral treaties concluded by Russia and Germany in the early 1990s, Russia enacted the Cultural Valuables Law that nationalized cultural valuables which were transferred to the Soviet Union as a result of World War II. Besides political and legal issues, practical difficulties had to be overcome in the case under consideration. Germany learned about the whereabouts of the window panels in 1997 and 2005 when their location in Russian museums was revealed.
- Despite the refusal of the German Government to recognize the Cultural Valuables Law²⁰, it adopted a strategic approach when arguing for restitution by means of the law, considering the difficult political and sociological climate in Russia. According to its Article 8 (2), "[c]ultural valuables that were the property of religious organizations or private charitable institutions and that were used exclusively for religious or charitable purposes and did not serve the interests of militarism and/or Nazism (or Fascism)" are exempted from the nationalisation. It could thus be argued that the panels fell under that exception and could be returned in compliance with the Cultural Valuables Law²¹. Accordingly, the panels had to be labelled as "unique"²² cultural valuables by the enactment of a Federal law (Articles 10(1) and 18(2)). However, in spite of the legal exemption, Russia did not consider a relinquishment of the panels at the beginning. In fact, the Restitution department of the Russian Cultural Ministry announced the possibility of a **temporary repatriation** of the panels for the purposes of their restoration²³.
- Given the compensatory nature of restitutions determined by the Cultural Valuables Law²⁴, it is not surprising that Russia linked the return to a few conditions. The German Minister for Media and Culture and his Russian counterpart were invited to visit the Russian Orthodox Church of the Dormition of the Mother of God of Novgorod. Subsequently, Germany arranged for a corporate funding of its restoration, which led Russia to accept the panel's restitution.
- Should a "unique" cultural valuable be transferred to a foreign claimant State pursuant to the Cultural Valuables Law, all "expenses for its identification, expert appraisal, storage, and restoration, as well as for its transfer (transportation costs, etc.)" must be borne by the claimant

²⁰ See Grimsted, "Legalizing 'Compensation' and the Spoils of War," 219.

²¹ Grimsted, "Russia's 'Trophy' Archives," 4.

²² A cultural valuable of "unique" character is defined by the Law as "having especially important historical, artistic, scientific, or other cultural significance" (art. 18(2)).

²³ See "Russland gibt historische Fenster zurück," *Spiegel Online*, February 20, 2001, accessed January 9, 2011, <http://www.spiegel.de/kultur/gesellschaft/0,1518,118600,00.html>.

²⁴ See Christoff Jenschke, "In Kriegen erbeutet – Zur Rückgabe geraubter Kulturgüter im Völkerrecht," in *Osteuropa* 56 (January – February 2006): 369.

State (Article 18(4)). The request of payment for the maintenance and transport of cultural valuables is difficultly acceptable if Soviet troops were deliberately removing cultural property to be withheld and not simply in the bona fide belief of displacing enemy values.²⁵ In the case under consideration, it seems obvious that the German corporate funding of the Novgorod Church's restoration does not fall under the provision but was paid supplementary.

III. Legal Issues

Ownership – State Responsibility

- The prevalent legal issue in this case was the **ownership title** to the window panels held in Russian museums as a result of spoliation carried out during World War II. The issue is linked to the question whether the appropriation and withholding by Russia of the panels is legitimate in the light of international law and the bilateral treaties of 1990²⁶ and 1992²⁷ concluded with Germany.
- Russia considered its appropriation of trophy art from Germany to be justified **as a compensation for the losses suffered during the war** (right of history)²⁸. The government's approach is clearly evidenced by the content of the Law on Cultural Valuables, nationalizing “[a]ll displaced cultural valuables imported to the U.S.S.R in realization of its right to compensatory restitution and located on the territory of the Russian Federation with the exception of those specified in Articles 7 and 8” (Article 6(1) Cultural Valuables Law). With regards to the present case, the Nationalisation does not cover cultural valuables that were the property of religious organizations such as the Marienkirche (Article 7(2)). Instead, such objects could be returned as set forth in Article 9.
- The question of whether the Cultural Valuables Law and the provided appropriation of war spoils as reparation is unlawful in international law is highly debated²⁹. It is held that Russia's compensatory measures violate public international law such as the Hague Convention of

²⁵ See Pierre d'Argent, “The Russian Law on Removed Cultural Property: Some International Law Remarks,” *Spoils of War* 4 (August 1997): 23.

²⁶ Treaty between the Federal Republic of Germany and the Union of Soviet Socialist Republics on Good-Neighbourliness, Partnership and Cooperation, signed in Bonn, November 9, 1990, *ILM* 30 (1991): 504 et seq (hereinafter Treaty on Good Neighbourliness).

