Restitution of Jewish Cultural Property Looted in World War II: To Whom?

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Abstract: The Hague Convention on Cultural property of 1954 prohibits the transfer by the occupier of cultural property from territory occupied by him. Under the Protocol annexed to the said Convention, the parties to it undertake to return cultural property transferred in contravention of the Convention to their countries of origin. These provisions are clearly inadequate when dealing with Jewish cultural property looted by Nazi-Germany and its collaborators in the course of World War II. Jewish cultural heritage was usually considered as endangering the cultural heritage of the host nations and, consequently, subject to harassment and destruction. It would therefore seem inequitable to return looted Jewish cultural property (representing the cultural heritage of the Jewish people) to those countries from which it was looted; the proper recipient of this heritage (also by virtue of the principle of self-determination) is the Jewish people represented by the State of Israel and the major contemporary Jewish communities around the world.

1. INTRODUCTION

The recent controversy concerning the dormant bank accounts of the victims of the Holocaust (primarily, though not exclusively, in Switzerland), as well as the discussions regarding the fate of the gold looted from those victims, have naturally also given rise to analyses of the various legal aspects involved in these issues.[1] It is proposed to focus attention here on one particular aspect of this broad issue that deserves separate consideration, namely, the fate of the Jewish *cultural* property looted by Germany and by the regimes and individuals that collaborated with it in the course of World War II throughout Nazi-occupied Europe.[2]

The term 'Jewish cultural property' is used here not in order to designate cultural property owned by Jews, merely by reason of ownership; rather it is intended to denote the works and artifacts representing the cultural heritage of the Jewish people throughout the ages. Thus, for example, paintings of

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1. *See, e.g.*, D.F. Vagts, *Switzerland, International Law and World War II*, 91 AJIL 466 (1997).
2. On the legal problems relating to the restitution of looted cultural property in general, *see* G. Carducci, La restitution internationale des biens culturels et des objets d'art (1997). The book came to the author's attention after the submission of his manuscript.

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Renoir or Picasso owned by French Jews and looted from them by the Nazis or by the French Vichy authorities will not be considered, for present purposes, as 'Jewish cultural property' although it goes without saying that such property should also be restored to its rightful owners or to their heirs, whenever these can be traced and identified. Moreover, in those instances in which the heirs of such looted property cannot be identified, it should still be considered as ownerless 'Jewish property' the disposition of which should be effected accordingly.[3]

Due to well-known historical circumstances and the unique course of Jewish history, the works and artifacts constituting the cultural heritage of the Jewish people are mainly of a religious character. They include theological and philosophical works and manuscripts (first and foremost among them the Bible and its commentaries, the various editions of the Babylonian Talmud, and the vast responsa and other literature based on it), as well as books and manuscripts on other aspects of the history and life of Jewish communities in various countries and the archives of those communities. Further, they include Torah scrolls, their robes, and other ornamental items; Torah arks and the embroidered curtains covering them; Sabbath and Hanukka candelabra; ritual wine cups and spice boxes; charity boxes; various instruments used for ritual circumcision; prayer shawls and phylacteries; illustrated prayer books and Passover Haggadot; illustrated wedding contracts, etc.

In those instances in which the Nazi-Germans and their helpers of other nationalities did not deliberately destroy these and other cultural works and artifacts (many of them also of considerable artistic and material value), they systematically plundered them. Many of these cultural treasures were then concentrated by them at various assembly points the best known of which is probably the city of Prague. There the Nazis intended to establish the central 'museum of an extinct race' and, therefore, deposited there the contents of Jewish libraries, archives, and synagogues from all over Europe, as well as Jewish cultural items robbed from private individuals either in the countries ruled by Nazi-Germany or at the time of the arrival of the victims at the death camps in Poland and elsewhere.

3. A problem in this regard can arise when dealing with the looted works of painters of Jewish origin (such as Max Liebermann and Marc Chagall), especially when those paintings deal with patently Jewish motifs. The problem then becomes a definitional one, namely, whether such works, when plundered from Jews, should be treated merely as 'Jewish property' or as 'Jewish cultural property'.

