

COMMENT

SPOILS OF WAR? A SOLUTION TO THE HERMITAGE TROVE DEBATE⁺

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1. INTRODUCTION

Degas's *Place de la Concorde*. Van Gogh's *The White House at Night*. Renoir's *In the Garden*. For decades these masterpieces,¹ along with countless other works of art and cultural heritage, were thought to be lost among the ruins of World War II.² In February 1995, however, a stunned art world witnessed the emergence of these pieces from the secret catacombs of Russian

⁺ For the sake of simplicity, and with all due respect for the Pushkin and other museums, this Comment refers to the breadth of the art discussed as the "Hermitage trove" and to the entire controversy as the "Hermitage controversy."

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¹ See Jean MacKenzie, *Festive Opening for 'Trophy Art' Exhibition*, MOSCOW TIMES, Mar. 30, 1995, available in LEXIS, News Library, Non-US File (describing the artwork as "masterpieces"); but see Jamey Gambrell, *Displaced Art*, ART IN AM., Sept. 1995, at 88, 92 (questioning the artistic significance of the artwork in the trove).

² See Gambrell, *supra* note 1, at 88 (noting that many paintings were "thought irretrievably lost" after World War II); James Meek, *Hermitage Puts Stalin's German Loot on Display*, GUARDIAN, Dec. 4, 1996, at 12 (stating that the artwork in the Hermitage trove "was believed . . . [to have] been destroyed").

museums.³ The ensuing controversy in the international art community over the art's proper home has been as passionate as the debate surrounding the Elgin Marbles.⁴ Since its reemergence, the trove has been alternately described by commentators as the "last prisoners of World War II,"⁵ reparation for a "unique unprecedented act in world history,"⁶ and lost artwork whose recovery is "just short of miraculous."⁷ The variety of descriptions of the trove is indicative of the complexity of the controversy, which has become a cause célèbre in intellectual spheres ranging from the economic to the political.

The trove consists of art seized by the Soviet army from German collections at the end of World War II.⁸ Hidden beneath Russian museums for nearly five decades, this collection of artwork resurfaced early in February, 1995 as the centerpiece of two controversial exhibits in Russia.⁹ The exhibit held by St.

³ See generally Robert Hughes, *The Spoils of War: Russia's New Displays of Art Looted from Germany Reignite a Debate Over Who Rightfully Owns Such Plunder*, TIME, Apr. 3, 1995, at 64 (discussing the controversy arising from the Russian display of a portion of the trove).

⁴ The Elgin Marbles are portions of the frieze, metopes, and pediments of the Parthenon in Athens that were removed by a British subject between 1801 and 1812. See John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1882-84, 1897 (1985). The Marbles were subsequently sold to the British Museum, where they continue to be displayed. See *id.* at 1882. In the early 1980s, the Greek government unsuccessfully attempted to reacquire the Marbles. See *id.* The controversy continues, however, as to which country is entitled to possession of the Marbles. See *id.*

Such possessory disputes are not uncommon; other well-known examples include Montezuma's Aztec headdress held in Vienna and various masterpieces in the Prado that were taken during Spain's seventeenth century occupation of the Netherlands. See Deloris Tarzan Ament, *A Compelling Portrait of Art, War and Politics*, SEATTLE TIMES, Dec. 17, 1995, at M2.

⁵ Karl E. Meyer, *Editorial Notebook: Russia's Hidden Attic; Returning the Spoils of World War II*, N.Y. TIMES, Feb. 1, 1995, at A20.

⁶ Amei Wallach, *Russia, Art and Spoils of War*, NEWSDAY, Jan. 24, 1995, at B7 (quoting Irina Antonova, Director of the Pushkin Museum).

⁷ Will Englund, *Russia Unveils Seized Masterpieces*, BALTIMORE SUN, Feb. 10, 1995, at 1A.

⁸ See *infra* section 2 (discussing the history of the trove).

⁹ The Pushkin Museum later presented other related exhibitions, including "Five Centuries of European Drawing," held in October, 1995. See Mark Almond, *The Art of Cashing in on Nazi Treasures*, DAILY MAIL, Oct. 21, 1995, at 12. This exhibit consisted of 307 sketches and drawings by such artists as Dürer, Holbein, Mantegna, and Rembrandt. See *id.* Pushkin curators credited the exhibit as "the former collection of Franz Koenigs," a German Jew who owned the drawings before they were seized by the Nazis and ultimately taken

Petersburg's Hermitage Museum, innocuously called "Hidden Treasures Revealed,"¹⁰ was greeted with much acclaim by a delighted art world.¹¹ In contrast, its counterpart in Moscow's

by Soviet soldiers. *Id.* For a complete catalogue of the Koenigs collection, see ALBERT J. ELEN, MISSING OLD MASTER DRAWINGS FROM THE FRANZ KOENIGS COLLECTION CLAIMED BY THE STATE OF THE NETHERLANDS (1989).

On April 16, 1996, the Pushkin opened the "Trojan Gold" exhibition, which was scheduled to last one year. See Peter Plagens, *The Golden Hoard*, NEWSWEEK, Apr. 8, 1996, at 72. The exhibition consisted of Bronze Age gold objects excavated by Heinrich Schliemann in 1873 at an archaeological site in Turkey believed to be the legendary city of Troy. See *id.* The art was kept in Germany until 1945, when a German museum director supposedly gave the gold to the Soviets for protection. See *id.* at 73. Germany was unhappy with this exhibition, particularly since some German officials felt that such an exhibit should have been done in tandem with German museums, which possess a majority of the collection. See *Russia Unveils Trojan Treasures: Exhibit of WWII 'Trophy' Art Angers Germany*, CHI. TRIB., Apr. 16, 1996, § 1, at 4. In response, the Museum of Pre- and Early History in Berlin presented its own exhibit of Trojan artifacts. See *id.* The Hermitage museum has also continued to exhibit seized art, unveiling a show entitled "Treasures of European Drawing" in December, 1996. See Meek, *supra* note 2, at 12.

Much of the Hermitage trove consists of art originally confiscated by the German government from private German collections, like the Koenigs collection. See Almond, *supra*, at 12. This Comment, however, will not address the return of art to its original owners.

¹⁰ See Stanley Meisler, *The Hermitage*, SMITHSONIAN, Mar. 1995, at 40, 42. The exhibit included artwork plundered from private German collections, including the aforementioned pieces by Degas, Van Gogh, and Renoir. See *id.* at 41. Commentators note that some of the paintings "are important works, and one really is a 'lost' masterpiece, hitherto thought to have been destroyed and known only through photographs: Edgar Degas's spatially daring, wonderfully stylish slice-of-life image called *Place de la Concorde* The show also includes an exquisite Seurat seascape, some notable Cézannes and considerable paintings by Courbet, Gauguin, Van Gogh and others." Hughes, *supra* note 3, at 66.

¹¹ Commentators called the Hermitage show an "old-fashioned blockbuster," and 170,000 copies of a "lavish catalogue" detailing the show were printed by June, 1995. Christopher Knight, *Displaying the Spoils of War*, L.A. TIMES, Mar. 20, 1995, at A1. The exhibit was treated by organizers as a gala event of international scope; Hermitage Museum Director Mikhail Piotrovsky "extend[ed] invitations to the German consulate and to the families of the Germans who once owned this art." *Weekend Edition: Russian Museum Exhibits Art Taken From Nazi Germany* (National Public Radio broadcast, Apr. 1, 1995); see also MacKenzie, *supra* note 1 ("The mood at the Hermitage on Wednesday was festive. Piotrovsky emphasized the scrupulous restoration work by Russian specialists, and the high degree of professionalism displayed in the preparation for the exhibition. This theme was echoed by the acting consul general from the German Embassy"). The exhibition drew 1.5 million visitors and had its run extended twice. See Meek, *supra* note 2, at 12.

Pushkin Museum was entitled "Twice Saved,"¹² a more provocative title whose innuendo provides a hint of the international controversy ignited by the trove's resurfacing.

Since the reemergence of this trove and its subsequent exhibition, politicians, art scholars, and journalists have fiercely debated the economic, legal, political, cultural, and historical issues attendant to the larger questions implicated by the art's reemergence: where and to whom does it belong? The German government¹³ and many art commentators¹⁴ argue that the initial seizure and continued possession of the artwork by Russia violate international law and modern protocol.¹⁵ The Russian govern-

¹² The exhibition, held from February 28 to July 16, 1995, consisted of art originally from German and Hungarian private and museum collections. See Gambrell, *supra* note 1, at 88. The exhibit included paintings by the Master of the Holy Kindred, Lucas Crabnach the Elder, Veronese and his studio, Bartholomaeus Bruyn the Elder, Hendrick Ter Bruggen, El Greco, Tintoretto, George Romney, Vigée-Lebrun, Goya, Corot, Daumier, Manet, Degas, and Renoir. See *id.* at 91; see also Jo Ann Lewis, *Uncovering a Buried Treasure: Russians Reveal Two More Long-Lost Art Collections*, WASH. POST, Jan. 23, 1995, at B1 (discussing the portions of the exhibit originally taken by the Nazis from the Herzog and Hatvany families of Budapest, Hungary).

¹³ See Meyer, *supra* note 5, at A20 ("Germany seeks the return of treasures from its museums, libraries and private collections as part of a reciprocal deal with Russia."). The German position is well-documented in a series of statements issued by German Ambassador Hagen Graf Lanbdsdorff of the Foreign Office of the Federal Republic of Germany. See Return of Cultural Property: Hostages of War or Harbingers of Peace—Historical Facts, Political Positions and an Assessment From the German Point of View (January 1995) [hereinafter Statement 1995] (on file with the *University of Pennsylvania Journal of International Economic Law*); Agreements Between Germany and Russia on the Return of Cultural Property Removed From Their Countries in Time or as Consequence of War—The Legal Situation From the German Point of View (September 1994) [hereinafter Statement 1994] (on file with the *University of Pennsylvania Journal of International Economic Law*).

¹⁴ See Interview with Constance Lowenthal, Executive Director of the International Foundation for Art Research, in New York, N.Y. (Dec. 16, 1995) (discussing the Hermitage controversy); see also Meyer, *supra* note 5, at A20 ("[T]o many in the art world, . . . looming ethical question[s] threaten[] to obscure the aesthetic significance of the Hermitage discovery.").

¹⁵ The applicable treaties are the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 [hereinafter Hague 1954], and the 1907 Hague Convention Respecting Laws and Customs of War on Land, Oct. 18, 1907, 1 T.I.A.S. 631 [hereinafter Hague 1907], both of which bar the "confiscation of 'works of art and science' from territory occupied in war." Knight, *supra* note 11, at A10. Also implicated are 1990 and 1992 treaties between Russia and Germany regarding "missing or unlawfully removed cultural property." Statement 1994, *supra* note 13; see also Meyer, *supra* note 5, at A20 (noting that the return of the

ment, however, considers the trove reparations for acts committed by Germany during World War II.¹⁶

To date, this debate has yielded no comprehensive solution to the controversy.¹⁷ The complexity of the dispute, and the disparate interests involved, have contributed to this stalemate. This Comment attempts to resolve the controversy by analyzing it through an approach that is both comprehensive and cohesive. First, each of the perspectives involved in the controversy is examined, including the economic, legal, historical, cultural, and political perspectives; then, each perspective is integrated into a cohesive framework for analysis using the legal perspective as its foundation. In the process, this Comment demonstrates how a legal analysis can provide an objective, equitable, simple, and legitimate method of providing a solution to this complex problem.