²⁷ Treaty between the Federal Republic of Germany and the Russian Federation on Cultural Cooperation (*Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Russischen Föderation über kulturelle Zusammenarbeit*) signed in Moscow, December 16, 1992, *Bundesgesetzblatt Teil II* (1993): 1256, accessed July, 28 2011, <http://archiv.jura.uni-saarland.de/BGBI/TEIL2/1993/19931256.2.HTML> (hereinafter Treaty on Cultural Cooperation).

²⁸ Anne Laure Bandle, Alessandro Chechi, Marc-André Renold, “Case Sammlung 101 - Kunsthalle Bremen and Russia,” Platform ArThemis (<http://unige.ch/art-adr>), [Art-Law Centre, University of Geneva](http://unige.ch/art-adr).

²⁹ See for instance Andrea Gattini, “Restitution by Russia of Works of Art Removed from German Territory at the End of the Second World War,” *European Journal of International Law* 7 (1996): 82; For an attempt to find a legal justification for Russia's “reparation by replacement” purposes, see D'Argent, “The Russian Law on Removed Cultural Property,” 22 et seqq.

1907³⁰. These international laws prohibit the seizure or destruction of cultural assets during war time (Article 23(g)). Moreover, Russia's contention to retain cultural property as reparation art was countered by Germany as illegitimate, in view of Article 53 in connection with Article 56 of the Hague Convention of 1907³¹, Article 4 of the Hague Rules of 1954³² and Article I(3) of the First Protocol of the Hague Convention of 1954³³. When national law contradicts international law, it is the respective State's international responsibility to bring its law into line with its international obligations³⁴. On the other hand, it is to be noted that the Hague Convention of 1954 and its Protocol are not applicable to events which occurred prior to their enactment³⁵.

- Yet the situation between Russia and Germany with regards to the unilateral appropriation of cultural property is more delicate to address, given that both nations signed bilateral agreements, which foresee the return to their rightful owners of "lost or unlawfully transferred art treasures which are located on their territory" (Article 16(2) Treaty on Good Neighbourliness and Article 15 Treaty on Cultural Cooperation). Duma deputies have since modified their commitment to return war spoils and have advanced certain questions of interpretation: "[they] consider that the terms of those articles only concern the properties that were really lost (and not only hidden) or stolen (and not removed by the authorities)"³⁶.
- The German legal viewpoint was underlined in the Government's press release on the day of the return, stating that "the cultural heritage of a nation is a very important part of its identity.

³⁰ Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, October 18, 1907, accessed August 10, 2011, <http://www.icrc.org/ihl.nsf/full/195>.

³¹ Art cannot be seized as means of compensation (see Wilfried Fiedler, "Legal Issues Bearing on the Restitution of German Cultural Property in Russia," in *The Spoils of War: World War II and Its Aftermath: The Loss, Reappearance, and Recovery of Cultural Property*, ed. Elizabeth Simpson (New York: Harry N. Abrahams, Inc., 1997), 178; Susanne Schoen, "Die Rückgabe der kriegsbedingt nach Russland verbrachten Fenster der Marienkirche aus politischer Sicht," in *Der Antichrist. Die Glasmalereien der Marienkirche in Frankfurt (Oder)*, ed. Ulrich Kniefelkamp et al. (Leipzig: Edition Leipzig, 2008), 199. In 1939, the Hague Convention of 1907 "was the only comprehensive multilateral international agreement in effect in Europe dealing with the protection of cultural property during wartime" (Larry Kaye, *Laws in Force at the Dawn of World War II: International Conventions and National Laws*," in *The Spoils of War: World War II and Its Aftermath: The Loss, Reappearance, and Recovery of Cultural Property*, ed. Elizabeth Simpson (New York: Harry N. Abrahams, Inc., 1997), 102).

³² The Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954. Art. 4(3) commits contracting states to "undertake 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. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party."

³³ Ibid. Art. I(3) explicitly forbids the retention of cultural property as war reparation.

³⁴ See Lyndel Prott, "La déontologie et le droit des retours," *Museum international* No. 241-242 (Vol. 61, No. 1-2, 2009) : 113.

³⁵ See Andrea Gattini, "Restitution by Russia of Works of Art Removed from German Territory at the End of the Second World War," *European Journal of International Law* 7 (1996): 83; for a more comprehensive analysis of each government's legal argumentation on the matter of displaced cultural property from Germany to Russia, see Anne Laure Bandle, Alessandro Chechi, Marc-André Renold, "Case Sammlung 101 - Kunsthalle Bremen and Russia," Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva. Greenfield, Jeanette. *The Return of Cultural Treasures*, 3rd ed. Cambridge: Cambridge University Press, 2007.