2. THE 1907 CONVENTION

Article 56 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land, annexed to the Hague Convention of the same name of that year, provides that

> the property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, should be treated as private property. The seizure, destruction and wilful damage done to institutions of this character, historic monuments, works of art and science is forbidden and should be made the subject of legal proceedings.[4]

This stipulation should be read in conjunction with the provisions contained in Article 46 of the said Regulations ("Private property cannot be confiscated") and Article 47 ("Pillage is formally forbidden"). It thus follows that, under the 1907 Hague Regulations, cultural property, irrespective of whether or not it is privately owned, must not be destroyed, damaged, confiscated, seized, or pillaged in any way or form and that violators of these provisions may be prosecuted.

While the Regulations do not contain any provision concerning the restitution of plundered cultural property, there certainly does exist, under Article 3 of the 1907 Hague Convention,[5] a duty to compensate. That Article provides that a belligerent party which violates the stipulations of the Regulations annexed to it "shall, if the case demands, be liable to pay compensation".[6] Nevertheless, the opinion has been expressed that

> in view of the Nuremberg proceedings [of the International Military Tribunal] it would seem that restitution in effect or in kind has indeed become mandatory in respect of organized plunder in violation of Article 56 of the Hague Regulations.[7]

3. THE 1954 CONVENTION

The 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict of 14 May of that year,[8] is much more explicit on

4. 1907 Hague Convention Respecting Customs of War on Land, reproduced *in* 2 AJIL II (1908/Supp.); and annexed 1907 Hague Regulations Concerning the Laws and Customs of Land Warfare, at 116.
5. 1907 Hague Convention, *supra* note 4, at 93.
6. *Id.*
7. T. Einhorn, *Restitution of Archaeological Artifacts: The Arab-Israeli Aspect*, 5 International Journal of Cultural Property 133, at 136 (1996).
8. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, 249 UNTS 240.

the questions discussed here. In its preamble, it expresses the conviction of the contracting parties that

> damage done to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world.[9]

and it considers that "the preservation of the cultural heritage is of great importance for all peoples of the world and [...] should receive international protection".[10] Article 1(a) of the 1954 Convention defines 'cultural property', for the purposes of the Convention, irrespective of origin or ownership, as

> movable and immovable property of great importance to the cultural heritage of every people, such as [...] works of art, manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above.[11]

Under Article 2 of the 1954 Convention, the parties to it undertake to safeguard and respect cultural property. Under Article 4(1) they undertake

> to respect cultural property situated within their own territory as well as within the territory of other [...] Parties by refraining from any use of the property [...] for purposes which are likely to expose it to destruction or damage in the event of armed conflict; or by refraining from any act of hostility directed against such property.[12]

Article 4(3) then imposes on the parties the duty

> 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 [...] Party.[13]

9. *Id.*
10. *Id.*, at 249.
11. The definition of "cultural property" contained in this Art. also refers to "monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest". For present purposes, however, the question of immovable Jewish cultural property will not be discussed here. The question of its preservation certainly requires separate detailed treatment.
12. Art. 4(1) of the 1954 Hague Convention, *supra* note 8, at 242-244.
13. *Id.*, at 244.

4. THE 1954 HAGUE PROTOCOL

Article I(1) of the 1954 Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict, opened for signature simultaneously with the said Convention commits every party to it "to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property"[14] and, under Article I(3),

> to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph.[15]

It is noteworthy that in an introductory editorial note to the 1954 Protocol it has been pointed out that "in view of the difficulties of several governments in adopting provisions on the restitution of property, [...] it was decided to separate them from the Convention". It would thus appear that the duty to restitute plundered cultural property, as distinct from the duty to compensate for the looting of such property, exists at this time only for the parties to the Protocol.[16]

5. ANALYSIS

This state of affairs is certainly highly unsatisfactory from the point of view of equity and elementary justice. But even if it could be shown that a duty to restitute looted cultural property, in accordance with the provision contained in Article I(3) of the 1954 Protocol, has developed for all states since 1954