Section 2 reviews the trove's history, from the aftermath of World War II to the Hermitage exhibit. Section 3 explores each interest implicated in the controversy, while Section 4 creates a legal framework that integrates these perspectives. Section 4 also explores the current applicable legal doctrine, discusses how each perspective can be considered within a framework rooted in this doctrine, and details the reasons why such a framework is useful. Section 5 then uses the legal framework to find a solution to the controversy that fairly takes each perspective into account. Finally, Section 6 concludes that an equitable solution such as the one proposed can make great strides toward healing deep wounds that have continued to plague Europe since World War II.

disputed works "was the essence of a bilateral agreement [between Germany and Russia] in 1990 and reconfirmed by President Yeltsin in 1992"); *infra* section 3.2 (discussing such statements).

¹⁶ See Knight, *supra* note 11, at A10 ("But the recent nationalist backlash against any cooperation with the West has many Russians digging in their heels, insisting that the art be kept as reparations for German war atrocities.").

¹⁷ The primary international response thus far has been the formation of an official commission on restitution, composed of both German and Russian members. See *Charlie Rose: Guests Talk About the Art on Display at the Hermitage* (PBS television broadcast, Oct. 4, 1995) [hereinafter *Rose*]; see also *infra* section 3.2 (discussing the official Russian response). According to Hermitage director Mikhail Piotrovsky, however, the committee "was making little progress." Meek, *supra* note 2, at 12.

2. THE HISTORY OF THE HERMITAGE TROVE

To art professionals outside Germany the advent of Nazism and the bizarre goings-on of its art establishment were regarded at first as a passing phenomenon which would require some minor adjustments in international dealings.¹⁸

The foresight of these art professionals proved as keen as that of Neville Chamberlain when he appeased Adolf Hitler in 1938. In addition to being a time of human genocide, World War II was rampant with cultural genocide, as warring nations pillaged and destroyed cultural treasures throughout Europe.¹⁹ German troops, under Hitler's orders, plundered art from conquered nations for eventual display in a German "supermuseum."²⁰ In Russia, the Nazis simply destroyed most of the works they found, believing the Russians to be an inferior race with treasures

¹⁸ LYNN H. NICHOLAS, *THE RAPE OF EUROPA* 27 (1994) (giving a complete account of the pillaging of art during World War II).

¹⁹ See, e.g., *id.*

²⁰ See 1 LEONARD F. DUBOFF & SALLY H. CAPLAN, *THE DESKBOOK OF ART LAW* D-17 to D-21 (2d ed. 1993). While much of the art plundered by the Germans during the war was returned to its original owners and nations, efforts to recover art stolen by Nazi troops persist. See John Tagliabue, *Armed With List, Italy Artworks Looted by Nazis*, N.Y. TIMES, May 28, 1995, at 8 (describing attempts by collectors and officials in Italy to acquire stolen artwork). The current German government acknowledges the widespread pillaging by the Third Reich, noting that, "[w]hen German soldiers crossed the Bug in 1941 . . . the services behind the occupation army included not only the notorious task forces which killed people but also art historians in uniform who hunted down cultural property for Rosenberg, Göring and Himmler." Statement 1995, *supra* note 13, § I, at 1.

The German government continues to search for and return art stolen from Allied nations during the war. See *id.* §§ III-IV ("In spring 1994 Federal Chancellor Kohl returned to [French] President Mitterrand 28 important works of art which had been taken from France to Germany during the war in unknown circumstances."). Other art misappropriated during World War II continues to reappear throughout the world. See, e.g., David Colker, *Long Search Ends in Fight Over Degas Painting*, L.A. TIMES, July 19, 1996, at B1 (describing a dispute over ownership of a painting between a Dutch family from whom the painting was taken during World War II and an art collector who later purchased the painting).

unworthy of salvation.²¹

As the tide of the war changed, the Soviet Army,²² under

²¹ As they marched through Russia towards St. Petersburg, German troops pillaged countless cultural sites. See Knight, *supra* note 11, at A10. Commentators note that “National Socialist ideology regarded Slavic people as inferior, so Russia was a target not merely to be conquered—it was to be cleansed, and then Germanized.” *Id.* See also NICHOLAS, *supra* note 18, at 186-201 (giving a complete account of the Nazi pillage of Russia). Some paintings, however, were taken rather than destroyed, and Russia claims that it is still missing 200,000 pieces of art. See David Mazie, *Spoils of War: Display of Art Seized in Battle Sparks Debate*, CHI. TRIB., Feb. 19, 1995, § 13, at 21.

²² Other Allied nations generally did not follow Russia’s lead, although some soldiers confiscated some artwork on their own, most notoriously the Quedlinburg treasures. See Claudia Fox, Note, *The Unidroit Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U. J. INT’L L. & POL’Y 225, 227 (1993) (discussing the Quedlinburg treasures); William H. Honan, *U.S. Reviews Art Theft Case*, N.Y. TIMES, Jan. 24, 1997, at C8 (discussing the continuing legal resolution of the Quedlinburg case); William H. Honan, *Abrupt End to a Case of Looted Treasures*, N.Y. TIMES, Oct. 24, 1996, at C13 (discussing the Quedlinburg case); William H. Honan, *3 Are Indicted in Sale of German Art Stolen by a G.I.*, N.Y. TIMES, Jan. 5, 1996, at A10 [hereinafter Honan, *3 Are Indicted*] (detailing the theft of the Quedlinburg treasures from Germany by an American soldier in 1945).

Likewise, some American leaders were interested in cultural reparations. At one conference of Allied leaders in Berlin, U.S. representatives recommended returning all art plundered by Germany, while retaining art that is the “bona fide property of the German nation.” NICHOLAS, *supra* note 18, at 385. Specific recommendations included holding the art in “trusteeship for return to the German nation when it has re-earned its right to be considered as a nation.” *Id.*

Strong protests by American art historians and museum officials ended such consideration. The most notable protest was by a group of Monuments, Fine Arts and Archives Specialist Officers of the Armed Forces of the United States, who prepared a protest statement popularly known as the “Weisbaden Manifesto” in late 1945. See NICHOLAS, *supra* note 18, at 394. The officers stated that they “unanimously agreed that the transportation of those works of art, undertaken by the United States Army, upon direction from the highest national authority, establishes a precedent which is neither morally tenable nor trustworthy.” Protest Written on 7 November 1946 by MFAA Officers in the office of Walter Farmer in Weisbaden [hereinafter Weisbaden Manifesto] (on file with the *University of Pennsylvania Journal of International Economic Law*); see also NICHOLAS, *supra* note 18, at 394-95 (discussing the protest by the MFAA officers).

The United States and Great Britain eventually pursued a policy of “restitution in hand,” under which cultural objects were returned to their pre-war country of ownership. See Gambrell, *supra* note 1, at 88. A show of confiscated paintings, however, appeared at the National Gallery of Art in Washington, D.C. and in museums throughout the nation to raise money for German children; the art was subsequently returned to Germany’s Dahle Museum. See NICHOLAS, *supra* note 18, at 401-405.

Josef Stalin's orders, engaged in their own plundering, employing special brigades responsible for pillaging "trophy art" from German museums and private collections.²³ The trove gathered by the Soviets eventually included approximately 2.5 million pieces of artwork and 10 million books and manuscripts.²⁴ For decades, this cache sat untouched in the basements of Russian museums.²⁵ Despite the eventual return of some 1.5 million items to East Germany in the 1950s,²⁶ the Soviet government hid the rest of the trove, rumored to exist but never seen, during the

²³ See Knight, *supra* note 11, at A10. Historians note that "[a]s the Soviet Army advanced across Eastern Europe toward Berlin, so-called 'trophy commissions' of art professionals were dispatched from Moscow with the express purpose of collecting art, archives and books and arranging for their transport back to the Soviet Union." Gambrell, *supra* note 1, at 88. See generally KONSTANTIN AKINSHA & GRIGORII KOZLOV, BEAUTIFUL LOOT: THE SOVIET PLUNDER OF EUROPE'S ART TREASURES (1995) (providing a complete account of the Soviet plunder); NICHOLAS, *supra* note 18, at 327-68 (describing the Soviet plunder of German art).

The reasons for the Russian plundering ranged from concern for artwork and opportunism on the part of individual soldiers to a desire for reparations due to "Russian anger at the destruction of their own culture by the Germans." Hughes, *supra* note 3, at 65. Some historians claim that Stalin, like Hitler, had "a long-secret program dating from 1943 to build and stock a new 'supermuseum' with art looted from all over Europe." Ralph Blumenthal, *A Glimpse of Russia's Wartime Art Booty*, INT'L HERALD TRIB., Jan. 24, 1995. *But see* Hughes, *supra* note 3, at 65 ("Josef Stalin had no set plans to create a centralized supermuseum of war loot, though there is some evidence that he entertained the idea.").

²⁴ See Hughes, *supra* note 3, at 65. The contents of the trove ranged "from Gutenberg Bibles, to Impressionist paintings once in German private collections, to the 260 gold and silver objects that, though actually pre-Homeric, were dubbed 'The Treasure of Priam' after they were excavated by Heinrich Schliemann from the site of Troy." *Id.*

²⁵ See Almond, *supra* note 9, at 12 ("Much of the plunder was hidden behind a steel door in the Pushkin's basement."). According to Albert Kostenevich, Curator of the Hermitage, "about 10,000 items were left in the Hermitage in secret storages." Rose, *supra* note 17.

²⁶ See Rose, *supra* note 17; see also Gambrell, *supra* note 1, at 89 ("The restitution was orchestrated with great fanfare, to maximize its political capital. The Pushkin Museum in Moscow mounted a blockbuster exhibition in 1955 that included Raphael's *Sistine Madonna* . . . after which the art was returned."); Statement 1995, *supra* note 13, § III ("In the 1950s the Soviet Union decided to return to its brother nation the GDR some of the German cultural property it had requisitioned."). The Hermitage itself possessed 829,000 of these items in 1945, and Hermitage curators claim that all but approximately 10,000 of the items were returned to East Germany during the 1950s. See Rose, *supra* note 17.

Cold War.²⁷

With the fall of communism in the Soviet Union and East Germany, Russia and a reunited Germany signed treaties in 1990²⁸ and 1992,²⁹ each pledging that stolen works of art would be returned to their original owners.³⁰ Almost immediately after the signing of these pacts, the Hermitage trove slowly began to emerge into view from the museums' dusty storage rooms. In 1992, the Hermitage displayed Old Master and Modern drawings originally taken from a museum in Bremen, Germany.³¹ In February, 1995, the U.S. Federal Bureau of Investigation seized three more paintings originally in the Bremen collection from a Russian immigrant offering them for sale on the open market.³²

This slow trickle of paintings grew into a flood of controversy in 1995, when the Hermitage and Pushkin museums each unveiled significant portions of the long-hidden trove. On February 28, Pushkin officials opened "Twice Saved," a hastily-prepared³³

²⁷ See *Rose, supra* note 17 (discussing rumors of artwork hidden underneath Russian museums).

²⁸ The 1990 treaty, the "Treaty on Good Neighbourliness, Partnership and Cooperation (the Good-Neighbourliness Treaty)," was one of "a number of historic multilateral decisions terminating the East-West confrontation, ranging from the 'Two-plus-four Treaty' between the former occupying powers and the two German states . . . to the adoption of the 'Charter of Paris for a New Europe' at the CSCE summit on 21 November 1990." Statement 1994, *supra* note 13, para. 4. Article 16 of the treaty states that:

The Federal Republic of Germany and the Union of Soviet Socialist Republics will seek to ensure the preservation of cultural treasures of the other side in their territory. They agree that missing or unlawfully removed art treasures which are located in their territory will be returned to the owners or their legal successors.