³⁶ D'Argent, "The Russian Law on Removed Cultural Property," 24; see also Gattini, "Restitution by Russia of Works of Art Removed from German Territory," 77.

International law thus clearly establishes that cultural property have a special status during war times and may not be retained as reparation. This is also the line of the Federal Government.”³⁷ Notwithstanding applicable Russian law enabling a return, the negotiation process in the case under consideration may not be narrowed down to a purely legal argumentation. In fact, even the most convincing legal argumentation is not sufficient in the very unstable and complex relationship between Germany and Russia³⁸.

IV. Adopted Solution

Conditional restitution

- Russia agreed to return both groups panels (the 111 stored in the State Hermitage Museum and the 6 stored in the Pushkin State Museum of Fine Arts, respectively). Shortly before the scheduled date of return, the State Hermitage Museum independently decided to temporarily retain the panels for an exhibition. This decision was most likely not based upon the prior agreement between the two countries³⁹.
- In exchange for the panels, Germany agreed to finance for \$ 1.5 million the reconstruction of the medieval Russian Orthodox Church of the Dormition of the Mother of God located near Novgorod, which was heavily destroyed at war⁴⁰. The reconstruction was sponsored by the German energy company *Wintershall*⁴¹.

V. Comment

- The Russians intended to prevent the restitution of cultural property to the States from which they were taken during WWII by means of the Cultural Valuables Law. The strategy has proved to be rather efficient, given that only two restitutions under the Russian law have been reported so far: the Marienkirche window panels and four fragmentary early mosaics returned to the Ukraine in 2002⁴². The return was in fact downplayed by Anatoli Vilkov, head of the Russian Culture Ministry department for preserving cultural valuables, who was quoted as stating that “[w]e are not talking about a mass restitution here; just the return of concrete

³⁷ German Ministry of Culture Press Release, “Bernd Neumann übergab sechs Kirchenfenster an Marienkirche in Frankfurt (Oder) nach Rückgabe aus Russland,” November 17, 2008 (transl. author).

³⁸ See Kristiane Burchardi and Christof Kalb, “Beutekunst als Chance. Perspektiven der deutsch-russischen Verständigung,” *Osteuropa Institut München, Mitteilungen Nr. 38*, August 1998, 27.

³⁹ See Uta Baier, “Die unbequeme Beutekunst,” *Die Welt*, July 30, 2011, accessed January 9, 2012, http://www.welt.de/print/die_welt/vermischtes/article13516350/Die-unbequeme-Beutekunst.html.

⁴⁰ The financing is probably provided by German businessmen, see “Russland gibt historische Fenster zurück,” *Spiegel Online*, February 20, 2001, accessed January 9, 2011, <http://www.spiegel.de/kultur/gesellschaft/0,1518,118600,00.html>.

⁴¹ See Sylvia Hochfield, “The German-Russian Stalemate.”

⁴² See Grimsted, “Legalizing ‘Compensation’ and the Spoils of War,” 241.

items”⁴³. The return was commented to be a “gesture of goodwill” that timely coincided with a visit by President Vladimir Putin in Germany⁴⁴.

- Only very few similar conditional restitutions have taken place between these States, such as the exchange between Russia and the Kunsthalle Bremen (Sammlung 101)⁴⁵. Germany hopes to obtain further cultural property still located on Russian territory and laments that the return of war spoils is still too rare and slow a process⁴⁶. Russia’s authorities on the other hand have to be careful with restitutions as they fear complaints by powerful Russian nationalists⁴⁷.

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⁴³ John Varoli, “Restoring a Window’s Glow, Healing a War’s Wounds,” *The New York Times*, December 27, 2000, accessed January 9, 2012, <http://www.nytimes.com/2000/12/27/arts/arts-abroad-restoring-a-window-s-glow-healing-a-war-s-wounds.html>.

⁴⁴ “Disputed German Art Collection Causes Political Row in Russia,” *DW*, accessed April 12, 2012, http://www.dw.de/dw/article/0,,821145_page_0,00.html.

⁴⁵ See Anne Laure Bandle, Alessandro Chechi, Marc-André Renold, “Case Sammlung 101 - Kunsthalle Bremen and Russia,” Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

⁴⁶ See Uta Baier, “Die unbequeme Beutekunst,” *Die Welt*, July 30, 2011, accessed January 9, 2012, http://www.welt.de/print/die_welt/vermischtes/article13516350/Die-unbequeme-Beutekunst.html.

⁴⁷ John Varoli, “Restoring a Window’s Glow, Healing a War’s Wounds,” *The New York Times*, December 27, 2000, accessed January 9, 2012, <http://www.nytimes.com/2000/12/27/arts/arts-abroad-restoring-a-window-s-glow-healing-a-war-s-wounds.html>.

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