14. 1954 Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 249 UNTS 358.
15. *Id.*
16. Mention should be made in this connection also of UN General Assembly Resolution 3391(XXX) of 19 November 1975, entitled 'Restitution of Works of Art to Countries Victims of Expropriation'. While the said Resolution does not refer explicitly to cultural property looted in time of war, it is addressed to countries which had access to such property "as a result of their rule over or their occupation of a foreign territory" (para. 2). The resolution calls upon "those States concerned which have not already done so to proceed to the restitution of objets d'art, monuments, museum pieces, manuscripts, and documents to their countries of origin" (para. 6). Admittedly, resolutions of the UN General Assembly as such do not have, as a rule, a binding legal effect for member states (*see* the commentary on Art. 10 of the UN Charter in B. Simma (Ed.), The Charter of the United Nations: A Commentary 226 (1995), and the authorities cited there; F.B. Sloane, *The Binding Force of a 'Recommendation' of the General Assembly of the United Nations*, 25 BYIL 1 (1948); and D.H.N. Johnson, *The Effect of Resolutions of the General Assembly of the United Nations*, 32 BYIL 97 (1955-56), but they do frequently reflect – as they seem to do in the instant case – the considered opinion of the international community of what behaviour is right and equitable in a particular situation.

and is now a binding rule of general international law, it would still fail to meet the requirements arising out of the particular situation regarding the Jewish cultural property plundered during World War II.

To start with, the 1954 Hague Convention and Protocol were adopted almost a decade *after* the end of World War II and thus, under the normal rules of the law, both domestic and international, have no retroactive application.[17]

But even if one were to assume, for some reason, such retroactive application of the Protocol, one would still be faced, in the instant case, with a problem of a more general character, due to the unique situation of the Jewish minorities in the various European countries.

The various conventions referred to above (as well as UN General Assembly Resolution 3391(XXX))[18] all envisage a situation in which the country of origin of a certain item of cultural property is also the country of the people whose cultural heritage that item represents. In other words: if a piece of cultural property has been removed from Greece, for example, then it may be assumed that the piece in question represents the cultural heritage of the Greek people. This assumption is, indeed, correct in the vast majority of the cases in which items of cultural property have been removed from their country of origin. It is, therefore, perfectly logical to demand, as do the 1954 Hague Protocol and UN General Assembly Resolution 3391(XXX), that such items of cultural property be returned to their countries of origin.

However, in the case of the Jewish cultural property looted in World War II this assumption is not a valid one. Throughout most of recorded history, the nations of Europe did not, as a rule, consider Jewish culture as part of their own culture; on the contrary, since they usually regarded the Jews living in their midst as an alien element, worthy of contempt, derision, humiliation, and persecution, they accorded the same treatment to the products of Jewish culture. Hence the not infrequent burning of Jewish books and the systematic desecration and destruction of scholarly and artistic works representing Jewish culture. The hostile attitude displayed towards Jewish culture and its manifestations was thus but a reflection of the treatment accorded to the bearers of that culture, that is, the Jewish communities living within the host countries.

Nazi-Germany and its collaborators went even further: since the Jewish communities were considered by them not just as foreigners but as dangerous polluters of the spirit and vitality of the host nations, Jewish culture was

17. Thus, Art. 28 of the 1969 Vienna Convention on the Law of Treaties, reproduced *in* 8 ILM 679 (1969), (entitled "non-retroactivity of treaties") provides that "unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place [...] before the date of entry into force of the treaty with respect to that party".

18. *See* UN Doc. A/Res/3391(XXX).

also regarded not just as an alien culture but also as one having a particularly poisonous and pernicious effect on the majority culture and, consequently, worthy of destruction.

In retrospect, it is undoubtedly correct to state that, with very few and brief exceptions, Jewish culture was not considered by the host nations of Europe as part of their own cultural heritage. It is certainly ironic that many of these nations (including not only Germany but also other European countries) should have discovered (and on occasion even celebrated) the Jewish cultural contribution to their own culture only after the virtual disappearance of their own Jewish communities. But even this belated realization – prompted no doubt to a large extent by pangs of conscience brought about by the revelations of the enormity of the genocidal crimes perpetrated against the Jewish communities, often with the active collaboration of the population of the occupied territories with the German invaders – cannot serve as a justification for the retroactive incorporation of Jewish cultural heritage within the cultural heritage of the countries in whose midst the Jewish communities resided prior to their destruction.