Id. para. 7.

²⁹ Article 15 of the German-Russian Cultural Agreement of 1992 states that "[t]he contracting parties agree that missing or unlawfully removed cultural property which is located in their territory will be returned to their owners or their legal successors." *Id.*

³⁰ See *Russian Parliament Bans Return of Stolen Art Works*, DEUTSCHE PRESSE-AGENTUR, Apr. 21, 1995, available in LEXIS, News Library, Non-US File [hereinafter *Russian*] (discussing the treaties).

³¹ See Knight, *supra* note 11, at A10.

³² See *id.*

³³ See Gambrell, *supra* note 1, at 91 ("In late February, just weeks after the New York conference [on the artwork], much to everyone's surprise, the Pushkin hastily opened 'Twice Saved.'). Much of the Russian press was cynical about the motives of Pushkin director Irina Antonova, seeing the haste as signifying her "main objective . . . to set the tone of public discussion about

exhibit showcasing sixty-three so-called “lost” paintings,³⁴ a full one-sixth of the Pushkin’s collection of appropriated art.³⁵ Exactly one month later, the Hermitage presented “Hidden Treasures Revealed,” a carefully planned and marketed exhibit aimed at avoiding political controversy.³⁶ Commentators hailed the Hermitage exhibit as “the event of the century,”³⁷ and the international art community applauded the removal of the art’s veil of secrecy.³⁸

Despite their popular and critical success,³⁹ the exhibits reopened old wounds left from the War and ignited debate about the legality and morality of Russia’s possession of the art.⁴⁰ Citing a body of international treaties dating back to the turn of the century,⁴¹ Germany demanded the return of the artwork.⁴²

the art and to upstage the Hermitage exhibition.” *Id.* at 95. Unlike their Hermitage counterparts, Antonova and her colleagues conducted their preparations in secrecy, did not produce a catalogue, and did not inform German officials of the exhibit in advance. *See id.* at 94 (contrasting the Pushkin and Hermitage exhibits).

³⁴ *See id.* at 91-93 (discussing these paintings in detail).

³⁵ *See id.* at 91 (“The museum announced that the show represented approximately one sixth of the disputed paintings remaining in its collection.”).

³⁶ In contrast to Antonova, Hermitage director Mikhail Piotrovsky “demonstrated considerable diplomatic aplomb, managing to avoid antagonizing Russian public opinion while earning the museum a great deal of international good will.” *Id.* at 94. A catalogue was distributed, the Western press lavished the exhibit with advance press, and Hermitage officials “treated the Germans as partners rather than enemies and kept them informed at every stage in the preparations. German cultural officials, foreign museum directors . . . and various heirs to the German private collections who were in St. Petersburg to press their claims, were all invited to a gala opening banquet.” *Id.* at 94.

³⁷ George Myers, Jr., *Exhibit Adds Epilogue to Volume on Art Theft*, COLUMBUS DISPATCH, Mar. 25, 1995, at 3E.

³⁸ *See* Lark Borden, *50-Year-Old Secrets at Hermitage: Here Are 74 “Stolen” Masterpieces*, GANNETT NEWS SERVICE, Apr. 5, 1995, available in LEXIS, News Library, GNS File (discussing how the Hermitage exhibit sent a “wave of exaltation through the global art community”).

³⁹ Although the Hermitage exhibit got the majority of international attention, *see* Hughes, *supra* note 3 (analyzing the entire controversy only after the Hermitage exhibit began), the Pushkin exhibit was also well received, with long lines of visitors and commentators who noted that “the paintings on view at the Pushkin . . . generally appear[ed] to be in excellent condition.” Gambrell, *supra* note 1, at 91.

⁴⁰ *See generally* Hughes, *supra* note 3 (discussing the Hermitage controversy).

⁴¹ Specifically, the 1907 and 1954 Hague Conventions, *supra* note 15.

The Russian parliament subsequently took action to prevent such restitution,⁴³ claiming that Russia was entitled to reparations for the damage caused by Germany during World War II.⁴⁴ Despite the formation of an official commission on restitution composed of German and Russian officials,⁴⁵ the debate has thus far yielded no resolution.

3. A MULTI-LAYERED CONTROVERSY

A major obstacle to a resolution is the complexity of the controversy. Although primarily treated by the media as the subject of a “huge diplomatic row,”⁴⁶ the debate over the Hermitage trove implicates historical, political, economic, cultural, and, ultimately, legal concerns. This section discusses the first four perspectives on the controversy.

3.1. *Historical Sentiments*

The Hermitage trove holds a deep emotional resonance for both nations involved, invoking nationalistic pride and vengeful anger fifty years after the fall of Berlin. “Twice Saved” and “Hidden Treasures Revealed” were more than exhibitions; for many Russians, they were affirmations of Russia’s strength, fueled by memories of past victory in war.⁴⁷ When “Twice Saved” opened, Pushkin Museum Director Irina Antonova proudly proclaimed, “[t]hose of us who know what fascist Germany did to our national heritage, how they destroyed hundreds of thousands of statues and paintings, more than 400 museums, entire cities . . . think such a loss demands compensation.”⁴⁸ One account of the exhibition’s opening noted that Antonova’s words, “even after a

⁴² For a complete articulation of the German position, see Statement 1994 and Statement 1995, *supra* note 13.

⁴³ See *infra* section 3.2 (discussing Russian action regarding the trove).

⁴⁴ See *id.*

⁴⁵ See Rose, *supra* note 17.

⁴⁶ Almond, *supra* note 9, at 12.

⁴⁷ See Gambrell, *supra* note 1, at 95 (“[M]any Russians feel that the Soviet victory [over the Nazis] is the last unsullied spark of glory to which they can proudly and undisputably [sic] lay claim. Anything that is perceived to challenge that glory—however indirectly—rubs salt into an already wounded national pride.”).

⁴⁸ *Russia, with Feeling, Displays Its Booty*, U.S. NEWS & WORLD REP., Mar. 13, 1995, at 11.

half century of peace, drew applause from the museum's workers.⁴⁹

Such sentiments stem from the German siege on Russia that began in June, 1941 and lasted nearly three years.⁵⁰ During that time, more than 20 million Russians were slaughtered,⁵¹ and 1200 churches, 500 synagogues, and 500 museums were destroyed.⁵² Monuments across Russia pay homage to those who lost their lives in the war,⁵³ and some Russians still believe that they were never duly compensated for the wartime damage.⁵⁴ Thus, Russians argue, the nation is entitled to continued possession of the art.⁵⁵ Artwork as a means of compensation seems particularly appropriate, considering the sheer number of cultural artifacts seized from Russia by Nazi troops and Hitler's plans to display the works in a massive museum.⁵⁶ Such emotions run deep among Russians, and from a historical standpoint, their continued possession of the Hermitage trove seems entirely appropriate.⁵⁷

Germans, however, do not share these sentiments.⁵⁸ Many Germans feel that the war is in the past and that Germany is now a democracy that has earned the right to be free of the vestiges of the Third Reich.⁵⁹ German officials deny the validity of Russian sentimental arguments and instead point to the international law

⁴⁹ *Id.*

⁵⁰ See Knight, *supra* note 11, at A10.

⁵¹ See Christopher Knight, *Palace Intrigue*, L.A. TIMES, May 7, 1995, at C-6.

⁵² See Gambrell, *supra* note 1, at 88.

⁵³ See Interview with Constance Lowenthal, *supra* note 14.

⁵⁴ See Knight, *supra* note 11, at A10.

⁵⁵ This argument weakens, however, when considering paintings not actually owned by Germans during the war. For instance, some commentators note that "a large number of French paintings . . . were among those seized by the Soviet army." Gambrell, *supra* note 1, at 92.

⁵⁶ See Catherine Foster, *Stolen Art as War Booty: Hostages or Harbingers of Peace?*, CHRISTIAN SCI. MONITOR, Feb. 8, 1995, at 1.

⁵⁷ See, e.g., *id.* ("Some [Russians] argue that the artworks are just compensation for the killing of 20 million Russians."); Jo Durden-Smith, *Russia Deserves Art Booty*, MOSCOW TIMES, Apr. 18, 1995, available in LEXIS, News Library, Non-US File ("It's time, then, to stop excoriating the Russians—who, after all, suffered more than any other nation during the war.").

⁵⁸ See Statement 1994, *supra* note 13, at 8-10; Statement 1995, *supra* note 13, at 2.

⁵⁹ See Gambrell, *supra* note 1, at 120 ("Germany is now a changed, democratic country and should not be linked in permanent penance to its past.").

favoring their position.⁶⁰ Regardless, Russia's sentimental arguments have both captivated her citizens and engendered the sympathy of many outside Russia.⁶¹

3.2. *Political Concerns*

Russian politicians are attempting to build on this strong sentiment in an attempt to promote public faith in a deeply troubled government. When Russia and Germany signed agreements in 1990 and 1992 to return cultural artifacts,⁶² Russia became swept up in a "moment of 'euphoria' over the Cold War's end."⁶³ This enthusiasm, however, has since faded. The implementation of capitalism in Russia has led to chronic unemployment, economic instability, and subsequent popular opposition to cooperation with the West.⁶⁴ In an attempt to stem this unpopularity and gain from the nationalistic fervor arising out of the Hermitage controversy,⁶⁵ the Russian Parliament passed a resolution imposing a temporary ban on any restitution of the Hermitage trove to its original owners.⁶⁶

⁶⁰ See Hughes, *supra* note 3, at 67 ("[T]he two sides approach the issue from drastically different perspectives: 'While the Germans cite legal arguments, the Russians cite historical responsibility.'").

⁶¹ See Suzanne Muchnic, *On the Trail of Spoils of War*, L.A. TIMES, June 4, 1995, at 10 (discussing the opinion of Otto Wittmann, a trustee emeritus of the J. Paul Getty Trust and prominent member of the art community).

⁶² See *supra* notes 28-29 and accompanying text (discussing the treaties).

⁶³ Knight, *supra* note 11, at A10.

⁶⁴ See *id.*

⁶⁵ Russian Culture Minister Yevgeny Sidorov is among those politicians vehement in their opposition to returning the artwork. See *Russian Minister Hits Out at German Claims Over Stolen Art*, AGENCE FRANCE-PRESSE, July 11, 1995, available in LEXIS, News Library, Non-US File. Sidorov claims the art as restitution for war crimes, stating that "[t]hirty Russian towns were wiped from the face of the earth, hundreds of museums were pillaged or reduced to ashes Who will compensate these losses?" *Id.* There have, however, been some recent token gestures on the Russian government's part to return the artwork. For instance, "[Boris] Yeltsin personally returned two paintings to Hungary in 1993, and . . . Sidorov . . . recently handed over several rare books from the Gotha library to German foreign minister Klaus Kinkel." Gambrell, *supra* note 1, at 90.

⁶⁶ See *Russian*, *supra* note 30; see also MacKenzie, *supra* note 1 (discussing the Russian bill). The Russian parliament also considered legislation "that would make all 'lawfully removed' art works—i.e., works that were taken from Germany by order of the Soviet Zone commander—the property of the Russian Federation." Gambrell, *supra* note 1, at 93. The law would have effectively placed tremendous restrictions on any future return of the portions of the

Other nations⁶⁷ claim the resolution contravenes the previous German-Russian treaties⁶⁸ as well as statements by the commission investigating the Hermitage controversy.⁶⁹ Despite such diplomatic dilemmas, commentators note that "those [Russians] critical of the parliament's position are now being attacked as unpatriotic 'traitors' who have sold out to the West."⁷⁰

Seemingly less important to Russian officials are the international political ramifications of their actions. The Russian-German treaties,⁷¹ the formation of the Russian-German commission,⁷² and Boris Yeltsin's return to Hungary of paintings from the trove in 1993⁷³ demonstrate that Russia is concerned with the consequences the Hermitage controversy could have on its standing in the international community. Nonetheless, Russia's retention of a great majority of the trove is straining relations with Germany⁷⁴ and with other nations.⁷⁵ Although interna-

trove. See *Russian Parliament Restricts Handover of WW2 Booty*, REUTERS, July 7, 1996, available in LEXIS, News Library, Non-US File. The upper house of the Russian Parliament, however, rejected the proposed law in July. See Gareth Jones, *Russia Unveils Drawings Seized as Nazi War Booty*, REUTERS, Dec. 3, 1996, available in LEXIS, News Library, Non-US File.

⁶⁷ See *supra* note 13 (discussing the German point of view); Knight, *supra* note 11, at A10 (noting the international criticism of the Russian laws preventing the return of the trove). The U.S. government, however, has stayed neutral so far. In April, 1996, President Clinton visited "Hidden Treasures Revealed," escorted by Mikhail Piotrovsky. See Paul Basken, *Clinton Tours St. Petersburg*, UPI, Apr. 19, 1996, available in LEXIS, News Library, UPI File. Clinton refused to side with either party, although he acknowledged that it was "a very big issue." *Id.*

⁶⁸ See *supra* notes 28-29 and accompanying text (discussing the Russian-German treaties).

⁶⁹ The commission stated in March, 1994, that "[t]he two sides agree that . . . the subject of the work of the Joint Commission are [sic] those items of cultural property which were taken from their respective countries during or as a consequence of the Second World War." Statement 1994, *supra* note 13, at 3 (quoting paragraph 5 of the Moscow Protocol of March 24, 1994).

⁷⁰ Gambrell, *supra* note 1, at 95.

⁷¹ See Statement 1994, *supra* note 13, at 2 ("Politically, the 1990 treaties were and continue to be a whole in that they manifest a new identity of political intent, envisage a programme of comprehensive cooperation, and seek to establish a new relationship of broad-based partnership.")

⁷² See *supra* note 69 and accompanying text (discussing the commission).

⁷³ See *supra* note 65.

⁷⁴ See Statement 1995, *supra* note 13, at 5-6 (discussing the importance of proper restitution for the sake of good relations between the nations); see also Lee Hockstader, *Russia Unveils Exhibit of WWII Cache*, WASH. POST, Feb. 10,

tional cooperation is crucial to Russia's attempts to secure an important position on the world stage,⁷⁶ Russian politicians appear to be responding more to a desire for domestic public approval than to threats of international estrangement.

The German government also has political concerns, both domestic and international in scope, arising out of the Hermitage controversy. Return of the art would prove popular with Germans eager to put World War II behind them,⁷⁷ as well as with the original owners of the treasures.⁷⁸ Furthermore, complying with German popular will would satisfy the international community, given the nearly worldwide support for the return of the Hermitage trove.⁷⁹ For Germany, therefore, the political ramifications of this controversy are straightforward.⁸⁰ The two nations' conflicting political motivations, however, help prevent a resolution to the debate.

3.3. *Economic Ramifications*

For the Hermitage and Pushkin museums, returning the art would be akin to slaying the proverbial golden goose. Russia's

1995, at B1 (noting the statement by Germany's consul general that "[i]t is poisonous for bilateral and international relations").

⁷⁵ See Foster, *supra* note 56, at 1 ("[I]n the interests of being an effective player in the new Europe, Russia must give the art back.").

⁷⁶ See *Who Owns This Art?*, PROVIDENCE J.-BULL., May 9, 1995, at 12A ("It is important for Russia's move toward democracy that it begin to form the habit of abiding by the law, and honor the Hague Convention."). Russia has a particular interest in maintaining strong ties with Germany, which happens to be Russia's largest foreign aid donor. See Jack Kelley, *The Spoils of War*, USA TODAY, Mar. 3, 1995, at 1D.

⁷⁷ See James O. Jackson, *The New Germany Flexes its Muscles*, TIME, Apr. 13, 1992, at 34, 35 ("[T]he German inclination is to savor success without dwelling on the past.").

⁷⁸ See Almond, *supra* note 9, at 12 (noting that "Franz Koenigs's surviving grandchildren would like to get the drawings back too").

⁷⁹ See Knight, *supra* note 11, at A10 (noting the international criticism of the Russian laws that prevent the return of the paintings).

⁸⁰ Germany also has an interest in maintaining good relations with Russia; as one commentator has noted, "Chancellor Helmut Kohl's government is attempting to prevent the looted art from becoming a . . . disrupting factor in ties with Moscow." Leon Mangasarian, *Kinkel: Return of Stolen Art Works a 'Test' for German-Russian Ties*, DEUTSCHE PRESSE-AGENTUR, Mar. 2, 1995, available in LEXIS, News Library, Non-US File.

uncertain economic situation⁸¹ and the transition from a paternalistic government to a free market system have dramatically drained the fiscal wells of Russian museums.⁸² The Hermitage finds itself in a particularly precarious position, since its financial troubles may threaten its position among the top tier of the world's art museums.⁸³ Opening its doors to the West after decades of Communist rule, the museum is in the midst of a worldwide campaign to raise \$400 million for modernization and restoration.⁸⁴ Despite the Hermitage's preeminence in the art world, the museum is outdated and desperately in need of this renovation.⁸⁵

The trove can provide a remedy to these financial problems. The Hermitage's share of the art is valued at approximately \$1 billion,⁸⁶ and the total value of Russia's holdings is estimated at \$6.4 billion.⁸⁷ Furthermore, the proceeds from ticket sales for such a major exhibition, as well as from prints, brochures, and other souvenirs,⁸⁸ can reach millions of dollars.⁸⁹ An interna-

⁸¹ See Jo Ann Lewis, *The Art that Came Out of the Woodwork*, WASH. POST, Feb. 14, 1995, at B1 (noting the current economic problems in Russia); Knight, *supra* note 11, at A10 (describing Russia's economy as "desperately strapped").

⁸² See Wallach, *supra* note 6, at B7 ("It is no secret that Soviet museums are desperately in need of funds."); Meisler, *supra* note 10, at 43 ("[T]he Hermitage [is] strapped for funds because of the cut in government subsidies since the end of Soviet rule."). The Russian government currently supplies between sixty and seventy percent of the Hermitage's annual budget, and the rest must be secured through other means. See Knight, *supra* note 11, at A10. For details of the Hermitage's most recent economic problems, see Carol Vogel, *A Friendly Touch, to Aid the Hermitage*, N.Y. TIMES, Oct. 19, 1996, at 13; Elizabeth Williamson, *A Crippled Giant*, CHI. TRIB., Nov. 17, 1996, at C1.

⁸³ See Meisler, *supra* note 10, at 42 (comparing the Hermitage to the Louvre, the Prado, and the Metropolitan Museum of Art).

⁸⁴ See *id.* at 43.

⁸⁵ See *id.* ("The museum's problems range from poor lighting to inadequate tourist information to lack of space to questionable security. Most of the paintings . . . are guarded by grandmotherly babushkas, some wearing house slippers. A Rembrandt was badly damaged in 1985 by a crazed attacker wielding a knife and sulfuric acid.")

⁸⁶ See Hockstader, *supra* note 74, at B1.

⁸⁷ See *id.*

⁸⁸ Commentators note that "[a]lavish catalogue, the potential for exhibition souvenirs and a global museum tour . . . may all be sources of income." Knight, *supra* note 11, at A10. Such souvenirs range from notecards to calendars. See *id.*

tional tour of the artwork could provide another source of revenue for the Hermitage and other Russian museums, much like the heralded traveling exhibition of impressionist and post-impressionist works did for the Barnes Foundation in Pennsylvania.⁹⁰ The presence of such art also impacts fundraising efforts by raising international interest in the museums and encouraging donations.⁹¹

Given the significant economic rewards that come with control of the trove, German museums have the same economic incentives for securing the art as do their Russian counterparts. Thus, both German and Russian institutions have much to gain from possession of the artwork, and these financial considerations and incentives further complicate the controversy.⁹²

3.4. *The Best Interest of the Artwork*

Members of the art community are primarily concerned with

⁸⁹ See Wendy Sloane, *Russians Unveil Disputed Paintings*, CHRISTIAN SCI. MONITOR, Feb. 10, 1995, at 13 (“We are talking many millions [of dollars] because we are talking major pictures.”) (quoting James Randall, head of Christie’s Impressionist Department in London) (alteration in original). Another part of the trove is King Priam’s 5,000-year-old golden treasure unearthed in Turkey in the 19th Century. See Wallach, *supra* note 6, at B7; see also *supra* note 10. Commentators note that an exhibit of such art could possibly “rival the King Tutankhamen blockbuster of the ‘70s in appeal.” Wallach, *supra* note 6, at B7. But see Lynnley Browning, *Russian Museum to Show Art Seized in World War II*, REUTERS, Feb. 7, 1995, available in LEXIS, News Library, Non-US File (“Although the Hermitage exhibition will attract hundreds of visitors, it will not . . . bring the cash-strapped museum the money it desperately needs.”).

⁹⁰ The Barnes Foundation, located in suburban Philadelphia, sent many of its most famous holdings on a very successful international tour in 1993-95 in order to raise funds needed to renovate the dilapidated building which housed the Foundation’s artwork. See, e.g., Leonard W. Boasberg, *Founder’s Orders Stand, Barnes Foundation Told*, PHILA. INQUIRER, Sept. 22, 1995, at B2 (noting that the Barnes tour raised more than \$16 million for renovations); *Where There’s a Will*, ECONOMIST, Aug. 1, 1992, at 77 (noting the financial incentives behind the Barnes tour).

⁹¹ See Corbeil, *supra* note 90, at 62 (discussing the attention received by museums holding popular exhibitions).

⁹² A tangential economic concern exists among private collectors in Russia. Many worry that a government restitution policy might lead, more invidiously, to the government plundering private collections. See Gambrell, *supra* note 1, at 94.

accessibility to and preservation of the art.⁹³ Working in Russia's favor in this regard is the fact that, despite its financial problems,⁹⁴ the Hermitage is a museum of international prestige⁹⁵ and thus a fitting forum for the exhibition of the trove. Concentrating the art in the Hermitage, as well as in the Pushkin, creates a convenient and grand setting for international adulation. These museums have also kept the paintings intact and undamaged for fifty years⁹⁶ and will presumably continue this preservation in the future. However, St. Petersburg and other Russian locations are not especially accessible or "tourist-friendly," and such a location might deter public access to some degree.⁹⁷

In comparison, Germany has a far more stable economy and government,⁹⁸ and thus might be in a stronger position than Russia to preserve the art. Furthermore, Germany has many appropriate venues, all well-respected within the art community, in which to properly preserve and showcase the trove.⁹⁹ Thus, both sides can legitimately argue that they are the best potential guardian of the artwork; however, determining which location

⁹³ See PAUL M. BATOR, *THE INTERNATIONAL TRADE IN ART* 18-34 (Midway Reprint ed., 1988) (discussing these two fundamental values).

⁹⁴ See *supra* note 82 and accompanying text.

⁹⁵ See *supra* note 83.