The salient and incontrovertible historical fact remains that if Jewish culture managed to thrive and to flourish in those countries and was able to produce scholarly, spiritual, and artistic achievements of lasting value, this happened, as a rule, *despite* the attempts of the majority to oppress the Jewish minority and to repress (and even obliterate) its culture. It would be a cruel irony of history if the nations that persecuted their Jewish minorities and impeded the development of Jewish culture in all its manifestations were now to become the guardians and beneficiaries of the relics of that culture.

It is thus obvious that in this particular case the provisions regarding the return of cultural property to its country of origin do not meet the requirements of justice. What is more: even if the plundered Jewish cultural property was not taken across the boundaries of the countries in whose territory it was originally located, it still remains *the cultural heritage of the Jewish people* and not of the nations on whose territory it was produced. It is worth emphasizing in this connection that the 1954 Hague Convention and Protocol as well as UN General Assembly Resolution 3391(XXX) rightly refer to the cultural property of *peoples* and not of states or territories.

The right of self-determination of peoples is now generally recognized as one of the fundamental principles of contemporary international law.[19] Peoples have consequently come to be regarded as subjects of international law and are endowed with certain rights under it. The cultural heritage of a people is unquestionably one of the basic manifestations of its peoplehood and

19. *See* D. Thuerer, *Self-Determination*, *in* R. Bernhardt (Ed.), Encyclopedia of Public International Law, Instalment 8, at 470-476 (1985), and the authorities cited there.

thus one of the essential attributes that characterize it as a people entitled to exercise its right of self-determination. It would thus be absurd to assert the existence of the right of self-determination of peoples, while denying the right of a people to its cultural heritage which, together with other elements, underlies the right of self-determination. In other words: a people is entitled, as an integral part of its right of self-determination, to the ownership of its cultural property which constitutes the expression of its unique cultural heritage.

At the time of the Holocaust the Jewish people did not have a state that it could call its own. Such a state – Israel – has, however, been in existence since 1948. The cultural heritage of the Jewish people constitutes an integral part of the culture of the state of Israel which in its Declaration of Independence defined itself as "the Jewish State".[20] Moreover, Israel is already home to almost one half of the Jewish people, and, according to demographers' forecasts, will become, within a decade or so, the home of the majority of the Jewish people. Justice, fairness, and common sense alike thus dictate that the bulk of the plundered cultural property representing the cultural heritage of the Jewish people be transferred to the Jewish state which is the repository of that heritage. The natural habitat of that property are places like the Israel Museum, the Yad Va-Shem Holocaust Memorial, and the Jewish National Library in Jerusalem.[21]

Admittedly, the ideas advanced here do not conform to the conservative views based on the interpretation of existing international instruments regarding the disposition of looted cultural property. Due to the uniqueness of the situation here under consideration, it is evident that the normal rules governing the restitution of cultural property are inadequate in the present case. The uniqueness of this situation, as demonstrated above, clearly calls for a solution *sui generis*. Nothing less can do justice to this unique situation. The ideas mooted here are thus believed to meet the requirements of equity and fairness in this sad and tragic chapter of contemporary history.

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20. See R. Lapidoth & M. Hirsch (Eds.), The Arab-Israel Conflict and Its Resolution: Selected Documents 61, at 62 (1992).
21. Since we are dealing here with the fate of cultural property representing the cultural heritage of the entire Jewish people, legitimate claims in this regard may also be raised by the major Jewish communities of the Diaspora (especially those communities whose members originally hailed from the countries ruled during World War II by Nazi-Germany and its allies). Once the principle of the right of the Jewish people to own the cultural property representing its cultural heritage is accepted, the disposition of this property and the modalities concerning its distribution would become a matter to be settled between the state of Israel, on the one hand, and the organizations representing those communities on the other hand.