⁹⁶ One commentator was "completely bowled over . . . [by the artwork's] condition. [One painting] looked as if it had been painted this morning." *Rose, supra* note 17. Another commentator notes that "the museum's conservators had monitored the condition of the art and taken restoration measures when necessary. And indeed, the paintings on view at the Pushkin, like those at the Hermitage, generally appear to be in excellent condition." Gambrell, *supra* note 1, at 91. *But see* Interview with Constance Lowenthal, *supra* note 14 (noting that the museums' treatment of the art might be more akin to "benign neglect" than active preservation).

⁹⁷ See Borden, *supra* note 38 ("St. Petersburg is not exactly the most tourist-friendly destination resort on Earth, with its ever-changing Russian visa requirements, crime rates and black markets and trying to keep up with ever-vascillating [sic] exchange rates.").

⁹⁸ See Rudi Dornbusch, *Back to the Gold Standard? Only in Steve Forbes's Dreams*, *BUS. WK.*, Feb. 19, 1996, at 16 (noting Germany's low inflation); Thomas Sancton, *Is this a Crossroads—Or the Edge of a Cliff?*, *TIME*, Dec. 11, 1995, at 58 (discussing a "strong, united Germany"); *Single-Currency-Minded*, *ECONOMIST*, Dec. 23, 1995, at 61 (discussing Germany's influence in the European Union and the tough economic standards that all members of the European Union, including Germany, must meet).

⁹⁹ See Margarita Tupitsyn, *Shaping Soviet Art*, *ART IN AM.*, Sept. 1994, at 41, 41 ("[I]n the late '80s, German museums and galleries enthusiastically led the way in organizing major historical and contemporary exhibitions.").

best promotes the interests of the public and the artwork itself must be considered in resolving the controversy.

4. CREATING A FRAMEWORK BASED ON A CENTURY OF LAW

The final perspective on the Hermitage controversy is the legality of Russia's possession. International law prohibits the wartime pillaging of cultural treasures and demands the restitution of such goods to their original owners.¹⁰⁰ This section both explains this body of law and creates a framework, based on the legal doctrine, from which a solution to the Hermitage controversy can be fashioned. This section first discusses the applicable law. A summary of both nations' legal perspectives follows. Finally, this section explains how this legal foundation can integrate all previously-discussed perspectives to create a solution that is not only fair to both nations, but also logically considers and satisfies all perspectives on the controversy.

4.1. *A Century of Law*¹⁰¹

The image of the swashbuckling soldier, marching over devastated territory in search of spoils of battle, pervades history.¹⁰² Pillaging during wartime was rampant during the days of the Roman Empire¹⁰³ and has continued ever since.¹⁰⁴ Since the nineteenth century, attempts to stop such looting have been just as common.

Early efforts at limiting and regulating pillaging include the United States' Lieber Code,¹⁰⁵ the Conference of Brussels in

¹⁰⁰ See *infra* section 4.1 (detailing the history of this body of law).

¹⁰¹ See generally M. Catherine Vernon, Note, *Common Cultural Property: The Search for Rights of Protective Intervention*, 26 CASE W. RES. J. INT'L L. 435, 454-57 (1994) (detailing pre-1954 efforts to prevent such pillaging).

¹⁰² See George Myers, Jr., *Exhibit Adds Epilogue to Volume on Art Theft*, COLUMBUS DISPATCH, Mar. 25, 1995, at 3E (noting this swashbuckling image of pillaging).

¹⁰³ See 1 DUBOFF & CAPLAN, *supra* note 20, at D-3.

¹⁰⁴ See 1 *id.* at D-3 to D-8 (describing various instances of looting by the Roman Empire, by Spain during the exploration of the Americas, and by France during Napoleon's reign). Such pillaging continues to occur in modern times, most recently during Saddam Hussein's siege on Kuwait and in the current Balkan War. See Foster, *supra* note 56, at 18.

¹⁰⁵ See 1 DUBOFF & CAPLAN, *supra* note 20, at D-9. The 1863 code, which governed army conduct on the battlefield, "provided for a determination of ownership by treaty after war in the few situations where the code allowed the

1874,¹⁰⁶ and the Hague Conventions of 1899 and 1907.¹⁰⁷ While the Lieber Code applied only to conflicts within and wholly concerning the United States, the other pacts marked the beginning of an international attempt to curb wartime looting. The 1907 Hague Convention provided, as did its 1899 predecessor, a framework for the "Protection of Cultural Property in the Event of Armed Conflict and Protocol Conflict."¹⁰⁸ The 1907 Convention outlined the basic principles that all signatories intended to govern situations where pillaging and destruction of cultural treasures were likely.¹⁰⁹

seizure of art objects." *Id.* The code was based on a field manual prepared by a Columbia College professor for use by Union military commanders in the Civil War. See 1 JOHN HENRY MERRYMAN & ALBERT E. ELSÉN, LAW, ETHICS AND THE VISUAL ARTS 14 (2d ed. 1987); see also Vernon, *supra* note 101, at 455 (chronicling Professor Francis Lieber's preparation of the "Instructions for the Governance of Armies of the United States in the Field," which, in part, "provided for the protection of cultural property").

¹⁰⁶ See 1 DUBOFF & CAPLAN, *supra* note 20, at D-10. This treaty "stated that establishments devoted to the arts, whether or not belonging to the state, should be treated as private property and that seizure or destruction of such establishments should be prosecuted by the competent authorities. Private property should not be confiscated and pillage was prohibited." *Id.* The treaty was never formally adopted and hence not binding on the parties. See 1 MERRYMAN & ELSÉN, *supra* note 105, at 14. Ironically, Russia was responsible for initiating the convention. See *id.*

¹⁰⁷ See 1 DUBOFF & CAPLAN, *supra* note 20, at D-10. The 1899 and 1907 Hague Conventions are regarded as the "first formal establishment of guidelines for the 'Protection of Cultural Property in the Event of Armed Conflict and Protocol Conflict.'" *Id.* The 1899 conference, organized at the initiative of the Russian government, involved twenty-six nations and resulted in several treaties: a Convention on Pacific Settlement of International Disputes, a Convention on Laws and Customs of War on Land, and most notably, "Regulations Respecting the Laws and Customs of War on Land." *Id.* Article 56 of the latter treaty provides that:

The property of the communes, that of religious, charitable, and educational institutions, and those of art and science, even when State property, shall be treated as private property.

All seizure of, and destruction, or intentional damage done to such institutions, to historical monuments, works of art or science, is prohibited, and should be made the subject of proceedings.

1 MERRYMAN & ELSÉN, *supra* note 105, at 14-15.

¹⁰⁸ 1 DUBOFF & CAPLAN, *supra* note 20, at D-10.

¹⁰⁹ See 1 *id.* at D-11 (noting that the convention "set forth the basic principles that all interested parties hoped would govern situations that in the past had wrought such destruction upon many of the world's treasures"). Among the treaty's key provisions were:

Article 46

What the nations aspired to on paper, however, did not correspond with their actions. Although ratified by most major Western powers,¹¹⁰ the 1907 treaty was largely ineffectual during World War I.¹¹¹ Nations generally ignored the terms of the treaty, and the casualties of the "Great War" included Rheims Cathedral and the library at Louvain.¹¹² After the war's conclusion, the Treaty of Versailles dealt retroactively with the destruction, providing only that Germany accept "full responsibility for causing all the loss and damage which occurred as a result of the war."¹¹³ Efforts after the war to deter future wartime pillaging failed,¹¹⁴ paving the way for the cultural destruction of World War II.

Rampant pillaging during World War II renewed efforts to address the problem of wartime looting. Despite some indiscretions on their part,¹¹⁵ the Allies agreed that cultural reparations were illegal and immoral.¹¹⁶ The German reparations made to

Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. *Private property cannot be confiscated.*

Article 56

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction or 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.

Hague 1907, *supra* note 15, 1 T.I.A.S. at 651, 653 (emphasis added).

¹¹⁰ Forty-four nations attended the conference which led to this treaty, including the United States. See 1 MERRYMAN & ELSÉN, *supra* note 105, at 15.

¹¹¹ See 1 *id.* at 40.

¹¹² See LEONARD D. DUBOFF, *THE DESKBOOK OF ART LAW* 136 (Donald P. Arnavas ed., 1977).

¹¹³ *Id.* (emphasis omitted). Germany was deemed unable to "cover the full compensation for these losses; restitution, therefore, was limited to compensation of the civilian population." *Id.*

¹¹⁴ See Vernon, *supra* note 101, at 456-57 (discussing such efforts as the Roerich Pact, the Draft Declaration, and a Draft International Convention for the Protection of Monuments and Works of Art in Time of War).

¹¹⁵ See *supra* note 22; NICHOLAS, *supra* note 18, at 370-405 (discussing in full the actions of those in favor of cultural restitution).

¹¹⁶ See *supra* note 22. The United States followed up on such agreements in 1982 by enacting Public Law 97-155, which authorized the Secretary of the Army to return to Germany works of art seized by U.S. troops at the end of World War II. See 1 DUBOFF & CAPLAN, *supra* note 20, at D-21; see also

the Allies after the war specifically did not include art treasures, although some commentators encouraged such an "eye-for-an-eye" approach.¹¹⁷ In addition, the destruction of cultural property constituted a criminal offense at the Nuremberg War Trials.¹¹⁸ The 1907 Hague Convention was, in part, the legal foundation for these indictments.¹¹⁹

The Hague Convention of 1954 represented the international response to the pillaging of World War II.¹²⁰ This treaty serves as the most comprehensive attempt to date to solve the problem of wartime looting.¹²¹ Aiming to reestablish the basic principles prohibiting wartime theft, the convention provided that:

The High Contracting Parties further 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.¹²²

The treaty also set forth detailed procedures for the enforcement of its provisions.¹²³ Although not specifically retroactive in its

Honan, *3 Are Indicted*, *supra* note 22, at A10 (detailing judicial efforts to resolve the theft of the Quedlinburg treasures by U.S. soldiers).

¹¹⁷ See 1 MERRYMAN & ELSEN, *supra* note 105, at 40-43 (discussing the arguments on both sides of this debate).

¹¹⁸ See 1 *id.* at 20-25.

¹¹⁹ See 1 *id.* at 21 ("These acts were contrary to international conventions, particularly Articles 46 to 56 inclusive of the Hague Regulations, 1907, the laws and customs of war . . .") (quoting 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 55-56 (1948)).

¹²⁰ See Vernon, *supra* note 101, at 458 ("The contracting parties to the Hague 1954 Cultural Property Convention further recognized the damage to cultural property suffered during World War II . . .").

¹²¹ See *id.* at 459 ("[T]he Hague 1954 Cultural Property Convention is 'sometimes called the "Red Cross" of monuments and museums in time of war.'").

¹²² Hague 1954, *supra* note 15, art. 4, para. 3, 249 U.N.T.S. at 244. While Germany and the former U.S.S.R. were the initial contracting parties to the convention, the United States declined to become a party to the treaty. See DUBOFF, *supra* note 112, at 181-83.

¹²³ See Hague 1954, *supra* note 15, arts. 20-28, 249 U.N.T.S. at 256-60.

approach, the Convention formally incorporates and attaches to the 1907 and 1899 Hague Conventions.¹²⁴

The 1990 and 1992 treaties between Russia and Germany enforce the basic ideals of the 1954 Hague Convention as pertaining to the two nations.¹²⁵ Thus, this line of documents, dating back over a century, forms a consistent body of law regarding cultural artifacts in times of war and peace and embodies one basic sentiment: the preservation of works of art and cultural heritage despite the conditions of the world surrounding them.

4.2. *Dispute over the Law*

International law forms the core of Germany's argument for the return of the trove.¹²⁶ Both the initial pillaging by Russia and its current possession clearly violate the 1907 and 1954 Hague Conventions and the 1990 and 1992 Russian-German treaties. To many commentators, Russia's actions also violate the spirit of the law.¹²⁷

Russia, however, asserts that its claim to the trove is legitimate. Seizing upon nuances in the treaties' wording to justify its actions, the Russian government claims that the treaties only prohibit illegal looting and that Russia's actions did not fall within the prohibited conduct.¹²⁸ Russian officials "contend that anything transferred to the USSR by order of the Soviet military command in the Soviet occupied zone . . . was removed legally, since that body was the legally constituted German government of the time."¹²⁹ They argue that, since the looting was legal, the treaties are inapplicable and, therefore, Russia's claim to the art is completely legitimate.¹³⁰ In addition to the other obstacles already noted, conflicting definitions of what actions are "illegal"

¹²⁴ Article 36 of the treaty states that "[i]n the relations between Powers which are bound by the Conventions of The Hague concerning the Law and Customs of War on Land (IV) . . . and which are Parties to the present Convention, this last Convention shall be supplementary to the . . . Regulations annexed to the aforementioned Convention (IV)." *Id.* art. 36, para. 1, 249 U.N.T.S. at 264.

¹²⁵ See *supra* notes 28-29 and accompanying text (detailing both treaties).

¹²⁶ See Statement 1994, *supra* note 13 (outlining the German legal position).

¹²⁷ See, e.g., Interview with Constance Lowenthal, *supra* note 14.

¹²⁸ See Gambrell, *supra* note 1, at 90-91.

¹²⁹ *Id.*

¹³⁰ See *id.*

stand between the two nations.

4.3. *Creating a Framework*

Much commentary on the Hermitage trove suffers from the following flaws: (a) the analysis of each perspective in isolation from the others; (b) the use of a disjointed analytical framework; (c) the lack of objective standards; and (d) the divisive nature of the debate. As a result of these defects, the existing analytical framework has proved ineffective in reaching a fair resolution.

First, commentators have generally viewed each perspective in isolation from the others. That is, to some commentators the Hermitage controversy is rooted primarily in politics,¹³¹ while others view it solely as an epilogue to history.¹³² Few commentators note the complexity of the situation, opting instead to simplify the controversy by examining only one perspective and arguing for a solution solely within that single level of the debate.¹³³

The second problem is the disjointed and unintegrated debate that occurs when commentators actually consider multiple perspectives. Such commentators generally use each perspective as a part of an "all-things-considered" analysis.¹³⁴ Commentators typically use a balancing approach, favoring the Russians on some perspectives and the Germans on others, ultimately weighing both and rewarding the party with the biggest analytical bounty.¹³⁵ Relationships between the perspectives are noted in a cursory fashion, if at all. As a result, the debate rarely integrates perspectives and fails to appreciate the complexity of the controversy.

The third problem with the present approach derives from the subjective judgments inherent in balancing different perspectives. This subjectivity allows Russian nationalists to weigh the

¹³¹ See Meyer, *supra* note 5, at A20 ("At bottom, this is a political rather than a legal dispute.").

¹³² See Durden-Smith, *supra* note 57.

¹³³ See Meyer, *supra* note 5, at A20; Durden-Smith, *supra* note 57.

¹³⁴ Robert Hughes' examination of the Hermitage controversy is an example of such an "all-things-considered" analysis. See Hughes, *supra* note 3. Hughes simply notes each perspective of the controversy without putting them in a unifying framework. In the process, he minimizes some perspectives, particularly the legal doctrine involved.

¹³⁵ See *id.*

historical perspective heavily,¹³⁶ museum curators to look solely at the cultural perspective, and so on, thereby distorting the actual value of each perspective according to the commentator's best interest.¹³⁷ As a result, commentators diminish some factors¹³⁸ while amplifying others and, in the end, few objective criteria exist with which to create a solution.

The balancing approach also has a divisive effect on the communities involved in the debate.¹³⁹ If the current analysis ultimately leads to a solution, it is likely that some communities will feel shortchanged and dissatisfied with the solution. Furthermore, it encourages political confrontation rather than constructive cooperation between the involved parties. An example of this occurred during the Elgin Marbles debate, when the Greek government, armed primarily with nationalistic arguments, lobbied extensively to secure the return of the treasures from Great Britain.¹⁴⁰ This propelled the controversy to a purely political level, resulting in a diplomatic rift between Greece and Great Britain. Instead of concerned parties working together to find a proper solution, the "all-things-considered" framework divides and isolates the parties. In the end, this approach only harms the chances of uniting the art community.

These problems indicate the need for another method to resolve the controversy. An objective framework carefully considering each perspective must be used to fashion a solution that satisfies all parties and perspectives.¹⁴¹ A proper analytical

¹³⁶ See *supra* notes 48-49 and accompanying text (discussing the primarily historical perspective of Pushkin director Irina Antonova).

¹³⁷ See BATOR, *supra* note 93, at 18 (discussing this tendency towards "oversimplified debates" surrounding the international trade in art).

¹³⁸ See, e.g., Hughes, *supra* note 3 (analyzing the controversy using a balancing approach and minimizing the legal perspective).

¹³⁹ An obvious example is the tension between Russian and German officials. Russian officials focus on the historical perspective, see *supra* notes 65-66 and accompanying text, and their German counterparts continually cite legal arguments. See *supra* notes 126-27 and accompanying text. As a result, there has been little agreement and much tension between the two groups.

¹⁴⁰ See Merryman, *supra* note 4, at 1911-16 (discussing the Greek nationalistic arguments for the return of the Elgin Marbles); see also JEANETTE GREENFIELD, *THE RETURN OF CULTURAL TREASURES* 47 (1989) (noting the Greek position that the Elgin Marbles "are an integral part of the Acropolis, which symbolizes Greece itself").

¹⁴¹ See John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 341 (1989) (discussing the need for a proper "framework for

framework must integrate each perspective, balance the importance of each properly, and, most importantly, acknowledge and account for each perspective, thereby diminishing the potential for antagonism between parties. The use of the legal doctrine as the linchpin, weaving all perspectives together, provides such a framework.

Most commentators err in treating the legal issues as simply another perspective, isolated from the others.¹⁴² Instead, what is required is a framework that uses the legal perspective as an umbrella, covering and including each of the other perspectives.¹⁴³ Legal doctrine is unique in that it does not spring from a vacuum, but rather is created with and from other perspectives. Thus, a law does not merely define a legal perspective, but rather articulates the integration of other societal values that were considered by the framers of the given statute and those who later interpret such statutes. For instance, the framers of the Hague Conventions accounted for many of the considerations now being debated in the Hermitage controversy. In light of this, it is myopic to look at the legal perspective as isolated from the rest. Instead, commentators must recognize that the legal perspective encompasses and integrates other interests.

This Comment proposes a framework based upon this understanding of law as a tool for integration. The first step in this framework is simply to determine the legal solution to this controversy. The second step details the other perspectives, showing how the legal solution accounts for each relevant factor.¹⁴⁴ The legal doctrine emerged from consideration of

thinking about cultural property”).

¹⁴² See Yardley Rosemar, *Who Owns the Art Loot?*, GREENSBORO (N.C.) NEWS & REC., Mar. 31, 1995, at A11 (treating the legal perspective as wholly independent from the debate).

¹⁴³ See BATOR, *supra* note 93, at 18-34 (using a variety of “relevant values of interests” to assess and propose legal systems for regulating the international trade in art).

¹⁴⁴ This strategy envisions the Hague Conventions as essentially creating strict liability for looting. See WILLIAM L. PROSSER, ET AL., *CASES AND MATERIALS ON TORTS* 669-95 (8th ed. 1988) (discussing strict liability, under which the tortfeasor is held liable for her actions regardless of intent and reasonable precautions). With strict liability statutes, the balancing of arguments primarily occurs during the statute’s framing. The framework created by this Comment likewise presumes that the balancing of most factors occurred during the framing, thus imposing strict liability regardless of such factors during the later judgment of a specific instance of pillaging.

these specific arguments and thus further discussion of them is simply redundant. The purpose, therefore, is not to explore such arguments on their merits; instead, the goal is to determine whether these arguments should be discarded in the face of international law's explicit rebuttal of the significance of such arguments.

The final step looks at perspectives either specific to the given situation or, as determined by the second step, outside of the framers' consideration. Such perspectives are evaluated in light of the legal viewpoint to determine whether the strength of such considerations outweigh the legal solution. A strong presumption, however, exists in favor of the party with legal authority.¹⁴⁵

This framework provides several advantages. First, it is based primarily on the objective criteria of the law.¹⁴⁶ Second, it integrates all the perspectives into a common framework, taking each into account while avoiding the problem of subjectively weighing them independently. Third, it avoids dwelling on arguments already considered and disposed of. Finally, it achieves a legitimacy that other approaches lack. This legitimacy stems from two sources: the fact that this solution is based on treaties signed by all concerned parties¹⁴⁷ and the fair consideration this framework accords to each perspective.

The remainder of this Comment analyzes the Hermitage controversy using this framework. Ultimately, this analysis will yield a solution based on fairness, objectivity, and inclusiveness instead of subjectivity and divisiveness.

5. APPLYING THE LEGAL FRAMEWORK

5.1. *Legality of Russia's Possession*

Despite Russia's arguments to the contrary, international law dictates that the trove be returned to Germany.¹⁴⁸ The 1907

¹⁴⁵ See Merryman, *supra* note 4, at 1899 (conducting an analysis of the Elgin Marbles controversy, focusing on the legal and moral implications, and noting the presumption in favor of the legally entitled party).

¹⁴⁶ See *id.* at 1894 (indicating the need for reasoned standards in discussing cultural heritage issues).

¹⁴⁷ See Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 707 (1988) (discussing the legitimacy of international law).

¹⁴⁸ For a far more comprehensive analysis of both parties' legal arguments, see S. Shawn Stephens, *The Hermitage and Pushkin Exhibits: An Analysis of the*

Hague Convention was the governing treaty during the time of the plunder, World War II. The plain language of the 1907 treaty prohibits wartime looting, stating that all "seizure of . . . works of art and science is forbidden."¹⁴⁹ The treaty was used to prosecute pillaging Nazis at the Nuremberg Trials,¹⁵⁰ and the Allies reaffirmed the spirit of the treaty through post-war action ensuring the return of looted art.¹⁵¹ The 1954 treaty, to which Russia was a party,¹⁵² repeated the 1907 treaty's opposition to wartime looting. Thus, by the plain language of the treaty enforced at the time of the pillage, Russia's actions were illegal.¹⁵³

Differences between German and Russian looting during World War II did exist, but none of these distinctions change the sheer illegality of Russia's acts. First, it can be argued that Russia's status as a wartime victim changes the legal situation. Anti-pillaging treaties are typically applied to aggressor nations, such as Nazi Germany.¹⁵⁴ According to proponents of this argument, since Russia was the victim and not the aggressor in World War II, it is entitled to some restitution. Since the treaties are only intended to outlaw pillaging by the conqueror, it can be argued that they do not apply to Russia's actions, which simply provided restitution to the attacked nation.¹⁵⁵

This argument fails, however, as the treaties condemn *all* pillaging, regardless of circumstances.¹⁵⁶ The 1907 treaty is broad in both words and spirit, using such general language as "all seizure."¹⁵⁷ Furthermore, the Allies addressed the cultural restitution issue during and after the war, concluding that seizure

Ownership Rights to Cultural Properties Removed from Occupied Germany, 18 HOUS. J. INT'L L. 59 (1995).

¹⁴⁹ Hague 1907, *supra* note 15, art. 56, 1 T.I.A.S. at 653.

¹⁵⁰ See *supra* notes 118-19 and accompanying text.

¹⁵¹ See *supra* note 22 and accompanying text.

¹⁵² See *supra* note 122.

¹⁵³ See Stephens, *supra* note 148, at 73-75.

¹⁵⁴ See *supra* note 118 (discussing the application of the 1907 treaty to the Nazis during the Nuremberg trials).

¹⁵⁵ See *supra* note 23 and accompanying text.

¹⁵⁶ See Hague 1907, *supra* note 15, art. 56, 1 T.I.A.S. at 653 ("All seizure of . . . works of art and science, is forbidden . . ."); Hague 1954, *supra* note 15, art. 4, para. 3, 249 U.N.T.S. at 244 ("The High Contracting Parties further undertake to prohibit . . . any form of theft [or] pillage . . .").

¹⁵⁷ Hague 1907, *supra* note 15, art. 56, 1 T.I.A.S. at 653.

of art as reparations was inappropriate¹⁵⁸ and against international law.¹⁵⁹ While tragic, Russia's situation is irrelevant to the determination of legality.

The second basis for Russia's denial of the legal claim concerns the supposed legality of their actions.¹⁶⁰ Russian officials claim that because they were the sovereign power over parts of Germany at the time of the pillaging, their actions were fully legal.¹⁶¹ These officials contend that, since the 1907 and other treaties pertain only to *illegal* actions, they are inapplicable to Russia's plunder.¹⁶² This argument, however, fails for several reasons.

First, this argument is counterintuitive. Russia shared the same position as other victorious countries that have claimed legal power over a conquered nation.¹⁶³ It is recognized that "belligerent wartime occupations do not affect the sovereignty of an occupied state."¹⁶⁴ The treaties were created in the wake of

¹⁵⁸ See *supra* note 22 and accompanying text. This was despite the fact that the other Allies were, like Russia, also victims of Nazi aggression.

¹⁵⁹ Much of the opposition to cultural reparations after World War II concerned the unimportance of this distinction between the Allies and the Nazis. In the Weisbaden document, the Monuments, Fine Arts, and Archives ("MFAA") officers noted the inherent hypocrisy of making such a distinction, stating that:

The Allied Nations are at present preparing to prosecute individuals for the crime of sequestering, under pretext of "protective custody," the cultural treasures of German-occupied countries. A major part of the indictment follows upon the reasoning that, even though these individuals were acting under military orders, the dictates of a higher ethical law made it incumbent upon them to refuse to take part in, or countenance, the fulfillment of these orders. We, the undersigned, feel it is our duty to point out that, though as members of the Armed Forces we will carry out the orders we receive, *we are thus put before any candid eyes as no less culpable than those whose prosecution we affect to sanction.*

Weisbaden Manifesto, *supra* note 22, at 1 (emphasis added). See also NICHOLAS, *supra* note 18, at 394-96 (discussing the MFAA document).

¹⁶⁰ See *supra* notes 128-30 and accompanying text.

¹⁶¹ See Stephens, *supra* note 148, at 93-96.

¹⁶² See *id.*

¹⁶³ For example, Nazi Germany claimed sovereignty over France and other conquered countries during World War II. See NICHOLAS, *supra* note 18, at 86-97 (discussing the Nazi invasion of France).

¹⁶⁴ Stephens, *supra* note 148, at 71.

various instances of plunder by the conquering nation¹⁶⁵ with newfound, but limited, legal authority over the conquered nation.¹⁶⁶ Likewise, officials at Nuremberg found Nazi plundering, even in countries where they had legal authority, inconsistent with the 1907 treaty.¹⁶⁷ In terms of legal authority, Russia's position was analogous to that of both Napoleonic France and Nazi Germany, and thus their pillaging was precisely what the 1907 treaty intended to counter.¹⁶⁸ To hold otherwise would severely diminish the treaty's power and allow any country to pillage the art of another nation over which it exercises temporary control, thus justifying the actions of Hitler's Germany, Napoleon's France, and even Saddam Hussein's Iraq.

Furthermore, the 1990 and 1992 treaties between Russia and Germany render Russia's argument moot. These treaties provide for the return of both "missing" and "unlawfully" removed cultural property.¹⁶⁹ Even if the applicability of the 1907 treaty were in question, these later treaties are unambiguous in their wording.¹⁷⁰ Regardless of the legality of Russia's actions, the artwork falls within the treaties' definition of "missing," thereby making the treaties fully applicable.¹⁷¹ Therefore, Russia's linguistic distinction is irrelevant under the terms of these treaties.

In sum, both the plain wording and spirit of the 1907, 1990, and 1992 treaties clearly prohibit Russia's initial looting and

¹⁶⁵ See, e.g., 1 DUBOFF & CAPLAN, *supra* note 20, at D-5 to D-7 (discussing the pillage of the Americas by France and Spain during the exploration era).

¹⁶⁶ See Stephens, *supra* note 148, at 71-72 (noting that the rights exercised by an occupying power "are not co-extensive with those of sovereignty" and "are due to the military exigencies created by the invader, and, consequently, are only provisional").

¹⁶⁷ See *supra* note 118.

¹⁶⁸ The Allies' actions further reinforce the applicability of the 1907 treaty. See *supra* note 116 and accompanying text. Given that they too were technically the legal authorities over parts of Germany, their plundering would have had the same legal value as that of Russia. Their recognition of the illegality of such actions, identical to Russia's activities, thus reinforces the notion that Russia's acts were illegal.

¹⁶⁹ See *supra* notes 28-29.

¹⁷⁰ See Statement 1994, *supra* note 13, at 5 ("By choosing to write 'missing or unlawfully cultural property' the contracting parties obviously wanted to show that two different categories of cultural property are meant . . . and that for each of these categories viewed separately there exists an obligation to return the property.").

¹⁷¹ See *id.*

subsequent possession of the trove. Therefore, Russia is legally obligated to return the art to Germany. The following sections examine the other perspectives, explaining how they are incorporated under this legal doctrine and thus reinforce the legitimacy of this conclusion.

5.2. *Historical Justifications*

Russians claim the tide of history is on their side, asserting that the Nazi ravages of World War II require their continued possession of the Hermitage trove.¹⁷² Such historical justifications, however, are not new arguments; instead, sovereign nations have already discussed and dismissed historical reparation considerations in the framing and application of previous treaties. The 1907 treaty implicitly presumed that all seizures of art are forbidden, including those taken for the purpose of restitution. The purpose of this legal doctrine was to render such historical arguments moot, so that they could not serve as an independent basis for possession.¹⁷³

First, the broad wording of the 1907 treaty indicates that such historical arguments are immaterial. The convention does not differentiate between types of pillaging; it simply bans all taking of art.¹⁷⁴ The unambiguous wording of the treaty indicates the strength of the framers' convictions that no cultural looting is appropriate, regardless of circumstance, and thereby rejects an "eye-for-an-eye" argument.

Second, interpretation of the 1907 treaty has repeatedly yielded the proposition that the treaty rejects the "restitution" argument. For instance, the question of the legality of restitution was discussed after World War II.¹⁷⁵ The extent of the harm inflicted by the Nazis was fully known after the end of the war, and any historical arguments now cited by Russia were passionately

¹⁷² See *supra* section 3.1.

¹⁷³ Returning to the strict liability analogy, one is liable for damage by abnormally dangerous materials. See PROSSER, *supra* note 144, at 673-88. Thus, in a specific case, the perception of the dangerous nature of a presumptively dangerous material is irrelevant, as the debate about the dangerous nature already occurred during the framing of the statute. Similarly, within this Comment's analysis, an argument already considered and dismissed during the framing of these treaties is also treated as irrelevant.

¹⁷⁴ See *supra* note 156.

¹⁷⁵ See *supra* note 22.

debated at that time.¹⁷⁶ Despite the extent of this harm, postwar debate concluded that the 1907 treaty, among other sources,¹⁷⁷ rendered cultural reparations inappropriate and illegal.¹⁷⁸

Finally, the nearly identical wording of the 1954 Hague Convention¹⁷⁹ further reinforces this point. By choosing not to change the wording of the 1954 treaty to reflect disapproval with the post-World War II interpretation of the 1907 treaty, the framers of the 1954 treaty essentially approved such an anti-reparations interpretation.

These arguments demonstrate that the use of broad language by the framers of the 1907 treaty sought to directly counter such historical reparations arguments, and have been consistently interpreted as such. Thus, instead of existing as a legitimate and independent basis for possession, historical arguments are precisely the type that the 1907 treaty aimed to counter and are inherently incorporated into the legal perspective.

5.3. *Political Motivations*

Political arguments likewise fail to overcome legal doctrine. First, the very nature of international law silences political arguments. International agreements demand that all participating nations act to achieve a higher goal, relinquishing their political motivations even "in a situation where the rule conflicts with perceived self-interest."¹⁸⁰ Thus, the 1907 and subsequent treaties, as with most international conventions, render political interests obsolete.

In this specific case, the Hague Conventions were framed with the express motivation of preserving cultural heritage despite political circumstances.¹⁸¹ Early treaties, including the 1907

¹⁷⁶ See *id.*

¹⁷⁷ See DUBOFF, *supra* note 112, at 160 (discussing other legal support for the post-World War II consensus).

¹⁷⁸ See *supra* note 156; NICHOLAS, *supra* note 18, at 402 (noting that U.S. officials cited to the 1907 Convention in support of the return of art to Germany after World War II).

¹⁷⁹ Compare Hague 1907, *supra* note 15, art. 56, 1 T.I.A.S. at 653 with Hague 1954, *supra* note 15, art. 4, 249 U.N.T.S. at 244.

¹⁸⁰ Franck, *supra* note 147, at 707.

¹⁸¹ The 1954 Hague Convention is generally thought to endorse the concept of "cultural internationalism," by which art is seen as the property of the world rather than of one political entity. See Vernon, *supra* note 101, at

Convention, responded to pillage arising from political disputes, such as the plundering by Napoleon's armies.¹⁸² Similarly, the 1954 convention represented the international response to Germany's political actions.¹⁸³ The applicable treaties, therefore, render the political interests of both Russia and Germany irrelevant. To argue otherwise is to deny the legitimacy of international treaties and their inherent power to override political considerations.¹⁸⁴ Additionally, the use of political justifications ignores the circumstances that gave rise to these treaties. Thus, as with the historical perspective, political arguments offer no independent basis for possession.

5.4. *Economic Boon*

The economic perspective is not as obviously incorporated into the legal doctrine. Nonetheless, economic arguments exert little influence in this framework. First, the Hague Conventions most likely render economic motivations irrelevant, for many of the same reasons that negate political arguments.¹⁸⁵ Thus, the 1907 treaty inherently forbids all seizures regardless of economic arguments.

Even if the economic perspective is not directly incorporated under the legal doctrine, it may be considered part of the political perspective. Economic and political interests are often peculiarly intertwined; economic stakes often influence political actions and obliterate any divisions between the two motivations.¹⁸⁶ In this case, the economic perspective is simply a subset of the political interests of the countries, and no independent explanation for the treaties' incorporation of these interests is necessary.

Furthermore, other factors render economic arguments moot

459. Thus, the specific interests of nations are irrelevant when determining the proper home for cultural heritage. *See id.*

¹⁸² *See* 1 MERRYMAN & ELSEN, *supra* note 105, at 14-19 (discussing Napoleon's plundering).

¹⁸³ *See* Vernon, *supra* note 101, at 458 ("The contracting parties to the Hague 1954 Cultural Property Convention further recognized the damage to cultural property suffered during World War II . . .").

¹⁸⁴ *See* Franck, *supra* note 147, at 707.

¹⁸⁵ *See supra* section 5.3 (discussing the legal doctrine's incorporation of the political perspective).

¹⁸⁶ *See* BATOR, *supra* note 93, at 27-28 (discussing the influence of economic issues in political disputes such as the Elgin Marbles controversy).

regardless of the incorporation status of this perspective. The development of art as big business is a relatively recent phenomenon.¹⁸⁷ It is reasonable to assume that the framers of these treaties did not contemplate any economic motivation in disputes over cultural heritage and that the economic perspective is not incorporated under the applicable law. Even if this is true, however, economic arguments are neutral and thus favor neither nation. Potential economic benefits are similar for the art institutions of both Russia and Germany, and given international law's inherent neutrality,¹⁸⁸ neither side enjoys most-favored status. Thus, regardless of if and how economic concerns are incorporated under the legal framework, this line of argument has no independent value as a determinant of possessory rights.

5.5. *The Artwork's Best Interest*

The final, and most unique, perspective is the interests of the artwork itself.¹⁸⁹ This argument differs significantly from the other perspectives, as it involves the very foundation of the applicable law—preservation of cultural heritage. The primary purpose of the 1907 Hague Convention and its successors is to protect artwork and other cultural treasures.¹⁹⁰ Therefore, if the framers of these treaties took such interests into account,¹⁹¹ the

¹⁸⁷ See Merryman, *supra* note 141, at 355 n.70 (discussing the growth of the art market); see also Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 378 (1995) (discussing the “tremendous economic incentives for dealing in stolen artifacts”); Robert Lacey, *A Grand Old Rivalry*, VANITY FAIR, Jan. 1996, at 104, 114 (discussing the growth of the “notion of art as an investment”).

¹⁸⁸ See Franck, *supra* note 147, at 708 (discussing the “international rules of neutrality”).

¹⁸⁹ See Merryman, *supra* note 141 (discussing the importance of cultural property in society). Many commentators, including John Merryman, believe that the interest of the pieces of cultural heritage themselves is the most important factor in such cases, transcending political and legal boundaries. See Merryman, *supra* note 4, at 1916-21.

¹⁹⁰ See Cathryn A. Berryman, *Toward More Universal Protection of Intangible Cultural Property*, 1 J. INTELL. PROP. L. 293, 330 (1994) (“[P]reservation of physical works is the obvious objective [of international art conventions.]”); see also Teresa McGuire, *International Dimensions*, 11 CARDOZO ARTS & ENT. L.J. 59, 59 (1992) (referring to the importance of “protecting and sharing cultural property”).

¹⁹¹ This is entirely possible. After World War II, some Allied policymakers favored U.S. possession of German art in order to properly preserve it. See NICHOLAS, *supra* note 18, at 390 (quoting a U.S. general speaking of the need

treaties fail to achieve and, in fact, work against their objective if they do not actually preserve artwork. If the treaties impair the condition and accessibility of the art, legal authority becomes irrelevant and the art should be kept in Russia.¹⁹² Thus, this is the one perspective that requires analysis independent from the legal perspective and necessitates an independent exploration of cultural heritage arguments.

This preservation of cultural heritage viewpoint consists of three separate claims. First, the world community should credit Russia for preserving the artwork for a half-century.¹⁹³ Second, the art is, and will continue to be, safer and better-maintained in Russian institutions than in their German counterparts.¹⁹⁴ Finally, the trove is more accessible to the international community in Russia than in Germany.¹⁹⁵ None of these arguments, however, stands on sufficient footing to override international law.

The first prong of this perspective focuses on the “rescue argument,”¹⁹⁶ under which the looting country receives the art because it kept the art in better condition than if the art had been maintained by the country of origin.¹⁹⁷ In the case of the

to “preserve [the art] for the German people”). Conversely, one argument often used to prevent U.S. possession was the potential for damage of art while in transit across the Atlantic Ocean. See *id.* at 389-90. The 1954 Hague Convention was framed in the wake of this debate, and such arguments presumably were in the minds of the framers. Despite such interests, the actual treaty lacks an “in the best interest of the art” clause. This omission indicates the categorical rejection of such interests.

¹⁹² Some commentators, however, have criticized this approach as mere subjective paternalism. See Interview with Constance Lowenthal, *supra* note 14. But see Borodkin, *supra* note 187, at 379 n.13 (noting the opinion that the best interest of the art must take priority over legality issues).

¹⁹³ See *supra* note 96 and accompanying text (discussing the condition of the trove).

¹⁹⁴ See Merryman, *supra* note 141, at 355-56 (discussing the preservation argument).

¹⁹⁵ See *infra* notes 204-06 and accompanying text.

¹⁹⁶ See Karen J. Warren, *A Philosophical Perspective on the Ethics and Resolution of Cultural Property Issues*, in *THE ETHICS OF COLLECTING CULTURAL PROPERTY: WHOSE CULTURE? WHOSE PROPERTY?* 1, 3-4 (Phyllis M. Messenger ed., 1989) (discussing the rescue argument).

¹⁹⁷ This argument was frequently cited by supporters of the British Museum’s continued possession of the Elgin Marbles. See John Moustakas, Note, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1179 n.2 (1989) (“Those in whose best interests it has

Hermitage trove, however, there are two flaws with this argument. First, there is dispute as to how much credit Russia should receive for preserving the art. Commentators note that Russia's actions are more akin to "benign neglect" than affirmative effort.¹⁹⁸ The artwork was properly preserved primarily because it was stored in a secure underground climate, without exposure to either the elements or humanity, for fifty years.¹⁹⁹ Furthermore, there is little reason to believe that the art would have been damaged had it been left in occupied postwar Germany.²⁰⁰ The rescue argument, with dubious value, therefore fails.

The second prong of this argument, the future preservation of the art, likewise fails. Russian museums are primitive in some respects and in desperate need of renovations and modern preservation facilities.²⁰¹ German museums, in comparison, are equally, if not better, equipped to preserve the trove.²⁰² The stronger economic position of German art institutions also indicates that the art may be safer in German hands. Russian institutions therefore do not seem better prepared to protect the art than German museums and collections.

Finally, there exists a viable argument regarding accessibility.²⁰³ On the one hand, the Hermitage exhibition was a textbook example of a gala international art event, well-publicized and

been to suggest that the Greeks are, or at least were, incompetent to care for their artistic treasures have argued that retention of plundered art is justified because such art belongs to the "common heritage of mankind.")

¹⁹⁸ See Interview with Constance Lowenthal, *supra* note 14.

¹⁹⁹ See *id.*

²⁰⁰ Art in other parts of Germany generally stood undamaged during the postwar period, and the Allies protected art throughout Germany without ultimately seizing the works. See NICHOLAS, *supra* note 18, at 369-405 (noting that despite much debate, most art was kept in, or immediately returned to, occupied Germany after World War II). Pillaging, therefore, was unnecessary to preserve the art.

²⁰¹ See *supra* note 85 and accompanying text (discussing the condition of Russian museums).

²⁰² See *supra* note 99 and accompanying text.

²⁰³ This is similar to the argument labeled by some as the "scholarly access" argument, although that argument is limited primarily to scholars and members of the art community. See Warren, *supra* note 196, at 7 ("In order to preserve cultural properties, those whose primary responsibility or role is to promote and transmit cultural information and knowledge . . . must have scholarly access to cultural properties."); Merryman, *supra* note 141, at 360-61 (discussing the access argument). This Comment's version of this argument simply broadens this definition to the public and other concerned parties.

well-coordinated,²⁰⁴ and, despite the debate over the legality of Russia's actions, few argue that the exhibit did not do the art justice.²⁰⁵ The success of "Hidden Treasures Revealed" demonstrates that the Hermitage is more than capable of appropriately showcasing the trove. In addition, the Hermitage is one of the world's preeminent museums,²⁰⁶ a fact that lends further support to Russia's position—much as an exhibit in the Metropolitan Museum of Art is more accessible to the public than a private collector's living room, it seems fitting that important art like that which makes up the trove have an appropriately significant home like the Hermitage.

Germany, however, can also claim its share of prominent museums similarly well-suited for showcasing the trove.²⁰⁷ Art that is returned to private collections can also be exhibited by means of a remote tour similar to the Barnes Foundation exhibition.²⁰⁸ Additionally, Russia is not an inviting location for visitors, with its troubled economic and political situations and other barriers of entry.²⁰⁹ The accessibility argument favors Germany as much as it does Russia, and therefore fails to justify Russian possession.

In sum, Germany is as worthy a home for the trove as Russia. Any potential strength of the rescue, preservation, and accessibility arguments in Russia's favor are debatable and do not override the legal presumption in Germany's favor. The emotional arguments for Russia's continued possession may be strong; however, Russia must find other ways of healing the wounds of the past, as Germany is the rightful holder of the Hermitage trove.

6. CONCLUSION

By using legal treaties as its touchstone and giving fair consideration to non-legal perspectives, the analytic framework used above is fair and objective in its determination that Germany is entitled to the return of the Hermitage trove. The same values

²⁰⁴ See *supra* notes 11-12 and accompanying text.

²⁰⁵ See *id.*

²⁰⁶ See *supra* note 83.

²⁰⁷ See *supra* note 99.

²⁰⁸ See *supra* note 90.

²⁰⁹ See *supra* note 97.

that guided this analysis, fairness and inclusiveness, should similarly guide the process of returning the trove. That Germany is ultimately entitled to the trove, however, does not dictate that the Russian government must immediately return the art. Instead, alternative solutions exist that can provide Germany with eventual possession of the art while simultaneously calming political passions.

Some commentators have proposed that "the Germans aid Russia and the other former Soviet republics with restoration projects, museum renovation, library acquisitions and the like. In return, most of the art would be restored to its former owners, and some would be donated or loaned to former Soviet museums."²¹⁰ Such creative solutions ultimately enable all parties to benefit from this controversy, and, more importantly, to build bridges within the international art community.

Indeed, there is hope for such a solution. In 1995, Jorn Merkert, Director of the Berlinsche Galerie in Berlin, and Irina Antonova, the aforementioned Director of the Pushkin Museum, attempted to bridge the gap between Russia and Germany through an exhibition entitled "Berlin-Moscow/Moscow-Berlin 1900-1950."²¹¹ The exhibition consisted of approximately 2500 paintings, sculptures, models, and other pieces of cultural heritage detailing the relations between the two cities.²¹² Such an exhibit illustrates the potential for cooperation between the art communities of both nations, even when dealing with controversial subjects, to present art in a fashion that transcends political differences. In a similar fashion, the Hermitage controversy, while rooted in deep divisions between nations, can ultimately serve to heal, rather than reopen, the wounds of World War II.

²¹⁰ Gambrell, *supra* note 1, at 120 (noting the opinions of such art experts as Wolfgang Eichwede of Bremen's East European Research Institute and Ekaterina Geneva, director of Russia's Foreign Literature Library). See also Stephens, *supra* note 148, at 110 (noting that "this dispute initially appears to offer a perfect scenario for a Solomonic 'split the baby' resolution"); *Who Owns This Art?*, *supra* note 76, at 12A (proposing alternative solutions to this controversy).

²¹¹ See Jamey Gambrell & Christopher Phillips, *Red Wedge, Black Wedge: Relationship Between Russian and German Art*, Martin Gropius Bau, Berlin, Germany, ART IN AM., Dec. 1995, at 72.

²¹² See *id.*